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THE

DECENNIAL DIGEST

CIVIL, CRIMINAL AND REVENUE

(1921—1930)

BY

R. N. IYER

AND

V. V. CHITALEY

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ABBREVIATIONS EXPLAINED.

Reports.

All. or A.	Indian Law Reports, Allahabad Series.
A.L.J.	Allahabad Law Journal.
A.I.R. 1929 All. or 1929 A.	All India Reporter, 1929 Allahabad.
A.I.Cr.R.	All India Criminal Reporter.
Bom. or B.	Indian Law Reports, Bombay Series.
Bom.L.R.	Bombay Law Reporter.
A.I.R. 1929 Bom. or 1929 Bom.	All India Reporter, 1929 Bombay.
Bur.L.T.	Burma Law Times.
Bur.L.J.	Burma Law Journal.
Cal. or C.	Indian Law Reports, Calcutta Series.
C.L.J.	Calcutta Law Journal.
1929 Cr. C.	Criminal Cases.
Cr.L.J.	Criminal Law Journal.
C.W.N.	Calcutta Weekly Notes.
A.I.R. 1929 Cal. or 1929 Cal.	All India Reporter, 1929 Calcutta.
I.A.	Law Reports, Indian Appeals.
I.C.	Indian Cases.
Lah. or L.	Indian Law Reports, Lahore Series.
A.I.R. 1929 Lah. or 1929 Lah.	All India Reporter, 1929 Lahore.
Lah.L.J. or L.L.J.	Lahore Law Journal.
L.R.	Law Reporter (Allahabad).
L.R.A.Civ.	Law Reporter, Allahabad, Civil.
L.R.A. (Cr.)	Law Reporter, Allahabad, Criminal.
L.B.R.	Lower Burma Rulings.
M.L.W.	Madras Law Weekly.
Luck.	Indian Law Reports, Lucknow Series.
Mad. or M.	Indian Law Reports, Madras Series.
M.L.J.	Madras Law Journal.
M.L.T.	Madras Law Times.
M.W.N.	Madras Weekly Notes.
A.I.R. 1929 Mad. or 1929 Mad.	All India Reporter, 1929 Madras.
Mys.L.J.	Mysore Law Journal.
N.L.J.	Nagpur Law Journal.
N.L.R.	Nagpur Law Reports.
A.I.R. 1929 Nag. or 1929 Nag.	All India Reporter, 1929 Nagpur.
O.C.	Oudh Cases.
A.I.R. 1929 Oudh or 1929 Oudh	All India Reporter, 1929 Oudh.
O.L.J.	Oudh Law Journal.
O.W.N.	Oudh Weekly Notes.
P.R.	Punjab Record.
P.L.R.	Punjab Law Reporter.
P.W.R.	Punjab Weekly Reporter.
Pat.	Indian Law Reports, Patna Series.

P.H.C.C.	Patna Supplement to C. W. Notes.
A.I.R. 1929 P. or 1929 Pat. ..	All India Reporter, 1929 Patna.
A.I.R. 1929 P.C. or 1929 P.C. ..	All India Reporter, Privy Council Section.
Pat.L.J.	Patna Law Journal.
Pat.L.R.	Patna Law Reporter.
Pat.L.T.	Patna Law Times.
R. or Rang.	Indian Law Reports, Rangoon Series.
A.I.R. 1929 R. or 1929 Rang. ..	All India Reporter, 1929 Rangoon.
R.D.	Revenue Decisions.
S.L.R.	Sind Law Reporter.
A.I.R. 1929 S. or 1929 Sind ..	All India Reporter, 1929 Sind.
U.P.L.R.	United Provinces Law Reporter.
U.B.R.	Upper Burma Rulings.

Other Abbreviations.

Appl.	Applied.	Expl.	Explained.
Appr.	Approved.	Foll.	Followed.
Comm.	Commented.	F.B.	Full Bench.
Cons.	Considered.	P.C.	Privy Council.
Cr.	Criminal.	Ref.	Referred.
Dist.	Distinguished.	Rel.	Relied.
Disc.	Discussed.	Rev.	Revenue.
Diss.	Dissented from.	S.B.	Special Bench.
Doubt.	Doubted.		

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DECENNIAL DIGEST
CIVIL, CRIMINAL & REVENUE
1921—1930

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———*Cause of action—Continuous dealings—Part cannot be time-barred.*

Where a tradesman has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided. If all the items form but one cause of action, it is idle to suggest that a part of it can be barred by limitation, and that the rest may not be so barred. (*Mulla, J.*) NAJAN AHMED *v.* SALEMAHOMED PEER MAHOMED.

24 Bom. L. R. 998 = 77 I. C. 943 = A. I. R. 1923 Bom. 113.

———*Cause of action—Items of contract comprising the account intended to be continuous—One contract cannot be picked out and sued on—Such intention must be mutual.*

ACCOUNTS.

If the items in the account are so connected together that it appears the dealing is not intended to terminate with one contract, but to be continuous, so that one item if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided.

It is a question of fact whether the intention of both parties is that there should be one account between them of all the dealings. Keeping of such an account by one party is not sufficient, if the other party is not made to agree to the fact that there is to be only one cause of action between them on the account. (*Kemp, A. J. C.*) FIRM OF LILARAM *v.* FIRM HUSAINBHOY.

15 S. L. R. 207 = 67 I. C. 44 = A. I. R. 1922 Sind 15.

———*Continuous—Running accounts—Separate orders—Separate bills—Plaintiff treating subject-matter of bills as creating separate causes of action—No continuous account exists.*

Where separate and distinct orders were given for the items comprised in certain bills and the bills were submitted separately and the plaintiff referred in the plaint to the causes of action which arose on the various dates, clearly treating the subject-matter of the bills as giving rise to different causes of action, *held*, that there was no continuous account. (*Buckland, J.*) MAURICE MAYAHAS *v.* W. MORLEY.

29 C. W. N. 496 = 87 I. C. 508 = A. I. R. 1925 Cal. 937 (939).

——— *Jurisdiction—Venue—Suit for accounts—Forum of appeal from preliminary decree how determined.*

In a suit for accounts, the determination of the forum of appeal from the preliminary decree depends upon the valuation of the suit for purposes of jurisdiction, and the fact that the amount ultimately to be found may or may not exceed the valuation cannot disturb the course of appeal. (*Shadi Lal, C.J., and Abdul Qadir, J.*) HARI CHAND *v.* MADAN LAL. **31 P.L.R. 536 = A. I. R. 1930 Lah. 832 (b).**

———*Liability—Back accounting.*

It is a general principle that back accounting will not be decreed except on proof of dishonesty and malversation. (*Wallace and Thiruvenkatachariar, JJ.*) KELU ACHAN *v.* SIVARAMA PATTAR.

113 I. C. 635 = A. I. R. 1928 Mad. 879 (887).

———*Liability—Defendant firm being owned by one of the plaintiffs who was partner of plaintiff firm precludes suit by plaintiffs for account.*

Where the plaintiff firm which consisted of three partners sued the defendant firm which was owned by one of the partners and the defendant firm subsequently brought a suit for dissolution and taking accounts of the plaintiff's firm, *held*, that the first suit for accounts was not maintainable and that all matters should be decided in the second suit for dissolution of partnership. (*Shah and Crump, JJ.*) KRISHNA ANNAPPA *v.* GANPAT. **25 Bom. L. R. 1307 = 87 I. C. 289 = A. I. R. 1924 Bom. 263.**

———*Liability—Liability of defendants should be ascertained—Court can vary mode of taking.*

In all cases in which accounts are directed to be taken it is desirable that before ordering an account to be taken the question of principle involving the measure of liability of the defendant should always be decided. It is always permissible to the Court to vary or modify the directions already given if it should be satisfied that some mistake had been made. (*Dawson Miller, C. J. and Foster, J.*) HARIHAR PRASAD SINGH *v.* KESHO PRASAD SINGH. **71 I. C. 911 = A. I. R. 1924 Pat. 176.**

ACCOUNTS.

——*Liability—Suit for claim to a statement of account can be granted only when the relationship between the parties makes it necessary in order to entitle claimant to assert his legal rights.*

The right to claim a statement of account can only be claimed when looking to the relationship between the parties. It is the only relief which will make the claimant to assert his legal rights satisfactorily, such right being an unusual form of relief. (*Moti Sagar, J.*) GHULAM QUATAB-UD-DIN KHAN *v.* MIAN FAIZ BAKSH.

78 I. C. 959 = A. I. R. 1925 Lah. 100.

——*Liability—Vouchers must be produced to prove details of expenditure—If any party objects to a voucher, the affidavit or oral evidence of person who received the money is required, and in its absence, proof of his signature to the voucher must be given.*

The account is vouched by the production of the proper vouchers such as receipts. The vouchers will be admitted as evidence of the payment of the sums therein specified and credit given to the accounting party in the account, unless, the other side shows some reasonable ground for impeaching the vouchers; but if any party objects, the affidavit or oral evidence of the person who received the money is required, and if this cannot be had, then proof must be given of his signature to the voucher. (*Mookerjee and Chotzner, JJ.*) HAJI TELLER RAHMAN *v.* GOLAM GONE. **40 C. L. J. 28 = 82 I. C. 419 = A. I. R. 1924 Cal. 1063.**

——*Limitation.*

Balance of account is not recoverable unless it is within limitation or there is a fresh cause of action. (*Dalal, J. C.*) MENDI LAL *v.* RAM CHANDER.

86 I.C. 330 = A. I. R. 1925 Oudh 632 (2).

——*Limitation*—Khatas — *Several* Khatas *between the same parties—Accounts in all of them taken in* 1913 *—Suit on accounts within time from that date is not barred.*

However many accounts may be opened regarding transactions between two parties they must be treated as one account for the purposes of limitation. Where three *Khatas* (accounts) were operated upon up till 1908 and the business transactions between the parties continued after 1908, and were recorded in the remaining two *Khatas* and accounts were taken in 1913, the total effect was that what was due to the plaintiffs was the balance on the five accounts. (*Macleod, C. J. and Shah, J.*) NARAYAN LAXMAN AGHARKAR *v.* CHAPSI DOSA. **46 Bom. 419 = 23 Bom. L.R. 1186 = 64 I. C. 1002 = A. I. R. 1922 Bom. 168.**

——*Mutual, open and current — Account may be mutual though balance is always one way provided parties contemplated balance might shift to other side at times.*

Where practically the only credits to a party were his wages for eighteen years and there was never once a balance in his favour: *Held*, that the parties never contemplated that the balance might shift to the other side. (*Baker, J.C. and Hallifax, A.J.C.*) CHITNAVIS *v.* NATHU SAO. **20 N. L. R. 106 = 7 N. L. J. 170 = 79 I. C. 1002 = A. I. R. 1925 Nag. 2 (a).**

——*Mutual, open and current--Limitation Act* (1908), *Sch. I, Art.* 85—*Accounts—Mutuality—No independent obligations on both sides—Account is not a mutual one —Open and current account defined—Accounts.*

Where an account does not indicate transactions creating independent obligations on both sides but there is sometimes a credit in favour of the defendant and that only for a few days. *Held*, the account is not a mutual account, and in a suit on such an account the plaintiff is not entitled to the benefit of Article 85 of Schedule I to the Limitation Act. An account current is an open or running account between two or more parties, or an account which contains items between the parties from which the balance due to one of them is, or can be ascertained, from which it follows that such an account comes under the term of open account in so far as it is running, unsettled or unclosed. Mutual accounts are such as consist of reciprocity of dealings between the parties, and do not embrace, those having items on one side only, though made up of debits and credits. The test of mutuality is that the dealings between the parties should be such that the balance is sometimes in favour of the other. An account which consists of entries of payments made by one party in reduction of a debt to another and of payments made by the latter on behalf of the former, is not a mutual account. (*Coutts and Ross, J.J.*) GOPAL RAI *v.* HARCHAND RAM ANANT RAM.

3 Pat. L. T. 492 = 66 I. C. 30 = A. I. R. 1922 Pat. 364.

——*Mutual, open and current accounts—Test—Mere shifting of accounts from one side to the other is not enough to constitute mutual obligations.*

In order that an account may be mutual, there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side those on the other being merely complete or partial discharges of such obligations. A mere shifting of the account from one side to the other is not enough to constitute mutual obligations: 6 Mad. H. C. R 142 Foll. (*Odgers, J.*) GOVINDA NADAN *v.* RAMASWAMI CHETTIAR.

1925 M. W. N. 927 = 23 M. L. W. 573 = 92 I. C. 106 = A. I. R. 1926 Mad. 224.

——*Suit for—Before passing final decree Court is bound to go into accounts and fix definitely amount payable by one party to the other.*

Before passing a final decree in a suit for accounts the Court is bound to go into accounts and fix definitely the amount which is payable by one party to the other; the Court cannot leave the examination of accounts to a future date and pass a decree for rendition of accounts by the defendant without deciding what deductions, if any, he is entitled to make. (*Fforde and Tekchand, JJ.*) HARRY PERCIVAL ROBSON *v.* ADMINISTRATOR GENERAL PUNJAB. **30 P. L. R. 503 = A. I. R. 1929 Lah. 753.**

——*Suit for—Decree may be in defendant's favour.*

In a suit for accounts a decree can, if necessary, be given in favour of the defendant on payment of the necessary Court-fees. 7 A.L.J. 543, Foll. (*Daniels and Neave, JJ*) RAM CHARAN *v.* BALAJI.

46 All. 858 = 83 I. C. 880 = 22 A L. J. 783 = 5 L. R. A. Civ. 563 = A. I. R. 1924 All. 854 (2).

——*Suit for—Executors of will appointed for limited period must account for money received after period is over—Executor.*

If executors appointed for a limited period receive any money belonging to the estate after that period is over, they must account for such money also in a suit for accounts. They cannot say that they are not liable because they had ceased to be executors. (*Rankin, C.J. and B. B. Ghose, J.*) KANTI CHANDRA TARAFDAR *v.* RADHA RAMAN SARKAR.

34 C. W. N. 275 = A. I. R. 1930 Cal. 461.

——*Suit for—Against executors—No relief sought against one executor—Other executors not taking objection in written statement or in argument cannot be allowed to raise objection at later stage.*

In a suit for accounts against executors the plaintiff did not seek any relief against one of them on the ground that the executor had taken no part in the management, though he made him a party. The other executors too did not raise the objection in the written statement or at the time of the framing of the issues or during argument that he was a necessary party to any order to account that might be passed. An order for rendering accounts was made against the others.

Held, that although *prima facie* all the surviving executors should be made parties to a suit for accounts and the order for accounts ought *prima facie* to be made against them all yet in the circumstances of the case the other executor could not be allowed at a later stage to insist on the executor omitted being joined in the order. (*Rankin, C. J. and B. B. Ghose, J.*) KANTI CHANDRA TARAFDAR *v.* RADHA RAMAN SARKAR.
34 C. W. N. 275 = A. I. R. 1930 Cal. 461.

———*Suit for—Against joint executors plaintiff has option to implead representatives of executors who have died.*

In a suit for accounts against executors of a will it is optional on the part of the plaintiff to implead the representatives of the executors who have died. (*Rankin, C. J. and B. B. Ghose, J.*) KANTI CHANDRA TARAFDAR *v.* RADHA RAMAN SARKAR. **34 C. W. N. 275 = A. I. R. 1930 Cal. 461.**

———*Suit for—Held not maintainable.*

Where in a suit for accounts the finding was that the defendant had constantly rendered accounts to the plaintiff which had been accepted by him ; there was no allegation of fraud and the plaintiff was not able to produce accounts and documents in respect of the transactions, which should be in his possession.

Held, that the defendant could not, under the circumstances, be called upon to render accounts, and the suit should be dismissed. (*Shadilal and Wilberforce, JJ.*) MOHANLAL *v.* N. W. RY. CO-OPERATIVE STORES ASSOCIATION, LTD. LAHORE. **79 I. C. 275 = A. I. R. 1921 J. 14 (2) = 5 Lah. L. J. 19.**

——— *Suit for—Jurisdiction of Referee on Original Side of Madras High Court.*

In a suit for accounts on the Original Side, the Official Referee has jurisdiction to enquire and report as to the quality of goods contracted and despatched and as to whether certain title-deeds were deposited by plaintiff with defendant for safe custody or as security. (*Krishnan and Venkatasubba Rao, JJ.*) C. KANNI CHETTI *v.* K. RAJU CHETTI. **95 I. C. 436 = A. I. R. 1926 Mad. 879.**

———*Suit for—Papers necessary for preparing account with plaintiff and not produced—Suit not maintainable.*

Where after the Naib of a Zemindar was removed from his office the Zemindar sued him for rendition of accounts for a certain period and it was proved that the papers necessary for furnishing the account were with the plaintiff and the latter would not produce the same, the suit was *held* as not maintainable. (*Richardson and Shamsul Huda, JJ.*) JATINDRA NATH DUTTA *v.* SURESH CHANDRA ROY. **59 I. C. 181 = 24 C. W. N. 922.**

———*Suit for partial account does not lie where suit for whole account is barred.*

A suit to recover plaintiff's father's share of debt due to his firm by another firm in which one partner of the creditor firm is also a partner, where accounts are not settled, is an action for partial account. Such a suit will no doubt lie in certain cases, but when a suit for an account is barred a suit for a partial account cannot be allowed merely on the ground that defendant could claim that a general account should be taken because it would not be fair to drive him to taking an account which the law thinks cannot be properly taken owing to the lapse of time. The rule leaves it to the Court to determine under what circumstances it would be equitable to order a partial account having regard to the rights of the parties. Ordinarily when one partner seeks to make another liable for one single item due to the firm, it would not be equitable to decree such a claim, when the defendant partner is not allowed to claim other items, which may be due by the plaintiff to the firm, 45 M. 378. 16 L. W. 200 P. C. and 32 M. 76 Foll. (*Phillips and Venkatasubba Rao, JJ.*) SUBRAMANIAM CHETTY *v.* LAKSHMANAN CHETTY.
33 M. L.T. 71 = 76 I. C. 670 = 18 M. L. W. 613 = A. I. R. 1924 Mad. 161.

———*Suit for—Primarily it is the duty of defendant to produce accounts—If he fails plaintiff should prove his case.*

In a suit for accounts it is primarily the duty of the defendant to render accounts. When he fails to do so, it is for the plaintiff to endeavour to prove what was due to him so far as he could. (*Jailal and Dalipsingh, JJ.*) RAMJI LAL *v.* BUJAN MAL. **28 P. L. R. 98 = 9 Lah. L. J. 94 = 109 I. C. 820 = A. I. R. 1927 Lah. 782.**

———*Suit on—Dealings for many years—Acknowledgment by defendant of the liability, but failure to pay—Suit for recovery of the same is maintainable.*

Where a suit was brought on the strength of many years' dealings between the plaintiff and the defendant's deceased husband and on an acknowledgment of the debt by the defendant as representative of her deceased husband and the plaintiff produced his accounts in support of his prayer

Held, that the suit was not based merely upon the acknowledgment of debt by defendant and was therefore maintainable 119 P. R. 1908, Dist. (*Le Rossignol, J.*) GANPAT RAI *v.* NIHAL DEVI. **89 I. C. 366 = A. I. R. 1926 Lah. 160**

———*Trustee—Two kinds of accounts can be claimed against trustee.*

There are two forms of account which can be claimed by a *cestui que* trust against the trustee. One is an account of all such of the moneys or funds comprised in the trust deed or from time to time subject to the trusts thereof, as have been possessed or received by the trustee or by any person by his order or for his use. The other is an account, in addition to the former account, of the moneys or funds comprised in the trust deed or from time to time subject to the trusts thereof, which might without the wilful neglect or default of the trustee, have been so possessed or received. 1 M. & G. 433 (n), Ref. and 4 Drewry 253 Ref. (*Mookerjee and Rankin, JJ.*) (RAJA) PEARY MOHAN MOOKERJEE *v.* MANOHAR MOOKERJEE. **38 C.L.J. 255 = 27 C.W.N. 989 = 74 I. C. 373 = A. I. R. 1924 Cal. 160.**

ACCOUNTS SETTLED—*Commission Agency for supplying goods—Payment under each separate transaction was held to constitute settled account.*

Respondents were appellants' agents for each indent placed with them and they could at any moment discontinue the agency as regards any goods not already under order.

Held, that the payment of each pro-note was an indication of a settled account with regard to the particular transaction represented by it. (*Young and Carr*

JJ.) A. RAHIM *v.* H. V. LOW AND CO. **3 Rang. 1 = 89 I. C. 598 = A. I. R. 1925 Rang. 210.**

——*Settled — Defendant accepting settlement of mutual accounts as correct—Plaintiff has a cause of action and need not prove that balance is correct.*

Where there is settlement of mutual account and the defendant accepts the result as correct and promises to pay, the plaintiff has a good cause of action against him. It is not even necessary for the plaintiff to prove that the balance found is correct, provided it is accepted as correct by the defendant : 43 Cal. 733 ; 32 Bom. 353 and 16 Mad. 339, Rel. on. 1 L. B. R. 190, Dist. (*Baguley, J.*) MAUNG CHIT U *v.* MAUNG PYA. **6 Rang. 538 = 117 I. C. 572 = A. I. R. 1928 Rang. 304.**

——*Settled—Defendant signing accounts when submitted—Interest charged at various periods at compound rates—Every occasion when accounts were settled further advances obtained—Agreement to pay compound interest held proved—Interest.*

The course of dealing between the parties continued for about 14 years. The accounts were periodically submitted to the defendant and when submitted the defendant signed them and the accounts showed in detail the advances made, the interest charged and the periods at which the rests were made and no objection was made at any time during the period of 14 years. An allegation was also made in the plaint that the plaintiffs' practice was to charge interest with annual rests. There was also an allegation that the defendant was informed of the claim to interest and also compound interest and that he accepted the claim.

Held, there was good consideration for the above mentioned agreement as further advances were obtained on every occasion by the defendant, and that an agreement by the defendant to pay the compound interest charged in the account which were submitted to and accepted by him was proved. (*Sir Lancelot Sanderson.*) HIRALAL SAHU *v.* LACHHMI PRASAD NARAIN SINGH. **1929 A. L. J. 787 = 33 C.W.N. 921 = 117 I.C. 496 = 31 Bom. L.R. 905 = 50 C.L.J. 183 = 30 M.L.W. 615 = 1929 M.W.N. 770 = 11 P.L.T. 21 = A. I. R. 1929 P. C. 176 = 57 M.L.J. 319.**

——*Settled—Opening of, not allowed in absence of fraud etc.*

If the settlement of account is made and agreed to, it cannot be re-opened in the absence of an allegation of fraud, coercion and so on. (*Baguley, J.*) MAUNG CHIT U *v.* MAUNG PYA. **6 Rang. 538 = 117 I.C. 572 = A.I.R. 1928 Rang. 304.**

——*Settled—Overcharge paid consciously cannot be objected to subsequently.*

A principal who, with his eyes open, pays an overcharge cannot be heard to object later after accounts have been settled. (*Young and Carr, JJ.*) A. RAHIM *v.* H. V. LOW AND CO. **3 Rang. 1 = 89 I.C. 598 = A.I.R. 1925 Rang. 210.**

——*Settled—Party to settlement of, can prove mistake—Evidence Act, S.* 115.

A person is always entitled to prove if he can, that there was a mistake in the accounts and that he signed them as correct by mistake. (*Batten, J. C.*) SETH BHOJRAJ *v.* PANDA SHANKERNATH. **71 I.C. 45 = A. I. R. 1922 Nag. 265.**

——*Settled—Re-opening of—Accounts settled can be re-opened where there is mutual mistake or fraud.*

Where owing to retirement of some partners a trading partnership was dissolved and on accounts being taken, part of the retiring partner's share of profits was carried over by the other partners to a new account.

Held: that the action of the other partners was either due to mutual mistake or a fraud but that in either case the retiring partners were entitled to have the mistake or fraud rectified.

Held further—that as the whole account was not impugned it was sufficient to give the retiring partners leave to surcharge and falsify. (*Young, J.*) G. ABDOOLA *v.* I. A. MAHOMED. **75 I. C. 171 = A. I. R. 1925 Rang. 99.**

——*Settled—Re-opening of—Fraud must be alleged and proved.*

Where accounts are impeached on the ground of fraud, two or three instances of particular items, which can be taken as false and fraudulent, must be brought to the notice of the Court before it can be called upon to order the accounts to be re-opened from the first. But before the defendant could ask the Court to re-open the account, he is bound to allege fraud. (*Macleod, C. J. and Coyajee, J.*) SANKALCHAND VITHAL *v.* CHIMANLAL MAGHANLAL SHAH. **70 I.C. 839 = A. I. R. 1923 B. 16 (1).**

——*Settled—Re-opening of—Fraud—Error.*

Accounts settled between parties may be re-opened on the ground of substantial error or fraud. If the errors are sufficient in number and importance whether caused by fraud or mistake or where the parties occupy a fiduciary relation *e.g.* trustee agent, guardian, etc., it is easier to re-open the account. (*Mears, C. J. and Bannerji, J.*) BHAGWAN BAKSH SINGH *v.* JOSHE DAMODARJI. **42 A. 230 = 59 I. C. 20 = 18 A.L.J. 100.**

——*Settled—Re-opening—Parties in fiduciary relation—Re-opening can be ordered for errors less serious than in other cases.*

In a case of principal and agent or persons standing in a fiduciary relation, the number of errors to justify the Court in opening the account altogether has to be less considerable than where the parties stand in no such relation. (*Young and Carr, JJ.*) A. RAHIM *v.* H. V. LOW AND CO. **3 Rang. 1 = 89 I. C. 598 = A. I. R. 1925 Rang. 210.**

——*Settled—Single fraudulent error—Re-opening must be ordered.*

Where a single fraudulent error is discovered in settled accounts the proper order to make is for the re-opening of the whole account. But the onus of proving the fraud is on the party setting up. L. R. 9 Ch. D. 529 and L. R. 9 Ch. D. 547, Foll. (*Young and Carr, JJ.*) A. RAHIM *v.* H. V. LOW AND CO. **3 Rang. 1 = 89 I.C. 598 = A. I. R. 1925 Rang. 210.**

——*Settled—Single important error—Leave to surcharge and falsify must be given.*

Where there is a single important error, though it may not be fraudulent and though it may not justify the ordering of the re-opening of the accounts, leave must be given to surcharge and falsify. *Gething* v. *Keighley*, p. 550, 1829 Taml. 199, and 1 D. and Warr. 557, Ref. (*Young and Carr, JJ.*) A RAHIM *v.* H. V. LOW AND CO. **3 Rang. 1 = 89 I. C. 598 = A. I. R. 1925 Rang. 210.**

——*Settled—Taken in presence of representatives of parties will not be lightly re-opened.*

An account once taken in the presence of the parties interested and acquiesced in by them will not be lightly re-opened. (*Mookerji and Panton, JJ.*) PULIN BIHARI *v*, MAHENDRA CHANDRA. **34 C.L.J. 405 = 67 I.C. 10 = A. I. R. 1921 C. 722.**

ACCRETION.

See (1) ALLUVION AND DILUVION;
(2) BENGAL ALLUVION AND DILUVION REGULATION (XI OF 1825.)
(3) HINDU LAW.
(4) LANDLORD AND TENANT.
(5) LAND TENURES.
(6) T. P. ACT. SS. 63, 72 AND 108.

ACCRUAL—Of Cause of action.

See (1) C. P CODE, O. 2, R. 2.
(2) LIMITATION.

ACCUMULATION—*See* T. P. ACT, S. 18.

ACCUSED—*See* CRIMINAL TRIAL—CR. P. CODE, SS. 256, 342, ETC.

———Personal Attendance.
See CR. P. CODE, S. 205.

ACCUSED PERSON—Examination of—*See* CR. P. CODE, S. 342.

ACKNOWLEDGMENT.

See (1) ACCOUNTS.
(2) CONTRACT ACT, S. 25.
(3) LIMITATION ACT, S. 19.
(4) MAHOMEDAN LAW—LEGITIMACY.
(5) STAMP ACT, ART. 1.

ACQUIESCENCE.

See also (1) EJECTMENT.
(2) EVIDENCE ACT, S. 115.
(3) LANDLORD AND TENANT.

———*It must be with knowledge of a person's rights—Other party's* bona fides—*In absence of either, doctrine does not apply—It must amount to fraud to deprive a person of his rights.*

Acquiescence implies that the person who is said to have acquiesced did so with knowledge of his rights and the other person acted in the *bona fide* belief that he was acting within his rights. The absence of either of these elements makes the doctrine inapplicable. The acquiescence, which will deprive a man of his legal rights, must amount to fraud. (*Raza, J.*) SUCHIT *v.* MOHAMMAD HABIB ULLAH. **99 I. C. 199 = A. I. R. 1927 Oudh 89.**

———*Acquiescence and laches—Acquiescence relates to inaction during performance of act; laches refers to delay after the act—Acquiescence is equivalent to conduct amounting to either release or estoppel—Laches to bar a claim must amount to waiver, abandonment or acquiescence.*

The word "acquiescence" is used in two senses sometimes it is used to denote conduct which is evidence of an intention, by the party conducting himself, to abandon an equitable right; sometimes to denote conduct from which another party would be justified in inferring such an intention, *i.e.*, it is sometimes employed as equivalent to conduct which amounts to a release and sometimes as equivalent to conduct which creates an estoppel or constitutes a promise, for which the acts of the defendant supply a consideration. Acquiescence, properly speaking, relates to inaction during the performance of an act, laches relates to the delay after the act is done . . . So to fix acquiescence upon a party it should unequivocally appear that he knew the facts upon which the supposed acquiescence is founded, and to which it refers. Laches to bar the plaintiff's right must amount to waiver, abandonment, or acquiescence and to raise a presumption of any of these; the evidence of conduct must be plain and unambiguous: 29 Bom. 234 and 33 Cal. 633, Ref.

Two circumstances always important in such cases are the length of the delay and the nature of the acts done

during the interval, which might affect either party and cause the balance of justice or injustice in taking the one course or the other, so far as relates to the remedy: 22 W. R. 492 Ref. (*Kinkhede, Og. A. J. C.*) MURARILAL *v.* BALKISAN. **95 I. C. 636 = A. I. R. 1926 Nag. 416.**

———*Acquiescence by occupancy tenant in illegal transfer does not affect his heir to get rights after his death.*

H, an occupancy tenant transferred his holding to *D*. On *H's* death *P* brought a suit for possession against *D*. *P* contended that the deed of transfer executed by *H* was sale-deed and as such the sale was void, while *D* said that it was a perpetual lease and also put up plea of adverse possession, namely that *P* had not proved possession within 12 years.

Held, *P* had no right until the death of *H* and as soon as *H* died *P* took every course to assert his right. *P* was not bound by the acquiescence of *H* for period of twelve years in his own illegal transfer. A. I. R. 1928 Oudh 472; A. I. R. 1922 Oudh 81: A.I. R. 1921 Oudh 240; A. I. R. 1922 Oudh 42, Rel. on. (*Pullan, J.*) GOPAL SAHU *v.* NAND KUMAR SINGH. **7 O. W. N. 438 = 123 I. C. 53 = 14 R. D. 190 = A. I. R. 1930 Oudh 300.**

———*Application of acquiescence as bar to exercise of man's legal rights—Principle guiding Court enunciated.*

The acquiescence which will deprive a man of his legal rights must amount to fraud. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. The elements or requisites necessary to constitute fraud of that description are, in the first place that the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily on the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but nothing short of this will do. *Willmott* v. *Barber*. (1880) 15 Ch. L. 96, Rel. on. (*Stuart, and Raza, J.*) B. KANHAIYA LAL *v.* SYED HAMID ALI. **122 I. C. 774 = 7 O. W. N. 271 = 14 R. D. 119 = A. I. R. 1930 Oudh 235.**

———*By agent binds principal.*

A holder of an agricultural holding sold his house. The purchaser proceeded to errect a substantial pucca house. During this period the karinda of the zemindar did not make any objection to the transfer or the erection of the house. The circumstances indicated that the karinda must have had knowledge of the purchase and construction of the house.

Held, that the action of the karinda did amount to acquiescence on the part of the zemindar. 27 All. 338, Foll. (*Bennet, J.*) DAN KUNWAR *v.* RAMESWAR. **112 I. C. 609 (All.).**

———*Defence of acquiescence explained and enunciated.*

Before any one can acquiesce in another's act he must know what that act is. No one can acquiesce in a fraud till he knows that there has been a fraud or in a violation of his right till he knows that his rights have been violated and in what way. Persons cannot be said to acquiesce in the claims of others unless they are fully cognisant of their right to dispute them. But it is not necessary that the plaintiff should have known the exact relief to which he was entitled; it is enough that he knew the facts constituting his title to relief. The ground for admitting the defence of acquiescence or laches according to the doctrine of the English Courts of Equity is that a plaintiff in equity is bound to prosecute his claim without undue delay. Where however there is, as in India, a statutory time limit to all conceivable kinds of action, the plaintiff is entitled to the full statutory period before his claim becomes unenforceable. Besides, even if in such cases the defence of laches were admissible the defendants would have to show that they had suffered a change of position by reason of the plaintiff's laches in which it would not be reasonable to allow him to assert his right. 21 All. 496, (P. C.), Ref. (*Coutts-Trotter, C. J. and Pandalai, J.*) S. L. RAMASWAMY *v.* PALANIAPPA. **122 I. C. 37 = 30 M. L. W. 898 = A. I. R. 1930 Mad. 364.**

———*Delay—Evidence Act, S.* 115.

A mere delay in filing a suit does not *per se* constitute acquiescence. 1 All. 82, Foll. (*Findlay, J. C.*) NARAYAN *v.* LAXMAN RAO. **105 I. C. 286 = A. I. R. 1927 Nag. 400.**

———*Delay—Whether amounts to.*

Mere delay in suing does not amount to a proof of acquiescence. (*Chevis, J.*) KEHR SINGH *v.* ASA SINGH. **60 I. C. 519 = 3 U. P. L. R. (Lah.) 24.**

———*Essentials—Where defendants do not make mistake as to their legal rights there is no acquiescence.*

In case of acquiescence the onus is on the defendants to show (1) that they made a mistake as to their legal rights, (2) that they had expended money on the faith of that belief, (3) that the plaintiff knew of the existence of his own right which was inconsistent with the rights claimed by the defendants, (4) that the plaintiff knew of the defendants' mistaken belief in his rights and (5) that the plaintiff must have encouraged the defendants in their expenditure of money directly or by abstaining from asserting his legal right. Where therefore the necessary elements are lacking and there is no evidence that the defendants made a mistake as to their legal rights, there can be no acquiescence: *Willmott* v. *Barber*, (1800) 15 Ch. D. 96 and A. I. R. 1926 All. 324, Ref. (*Young, J.*) KAZIM HUSAIN *v.* RAM SARUP. **A. I. R. 1929 All. 877.**

———*Evidence Act—Acquiescence to be successfully pleaded, must amount to fraud.*

The acquiescence which will deprive a man of his legal rights must amount to fraud. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights: *Willmott* v. *Barber*, (1880) L. R. 16 Ch. D. 96 and A. I. R. 1926 All. 324, Foll.

The mere fact the plaintiff raised no objection when the building was constructed by the defendant and that there was long delay on her part in enforcing her rights, if any, in respect of the land in dispute, is not sufficient to establish acquiescence when the defendant has never alleged that he had acted in the *bona fide* belief that he was acting within his rights: A. I. R. 1925 Oudh 258, Dist. (*Raza, J.*) MUSTAFA HUSAIN *v.* MT. SAIDUL NISAN. **99 I. C. 255 = 3 O. W. N. (Sup.) 282 = A. I. R. 1927 Oudh 66.**

———*Extinction of right.*

If a man has been neglectful of his rights in certain cases that does not mean that he should be compelled to forego his remaining property. (*Mukerji, J.*) AL HUSAIN *v.* SYED MAZAHIR HUSAIN. **79 I. C. 134 = 5 L. R. A. Rev. 115 = A.I. R. 1924 All. 477.**

———*Landlord and tenant—Parole agreement of permanent lease in* 1913*—No formal lease executed—Landlord giving possession of land in accordance with agreement—Tenant on faith of oral agreement erecting permanent structures on land—Landlord knowing erection of structures but not objecting to them—In* 1918 *landlord giving notice of refusal to perform his contract and suing in* 1923 *for ejectment—Landlord's allowing to erect permanent structures on land would be such acquiescence as would disentitle him from asking for ejectment.*

In 1913 the landlord contracted to grant a permanent lease in respect of certain land. No formal lease was executed under the terms of S. 107, T. P. Act. Pursuant to the contract the tenant obtained possession of the land and erected permanent and costly structures thereon. The landlord was aware of the erection of those structures and must have realized that the tenant would not have constructed such a building unless he was assured of the possession of a permanent right in the land. In December 1918 the landlord gave notice to the tenant of his refusal to specifically perform the contract. The landlord in 1923 brought a suit for ejectment against the defendant.

Held: that the landlord having allowed the tenant to erect structures on his land would not be allowed to eject the tenant as he acquiesced in tenant's conduct; *Ramsden* v. *Dyson*, (1866) 1 H. L. 129 and *Gregory* v. *Mighell*, (1881) 18 Ves 328, Foll; 21 All. 496 (P. C.), Dist. 28, Cal. 693 (P. C.) and A. I. R. 1925 P. C. 146, Rel. on. (*Mukerji and Graham, JJ.*). G. H. C. ARIFF *v.* JADUNATH MAJUMDAR. **55 Cal. 1090 = 33 C. W.N. 333 = 112. I. C. 865 = A. I. R. 1929 Cal. 101.**

———*Mere fact that party sees building being built is not sufficient—Other party must be encouraged to build.*

The mere fact that plaintiffs living in the neighbourhood of a factory must have seen it being built by the defendant is not sufficient to establish the plea of acquiescence where there is nothing in the evidence indicating that the plaintiffs encouraged the defendants to build. (*Fforde and Johnstone, JJ.*) BANARSI DAS *v.* SITAL SINGH. **121 I. C. 295 = 31 P. L. R. 33 = A. I. R. 1930 Lah. 392.**

———*Mortgagor and Mortgagee—Mortgagee in possession building on Mortgagor's land—Mortgagor can sue for demolition of structure.*

The principle of acquiescence does not apply to the case of a mortgagee building on the mortgaged premises and the mortgagor can ask for demolition of such building even after 12 years. Under the Transfer of Property Act, S. 76 it is the duty of the mortgagee when he takes possession of the mortgaged property to manage it as a person of ordinary prudence would manage if it were his own. This implies that a duty is cast on him to see that the property is not lost by any encroachment. Further the same rule lays down that the mortgagee in possession is not to commit an act which is destructive or permanently injurious to the property. The mortgagee is therefore bound to protect the plaintiffs' rights. Moreover so long as the mortgagee is in possession it cannot be expected that the mortgagors would be going about inspecting the land mortgaged in order to see that it has been well taken care of 21 All. 496 (P. C.) Foll. (*Mukerji, J.*) DIP NARAIN SINGH *v.* JAGMOHAN AHIR. **87 I. C. 15 = 6 L. R. A. Civ. 252 = A. I. R. 1925 All. 576.**

———*Person said to acquiesce must be aware of the matter he acquiesced in and of the effect of such acquiescence.*

Per Das, J.—The doctrine of recognition is merely the application of the rules of acquiescence or waiver, preventing a party who has acquiesced in a state of things from turning round and alleging a different state of things. It is established that parties cannot be said to acquiesce in the claims of others unless they are fully cognizant of their right to dispute them, and that, where acquiescence is relied on, it must be shown that the person acquiescing was aware of the matter in which he acquiesced, and of the effect of such acquiescence. Recognition like waiver, must be an intentional act with knowledge. 34 Cal. 902, foll.
(*Dawson Miller, C. J., Das and Adami, JJ.*) BHONU LAL CHOWDHURY *v.* W. A. VINCENT. **3 Pat. L. T. 653 = 65 I. C. 882 = A.I.R. 1922 Pat. 619.**

———*Plaintiff's connivance at defendant's building in plaintiff's land—Defendants having* bona fide *belief that they possess good title to the property—Plaintiff's bringing a declaratory suit—Plaintiff's claim cannot be decreed on ground of acquiescence—Evidence Act, S.*115.

Where the defendants built on the plaintiff's land on the *bona fide* belief that they had a good title to the property, the large investment they made being evidence of their *bona fide* belief and where the plaintiffs never objected to the infringement upon his right though they knew of the mistaken belief of the defendants and thus encouraged the defendants in their building.

Held : that when the plaintiff brought a declaratory suit, it could not be decreed, the plaintiffs being estopped by the doctrine of aquiescence: *Willmott* v. *Barber*, (1880) 15 Ch. D. 96 and A. I. R 1927 Oudh 66, Rel. on. (*Shrivastava, J.*) IMAMI *v.* IBRAHIM. **A. I. R. 1929 Oudh 292.**

———*Plaintiff conniving at defendant's building in plaintiff's land cannot pray for demolition of the structure—Evidence Act, S.* 115.

If a stranger builds upon the land of *A*, supposing it to be his own and *A* remains wilfully passive, equity will not allow him to profit by the mistake. If a person having a right and seeing another person about to commit or in the course of committing an act, infringing upon that right, stands by in such a manner as really to induce the person who commits the act and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. (*Wazir Hasan, A. J. C.*) RAFIQ HUSSEIN *v.* BHAYA BISHNATH PRASAD. **28 O. C. 114 = 84 I. C. 511 = 11 O. L. J. 677 = A. I. R. 1925 Oudh 258.**

———*Stranger deliberately building on another's land —Owner is entitled to recover except under special circumstances amounting to his acquiescence—Mere delay in bringing suit is not sufficient to deprive him of his right.*

If a stranger builds deliberately on the land of another, the owner is entitled to recover the land, unless there are special circumstances amounting to a standing by, so as to induce the belief that, the owner intended to forego his right or to an acquiescence in his building on the land. Mere delay in bringing a suit is not in itself sufficient to create an equity in favour of the person building so as to deprive the owner of his strict rights : 20 Bom. 298 and 28 Bom. 298, Appl. (*Broadway, J.*) KARIM BUKSH *v.* MD. SHAFI. **94 I. C. 168 = A. I. R. 1926 Lah. 354.**

———*Trespasser building on site of another in spite of owner's protesting—Owner suing for possession after two years—He has not acquiesced and is entitled to possession—Evidence Act, S.* 115.

The mere fact that more than two years were allowed by the owner of the site to lapse after the building had been begun by a trespasser on the former's site before a suit for possession of the site was instituted does not establish acquiescence, especially when a protest has originally been made by him before the building was begun. The owner is entitled to possession, and not only damages : 3 N. L. R. 114, Dist. (*Findlay, J. C.*) MAHADEO PATEL *v.* NARAYAN. **104 I. C. 565 = A. I. R. 1927 Nag. 348.**

———*Words or conduct may amount to—Limitation Act, Art.* 85.

Words or conduct may amount to acquiescence as to the correctness of an account and may even operate as a settlement : 7 Bom. L. R. 151, Foll. (*Madgavkar, J.*) PREMJI VIRJI *v.* EDWARD ELIAS SASSOON. **29 B. L.R. 375 = 102 I C. 225 = A. I. R. 1927 Bom. 225.**

ACQUIRED PROPERTY—*See* HINDU LAW—JOINT FAMILY.

ACQUISITION—*See* HINDU LAW—JOINT FAMILY.

———By Government. *See* LAND ACQUISITION ACT.

———Of easement. *See* EASEMENTS ACT, SS. 47 AND 15.

ACQUITTAL—*See* (1) CR. P. CODE, SS. 403, 417 AND 439.
(2) CRIMINAL TRIAL.

ACT—Done in Official Capacity—*See* TORT.

———**Of Bankruptcy**—*See* INSOLVENCY.

———**Of God.**
See (1) CARRIERS.
(2) CARRIERS ACT.
(3) RAILWAYS ACT, ETC.
(4) TORT.

ACT OF INSOLVENCY—*See* INSOLVENCY ACT.

ACT OF STATE—*See also* C. P. CODE, S. 9.

———*British Protectorate—Native subjects in—Rights of—Crown controlling its foreign relations—Protectorate State is semi-sovereign.*

In the general cases of a British Protectorate although the protected country is not a British Dominion its foreign relations are under the exclusive control of the Crown so that its Government cannot hold direct communication with any other foreign power, nor a foreign power with its Government.

The protected State becomes only semi-sovereign for the protector may have to interfere at least to a limited extent with its administration in order to fulfil the obligations which International Law imposes on him to protect within the subjects of foreign powers. A restricted form of extra-territorial sovereignty may have its exercise called for, really in involving division of sovereignty in the hands of protector and protected. But beyond this, it may happen that the protecting power thinks itself called on to interfere to an extent which may render it difficult to draw the line between a protectorate and a possession. In South Africa the extension of British Jurisdiction by order in Council has at times been carried very far. Such extension may be referred to an exercise of power by an act of State unchallengeable in any British Court, or it may be attributed to statutory powers given by the Foreign Jurisdiction Act, 1890. (*Viscount Haldane.*) SOBHUZA II *v.* MILLER. **30 C. W. N. 961=99 I. C. 265= A. I. R. 1926 P. C. 131.**

——*Jurisdiction — Civil Courts can declare only rights recognised after an Act of State but not even rights agreed up between High Contracting Parties—Documents granted by former sovereign are useful for succeeding Government (but not for the Civil Court) for determining what rights may be admitted—Act of State.*

When a territory is acquired by a sovereign state for the first time that is an Act of State. It matters not how the acquisition has been brought about. It may be by conquest ; it may be by cession following on treaty ; it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can only make good in the municipal courts established by the new sovereign such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay, more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights that does not give a title to these inhabitants to enforce these stipulations in the municipal courts. The right to enforce remains only with the High Contracting Parties. 7 M.I.A. 476 and 42 I.A. 229, Foll.

Where Scindia of Gwalior ceded certain districts in exchange for other districts to the British Government and both parties agreed to maintain intact rights of private subjects, on suit by certain persons for a declaration that they were Talukdars,

Held, the whole object of enquiry is to see whether after cession, the British Government has conferred or acknowledged as existing the proprietary right which the plaintiffs claimed. The view of the officials of the Government as to documents would influence them to make up their minds as to what title should be given or recognised, but even then it is what they did after investigation, not what they thought at investigation, that is matter of moment ; a mere general statement that existing rights would be upheld could never prevail against exact determinations. Any statement in general terms that rights will be respected must necessarily mean as these rights are on investigation determined by the Government officials. To suppose that by such general statements in a proclamation the Government renounced their right to acknowledge what they thought right and conferred on a municipal court the rights to adjudicate as upon rights which existed before cession, is to misapprehend the law as above set forth. (*Lord Dunedin.*) NAYAK VAJESINGJI *v.* SECRETARY OF STATE. **48 Bom. 613= 51 I.A. 357=82 I.C. 779=1924 M.W.N. 694= 22 A. L. J. 951=5 L. R. P. C. 199= 26 Bom. L. R. 1143=40 C. L. J. 473= 29 C. W. N. 317=21 M.L.W. 28= A. I. R. 1924 P.C. 216=47 M.L.J. 574.**

——*Land tenure—Communal ownership—Incidents of—Effect of British occupation is not to destroy private rights—Public Lands Ordinance of* 1903 *of Southern Nigeria.*

A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners and the general terms of cession are *prima facie* to be construed accordingly. The introduction of the system of Crown grants, which was made subsequently, must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing. Questions of difficulty may arise in individual instances as to the effect in law of the terms of particular documents. But when the broad question is raised as to what is meant by the provisions in the Public Lands Ordinance of 1903, that where the lands to be taken are the property of a native community the Head Chief may sell and convey it, the answer must be that he is to convey a full native title of usufruct, and that adequate compensation for what is so conveyed must be awarded for distribution among the members of the community entitled for apportionment as the native council of the district, with the sanction of the Governor, may determine. The chief is only the agent through whom the transaction is to take place and he is to be dealt with as representing, not only his own, but the other interests affected.

The title of the land occupied by a native community is *prima facie* based, not on such individual ownership as English Law has made familiar, but on a communal usufructuary occupation, which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference. There is no evidence that this kind of usufructuary title of the community was disturbed in law, either when the Benin Kings conquered Lagos or when the Cession to the British Crown took place in 1861. (*Viscount Haldane.*) AMODU TIJANI *v.* SECRETARY FOR SOUTHERN PROVINCES, NIGERIA. **A. I. R. 1921 P. C. 212.**

ACTION—For Damages—*See* DAMAGES.

——**Form of.**
See (1) C. P. CODE.
(2) PLEADINGS.
(3) PRACTICE.

——**Framed in Tort.**
See (1) C. P. CODE.
(2) PLEADINGS.
(3) PRACTICE.
(4) TORT.

——**On Contract**—*See* CONTRACT.

ACTIONABLE CLAIM.
See (1) ASSIGNMENT.
(2) NEGOTIABLE INSTRUMENTS ACT.
(3) PROMISSORY NOTE.
(4) T. P. ACT, SS. 3, 6 (*e*), 130 TO 137.

ACTIONABLE WRONG—*See* TORT.

ACTIO PERSONALIS, ETC.
See (1) C. P. CODE, O. 22, R. 1.
(2) MAXIMS.
(3) PROBATE AND ADMINISTRATION ACT.

ACTS—Construction of—*See* INTERPRETATION OF STATUTES.

ACTS—Imperial.
32 OF 1839—INTEREST ACT.
18 OF 1850—JUDICIAL OFFICERS PROTECTION ACT.
21 OF 1850—CASTE DISABILITIES REMOVAL ACT.
13 OF 1855—FATAL ACCIDENTS ACT.
9 OF 1856—BILLS OF LADING ACT.
15 OF 1856—HINDU WIDOWS' REMARRIAGE ACT.
35 OF 1858—LUNACY ACT.
13 OF 1859—WORKMEN'S BREACH OF CONTRACT ACT.
21 OF 1860 —SOCIETIES' REGISTRATION ACT.
45 OF 1860—PENAL CODE.
5 OF 1861—POLICE ACT.
5 OF 1863—PUBLIC CONVEYANCES ACT.
20 OF 1863—RELIGIOUS ENDOWMENTS ACT.
3 OF 1864—FOREIGNERS ACT.

ACTS—Imperial.

3 OF 1865—CARRIERS ACT.
10 OF 1865—SUCCESSION ACT.
21 OF 1865—PARSI INTESTATE SUCCESSION ACT.
21 OF 1866—NATIVE CONVERTS MARRIAGE DISSOLUTION ACT.
3 OF 1867—PUBLIC GAMBLING ACT.
25 OF 1867—PRESS AND REGISTRATION OF BOOKS ACT.
4 OF 1869—DIVORCE ACT.
7 OF 1870—COURT FEES ACT.
21 OF 1870—HINDU WILLS ACT.
1 OF 1871—CATTLE TRESPASS ACT.
23 OF 1871—PENSIONS ACT.
1 OF 1872—EVIDENCE ACT.
3 OF 1872—SPECIAL MARRIAGE ACT.
9 OF 1872—CONTRACT ACT.
8 OF 1873—NORTHERN INDIA CANAL AND DRAINAGE ACT.
10 OF 1873—OATHS ACT.
2 OF 1874—ADMINISTRATOR-GENERALS' ACT.
3 OF 1874—VATAN ACT.
9 OF 1875—MAJORITY ACT.
1 OF 1877—SPECIFIC RELIEF ACT.
1 OF 1878—OPIUM ACT.
7 OF 1878—FOREST ACT.
8 OF 1878—SEA CUSTOMS ACT.
11 OF 1878—ARMS ACT.
8 OF 1879—LEGAL PRACTITIONERS ACT.
14 OF 1879—HACKNEY CARRIAGES ACT.
21 OF 1879—EXTRADITION ACT.
5 OF 1881—PROBATE AND ADMINISTRATION ACT
15 OF 1881—FACTORIES ACT.
26 OF 1881—NEGOTIABLE INSTRUMENTS ACT.
2 OF 1882—TRUSTS ACT.
4 OF 1882—T. P. ACT.
5 OF 1882—EASEMENTS ACT.
6 OF 1882—COMPANIES ACT.
10 OF 1882—PRESIDENCY SMALL CAUSE COURTS ACT.
12 OF 1882—SALT ACT.
20 OF 1882—PAPER CURRENCY ACT.
12 OF 1884—AGRICULTURIST LOANS ACT.
2 OF 1886—INCOME-TAX ACT.
7 OF 1887—SUITS VALUATION ACT.
9 OF 1887—PROVINCIAL SMALL CAUSE COURTS ACT.
7 OF 1889—SUCCESSION CERTIFICATE ACT.
6 OF 1890—CHARITABLE ENDOWMENTS ACT.
8 OF 1890—GUARDIAN AND WARDS ACT.
9 OF 1890—RAILWAYS ACT.
11 OF 1890—PREVENTION OF CRUELTY TO ANIMALS ACT.
4 OF 1893—PARTITION ACT.
1 OF 1894—LAND ACQUISITION ACT.
8 OF 1894—TARIFF ACT.
9 OF 1894—PRISONS ACT.
15 OF 1895—CROWN GRANTS ACT.
2 OF 1896—COTTON DUTIES ACT.
12 OF 1896—EXCISE ACT.
4 OF 1897—PROVIDENT FUNDS ACT.
8 OF 1897—REFORMATORY SCHOOLS ACT.
10 OF 1897—GENERAL CLAUSES ACT.
5 OF 1898—CODE OF CRIMINAL PROCEDURE.
6 OF 1898—POST OFFICE ACT.
2 OF 1899—STAMP ACT.
9 OF 1899—ARBITRATION ACT.
2 OF 1902—CANTONMENTS HOUSE ACCOMMODATION ACT.
7 OF 1903—WORKS OF DEFENCE ACT.
15 OF 1903—EXTRADITION ACT.

ACTS—Imperial.

1 OF 1904—POISONS ACT.
10 OF 1904—CO-OPERATIVE CREDIT SOCIETIES ACT.
3 OF 1907—PROVINCIAL INSOLVENCY ACT.
5 OF 1908—CODE OF CIVIL PROCEDURE.
6 OF 1908—EXPLOSIVE SUBSTANCES ACT.
9 OF 1908—LIMITATION ACT.
14 OF 1908—CRIMINAL LAW AMENDMENT ACT.
15 OF 1908—PORTS ACT.
16 OF 1908—REGISTRATION ACT.
3 OF 1909—PRESIDENCY TOWNS INSOLVENCY ACT.
4 OF 1909—WHIPPING ACT.
1 OF 1910—PRESS ACT.
9 OF 1910—ELECTRICITY ACT.
2 OF 1911—PATENT AND DESIGNS ACT.
3 OF 1911—CRIMINAL TRIBES ACT.
10 OF 1911—PREVENTION OF SEDITIOUS MEETINGS ACT.
12 OF 1911—FACTORIES ACT.
2 OF 1912—CO-OPERATIVE SOCIETIES ACT.
4 OF 1912—LUNACY ACT.
3 OF 1913—ADMINISTRATOR-GENERALS' ACT.
6 OF 1913—MUSSALMAN WAQF VALIDATING ACT.
7 OF 1913—COMPANIES ACT.
3 OF 1914—COPYRIGHT ACT.
8 OF 1914—MOTOR VEHICLES ACT.
4 OF 1915—DEFENCE OF INDIA ACT.
7 OF 1916—MEDICAL DEGREES ACT.
7 OF 1918—INCOME-TAX ACT.
9 OF 1918—INDIAN SOLDIERS' LITIGATION ACT.
9 OF 1918—SOLDIERS ACT.
10 OF 1918—USURIOUS LOANS ACT.
10 OF 1919—EXCESS PROFITS DUTY ACT.
5 OF 1920—PROVINCIAL INSOLVENCY ACT.
14 OF 1920—CHARITABLE AND RELIGIOUS TRUSTS ACT.
19 OF 1920—SUPER-TAX ACT.
8 OF 1921—HINDU TRANSFERS AND BEQUESTS ACT.
18 OF 1921—MAINTENANCE ORDERS ENFORCEMENTS ACT.
11 OF 1922—INCOME-TAX ACT.
22 OF 1922—POLICE INCITEMENT TO DISAFFECTION ACT.
8 OF 1923—WORKMEN'S COMPENSATION ACT.
10 OF 1923—PAPER CURRENCY ACT.
19 OF 1923—OFFICIAL SECRETS ACT.
23 OF 1923—LEGAL PRACTITIONERS (WOMEN'S) ACT.
42 OF 1923—MUSSALMAN WAKF ACT.
13 OF 1924—SPECIFIED INSTRUMENTS (STAMP) ACT.
19 OF 1925—PROVIDENT FUNDS ACT.
23 OF 1925—LEGISLATIVE MEMBERS EXEMPTION ACT.
39 OF 1925—SUCCESSION ACT.
11 OF 1926—PROMISSORY NOTES (STAMP) ACT.
12 OF 1926—CONTEMPT OF COURTS ACT.
16 OF 1926—TRADE UNIONS ACT.
21 OF 1926—LEGAL PRACTITIONERS (FEES) ACT.
30 OF 1926—NEGOTIABLE INSTRUMENTS (INTEREST) ACT.
38 OF 1926—BAR COUNCILS ACT.
12 OF 1928—HINDU INHERITANCE (REMOVAL OF DISABILITIES) ACT.
20 OF 1928—LIFE INSURANCE COMPANIES ACT.
2 OF 1929—HINDU LAW OF INHERITANCE (AMENDMENT) ACT.
19 OF 1929—CHILD MARRIAGE RESTRAINT ACT.

ACTS—Imperial.

20 OF 1929—Transfer of Property (Amendment) Act.

3 OF 1930—Sale of Goods Act.

ACTS—Local—*See* under Bengal, Bombay, Burma, Calcutta, Central Provinces, Madras, Punjab and United Provinces.

ADDITIONAL DISTRICT MAGISTRATE—*See* Cr. P. Code, Ss. 10 and 12.

ADDITIONAL EVIDENCE—*See* C. P. Code, O. 13, Rr. 1 and 2.

——**Appeal**—*See* C. P. Code, O. 41, R. 27.

ADDITIONAL JUDGE—*See* C. P. Code, S. 24.

ADDITION OF PARTIES.

See (1) C. P. Code, O. 1, R. 10.
(2) Limitation Act, S. 22.

ADEN CIVIL AND CRIMINAL JUSTICE ACT (BOMBAY) II OF 1864.

——**S. 8**—*Scope.*

A reference from an appeal is competent under S. 8 from an order passed under C. P. Code, O. 21, R. 50 (3). Bom. Civil Ref. No. 253 of 1926, Dist. (*Kemp, Ag. C. J. and Murphy, J.*) Abadi Hassan & Sons *v.* A. Bessee. **54 Bom. 26 = 31 Bom. L. R. 1302 = 122 I. C. 851 = A. I. R. 1930 Bom. 57.**

——**S. 8**—*Whether revision lies from an order by Resident declining reference under C P. Code, S. 115.*

With regard to the questions arising in reference to cases to be stated by the Resident for the decision of the High Court under S. 8, Aden Courts Act (II of 1864), the Resident's Court is subordinate to the High Court, and the application for revision under S. 115 would lie against the order of the Resident declining to make a reference under that section. 34 Bom. 267, Foll.; A. I. R. 1926 Bom. 139, Expl. and Dist.; 30 Bom. 246 (P.C.) and 27 Bom. 575, Rel. on. (*Patkar and Murphy, JJ.*) Sadeck Abdulla *v.* Mahomed Abdulla Hasanalli. **115 I. C. 407 = 31 Bom. L. R. 225 = A. I. R. 1929 Bom. 190.**

ADEQUACY OF CONSIDERATION.

See (1) Contract.
(2) Contract Act.

ADHLAPI TENURE—*See* Land Tenure.

AD-INTERIM INJUNCTION—*See* C. P. Code O. 39.

ADJACENT LANDS—*See* Neighbour.

ADJOURNMENT.

See (1) C. P. Code, O. 17, R. 1.
(2) Cr. P. Code, Ss. 344 and 526.
(3) Criminal Trial.
(4) Practice.

ADJUDICATION.

See (1) Provincial Insolvency Act.
(2) Presidency Towns Insolvency Acts.

ADJUSTMENT—Decree—*See* C. P. Code O. 21, R. 2, and O. 34.

——**Suits**—

See (1) C. P. Code, O. 23, R. 3.
(2) Compromise — Decree— Adjustment.
(3) Family Arrangement.

ADMINISTRATION—*See also* Probate and Administration Act.

——*Applications relating to administration should ordinarily lie to the trial Court.*

In the case of an ordinary administration suit, it is wrong to come to the appellate Court merely because at some phase of the case the matter has been before the appellate Court. Once the matter has been decided by the appellate Court then all future applications with regard to the administration of the estate should come before the Judge of first instance in the ordinary way. But where there is a deficiency in the order of the appellate Court it is not unnatural to apply to the appellate Court to remedy the defect. (*Marten, C. J. and Blackwell, J.*) Ladkavahoo *v.* Charandas Chaturbhuj. **29 Bom. L. R. 1082 = 104 I. C. 692 = A. I. R. 1927 Bom. 519.**

——*Formal administration decree necessary prior to actual administration.*

In an administration suit the Court would usually insist on a formal administration decree being made before it proceeds in effect to administer the estate by granting orders for sale and so on. (*Marten, C. J. and Kemp, J.*) Grimault & Co. *v.* Premji Gopalji. **32 Bom. L. R. 414 = A. I. R. 1930 Bom. 336.**

——*Fund set apart for paying annuity becoming insufficient—Corpus if can be sold, where annuitant has a charge on the corpus.*

In a case where an annuity is charged on residuary estate, the Court has jurisdiction to set apart a fund to answer the annuity, and thereupon to release the rest of the property and to hand it over to the legatees or next-of-kin. At the same time, if there is any deficiency in the fund, the annuitant is entitled to resort to the corpus, at any rate, where he has a charge on the corpus. (*Marten, C. J. and Blackwell, J.*) Ladkavahoo *v.* Charandas Chaturbhuj. **29 Bom. L. R. 1082 = 104 I. C. 692 = A. I. R. 1927 Bom. 519.**

——*Hindu law—Maintenance if can be claimed in administration suit—Arrears must be claimed in a separate suit.*

A party may apply for maintenance in the administration suit itself and a separate suit is not necessary; but arrears of maintenance must be claimed by a separate suit. (*Rutledge, C. J. and Mya Bu, J.*) C. S. Maha Sabha *v.* Anna Sohan Lall. **6 Bur. L. J. 105 = 104 I. C. 119 = A. I. R. 1927 Rang. 256.**

——*Order for, when question is determinable otherwise—Supreme Court Rules, O. 55, R. 10.*

It is not obligatory on the Court to make an order for administration if the question between the parties can be determined without such order being made. (*Shah Ag. C. J. and Pratt, J.*) Ratanbai Rustumji *v.* Cowasji Edalji. **24 Bom. L. R. 1124 = 70 I. C. 178 = A. I. R. 1923 Bom. 96.**

——*Part of property partitioned—Suit for administration of unpartitioned portion lies.*

A division of a portion of the estate does not preclude any of the heirs from filing an administration suit in respect of the undivided portion. (*Brown and Chari, JJ.*) Ma Pwa Sein *v.* Maung Ba Saw. **A. I. R. 1929 Rang. 243.**

——*Powers of administrator to saddle estate with heavy expenses merely because he is incompetent to carry out his ordinary duties.*

If a person takes out letters of administration and assumes to himself the responsibility of his position, the estate cannot be justly saddled with heavy expenses merely because he is incompetent to carry out the ordinary duties of the administrator.

A widow took out letters of administration to her husband's estate and executed a document in favour of a person who was a friend of her family and not a broker authorising him to sell the property and further agreed to pay him brokerage as soon as the estate had cash in hand.

Held, that the agreement was one which the administratrix was not justified in entering on behalf of the estate, and the estate could not be bound by it.

Held further, that as the agreement was to pay the brokerage when the estate had cash in hand, there was no personal guarantee for the payment. A. I. R. 1928 Bom. 270, Dist. *Weiss* v. *Dill*, 40 Ch. 10, Ref. (*Rutledge, C. J. and Brown, J.*) KHOO SEIN BAN *v.* OFFICIAL ASSIGNEE. **124 I. C. 270 = A. I. R. 1930 Rang. 13.**

———*Property partly outside jurisdiction—Court cannot order delivery of property to administrator but can order person in possession to account for the portion as condition to his obtaining his share if any in the estate —C. P. Code, S.* 16.

If in an administration suit it is found that some of the properties are situated outside the jurisdiction of the Courts of British India, and are in the possession of a person claiming a share in the estate, the Court has no jurisdiction to order that person to deliver possession of the property to the administrator to enable him to sell it and realize its proper price for the benefit of the estate ; but the Court has jurisdiction to direct that person to account for the value of such property as a condition to his obtaining his share of the estate in the hands of the administrator. Case-law considered and discussed. (*Maung Kin and Higginbotham, JJ.*) MT. AYESHA BEE *v.* GULAM HUSEIN. **66 I. C. 530 = 11 L. B. R. 188 = A. I. R. 1921 L. B. 82.**

———*Receiver appointed—District Judge can direct share of one heir to be made over to him on terms.*

Pending the administration of the estate the District Judge has jurisdiction to direct the share of one of the heirs, who gives an undertaking to be responsible for his share of debts to be made over to him. Such an order of the District Judge merely operates as an order of discharge of the Receiver so far as that share is concerned. (*Coutts and Das, JJ.*) MT. DULHIN SONA KOER *v.* SHAH MAHMUDDUL HAQUE. **1 Pat. 667 = 69 I. C. 684 = 4 P. L. T. 209 = A. I. R. 1922 Pat. 585.**

———*Suit before Chamber Judge—Applications regarding administration should be made before him.*

Where the appeal Court is not seised of the whole administration suit but is only seised in appeal of certain exceptions to the Commissioner's report, and those only, an application regarding the interim management or the distribution of the estate should be made to the trying Court and not to the Court of appeal. A. I.R. 1927 Bom. 519, Appl (*Marten, C. J. and Crump, J.*) KAI KHUSHRU *v.* NAVAJBAI. **29 Bom. L. R. 1520 = 106 I. C. 75 = A. I. R. 1928 Bom. 34.**

———*Suit may be filed within six months from grant of probate but good ground must be shown therefor.*

A suit for administration can be instituted before the expiry of the period of six months from the grant of probate, otherwise an estate might be irreparably wasted, but there must be some good ground for bringing it before the period of six months. (*Woodroffe and Cuming, JJ.*) J. N. GHOSE *v.* B. B. DASI. **70 I. C. 638 = A. I. R. 1922 Cal. 302 at 306.**

———*Suit for—Creditor of deceased's heir, intervening—Unsuccessful claimant is not liable for costs.*

The unsuccessful claimant in an administration suit should not be made to pay the costs of a creditor of one of the heirs of the deceased who (the creditor) has been allowed to intervene. (English Case-law referred to.) (*Mookerji, Ag.C.J. and Fletcher, J.*) SOURENDRA MOHAN *v.* MURARI LAL SINHA. **48 Cal. 352 = 24 C. W. N. 888 = 59 I. C. 581 = A. I. R. 1921 Cal. 222.**

———*Suit for enquiry as to assets of deceased, payments of his debts and division of residue among his heirs is an administration suit—Mahomedan law.*

A suit by the widow of a deceased Mahomedan, asking that the extent of property of deceased may be ascertained, that his outstandings may be realized, that his estate may be administered, that her mehar may be paid and that the residue divisible among his heirs may be divided according to their shares under the law, is an administration suit and is not a suit for mere partition. 39 Bom. 545 ; A. I. R. 1921 Bom. 424, and 28 I.C. 895, Rel. on ; 28 Mad. 216, Dist. (*Venkatasubba Rao, J.*) MT. AMER BI *v.* ABDUL RAHIM. **28 M. L. W. 583 = 110 I. C. 276 = A. I. R. 1928 Mad. 760 = 55 M. L. J. 266.**

———*Suit for—Joining party for watching proceedings is a mistake—C. P. Code, O.* 1, *R.* 10.

In an administration suit it is a mistake to make an order for a person to be a party for watching the proceedings. There is neither meaning nor purpose in such an order. (*Rankin, C. J. and B. B. Ghose, J.*) NATIONAL INSURANCE CO., LTD. *v.* NISSIM ABRAHAM GUBBAY. **56 Cal. 447 = 119 I. C. 21 = A. I. R. 1929 Cal. 477.**

———*Suit for—Mahomedan dying—Heir can sue for administration—Mahomedan Law.*

Where a Mahomedan dies, one of the heirs is entitled to bring a suit for accounts and administration and is not bound to sue for partition even although he knows exactly what the estate consists of. (*Macleod, C.J and Heaton, J.*) ESSUFALLY ALIBHAI *v.* ABDEALI ALIBHAI. **45 Bom. 75 = 22 Bom. L. R. 1117 = 59 I. C. 396 = A. I. R. 1921 Bom. 424.**

———*Suit for—Official Referee can consider accounts of money due to estate by agent appointed in deceased's lifetime.*

In an administration suit, the Official Referee has power to go into the accounts of losses alleged to have been caused to the estate, and money alleged to have been due to the estate, by an agent appointed by the deceased in his lifetime. 6 L. B. R. 34, Rel. on. (*Sen and Heald, JJ.*) FATIMA BEE BEE *v.* M.A. GAFFOOR. **A. I. R. 1930 Rang. 240.**

———*Suit for—Order for costs should be so made as to relieve persons with unencumbered share—C. P. Code, S.* 35.

The correct course in administration suits, when orders for costs are made, is to make them in such a form that the person who has not encumbered his share shall be relieved as far as possible in the matter of costs created by the fact that another co-sharer has assigned or encumbered his share. *Greedy* v. ***Lavender***, (1848) 11 Beav. 417, Rel. on. (*Rankin, C. J. and B. B. Ghose, JJ.*) NATIONAL INSURANCE CO., LTD. *v.* NISSIM ABRAHAM GUBBAY. **56 Cal. 447 = 119 I. C. 21 = A. I. R. 1929 Cal. 477.**

———*Suit for—Property in possession of party to suit —Administrator can decide if it belonged to deceased.*

If in the course of an inquiry as to the assets belonging to the estate of a deceased person, any assets in possession of persons who are parties to the suit are claimed as forming part of the assets of the estate of the deceased, the person, appointed by the Court as representing the estate of the deceased to take such steps as may be necessary for the proper administration of the estate, can decide whether such assets belonged to the deceased or not. But he cannot decide such a question if the persons in whose possession the properties are, are not parties to the suit. (*Macleod, C. J. and Shah, J.*)

ADMINISTRATION.

MOTIBHAI SHANKARBHAI *v.* NATHUHAI NARAYANBHAI. **45 Bom. 1053 = 23 Bom. L. R. 444 = 62 I. C. 24 = A. I. R. 1921 Bom. 187.**

——*Surety—Discharge of—Procedure.*

A surety to an administration bond cannot be discharged from his liability till the estate is fully administered. The proper remedy for a surety to an administration bond who wishes to be discharged would be to get some person entitled to a grant to apply for revocation. (*Twomey, C.J. and Young, J.*) GANY, A. *v.* OMAR. **13 Bur. L. T. 111 = 61 I. C. 563.**

——*Wife appointed as administratrix and granted permission to make permanent leases for necessary purposes—Permanent lease granted by her, but for purposes not necessary for administration, will be deemed to be by her as holder of a widow's estate and if not for necessity reversioners can set aside—Hindu law—Alienation.*

An executor or administrator does not appear to have, according to the law, an absolute power to dispose of the property of the deceased if it is not necessary for the purpose of administration of the estate, but a *bona fide* purchaser may be protected in certain cases where a transfer is not for that purpose.

A will provided : " In case it becomes necessary to grant any permanent leases to tenants the executors shall be competent to grant them under the signature of my wife and at the end of each year they shall submit and explain an account of the income and expenditure to her." The wife made certain permanent leases to have money which was required for purposes quite different from what it was the duty of the wife to perform as an administratrix.

Held, that the lady was not competent to grant the leases as the administratrix.

Held further, that the leases which were granted by the lady were granted by her in the exercise of her right as the owner of a widow's estate as heir of the testator and, as such, not being supported by legal necessity, the reversioners were entitled to recover possession after the death of the widow. English cases referred. (*B. B. Ghose and Cammiade, JJ.*) ANANDA BANDHU *v.* AMBICA CHARAN. **55 Cal. 892 = 47 C. L. J. 569 = 107 I.C. 747 = A. I. R. 1928 Cal. 412.**

ADMINISTRATION OF ESTATE OF NATIVE CHRISTIANS ACT—*See* NATIVE CHRISTIANS ADMINISTRATION OF ESTATES ACT.

ADMINISTRATOR—*Also co-heir—Sale by, passes the greatest estate he could pass.*

Where an administrator in whom the whole estate is vested is also a co-heir and he sells certain of the properties he must be taken to have sold the greatest estate he could and the fact that he did not describe himself, as administrator should make no difference. (*Robinson, C. J. and MacGregor, J.*) A. L. A. R. FIRM *v.* MAUNG THWE. **1 Bur. L. J. 133 = 74 I.C. 54 = A.I.R. 1923 Rang. 69.**

——*Not deprived of his power till a Receiver is appointed or injunction issued against him.*

Where a creditor or one of the next-of-kin institutes an administrative action against an executor administrator, the mere institution of the action or obtaining of a mere administration decree does not ordinarily deprive the executor or administrator of the general power to dispose of assets, unless and until the plaintiff has obtained an order appointing a receiver of the estate or at least an injunction restraining the executor or administrator from exercising the powers vested in the executor or administrator. An executor is under the duty to realise assets and pay the debts due by the estate, and it is only right that this duty to administer the estate should not be interfered with or stopped except by a specific order of the Court, especially as the object of such an action is often to hasten such administration and to obtain for the plaintiff that result, and in any case the rights of other creditors and persons interested in the estate should also be considered before any order is passed curtailing the powers of an executor or administrator. (*Heald and Lentaigne, JJ.*) LEE LIM MA HOOK *v.* SAW MAH HONE. **2 Rang. 4 = 79 I.C. 729 = A. I. R. 1924 Rang. 221**

ADMINISTRATOR-GENERALS ACT (1874), S. 52.

——*Tenant—Wrongful collection of rent by defendant—Action in tort by administrator against him lies.*

Where an administrator sued for rent collected by the respondents from the tenants,*held*, that an action lay against the respondent in tort and was quite distinct from administrator's remedy against the tenants for rent. (*Lentaigne and Carr, JJ.*) MA MA GUN *v.* MAUNG BO THAN. **3 Bur. L. J. 25 = 82 I. C. 352 = A. I. R. 1924 Rang. 282.**

——*Will providing for reasonable expenses of marriage—Spending one-third of estate is unreasonable—Decree against administrator as heir—Payment of decree must be given credit to in accounts.*

Where the administrator without the authority of the Court allowed one-third of the estate for the marriage of a girl although the direction of the testator was that all marriage expenses should be paid out of the estate ; *held*, what was meant was that reasonable expenses should be paid; and one-third of the estate was unreasonable. Where an administrator is sued along with another as heir for a valid debt and payment is made by him, credit must be allowed for that amount in accounts of administration. (*Macleod, C. J. and Coyajee, J.*) JAMASJI HORMASJI BAHADURPURWALA *v.* JAMSEDJI HORMASJI BAHADURPURWALA. **70 I. C. 754 = A. I. R. 1922 Bom. 341.**

ADMINISTRATOR-GENERALS ACT (II OF 1874), S. 52 read with S. 54—*Commission is fixed on value of assets as they are ultimately distributed.*

The amount which the Administrator-General is to receive is a percentage on the value of the assets distributed, provided, of course, they have before distribution been collected by him ; with the result that if there is a rise in the value of the estate since collection, he gets a larger amount by way of commission, and if there is a fall in the value of the estate his commission decreases proportionately. But section 54 does not control the fixing of the commission as between the Administrator-General. whether he be the same person throughout or not, on the one hand and the beneficiary who is to pay the commission on the other, and, the commission fixed by section 52 can only be the commission upon the value of the assets as they are ultimately distributed and placed in the hands of the beneficiary or beneficiaries. (*Schwabe, C.J. and Coutts-Trotter, J.*) THE ADMINISTRATOR-GENERAL OF MADRAS *v.* V.V.RAMAIAH. **74 I. C. 182 = 1922 M. W. N. 571 = 16 M. L. W. 711 = A. I. R. 1922 Mad. 492 = 43 M. L. J. 347.**

——**S. 52 (1)**—" *Assets" include both immovable as well as movable property—Whether assets have been " collected " depends on facts of each case—Mere taking letters of administration is not sufficient to get commission.*

Assets in S. 52 include both movable and immovable properties.

The Administrator-General does not earn a commission by merely taking out letters of Administration and thereby getting the legal right to deal with the properties, if he does not do anything more. In each case the

ADMINISTRATOR GENERALS ACT (1913), S. 25.

question whether assets have been "collected" or not has to be decided on its own particular facts.

On obtaining letters of administration vesting the estate of the deceased in him, the Administrator-General took possession of all the properties belonging to the estate and administered them for over ten years. He sold some of them and paid off debts and claims. He leased out two shops from time to time to tenants and collected the rents and paid the revenue and taxes and kept them in proper repair and generally managed them as an owner would. The properties were entirely under his control during the period of administration and he was prepared to hand over the shops to the heir-at-law.

Held, that the shops were "assets collected and distributed in due course of administration" and the Administrator-General was entitled to a 5 per cent. commission on their estimated value. (*Krishnan and Venkatasubba Rao, JJ.*) SEETHARAMA CHETTY *v.* ADMINISTRATOR-GENERAL, MADRAS.

97 I. C. 722 = A. I. R. 1926 Mad. 1026 = 51 M. L. J. 334.

———**(III OF 1913), S. 25**—*High Court should not advise on disputed points of law and fact.*

The High Court should not advise on disputed points of law and fact under S. 28 but only on such questions as advancement, management, change of investments, etc., of the estate in charge of the Administrator. 7 Bom. 381, 12 Bom. 638 and 18 Mad. 443, Ref. (*Addison, J.*) GURAN DAS *v.* ADMINISTRATOR-GENERAL, PUNJAB.

111 I. C. 16 = A. I. R. 1928 Lah. 514.

ADMIRALTY—*See also* SHIPPING.

———*Prosecution under Act 12 of 1859 should be launched after thorough enquiry.*

Circumstances attending a collision should be thoroughly examined and great care should be exercised by authorities concerned before a prosecution in respect of it is launched against a pilot under Act 12 of 1859. (*Page, J.*) *In re* "RABENFELS."

56 Cal. 763 = 121 I. C. 312 = 31 Cr. L.J. 215 = A. I. R. 1930 Cal. 97.

ADMIRALTY COURT ACT (1861), Ss. 5 and 35—*Act of* 1840, *S.* 6—*Interpretation Act*, 1889, *S.* 18 (2)—*Suit* in rem *for necessaries supplied to ship can be brought in Admiralty Court within whose jurisdiction the ship is—Claim* in rem *does not lie unless supplier looked to the owner for payment.*

Claim for necessaries can be enforced in a Colonial Court of Admiralty by a suit *in rem*, and such a suit can presumably be instituted in any Admiralty Court within whose jurisdiction the ship happens to be at the time when the suit is instituted. Before there can be an action *in rem* there must be a personal liability on the part of the owner. Though necessaries supplied to a ship are *prima facie* presumed to have been supplied on the credit of the ship, this *prima facie* presumption may be rebutted by evidence of facts going to show that the person who has supplied or paid for the necessaries looked for payment to the person at whose instance he furnished the supplies or advanced monies, and not to the owner of the ship. *The Magileff*, (1921) P. 236; *Foong Tai* v. *Buchheister*, (1908) A. C. 458; *The Heinrich Bjorn*, 11 A. C. 276, Ref. (*Heald and May Oung, JJ.*) "HEIWA MARU" *v.* BIRD & CO.

1 Rang. 78 = 76 I. C. 458 = A. I. R. 1923 Rang. 163.

ADMIRALTY JURISDICTION—*See* JURISDICTION.

ADVANCEMENT.

ADMISSIBILITY.

See (1) EVIDENCE.
(2) EVIDENCE ACT.

———**of Unregistered Deeds**—*See* REGISTRATION ACT, Ss. 49 AND 17.

ADMISSIONS.

See (1) C. P. CODE, O. 12.
(2) EVIDENCE ACT, Ss. 17 to 30 AND 115.
(3) LEGAL PRACTITIONER.

ADNA AND ALA MALIK—*See* CUSTOM—PUNJAB.

ADOPTION—*See* HINDU LAW—ADOPTION.

ADULTERATION—*See* MUNICIPAL ACTS.

ADULTERY.

See (1) DIVORCE ACT.
(2) HINDU LAW.
(3) HUSBAND AND WIFE.
(4) PENAL CODE, Ss. 497 AND 498.
(5) RESTITUTION OF CONJUGAL RIGHTS.

AD VALOREM FEE.

See also (1) COURT-FEES ACT,
(2) TRUSTS ACT, S. 82.

ADVANCE FREIGHT—*See* SHIPPING.

ADVANCEMENT.

See also (1) BENAMI.
(2) TRUSTS ACT, S. 82.

———*Person making irrevocable gift to his son—There is no presumption of advancement.*

Where a person makes an irrevocable gift to his son of some property, there is in India no presumption in favour of an advancement to a child as there is in England. 13 M. I. A. 232 (P. C.) and A. I. R. 1921 P. C. 56, Foll. (*Fawcett, J.*) VALLAB DAS MALJI *v.* PRANSHANKAR NARBHESHANKAR. **30 Bom. L.R. 1519 = 113 I. C. 313 = A. I.R. 1929 Bom. 24.**

———*No presumption as to, arises in cases of transfers in the name of wife or child—Person alleging the advancement must prove the contrary.*

Where a husband or father pays the money and the purchase is taken in the name of the wife or child, there is no presumption of an intended advancement unless there is evidence of some other and sufficient motive for gift or transfer. The onus therefore lies on the person alleging the advancement to prove that the purchase made was intended to be advancement. *Macleod C.J. and Coyajee, J.*) MABEL PANTON *v.* ADMINISTRATOR-GENERAL OF BOMBAY. **93 I. C. 161 = 28 Bom. L. R. 11.**

———*No presumption in India—Each case should be decided on its merits.*

There is no presumption in India as to the advancement and the decision whether a transaction is benami or not has to be given according to merits in each case. (*Misra and Shrivastava, JJ.*) AMEER HASAN *v.* MD. EJAZ HUSAIN. **6 O. W. N. 51 = 117 I. C. 456 = A. I. R. 1929 Oudh 134.**

———*Presumption as known in English law applies to Anglo-Indians.*

The presumption of advancement as it is known in English Law, may arise in the case of Anglo-Indians where a husband transfers property in the name of his wife. (*Robinson, C. J. and May Oung, J.*) EUGNE HUGH COURAD LECUN *v.* MAY JULIA LECUN.

2 Rang. 253 = 3 Bur. L. J. 85 = 82 I.C. 686 = A. I. R. 1924 Rang. 283.

ADVERSE POSSESSION.

Acquisition of Title.
Animus Possidendi.
Burden of Proof.
Co-heirs.
Community.
Co-mortgagors.
Constructive.
Co owners.
Co-parcener.
Co-sharer.
Co-tenants.
Criminal Trial.
Donor and Donee.
Easement.
Effect of.
Ejectment.
[*See* **(1) Limitation Act, Arts. 142 and 144.**]
(2) Landlord and Tenant.
(3) Possessory Title.
Elements of.
Essentials of.
Evidence.
Extent of Right.
Fishery.
Forest Land.
Hereditary Office.
Hindu family.
Interruption of.
Joint Property.
Landlord and Tenant.
Lessor and Lessee.
License.
Limitation.
Limited Interest.
Limited owner.
Minor.
Mortgagor and Mortgagee.
Municipality.
Nankar Allowance.
Nature of.
Neighbours.
Permissive.
Plea of.
Possession.
Presumption.
Proof of.
Purchaser.
Receiver.
Religious Endowment
Service Tenure.
Submerged Land.
Tacking of.
Trust and Trustee.
Under-Proprietary Rights.
Vacant Site.
Waste Land.

Acquisition of Title.

———*Acquisition of title.*

The plea of limitation assumes that the title is in the plaintiff. A person cannot by using or working one portion of a coal mine acquire a right to any other portion of it. (*Das and Macpherson, JJ.*) SHASHI BHUSAN BANERJI *v.* RAMJAS AGARWALA.

83 I. C. 205 = 3 Pat. 85 = A. I. R. 1924 Pat. 402.

———*Acquisition of title—No title acquired by mere want of possession by owner—Other person must be in actual possession adversely for 12 years.*

The statute of limitation applies not to want of actual possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed period. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected to bring the case within the statute. Besides adverse possession must continue for at least 12 years, and that the limitation does not continue to run against the rightful owner after an intruder has relinquished possession without acquiring title by prescription. Possession so abandoned leaves the rightful owner in the same position in all respects as he was before the intrusion took place. Nor can possession of a portion of the land in the case of an intruder be treated as constructive possession of the whole. (*Shadi Lal, C. J. and Hilton, JJ.*) MANGAL SINGH *v.* ALISHER.

120 I.C. 792 = A. I. R. 1930 Lah. 303.

———*Acquisition of title—Until some one is in adverse possession, plaintiff's title is not extinguished though he be out of possession for over 12 years—Limitation Act, S. 28.*

An owner of property does not lose his right to property merely because he happens not to be in possession of it for 12 years. Under S. 28 his right is only extinguished at the determination of the period limited by the Act to him for instituting a suit for possession of property; that period cannot be determined unless it has commenced to run, and the period will not commence to run until the owner is aware that some one else in possession is holding adversely to himself. 45 Bom. 1020, Foll. (*Raza, J.*) SUKHDEO *v.* MT. RAMDULARI.

29 O. C. 131 = 13 O. L. J. 400 = 92 I. C. 825 = A. I. R. 1926 Oudh 313.

———*Acquisition of title— Decree for possession—Possession acquired without Court's intervention is still to be ascribed to decree.*

If a party in whose favour a decree for possession had been passed went into possession without intervention of the Court, its possession would be ascribed to the decree. Decree is effective *qua* that part of land over which possession has been proved. A. I. R. 1921 Bom. 470, Rel. on. (*Shadi Lal, C. J. and Abdul Quadir, J.*) MT. INDAR DEVI *v.* KIRPA RAM.

31 P. L. R. 578 = A. I. R. 1930 Lah. 803.

———*Acquisition of title—Invalid deed of grant—Possession under.*

Where a property is transferred by an unregistered deed of grant and the grantee is put in possession, although the deed cannot be put in evidence to prove the grant as it was compulsorily registrable, still the grantee, if he continues in possession for more than twelve years, acquires title to the land by adverse possession. A. I. R. 1919 P. C. 44, Foll.; 27 Bom. 500 and A. I. R. 1921 Mad. 337 (F.B.), Rel. on ; A. I. R. 1914 P. C. 27, Ref. (*Niamatullah, J.*) RAJAI *v.* BEHARI LAL.

115 I.C. 141 (All.).

———*Acquisition of title—Invalid lease deed—Possession by lessee for over 12 years—Title—Perfection of.*

Where a lessee's title began under a genuine deed of perpetual lease which is subsequently found to be void for want of registration, his title will be perfected by adverse possession if he continues in possession for more than 12 years. (*Stuart, C. J. and Raza, J.*) BANK OF UPPER INDIA, LTD. *v.* MT. HURNATH KUNWAR.

93 I. C. 852 = A. I. R. 1926 Oudh 410.

———*Acquisition of title—Invalid title.*

Possession for twelve years or any other period prescribed by the law on an invalid title, cannot perfect anything but that title. (*Hallifax, A. J. C.*) DINA SINGH *v.* JAMAL SINGH. **78 I.C. 446 = A.I.R. 1925 Nag. 48.**

———*Acquisition of title—Invalid title deed—Possession under.*

SITY OF KASHMI
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Person in possession of lands under invalid deed of gift conferring absolute rights on the donee, perfects his title at the end of the statutory period. (*Venkatasubba Rao, J.*) NARAYANASWAMY DEVARAVAR *v.* THANGAVELU PADAYACHI. **1924 M. W. N. 571 = 82 I. C. 67 = A. I. R. 1924 Mad. 800.**

———*Acquisition of title—Possession under invalid sale deed.*

A purchaser taking possession under an invalid sale deed and holding it for more than 12 years can acquire title by prescription and the sale deed though invalid, can be referred to determine the nature of his possession. 43 Mad. 244 (P.C.), Rel. on. (*Hasan, J.*) RAM UDIT *v.* BHAGWAT PRASHAD. **95 I. C. 438 = A. I. R. 1926 Oudh 500.**

———*Acquisition of title—Possession under invalid sale deed.*

Even when a registered sale deed is found to be illegal, the purchaser gets full title to the property purchased, if he is put in possession in pursuance of the registered deed and continues to be in possession for over twelve years openly and adversely to the vendor. (*Jwala Prasad and Adami, JJ.*) MT. JASODA KUAR *v.* JANAK MISSIR. **4 Pat. 394 = 92 I. C. 1034 = 7 P. L. T. 507 = A.I. R. 1925 Pat. 787.**

———*Acquisition of title—Possession under invalid title-deed.*

If the possession is acquired by a person under an invalid title and he continues to remain in possession for more than 12 years, although the document relating to his title may be invalid for want of registration or any other ground, yet the possession having lasted for more than 12 years the title becomes an unassailable one. 43 Mad. 244 (P.C.), Foll. (*Misra, J.*) MAHIPAL SINGH *v.* SARJOO PRASAD. **3 O. W. N. 100 = 13 O. L. J. 326 = 92 I. C. 99 = A. I. R. 1926 Oudh 141.**

———*Acquisition of title—Possession under an invalid will.*

Where a person has been in possession of a property for over 12 years as legatee with an absolute estate under a will by a testator who had no disposing power over the property and no objection has been made by the persons entitled to the property, the person in possession acquires an absolute title to the property. (*Kumaraswami Sastri, J.*) GANSHAMDOSS NARAYANDOSS *v.* SARASWATHI BAI. **21 M. L. W. 415 = 1925 M. W. N. 285 = 87 I. C. 621 = A.I.R. 1925 Mad. 861.**

———*Acquisition of title—Possession under void document.*

Adverse possession denotes possession under a claim or colour of title and where a defendant entered upon possession by virtue of a document and continued to be in possession on the strength of that document even if the title as based upon the document itself was void the possession, nevertheless, being under a claim or colour of title, must be regarded as adverse. (*Das and Adami, JJ.*) BAGESWARI CHARAN *v.* JAGERNATH. **8 Pat. 549 = 115 I. C. 699 = A. I. R. 1929 Pat. 117.**

———*Acquisition of title—Possession under void sale.*

Plaintiff, one of two Khoti sharers in a village, brought a suit to recover possession of certain lands which formed part of an occupancy tenancy Khata. The lands comprised in that Khata originally belonged to the family of the defendants (Nos. 1 to 7). At a partition effected in or about the year 1890, between the first defendant *D* and his three brothers, *S*, *R* and *Z*, the suit lands fell to the share of *D*. In 1895, they were put up to sale in execution of a money-decree passed against *D*, and purchased by the eighth defendant. In 1899, he obtained possession of the lands through the Court and in 1901 surrendered them to the plaintiff. Since then, plaintiff had been in continuous possession and enjoyment of the lands until 1916 when he was wrongfully dispossessed by defendants (Nos. 2 to 7).

Held, that assuming that the auction-sale was void, as being in defiance of the provisions of the Khoti Settlement Act plaintiff had been in possession for about fifteen years without a title and this long possession was sufficient to enable him to eject the third defendant. 20 I.A. 99, Foll. (*Fawcett and Coyajee, JJ.*) ATMARAM BHILA *v.* BALAJI RAGHUNATH. **25 Bom. L.R. 1032 = 77 I. C. 307 = A. I. R. 1924 Bom. 178.**

———*Acquisition of title—Purchase of land from person without title—Open user.*

The plaintiff purchased the site in suit from a person who had no right to sell ; the sale deed was not registered but it was attested by a lambardar of the patti to which the land belonged ; on other land purchased by the plaintiff, he had constructed a house and he had been using the land in suit as an appurtenance to his house ; he enclosed it with a hedge and he had been using it as a carpenter's yard.

Held, that the plaintiff has acquired ownership by adverse possession. 16 Bom. 338, Dist. (*Campbell, J.*) ISHER SINGH *v.* WIR SINGH. **8 L.L.J. 341 = 27 P. L. R. 759 = 94 I. C. 1000 = A. I. R. 1926 Lah. 431.**

———*Acquisition of title—Possession under oral gift—Adverse or permissive.*

Where donee took possession under an oral gift and remained in possession for over 12 years, *held*, that the donee's possession was adverse for over the statutory period and ripened into a good title. 43 M. 244 (P.C.), Foll. (*Baker, J.C.*) MT. KASTURI *v.* BALIRAM. **79 I. C. 117 = A.I.R. 1924 Nag. 222.**

———*Acquisition of title—"Joint estate"—Possession of—If adverse to—"Separate estate".*

Possession of a joint estate is adverse to any claim to such an estate as a separate one and that possession by a joint family may by lapse of time become adverse to a separate estate. 24 Mad. 387, Foll. ; A.I.R. 1928 Bom. 287 ; A. I. R. 1929 Bom. 424 ; 27 Cal. 943 and 26 Bom. 410, Dist.; A. I. R. 1922 P.C. 181, Expl. (*Murphy and Broomfield, JJ.*) BABAJI DASO DESHPANDE *v.* JIVAJI YESHWANT DESHPANDE. **32 Bom. L.R. 314 = A. I. R. 1930 Bom. 333.**

———*Acquisition of title — Possession in assertion of ownership to half undivided share—Title can be perfected only as regards that half.*

It is impossible to obtain by prescription anything more than is claimed. If a man asserts that he is the owner of an undivided half share in property, and holds possession of it for twelve years, he becomes the owner of that half-share only, not of the whole property. (*Hallifax, A.J.C.*) CHUNNU *v.* SUBHETI. **22 N.L.R. 181 = 98 I.C. 540 = A. I. R. 1927 Nag. 67.**

———*Acquisition of title—After expiry of statutory period, true owner's title is not revived by his re-entry.*

If a party who has been 12 years out of possession and whose suit is, therefore, barred, should again get into possession, he is not remitted to his old title as there is no remitter to a right for which the party had no remedy by action at all. (*Wasir Hasan, J.C. and*

Neave, A. J. C.) MT. MAHMUD-UN-NISSA *v.* SYED ZABID RAZA. **84 I.C. 98 = 11 O.L.J. 466 = A. I. R. 1925 Oudh 20.**

———*Acquisition of title—Title can be got only after 12 years.*

No one can acquire a title by adverse possession unless that possession has continued for 12 years. An assertion of adverse title for 11 years is insufficient for the purpose. (*Martineau, J.*) RAM DAS *v.* CHANDI. **69 I.C. 363 = A.I.R. 1923 Lah. 35 (2).**

———*Acquisition of title—Trespasser abandoning possession before statutory period is over—Rightful owner's title is not affected.*

The rightful owner including a lessee may invoke the doctrine as to constructive possession. He may for a time be dispossessed; but when the trespasser abandons possession before the statutory period is over, the rightful owner is in the same position in all respects as he was before the intrusion took place. (*Das and Adami, JJ.*) MIDNAPUR ZEMINDARI CO., LTD. *v.* RAM KANAI SINGH DEO. **5 Pat. 80 = 7 P. L. T. 188 = 1925 P. H. C. C. 254 = 91 I. C. 169 = A. I. R. 1926 Pat. 130.**

Animus Possidendi.

———Animus possidendi—*Adverse possession whether absolute or limited depends on intention at start—If origin of possession is lawful no adverse possession begins until denial to knowledge of owner.*

The quality and extent of right acquired by adverse possession depends upon the claim accompanying it and upon the nature of the *animus possidendi*. Where the origin of the defendant's possession is lawful, time does not run against the owner until the denial of his right has been brought to his knowledge. Possession of mortgagee from *de facto* guardian of a Muhammadan minor will create mortgagee's interest, but if he also gets sale later on, possession will create absolute title if continued over 12 years from date of sale by *de facto* guardian. (*Venkatasubba Rao and Jackson, JJ.*) AIYISA BIVI AMMAL *v.* KALANDARASA ROWTHER. **86 I. C. 433 = A. I. R. 1925 Mad. 1020.**

———Animus possidendi—*No particular form necessary.*

No particular form of expression of an intention is necessary to constitute adverse possession; it is always a question of *animus* which has to be gathered from all the circumstances. (*Suhrawardy and Mukerji, JJ.*) GANGAPRASAD CHAUDHURI *v.* KULADANAND ROY. **44 C. L. J. 399 = 30 C. W. N. 415 = 94 I. C. 235 = A. I. R. 1926 Cal. 568.**

———Animus possidendi—*Assertion of title on basis of gift—Claim under gift subsequently failing—Possession adverse from the date of assertion of title.*

Where a person who is not the heir of the deceased, obtains possession of a portion of the property belonging to the deceased under an assertion of title on the basis of a gift, his assertion is a sufficient disclaimer of the title of the heirs of the deceased and sets limitation in motion against them though the claim under the gift may not be proved. 43 Mad. 244, Foll. (*Wazir Hasan, A. J. C.*) WAJID ALI *v.* MT. SULIMA BEGAM. **89 I. C. 473 = A. I. R. 1925 Oudh 745.**

———Animus possidendi—*Compromise to deliver possession—Continuance of possession in spite of.*

Where dispute with respect to a plot had been going on between the zemindars and the defendants' ancestors for a very long time and there was once a suit by the predecessors-in-title of the zemindars as against the predecessors-in-title of the defendants with respect to this very plot and that suit was compromised whereby the ancestors of the defendants agreed to remove their belongings from the plot in suit and to deliver possession to the zemindars within a specified time but that compromise was never acted upon and in the teeth of that decree the defendants' ancestors and the defendants continued to hold possession of the said plot.

Held, that apart from the nature of user by the defendants their possession can in no way be said to have been with the tacit permission of the zemindars, and must be held to have been in assertion of an adverse right. (*Iqbal Ahmad, J.*) DALLE *v.* AMIR. **98 I. C. 827 (All.)**

———Animus possidendi —*Transfer to minor daughter in lieu of her share of inheritance—Continued possession by father consistent with title—Adverse possession—Title by, if sustainable.*

By a formal registered deed of partition, certain properties were made over to the plaintiff, the infant daughter of the defendant. The father, however, continued in possession of the property and received its rents and profits but contributed to the support of the plaintiff. On various occasions, he professed to deal with the property on behalf of his daughter. *Held*, the retention of possession and management by the father under such circumstances was not inconsistent with the possession and management being conducted in accordance with the legal title, that is, for and on account of the daughter and no title was acquired by the father under the law of limitation. (*Lord Atkin.*) MA NGWE NAING *v.* MAUNG THA MAUNG. **7 R. 4 = 49 C. L. J. 167 = 31 Bom. L. R 311 = 33 C. W. N. 513 = 1929 M W. N. 235 = 29 M. L. W. 669 = 114 I. C. 595 = A.I.R. 1929 P. C. 55 = 56 M. L. J. 244.**

———Animus possidendi—*Entire land jointly belonging to Mahomedans* N, K *and their minor nephew* M *sold and possession given to vendee—In revenue records* M *even after sale entered as co-sharer but in column of cultivation name of vendee entered from date of sale—Vendee's possession of whole land is in his own right and adverse to* M.

Land which jointly belonged to Mahomedans *N, K* and their minor nephew, *M*, was sold by *N* and *K* including the share of the minor *M* and the possession of the entire land was given to the vendee. In the revenue records the minor, even after sale, was entered as a co-sharer, but in the column of cultivation the name of the vendee was entered from the date of the sale.

Held, that as the sale so far as the share of the minor *M* was concerned was not effected by a competent person, the revenue authorities did not effect mutation of names in the vendee's favour on the basis of the sale and that the vendee had been in possession of the entire land including the share of the minor *M* in his own right and not as his co-sharer and therefore the vendee's possession was adverse to *M*. (*Jai Lal, J.*) IBRAHIM *v.* ALI MUHAMMAD. **116 I. C. 890 = A. I. R. 1930 Lah. 214.**

———Animus possidendi—*Entry must be as an owner.*

For claiming adverse possession, the entry upon land, in order to be an assertion of hostile title, must be an entry as an owner. (*Cuming and Mallik, JJ.*) GAYA PRASAD *v.* BAKYA MANI DASI. **56 Cal. 914 = 33 C. W. N. 277 = 119 I. C. 289 = A. I. R. 1929 Cal. 297.**

———Animus possidendi—*Two estate previously owned by two persons jointly subsequently transferred to two persons—Possession of each transferee is adverse to other.*

Where two estates previously owned by two persons jointly, afterwards become vested in two different transferees between whom there is no privity of estates, possession of each transferee becomes adverse to the other although there was no question of adverse possession when the two estates were jointly held by the same persons. (*Suhrawardy and Jack, JJ.*) DURGANATH BHATTA CHARYA *v.* HAR KISHORE CHAKRABARTY. **33 C. W. N. 117 = 119 I. C. 123 = A. I. R. 1929 Cal. 218.**

———Animus possidendi—*Grove-holder continuing to hold even after land ceasing to be grove—In absence of any assertion of adverse title he must be considered as holding over and his possession is only of tenant.*

Where a grove-holder continues to hold even after the land has lost its character as a grove, he must be considered to be holding over and his possession in the absence of any open assertion of proprietary right by him, cannot be considered to be otherwise than as a tenant. 70 L. J. 282, Dist. (*Srivastava, J.*) PRAG NARAIN *v.* DACHHINA BUX. **116 I. C. 56 = 12 R. D. 674 = A. I. R. 1929 Oudh 397.**

———Animus possidendi—*Hindu—Sister acting as co-owner of her minor sister is not necessarily asserting a hostile title.*

The mere fact that a married sister purported to deal with the property as her minor sister's co-owner, does not necessarily give rise to the inference that she was asserting a hostile title, as against the minor. (*Kinkhede, Offg. A. J. C.*) PUNJABRAO *v.* RAMKRISHNA. **9 N. L. J. 70 = 95 I. C. 553 = A. I. R. 1926 Nag. 332.**

———Animus possidendi—*Hindu Law—Widow—Possession by widow not in lieu of maintenance or any arrangement but adversely in her own right—After 12 years she becomes absolute owner.*

When a Hindu widow who would not be entitled to anything more than maintenance out of her husband's estate, obtains possession of the property not as the result of an arrangement with the husband's heirs but absolutely in her own right, her possession becomes adverse to them and their rights are barred at the expiration of 12 years from the date of the husband's death. A. I. R. 1924 P. C. 121, Dist.; 29 Cal. 664 (P. C.) Foll. (*Misra and Raza, JJ.*) RAJ BAHADUR SINGH *v.* KANHAIYA BAKHSH SINGH. **99 I. C. 890 = 4 O. W. N. 350 = A. I. R. 1927 Oudh 138.**

———Animus possidendi—*Lease by Government of a thok fallen in arrears—Lessee's possession over 12 years after expiry of lease—Suit to recover possession is barred.*

When a zamindar of a thok allowed his revenue to fall into arrears the areas were taken under the direct management of the Collector and were subsequently made over to a co-sharer of the mahal in which the thok was situated for certain years on his payment or agreement to pay the arrears of revenue to Government *Held* the co-sharer's possession was that of a lessee of the particular area from Government and when he held over at the end of those years his possession becomes adverse. A suit to recover possession instituted beyond 12 years from the expiry of the lease is barred. (*Kanhaiya Lal and Ashworth, JJ.*) B. KANHAIYA LAL *v.* L. MANG RAM. **95 I. C 103 = A. I. R. 1926 All. 584.**

———Animus possidendi—*Male owner being away, woman's name entered in village papers—Woman does not hold adversely.*

In a case where a woman's name is entered in village record, because the male owner is away, the woman would be considered to be in possession on behalf of the man and not adversely. (*Dalal, J.*) ZORAWAR SINGH *v.* DIPCHAND. **119 I. C. 502 = A. I. R. 1929 All. 331.**

———Animus possidendi—*Natham poramboke of Government—Erection of hut and user for stocking of hay and tethering cattle constitute adverse possession.*

The erection and open use of a pucca thatched building on a site forming part of *Natham* poramboke for a period of over 60 years used by the plaintiff and co-parcener for the purpose of tethering cattle and storing hay, etc., and the fact of the enclosure of the site by a *kalli* fence all round constitutes adverse possession as against Government and the fact that the Government levied assessment on some of the trees scattered on the site should not change the character of possession of the plaintiff. 16 Bom. 338; 21 Mad. 53 and A. I. R. 1922 P. C., 181 (P. C.), Dist. (*Sundaram Chetty, J.*) SECRETARY OF STATE *v.* MUTHUKUMARA PILLAI. **25 M. L. W. 349 = 101 I. C. 96 = 38 M. L. T. 348 = A. I. R. 1927 Mad. 456.**

———Animus possidendi—*Notice of disclaimer.*

Notice of disclaimer need not be express or explicit when the party ousted must be held to have had knowledge, the adverse claimant's possession having been open, notorious and visibly hostile. (*Venkatasubba Rao, J.*) VENKATACHALAM CHETTIAR *v.* ANNAPURANI AMMAL. **109 I. C. 553 = 28 M. L. W. 599 = A. I. R. 1928 Mad. 652 (2) = 55 M. L. J. 223.**

———Animus possidendi—*Owner is not deemed to be dispossessed merely because cattle are collected or mangers, pegs etc. are fixed—He is entitled to injunction.*

An owner of land cannot be said to be out of possession so as to disentitle him for an injunction merely because the defendant collects cattle on the land or fixes mangers or pegs or erects a platform thereon. (*Dalip Singh, J.*) MUHAMMAD AMIN KHAN *v.* BALANDA. **109 I. C. 657 = A. I. R. 1929 Lah. 71.**

———Animus possidendi—*Person mortgaging certain plot and then selling same—Vendee bringing redemption suit and obtaining possession not only over the plot but also over another plot—Latter plot in possession of mortgagee under colour of mortgage—Vendee continuing in possession of both plots—By the redemption decree proprietary rights in second plot went back to proprietors, vendor and possession of vendee is adverse to him.*

A person mortgaged a plot of land No. 99 in 1862 and sold the same land in 1867. The vendee brought a suit for redemption and by a compromise succeeded in the suit and got possession not only over plot No. 99 but over another plot 100/1. The latter plot belonged to the mortgagor and was taken by the mortgagees under colour of mortgage. The vendee was in possession over both the plots since 1867. The descendants of the vendor obtained an order directing the removal of the vendees' name from the record so far as the plot 100/1 was concerned. The vendee brought a suit against his order for declaration that he was owner of plot 100/1. *Held*, that when the redemption suit was decreed the proprietary rights in plot 100/1 went back to the proprietors, the descendants of the vendor and the possession of the vendess was not as mortgagee but it was adverse to descendants of vendor and the vendee was entitled to declaration that he was in possession of plot 100/1 as proprietor. (*Mukerji, J.*) RAM DUBEY *v.* HAR NARAIN. **119 I. C. 110 = A. I. R. 1929 All. 799 (2).**

——Animus possidendi—*Possession although not adverse at its inception becomes so when adverse claim is set up by some act.*

Unless adverse in the inception, possession will be presumed to continue as it began; yet this does not preclude the occupant from setting up an adverse claim at any time he chooses by any act which changes the character of his occupancy from amicable to adverse. (*Venkatasubba Rao, J.*) NOMULA NARASIMHA *v.* VASAM MANGAMMA. **91 I.C. 556 (Mad.).**

——Animus possidendi—*Possession of property as mortgagee—He cannot prescribe title as absolute owner.*

Where the names of the mortgagees are by mistake entered as mortgagees as regards the land which is not mortgaged and they remain in possession of the land for more than 12 years, they cannot prescribe title as absolute owners of the land. Their possession is in the capacity of mortgagees and not as absolute owners and they cannot plead adverse possession. (*Iqbal Ahmad, J.*) MOHAMMAD KAMIL *v.* MUHAMMAD SALIM. **119 I. C. 111 = A. I. R. 1929 All. 875.**

——Animus possidendi—*Possession taken under mistake is adverse.*

Possession of plaintiff's land taken by an adjoining landowner under mistaken knowledge on the part of both parties as to the true boundary is adverse to the plaintiff. (*Heald, J.*) MA SHAN MA *v.* L.S.M. SOMASUNDARAM CHETTY. **1 Rang. 492 = 83 I. C. 132 = A. I. R. 1925 Rang. 111 (1).**

——Animus possidendi—*Possession traceable to lawful title—No adverse possession.*

Where there is a title to which possession may be traced, it cannot be assumed or asserted that possession is adverse.

A died leaving certain property to his wife *B*. *B* by adverse possession got absolute proprietary interest in the property and it became her stridhan. *B* attempted to make a gift of the property to her daughter *C* and got the mutation of names effected in *C's* favour. *C* continued in adverse possession till *B's* death. On *B's* death *C* became the sole heir and remained in possession of property till her death. *C's* husband's heirs claimed the property on the ground that it was stridhan of *C*. The heirs of *B* contested the claim pleading that *C* held Hindu daughter's estate only, which should revert to the heirs of *B*, the last full owner.

Held, that on *B's* death when *C* became the sole heir and the exclusive owner of the property for the time being, her adverse possession came to an end. Her own possession could not be adverse against herself. From *B's* death *C's* possession was that of a Hindu daughter and on *C's* death the property would not go to *C's* heirs but to heirs of *B* who was the last full owner. A. I. R. 1919 P.C. 44, Dist. (*Sulaiman, Ag. C.J. and Kendall, J.*) DHURJATI UPADHIYA *v.* RAM BHAROS PANDE. **1930 A. L. J. 585 = 121 I. C. 701 = A. I. R. 1930 All. 109.**

——Animus possidendi—*Possession traceable to lawful title—Possession cannot be adverse.*

Where there is a title to which possession may be traced, it cannot be assumed or asserted that the possession was adverse.

A Hindu widow, *N*, made a gift of her properties to her daughter *L*. No registered deed was executed but *L* was put in possession. Within 12 years of the gift *N* died and *L* succeeded her. *Held*, that although *L's* possession up to the death of *N*. was adverse for want of a registered deed, it ceased to be adverse when succession opened out on the death of *N*. (*Mukerjee, J.*)

RAMBHAROS PANDE *v.* DHURJATEE UPADDHYA. **101 I. C. 621 = A. I. R. 1927 All. 554.**

——Animus possidendi—*Possession for 12 years—Intention to hold possession as of right—Adverse possession.*

Where it is found that a person is in continuous possession of some property for more than 12 years without any right whatever and that, although he did not at any time make any openly avowed claim of right to it, his acts and circumstances attending his possession clearly showed that he intended to hold possession as of right, he must be declared as having acquired title by adverse possession. 7 O. L. J. 282, Foll. (*Raza, J.*) SUKHDEO PANDE *v.* PRAGDAT PANDE. **104 I. C. 760 = A. I. R. 1928 Oudh 18.**

——Animus possidendi—*A's tenancy right devolving on B—B continuing to jointly cultivate with A—A's possession is not adverse to B.*

Where a daughter-in-law in whom the tenancy right was vested, remarried and by reason thereof the tenancy devolved on her mother-in-law, but the latter continued joint along with the former and allowed her and helped her to cultivate the field, *held* that the possession of the daughter-in-law is not adverse to the mother-in-law. Reasons or motives of the parties cannot alter the nature of possession. (*Hallifax, A. J. C.*) MT. MUNGA *v.* LACHMIPRASAD. **74 I. C. 51 = 6 N. L. J. 70 = A. I. R. 1923 Nag. 65.**

——Animus possidendi—*Use of land by public—Owner's title is not affected—Acquisition by public is not equivalent to acquisition by Secretary of State.*

Plaintiff sued for a declaration of his right to the property outside his boundary wall. The Government had registered the land as *poramboke* at the recent survey, and he claimed it as his *jenmam* property. The land had been used as a cart stand by the public freely and the plaintiff used to go over it from road to gateway.

Held, that there can be no adverse possession by public and the use of land by them cannot affect plaintiff's title or possession. No rule can be laid down that acquisition of a right by the public will be equivalent to its acquisition by the Secretary of State, as the public or a portion of it sometimes prescribes or attempts to prescribe against Government. (*Oldfield and Ramesam, JJ.*) KASIM SAIT *v.* SECRETARY. OF STATE. **47 Mad. 116 = 74 I. C. 25 = 17 M. L. W. 610 = 1923 M. W. N. 315 = A. I. R. 1923 Mad. 624 = 44 M. L. J. 638.**

Burden of Proof.

——*Burden of proof—Possession referable to lawful origin.*

Where possession is referable to a lawful origin the presumption is that it is acquired lawfully and the burden is on the party asserting adverse possession to prove his case. (*Kinkhede, A.J.C.*) MT. DESHRANI *v.* THAKUR KISHORE SINGH. **22 N. L. R. 175 = 10 N. L. J. 5 = 100 I. C. 446 = A. I. R. 1927 Nag. 104.**

——*Burden of proof—Ejectment suit—Defendants entered as saunjidars in revenue records—Plea of adverse possession*—Onus.

The defendants in an ejectment suit were entered as saunjidars in the revenue records. The plea was that they were in adverse possession of the lands in suit.

Held, that the *onus* of proving affirmatively that the possession had become adverse lay upon the defendants. (*Bhide, J.*) ALI MAHOMED *v.* BARKAT ALI. **103 I. C. 475 = A. I. R. 1927 Lah. 619.**

———*Burden of proof—Ejectment suit—Proof of title and possession.*

In a suit for ejectment it is incumbent upon the plaintiffs not only to prove their title but also that they have been in possession within twelve years of the date of the suit. (*Das and Kulwant Sahay, JJ.*) CHATTRAPAT PRATAB *v.* C. G. LEES. **72 I.C. 648 = 1 P. L. R. 322 = 4 P. L. T. 487 = A. I. R. 1923 Pat. 558 (560).**

———*Burden of proof*—Onus *on claimant.*

The burden of proving title by adverse possession lies upon the person claiming to have acquired title by such possession. (*Bennet and Iqbal Ahmad, JJ.*) KANHAIYA LAL *v.* GIRWAR. **51 All. 1042 = 119 I. C. 6 = 1929 A. L. J. 1106 = A. I. R. 1929 All. 753.**

———*Burden of proof—Specific Relief Act, S.* 42—*Declaration of title and injunction—Plaintiffs having title and in possession—Defendants must prove adverse possession for* 12 *years—Evidence Act, S.* 103.

Where plaintiffs are in possession as having some title to the lands, in a suit by them for declaration of ownership and injunction it is for defendants to prove adverse possession for 12 years. (*Macleod, C. J. and Crump, J.*) GAVARAWA KOM GAUDAPPA *v.* MALLANGOWDA CHANAGOWDA PATIL. **76 I. C. 559 = A. I. R. 1923 Bom. 382.**

———*Burden of proof—Suit for possession—Plea of title by adverse possession*—Onus.

Where in a suit for possession the defendant pleads title by adverse possession, the burden is upon him to allege and establish such title. (*Mookerjee, A. C. J. and Fletcher, J.*) BIPIN BEHARI *v.* CHARU CHANDRA. **35 C. L. J. 192 = 60 I. C. 753 = A. I. R. 1921 Cal. 816.**

———*Burden of proof—Suit for ejectment—Denial of tenancy—Proof of plaintiff's title — Plea of adverse possession*—Onus.

Where in a suit for ejectment on the ground that the defendant was a tenant, the defendant denies that he is a tenant and pleads adverse possession, but plaintiff's title is established, it is for the defendant to prove adverse possession for 12 years and if he fails to prove that, the plaintiff will succeed merely on his *prima facie* title as landlord. It is not necessary for him to go further and prove that he had been in actual possession at some period within 12 years previous to the commencement of the suit. (41 A. 669 Foll.). (*Abdul Raoof, J.*) SANTA SINGH *v.* NARAIN SINGH. **91 I.C. 1047 = A. I. R. 1927 Lah. 32.**

———*Burden of proof—Evidence Act, S.* 101—*Title with plaintiff*—Onus *is on defendant to prove adverse possession—Limitation Act, Art.* 142.

In a case where the suit is resisted on the ground of acquisition of title by prescription it is not for the plaintiff to prove his title within 12 years. It is for the defendants to prove his adverse proprietary title, 39 Mad. 670 ; 17 A. L. J. 84, Foll.

Kabuliats and application to the municipality may not be sufficient to prove possession but *prima facie* counterparts of leases executed by tenants and applications for permission to build, put in the Municipal Board are the best possible evidence of possession. They would at least tend to show which were the persons who were in actual possession and on whose behalf they held that possession. The application would show also that a certain party alleged himself to be in possession of the property in dispute. (*Gokul Prasad, J.*) L. RAGHA MAL *v* ABDUS SATTAR. **74 I C. 879 = A. I. R. 1923 All. 565.**

———*Burden of proof—Co-owners—Adverse possession by one*—Onus.

Onus lies on the defendants to prove that the plaintiff having proved title, was not entitled to possession of the suit property. (*Macleod, C. J. and Shah, J.*) VINAYAK KESHAV GULVE *v.* BALA SHIVRAM HINGUE. **24 Bom. L. R. 261 = 67 I.C. 176 = A.I.R. 1922 Bom. 94.**

Co-heirs.

———*Co-heirs—Limitation Act, Art.* 144—*Muhammadan co-heirs presumably co-tenants until ousted.*

In cases between Muhammadans, co-heirs are presumably co-tenants unless there is an ouster when only limitation begins to run. *Corea* v. *Appuhamy*, (1912) A. C. 230 ; A. I. R. 1929 Lah. 195, Foll. ; 89 P.R. 1888; 84 P.R. 1916 ; A. I. R. 1923 Lah. 519; A. I. R. 1927 Lah. 790; 97 P. R. 1890, Held overruled. (Cases referred.) (*Zafar Ali and Addison, JJ.*) MUHAMMAD BAKSH *v.* FATEH MAHAMMAD. **10 Lah. 849 = 31 P. L. R. 179 = 118 I. C. 905 = A. I. R. 1929 Lah 464.**

———*Co-heirs — Mahomedan Law—Co-heirs alleging adverse possession must prove ouster within knowledge of other party.*

Where the possession of a person is the possession of a co owner, he cannot put an end to that possession by secret intention and gain an adverse title as against the other co-owners. Nothing short of ouster can bring about that result. Further co-heirs in Mahomedan Law are in the position of tenants-in-common and entry and possession of one of such co-heirs must be deemed to be on behalf of all co-heirs. Therefore, a Mahomedan co-heir claiming adverse title on ground of adverse possession must prove ouster of the party claiming possession. The ouster must be to the knowledge of the persons who would be affected thereby- A.I.R. 1929 Lah. 195 ; A. I. R. 1929 Lah. 464 ; A. I. R. 1929 Lah. 549 ; A. I. R. 1924 All. 384 ; A. I. R. 1922 Bom. 150 and A. I. R. 1927 Lah. 886. Rel. on. (*Addison, J.*) GHULAM MUHAMMAD *v.* MT. BEGAM. **31 P. L. R. 113 = 122 I. C. 105 = A. I R. 1930 Lah. 251.**

Community.

———*Community—African Law—Joint family—Land belongs to community or family but not to individual—Son, though holding exclusive possession of the land after father's death, holds it on behalf of the family and cannot acquire title by lapse of time.*

The notion of individual ownership is quite foreign to native ideas in Africa. Land belongs to the community, the village or the family ; never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon goes to him for it. But the land so given still remains the property of the community or family. Where, therefore, a son holds land after his father's death, he must be deemed to hold for the family and cannot acquire exclusive title to it by lapse of time. (*Viscount Haldane.*) SUNMONU *v.* DISU RAPHAEL. **47 C. L. J. 333 = 27 M. L. W. 824 = 107 I. C. 344 = A. I. R. 1927 P. C. 270 = 54 M. L. J. 394.**

ADVERSE POSSESSION.

Co-mortgagors.

——*Co-mortgagors—Redemption by one co-mortgagor—His possession is not adverse* ipso facto *to the other co-mortgagors—Record-of-rights.*

Where defendants-co-mortgagors redeem the mortgage and get into possession, their possession as alienors does not, in any way, contradict the ulterior proprietary right of the Plaintiffs-mortgagors. It must be established that the Defendants have been in possession for twelve years on an assertion of a hostile title to the knowledge of the Plaintiffs. The entry in record-of-rights would not operate to the prejudice of the Plaintiffs even if it has recorded the exclusive title of the Defendants, unless it has been established that the Plaintiffs had knowledge of the entry more than twelve years before suit. (*Jwala Prasad, C. J. and Das, J.*) RAM NARAYAN RAI *v.* RAM DEVI RAI.

6 P. L.J. 680 = 63 I. C. 282 = 1922 P. H. C. C. 129 = A. I. R. 1923 Pat. 98.

Constructive.

——*Constructive—Doctrine of, does not apply where occupant defends himself on ground of possession only—But when claim is under document or descent, doctrine applies.*

The doctrine of constructive possession is not applicable where the occupant defends himself on the ground of possession only without proving any title and a wrong-doer's rights by adverse possession must be confined to the land and the area of which he is in actual possession, and the owner of the underground rights is not ousted unless either he has not been in possession or has abandoned it and in addition there has been actual user or some unequivocal act of adverse possession by a stranger or a person claiming a possessory title. But where a person claims under documents or by descent, the law makes a presumption in his favour and possession of part of the mines or one seam out of several comprised in a lease or conveyance carries possession of the whole and where surface and underground rights go together; continued possession of the surface is, in the absence of any adverse possession by another person, continued possession of the underground rights also, and where possession is taken under a document, constructive possession in favour of the occupants will be inferred in respect of the areas comprised within the boundaries specified in the document. A much more liberal effect in such a case is given to partial acts of possession as evidencing possession of the whole than any acts of prescriptive possession which establishes a new and adverse right in the possessor. (Case-Law Ref.) (*Jwala Prasad and Adami, JJ.*) RAMLAL KAVIRAJ *v.* SATYANIRANJAN CHAKRAVERTY.

5 Pat. L. J. 563 = 1 Pat. L. T. 474 = 57 I. C. 786 = 1921 P. H. C. C. 49 = A. I. R. 1921 Pat. 379 (2).

——*Constructive—Possession is not the same thing as actual user—Doctrine of constructive possession applies to rightful owner and not to wrongdoer.*

Presumption of possession, which is not necessarily the same thing as actual user, follows title. The nature of possession to be looked for and the evidence of its continuance must depend upon the character and condition of the land claimed adversely. The doctrine of constructive possession applies only in favour of a rightful owner and must not as a rule be extended in favour of wrongdoer whose possession must be confined to the land of which he is in actual possession. (*Raza, J.*) MOHAMMAD HASAN ALI *v.* HARNATH KUER.

110 I. C. 569 = A. I. R. 1928 Oudh 470.

ADVERSE POSSESSION—Co-owners.

——*Constructive—Trespasser in possession of a larger plot comprising plot in dispute—Assertion of title over the whole plot—Adverse possession over the smaller plot in question can be claimed.*

Though ordinarily speaking the doctrine of constructive possession cannot be used in favour of a trespasser, nevertheless, in a case where the plot in dispute forms part of a larger plot with defined boundaries over which larger plot there have been physical acts of ownership in portions and where there has been an assertion of title over the whole plot throughout, such circumstances are relevant evidence as to possession of the waste land. 15 Mad. 101 (P.C.) and 16 I.C. 39, Foll. (*Dalip Singh, J.*) NIZAM DIN *v.* ALI MAHOMED.

99 I C. 698 = A. I. R. 1927 Lah. 753.

Co-owners.

——*Co-owner.*

Vacant possession must necessarily go with title and each co-owner must be deemed to have continued in joint possession. (*Kinkhede, A. J. C.*) YAKUBSHA *v* KALUSHA. **109 I.C. 864 (Nag.).**

——*Co-owners.*

When one co-owner continues in possession of a plot that was once joint and which has fallen to the share of another co-owner, he does not necessarily do so wrongfully because where possession can be lawful, it shall be presumed to be so. 81 P. R. 1911, Not Foll. (*Addison J.*) BHOLU *v.* SANT SARAN SINGH.

109 I. C. 458 = 29 P. L. R. 162.

——*Co-owners—Adverse possession of one of the proprietary body against others is possible.*

The plaintiffs brought the suit under S. 106, Bengal Tenancy Act to have a certain entry in the record of rights corrected. The subject matter of the suit was a two-storeyed building with the tank and orchard round it and some tenanted lands the area of the whole being some sixty bighas. The building and the tank were in the centre of a village which became a municipality. The record of rights treated that these lands were in the possession of the plaintiffs and that they were liable to be assessed with rent by the Zemindars. The plaintiffs themselves were fractional owners of the Zemindary. The case made by the plaintiffs was that there was an old Brahamatter grant made in 1165 B. S. to one *A* that by a kobala dated in 1296 B, S. their predecessors-in-interest took from the executor of *A's* (grantee's heir) estate the Nisker right which had been in this Brahmin family for a very long time.

Held, that the plaintiffs had succeeded in tracing back the possession to grantee's grandson and his possession without any stipulation for payment of rent was undoubtedly adverse to the proprietors of the estate and that the plaintiffs were not liable to pay rent. (*Rankin and B. B. Ghose, JJ.*) SAILAJA NATH RAY CHOWDHURY *v.* RAJA RISHEE KESH LAW. **51 Cal. 135 = 81 I. C. 493 = 39 C. L. J. 380 = A. I. R. 1924 Cal. 693.**

——*Co-owners—Co-owner not participating in rents and profits for considerable time may be presumed to be ousted and such ouster for 12 years bars his right title.*

It is a settled rule of law that the possession of one of several co-owners is the possession of others so as to prevent the statutes of limitation from affecting them. But where the claimant co-owner has not been in participation of rents and profits for such a length of time that considering the circumstances a presumption that there has been an ouster is a good presumption and if such ouster is established for over 12 years the right of the ousted co-owner to possession or partition of property is barred. A. I. R. 1919 P. C. 44; A. I. R. 1924

C.. 693, Rel on. (*Das and James. JJ.*) RAMLAKHAN SINGH *v.* BHAIA CHATHUSAHI.
117 I. C. 636 = A. I. R. 1929 Pat. 624.

———*Co-owner—Co-owner's possession is not adverse unless there is disclaimer by open assertion of hostile title—Entry in revenue papers or non enjoyment of produce is insufficient.*

In order that possession of one co-owner may be adverse to the other, there must be on the part of the co-owner setting up adverse possession a disclaimer of the other's right by an open and unequivocal assertion of a hostile title. Mere entry of name in the revenue registers is insufficient, and mere enjoyment of the produce is equally insufficient. A. I. R. 1928 Mad. 652 ; A. I. R. 1928 Rang. 95 and A. I. R. 1921 Sind 177, Rel. on. (*Rupchand and Barlee, A. J. Cs.*) ABDUL RAHMAN *v.* HAJI MD. IDRIS. **23 S. L. R. 461 = 118 I. C. 207 = A. I. R. 1929 Sind 212 (215).**

———*Co-owner—Denial.*

An application to build a wall by a tenant-in-common does not amount to a denial of title of other co-heirs. (*Addison, J.*) MT. AHMAD BIBI *v.* SHAMAS DIN.
31 Punj. L. R. 167 = 10 Lah. 842 = 122 I. C. 81 = 109 I. C. 658 = A. I. R. 1929 Lah. 195.

———*Co-owners—Eldest male member of* Thavazhi *being also* Karnavan—*Possession by, cannot be adverse to* Tarwad.

Where the eldest male member of a *Thavazhi* happens also to be the *Karnavan* of the *Tarwad* of which the *Thavazhi* is a branch, there can be no adverse possession by the *Thavazhi*, against the *Tarwad*. (*Spencer and Devadoss, JJ.*) ABUVAKKAR *v.* KUNHI KUTTIYALI. **16 M. L. W. 768 = 31 M. L. T. 389 = 74 I. C. 27 = A. I. R 1923 Mad. 153 (158).**

———*Co-owners—Entry showing defendants in possession as sole owners—Position made clear in a subsequent litigation—Possession is adverse since the litigation.*

Where the entry regarding the well in dispute clearly showed that the defendants and their descendants have been claiming to be not only in possession of this well but in possession as sole owners and the position was made clear in the course of a litigation, *held*, the possession of the defendants was adverse since the time of the litigation. (*Broadway and Abdul Qadir, JJ.*) LALA *v.* KHALAS. **4 Lah. L. J. 181 = A. I. R. 1922 Lah. 102.**

———*Co-owner—Exclusion of — Subsequent consent decree interrupts adverse possession.*

Where a co-owner was excluded in 1897 by another from possession, but in a subsequent suit in 1904 there was a consent decree in respect of the lands, *held*, that a suit for possession brought within 12 years from the date of the consent decree is not barred though it was more than 12 years from the date of the original dispossession. The consent decree will put an end to the adverse possession and would make the parties to the consent decree co-owners in joint possession. They could not thereafter secretly or surreptitiously convert their occupation into hostile possession. (*Mookerjee and Chotzner, JJ.*) SYAMA CHARAN DAS *v.* SATYA PRASAD CHOWDHURI. **36 C. L. J. 101 = 70 I. C. 427 = A. I. R. 1923 Cal. 252.**

———*Co-owner—Lessee of mortgagee from, cannot claim adverse possession against co-owner.*

Possession of lessee from mortgagee is not adverse to co-owner of the mortgagor since mortgagor must be deemed to hold for himself and his co-owner, though mortgagor may have sold the interest of his owner, unless there was ouster of co-owner. (*Prideaux, A.J.C.*) SUKHARAM *v.* DEOBA. **68 I. C. 320 = A. I. R. 1923 Nag. 2.**

———*Co-owners—Mahomedan law.*

On the death of a Muhammadan his heirs became co-owners in his estate according to respective shares and that if one of such co-owners be in possession of such estate, then he must be deemed to be in possession on behalf of the other co-owners and cannot claim that he has extinguished the rights of the other co-owners by the mere fact of his possession unless he can show that his possession became adverse to the others and remained so for more than 12 years to their knowledge ; in other words, unless he can show that he did some overt act which amounted to a notice to his co owners that he was holding the property adversely to them. (*Jai Lal and Agha Haidar, JJ.*) MT. UMATULHABIBI *v.* ABDUL KARIM. **119 I. C. 335 = A. I. R. 1930 Lah. 78.**

———*Co-owners—Mahomedan Law—Property owned by sons—Father cannot obtain adverse possession of son's property because of their joint living.*

When the father is the natural guardian of his sons and maintains them out of the common fund, and all dine together in the same house, there will, in those circumstances, normally be no question of rendering accounts and thus the father cannot acquire a title by adverse possession, as against his sons, of the property owned by the latter. (*Findlay, J. C.*) MAYADAD KHAN *v.* HAZARI LAL. **108 I. C. 435 = A. I. R. 1928 Nag. 275 (2).**

———*Co-owners—*Onus *is on person setting up adverseness to prove it.*

Onus lies on the defendants to prove that the plaintiff having proved title, was not entitled to possession of the suit property. (*Macleod, C. J. and Shah, J.*) VINAYAK KESHAV GULVE *v.* BALA SHIVRAM HINGNE.
24 Bom. L. R. 261 = 67 I. C. 176 = A. I. R 1922 Bom. 94.

———*Co-owners—Ouster—Mortgage by itself does not amount to ouster—It must be with knowledge of persons interested.*

A mortgage by itself does not amount to an ouster. It, by itself, does not show that the act is an adverse one. It must be shown that the mortgage was made with the knowledge of other members interested. A. I. R. 1929 Mad. 27 ; A. I. R. 1923 All. 291 (1) and A. I. R. 1923 All. 447, Rel. on. (*Addison, J.*) GHULAM MUHAMMAD *v.* MT. BEGAM. **122 I. C. 105 = 31 P. L. R. 113 = A. I. R. 1930 Lah. 251.**

———*Co-owner—Partition of family property—Some property left undivided left in possession of a member—Its possession over 12 years by him whether adverse to other members—Proof of adverse possession—Repudiation of others' title and acts adverse to their interest to their knowledge—Necessity—Mere mortgage by him without others' knowledge if sufficient—Hindu Law—Partition.*

In a partition of family property when some property is left undivided and is allowed to remain in possession of a certain person, the person holding such property is merely a co-owner. In order to claim adverse possession the burden is on him to prove that he repudiated the title of other members (having interest in the property) to their knowledge and that he has done some acts adversely to the knowledge of such members. Mere failure on the part of such members to prove the permissive possession does not go to establish his title by adverse possession. A. I. R. 1924 Mad. 113, Rel. on. A mere mortgage of that property by him alone does not by itself show that the act is an adverse one It must be proved that the mortgage was made with the knowledge of other members interested. A. I. R. 1923 All.

291, Appr. (*Madhavan Nair, J.*) VAIYAPURI CHETTIAR *v.* SUBRAMANIA CHETTIAR.
114 I. C. 337 = A. I. R. 1929 Mad. 27.

——*Co-owner—Possession of is not adverse to others in absence of assertion of hostile title to the knowledge of others.*

The proposition is now firmly established that the possession of the joint tenant is the possession of all and there can be no dispossession by the joint tenant, in the absence of an assertion of a hostile title in himself to the knowledge of the other joint tenants sought to be excluded from the joint tenancy.

The entry and possession of land by one co-owner will not be presumed to be adverse to the other but will ordinarily be held to be for the benefit of all. (*Ashutosh Mookerjee and Buckland, JJ.*) JOY NARAYAN SEN UKIL *v.* SRIKANTA ROY. **33 C. L. J. 592 = 26 C. W. N. 206 = 65 I. C. 8 = A. I. R. 1922 Cal. 8.**

——*Co-owners—Possession of one not adverse to others—Entry of one's name in Revenue papers is not ouster of others.*

The possession of one co-owner must be deemed to be the possession of all the co-owners, unless there was some act of ouster by which one of the co-owners was deprived of possession by another. The mere fact of getting the name entered in the revenue papers would not be sufficient to amount to an ouster. (*Banerji and Gokul Prasad, JJ.*) DEOKINANDAN *v.* ZAMIR HUSAIN KHAN. **64 I. C. 24 = A. I. R. 1922 All. 399.**

——*Co-owners—Sole possession and enjoyment by one without denial of the right of the others is not adverse to the others—But ouster may be presumed from sole possession for long period.*

The sole possession by one of two joint owners itself is no evidence of the denial of the right of the other joint owner, and time does not run against the joint owner out of possession until the joint owner in possession has done some act to the knowledge of the other which amounts to a denial of the latter's right. No doubt it is perfectly correct to say that sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is evidence from which an actual ouster of the other tenant-in-common may be presumed. (*Macleod, C.J. and Shah, J.*) CHAND BHAI MAHAMADBHAI VOHRA *v.* HASANBHAI RAHIMTOOLA. **46 Bom. 213 = 23 Bom. L. R. 1033 = 64 I. C. 205 = A. I. R. 1922 Bom. 150.**

Co-Parcener.

——*Co-parcener — Adverse possession cannot arise against a co-parcener without his knowledge.* (Obiter).

Adverse possession cannot be acquired as against an undivided co-parcener without notice to or knowledge of such co-parcener. (*Odgers, J.*) GOVINDASAMI CHETTIAR *v.* KOTHANDAPANI CHETTIAR.
24 M. L. W. 766 = 99 I. C. 158 = A. I. R. 1927 Mad. 111 = 52 M. L. J. 203.

——*Co parceners — Adverse possession by one co-parcener after partition, of land omitted at partition does not arise until intention to hold so is proved or is inferable from exclusive possession.*

Where a member of a joint family is in possession of joint family properties and a partial partition takes place leaving him however in possession of certain properties not divided between them, his possession will still continue to be the possession of other members of the family though they may have been divided, till some event happens which renders his possession exclusive or hostile to others. The fact of adverse holding must be brought home to the co-owner, either by information to that effect given by the tenant-in-common asserting the adverse right or there must be outward acts of exclusive ownership of such a nature as to give notice to the co-tenant that an adverse possession and disseisin are intended to be asserted. 32 M. 191 and 35 C. 961 Foll. (*Ayling and Odgers, JJ.*) RAJAGOPALA AIYANGAR *v.* SOUNDARARAJA AIYANGAR. **74 I. C. 1018 = 1923 M. W. N. 636 = A. I. R. 1924 Mad. 113 = 45 M. L. J. 476.**

——*Co-parcener—One co-parcener in possession by mistake of plot fallen to the other's share—Possession must be taken to be permissive and not adverse—One party cannot recover without surrendering benefit taken under the mistaken act—Equity.*

Permissive possession does not rest barely on an expressed agreement by means of which one party permits another to take possession of his property. It is a question of legal inference from the circumstances of a particular case. Where after partition between co-parceners each by mistake acquires possession of plots which have been allotted to the other, such possession continuing even after the mistake is discovered, each must be deemed to hold possession of the plots with equal consciousness that he is entitled to hold possession of them so long as the other party holds possession of his plots and each is liable to restore the plots which he holds as soon as the other party delivers the plots which that party holds in lieu of the former.

The possession, held under such conditions and amounting to mere detention of Roman Law, is lacking in the permanent presence of the essential element *animus domini* in the conception of juristic possession. A person, who has acquired possession *precaris.* is not deemed to have juristic possession. He is liable to be condemned to deliver up such possession to his opponent as soon as the latter is ready and willing to restore what he holds to him. The possessory relation which in such circumstances is imperfect is vitiated by the duty to restore and must, therefore, be deemed as equivalent to permissive possession.

Where the parties in such a case get into possession of the wrong plots in ignorance of the title of the other party, both must be regarded to be labouring under a mistake of fact and when restoration of one party takes place to his original position he cannot recover from the other without surrendering the benefit which he derived under the mistaken act. This principle of equity which cannot be limited to cases of agreements under Contract Act extends even to acts committed under a common mistake of fact. (*Wazir Hasan, A. J. C.*) MAQBUL AHMAD *v.* FARHAT ALI. **66 I. C. 461 = 8 O. L. J. 546 = A. I. R. 1922 Oudh 152 (155, 156).**

Co-sharer.

——*Co-sharers—Joint possession—Kabuliat executed by one—Title by adverse possession of others if affected.*

A, *B* and *C*, three brothers, jointly inherited a certain homestead. *A* and *B* had two-thirds share and *C* one-third share, all being in joint possession of the homestead though in separate occupation of the different huts therein. In 1906 the landlord under whom they held the homestead obtained a decree for ejectment against the three brothers but the decree was never executed and the three brothers remained in possession as before. Subsequently one of the brothers, *C.* executed a kabuliyat in favour of the landlord for a term of five years. On the expiry of the said term he obtained another ejectment decree against *C* and attempted to pull down the huts in execution of the decree. *A* and *B* then instituted the suit for declaration of their niskar title to a two-thirds share in the homestead, for confirmation of possession therein and for injunction restraining the landlord from interfering with their possession.

Held, that *A* and *B* were entitled to the decree. *C* could not, by entering into arrangements with the landlord, put him in constructive possession of anything in excess of the share of which he was in possession. There was no obstacle to *A* and *B* having acquired a title by adverse possession in respect of the shares to the extent of which they were in possession for the statutory period. (*Mukerji, J.*) BIR BIKRAM KISHORE *v.* DASHARATH RISHI. **109 I. C. 296 = A. I. R. 1928 Cal. 563.**

———*Co-sharers.*

To prove adverse possession against a co-owner unambiguous evidence of complete ouster to his knowledge must be established. (1912 A. C. 230; 28 C.L.J. 437, Foll.) (*Mukerji and Rankin, JJ.*) HASAN ALI *v.* ABJAL KHAN. **40 C. L. J. 30 = 82 I. C. 392 = A. I. R. 1924 Cal. 1046.**

———*Co-sharer—Act of ouster is necessary.*

The possession of one co-sharer cannot be held to be adverse to the other co-sharers without definite act of ouster. (*Dalip Singh, J.*) MT. MANSA DEVI *v.* SANSARN. **117 I.C. 904 = A. I. R. 1930 Lah. 220 (1).**

———*Co-sharer—Adverse possession enures in favour of co-sharer who refuses possession until payment of charge defrayed by him.*

The rule that ordinarily one co-sharer cannot hold adversely against another proceeds upon a rebuttable presumption that the co-sharer in exclusive possession is holding on behalf of the other co-sharers and this presumption is rebutted when it is shown that the co-sharer in possession denies the right of the other co-sharers to enter into joint possession until they have paid to him their share of a charge upon the property which he has defrayed. A. I. R. 1923 Lah. 311, Foll; A. I. R. 1923 Pat. 98, not Foll. (*Martineau, J.*) NARAIN DAS *v.* SARAJ DIN. **27 P. L. R. 65 = 92 I. C. 980 = A. I. R. 1926 Lah. 238.**

———*Co-sharers—Possession adverse to—What amounts to.*

Adverse possession that would extinguish a co-sharer's title must be adverse to the proved knowledge of the co-sharer ousted, however notorious such possession may be. Exclusion or ouster involves not merely the act of the person ousting but the state of the mind of the person ousted. Knowledge on the part of the latter, therefore, is essential. Such knowledge may be proved directly or inferentially. On the principle of constructive notice, it may also be proved that the co-sharer against whom possession was exercised had sufficient notice of facts or sufficient information which would put a reasonable person on enquiry and on receipt of which a reasonably attentive person could not but realize that he was ousted. It is not the law that a non-diligent co-sharer is bound to suffer. It is essential to find knowledge of ouster of his part. (Case-law considered.) (*Mukerji and Jack, JJ.*) ABDUL WAHED *v.* MOHAN BASHI SAHA. **34 C. W. N. 246 = A. I. R. 1930 Cal 466.**

———*Co-sharers—Exclusion of one co-sharer from enjoyment of income—Ouster—Title by adverse possession.*

Where there had been an ouster from *sir* land and the person ejected had not been in participation of the rents and profits for a considerable length of time and the persons ejecting had successfully asserted their right to the sole enjoyment of the property.

Held that persons ejecting obtained title to property in suit by adverse possession. *Corea* v. *Appuhamy*, (1912) A. C. 230 and A. I. R. 1919 P. C. 44, Foll. (*Stuart, C. J., and Raza, J.*) RAMNARAIN *v.* MANNULAL. **107 I. C. 866 = 5 O. W. N. 85.**

———*Co-sharer—Claim adverse to plaintiff put in a criminal case by defendant—Limitation runs from the time when defendant so sets up the claim.*

Obiter—Where in a criminal case a defendant-co-sharer denied the co-sharer-plaintiff's claim to share in certain property.

Held, that the assertion would certainly start adverse possession against plaintiff and other co-sharers. (*Addison, J.*) ALLAH JAWAI *v.* MAHOMED BAKHSH. **100 I. C. 145 = A. I. R. 1927 Lah. 790.**

———*Co-sharers—Co-owner in sole possession of joint property.*

The sole occupation by one co-sharer, of a portion of joint property does not constitute an ouster of the other co-sharers; and a co-sharer in possession of a portion of the common land, with the tacit or express consent of his co-sharers, cannot change the nature of that possession. (*Mookerjee and Cuming, JJ.*) KAILASH CHANDRA NAG *v.* BEJOY CHANDRA NAG. **36 C. L. J. 434 = 72 I. C. 680 = A. I. R. 1923 Cal. 18.**

———*Co-sharer—Co-sharer's claim put forward after thirty years—Intention to allow co-sharer in possession to take the whole may be presumed—Ordinarily sole possession by one co-sharer is not adverse to others.*

Sole possession by one of two or more joint owners is not adverse to the others until the joint owner has done some act to the knowledge of the others which amounts to a denial of the latter's right though where parties have not put forward a claim to their legal share for a period of some thirty years, it very often, if not usually, is the fact that they have all along intended to allow one co-sharer to take the whole. (A. I. R. 1922 Bom. 150 and 37 All. 203, Ref.) (*Daniels J.*) SHAKUR *v.* HUSAINI BIBI. **71 I. C. 653 = A. I. R. 1923 All. 447.**

———*Co-sharer—He must continue to hold adversely.*

Where a co-owner is already in adverse possession there is adverse possession only if he continues to hold adversely as before. The possession of a co-owner is not ordinarily adverse to the other co-owners unless, if he was already in possession he continued to hold the land after he became a co-owner in the assertion of the same hostile title as he had set up before he became a co-owner. Uninterrupted sole possession by a member of joint Hindu family property, without more, must be referred to the lawful title possessed by the joint holder to the use of the joint estate and cannot be regarded as an assertion of a right to hold it as separate, so as to assert an adverse claim against other interested members. (*Chatterjea and Panton, JJ.*) PANKAJ MOHAN RAI *v.* BIPIN BEHARI CHAKLADAR. **38 C. L. J. 220 = 76 I. C. 511 = A. I. R. 1924 Cal. 118 (122).**

———*Co-sharer—Co-sharer out of possession owing to disappearance and subsequent death—Other co-sharers cultivating land in absence—Possession of other co-sharer is not adverse.*

A co-tenant out of possession starts with a presumption in his favour that the possession of other co-tenant is not adverse but lawful and consequently if a co-sharer disappears and is subsequently found dead and his co-sharers cultivate the land in his absence, in the absence of any ouster or asserting of adverse possession they should be held to have been in possession of the property on behalf of their co-sharer. A.I.R. 1924

Oudh 266, Rel. on. (*Wazir Hasan, Ag. C. J. and Pullan, J.*) ALI SHER *v.* WAJID ALI. **4 Luck 339 = 121 I. C. 892 = 7 O. W. N. 61 = A. I. R. 1930 Oudh 177.**

——*Co-sharer's possession.*

Possession by a co-sharer cannot be adverse unless it is coupled with some act which is equivalent to ouster of the other co-sharer: A. I. R. 1924 Oudh 266, Rel. on; 5 O. W. N. 85, Dist. (*Wazir Hasan, Ag. C. J. and Pullan, J.*) SHEO RAJ *v.* ADJUDHIYA. **4 Luck. 503 = 6 O. W. N. 213 = 116 I. C. 195 = A. I. R. 1929 Oudh 284.**

——*Co-sharer—Exclusive possession by—If adverse.*

Though a co-sharer in certain property is in exclusive possession of that property, his possession cannot be adverse against the other co-sharers. 64 P. R. 1918 (P.C.), Rel. on. (*Tek Chand, J.*) MEHRAN *v.* RAHIMI. **28 P. L. R. 181 = 102 I. C. 426 = A. I. R. 1927 Lah. 426.**

——*Co-sharers—Denial of title by one co-sharer of other co-sharers, and continuance of possession for 12 years must be proved.*

If a co-sharer has been in possession of a particular land, his possession cannot be considered adverse against the other co-sharers, but must be deemed to be on behalf of them all. In order to establish adverse possession in such a case a co-sharer has to establish that he expressly denied the title of the other co-sharers, and remained in possession after such denial for over 12 years. (*Misra, J.*) MAHIPUL SINGH *v.* SARJOO PRASAD. **3 O.W.N. 100 = 13 O. L. J. 326 = 92 I. C. 99 = A. I. R. 1926 Oudh 141.**

——*Co-sharer—Erection of building by one co-owner or non-participation in profits by other is not conclusive evidence of ouster.*

The erection of a substantial building on joint property by one co-owner or non-participation in profits cannot be regarded as conclusive evidence of ouster. Principles and Case-law fully discussed. (*Mookerjee and Buckland, JJ.*) JAGANNATH *v.* CHANDNI BIBI. **26 C.W.N. 65 = 67 I. C. 31 = 34 C. L. J. 432 = A. I. R. 1921 Cal. 647 (651).**

——*Co-sharer—Evidence—Ouster or denial of right is necessary.*

In order that a co-sharer or co-tenant can be excluded from his share in the property it is necessary to show that some act has been done by the co-owner to the knowledge of the other which amounts to the denial of the latter's right. The onus lies on the defendant to prove his adverse possession. 29 Bom. 300. Dist. A.I.R. 1922 Bom. 150; 47 Cal. 274, Foll. (*Baker, J.*) MALHARI VAMAN *v.* VINAYAK RAVJI. **31 Bom. L. R. 640 = 119 I. C. 779 = A. I. R. 1929 Bom. 323 (326).**

——*Co-sharer—Joint collection of rent proved—Failure to pay shares does not amount to asserting adverse claim.*

Where there is joint collection of rent any failure to deliver to the plaintiffs their share of the rent can hardly be held to amount to assertion of adverse title or to dispossession until it is shown that the plaintiffs' title was definitely denied. (*Coutts and Das, JJ.*) KULDIP SINGH *v.* RAM SEWAK SINGH. **67 I. C. 795 = A. I. R. 1923 Pat. 183.**

——*Co-sharers—Lambardar continuing in possession after partition and delivery of possession—Earliest moment when possession can become adverse.*

Where a lambardar continues in possession of the share in the zamindari property of one of the co-sharers consequent upon partition and delivery of possession of the same, the earliest moment his possession can become adverse is the date when the co-sharer would be entitled to ask for "profits." (*Mukerji and Young, JJ.*) HARNATH *v.* PHOOL KOER. **122 I. C. 893 = A. I. R. 1930 All. 125.**

——*Co-sharer—Limitation Act, Arts. 144 and 142—Suit for possession by one co-sharer against another co-sharer—Defendant must prove adverse possession for 12 years.*

Where one co-sharer sues another co-sharer for possession and the defendant pleads adverse possession, the suit will fail only when defendant proves adverse possession for 12 years and Art. 144 will apply. (*Wazir Hasan, J.*) MT. SUGHRA BEGAM *v.* NUR ALI. **98 I. C. 80 = 3 O. W. N. 796 = 13 O. L. J. 824 = A. I. R. 1927 Oudh 6.**

——*Co-sharers—Mere exclusive possession of a portion for purposes of management is no ouster—A specific denial of other co-sharer's right to possession is necessary.*

Possession of one co-sharer lawfully acquired in the first instance may become adverse to the others, but mere occupation even for a long period creates no presumption of ouster. There must be open and notorious acts indicating a claim to exclusive ownership in denial of the rights of the other co-sharers, before adverse possession can begin to run. The only difference between the possession of a co-owner, and other cases is, that acts, which, if done by a stranger, would *per se* be a disseisin, are in the case of tenancies in-common, susceptible of explanation consistently with the real title; acts of ownership are not, in tenancies-in-common, acts of disseisin; it depends upon the intent with which they are done and their notoriety; the law will not presume that one tenant-in-common intends to oust another; the facts must be notorious and the intent must be established in proof. (24 C. W. N. 1057, ref.) The appropriation of profits cannot be regarded as notice to the co-sharers that their title was repudiated. 32 All. 389, Ref. (*Dawson Miller, C. J. and Foster, J.*) TILAKDHARI LAL *v.* ABDUL WAHAB KHAN. **89 I.C. 913 = A.I.R. 1926 Pat. 112 (116).**

——*Co-sharer—Mere fact that other people are co-sharers cannot prevent acquisition of title by adverse possession.*

The mere fact that other people are co-sharers would not prevent an acquisition of title by adverse possession. In any case if in the joint land actual ouster to the knowledge of the true owner is established, adverse possession can be proved. (*Sulaiman and Niamatullah, JJ.*) ABHEY RAM *v.* JHANDA **1929 A. L. J. 1100 = 121 I. C. 102 = A. I. R. 1929 All. 910.**

——*Co-sharers—Mutation in the name of one without denial of title of others does not establish.*

Mutation in the name of one co-sharer cannot be any indication of adverse possession until it is shown that it was obtained after a clear declaration to the effect that the title of other co-sharers was denied. (*Mirsa, J.*) BASHIR AHMAD *v.* PARSHOTAM. **6 O. W. N. 536 = 115 I. C. 440 = A. I. R. 1929 Oudh 337.**

——*Co-sharers—One co-sharer in actual possession of part and other co-sharer in constructive possession of same and actual possession of rest—No adverse possession exists.*

A title by adverse possession is not established in a case where one of two co-sharers equally entitled to the property is in actual possession of a part of it and the other co-sharer is in constructive possession of the same

and also in actual possession of the rest. (*Wazir Hasan, J. C.*) CHHOTEY LAL *v.* HANUMAL SINGH.
80 I. C. 619 = 11 O. L. J. 735 = A. I. R. 1925 Oudh 208.

———*Co-sharers—One co-sharer holding adversely to others—Entry of latter's name in Revenue Records does not affect.*

Where a co-sharer in possession of joint property has by an overt act shown to his co-sharers that he would hold adversely to them, his possession does not cease to be adverse merely because subsequently the names of his co sharers were entered in the Revenue Records as co-sharers. Title to the waste land will go with title to the cultivated area. 22 I.C. 805 Ref. 29 I.C. 348 Dist. (*Martineau, J.*) MUHAMMAD HASAN *v.* SOHARA.
71 I. C. 805 = A. I. R. 1924 Lah. 389.

———*Co-sharers -One co-sharer mortgaging joint property exempting some plots—Exemption does not prove his exclusive title to them or ouster of other co-sharers.*

Where a co-sharer while mortgaging joint property exempted certain plots therein, the fact of mere exemption of these plots would not indicate that he was in exclusive possession of these plots and therefore, had become exclusively entitled to them, and had power to mortgage them in entirety thus constituting an ouster of the other co-sharers with respect to these plots. (*Misra, J.*) BASHIR AHMAD *v.* PARSHOTAM.
6 O. W. N. 536 = 115 I. C. 440 = A. I. R. 1929 Oudh 337.

———*Co-sharers—Though one co-sharer ordinarily holds on behalf of all, overt act clearly showing intention to hold exclusively can make his possession adverse—Limitation cannot be stopped by affirmations of right or applications for partition but by effectual breaking of the exclusive possession.*

The possession of one co-sharer is ordinarily the possession of all the co-sharers, but the co-sharer in possession can convert his possession into adverse possession by an overt act showing unequivocally to the co-sharers, that in future, he intends to hold for himself alone. This adverse possession so begun cannot be stopped by the other co-sharers merely by affirmations that they are co-sharers or by mere applications for partition. It is the business of those co-sharers, within limitation, actually and effectually to assert their rights and to break up the usurper's exclusive possession. (*Campbell, J.*) HIRA SINGH *v.* PUNJAB SINGH. **78 I. C. 113 = A. I. R. 1925 Lah. 183.**

———*Co-sharers—One co-sharer taking lease from others—Remaining in possession even after expiry of term—Rent not paid—Possession is adverse.*

Where a co-sharer obtains a lease of the land from the other co-sharers and continues in possession of the land for a long time, even after the expiration of the period of the lease, and does not pay any rent or share of profits to the other co-sharers, the only inference possible under the circumstances is that he held the land adversely and not as co-sharer. (*Mukerji, J.*) DALIMAR SINGH *v.* JOTI PRASAD. **85 I. C. 550 = 6 L. R. A. (Civ.) 254 = A. I. R. 1925 All. 698.**

———*Co-sharers—One of two equal co-sharers of the khewat land, though in possession of the major portion, does not hold the excess land adversely.*

Where *A* and *B* were equal shares in the khewat land of 18 biswas, and the latter was in the cultivating possession of 13 biswas and the former in possession of 5 and *A* did not receive for many years his profits to which he was entitled according to his half-share:

Held that there can be no adverse possession by *B* of *A's* share in the khewat and *A* is entitled to profits for back years. A. I. R. 1919 P.C. 44, Ref (*Dalal, J.*) GANGA SAHAI *v.* NIHAL SINGH. **105 I. C. 628 = 8 L. R. A. (Rev.) 254 = A. I. R. 1927 All. 846.**

———*Co-sharer—Onus of proof is on party asserting.*

Where the evidence establishes that one of the parties was not only a joint owner, but that he undertook to look after the share of the other party at the express request, the burden lies upon the former to establish when he became faithless to the trust imposed upon him and asserted a hostile title in himself to the knowledge of the rightful owner. (*Mookerjee and Buckland, JJ.*) JAGANNATH MARWARI *v.* MT. CHANDNI BIBI.
26 C. W. N. 65 = 67 I. C. 31 = 34 C. L. J. 432 = A. I. R. 1921 Cal. 647 (661).

———*Co-sharer—Ouster.*

Even when there is no evidence of ouster at a particular time, it is not unreasonable for Courts to infer an ouster as existing for a long time from facts found by them. 29 Bom. 300 Foll. (*Kumaraswami and Reilly, JJ.*) BAPATLA VENKATA ROW *v.* BAPATLA VENKOBA ROW. **102 I. C. 300 = 38 M. L. T. 283 = A. I. R. 1927 Mad. 595.**

———*Co-sharer—Ouster—Mere possession by some will not constitute ouster of others.*

Three brothers Ghazi, Rawa and Maula Baksh obtained a decree in 1870, declaring their title to the house in dispute. Maula Baksh did not live in the house after the decree but allowed his two brothers to remain in possession. This they did until the year 1889 when they mortgaged the house to a third party and that third party remained in possession. This mortgage was redeemed and upon this being done, the plaintiffs who were the representatives of Maula Baksh, brought a suit for their one-third share of the house. There was nothing to show that the plaintiffs had knowledge of the mortgage.

Held, that the single fact that the brothers of Maula Baksh remained in possession and that a mortgagee from them was also in possession is not sufficient to constitute ouster. (*Mears, C. J. and Banerji, J.*) HAFIZ ABDULLAH *v.* ALLI. **21 A. L. J. 204 = 71 I. C. 640 = 4 L. R. A. (Civ.) 139 = A. I. R. 1923 All. 291 (1).**

———*Co-sharer—Possession is not adverse if it could be referred to a lawful title—Where no previous denial of title of other co-owners by a co-owner in possession of the whole property, possession must be presumed on his own behalf and on behalf of his co-owners.*

Possession is never considered adverse if it could be referred to a lawful title. Possession of one co-owner is in law the possession of all the co-owners and nothing short of ouster or something equivalent to ouster will put an end to that possession.

Where a co-owner in possession does not deny the title of the other co-owners till shortly before the institution of the suit claiming adverse possession of property and never lays claim to more than his share, it is presumed that the co-owner in possession is in possession on his own behalf and on behalf of his co-owners. *Corea* v. *Appuhamy*, (1912) A.C. 230; *Thomas* v. *Thomas*, (1855) 2 K. & J. 79; 37 All. 203; 35 Cal. 961; 21 C. L. J. 253; A. I. R. 1926 Oudh 141; and A. I. R. 1926 Oudh 258; Con. and Rel. on. (*Gokar Nath Misra and Nanavatty, JJ.*) MD. JAMIL ATA *v.* MD. HAFIZ ATA.
5 O. W. N. 847 = 112 I. C. 522 = A. I. R 1928 Oudh 449 (460).

———*Co-sharer—Possession between tenants-in-common—A person cannot be a tenant-in-common with one whom he never recognized as such.*

The principle of possession between co-owners is that every co-owner is a tenant-in-common and that possession

of a tenant-in-common is not adverse to his co-tenant. But a person cannot be a tenant-in-common with a person whom he never recognized as a co-tenant and probably had no knowledge of his existence. 16 C. W. N. 849, Rel. on. (*Suhrawardy and Graham, JJ.*) MAHENDRA NATH BISWAS *v.* CHARU CHANDRA BOSE.
107 I. C. 741 = A. I. R. 1928 Cal. 396.

———*Co-sharer—Possession of one is not adverse to others unless they are aware of the exclusion.*

The exclusion by a co-owner of other co-owners will not become adverse to the other co-owners until they become aware of it. But none the less there may be exclusion in fact. (*Ashworth, J. C. and Simpson, A.J.C.*) THAKUR RUDRA PRATAP NARAYAN SING *v.* THAKUR NIRMAN PRASAD SING. **74 I. C. 225 = 9 O. L. J. 552 = A. I. R. 1923 Oudh 61 (76).**

———*Co-sharers—Possession of one is not adverse unless there is ouster —Denial of title is ouster.*

If a property belongs to several co-sharers and one co-sharer is in possession of the entire property, his possession cannot be deemed to be adverse to other co-sharers. He must be deemed to be in possession on behalf of the other co-sharers and adverse possession cannot be founded on the basis of such exclusive possession, unless there has been an ouster of the other co-sharers. The ouster takes place when the title of the other co-sharers is denied. Cases referred. (*Misra, J.*) BASHIR AHMAD *v.* PARSHOTAM. **6 O. W. N. 536 = 115 I. C. 440 = A. I. R. 1929 Oudh 337.**

———*Co-sharer—Possession of other's share is adverse.*

Exclusive possession by one co-sharer of lands allotted in partition to another, is adverse. (*Abdul Raoof, J.*) MUHAMMAD DIN *v.* MUHAMMAD. **67 I. C. 425 = 3 Lah. L. J. 377 = A. I. R. 1921 Lah. 83.**

———*Co-sharer—Possession and enjoyment of entire profits by one co-sharer are not adverse possession against other co-sharers.*

The fact that the plaintiffs have not been in the enjoyment of the rents and profits of the property is not sufficient to establish a title by adverse possession in the defendants who have enjoyed such profits. The simple reason for this view of the law is that the fact is consistent with the legal title in the co-tenant in possession; but having the title to possession, his act of exclusive enjoyment of the profits cannot amount to a hostile assertion on his part as against the title of the co-tenant not in possession. The facts that mutation of names in the Revenue Registers on the death of a Muhammadan was made in favour of his sons only, though this was done with the knowledge and with the consent of their sister, that neither the sister nor her heirs ever lived with the defendants, the sons, and that neither she nor her heirs ever enjoyed the fruits of the common estate do not constitute adverse possession as understood in law, in a case between co-sharers. (*Wazir Hasan, A. J. C.*) ABDUL SHAKUR KHAN *v.* MUHAMMAD ALI KHAN.
78 I. C. 282 = A. I. R. 1925 Oudh 241.

———*Co-sharer—Principles as to, explained.*

In the case of adverse possession between co-owners, the test is not, has the plaintiff been out of possession for twelve years, but it is for the defence to make out adverse possession and as between co-heirs the onus is heavy upon the party who asserts that he has been in exclusive possession. It is settled law, that in order that possession may be adverse, there must be, on the part of the co-owner setting up adverse possession, a disclaimer of the other's right, by an open and unequivocal assertion of a hostile title. Acts which would amount to dispossession, if done by strangers, would not in the case of a co-sharer, be construed as such, for the reason that each of the co-owners being entitled to the endowment of the property, it will be presumed, until the contrary is shown, that the acts were not unlawful acts but were done in the exercise of a lawful right. In the case of co-heirs, the question of adverse possession may arise at least in three ways: first, possession of the entering heir may be from the outset adverse and on his own behalf; secondly, while the entering co-heir may originally take possession on behalf of all, he may subsequently change his intention and hold the property adversely and on his own behalf; and thirdly, there may be a prior joint occupation in fact, but one of the co-heirs may subsequently obtain sole possession under a hostile claim of title and rely upon that possession to support an exclusive right. (*Venkatasubba Rao, J.*) VENKATACHALAM CHETTIAR *v.* ANNAPURNI AMMAL. **109 I. C. 553 = 28 M. L. W. 599 = A. I. R. 1928 Mad. 652 = 55 M. L. J. 223 (2).**

———*Co-sharer—Shamilat land—Evidence of hostile enjoyment—Entry in Govt. records—Interruption of possession.*

To establish complete ownership by adverse possession over *shamilat* land, the co-sharer claiming exclusive ownership must show two things, namely, (*i*) that the land has been in his exclusive possession, and (*ii*) that he has openly asserted his exclusive ownership or has done some overt act to show the intention of holding the land as his own. The mere retention by the Revenue Authorities of the names of the other co-sharers after the usurping co-sharers' exclusive possession has begun does not prevent limitation running against them. Nor does even a decree in their favour, not accompanied by actual effective assertion of rights and taking possession of those rights, help them. 29 B. 300; (1911) 1 M. W. N. 207, Rel (*Abdul Raoof and Moti Sagar, JJ.*) HANS RAJ *v.* MAULU. **63 I. C. 881.**

———*Co-sharer—Sole occupation by one is not adverse to others.*

As between co-sharers, the mere fact that one of the co-sharers is in sole occupation of the property does not, by itself, show that such possession is adverse to the others. 16 C. W. N. 849; 24 C. W. N. 1057, Rel. (*Chatterjee and Cuming, JJ.*) SHEIKH SACHUNI *v.* SHEIKH BASIR. **64 I. C. 613.**

———*Co-sharer—Trees—Individual proprietor, cannot, by planting trees on common land without consent of all, appropriate it to his use and claim adverse possession.*

The planting of trees on the common land is a matter of common occurrence in India and is often done as an act of piety and public utility. It is well settled that an individual proprietor cannot by planting trees on common land without consent of all co-sharers appropriate it to his own use and therefore title by adverse possession cannot be acquired by such possession. (*Tek Chand, J.*) KUNJ LAL *v.* RAMJI LAL. **28 P. L. R. 217 = 102 I. C. 9 = A. I. R. 1927 Lah. 416.**

Co-tenants.

———*Co-tenant—To constitute adverse possession by one tenant-in common there must be ouster of the other —Ouster may be presumed from sole possession of one tenant for long time.*

To constitute an adverse possession as between tenants-in-common there must be an exclusion or an ouster. (29 Bom. 300, Rel. on.) Sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is evidence from which an actual ouster of the other tenants-in-common may be presumed. It does not follow, therefore, that as soon as a receipt of all the profits by one tenant-in-common commences, time is running adversely against the other tenant. It is only after a continuous enjoyment by one tenant-in-common that a presumption might arise that he has denied the right of the other tenant-in-common to enjoy together with him the property. (*Macleod, C. J. and Shah, J.*) SHIVLINGAPPA SATVIRAPPA *v.* SATYAVA LAXMAN. **23 Bom. L. R 967 = 64 I. C. 552 = A. I. R. 1921 Bom. 77** at (78).

——*Co-tenant—Ouster by one need not be violent.*

The ouster of the co-tenants in order to render the possession adverse need not be violent or intimidating expulsion or repulsion nor need notice of adverse holding be actually brought home to the other co-tenants by personal or formal communication ; but it is sufficient. if contrary is not proved, that the circumstances show that such knowledge may reasonably be presumed. (*Suhrawardy and Mukerji, JJ.*) SABITRI DASI *v.* NADIAR CHAND. **94 I. C. 38 = A.I.R. 1926 Cal. 881.**

Criminal Trial.

——*Criminal Trial—Possession—Formal possession in execution of decree is sufficient possession.*

A person in formal possession of a property in execution of a decree shall be deemed to be in possession of property. (*Neave, A. J.C.*) BALKU *v.* KING-EMPEROR. **81 I. C. 533 = 25 Cr. L. J. 917 = A. I. R. 1925 Oudh 183.**

Donor and Donee.

——*Donor and donee.*

A donee under an invalid deed of gift acquires title by adverse possession if he remains in possession for over 12 years. 43 Mad. 244, Rel. on. (*Misra, J.*) SECRETARY OF STATE *v.* HARCHARAN DAS. **1 Luck. 33 = 13 O. L. J. 115 = 3 O. W N. 45 = 91 I C. 927 = A. I. R. 1926 Oudh 98.**

——*Donor and Donee—Donor of dedicated property can himself acquire title to it by adverse possession—Religious endowment.*

Adverse possession can be acquired against idols in respect of property dedicated in their favour. The same principle applies whether the adverse possession is exercised by a total stranger or by the donor himself. 32 Cal. 129 (P. C.); A.I.R. 1926 P.C. 2 Appl. ; 37 Cal. 885 Ref.

A donor executed a deed dedicating his property to an idol making his mother a shebait.

No mutation was effected and the municipal taxes were continued to be paid by the donor. Two years later the donor with his mother revoked the dedication and thereafter the donor treated the property as owner for over 12 years.

Held, that he acquired title by adverse possession. (*Sulaiman and Kendall, JJ.*) DASAMI SAHU *v.* PARAM SHAMESHEDAR. **51 All. 621 = 1929 A. L. J. 473 = 116 I. C. 433 = A. I. R. 1929 All. 315.**

——*Donor and Donee—Void gift.*

Possession under an invalid gift is adverse. (*Stuart, C. J. and Hasan, J.*) JAGDEV SINGH *v.* DEPUTY COMMISSIONER, PARTABGARH. **2 Luck. 507 = 13 O. L. J. 762 = 29 O. C. 176 = 3 O.W.N. Sup. 56 = 96 I. C. 47 = A. I. R. 1926 Oudh 431.**

Easement.

——Easement—Right of fishery. *See* ADVERSE POSSESSION—FISHERY.

——*Easement—Public exercise of easement does not destroy title.*

The proprietor of a piece of land over which the members of the public exercise a right of easement does not lose his right to the land as proprietor of the land on account of the occasional user for the purpose of exercising the right of easement. (*Cuming and Chakravarti, JJ.*) MOHENDRANATH *v.* NABODWIB CHANDRA. **43 C. L. J. 180 = 94 I. C. 5 = A. I. R. 1927 Cal. 97.**

——*Easements—Right to open shutters and maintain weather-frames is acquirable by adverse possession.*

Where the plaintiff had opened his shutters and maintained his weather-frames projecting for more than twelve years on the defendant's soil.

Held that he acquired a right thereto by adverse possession, and was entitled to an injunction against the defendants restraining them from building, so as to interfere with the right of the plaintiff to open the shutters on the defendant's land or to interfere with the said weather-frames. 3 Bom. 174 ; 28 Bom. 428, Foll. (*Taraporewala, J.*) BAHADURMAL GURMUKHRAI NEMANI *v.* MOHANLAL SURCHAND. **27 Bom. L. R. 536 = 87 I. C. 1008 = A. I. R. 1925 Bom. 335.**

Effect of.

——*Effect of*

Where the right to bring a suit for land has become barred the mere fact of a trespasser taking possession does not revive the right. (*Heald and Chari, JJ.*) MG. SAN THIM *v.* MG. MAUNG. **5 Bur. L. J. 4 = 95 I. C. 514 = A. I. R. 1926 Rang. 95.**

——*Effect of—Party who is out of possession for 12 years cannot be remitted to his old title by entering into possession.*

If a party, who has been 12 years out of possession and whose suit is, therefore, barred, should again get into possession, he is not remitted to his old title. 11 B. L. R. 237 and 1 *Boulnois* 70, Rel. on. A. I. R. 1926 Nag. 99, Dist. (*Findlay, J.C.*) KAPOOR *v.* NANHI. **109 I. C. 401 = A. I. R. 1928 Nag. 280.**

——*Effect of—Right to possession barred—Subsequent re-entry.*

If a party who has been 12 years out of possession and whose suit is, therefore, barred, should again get into possession, he is not remitted to his old title as there is no remitter to a right for which the party had no remedy by action at all. (*Wazir Hasan, J. C. and Neave, A. J. C.*) MT. MAHMUDUNNISSA *v.* SYED ZAHID RAZA. **84 I. C. 98 = 11 O. L. J. 466 = 1 O. W. N. 139 = A. I. R. 1925 Oudh 20.**

Elements of.

——*Elements of—Origin and quality of possession, can be considered.*

In considering cases of adverse possession Court is clearly entitled to consider the origin and quality of the possession. (*Odgers, J.*) GOVINDSWAMI CHETTIAR *v.* KOTHANDAPANI CHETTIAR. **24 M. L. W. 766 = 99 I. C. 158 = A. I. R. 1927 Mad. 111 = 52 M. L. J. 203.**

——*Elements of—Throwing of rubbish is not sufficient user.*

Obiter.—Much more substantial user than the mere throwing of rubbish on to a piece of land must be proved in order to establish any sort of title by adverse possession. 16 Bom. 338, Foll. (*Bucknill and Ross, JJ.*) HEMAT RAM *v.* R. KARU SAHU. **96 I. C. 452 = 1926 P. H. C. C. 246.**

Essentials of.

——*Essentials of.*

To prove title by adverse possession it must be shown that such possession is adequate, in continuity, in publicity and in extent and it must be actual, visible, exclusive, hostile and continued during the statutory period. Knowledge on the part of the person whose rights are invaded is an essential element of adverse possession. 27 Cal. 943 (P.C.) ; 35 Cal. 961 ; AI.R. 1922 P.C. 181; 27 Bom. 43, Rel. on; 7 O. L. J. 282, Dist. (*Raza, J.*) MUBINULNISSA *v.* ALI HUSAIN. **6 O. W. N. 652= 119 I. C. 866=A. I. R. 1929 Oudh 402.**

——*Essentials of—It must be adequate in continuity, publicity and extent so as to show that it is possession adverse to the competitor.*

The fact that a stranger takes possession of a property under a mistake common to all does not make his possession any the less adverse. But adverse possession must be adequate in continuity, publicity and extent so as to show that it is possession adverse to the competitor. 5 Bom. L. R. 674 ; A. I. R. 1922 P. C. 181 ; 27 Cal. 943 (P.C.) ; and 26 Bom. 410 ; Rel. on. (*Patkar and Baker, JJ.*) KESHAV RAGHUNATH *v.* GOVIND CHIMNAJI. **30 Bom. L. R. 509=110 I. C. 303= A. I. R. 1928 Bom. 287.**

——*Essentials of—It must be open, adequate in extent and continuous.*

A trespasser cannot perfect his title by mere occasional user of the land. The rightful owner's title cannot be extinguished where the trespasser's possession, is otherwise than open, adequate, in extent and continuity, etc. (*Chakravarti, J.*) HARISADHAN PATARI *v.* DINANATH BANERJEE. **82 I. C. 318=A. I. R. 1925 Cal. 316.**

——*Essentials of—Adverse possession to be effective must be continuous, and actual, not merely constructive or ideal.*

In order to bring a case within the statute of limitation there must be both absence of possession by the person who has the right and actual possession by another whether adverse or not, If a person enters upon the land of another and holds possession for a time, and then without having acquired title under the statute abandons possession, the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place. There can be no continuance of adverse possession when the land is not capable of use and enjoyment, so long as such adverse possession must rest on the fact of use and occupation and the real owner does not discontinue his possession so long as the land is diluviated. Adverse possession to be effective must be possession adequate in continuity, in publicity and in extent of area, and must be actual, visible, exclusive and hostile; further the doctrine of constructive possession cannot be applied in favour of a wrong-doer whose possession is confined to the area of which he is in actual occupation.

A series of isolated acts of trespass with no continuity of possession would fall short of the requisite and if, in fact, there has been interruption, possession during such interruption must be deemed to be with the person having the lawful right. It must also be actual as opposed to ideal possession.

Once in fact there has been cessation of possession the question of intention is wholly immaterial but in determining whether there has been discontinuance of possession intention cannot altogether be left out of account. For after all, the adverse character of possession must be based to a certain extent on the intention to exclude the real owner. (*Rankin and Mukerji, JJ.*) ABHOY SANKAR MAZUMDAR *v.* SATYENDRA PRASANNA BOSE MAZUMDAR. **85 I. C. 594= A I. R. 1925 Cal. 981.**

——*Essentials of—Adverse possession must be adequate, continuous and exclusive—Acts of possession by owner*

though not continuous will destroy adverse possession—Limitation Act (IX of 1908), *Art.* 144.

Adverse possession, contemplated by article 144 must be adequated in continuity, in publicity, and in extent to show that it is possession adverse to the competitor. Standing a title in A, the alleged adverse possession of B must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession. The *onus* of establishing these things is upon the adverse possesssor. Accordingly when the holder of title proves that he too has been exercising, during the currency of his title, various acts of possession, then the quality of these acts, even though they might have failed to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds. (*Lord Shaw.*) KUTHALI MOOTHAVAR *v.* PERINGATI KUNHARAN KUTTY. **48 I. A. 395=44 Mad. 883=66 I. C. 451= 26 C. W. N. 666=24 Bom. L. R. 669= 30 M. L. T. (P.C.) 42=14 M. L. W. 721= 1922 M. W. N. 847=A. I. R. 1922 P. C. 181= 41 M.L.J. 650.**

——*Essentials of—Possession ought to be unequivocally adverse.*

In considering whether possession was adverse or not, Courts should remember that there ought to be nothing equivocal in the possession relied upon as being adverse. 2 Bom. 388 and *Thomas* v. *Thamas*, 169 E. R. 701, Ref. (*Anantakrishna Ayyar, J.*) KALATTY MUDALI *v.* MANGAPATHI MUDALI. **31 M. L. W. 526= 1930 M.W.N. 111=125 I.C. 227= A. I. R. 1930 Mad. 563.**

——*Essentials of—Some Acts of possession are not enough to constitute adverse possession.*

To prove title to land by adverse possession for the statutory period, it is not sufficient to show that some acts of possession have been done ; the possession required must be adequate, in continuity, in publicity and in extent, to show that it is possession adverse to the competitor, in other words, the possession must be actual, visible, exclusive, hostile and continued during the time, necessary to create a bar under the statute of limitation. 35 Cal. 961, Foll. (*Raza, J.*) IMDAD HUSAIN KHAN *v.* MT. HAIDARI KHANAM. **102 I. C. 207= A. I. R. 1927 Oudh 551.**

Evidence.

——*Evidence—Kabuliats and applications to Municipality.*

Kabuliats and application to the Municipality may not be sufficient to prove possession but *prima facie* counterparts of leases executed by tenants and applications for permission to build, put in the Municipal Board are the best possible evidence of possession. They would at least tend to show which were the persons who were in actual possession and on whose behalf they held that possession. The application would show also that a certain party alleged himself to be in possession of the property in dispute. (*Gokul Prasad, J.*) RAGHA MAL *v.* ABDUS SATTAR. **74 I.C. 879=A.I.R. 1923 All. 565.**

——*Evidence—Mortgage by one co-owner.*

A mortgage by itself does not amount to an ouster. It, by itself, does not show that the act is an adverse one. It must be shown that the mortgage was made with the knowledge of other members interested. A.I.R. 1929 M. 27 ; A. I. R. 1923 A. 291 (1) and A. I. R. 1923 A. 447, Rel. on. (*Addison, J.*) GHULAM MUHAMMAD *v.* MT. BEGAM. **122 I. C. 105= A. I. R. 1930 L. 251=31 P. L. R. 113.**

——*Evidence—Portion of property left undivided and allowed to remain with a member—Secret mortgage by him.*

In a partition of family property when some property is left undivided and is allowed to remain in possession of a certain person, the person holding such property is merely a co-owner. In order to claim adverse possession the burden is on him to prove that he repudiated the title of other members (having interest in the property) to their knowledge and that he has done some acts adversely to the knowledge of such members. Mere failure on the part of such members to prove permissive possession does not go to establish his title by adverse possession. A.I.R. 1924 M. 113 Rel. on. A mere mortgage of that property by him alone does not by itself show that the act is an adverse one. It must be proved that the mortgage was made with the knowledge of other members interested. A. I. R. 1923 A. 291, Appr. (*Madhavan Nair, J.*) VAIYAPURI CHETTIAR *v.* SUBRAMANIAN CHETTIAR,
114 I. C. 337 = A. I. R. 1929 M. 27.

——*Evidence—Co-owners—Sole possession and enjoyment by one without denial of right.*

The sole possession by one of two joint owners itself is no evidence of the denial of the right of the other joint owner, and time does not run against the joint owner, out of possession until the joint owner in possession has done some act to the knowledge of the other which amounts to a denial of the latter's right. No doubt it is perfectly correct to say that sole possession by one tenant in common continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is evidence from which an actual ouster of the other tenant-in-common may be presumed. (*Macleod, C. J. and Shah, J.*) CHAND BHAI MAHAMADBHAI VOHRA *v.* HASANBHAI RAHIMTOOLA. **46 B. 213 = 23 Bom. L. R. 1033 = 64 I. C. 205 = A. I. R. 1922 B. 150.**

——*Evidence—Natham Poramboke—Open use of.*

Erection of hut, tethering cattle and enclosure of the site and other acts of open use for over 60 years constitute adverse possession as against the Government. (*Sundaram Chetty, J.*) SECRETARY OF STATE *v.* MUTHUKUMARA PILLAI. **A. I. R. 1927 M. 456 = 25 M. L.W. 349 = 101 I.C 96 = 38 M.L.T. 348.**

——*Evidence.*

Collecting cattle on the land or fixing mangers or pegs or erecting a platform on it by the defendant are not sufficient to make the owner out of possession. (*Dalip Singh, J.*) MUHAMMAD AMIN KHAN *v.* BALANDA. **109 I. C. 657 = A. I. R. 1929 L. 71.**

——*Evidence—Co-sharers—Erection of building by one or non-participation of profits by others—If conclusive.*

The erection of a substantial building on joint property by one co-owner or non-participation in profits cannot be regarded as conclusive evidence of ouster. Principles and case-law fully discussed. (*Mookerjee and Buckland, JJ.*) JAGANNATH *v.* CHANDNI BIBI.
67 I.C. 31 = 34 C.L.J. 432 = 26 C.W.N. 65 = A. I. R. 1921 Cal. 647.

——*Evidence—Co-sharers—Ouster—What amounts to*
See also ADVERSE POSSESSION, CO-SHARER.

——*Evidence—Mere non-payment of rent does not* per se *establish adverse possession—Claimants being in permissive possession of portion of land absorption by them of rest of land cannot be regarded as act tending to make possession adverse—Entry in revenue record does not necessarily show that adverse possession commenced on that day.*

The mere fact that persons claiming land described kharkana and lying waste on ground of adverse possession, have been in possession of the land as tenants at will paying no rent does not by itself establish that they were in adverse possession. Mere non-paymeut of rent does not *per se* establish adverse possession and when the claimants are in permissive possession of a portion of the land their absorption of the rest of the land, cannot be regarded as an act which the mere efflux of time can make their possession adverse. The claimants must show when the adverse possession began. Mere entry of their names into revenue records in particular years does not necessarily show that their possession commenced to be adverse from that period A.I.R. 1927 Lah.759 and 35 Mad. 618, Rel on. (*Tapps, J.*) ALLAH DITTA *v.* BUDHU. **A.I R. 1930 Lah. 437.**

——*Evidence—Record-of-Rights—Order in mutation proceedings* per se *does not create title—But if accompanied by acts of possession, adverse inference of hostile title may arise.*

Although an order made in mutation proceedings may not *per se* create any title, but if accompanied or followed by overt acts of possession such an order might give rise to an adverse inference of an assertion of a hostile title. A.I.R. 1926 P.C. 100 Rel. on. (*Kinkhede, A. J. C.*) BALKISAN SINGH *v.* GOVIND SINGH.
109 I.C. 522 = A.I.R. 1928 Nag. 252.

——*Evidence—Grazing cattle and storing straw do not constitute.*

Where defendant and his tenants used to tether their cattle and to store fodder and straw, and they used to graze their cattle on the land, *held*, the user of the sort established in this case is common in this country and excites no particular attention. It is neither intended to denote, nor understood as denoting—on the one side or the other—a claim to the ownership of the land, and, where this, and no more, is the case, it would be wrong to hold that a claim by adverse possession has been made out. 16 Bom. 338, Foll. (*Abdul Raoof, J.*) MAUSA SUKHAE LAL *v.* KHUSHALI RAM.
4 Lah. .L. J. 467 = 58 P.L.R. 1922 = 69 I.C. 4 = A.I.R. 1923 Lah. 25.

——*Evidence.*

Mere holding of a mela and realisation of profits therefrom, even assuming that the mela was held at the instance of fakirs who looked after a foundation does not prove their title to the land on which mela was held. (*B. B. Ghose and Bose, JJ.*) ABDUL BARI *v.* HRISHI KESH MITTRA. **49 C.L J. 546 = A.I.R. 1929 Cal. 459.**

——*Evidence—Equity of Redemption—Clear evidence is necessary.*

It is true that adverse possession of an intangible right such as the equity of redemption is possible and that in law a title to such a right can be acquired by adverse possession. But it would require strong and clear evidence to make out the plea. Where a minor transferred the equity of redemption in 1899 and the transferee redeemed the mortgage in 1908 and got possession, from the mortgagee who was in possession prior to 1908, *held* that the transfer by the minor being void, the equity of redemption such as was possible under the circumstances, between 1898 and 1908, must be deemed to be with the rightful owner and that the adverse possession of the transferee, if any began to run only after 1908. (*Shah, Ag. C. J. and Crump, J.*) RAM LINGAPPA RUDRAPPA *v.* DHONDI SUBRAO KUTRE.
24 Bom. L.R. 1304 = 76 I.C. 145 = A.I.R. 1922 Bom. 451.

——*Evidence—Inconclusive evidence as to possession undermines plea.*

Where the evidence as to possession itself is of an inconclusive character no finding of adverse possession for the statutory period can possibly be founded on it. (*Spencer, Og. C.J. and Srinivasa Aiyangar, J.*) RANGAPPA NAYAKAR *v.* RANGASAMI NAYAKAR.
88 I.C. 249 = 1925 M.W.N. 232 =
A.I.R. 1925 Mad. 1005. (1010)

——*Evidence—Mere fact of bidding at auction of the property is not enough to refuse claim of adverse possession—Limitation Act, S. 19.*

Where the tenants of a landlord who were in possession of certain tanks belonging to the landlord bid at an auction in connexion with the landlord's advertisement for tenants for the tank lands.

Held, that they might have done so from various motives and their action could not be either disturbance of the adverse possession otherwise constituted, or acknowledgment within the meaning of S. 19 of Limitation Act. (*Rankin and Ghose, JJ.*) GOLAM NAZAR *v.* ABBAS MOLLA. **40 C.L.J. 160 = 84 I.C. 657 =**
A.I.R. 1925 Cal. 193.

——*Evidence—Mutation proceedings are not judicial proceedings and do not decide title and are no evidence of exclusion from property.*

It is an error to suppose that the proceedings for the mutation of names are judicial proceedings in which the title to and the proprietary rights in immoveable property are determined. They are nothing of the kind as has been pointed out times innumerable by the Judicial Committee. They are much more in the nature of fiscal inquiries instituted in the interest of the state for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immoveable property may be put into occupation of it with greater confidence that the revenue for it will be paid. Orders in mutation proceedings are not evidence that the successful applicant was in possession as sole legal owner in a proprietary sense, to the exclusion, for example, of all claims of the other members of the family as co-owners or for maintenance or otherwise, as revenue authorities have no jurisdiction to pronounce upon the validity of such a claim. (*Lord Atkinson.*) HIRNAM SINGH AND OTHERS *v.* RUDRA PARTAB NARAIN SINGH.
53 I. A. 220 = 48 All. 529 = 1 Luck. 389 =
29 O. C. 316 = 25 A. L. J. 25 = 28 Bom. L. R. 1409 =
44 C.L.J. 330 = 25 M.L.W. 1 = 98 I. C. 1013 =
3 O. W. N. 623 = 1926 M. W. N. 716 =
13 M. L. T. 81 = A.I.R. 1926 P. C 100 =
51 M. L. J, 836.

——*Evidence—Possessor's title admitted under mistaken impression—Possession is not adverse.*

Possession by defendants whose title is admitted by plaintiff under a mistaken impression cannot be adverse to plaintiff. (*Broadway and Wilberforce, JJ*) INDAR SINGH *v.* BAKHSHISHA. **3 Lah. L.J. 424 =**
A.I.R. 1921 Lah. 175.

Extent of Right.

——*Extent of right.*

Possession in assertion of ownership to a half undivided share can only perfect the title to that half and not to the whole property. (*Halifax, A. J. C.*) CHUNNU *v.* SUBHETI. **22 N.L.R. 181 = 98 I.C. 540 =**
A.I.R. 1927 N. 67.

——*Extent of right—Trespasser—Title only to lands effectively occupied by him.*

It is settled law that a wrong-doer usually gains possession only of that portion of the land which is in his actual control, and the possession of the part of the property does not raise a presumption of the whole. It is the very essence of adverse possession that it must be marked by clear and unequivocal acts of ownership and must be sufficiently definite as regards duration, continuity and extent. The presumption of adverse possession extends only to the areas which are in the actual possession of the trespasser: 9 M. 285; 26 B. 410; 3 L. W. 246, Dist. (*Tekchand, J.*) AMRIT SARYA RAM *v.* DIWAN CHAND. **114 I.C. 70 =**
A.I.R. 1929 Lah. 625.

——*Extent of right—Non-owner's possession.*

Possession by a person who has no title is confined to the land actually occupied by him; 12 O. C. 58 and 8 O.L. J. 495, Foll. (*Srivastava, J.*) SOHAN LAL *v.* SHAIKH MOHAMMAD HUSAIN. **7 O.W.N. 547 =**
14 R.D. 276 = A.I.R. 1930 Oudh 374.

——*Extent of right—Trespasser can acquire right only in land encroached upon.*

A trespasser cannot acquire by prescription title to anything more than the precise area encroached upon. (*Dawson-Miller, C. J. and Mullick, J.*) KESHABJI PITAMBAR *v.* SHASHI BHUSAN BANERJI.
1926 P.H.C.C. 210 = 96 I.C. 1027 =
A.I.R. 1926 Pat. 385. 391

——*Extent of right—Void usufructuary mortgage—Possession transferred—Transferee prescribes for title as usufructuary mortgagee.*

Where possession is obtained under a void usufructuary mortgage, the person obtaining possession and retaining it for 12 years acquires title only as usufructuary mortgagee and is bound by the covenants of the mortgage. (*Ayling and Odgers, JJ.*) SONTYANA GOPALA DASEE *v.* INAPUTALUPULA RAMI.
44 Mad. 946 = 64 I.C. 328 = 13 M.L.W. 685 =
1921 M.W.N. 385 = A.I.R. 1921 Mad. 410 (2) =
41 M.L.J. 194.

Fishery.

——*Fishery—Exclusive right of—An interest in immoveable property—Mere right to fish along with others if an easement—Limitation Act—Ss.26 and 28—Art.144.*

If the right claimed is a mere right to fish not excluding the lawful owner, it would appear to be an easement within the description of the word in the Limitation Act and can be acquired by 20 years, uninterrupted enjoyment. If it is an exclusive right of fishery it is an interest in immovable property and can be acquired by 12 years' adverse possession involving an ouster of the right owner. Such a right contains all the essential elements of property and even if it may properly be described as a profit a *prendre*, it has also the distinctive features of an interest in immovable property. Even if S. 26 of the Act should be applicable, this would not bar the operation of Art. 144 and S. 28 if the right came under both descriptions. 2 P.L.J 283. foll.; 5 Cal. 945; 12 Bom. 221; 18 Cal. 80, Ref. (P. 62, C. 1.) (*Dawson Miller, C.J. and Mullick, J.*) HENRY HILL & CO. *v.* SHEORAJ RAI.
1 P. 674 = 67 I.C. 954 = 3 P. L.T. 477 =
1 P.L.R. 34 = A.I.R. 1923 Pat. 58. (62)

——*Fishery—Public navigable river — Right of fishery can be acquired by adverse possession.*

Adverse possession of fishery rights can be established in a public navigable river if exclusive acts of possession are shown for the statutory period. (*Greaves and Mukerji, JJ.*) DEBENDRA LAL *v.* SECRETARY OF STATE. **31 C.W N. 473 = 103 I.C. 13 =**
46 C.L.J. 322 = A.I.R. 1927 Cal. 403.

——*Fishery—Right of, in open sea used exclusively and continuously for 28 years—Still no right to exclude can be obtained by prescription.*

ADVERSE POSSESSION—Fishery.

The right of the public to fish in the sea is common and is not the subject of property and members of the public exercising the common right to fish in the sea are bound to exercise that right in a fair and reasonable manner and not so as to impede others from doing the same : 2 Bom. 19, foll.

A person, therefore, although exclusively and continually using a portion of the sea over 28 years, cannot claim it as the basis of the legal right to exclude any others and to confine the use of that portion of the sea for fishing for himself : 2 Bom. 19 and 39 Cal. 53, Rel. on. (*Madgavkar, J.*) RAOJI VASUDEO *v.* TUKARAM VISHNU. **31 Bom. L.R. 329 = 117 I.C. 335 = A.I.R. 1929 Bom. 226.**

———*Fishery—Exclusive right of—Enjoyment of—Mistaken notion of right.*

Enjoyment of an exclusive right of fishery, even though it proceeded for some time under the mistaken notion of right would still be adverse to the real owner of the property. (*Sundaram Chetty, J.*) SECRETARY OF STATE *v.* DISTRICT BOARD OF TANJORE. **1930 M.W.N. 328 = 31 M.L.W. 508 = A.I.R. 1930 Mad. 679.**

Forest Land.

———*Forest land—Talukdar is not required to prove actual user of jungle and waste land.*

A taluqdar cannot be required to prove actual user of jungle and waste land and his possession is assumed until there is definite proof of ouster : 8 O.C. 177, foll. (*Raza and Pullan, JJ.*) JAGATJIT SINGH *v.* MD. ASGHAR ALI. **114 I.C. 815 = A.I.R. 1929 Oudh 328**

Hereditary Office.

———*Hereditary office—Service inam—Land disannexed from office.*

Where service *inam* lands attached to the office of *karnam* become disannexed from the office, and are enjoyed by a person having no claim to the office, as ordinary private property, such possession is adverse to the holder of the office. (*Abdur Rahim and Ayling, JJ.*) IDARAPALLI DHANUSHKOTIRAYUDU *v.* VAKAYALA VENKATARATNAM. **59 I.C. 65 = 11 M.L.W. 453 = 38 M.L.J. 320.**

———*Hereditary office—Title acquired by statute.*

Where a title to an office has been acquired by prescription, the title of the true owner is not revived by re-entry. (*Mookerji, A. C. J. and Fletcher, J.*) KASIM HASSAN *v.* HAZRA BEGUM. **60 I.C. 165 = 32 C.L.J. 151.**

———*Hereditary office*—Vatan—*Patilki and Kulkarniki* Vatan—*Possession of* Jahagirdar, *is not adverse to* Vatandars *until the latter is made aware of setting up of title by the former—Office of Patilki and Kulkarniki cannot be acquired by adverse possession.*

Assuming that the Nadgirs were entitled either by agreement or by custom to get back their *Vatan* lands on payment of *Judi*, time would not begin to run against them until they were made aware that the *Jahagirdars* were setting up a title to hold the *Vatan* lands in their own right. Nor is it easy to see how the *Jahagirdars* could acquire the offices of Patil and Kulkarni by adverse possession.

The *Vatan* lands had not become the absolute property of the *Jahagirdars* considering the way of, in which they were treated both by Government and its assignees the Jahagirdars. (*Macleod, C. J. and Shah, J.*) SHRINIVAS LINGO NADGIR *v.* SECRETARY OF STATE FOR INDIA. **24 Bom. L. R. 214 = A. I. R. 1922 Bom. 18. (24, 25)**

ADVERSE POSSESSION—Interruption of.

Hindu family.

———*Hindu family—Hindu Dayabhaga joint family—Widows of brothers living jointly—One widow becoming Vaishnavi and living by begging and not participating in profits of the property—Possession of other widow is adverse—Hindu Law.*

Two widows were in joint occupation of certain properties as the heirs of their husbands who were brothers and members of a Dayabhaga Hindu joint family. Subsequently one of the widows became a Vaishnavi and left her husband's home and lived by begging or in her daughter's house. For 15 years she never paid any visit to her former home and did not participate in the profits of the property.

Held, that under these circumstances, the other widow who remained in possession of the property should be held to have been in adverse possession. (*Teunon and Newbould, JJ.*) CHAITANYA KRISHNA *v.* SOUDHYAMONI DASI. **27 C. W. N. 624 = 64 I.C. 773 = A. I. R. 1921 Cal. 555.**

———*Hindu family—Members of—Possession of one not adverse to others.*

If members of a joint family are separate only in mess and not in estate there can be no adverse possession. (*Greaves and Panton, JJ.*) HEMANGINI DASI *v.* SITAL MONDAL. **67 I. C. 300 = A. I. R. 1923 Cal. 310.**

———*Hindu family—Non-heir's possession is adverse to heir in absence of possession being permissive.*

Possession of the paternal aunt would be adverse to the nephew who is the rightful heir unless she continued in possession under agreement or arrangement with a nephew whereby admitting the nature and possession of the nephew. (*Wazir Hasan, A.J.C.*) JAISI RAM *v.* RAJ BAHADUR KUMARI. **11 O. L. J. 87 = 83 I.C. 563 = A. I. R 1924 Oudh 326.**

———*Hindu family—Person after adoption treated as and exercising rights as member of joint family of his birth can acquire title by adverse possession.*

A person given in adoption but even after adoption treated as a member of the joint family of his birth openly exercising the rights appurtenant to such a position for over twelve years acquires a title to joint possession by adverse possession. 24 Mad. 387, Foll. (*Murphy and Broomfield, JJ.*) BABAJI DASO DESHPANDE *v.* JIRAJI YESHVANT DESHPANDE, **32 Bom. L.R. 314 = A. I. R. 1930 Bom. 333.**

Interruption of.

———*Interruption of—Decree unaccompanied by actual assertion of right—Effect of.*

A decree, not accompanied by actual effective assertion of rights and taking possession of these rights, does not help to stop adverse possession running: 45 P. R. 1914; 63 I. C. 881; (1911) M. W. N. 207, Foll. 44 Bom. 934, Not foll. (*Addison, J.*) JAIMINI DAS *v.* PHULLA KHAN. **A. I. R. 1930 Lah. 472.**

———*Interruption of—Decree for possession does not necessarily interrupt possession or alter its character.*

C, who had two sons *M* and *F* had let certain lands to *R* in 1899 for a period of 11 months. *R* did not pay any rent. In 1912 *F* obtained a decree for possession against *R* which was not executed. In 1925 *M* sued to recover possession from *R*.

Held, that the possession of *R* was adverse from 1900 to 1925 and there was nothing to show that the adverse character was altered by the decree obtained by *F*. 44 Bom. 934, Expl. and Dist. (*Madgavkar, J.*) ULCHAND CHOUTHMAL *v.* HIRABAI FAKIRCHAND. **A. I. R. 1930 Bom. 400.**

——*Interruption of—Decree for the possession of a portion of property in defendant's favour—Effect of.*

Where the defendant was in adverse possession of the property in dispute, the mere fact that a decree for possession of share of that property is in the meantime passed in his favour, does not affect the character of his possession and convert it into possession of a tenant-in-common: A. I. R. 1923 Mad. 88; A. I. R. 1923 P. C. 175; 45 P. R. 1914, Ref. A. I. R. 1919 P. C. 44, Rel on. (*Broadway and Marrison, JJ.*) BAHAWAL *v.* GHULAM. MD. **117 I.C. 808 = A.I.R. 1929 Lah. 524.**

——*Interruption of—Assertion of adverse title and ouster by defendants—Declaratory decree in favour of plaintiffs—Effect.*

Where there has been an assertion of adverse title accompanied by the ouster of plaintiffs, the mere fact that the plaintiffs subsequently obtained a declaratory decree would not prevent the statute of limitation from running against them: 45 P. R. 1914 and 63 I. C. 881, Ref. (*Shadi Lal, C. J. and Agha Haidar, J*). MUHAMMAD IBRAHIM *v.* SHAIDA MUHAMMAD.

11 Lah. L. J. 553 = 120 I. C. 486 = A. I. R. 1930 Lah. 297.

——*Interruption of—C. P. Code, O. 21, R. 35 (2)—Symbolical joint possession stops adverse possession from running against the decree-holder.*

The giving of joint possession is merely a symbolical transaction under O. 21, R. 35 (2), but it stops adverse possession from running against the decree-holder. (*Addison, J.*) KUNDAN LAL *v.* GOURI MAL.

108 I. C. 396 = A I. R. 1928 Lah. 719.

——*Interruption of—Attachment of the property under C. P. Code—C. P. Code, O. 21, R. 54—Effect of.*

An attachment under the C. P. Code, does not confer any interest in the property and cannot disturb the continuance of physical possession of the holder at the time. Hence, a mere attachment cannot affect the continuity of adverse possession. 11 M. L. J. 344, Foll. (Case-law discussed). (*Philipps and Odgers JJ.*) RANGANATHA AIYAR *v.* SHRINIVASA AIYANGAR.

22 M. L. W. 274 = 90 I. C. 1037 = A. I. R. 1926 Mad. 42 = 49 M. L. J. 656.

——*Interruption of—Mere paper dispossession does not amount to dispossession within the meaning of Art. 144 or 142.*

Mere paper dispossession does not amount to dispossession and whether Art. 142 or 144 of the Limitation Act be applicable, the *terminus a quo* is the actual physical dispossession. (*Shadi Lal, C. J. and Le Rossignol, J.*) MUNNA LAL *v.* HAMID ALI. **79 I. C. 39 = A. I. R. 1925 Lah. 53.**

——*Interruption of—Is not interrupted by theft of crops on land.*

Where in the 11th year of adverse possession the possessor prosecuted the opposite party for cutting or taking away the crops grown on the land and they were convicted but acquitted on appeal, *held*, that it is doubtful whether the act of the accused was of such a character as to cause total dispossession of the prosecutor or it was only a case of theft of crops. (*Walmesley and Suhrawardy, JJ.*) SUKUR MAHAMED *v.* ASMOT MANDAL. **50 Cal. 978 = 79 I. C. 491 = A. I. R. 1924 Cal. 384.**

——*Interruption of—Exclusive possession by one co-owner—Subsequent consent-decree—Effect.*

Where a co-owner was excluded in 1897 by another from possession, but in a subsequent suit in 1904 there was a consent decree in respect of the lands, *held* that a suit for possession brought within 12 years from the date of the consent decree is not barred though it was more than 12 years from the date of the original dispossession. The consent decree will put an end to the adverse possession and would make the parties to the consent decree co-owners in joint possession. They could not thereafter secretly or surreptitiously convert their occupation into hostile possession. (*Mookerjee and Chotzner, JJ.*) SYAMA CHARAN DAS *v.* SATYA PRASAD CHOUDHURI. **36 C. L. J. 101 = 70 I. C. 427 = A.I.R. 1923 Cal. 252.**

——*Interruption of—Attachment under Cr. P. Code, S. 146.*

When a property is attached under Section 146, it passes into legal custody, and during the continuance of the attachment, such custody is for the benefit of the true owner. If the true owner was in fact in possession when the attachment was effected, his possession in the eye of the law is not interrupted. If, on the other hand, the wrongdoer was in possession at the time when the attachment took place, the effect of the attachment is to interrupt his possession, and from the moment of attachment the possession of the rightful owner revived in the eye of the law. 22 C. L. J. 283, Foll. 28 Cal. 86 Held obsolete. (*Mookerjee and Panton, JJ.*) SARAT CHANDRA *v.* BIBHABATI DEBI. **34 C. L. J. 302 = 66 I. C. 433 = A. I. R. 1921 Cal. 584.**

——*Interruption of — Decree that the person in adverse possession had no legal title—Effect of.*

The judgment of a Court declaring that one of the parties has no legal title to the properties in suit cannot have the effect of causing his possession to cease to be adverse to the opposite party from the moment of its pronouncement so long as possession remains undisturbed. (*Spencer and Venkatasubba Rao, JJ.*) SINGARAVELU *v.* CHOKKALINGA. **46 Mad. 525 = 70 I.C. 994 = 1922 M.W.N 676 = 16 M.L.W. 544 = 31 M. L. T. 298 = A. I. R. 1923 Mad. 88 = 43 M.L.J. 737.**

——*Interruption of — Formal possession decreed against stranger—Effect.*

The fact that formal possession was given by decree against a stranger, does not affect the position of the adverse possessor. (*Abdul Raoof, J.*) MUHAMMAD RAMZAN *v.* MUNICIPAL COMMITTEE, ALIPUR.

77 I.C. 509 = A.I.R. 1923 Lah. 534.

——*Interruption of — Limitation Act, S. 23—Attachment under S. 146, Cr. P. Code—Effect of.*

A trespasser's possession is determined upon the Magistrate taking possession under the attachment, for, the possession of the Magistrate being in law, the possession of the true owner, the true owner must be taken to have been restored to possession constructively on the date of the attachment, and must be taken to get a fresh starting point, the case being one of continuing wrong. (*Chatterjee and Cuming, JJ.*) PANNA LAL BISWAS *v.* PANCHU RUIDAS. **49 Cal. 544 = 26 C. W. N. 432 = 65 I. C. 200 = A.I.R. 1922 Cal. 419.**

——*Interruption of—Original owner staying as a guest will not interrupt adverse possession—Person with prescriptive title can eject trespasser.*

The mere fact that the original owner came and stayed for a few days as a guest will not operate to make the possession of the intruder less exclusive so as not to extinguish the rights of the original owner in the property. The person who has completed the statutory prescription is entitled to eject any person with no title who seeks to retain possession of the premises. *Tichborne* v. *Weir*, (1892) 67 L. T. 735, Dist. (*Coutts-Trotter and Ramesam, JJ.*) AMMAKANNU *v.* NARAYANASWAMI. **72 I.C. 635 = 17 M.L.W. 629 = A.I.R. 1923 Mad. 633.**

———*Interruption of—C.P. Code, (Act V of* 1908*), O.* 21, *R.* 95—*Decree for possession and symbolical possession.*

Where the plaintiff got a decree for possession in 1914, against the defendants and got delivery of symbolical possession in execution.

Held, that the decree would put a stop to any adverse possession prior to the date of the decree, and that even otherwise symbolical possession is sufficient to interrupt adverse possession where the person setting up adverse possession was a party to the execution proceedings in which the symbolical possession was given. (36 Bom. 373), Doubted. (20 Bom. L. R. 502,) (P. C.) Followed. (*Macleod, C. J. and Shah, J.*) MAHADEVAPPA DUNDAPPA HAMPIHOLI *v.* BHIMA DODDAPPA MALED.
46 Bom. 710 = 24 Bom. L. R. 232 = 66 I. C. 320 = A.I. R. 1922 Bom. 27.

———*Interruption of—Withholding of possession after symbolical delivery of possession gives rise to fresh cause of action for possession—C.P. Code, O.* 21, *R.* 95.

The possession of the judgment-debtor after symbolical delivery of property in execution of a final decree for foreclosure can only be regarded as a fresh act of trespass giving rise to a new cause of action. So if the judgment-debtor remains in possession after such delivery, the cause of action arises when formal possession is taken; 10 N. L. R. 60; 23 All. 442 and 16 Bom. 343 Rel. on. (*Kinkhede, A. J. C.*) GOURI SHANKAR *v.* IBRAHIM ALI. **116 I.C. 70 = A.I.R. 1929 Nag. 298.**

———*Interrruption of—Delivery of formal possession —Effect of.*

When a decree-holder has received formal possession as usual after due proclamation by beat of drum, adverse possession of the judgment-debtor is interrupted. Though the judgment-debtor was actually in possession and the decree-holder was consequently entitled to take not merely formal possession, yet the formal possession given to the decree-holders is in the eye of the law sufficient possession as against the judgment-debtor. (*Mookerjee and Chotzner, JJ.*) KULADA PROSAD CHATTERJEE *v.* KHUDIRAN MISRA. **27 C.W.N. 673 = 37 C.L.J. 545 = 70 I.C. 187 = A.I.R. 1923 Cal. 371.**

———*Interruption of — Limitation Act, Art.* 144—*Symbolical possession—Effect of.*

Delivery of formal possession to the predecessor-in-title of the plaintiffs gives a fresh starting point of limitation. (*Ryves and Gokul Prasad, JJ.*) ROMLALON SINGH *v.* HARAKH NARAIN RAI.
20 All. L.J. 641 = 73 I.C. 920 = A.I.R. 1922 All. 463.

———*Interruption of—Symbolical possession.*

Symbolical possession granted in execution proceedings when actual possession should have been delivered, puts an end to adverse possession and serves to give a fresh starting point for purpose of limitation: A. I. R. 1926 Lah. 35; A.I.R. 1925 Lah. 61; 55 I.C. 646; 70 P. L. R. 1910 and A I. R. 1917 P. C. 197. Rel. on; 36 Bom. 373; A. I. R. 1921 All. 9 and A. I. R. 1925 Mad. 1140, Doubted; A. I. R. 1924 Lah. 301, Not Foll. (*Bhide, J.*) SURJA *v.* MULCHAND
A. I. R. 1930 Lah. 823.

———*Interruption of—Symbolical possession, delivery of—Effect of, on adverse possession of persons not parties to proceedings.*

Delivery of symbolical possession does not in any way affect the possession of, or give start to a fresh period of limitation against persons who are not parties to a suit or execution proceedings. This rule is applicable to the case of purchasers at sales for arrears of revenue. (*Mookerjee and Chotzner, JJ.*) JOBEDA KHATUN *v.* TULSI CHARAN DAS. **36 C. L. J. 472 = 77 I. C. 564 = A. I. R. 1923 Cal. 82.**

———*Interruption of—Symbolical possession—Delivery of—Effect of, on possessors not parties to proceedings.*

Per *Odgers, J.*—Symbolical possession is sufficient to interrupt adverse possession when the adverse possessor is a party to the execution proceedings, in which symbolical possession is given; as regards persons not so parties, only actual dispossession can interrupt their adverse possession. (*Phillips and Odgers, JJ.*) RANGANATHA AIYAR *v.* SRINIVASA AIYANGAR.
22 M. L. W. 274 = 90 I. C. 1037 = A. I. R. 1926 Mad. 42 = 49 M. L. J. 656.

———*Interruption of—Symbolical possession interrupts.*

Symbolical possession interrupts adverse possession of a party against whom the symbolical possession is obtained. (5 Cal. 584 and 22 C. W. N. 330, Followed.) (*Walmesley and Ghose, JJ.*) JOGENDRA NATH BHOMICK *v.* DINANATH DASS. **A.I. R.1922 Cal. 313.**

———*Interruption of — Symbolical possession as against judgment-debtor interrupts adverse possession.*

Symbolical possession as against the judgment-debtor operates as actual possession and gives a fresh start of limitation even in a case coming under S. 318 of the 1882 Code corresponding to O. 21, R. 95 of the present Code. A person claiming under certified purchaser can also avail of the principle. (Case-law discussed.) (*Chatterjee and Pearson, JJ.*) BHULA BEG *v.* JATINDRA NATH SEN. **27 C. W. N. 24 = 77 I. C. 1035 = A. I R. 1923 Cal. 138.**

———*Interruption of—Symbolical possession is effective only in cases where it is recognised by the Code.*

Symbolical possession is effective only in the cases in which the Code recognises symbolical possession (36 Bom. 373, Followed.) Where certain persons were defendants to a suit for partition and against whom the relief of ejectment was asked for but not granted they are in substance not parties to the suit and delivery of possession as against him is not delivery of symbolical possession and the ruling in 20 Bom. L. R. 502 would not therefore apply to the case. (*Pratt and Kanga, JJ.*) RAGHUNATH VAMAN MATAPURKAR *v.* KONDIBA BABAJI MOKASHI. **46 Bom. 932 = 24 Bom. L. R. 499 = 68 I. C. 91 = A. I. R. 1922 Bom. 2.**

———*Interruption of—Symbolical possession is sufficient against a party, but not against a stranger to break adverse possession.*

Where the decree-holders got possession in accordance with an order by the Court and in pursuance of the order of the officer of the Court who went to deliver possession,

Held, the possession operated as a complete transfer to the decree-holder.

Held further, that possession even though symbolical would be sufficient to interrupt the adverse possession of the party to the execution proceedings but would not avail against a third party. (*Motisagar and Abdul Raoof, JJ.*) MUKAND LAL *v.* RAM DIN.
6 L. L. J. 302 = 84 I.C. 952 = A.I.R. 1925 Lah. 61.

Joint Property.

———*Joint property—Notice by one co-sharer to other refusing right in property if he did not pay his share of redemption money, is not ouster—Ouster cannot be presumed for short possession.*

Mere notice by one co-sharer who redeemed mortgaged joint property, to the other, to the effect that, if he did not pay his share of the amount required for paying off the mortgage, he will have no right over the property redeemed is not sufficient to constitute ouster. If since the date of the notice the defendant has not been in possession of the family property sufficiently long, it cannot be presumed that such long possession amounts by itself to an ouster. (*Macleod, C. J. and Shah, J.*) KESHAV NARAYAN SHASTRI PRABHANE *v.* RAMCHANDRA GANESH PRABHANE. **77 I. C. 521 = A. I. R. 1922 Bom. 156 (1).**

Landlord and Tenant.

——*Landlord and tenant.*

The possession of a tenant does not become adverse by the mere fact of his repudiating the tenancy unless his repudiation is accepted by the landlord. (*Martineau, J.*) MUHAMMAD HASSAN *v.* SOHARA. **71 I. C. 805 = A. I. R. 1924 Lah. 389.**

——*Landlord and tenant.*

Where a tenant does not attorn to the transferee of land, but pays rent to the landlord himself and then to another transferee from landlord for over twelve years, the title of first transferee is extinguished by prescription. (*Ramesam, J.*) UMMAYYA *v.* MUSALIYAR. **39 M. L. T. 211 = 104 I. C. 831 = A. I. R. 1927 Mad. 1157.**

——*Landlord and tenant — Adverse possession by tenant.*

Possession for more than twelve years is not quite sufficient to make out a case of adverse possession, unless it is established that the adverse possession commenced openly and to the knowledge of the landlord and continued for the full period of twelve years. A.I.R. 1921 Cal. 83 and 29 Cal. 518 (P.C.), Foll. (*Fazal Ali and Chatterji, JJ.*) SHYAM CRESHTO SHAW *v.* GANESH KAHAR. **124 I.C. 634 = A.I.R. 1930 Pat. 20.**

——*Landlord and tenant — Adverse possession by tenant.*

The possession must be adequate in continuity, in publicity and in extent of area to take the title out of the true owner. It must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the statute of limitation. This is specially necessary in a case between landlord and tenant, because the tenant's possession of the lands encroached upon can commence to be adverse only when the title adverse to the landlord is asserted or the landlord becomes aware of the encroachment; this is essential to enable the tenant to acquire title to a limited interest by adverse possession thereof. (*Mookerjee and Buckland, JJ.*) JOGENDRA NATH *v.* JAGADENDRA NATH RAY. **34 C. L. J. 133 = 67 I.C. 170 = A.I.R. 1921 Cal. 577.**

——*Landlord and tenant—Assertion of a proprietary title by tenant in judicial proceeding if then unfounded can never confer proprietary title.*

The simple assertion of a proprietary right in a judicial proceeding connected with the land in dispute which ex-hypothesi was unfounded at the date when it was made, cannot, by the mere lapse of 6 or 12 years, convert what was an occupancy or tenant title into that of an under-proprietor. A.I.R. 1923 P.C. 118, Foll. (*Raza, J.*) GAJADHAR *v* COURT OF WARDS, BIRWA MAHNAUN ESTATE. **98 I. C. 753.**

——*Landlord and tenant—Continuation of relationship of landlord and tenant by admission of parties cannot affect claims openly set up and not withdrawn by the tenant and in conflict with the continuation of any incidents of the original tenancy.*

The relationship of landlord and tenant might be continued by the admission of the parties. But when there are any claims openly asserted and not withdrawn by the tenant who is suffered to continue in possession, the admission of the parties cannot create, preserve or revive undisputed, conditions of the continuous right of the relationship of the landlord and the tenant which conflict with claims asserted by the tenant such as are referred to above. (*Jwala Prasad, A.C.J. and Macpherson, J.*) RAM RACHHYA SINGH *v.* KAMAKHYA NARAYAN. **4 Pat. 139 = 6 P.L.T. 12 = 84 I.C. 586 = 1924 P. H. C. C. 313 = A. I. R. 1925 Pat. 216 (228).**

——*Landlord and tenant—Entries in* khasra *as tenant for a long time—Possession should be presumed to be as of tenant and not adverse.*

Where the defendant in an action for possession relies upon entries in the village *khasra* a for large number of years as tenant of the suit plots, in the absence of any evidence to the contrary, the entries in the revenue papers must be deemed to represent correctly the relation between the parties to the effect that the claimant was tenant and not in adverse possession by right of being proprietor. 7 O.L.J. 282 and 5 O.L.J. 455, Dist.; 8 O.L.J. 495, Foll. (*Dalal, A.J.C.*) NAGESHAR SINGH *v.* BALDEO SINGH. **28 O.C. 325 = 87 I.C. 183 = 12 O.L.J. 160 = 2 O.W.N. 148 = A.I.R. 1925 Oudh 442.**

——*Landlord and tenant—Entry in village record or decision of Revenue Court will not start adverse title of under proprietor in a cultivator.*

An entry in the village record or even the opinion of a Revenue Court that a person cultivating land has rights higher than those of a tenant will not start adverse title of an under-proprietor in the cultivator and not compel the landlord to seek a declaration in the Civil Court at the risk of losing his right if he did not do so within six years of the final order in the litigation in the Revenue Court. Much less can a mere assertion start adverse title. A.I.R. 1923 P.C. 118, Foll. (*Dalal, J.C.*) SULTAN KHAN *v.* HARDWARI. **85 I.C. 850 = A.I.R. 1925 Oudh 601.**

——*Landlord and tenant — Rent, non-payment of, does not create.*

If the *thikadar* fails to collect the rent from any individual tenant it would not create adverse possession against the proprietor. Mere non-payment of rent or discontinuance of payment of rent, has not, by itself been held to create adverse possession. (*Mr. Ameer Ali.*) JAGDEO NARAIN SINGH *v.* BALDEO SINGH. **49 I. A. 399 = 2 Pat. 38 = 71 I. C. 984 = 1923 M.W.N. 361 = 27 C.W N. 925 = 3 P.L.T. 605 = 36 C. L. J. 499 = 32 M. L. T. 1 = A.I.R. 1922 P.C. 272 = 45 M. L. J. 460 (P.C.).**

——*Landlord and tenant—Non-payment of rent—Open disclaimer of landlord's title necessary.*

An adverse possession by the tenant cannot be predicated from the mere fact of non-payment of rent or discontinuance of payment of rent, unless in connection therewith the landlord has been apprised that the tenant claims title in himself. When the tenant thus disclaims the title of the landlord, claims title in himself, and the landlord has notice of that fact, it has the effect of an ouster and disseisin, even though this has happened during the continuance of the term. The theory on which adverse possession becomes a perfect title is that the true owner has, by his own fault, failed to assert his right against the hostile holder. Consequently, where possession is originally taken and held under the true owner, a clear positive, and continued disclaimer and disavowal of title, and an assertion of an adverse right brought home to the true owner, are indispensable before any foundation can be laid for the operation of the statute of limitation. Without this, the length of the occupation is immaterial and does not affect the title; possession for the full period of limitation must have elapsed after repudiation before title based thereon can be acquired. If the rule were otherwise, the greatest injustice might be done; without such knowledge of the repudiation, the landlord has the right to rely upon the fiduciary relation under which the possession was originally taken. As has been well said, a possession commencing under the authority of, or in subordination to, the true title, does not become transformed into a hostile one, by a mere change in mental attitude. It must be shown that the true owner had knowledge of the adverse holding, or it must be so open and notorious as to raise a presumption of notice to him. (*Mookerjee and Walmesley, JJ.*) GIRISH CHANDRA GANGOPADHYAYA *v.* SRI KRISHNA DE NAG. **38 C.L.J. 266 = 75 I.C. 325 = A.I.R. 1924 Cal. 168.**

———*Landlord and tenant—Dues by tenant—Failure to pay—Effect.*

Mere failure to pay due by *adna maliks* does not establish adverseness nor are the *ala maliks* bound to bring a suit to vindicate their rights so long as their rights remain duly recorded in Revenue Records and they are able to succeed in the Revenue Courts. (*Le-Rossignol and Abdul Qadir, JJ.*) LEKHU RAM *v.* MAHOMMAD RAMZAN.

69 I.C. 6 = 5 L.L.J. 196 = A.I.R. 1923 Lah. 122.

———*Landlord and tenant—Limitation Act, S. 28—Non-payment of rent.*

If a tenant pays no rent, it does not follow therefrom that he is in adverse possession. (*Zafar Ali, J.*) LAL SINGH *v.* WADHAWA.

100 I. C. 73 = A. I. R. 1927 Lah. 759.

———*Landlord and tenant—Non-payment of rent.*

Mere non-payment of rent is not equivalent to an assertion of a hostile title to the knowledge of the landlord though there is no registered deed as required by S. 106 (*Das and Bucknill, JJ.*) RAM LOCHAN BAID *v.* KUMAR KAMAKHYA NARAIN SINGH. **71 I.C. 570 = 4 P.L.T. 123 = 1923 P.H. C.C. 54 = A.I.R. 1923 Pat. 201.**

———*Landlord and tenant—Mere non-payment of rent—Tenant's heir—Occupation by—Nature of.*

Mere non-payment of rent or discontinuance of payment of rent by a tenant for twelve years would not create adverse possession against the owner. Nor would the carrying out of alterations on the property to suit his convenience be evidence of adverse possession. The possession of the tenant's heir after tenant's death would not *ipso facto* be adverse to the owner. The heir continues in possession as a permissive occupant and it is for him to show that by some subsequent act his possession became adverse to that of the owner. A tenant may acquire adverse possession without giving up possession of the property. An unequivocal assertion of title by a tenant coupled with possession for the statutory period and the non-payment of rent during such period would be enough to complete adverse possession against the landlord. A.I.R. 1922 P.C. 272; 2 All. 517; (*Rupchand Bilaram, A. J. C.*) MAHOMED FARUZ *v.* SIDIK.

79 I. C. 59 = A. I. R. 1925 Sind 36.

———*Landlord and tenant—Owner receiving rents—Defendants also receiving rents from others at same time—Defendant's possession is not adverse to owner.*

So long as the owner realises rents from some tenants his possession must be deemed to continue and the realisations by the defendants of rents from other persons at the same time could not amount to an adverse possession against the owner. (*Kotwal, A. J. C.*) RAGHURAJ *v.* D. B. VALLABDAS. **69 I. C. 883 = A. I. R. 1923 Nag. 95.**

———*Landlord and tenant—Knowledge or want of knowledge on the part of the landlord—Materiality in regard to the acquisition of a tenant's interest in property by adverse possession.*

The knowledge or want of knowledge on the part of the landlord is perfectly immaterial in regard to the question of acquisition of a tenant's interest in property by adverse possession, and a landlord as against whom a person has been asserting tenant-right cannot repudiate the other man's interest unless he can prove that he was fraudulently kept out of knowledge of the assertion of the title by the other man. 17 C. W. N. 1088 and 19 C. W. N. 136, Foll. (*Cuming and Cammiade, JJ.*) JAMIRUDDEE NASKAR *v.* BASANTA KUMAR.

105 I. C. 85 = A. I. R. 1928 Cal. 47.

———*Landlord and tenant—Landlord not entitled to immediate right of re-entry—Limitation does not begin against landlord.*

If a tenant is in possession of land and the landlord has not the immediate right of re-entry any assertion by the tenant would not make time run against the landlord for the reason that the landlord cannot claim any redress so long as he is not entitled to get possession of the land. To hold that whenever the tenant asserts a right which he did not possess, it is the duty of the landlord to repudiate such right, would be to drive the landlord to have recourse to course of law almost every day merely because the tenant has chosen to assert a right which he does not possess. The real circumstance which makes the law of limitation run against the landlord is that he is entitled to possession. 25 C. L. J. 467, Ref. (*Suhrawardi and Duval, JJ.*) CHHAIKUDDIN *v.* RAM NARAYAN. **90 I. C. 617 = A. I. R. 1926 Cal. 364.**

———*Landlord and tenant—Lease void at inception—Relation of landlord and tenant does not come into existence—Possession by alienee is wrongful from commencement.*

Where a lease becomes void by reason of the alienation being prohibited by the law, the relation of landlord and tenant does not come into existence and the possession by the alienee becomes wrongful from the commencement. (*Patkar, J.*) GULABBHAI RANCHHOD BHAI *v.* BHAGVAN KESUR. **30 Bom. L. R. 980 = 114 I. C. 266 = A. I. R. 1928 Bom. 377.**

———*Landlord and tenant—Mere assertion of, by admitted tenant, does not give him a superior right*

The mere assertion of the right of adverse possession by an admitted tenant would not create any right superior to that of his tenancy even though followed by possession for over 12 years. 37 Mad. 1 and 25 C. L. J. 467, Appr. (*Newbould, J.*) GOPAL CHANDRA *v.* SATYA BHAM. **92 I. C. 963 = A. I. R. 1926 Cal. 634.**

———*Landlord and tenant—Open assertion by a tenant to the knowledge of the landlords of a right inconsistent with the right claimed by the landlord to treat the tenant as a tenant-at-will or from year to year would enable the tenant to resist the landlord's claim after limitation.*

Authorities in India show that a tenant in India is not precluded by an admission of tenancy, from showing that the nature of tenancy asserted by him to the knowledge of the landlord has been for the period prescribed by the Limitation Act *pro tanto* adverse to the right to eject-at-will or on notice given. The question then is not what was the right which actually existed at the beginning of the tenancy but what was the right which he has openly enjoyed to the knowledge of the owner or his representative for the time being. A manifest assertion by the tenant to the knowledge of the person representing the landlord's interest of a right inconsistent with that claimed by the landlord to treat him as a tenant-at-will or from year to year, would be a disclaimer of the landlord's title. *Vivian* v. *Mote*, 16 Ch. D. 730, Ref. to

(*Jwalaprasad, A. C. J. and Macpherson, J.*) RAM RACHHYA SINGH *v.* KAMAKHYA NARAYAN SINGH. **4 Pat. 139 = 84 I. C. 586 = 1924 P. H. C. C. 313 = 6 P. L. T. 12 = A. I. R. 1925 Pat. 216.**

———*Landlord and tenant—Owner of* ghura *or* bitaura *on a plot has not necessarily possession over the entire plot—Nor can he claim entire plot by adverse possession.*

The mere existence of a *ghura* or *bitaura* on patni land does not establish that the person to whom the *ghura* or *bitaura* belongs has got possession over the entire plot or can claim right to the entire plot by adverse possession. (*Raza, J.*) MOHAMMAD HASAN ALI *v.* HARNATH KUER. **110 I. C. 569 = A. I. R. 1928 Oudh 470.**

———*Landlord and tenant—Permanent tenancy is not acquired by mere lapse of time—Permanent tenancy.*

A tenant cannot, by any amount of declaration and acting on his part, acquire as against the landlord title by adverse possession to the properties covered by the lease and mere lapse of time does not enable a tenant to acquire the right of a permanent tenant. A. I. R. 1924 P. C. 65 and A. I. R. 1923 P. C. 205, Foll. (*Anantakrishna Ayyar, J.*) (DUMING ROSARIO) SALDANA *v.* ROMAN CATHOLIC CHURCH, MERMAJAL. **A. I. R 1930 Mad. 434 (438).**

———*Landlord and tenant —Permanent tenancy asserted—Marfatdari receipts granted by landlord—Yearly tenancies not created.*

Where one party was claiming a permanent right and the other was not willing to accept that claim and asserting that the other party had no right whatsoever to remain in possession,

Held, that the grant of Marfatdari receipts by the landlord did not create the relationship of landlord and yearly tenant between the parties. (*Jwala Prasad, Ag. C. J. and Kulwant Sahay, J.*) CHARAN MAHTON *v.* KUMAR KAMAKHYA NARAYAN. **86 I. C. 387 = 6 P. L. T. 98 = A. I. R. 1925 Pat. 357 (361).**

———*Landlord and tenant—Claim of—Permanent tenancy—Payment of rent—Effect.*

Payment of rent by persons claiming the status of permanent mokarridars cannot derogate from their position of being in adverse possession. (*Jwala Prasad, A. C. J. and Kulwant Sahay, J.*) CHARAN MAHTON *v.* KUMAR KAMAKHYA NARAYAN. **86 I. C.387 = 6 P. L. T. 98 = A. I. R. 1925 Pat. 357 (361).**

———*Landlord and tenant—Adverse possession against landlord.*

Where a tenant is found to be in possession for nearly fifty years as tenant he gets a statutory right to the tenancy and cannot therefore be ejected by the landlord. (*Devadoss, J.*) RAMA RAO *v.* APPU. **88 I. C. 924 = A. I. R. 1925 Mad. 1226.**

———*Landlord and tenant—Persons recorded as tenants-at-will cannot plead adverse possession.*

In 1905 at the time of settlement *A* and another person were recorded as mukarridars of the plot in suit, cultivating through a tenant-at-will, *B*. The plot was described *banjar qadim khalwara* and there was a note that the tenant-at-will was paying no rent to the mukarridars as the land was *banjar*. In 1915 on *A's* application *B's* ejectment was ordered. No suit was instituted by *B* to contest his liability to ejectment. In 1916, *B* was dead and *A* instituted a suit against *B's* sons for possession of the site. They pleaded adverse possession.

Held, that considering the document of 1905 it was clear that *B* was a tenant-at-will of *A* till 1905, and continued to hold that status until ejected in 1915. The adverse possession of *B's* sons did not therefore commence before 1915 and had continued for less than 12 years at the date of the suit. (*Shadi Lal, C. J. and Hilton, J.*) SUNDAR DAS *v.* MD. AKRAM KHAN. **120 I. C. 602 = A. I. R. 1930 Lah. 384.**

———*Landlord and tenant—Possession of ex-proprietary tenant if adverse to Zemindar.*

The possession of an ex-proprietary tenant can never be adverse to the zemindar. The latter is entitled to a declaration that he is the owner but not to possession so long as the tenancy subsists. (*Ryves and Gokul Prasad, JJ.*) GANESH PRASAD *v.* SHIB SINGH. **60 I. C 261 (All.).**

———*Landlord and tenant—Possession by tenant's assign is adverse from date of expiration of lease.*

When a lease expires, the tenant's assign has no right to the possession of the property and if he is in possession, the possession is wrongful. In the absence of evidence from which a fresh tenancy can be inferred time begins to run against the landlord from the expiration of the lease. (*Jwala Prasad, A. C. J. and Macpherson, J.*) RAM RACHHYA SINGH *v.* KAMAKYA NARAYAN SINGH. **4 Pat. 139 = 84 I. C. 586 = 6 P. L. T. 12 = 1924 P. H. C. C. 313 = A. I. R. 1925 Pat. 216.**

———*Landlord and tenant—Relationship of landlord and tenant alleged to be only ground of permissive possession—Relationship not established—Possession is adverse.*

Where the relationship of landlord and tenant was not found to exist between the parties and that being the only ground on which defendant's possession was alleged to have been permissive in its inception, it must be assumed that it was in defendant's own right and therefore adverse to the plaintiff. A. I. R. 1926 Lah. 13 ; A. I. R. 1927 Lah. 70 ; A. I. R. 1926 Mad. 177 ; A. I. R. 1927 All. 799 ; A. I. R. 1927 Lah. 777 and 41 All. 669, Dist. (*Jai Lal, J.*) MAMMAN *v.* KALLU MUL. **113 I. C. 145 = A. I. R. 1928 Lah. 959.**

———*Landlord and tenant—Suit for ejectment by plaintiff alleging defendant to be tenant—Tenant denying tenancy and pleading adverse possession—Plaintiff's title established—Defendant must prove his possession for 12 years—Plaintiff need not prove his possession within 12 years of suit.*

Where in a suit for ejectment on the ground that the defendant was a tenant, the defendant denies that he is a tenant and pleads adverse possession, but the plaintiff's title is established, it is for the defendant to prove adverse possession for 12 years and if he fails to prove that, the plaintiff will succeed merely on his *prima facie* title as landlord. It is not necessary for him to go further and prove that he had been in actual possession at some period within 12 years previous to the commencement of the suit. 41 All. 669, foll. (*Abdul Raoof, J.*) SANTE SINGH *v.* NARAIN SINGH. **91 I. C. 1047 = A. I. R. 1927 Lah. 32.**

———*Landlord and tenant—Tenancy can be acquired by adverse possession.*

Where a tenant dies and rent is accepted by the landlord from a person claiming to be the heir of the original tenant for more than 12 years, that person acquires the status of tenant. (*Cuming and B. B. Ghose, JJ.*) SADANAND MANDAL *v.* JYOTISH KANTA RAY. **30 C. W. N. 787 = 95 I. C. 101 = A. I. R. 1926 Cal. 952.**

———*Landlord and tenant—Tenancy set up—Adverse possession does not arise.*

No question of adverse possession can arise in favour of a person who has taken up a position of a tenant. (*Daniels, J.*) TULSHI SINGH *v.* SHEOSARAN RAI. **96 I. C. 187 = A. I. R. 1926 All. 678.**

———*Landlord and tenant—Tenant's encroachment on adjoining waste is made in his character as tenant and so if landlord would not evict within 12 years, he *cannot recover possession after, though his right to fair rent is not barred.*

An encroachment made by a tenant from the adjoining waste of his landlord is *prima facie* made by him in his character as tenant and if the landlord takes no steps to evict him for 12 years, his right to recover actual possession becomes barred, although his title to receive fair rent is not barred. 2 C. L. J. 125 ; 8 C. L. J. 557 ; 53 I.C. 184 ; A. I. R. 1922 Cal. 185 ; 35 Mad. 618, Rel. on. (*Tek Chand, J.*) AMAR NATH *v.* THAKRU. **117 I. C. 810 = A. I. R. 1929 Lah. 469.**

———*Landlord and tenant—Land ceasing to be grove—Groveholder continuing to hold—Possession if adverse.*

Where a groveholder continues to hold even after the land has lost its character as a grove, he must be considered to be holding over and his possession in the absence of any open assertion of proprietary right by him, cannot be considered to be otherwise than as a tenant. 7 O. L. J. 282, Dist. (*Shrivastava, J.*) PRAG NARAIN *v.* DACHHINA BUX. **116 I. C. 56 = 12 R. D. 674 = A. I. R. 1929 Oudh 397.**

———*Landlord and tenant—Agreement to hold land rent-free ending—Tenant becomes trespasser.*

A tenant held rent-free lands under an agreement. An order was passed putting an end to the title of that tenant to hold on as a rent-free grantee.

Held, that from the date of the order the position of the tenant was that of a trespasser and a suit after twelve years for ejectment was barred by limitation. (*Mukerji, J.*) DAULAT SINGH *v.* SHEONATH. **114 I. C. 890 = 10 L. R. A. Rev. 179 = A. I. R. 1929 All. 211.**

———*Landlord and tenant—Tenant for fixed period continuing to hold over becomes tenant at sufferance and time does not run unless tenancy at sufferance terminates—Limitation Act, Art.* 139.

Where a tenant for fixed period continues to hold over on the expiry of the term of lease, he continues as a tenant at sufferance and time will not in such a case begin to run until the tenancy at sufferance thus coming into existence, terminates. (*Sen and Niamatullah, JJ.*) ONKAR PRASAD *v.* DHANI RAM. **1930 A. L. J. 594 = 122 I. C. 865 = A. I. R. 1930 All. 177.**

———*Landlord and tenant—Tenant holding land under a permanent lease—Possession not disturbed for over* 12 *years—Right to permanent tenancy is not prescribed.*

It cannot be affirmed as a general proposition of law that a person, who is, in fact, in possession of land under a tenancy or occupancy title can, by a mere assertion in a judicial proceeding and the lapse of six or twelve years without that assertion having been successfully challenged, obtain a title as an under-proprietor to the lands. A. I.R. 1923 P.C. 118, A. I. R. 1923 P.C. 205 and A. I. R. 1924 P.C. 65, Foll.

Where the tenant has a real right to be in possession, the mere fact that a claim was asserted by him to have an unlimited number of years in which their right to the lands would subsist is not a circumstance that enables them to prescribe a permanent tenancy as against their landlords. (*Rankin, C. J. and Miller, J.*) RAJANI KANTA BANERJEE *v.* RAJ KUMARI DASI. **31 C. W. N. 1099 = 104 I. C. 812 = A. I. R. 1927 Cal. 913.**

———*Landlord and tenant—Tenant in possession in respect of limited interest for over twelve years—Claim for assessment of rent is not barred except under Arts.* 130 *and* 131, *Limitation Act.*

If the tenant is in adverse possession of the absolute interest for over twelve years, the landlord's right is completely extinguished. If the tenant is in adverse possession for such period in respect only of a limited interest as tenant then whatever may be the effect of it on the question of the landlord's right to *khas* possession a claim for assessment of rent will not be barred unless as provided for in Art. 130 or Art. 131. (*Suhrawardy and Mukerji, JJ.*) DEVENDRA NARAYAN MAJUMDAR *v.* JHUMUR PRAMANIK. **43 C. L. J. 387 = 95 I. C. 622 = A. I. R. 1926 Cal. 883.**

———*Landlord and tenant—Tenant setting up larger claim by adverse possession—Time runs from notice to landlord of such claim.*

When a tenant wishes to set up a larger claim by adverse possession, the landlord must have specific notice of his doing so and time does not begin to run against the landlord till such notice. 21 Bom. 509, Ref. (*Macleod, C. J. and Fawcett, J.*) BABU SING RAMCHANDRA *v.* PANDU. **45 Bom. 508 = 22 Bom. L. R. 1413 = 59 I. C. 718 = A. I. R. 1921 Bom. 227.**

———*Landlord and tenant—Transferee from life tenant.*

A transferee from a life-tenant cannot prescribe against the landlord during the lifetime of the life-tenant. (*Ross and Wort, JJ.*) CHOTA NAGPUR BANKING ASSOCIATION *v.* KAMAKHYA NARAIN. **7 Pat. 341 = 109 I. C. 306 = A. I. R. 1928 Pat. 431.**

———*Landlord and tenant—Under-proprietary rights cannot be created merely by long possession.*

Long possession, the origin of which is not traced to have begun in under proprietary rights, cannot create title by adverse possession. A.I.R. 1923 P.C. 118, Foll. (*Stuart, C. J. and Wazir Hasan, J.*) JHAGOO SINGH *v.* DEPUTY COMMISSIONER OF PARTABGARH. **101 I. C. 803 = A. I. R. 1927 Oudh 538.**

———*Landlord and tenant—Waste land in front of tenant's house—Use by tenant of such land is not adverse—Tenant must use it as owner to constitute adverse possession.*

The only thing that the defendants have been in possession of the land in suit in the sense that they have been enjoying it because it lies in front of their houses is not sufficient to make their enjoyment adverse. (8 O. C. 177, Rel. on.) In order to dispossess the owner the defendants in possession must show that they asserted clearly that they claimed the right to hold possession as owner or their conduct must be such as would amount to the assertion of the intention to exclude the actual owner. (*Misra, J.*) HULAS *v.* BARKATUNNISSA. **1 Luck. 469 = 13 O. L. J. 633 = 3 O. W. N. 475 = 94 I. C. 1034 = A. I. R. 1926 Oudh 393.**

Lessor and Lessee.

———*Lessor and lessee—Deed of perpetual lease void—Possession by lessee for over twelve years—Title by adverse possession.*

Where a lessee's title began under a genuine deed of perpetual lease which is subsequently found to be void for want of registration, his title will be perfected by adverse possession if he continues in possession for more than 12 years. 43 Mad. 244 (P.C.), Foll. (*Stuart, C. J. and Raza, J.*) BANK OF UPPER INDIA, LTD. *v.* MT. HARNATH KUNWAR. **93 I. C. 852 = A. I. R. 1926 Oudh 410.**

———*Lessor and lessee—Lease beyond authority by trustee—Possession of lessee if adverse to endowment.*

Where the Manager of a religious endowment had granted a permanent lease in excess of his authority, the possession of the lessee was not adverse to the endowment during the life of the head who granted the lease. L. R. 48 I.A. 302 ; 44 Mad. 831, Foll. (*Mukerjee and Cuming, JJ.*) GAJENDRA NATH *v.* ASHRAF HOSSAIN. **27 C. W. N. 159 = 69 I. C. 707 = 36 C. L. J. 48 = A. I. R. 1923 Cal. 130.**

———*Lessor and lessee—Lessee admitting other persons to possession after lease—Their possession is not adverse.*

If a person, after taking a lease, allowed his brothers to occupy the leased house along with him, it could certainly not be said that their possession was adverse to the lessor. (*Martineau, J.*) CHANHAR *v.* MANSHA SINGH. **70 I. C. 966 = A. I. R. 1923 Lah. 247.**

———*Lessor and lessee—Lessee of 8 annas mokarrari continuing to be in possession of whole 16 annas interest —Lessor not participating in profits and rents—Subsequent grant by lessor of other 8 annas mokarrari interest to third person who in turn transferred it to another person—None of these participating in rents and profits—Suit by last lessee for partition of his eight annas share brought 12 years after first lease—Held there was ouster before first lease and subsequent lapse of 12 years barred last lessee's right to partition.*

An owner of 16 annas interest in a mouza gave a mokarrari of 8 annas interest in the mouza. The lessee continued to be in possession of his, as well as the other share. There was no participation by the owner in rents and profits. Subsequently the owner transferred the other 8 annas mokarrari interest to a person who in turn transferred it to a third person. There was no participation in rents and profits. The lessee of the original 8 annas interest continued in possession for over 12 years after grant of the other 8 annas mokarrari by owner. The last transferee brought a suit for partition of his share by metes and bounds.

Held, that the lessee of the first 8 annas interest was holding the other 8 annas interest adversely to the owner and there was an ouster before the first lease and that the ouster continued making his possession adverse to rightful owner of 8 annas mokarrari barring his right to partition. (*Das and James, JJ.*) RAMLAKHAN SINGH *v.* BHAIA CHATHU SAHI. **117 I. C. 636 = A. I. R. 1929 Pat. 624.**

———*Lessor and lessee—Lessee in possession for more than 12 years.*

If the lessee holds land under the lease for over 12 years on a stipulated rent and without sharing profits with the lessor, he becomes a perpetual lessee, and his act amounts to a complete ouster of the grantor and his co-sharers and the time, for a suit to deprive him of possession, runs from the date of such possession. (*Wazir Hassan, A. J. C.*) FAZ-L-HAQ *v.* RUQUAIYA KHANAM. **60 I. C. 717 = 7 O. L. J. 692.**

———*Lessor and lessee—Lessor ceasing to be owner—Possession of person entitled is adverse only from date of expiry of lease.*

Where the lessor was adopted into another family *held* that, assuming that the adoptee lost his right to the property in the natural family on adoption, the person next entitled to the property cannot be deemed to be in adverse possession till after the expiry of the lease. (*Dhobby, A. J. C.*) MAROTI *v.* LAXMAN. **65 I. C. 362 = 5 Nag. L. J. 58 = A. I. R. 1922 Nag. 16.**

———*Lessor and lessee—Persons failing to prove claim on basis of lease cannot plead adverse possession.*

Where a person comes forward with a claim on the basis of a lease and fails to prove it, he cannot turn round and say that he has been holding adversely from the date on which he founded his title under a grant. Adversity of title can only be set up if he did not lay claim to any title whatsoever for the commencement of his possession. (*Dalal, J. C.*) SULTAN KHAN *v.* HARDWARI. **85 I. C. 850 = A. I. R. 1925 Oudh 601.**

———*Lessor and lessee—Trespass against lessee is not adverse against the lessor as long as the payment of rent is not intercepted—Lessee cannot claim abatement of rent in respect of portion trespassed upon—Abatement.*

The possession of a trespasser during the continuance of a lease does not become adverse against the lessor, who is in possession by receipt of rent from his lessee; so long as such rent is not intercepted by a trespasser, he cannot be said to have been dispossessed and consequently claim for abatement cannot be sustained. It is the lessee's duty to recover possession from the trespasser. (*Mookerjee, Newbould and Pearson, JJ.*) CHANDI *v.* KALYANI DEBI. **49 Cal. 948 = 35 C. L. J. 292 = 69 I. C. 126 = A. I. R. 1922 Cal. 87 (92).**

———*Lessor and lessee—Sub-tenant cannot claim adverse possession against permanent lessee from occupancy tenant—U. P. Tenancy Act, S. 79.*

A sub-tenant cannot claim adverse possession against the transferee to whom permanent lease has been granted by an occupancy tenant nor can he claim that the suit is barred by time. The appellant having not acquired the status of the Zemindar simply because of his purchase of a fractional share in the village, the appellant-defendant cannot claim the privileges of a *zamindar* as against the plaintiff who claims through the occupancy tenant. (*Gokul Prasad, J.*) RAMESHWAR DUBE *v.* S. H. DUBE. **66 I. C. 529 = A. I. R. 1922 All. 277.**

———*Lessor and lessee—Tenant leaving holding in charge of malguzar by unregistered usufructuary mortgage which is compulsorily registrable—If malguzar leases holding in contravention of any rights which tenant may have had, his and lessee's possession is adverse to tenant.*

Where the tenant leaves the holding in charge of the malguzar by a usufructuary mortgage not evidenced by a registered deed though the registration of the mortgage is compulsory and the malguzar leases the lands in contravention of the rights which the tenant may have had, the possession of the malguzar and the lessee is adverse to the tenant. (*Subhedar, A. J. C.*) BHAGONA *v.* GUMAN. **118 I. C. 674 = A. I. R. 1930 Nag. 26.**

License.

———*License.*

Possession of a licensee started under an invalid license is only permissive and not adverse. (*Ramesam, J.*) RAMANUJACHARYULU *v.* BUCHI MANGARAO. **91 I. C. 565 = 22 M. L. W. 485 = A. I. R. 1925 Mad. 1279 (2).**

———*License—Cantonments—Land in, cannot be adversely possessed.*

The Secretary of State is absolute owner of all cantonment land, unless it can be proved that he parted with it. There can be no adverse possession against him. A person occupying land in cantonments not specifically transferred to him by the Secretary of State, can only hold it as a licensee from him, who could eject him at will by revoking his license. (*Stuart, J.*) SECRETARY OF STATE *v.* MULLA. **66 I. C. 582 = A. I. R. 1922 All. 57.**

———*License—Licensee cannot acquire rights adverse to licensor.*

A licensee cannot by enjoying the license for any length of time acquire rights adverse to that of the licensor, even if the latter is a Zamindar and the former a tenant. (*Mears, C. J. and Gokul Prasad, J.*) BHOJ RAJ *v.* HAR DEVA. **44 All. 726 = 20 A. L. J. 608 = 77 I. C. 140 = A. I. R. 1923 All. 140 (1).**

———*License—Long possession does not create title.*

A licensee cannot claim title only from possession, however long, unless it is proved that the possession was adverse to that of the licensor, to his knowledge and with his acquiescence. (*Mr. Ameer Ali.*) AMBU NAIR *v.* SECRETARY OF STATE. **51 I.A. 257 = 47 Mad. 572 = 80 I. C. 835 = 26 Bom. L. R. 639 = 20 M. L. W. 49 = 1924 M. W. N. 572 =**

35 M. L. T. 128 = 29 C. W. N. 365 = A. I. R. 1924 P. C. 150 = 47 M. L. J. 35.

———*License—Possession permissive in the beginning—Possessor is licensee and not trespasser.*

Where a person takes possession of land with express permission of the owner, he becomes a licensee and not a trespasser. (*King, J.*) THAKUR PRASAD *v.* J. THOMKINSON. **1 Luck. 44 = 102 I. C. 26 = A. I. R. 1927 Oudh 206.**

Limitation.

———*Limitation—Inam—Resumption and regrant by Government—Right against grantee.*

Where Government resumes the inam land, ousts the occupant and hands it over to a grantee after resumption a long prior possession by the previous occupant short of 60 years will not avail against the grantee. A. I. R. 1925 Mad. 726 and 1184, Foll. ; A. I. R. 1925 Mad. 780 and A. I. R. 1924 Mad. 783, Foll. (*Wallace, J.*) MANIAPPA UDAYAN *v.* SABAPATHI ASARI. **105 I. C. 202 = A. I R. 1927 Mad. 1082 = 53 M. L. J. 515.**

———*Limitation—Lands belonging to Government—Trespasser in possession for 12 years—Lands granted to third person by Government without resuming them from the trespasser—Trespasser can successfully plead adverse possession against the grantee—Limitation Act, Art.* 149.

Where a person has been in adverse possession for 12 years of lands belonging to Government and the lands are granted by Government to a third person, the grantee can successfully be met with a plea of adverse possession, although it would have been open to Government to resume the lands, 60 years' adverse possession not having been completed as against the Government. Whether 12 years' possession as against the grantee was completed before the grant or afterwards is immaterial. A. I. R. 1924 Mad. 783, Diss. from; 30 Mad. 245 and A. I. R. 1924 Cal. 394, Rel. on. Case-law discussed. (*Phillips and Ramesam, JJ.*) VENKATA SURYANARAYANA *v.* VENKU NAIDU. **97 I. C. 253 = A. I. R. 1926 Mad. 1155.**

———*Limitation—Service inam—Enfranchisement of—Right of outsider against the grantee.*

Title conferred by the grant of a title-deed at enfranchisement of a service inam cannot be questioned by the previous holder of the inam unless he had by prescription acquired a title to the property good, not only as against the service holder but also against Government, so that Government's power of disposition was lost. This would, of course, involve adverse possession for 60 years. (*Phillips and Odgers, JJ.*) KRISHNASASTRI *v.* SINGARAVELU MUDALIAR. **91 I. C. 130 = 1925 M. W. N. 218 = 48 Mad. 570 = A. I. R. 1925 Mad. 780 = 48 M. L. J. 470.**

———*Limitation—Resumption and re-grant —Service inam—Enfranchisement of—Right against grantee.*

The enfranchisement of a service inam and the issue of a title-deed thereupon create a new title in the grantee unless Government had at the time of the resumption no right to resume. Adverse possession prior to resumption does not count against the new grantee. (*Wallace, J.*) GOURIKANTAM *v.* RAMAMURTHY. **19 M.L.W. 663 = 1924 M. W. N. 565 = 80 I.C. 557 = 34 M. L. T. 234 = A. I. R. 1924 Mad. 783 = 46 M. L. J. 482.**

———*Limitation —Purchaser from Government—Suit to recover possession by—Twelve years' adverse possession prior to purchase.*

The right of a purchaser from Government to recover possession of the properties sold to him is barred by twelve years' possession of another person prior to purchase. The fact that the purchase was from Government does not keep the right alive. (*Walmesley and Buckland, JJ.*) ANNADA MOHAN ROY CHOWDHURY

v. KINA DAS. **28 C. W. N. 66 = 81 I. C. 675 = A. I. R. 1924 Cal. 394.**

———*Limitation—Limitation Act, Ss.* 141, 142 *and* 144—*Suit by adopted son—Suit brought within* 12 *years of the date of adoption is not time-barred—Possession against a person not entitled to claim possession is not adverse—Widow does not represent entire estate for limitation purpose—Rule is applicable to a Mahomedan entitled to the possession of an estate after the death of a female.*

One of the general principles governing the law of limitation is that a person can only be considered to be barred, if he has a right to enter and does not exercise that right within the period fixed by the Limitation Act. *Ex facie* it must follow that a person who is not in existence cannot be considered to be in a position to claim whether immediate or otherwise. The cause of action in the case of an adopted son accrue only from the date of his adoption ; when therefore a suit is brought by an adopted son within 12 years of the date of the accrual of the cause of action in his favour, the suit cannot be considered to be barred by limitation. So far as a Hindu widow is concerned she cannot, for the purpose of limitation, be considered to represent the entire estate, so as to bar a suit of a reversioner when her own suit happens to be barred. This rule would be applicable not only in the case of a Hindu entitled to the possession of the estate after the death of a female, but also to the case of a Mahomedan occupying a similar position. The wording of Art. 141, Act XV of 1877 and of the present Act IX of 1908 make this amply clear. Case-law discussed. (*Gokaran Nath Misra, J.*) ABDUL HALIM KHAN *v.* RAJA SAADAT ALI KHAN. **108 I. C. 817 = 1 Luck. 733 = A.I.R. 1928 Oudh 155 (189, 192, 195).**

———*Limitation—Limitation Act, Art.* 142—*Suit in ejectment by person dispossessed—Plaintiff must show his possession within* 12 *years—Possession of independent trespassers without interval will bar true owner's title—Any interval, however, will cause restoration of true owner's title.*

Discontinuance of possession takes place where the person in possession goes out and is followed into possession by another person. In all cases, where the person, who was in possession at one time and discontinued possession or was dispossessed, seeks to eject a person in possession, he has to show that he was in possession within 12 years before the suit. 21 C.L.J. 157 ; Ref. to ; 29 Cal. 518; 13 A. C. 793, Dist. In order that the title of the true owner may be barred by the adverse possession of a trespasser or a series of trespassers the possession by them must be continued, and so long as it is continuous, it is immaterial whether they claim through one another or independently ; but if a period of time should elapse, however short, after the abandonment of one trespasser who has not been in for the full statutory period and the entry of another, the title of the true owner is, as from the time of such abandonment restored to him without any entry or act done on his part, for the statute does not apply to case of want of possession by true owner, but only to the cases where the owner is out of possession and another is in possession for the prescribed time. (*Kumaraswami Sastri and Devadoss, JJ.*) VENNAM RAMIAH *v.* KUSRU KOTAMMA. **45 Mad. 370 = 67 I.C. 246 = 1922 M.W.N. 132 = 30 M.L.T. (H.C.) 143 = A. I. R. 1922 Mad. 59 = 42 M.L.J. 319.**

———*Limitation—Nature of possession by one Hindu female entitled to maintenance against another female depends upon quality and extent and her intention—Possession to be adverse, lawful owner must have notice—Adverse possession does not run against a person until he is entitled to possession.*

It is a plain proposition of law that no adverse possession can run against a person until he becomes entitled to possession of the property. An adverse possession for any length of time, against a tenant for life is similarly ineffectual against the reversioner or remainderman whose right to possession only accrues on the death of the tenant for life: A. I. R. 1925 All. 707, rel. on. As regards the nature of possession by one Hindu female entitled to maintenance against another Hindu female in whom the inheritance vests for the time being, the quality and extent of right acquired by adverse possession always depends upon the claim accompanying it and upon the nature of the *animus possidendi*. The question whether possession is adverse or not is always a question of one's own intention to hold adversely and knowledge of such intention must be brought home to the real owner so as to extinguish his title 10 N. L. R. 35 and A. I. R. 1924 P. C. 121 (P.C.), Ref. (*Kinkhede A.J.C.*) Mt. Deshrani *v.* Thakur Kishore Singh.
22 N. L. R. 175 = 10 N. L. J. 5 = 100 I. C. 446 = A. I. R. 1927 Nag. 104.

———*Limitation—Plea of—Mines—Partnership.*

The plea of limitation assumes that the title is in the plaintiff. A person cannot by using or working one portion of a coal mine acquire a right to any other portion of it. *Obiter*,—Where a trespasser acts under a *bona fide* belief that he has a title to the coal, all that he is entitled to claim is that, in assessing damages the Court should not act harshly towards him and that he ought to be allowed the expense of severing the coal as well as bringing it to bank. (*Das and Macpherson, JJ.*) Shashi Bhusan Banerji *v.* Ramjas Agarwala.
3 Pat. 85 = 83 I. C. 205 = A.I.R. 1924 Pat. 402 (416).

———*Limitation—Public declaration by a permissive occupant gives a starting point of limitation for adverse possession.*

An open and public declaration communicated to the landlord by a person in permissive occupation who is not paying rent or rendering services and who is claiming adversely to be an owner will give a starting point for limitation. (*Kennedy, J. C. and Aston A. J. C.*) Sidick Haji Yacub *v.* Mahomed Faruq.
21 S. L. R. 185 = 90 I. C. 1007 = A. I. R. 1926 Sind 71.

———*Limitation—Reversioner—Limitation Act, Art.* 144.

If the plaintiff's title to the property commences from the death of the previous full owner, limitation begins to run against him from that date notwithstanding the estate may be in the possession of the last full owner's widow under a will which he had no power to make. (*Dawson Miller, C. J., Mullick and Foster, JJ.*) Harihar Prasad *v.* Kesho Prasad. **93 I.C. 454 = 5 P. L T. (Sup.) 1 = A.I.R. 1925 Pat. 68 (87) (F.B.)**

———*Limitation—Starting point—Possession of a puisne mortgagee purchaser under his purchase from mortgagor (whose equity of redemption was already foreclosed under a prior mortgage) who (purchaser) paid off in* 1901 *a middle usufructuary mortgagee, though the usufructuary mortgagee was entitled to possession up to* 1908, *is adverse at least from the date of payment to the usufructuary mortgagee as against mortgagor's successors-in-interest as well as the prior foreclosing mortgagee who were entitled to possession on satisfaction of the usufructuary mortgage.*

A mortgaged the suit land to one *R* in 1876, then to *K* usufructuarily till April 1908 and then to plaintiffs' father in 1889. Plaintiffs bought it in February 1901 from mortgagor, paid of *K* the entire mortgage money due to him and entered into possession of the land. The defendants dispossessed the plaintiffs in December 1917 and alleged that they had title by purchase from the transferees of *R* who had bought it in 1891 under his own mortgage decree, to which *K* was not made a party. *R* never obtained possession and the land remained in possession of *K*, till 1901.

Held, that the plaintiffs acquired title to the land by adverse possession from February 1901 up to December 1917 when they were dispossessed by defendants. The usufructuary mortgage in favour of *K* terminated in 1901, when *K* was paid off in full and *K* had no right to retain possession since then. Plaintiffs' adverse possession began in February 1901 and not from April 1909. (*Suhrawardy and Mukerji, JJ.*) Ramanuj Rai *v.* Dakshineshwar Rai. **43 C. L. J. 237 = 30 C. W. N. 259 = 93 I. C. 101 = A. I. R. 1926 Cal. 752.**

———*Limitation—T.P. Act, S. 72—Purchase by mortgagee from a co-mortgagor—Redemption—Other co-mortgagor knowing of the purchase—Time runs against him and right to redeem is extinguished after* 12 *years.*

If a mortgagee gets in the equity of redemption from one of two co-mortgagors and claims to be in possession as owner to the knowledge of the other co-mortgagor. then it may be said that the right of the co-mortgagor to redeem his share will be extinguished after 12 years. If the co-mortgagor is not acquainted with the purchase of the equity of redemption from the other co-mortgagor time does not run against him in favour of the mortgagee who has purchased the equity of redemption. (*Macleod, C. J. and Shah, J.*) Ibrahim Valad Gulam Husen Mulnaji *v.* Mobiddin Balku Moduk. **24 Bom. L. R. 287 = 67 I. C. 219 = A. I. R. 1922 Bom. 1.**

Limited Interest.

———*Limited interest — Adverse possession against life-tenant is not adverse possession against reversioner or remainderman—Limitation Act, Art.* 140.

No adverse possession can run against a person till he becomes entitled to the possession of the property. An adverse possession for any length of time against a tenant for life is similarly ineffectual against the reversioner or remainderman whose right to possession only accrues on the death of the tenant for life. (*Lindsay and Kanhaiya Lal, JJ.*) Naunihal Singh *v.* A. G. Skinner. **47 All. 803 = 23 A.L.J. 691 = 92 I. C. 63 = A. I. R. 1925 All. 707.**

———*Limited interest — Adverse possession of a limited interest is recognised—When such adverse possession is claimed question of payment of rent is immaterial.*

The receipt of rent does not necessarily show that the interest of a permanent tenure in the tenant was recognised by the landlord. Nor does it show that the position of a yearly tenant was accepted by the tenant. Therefore, payment or non-payment of rent is immaterial when defendant sets up plea of adverse title to limited interest or, pleads tenancy and in the alternative possession of a limited interest. For the defendant in a suit for possession can set up a plea of adverse title to a limited interest such as an occupancy right or perpetual tenure. (*Jwala Prasad, A. C. J. and Macpherson, J.*) Ram Rachhya Singh *v.* Kamakya Narain Singh. **4 Pat. 139 = 6 P. L. T. 12 = 84 I.C. 586 = 1924 P. H. C. C. 313 = A. I. R. 1925 Pat. 216.**

———*Limited interest—Assertion of higher interest—Not sufficient to acquire by lapse of time.*

The simple assertion of a proprietary right in a judicial proceeding connected with the land in dispute which *ex hypothesi* was unfounded at the date when it was made, cannot by the mere lapse of 6 or 12 years, convert what was an occupancy or tenant title into that of an under-proprietor. Where each party had his supposed rights judicially challenged by the other, the plaintiff, by the notice of ejectment, of which he had obtained cancellation, the defendant by the assertion in the proceedings for cancellation of the notice for ejectment that he was not liable to be ejected because of his rights as under-proprietor.

Held, it is not the duty of either party to institute such a suit if they were content that possession should remain on the same footing as before the notice of ejectment was served. It is not correct as a general proposition of law that a person who is in fact, in possession of land under a tenancy or occupancy title can, by a mere assertion in a judicial proceeding and the lapse of 6 or 12 years without that assertion having been successfully challenged obtain a title as an under-proprietor to the lands. Such a judgment might have very far-reaching results and would almost certainly lead to a flood of litigation. (*Lord Salvesen.*) MUMTAZ ALI *v.* MOHAN SINGH. **50 I. A. 202 = 26 O. C. 231 = 45 All. 419 = 74 I. C. 476 = 21 A. L. J. 757 = 33 M. L. T. 321 = 19 M. L. W 283 = 10 O. L. J. 383 = 28 C. W. N. 840 = 39 C. L. J. 295 = A. I. R. 1923 P. C. 118 = 45 M. L. J. 623.**

——*Limited interest—Equity of redemption is capable of adverse possession—Transfer of Property Act, S.* 60.

It cannot be maintained as a wide proposition that an equity of redemption can never be considered as capable of adverse possession. It must be held on the facts established in each case whether they would amount to be the cogent evidence of adverse possession of the equity of redemption. 32 Cal. 296 (P.C.) ; 27 Bom. 4. ; A. I. R. 1924 Oudh 40 ; 38 All. 411, rel. on. (*Misra and Nanavutty, JJ.*) CHANDRA SHEKHAR SINGH *v.* JAGJIWAN BAKHSH SINGH. **115 I. C. 279 = A. I. R. 1929 Oudh 215 (223)**

——*Limited interest—Facts necessary to prove acquisition of such interest must be found.*

A limited interest can be acquired by adverse possession, but the facts necessary to prove such possession must be found. (*Mullick and Bucknill, JJ.*) SIR RAMESHWAR SINGH *v.* RIT LAL SINGH. **86 I. C. 771 = 3 Pat. L. R. 50 = 6 P. L. T. 514 = A. I. R. 1925 Pat. 739.**

——*Limited interest—Limited interest could be got by adverse possession and is a defence to ejectment suit.*

Per *Venkatasubba Rao, J.*—A mortgagee to whom possession has not been transferred suing for sale of the mortgaged property cannot establish his right by relying upon an unregistered mortgage deed and his suit will necessarily be dismissed but where there is a transfer of possession other considerations will arise. 9 M. 244; 13 Mad. 467; 21 Bom. 509; 24 Mad. 471 (F.B.) Foll.

Per *Ramesam, J.*—To prove the extent of interest acquired by the defendants by adverse possession, the terms of the mortgage asserted by them have to be and may be proved. Such proof cannot be regarded as an attempt to prove the unregistered deed of mortgage ; for the asserted mortgage need not necessarily be, though very often it will be identical with the mortgage attempted to be created by means of the unregistered deed of mortgage. (*Ramesam, J.*) APPAMMA *v.* CHINNAVADU. **47 Mad. 203 = 79 I.C. 510 = 1923 M.W.N. 825 = 19 M.L.W. 37 = 33 M.L.T. 146 = A.I.R. 1924 Mad. 292 = 45 M.L.J. 667.**

——*Limited interest—Occupancy rights.*

Occupancy rights can be lost by adverse possession. (*Stuart, C.J. and Misra, J.*) SHEO NANDAN *v* HIRA LAL. **13 O.L.J. 6 = 92 I.C. 247 = A.I.R. 1926 Oudh 226.**

——*Limited interest—Person holding possession of land of grantee adversely acquires same title as grantee by prescription and no more—Trespasser is subject to the terms of the grant.*

P made a grant of land in favour of *M*. The land was to be used for planting a grove and not for any other purpose. Grantee was to have no right to transfer grove when planted and if he died without leaving male issue, *P* was to have the right to enter into possession of the grove and it was to become his property. *M* died without leaving any male issue and one *J.*, *M's* brother's grandson, took possession of the land and had the possession for over twelve years.

Held, that *J* came into possession of *M's* estate which *M* had in the grove and *J's* adverse possession had the effect of creating the same title in him as *M* had in the property. *P* possessed full proprietary title in the land in suit and *J's* possession had not been of such nature as to oust that title. *J* acquired by prescription the same title in the land as *M* had and no more and *J's* or his successor's acts of alienating any portion of the property and of making use of subject-matter of the grant contrary to the terms of it gave a right of re-entry to the landlord. 27 Cal. 943 (P.C.) and A.I.R. 1930 Oudh 46, ref. (*Wazir Hasan, J*) DEPUTY COMMISSIONER, FYZABAD *v.* BHAGWAN DEI. **7 O.W.N. 40 = A.I.R. 1930 Oudh 75.**

——*Limited interest—Possession of limited interest can be adverse—But only a limited interest can be acquired by such possession.*

Possession of a limited interest, for instance, the claim to an intermediate tenure, may be just as much adverse as is adverse possession of a complete interest in the property ; consequently such possession of a limited interest may be just as much adverse for the purpose of barring a suit for the determination of that limited interest as adverse possession of a complete interest in the property operates to bar a suit for the whole property. Such adverse possession of a limited interest, however, though a good plea to a suit for ejectment is good only to the extent of that interest. 2 C.L.J. 125, foll. (*Asutosh Mookerji and Rankin, JJ.*) SWARNAMOYI *v.* SOURINDRA NATH MITRA. **42 C.L.J. 14 = 89 I.C. 747 = A.I.R. 1925 Cal. 1189.**

——*Limited interest—Possession in limited interest which would not call for protest from owners does not amount to adverse possession.*

P purchased a portion of a share in a zamindari. The owners of remaining share granted a sikmi taluki interest of their share of the land of a mouza falling within the share in Zamindari to predecessors of *D*, who, however, came to possess all the lands of the mouza and got themselves recorded in the Record-of-Rights in taluk howla, or osat howla right in respect of *P's* share of land as well. *P* sued for assessment of rent and in the alternative for recovery of damages for occupation and use.

Held, that *D's* predecessors having come into possession under the osat howla right created by the howladars, any adverse possession of a limited interest which *D* or their predecessors had, commenced at the creation of the osat howla and during the continuance of that interest no amount of assertion of taluki right would call for protest from *P* or require him to take steps for recovering khas possession. *D's* possession therefore was not adverse. (*Mukerji and Mallik, JJ.*) SATYA PROSANNA *v.* KALI PROSANNA DAS **34 C.W.N. 43 = A.I.R. 1930 Cal. 389.**

——*Limited interest—Possession under void lease will convey lessee's interest.*

Where the defendants had been in possession under a void lease for more than 12 years, *held* that they acquired by adverse possession the lessee-rights under the lease, under which they claimed to be in possession, and could not be ejected until after the expiry of the lease. (*Shah, Ag. C.J. and Crump, J.*) CHATURBHAI LALLUBHAI *v.* MOTIBHAI BAPUJI. **24 Bom.L.R. 1315 = 77 I.C. 952 = A.I.R. 1923 Bom. 146.**

——*Limited interest — Principle that possession against a tenant or a lessee is not necessarily adverse as against the landlord or lessor, does not apply in favour of a trespasser.*

The principle that possession against a tenant or a lessee is not necessarily adverse as against the landlord or lessor, applies only where the landlord or lessor has title to the land and the right to immediate possession, if impediments in the shape of a lease or tenancy disappear and does not apply to a trespasser. 29 Cal. 518 (P.C.), Appl. (*Suhrawardy and Graham, JJ.*) SOURINDRA NATH *v.* NIRMAL CHANDRA. **32 C.W.N. 863 = 117 I.C. 693 = A.I R. 1928 Cal. 882,**

——*Limited interest—Tenant's interest can be acquired by adverse possession.*

A person can by prescription acquire the status of a tenant under the plaintiff on the well recognised principle that a limited interest in property can be acquired by adverse possession. (*Mookerjee, Ag. C.J. and Fletcher, J.*) UJIR ALI SIRDAR *v.* SHADHAI BEHARI. **35 C. L. J. 182 = 68 I C 1003 = A.I.R. 1922 Cal. 185.**

——*Limited interest—Widow—Caste custom entailing a forfeiture of widow's estate on remarriage—Widow continuing in possession in spite of the forfeiture—Her adverse possession could prescribe a title only to the limited estate of which she was possessed prior to forfeiture.*

Where a widow of a separated Hindu in possession of her deceased husband's property as his widow forfeits her right to that property, under a custom of her caste on account of her remarriage, but continues in such possession notwithstanding the forfeiture without objection by the reversioners.

Held, that by continuing in possession of the property even after the forfeiture, there could not be an automatic enlargement of the widow's estate but she must be presumed to have continued in possession of the same limited estate of which she was in possession since the death of her first husband. A.I.R. 1924 P C. 121; A. I. R. 1925 All. 369, Foll.; A.I.R. 1924 All. 740, Dist. (*Iqbal Ahmad, J.*) RARIF *v.* PHOOL SINGH. **99 I.C. 578 = A.I.R. 1927 All. 274.**

Limited owner.

——*Limited owner.*

Adverse possession, if any, against a limited owner is not adverse possession against a reversioner. 41 All. 154 and 17 N. L. R. 18, Foll. (*Kinkhede, Offg. A.J.C.*) MUSSAMMAT MULIA BAI *v.* AMRU. **95 I. C. 18.**

——*Intervention of limited owner—Effect.*

In a case in which limitation once began to run against a male owner, the fact that between him and the next reversioner, a widow with a life-estate intervened, would make no difference and would not give a fresh starting point for limitation. (6 P.R 1912, Foll.) (*Abdul Qadir, J.*) KILU RAM *v.* M. BHIRAUWAN BAI. **69 I. C. 398 = A. I. R. 1924 Lah. 292.**

——*Limited owner — Adverse possession starting against original owner—Inter-position of subsequent life estate—Reversioner cannot compute time from death of limited owner.*

Where adverse possession once starts against the original owner and continues after his death, the interposition of a subsequent life-estate does not avail against the running of time and the reversioner cannot compute limitation from the death of the limited owner. 27 I. C. 954, Rel. on. (*Mukerji and Mitter, JJ.*) (SREEPATI) BHUSAN MONDAL *v.* SARBESWAR MONDAL. **34 C.W.N. 409 = A.I.R. 1930 Cal. 474.**

——*Limited owner—Inam lands held adversely against office-holder create prescriptive title against all successors.*

Assuming that Khaji inam lands are inalienable and impartible, where inam lands are held adversely to the office-holder for more than 12 years, the person in adverse possession acquires a prescriptive title to the lands as against the holder of the office and his successors also. AI.R. 1922 P.C. 96 and 42 Cal. 244, dist.; 38 M.L.J. 320, Foll.

So long as the alienation is good for the lifetime of the alienor, limitation commences to run against the successor not from the date of alienation but from the date of the alienor's death. It is otherwise when possession is adverse from the start. (*Odgers and Hughes, JJ.*) MAJWATH ALLI *v.* MUJFAR ALLI. **77 I.C. 568 = 18 M.L.W. 887 = 1924 M.W.N 53 = 33 M.L.T. 175 = A.I.R. 1924 Mad. 201 = 45 M.L.J. 791.**

——*Limited owner—Assertion of full title is necessary.*

Where a widow who was prevented by custom from inheriting husband's property but was only entitled to maintenance, entered into possession of her husband's estate and sought mutation only as a limited owner. Her possession cannot be deemed as adverse to the husband's heirs. 42 All. 152, P. C. Expl. (*Stuart, C.J. and Misra, J.*) MT. RAM RAJI *v.* BALBHADDAR. **95 I.C. 432 = A.I.R. 1926 Oudh 497.**

——*Limited owner—Exclusive possession of widow is not necessarily adverse to the presumptive heir of the last male holder.*

Exclusive possession of widow unaccompanied by any overt act of denial of title of the presumptive heir of the last male holder to the property cannot prove anything in the nature of 'adverse" possession. (*Kinkhede, A.J.C.*) YESHAVANT *v.* DAULAT. **89 I.C. 663 = A.I.R. 1926 Nag. 129.**

——*Limited owner—Hindu Law—Reversioner.*

Possession adverse against widow is not so against reversioner. 13 C.P.L.R. 81, Ref. (*Findlay, J.C.*) DEORAM SUJAR *v.* BIJU SUJAR. **10 N.L.J. 90 = 101 I.C. 822 = A.I.R. 1927 Nag. 226.**

——*Limited owner—Hindu widow.*

If adverse possession against a widow is sought to be made adverse also against the reversioner, it can only be so in a case where the widow has been in actual possession and has been dispossessed. A.I.R. 1928 Cal. 670, not appr.; A.I.R. 1925 P.C. 249 Expl.; A.I.R. 1928 All. 561 (F.B.) Rel. on; 9 M.I.A. 539 and 23 Bom. 725 (P.C.) Cons. (*Raza and Pullan, JJ.*) MT. LACHMIN *v.* ISHURI PRASAD. **4 Luck. 592 = 115 I.C. 101 = 6 O.W.N. 138 = A.I.R. 1929 Oudh 153.**

——*Limited owner—Hindu widow—Original owner ceasing to be in possession—Widow and reversioners not taking steps to recover possession—Reversioners will be barred by limitation.*

Where the original owner has ceased to be in possession and his widow and his reversioners successively take no steps to recover possession within the period of limitation, the reversioners will be barred by limitation. (*Ashworth, J.*) JAIDEO SINGH *v.* MUNSHI DHOOM SINGH. **116 I.C. 740 = A.I.R. 1929 All. 419.**

——*Limited owner —Hindu widow forfeiting by reason of remarriage her widow's estate, but continuing to be recorded in possession as widow without reversioner's objection for more than 12 years after remarriage —Presumption of possession of widow's estate only—Absolute title to such limited interest only.*

A widow after her remarriage forfeited under custom her widow's estate but continued to be recorded as in possession of it as her first husband's widow for more than 12 years without objection by the reversioners.

Held, that her possession after her remarriage was only in respect of her widow's estate and what she acquired by adverse possession was complete title to such limited estate only, and the reversioners' right to succeed on her death could not be defeated. A. I. R. 1927 All. 274 ; A.I.R. 1925 All. 369 ; A.I.R. 1924 P.C. 121, Foll. (*Addison, J.*) DESA *v.* DANI. **119 I.C. 238 = A.I.R. 1929 Lah. 327.**

———*Limited owner—Hindu widow taking possession on the death of her deceased son's widow, does so in her own right and the adverse possession cannot be referred to her husband's or son's estate.*

Where a Hindu widow mother having no right to succeed to the property of her deceased son's widow takes possession of the property on the death of such son's widow, she takes the possession in her own right and the adverse possession enures in her and is not referable to her husband's or to her son's estate. (*Dalal, J.C.*) DRIGBIJOY SINGH *v.* DRIGPAL SINGH. **90 I.C. 825 = A.I.R. 1926 Oudh 126.**

———*Limited owner—Holder of life estate cannot assert adverse possession against remainderman.*

Holder of a life-estate and the remainderman must be considered as one and the holder of the life-estate who has entered under the will cannot against the will assert an adverse title derived independently against the remainderman. (*Stuart, C. J. and Raza, J.*) NISAR ALI KHAN *v.* MUHAMMAD ALI KHAN. **6 O.W.N. 549 = 119 I.C. 337 = A.I.R. 1929 Oudh 494 (513).**

———*Limited owner—Land granted for maintenance—Purchases made out of savings from the income of such land do not amount to denial of title of the heir of last male holder.*

A Hindu widow is entitled to make new purchases out of her savings and even to keep them separate from the parent estate held by her for maintenance. But such purchases do not constitute a denial of title of the legal heir of the last male holder. (*Kinkhede, A.J.C.*) YESHWANT *v.* DAULAT. **89 I.C. 663 = A.I R. 1926 Nag. 129.**

———*Limited owner—Maintenance—Daughter-in-law—Father-in-law may assign a portion of joint property for her maintenance—Her possession is not adverse to heirs of father-in-law.*

It is quite in keeping with the sentiments of a Hindu father-in-law to assign some portion of the joint family property to his daughter-in-law in lieu of her right to maintenance so that she may enjoy its usufruct during her lifetime. Even if such portion is mutated in her name, her possession does not go to convert the property into a stridhan nor does her possession become adverse to the legal heirs of father-in-law. 27 Cal. 515 (P.C.), Ref. (*Kinkhede, A.J.C.*) YESHWANT *v.* DAULAT. **89 I.C 663 = A.I.R 1926 Nag. 129.**

———*Limited owner—Near heirs, having rights to land, alive—Adverse possession against reversioners of last male holder does not begin in their lifetime.*

Reversioners of the last male holder have no *locus standi* to sue for possession of land during the lifetime of nearer heirs having a right to inherit and therefore adverse possession against such reversioners does not begin so long as such heirs are alive. 82 P.R. 1918 and 18 P. R. 1895. Rel. on. (*Jai Lal, J.*) NUR MAHOMED *v.* BUTA. **96 I.C. 837 = A.I.R. 1926 Lah. 678.**

———*Limited owner—Person holding life-estate under will cannot claim absolute estate adversely by merely asserting that he holds an absolute estate.*

A claim to an absolute estate by adverse possession cannot be made by the mere assertion on the part of a person, who has taken the property as a life-estate holder under a will, during the course of his tenure, that his estate is absolute and will not terminate on his death. The plea of adverse possession comes into force where the person entitled to the property fails to take some step within the period of limitation to assert his title against the person who attempts to set up the adverse title. (*Pullan, J.*) MAHOMED ALI KHAN *v.* NISAR ALI KHAN. **1 Luck. 592 = 109 I.C. 835 = A.I.R. 1928 Oudh 67 (81).**

———*Limited owner—Possession adverse to, is not adverse to reversioners.*

Possession which commences during the lifetime of a Hindu widow with a limited interest cannot be adverse to the reversioners. (*Daniels and Lyle, A.J.Cs.*). MT. PARBATI *v.* SAIYED MUHAMMEDHADI. **68 I C. 534 = 9 O.L.J. 304 = A.I.R. 1923 Oudh 81.**

———*Limited owner—Possession by female of property for maintenance is not adverse.*

The possession of a female who is allowed to hold property merely in lieu of her right of maintenance cannot be held to be adverse to the real heir 102 P.R. 1907, Foll. (*Tek Chand and Bhide. JJ.*) HAKAM SINGH *v.* HAZARA SINGH. **109 I.C. 54 = A.I.R. 1928 Lah. 695.**

———*Limited owner — Suit by reversioners after widow's death—Compromise decree between the trespasser and the widow is binding on reversioners if widow represented the estate in the suit and trespasser holds under the decree.*

Adverse possession cannot run against reversioners until after the death of the widow. In order to make the principle laid down in *Shivganga case* (9 M.I.A. 539) applicable, the possession of the alleged trespassers must be by force of the decree which is binding against the widow and not in spite of the decree, if he desires to maintain his possession against the reversioners. (*Lindsay, J.*) JAGANNATH SINGH *v.* SADAR SINGH. **75 I.C. 614 = A.I.R. 1923 All. 448.**

———*Limited owner—Tacking--Hindu widow—Reversioner if bound.*

Adverse possession against the widow is not adverse against the reversioners during the lifetime of the widow. (*Scott-Smith and Dundas, JJ.*) NAND SINGH *v.* MT. DHAN KAUR. **68 I.C. 299 = 2 L.L.J. 573.**

———*Limited owner—Vendor having vested right but entitled to possession after the death of a widow having a right of residence—Widow's possession cannot be adverse to the purchaser.*

The doctrine of adverse possession is applied to the detriment of a person who is entitled to possession, but is not in possession ; it cannot be applied as against a person not competent to claim possession. 44 Cal. 425 and 10 W. R. 15, Ref. Possession, when adverse, in order that it may extinguish title, must be adequate in continuity, in publicity and in extent. But it does not follow conversely that every possession which is continuous and public is necessarily adverse. A. I. R. 1923 P. C. 118, Ref. Where the plaintiff took a vested interest subject to the right of residence granted in favour of his mother by his father's will. *Held*, that he had no immediate right of possession which remained with his mother during her lifetime and, therefore, the purchaser of the right, title and interest of the plaintiff was in no better position and, therefore, the mother's possession cannot be adverse to the purchaser. (*Mookerjee and Rankin, JJ.*) AMBIKA PROSAD *v.* ANNADA PROSAD. **A. I. R. 1928 Cal. 250.**

Minor.

——*Minor*—De facto *guardian in possession of minor's property—His possession is not adverse.*

A person who is either an actual legal guardian, or who takes upon himself the guardianship of a minor cannot be heard to say that his possession must be taken to be adverse to the minor. 35 Bom. 79, Foll.; A. I. R. 1922 Mad. 12, Eexpl. and Dist. (*Kumaraswami Sastri and Reilly, JJ.*) MAHALAKSHMAMMA *v.* SURYANARAYANA. **51 Mad. 977 = 28 M. L. W. 919 = 117 I. C. 113 = A. I. R. 1928 Mad. 1113 = 55 M. L. J. 733.**

Mortgagor and mortgagee.

——*Mortgagor and mortgagee.*

Mere continuance in possession of the mortgagee after the mortgage money is paid out of the usufruct or by the mortgagor, does not make that possession of the mortgagee adverse to the mortgagor. 21 A. 115; 7 A. L.J. 963; 34 A. 261, Foll.; 25 I.C. 611, Dist. (*Neave, J.*) GOBIND RAM *v.* MT. RAN KOER. **83 I. C. 740 = 5 L. R. A. (Civ.) 421 = A. I. R. 1924 All. 522.**

——*Mortgagor and mortgagee.*

The defendants, successors of the mortgagee, who had somehow obtained possession of the mortgaged plot under a usufructuary mortgage, got their names entered in the revenue papers, as if they were occupancy tenants of the disputed land and set up their title by adverse possession. *Held*, no such possession, short of the statutory period of sixty years, would be a bar or defence to a suit for redemption, if the parties were otherwise entitled to redeem. If they (defendants) obtain unlawful possession by ousting the mortgagees at any time within the last twelve years or before, still their possession cannot be treated as adverse to the owner (mortgagor) so as to defeat his lawful title, because the right of the mortgagor to get possession could only arise on redemption and not earlier. 32 Cal. 296 (P. C.); 38 All. 411, Foll. (*Kanhaiya Lal, J.*) MT. DURGA DEVI *v.* GIRWAR SINGH. **70 I. C. 958 = A. I. R. 1923 All. 11 (2).**

——*Mortgagor and mortgagee.*

During mortgagee's possession under mortgage from tenant, landlords' forcible possession or mortgagee's collusive tenancy under the landlord, does not amount to adverse possession. Where mortgagees were in possession the dispossession of the mortgagees by the landlord even assuming that it was done against their will, cannot by itself operate as adverse possession as against the mortgagors during the continuance of the mortgage. The mortgagees cannot also by suffering dispossession and taking a new title from the landlord affect the right of the mortgagors in the property of which they were put into possession under the mortgage. (*Walmsley and B. B. Ghose, JJ.*) KAMALA KANTA *v.* ANANDA CHANDRA CHAKRABURTY. **71 I. C. 1030 = A. I. R. 1924 Cal. 357.**

——*Mortgagor and mortgagee.*

Contract of sale alone in favour of usufructuary mortgagee does not change the character of the possession of the mortgagee into adverse possession. (*Kendall and Pullan, A.J.Cs.*) SITLA SAHAI *v.* DHUM SINGH. **28 O. C. 100 = 82 I. C. 406 = 11 O. L. J. 543 = A. I. R. 1925 Oudh 114.**

——*Mortgagor and mortgagee—Adverse possession against mortgagee is not necessarily adverse to mortgagor.*

Adverse possession can be acquired over limited rights such as those of a mortgagee also, but adverse possession against mortgagee would not of necessity be adverse to the mortgagor. (*Ryves and Gokul Prasad, JJ.*) ABDULLA *v.* SHAMS-UL-HAQ. **43 All. 127 =**

18 A. L. J. 969 = 58 I. C. 833 = A. I. R. 1921 All. 262.

——*Mortgagor and mortgagee—Adverse possession against mortgagor is not adverse to mortgagee.*

Adverse possession against the mortgagor would not operate to the prejudice of the mortgagee. The mortgage being simple, a trespasser's adverse possession which commences after the date of the hypothecation is not a bar to the mortgagee's right to recover the land. 48 Cal. 425; 39 M. 811, Foll. (*Ayling and Venkata Subba Rao, JJ.*) SUNDARAM IYER *v.* THIYAGARAJA PILLAI. **99 I. C. 831 = A. I. R. 1923 Mad. 160 (2) = 50 M. L. J. 183.**

——*Mortgagor and mortgagee—No adverse possession by unilateral act of mortgagee still both can agree that mortgagee's possession should be adverse to mortgagor.*

Although a mortgagee cannot by any unilateral act on his part convert his possession as mortgagee into possession as absolute owner, there is nothing to prevent a mortgagor and the mortgagee from agreeing between themselves that the future possession of the mortgagee should be adverse to the mortgagor and thereafter if the said possession endures for the statutory period a good title is acquired by the mortgagee. 37 Mad. 545, Foll.; A. I. R. 1914 P. C. 27; 32 Cal. 295, 312; 39 All. 423 and A. I. R. 1921 Mad. 82, Ref. (*Patkar and Baker, JJ.*) AHEMED BHOUDDIN *v.* BABU DEVJI ZAJAM. **53 Bom. 676 = 31 Bom. L.R. 778 = 122 I.C. 113 = A. I. R. 1930 Bom. 135.**

——*Mortgagor and mortgagee—Assertion of title by mortgagee is not sufficient.*

A mortgagee cannot by mere assertion of title start possession adverse to the mortgagor or the mortgagor's heirs: 32 Cal. 296 (P. C.) and 89 P. W. R. 1918, Dist. (*Broadway and Fforde, JJ.*) JIWAN SINGH *v.* GHASITA. **8 L. L. J. 277 = 27 P. L. R. 402 = 95 I. C. 9 = A. I. R. 1926 Lah. 549.**

——*Mortgagor and mortgagee—Claim as against each other.*

As between mortgagor and mortgagee, no question of adverse possession arises, during the period with which either of them can enforce their rights and no acquiescence by the mortgagor not amounting to release of the equity of redemption can be a bar or defence to a redemption suit if the party is otherwise entitled to redeem. (*Stuart and Kanhaiya Lal, A. J. Cs.*) TILAK SINGH *v.* SHAMBHU SINGH. **7 O. L. J. 524 = 23 O.C. 269 = 60 I. C. 404 = 2 U. P. L. R. (J. C.) 163.**

——*Mortgagor and mortgagee—Co-mortgagee purchasing share of another co-mortgagee—His possession cannot be adverse to mortgagor.*

Where the mortgage is an indivisible transaction according to its terms, any one of the co-mortgagees cannot obtain adverse possession of a particular share in it by lapse of time. The mortgagor could only redeem the whole of the mortgage by a payment of the whole of the mortgage money irrespective of the shares of the co-mortgagee *inter se*, the money contributed by each being not stated in the deed. A co-mortgagee takes the place of each co-mortgagee whom he pays off; he does so as a co-mortgagee and thus his possession in his place is that of a mortgagee only and not in any other capacity. (*Broadway and Zafar Ali, JJ.*) SHUJAUDDIN KHAN *v.* SHER MUHAMMAD KHAN. **73 I. C. 475 = A. I. R. 1923 Lah. 366.**

——*Mortgagor and mortgagee—Decree of Court that mortgage debt satisfied—Subsequent possession of mortgagee is adverse.*

A decree of a Court pronouncing a mortgage debt to be satisfied is equivalent to declaration that the relations of mortgagee and mortgagor have ceased and renders subsequent possession of the mortgagee adverse to the mortgagor. (*Ayling, O. C. J. and Odgers, J.*) OMAYURUPAGAM MUTT *v.* SIVASOORIA THEVAN. **70 I. C. 33 = 16 M. L. W. 475 = 1921 M. W. N. 876 = A. I. R. 1922 Mad. 407 = 42 M. L. J. 144.**

——*Mortgagor and mortgagee—During continuance of equity of redemption mortgagee can't claim prescriptive title.*

A mortgagee is not in a position to deny the right of the mortgagors or their successors-in-interest to redeem the mortgage so long as the equity of redemption subsists. A person who lawfully comes into possession of land as a mortgagee cannot by setting up during the continuance of such relation any title adverse to that of the mortgagor inconsistent with the real legal relation between them, and that however notoriously and to the knowledge of the other party, acquire by the operation of the law of adverse possession a title as owner or any other title inconsistent with that under which he was let into possession. (25 Mad. 507 ; 38 All. 411 and 32 Cal. 296, Foll. (*Sulaiman and Kanhaiya Lal, JJ.*) BAKHA SINGH *v.* RAM NARAIN SINGH. **47 All. 73 = 22 A.L.J. 905 = L. R. 5 A. (Civ.) 681 = 80 I. C. 935 = A. I. R. 1925 All. 133.**

——*Mortgagor and Mortgagee—Equity of redemption can be acquired by adverse possession.*

Title can be acquired by adverse possession in the equity of redemption. (*Dalal, J. C.*) THAKURAIN ANAPURNA KUAR *v* JAGESHAR MISRA. **87 I. C. 208 = A. I. R. 1925 Oudh 658.**

——*Mortgagor and Mortgagee—Equity of redemption cannot be acquired by adverse possession—Possessory mortgage—Trespasser in possession holds adversely to mortgagee and not mortgagor.*

A possessory title to property can only be acquired by physical possession which ripens into ownership by the failure of the true owner to take steps to recover possession. Though a trespasser by holding possession against the mortgagor can bar the mortgagor's right to redeem, it cannot be said that an equity of redemption can be acquired by adverse possession of the mortgaged property. In the case of a possessory mortgage where possession has been delivered to the mortgagee, a trespasser obtaining possession may hold adversely to the mortgagee, but not to the mortgagor. 14 Bom. 176 and 18 Bom. 51, Ref. (*Macleod, C. J. and Crump, J.*) TARABAI RAMRAO *v.* DATTARAM GOVINDBHAI. **49 Bom. 539 = 27 Bom. L. R. 441 = 87 I. C. 765 = A. I. R. 1925 Bom. 465.**

——*Mortgagor and mortgagee—Exclusive possession of mortgagee short of 60 years does not bar suit for redemption.*

As between mortgagor and mortgagee neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redemption. 32 All. 296 (P.C.), Foll. (*Wazir Hasan and Gokaran Nath Misra, JJ.*) ACHCHE MIRZA *v.* AHMED SHAH. **1 Luck. 529 = 97 I.C. 922 = 3 O. W. N. 693 = A. I. R. 1926 Oudh 594 (600).**

——*Mortgagor and mortgagee—Neither exclusive possession by mortgagee short of statutory period, nor acquiescence by mortgagor not amounting to release can constitute adverse possession by mortgagee.*

As between a mortgagor and his mortgagee, neither can deny the title of the other for the purposes of the mortgage. A mortgagor cannot derogate from his grant so as to defeat his mortgagee's title, nor can the mortgagee deny the title of the mortgagor to mortgage the property. A. I. R. 1924 Oudh 40, Dist.; 36 Bom. 185, Rel. on. As between the mortgagor and the mortgagee or their representatives, neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption, can constitute adverse possession or will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem. 15 O. C. 39, Rel. on. No question of adverse possession can arise as between mortgagors and mortgagees during the periods of limitation within which either of them can enforce their rights. 23 O. C. 269, Ref. (*Raza, J.*) NIRANKER PRASAD *v.* MT. BECHAI. **95 I.C. 849 = A.I R. 1926 Oudh 517.**

——*Mortgagor and mortgagee—Neither exclusive possession for any length nor acquiescence not amounting to release is bar to suit for redemption.*

As between the mortgagor and the mortgagee neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption, will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem. 32 Cal. 296, Foll. (*Stuart, C. J. and Wazir Hasan, J.*) BAJRANG BALI *v.* MT. MAHRAJIA. **13 O. L. J. 333 = 92 I. C. 832 = A. I. R. 1926 Oudh 491.**

——*Mortgagor and mortgage—Holdinge mortgaged—Two-thirds subsequently sold to another with condition to discharge the prior mortgage—Mortgagee claiming pre-emption of portion sold and getting possession—Remaining one-third not redeemed for more than 12 years—Mortgagee gets that one-third by adverse possession.*

G mortgaged certain lands to defendants. He subsequently sold two-thirds to one *M* for Rs. 500 out of which he received Rs. 100 and the remaining Rs. 400 was to be paid to defendants to redeem the mortgage. If the mortgage had been redeemed, *M* would have got possession of two-thirds of half the share free from mortgage and *G* would have got the remaining one-third of that half quite unencumbered. But Defendants Nos. 1 and 2 brought a suit for possession by pre-emption of the share sold to *M* and the latter admitted their claim and gave up his rights under the sale on receiving Rs. 100. *G* then became entitled to obtain possession of the one-third of the holding from the Defendants Nos, 1 and 2, but he never took any steps to do so, and the defendants remained in possession of the entire holding, for more than 12 years. A suit for redemption was brought.

Held, that the mortgage was redeemed when defendants got possession in pursuance of claim for pre-emption and that from that date Defendants Nos. 1 and 2 were in possession of two-thirds as owners and of the remaining one-third without any title. Their possession of the latter portion was adverse to the owner and it had ripened into title by lapse of more than 12 years. The fact that in the revenue records defendants were still shown as mortgagees did not affect their title. (*Zafar Ali, J.*) KHUSHALA *v.* BISHAN DAS. **26 P. L. R. 544 = 88 I. C. 476 = A. I. R. 1925 Lah. 616.**

——*Mortgagor and mortgagee — Mortgage with possession—Invalid sale of the property to the mortgagee—Latter's possession becomes adverse to mortgagor for sale.*

Where subsequent to a mortgage with possession the mortgaged property is sold to the mortgagee, although the value of the property covered by the sale may be less than Rs. 100 a registered deed is essential as the property transferred is only the right of redemption which is intangible immovable property. Where the transfer is purported to be made by an unregistered deed, no sale is effected but the character of possession by the mortgagee becomes adverse to the mortgagor. (*Lindsay, J.C.*) MAHENDRA BAHADUR SINGH *v.* CHANDRAPAL SINGH. **24 O. C. 155 = 8 O. L. J. 622 = 63 I. C. 284 = A. I. R. 1921 Oudh 124 (2).**

——*Mortgagor and mortgagee—Mortgage with possession redeemed—Mortgagee failing to deliver possession and retaining it for twelve years—Right of mortgagor to recover possession is barred.*

A usufructuary mortgagee remaining in possession after satisfaction of the mortgage by redemption is a trespasser and if he continues in such possession for the statutory period the right of the mortgagor to recover possession becomes barred as against him. (*Mears, C. J. and Lindsay, J.*) MT. RAM KUER *v.* GOVIND RAM. **48 All. 145 = 92 I. C. 414 = A. I. R. 1926 All. 62.**

——*Mortgagor and mortgagee—Two mortgages with possession of same land executed in 1870 and 1871—Court finding that first mortgage was not acted upon, but that first mortgagee was recorded as owner ever since 1887—Mortgagor suing first mortgagee for redemption—His right to redeem would not be defeated by adverse possession although his mortgage was not acted upon and he got possession from second mortgagee.*

Certain land was mortgaged with possession first in 1870 and again in 1871. It was found that the first mortgage was not acted upon but that the first mortgagee was recorded as owner in 1887 and continued to be so recorded ever since. Mortgagor sued the first mortgagee for redemption and it was contended in defence that the mortgagor's right to redeem was defeated by more than 12 years' adverse possession.

Held, that the mortgagor's right to redeem could not be defeated. If the first mortgage was not acted upon, the first mortgagee must have taken possession from the second mortgagee and that also either by redeeming the second mortgage or as trespasser. If the former, his possession could by no means be adverse against the mortgagor. If the latter, the mere fact that he was recorded as owner would not confer title on him, bearing in mind the fact that he, by his mortgage of 1870, had admitted the title of mortgagor to the land. (*Dalip Singh, J.*) RAHMAT ALLAH *v.* MT. MUBARAK BIBI. **A. I. R. 1929 Lah. 691.**

——*Mortgagor and Mortgagee—Mortgage—Redemption—Mortgagee continuing in possession of property as mortgagee does not acquire title by adverse possession.*

A manager of joint Hindu family executed a mortgage with possession. One of the members subsequently sold the property to the mortgagee who continued to remain in possession for 12 years from the date of the invalid sale.

Held, that the mortgagee did not acquire any title by adverse possession. The possession of the mortgagee must be held to have continued in the same character in which it admittedly began in absence of evidence to show that it had changed in its character. As between the mortgagor and mortgagee neither exclusive possession by the mortgagee for any length of time short of the statutory period of 60 years nor any acquiescence by the mortgagor not amounting to a release of equity of redemption will be a bar or defence to suit for redemption, if the parties are otherwise entitled to redeem, 32 Cal. 296 (P. C.), Rel. on. (*Wazir Hasan, Ag. C. J. and Pullan, J.*) MT. GUJRATI KUNWAR *v.* BHAGWATIDIN SINGH. **118 I. C. 808 = A. I. R. 1930 Oudh 17.**

——*Mortgagor and mortgagee—If mortgaged property is sold to mortgagee by mortgagor, former can make his possession adverse even though sale is void.*

It is true that a mortgagee cannot make his possession adverse by a mere assertion of title, but where the mortgaged property is sold to him he can do so even though the sale is void as such sale can be taken into consideration for determining the nature of the possession held by the mortgagee. A. I. R. 1921 Mad. 82; A. I. R. 1919 P. C. 44; A. I. R. 1923 Lah. 495; and A. I. R. 1922 Oudh 7, Ref. (*Bhide, J.*) PREMDAS *v.* SARBALAND. **120 I. C. 481 = A. I. R. 1930 Lah. 71.**

——*Mortgagor and mortgagee—Mortgaged property purchased by usufructuary mortgagee—No delivery necessary—Even if necessary possession becomes adverse.*

Where a usufructuary mortgagee purchases the property in lieu of the debt, actual delivery is not necessary and even if it is necessary, the vendee's possession from the moment of sale is adverse to the vendor. (*Ramesam and Odgers, JJ.*) DAWOOD SAHEB *v.* MOIDEEN BATCHA SAHEB. **87 I. C. 331 = 21 M. L. W. 327 = A. I. R. 1925 Mad. 566 = 48 M. L. J. 264.**

——*Mortgagor and mortgagee—Whether a mortgagee has acquired title in mortgaged property is dependent on facts of each case.*

It would be going too far to say that in no possible case can a mortgagee set up an adverse title to the mortgaged property. It is to be decided on the facts of each case whether or not the circumstances established an adverse title. 232 P.L. R. 1911, Rel. on. (*Broadway and Moti Sagar, JJ.*) QADAR BAKSH *v.* MANGHA MAL. **4 Lah. 249 = 5 Lah. L.J. 175 = 5 Lah. L.J. 555 = 73 I.C. 889 = A. I. R. 1923 Lah. 495.**

——*Mortgagor and mortgagee—Mortgagee cannot acquire.*

A mortgagee cannot acquire a title by adverse possession against his mortgagor. (*Ross and Macpherson, JJ.*) DINANATH RAI *v.* RAMA RAI. **6 Pat. 102 = 1926 P. H. C. C. 286 = 97 I.C. 348 = A. I. R. 1926 P. 512.**

——*Mortgagor and mortgagee—Mortgagee being purchaser:*

Character of possession of a usufructuary mortgagee under a void mortgage is altered when the same property is sold to him by the same mortgagor. (*Wallace, J.*) AIYISA BIVI AMMAL *v.* KALANDARSA RAWTHER. **80 I. C. 561 = 34 M. L. T. 247 = A. I. R. 1924 Mad. 720 = 46 M. L. J. 501.**

——*Mortgagor and mortgagee—Mortgagee buying equity of redemption from one co-mortgagor cannot prescribe against the others.*

The mortgagees cannot rely on the 12 years' rule of limitation in support of a plea of adverse possession unless he can prove a subsequent valid sale of the equity of redemption. Sale of the whole property by only one co-mortgagor is not a valid sale as regards his co-mortgagors. (*Scott-Smith, J.*) AMIR *v.* NADIR ALI. **68 I. C. 733 = A. I. R. 1923 Lah. 74 (1).**

——*Mortgagor and mortgagee—Mortgagee cannot prescribe against mortgagor.*

A mortgagee cannot, during the continuance of the mortgage, be allowed to set up any title of adverse possession against the mortgagor. (*Chevis, J.*) ZORA *v.* CHANDU. **68 I. C. 883 = A. I. R. 1923 Lah. 71 (2).**

——*Mortgagor and mortgagee—Mortgagee does not derive a title by adverse possession on the strength of a void sale by mortgagor—Absolute title should be acquired in order to bar the remedy of mortgagor.*

If a mortgagee is in possession of the mortgaged property, he does not convert such possession into a possession adverse to the mortgagor by the mere fact of a void sale in his favour and the adverse possession does not commence from the date of such a sale. 34 All. 213 (P.C.). Expl. (*Jai Lal, J.*) DIN MAHOMED *v.* SOFDAR ALI. **113 I. C. 540 = A. I. R 1929 Lah. 30.**

——*Mortgagor and mortgagee — Mortgagee getting name entered in Revenue Records does not get title.*

Where the right to possession and the actual possession is with the mortgagee there can be no adverse possession of the equity of redemption. The mere fact that he succeeds in getting his name recorded in the Revenue Registers does not confer a title on him. (*Scott-Smith and Abdul Raoof, JJ.*) SHAH NAWAZ *v.* AHMAD. **1 Lah. 549 = 59 I. C. 478 = 2 Lah. L. J. 583.**

——*Mortgagor and mortgagee—Mortgagee not entitled to possession is not affected by acquisition of title by adverse possession against mortgagor.*

When after a simple mortgage has been granted, a third person commences to acquire title by adverse possession against the mortgagor, the period of adverse possession against the mortgagor cannot operate against the mortgagee while he is not entitled to possession. Adverse possession operates against a mortgagee only when the mortgagee is entitled to possession and time runs against him from the date when he is entitled to enter upon the land. But in the case of the grant of a mortgage by a person previously dispossessed the adverse possession which had commenced to operate against the mortgagor would not, by the grant of the mortgage, be arrested but would operate equally against the mortgagee. 5 A. 1 (P. C.); 39 M. 811 (F.B.); 44 Cal. 425; 23 M. 37 and 4 W. R. (P.C.) 37, Rel. on. (*Adami, J.*) KUNJ LAL *v.* KANHAI MAHTO. **68 I C. 641 = A.I.R. 1923 Pat. 305**

——*Mortgagor and mortgagee—Mortgagee's possession after mortgage debt is paid is not necessarily adverse—Question is one of intention.*

Possession of mortgagee continuing in possession after satisfaction of debt is not necessarily adverse. It is not the law that simply because a mortgage debt has been satisfied and the mortgagee continues in possession, his possession becomes adverse from the point of time of satisfaction of the mortgage debt. 34 All. 261, Rel. on.

The question whether the possession of the mortgagee after the mortgage debt has been satisfied is adverse to the mortgagor or not, is always a question of animus or intention of the parties concerned. (*Suhrawardy and Mukerji, JJ.*) KESHAB LAL *v.* BHOLANATH. **94 I. C. 342 = A. I. R. 1926 Cal. 910.**

——*Mortgagor and mortgagee—Mortgagee's possession after payment of mortgage money is not adverse.*

Mere payment of mortgage money without more does not amount to adverse possession by the mortgagee after the date of payment. (*Jack and Mitter, JJ.*) HARASIT GOLDER *v.* JALADHAR BISWAS. **56 Cal. 1130 = 121 I. C. 407 = 33 C. W. N. 963 = A. I. R. 1930 Cal. 15.**

——*Mortgagor and mortgagee—Mortgagee in possession—Trespass against mortgagor's interest must be known to mortgagor.*

A mortgagee in possession of property is bound to preserve the right, title and interest of the mortgagor and to prevent any invasion of that right by a stranger. The mortgagor having put the mortgagee in his stead in the possession of the property enjoys immunity and believes that so far as his possession is concerned his interest will be protected by the mortgagee. Therefore, if the mortgagee has either by neglect or in collusion allowed any other person to come into possession of the property there will be no invasion of the rights of the mortgagor and when the time for redemption arrives he will be entitled to treat the stranger as a trespasser, and the stranger's right by adverse possession will not commence against the mortgagor unless and until the mortgagor had exercised his right of redemption and had redeemed the property. This is the case of a complete possession where no right of possession is exercised by the mortgagor. There may, however, be cases where the mortgagor and the mortgagee are both in possession of the property in accordance with the arrangements arrived at by them, and set forth in the covenant in the bond. In such a case the application of the above principle will also be varied; but the principle will apply to that portion of the usufruct which is supposed to be in possession of the mortgagee. It may be that in some cases the mortgagor may himself be realising from the tenants that portion of the rents and profits which represents the *hakajri*; but that does not affect the principle though it may be only a question of what amount of evidence will be necessary to prove adverse possession in a stranger. Therefore when *hakajri* or rents and profits are reserved by the mortgage and are payable to the mortgagor there is no reason why the principle of adverse possession should not apply, though in order to take advantage of adverse possession it must satisfy all the usual conditions required for adverse possession. A mere non-payment of the *hakajri* or forbearance to realise it for any length of time would not create any adverse possession nor a mere payment of the same to a stranger by duress, force or compulsion, unless such payment is made with the knowledge of the mortgagor that it was being paid against his interest. (*Jwala Prasad and Ross, JJ.*) BINANAND SAWASE *v.* THUROO. MAHTO. **4 P. L. T. 659 = 1923 P. H C. C. 249 = 76 I.C. 277 = A.I.R. 1923 Pat. 592 (596.).**

——*Mortgagor and mortgagee—Mortgagee taking possession of mortgaged property does not hold it adversely—Transfer of Property Act, S. 76.*

When a mortgagee takes physical possession of the mortgaged property, rightly or wrongly, with or without or even against the consent of the mortgagor, his act will not be allowed to limit the right of redemption, as the law will treat his possession as that of a mortgagee; 46 I. C. 872 Ref. (*Raymond, A.J.C.*) SULLIMAN HASHIM *v.* ERSO. **20 S. L. R. 277 = 91 I. C. 87 = A.I.R. 1926 Sind 145 (148).**

——*Mortgagor and mortgagee—Mortgagee purchasing from one mortgagor—Possession of, is adverse to the co-mortgagors.*

From the date one of the mortgagors sells the mortgaged property to the mortgagee his possession becomes adverse to the co-mortgagor. (*Daniels and Dalal, A.J.Cs.*) JANIKI SHAH *v.* S. MOHAMED ABBAS. **25 O. C. 245 = 70 I. C. 983 = A. I. R. 1923 Oudh 50 (2).**

——*Mortgagor and mortgagee—Mortgagee's right to mortgaged property is not defeated by subsequent adverse possession of third person and decree obtained by mortgagee is binding on that party.*

If the mortgagor was in possession on the date of the execution of the mortgage, any party who acquires title to the mortgaged property by subsequent adverse possession will be bound by the mortgage and the decree obtained on the mortgage would give the mortgagee a title as against that party. (*Das and Kulwant Sahay, JJ.*) MOHAN BHAKAT *v.* JAGDAYAN PANDEY. **A. I. R. 1929 Pat. 577 (2).**

——*Mortgagor and mortgagee—Mortgagee found in possession as ostensible owner—Mortgagor must prove subsisting title.*

Where the heirs of an occupancy tenant sought to redeem property mortgaged with the landlord long before the date of the suit and it was found that the defendants were holding as ostensible owners for a number of years.

Held, that the mortgagors, in order to succeed, must prove subsisting title to the property.

Held, further that it was immaterial when the defendants' possession became adverse. 71 P. R. 1900, Ref. (*Moti Sagar, J.*) AHMED KHAN *v.* MUZAFFAR KHAN.
89 I.C. 788 = A. I. R. 1925 Lah. 632.

——*Mortgagor and mortgagee—Mortgagee taking possession as owner can obtain title by adverse possession.*

Where the mortgagee is not entitled to possession under the deed as mortgagee and actually takes possession claiming to be owner, his possession is not that of a mortgagee, but of a trespasser and he can obtain an indefeasible title by adverse possession for over 12 years. 232 P. L. R. 1911 ; A. I. R. 1923 Lah. 495 ; A. I. R. 1925 Lah. 53, Foll ; 65 P. R. 1908, Dist. (*Addison, J.*) JAWAHAR *v.* AMAR CHAND. **93 I. C. 934 = 8 Lah. L. J. 152 = 27 P. L. R. 235.**

——*Mortgagor and mortgagee—Against mortgagors can be adverse where there are rival mortgagors.*

The possession of a mortgagee is not adverse to his mortgagor but where there are rival mortgagors the possession of their respective mortgagees is adverse against the other mortgagors. (*Kendal, A. J C.*) RAM CHHOR BAKSH *v.* RAM SURAT. **80 I. C. 582 = A. I. R. 1925 Oudh. 182.**

——*Mortgagor and mortgagee—Is possible against mortgagor even when mortgage is with possession.*

Where the land was mortgaged with possession to a certain person, and that person was ousted from possession by another who remained in possession of the said land and dealt with it as his own for more than 12 years, *held* a suit for redemption brought by the mortgagor or his legal heirs, would not fall under Art. 148, but would be governed by Art. 144 of the Limitation Act, and would fail if the person in possession succeeded in proving that his possession was adverse to the mortgagor for more than 12 years prior to the suit. 18 B. 51, Foll. (*Dalal and Simpson, A. J. Cs.*) JAI GOVIND SINGH *v.* ABHAI RAJ SINGH. **26 O. C. 308 = 10 O.L.J. 216 = 77 I.C. 125 = A. I. R. 1924 Oudh 40.**

——*Mortgagor and mortgagee—Mortgagor relinquishing equity in mortgagee's favour—Mortgagee's possession becomes adverse.*

An agreement to relinquish the equity of redemption in favour of mortgagee, though not binding, if not properly evidenced by document, will start adverse possession against the mortgagors. A.I.R. 1922 Oudh 7, Ref. (*Dalal, J.C.*) IBAD ALI *v.* DWARKA.
90 I. C. 736 = A. I. R. 1926 Oudh 145.

——*Mortgagor and mortgagee — Mortgagor relinquishing equity of redemption in mortgagee's favour by unregistered sale-deed—Mortgagee's possession from that date is as absolute owner ripening into full ownership by lapse of 12 years.*

Section 60 expressly enacts that mortgagors have got the right to redeem unless such right has been extinguished by act of the parties, or by order of a Court. It is thus clear that such a right could be extinguished by act of the parties subsequent to the mortgage. If the subsequent acts are evidenced by proper documents, then the equity of redemption would be affected directly on the execution of these documents. If, however, the documents are inadmissible, for want of registration, or in case the subsequent transaction between the mortgagor and the mortgagee be not evidenced by any writing at all, but simply be oral, then the result would be that the mortgagor's equity of redemption would not be put an end to at once but the subsequent possession on the part of the mortgagee would not be that of a mortgagee but that of an absolute owner. As against parties entering into such transactions the mortgagee would acquire an absolute title to the property after the expiry of 12 years from the date of those transactions. 37 Mad. 545, Rel. on. (*Jackson and Ananthakrishna Ayyar, JJ.*) KANDASWAMI MUDALIAR *v.* PONNUSWAMI MUDALIAR.
109 I. C. 795 = A. I. R. 1929 Mad. 16.

——*Mortgagor and mortgagee—Mutation of names.*

A mortgagee is not entitled to have acquired ownership of the equity of redemption by adverse possession on the ground that his name was mutated in the Revenue Register when it is not shown that he had any manner of possession actual or constructive. 34 I C. 171, Foll. (*Scott-Smith and Abdul Raoof, JJ.*) SHAH NAWAZ *v.* SHEIKH AHMAD. **1 Lah. 549 = 59 I. C. 478 = 2 Lah. L. J. 583.**

——*Mortgagor and mortgagee—Mutation of mortgagee's name as proprietor does not constitute.*

A mere mutation entry of the mortgagee as proprietor cannot convert his possession as mortgagee into adverse possession. (*Daniels and Neave, JJ.*) RAM GANESH RAI *v.* B. RUP NARAIN RAI. **80 I. C. 944 = 5 L. R. A. Civ. 542 = A. I. R. 1925 All. 34.**

——*Mortgagor and mortgagee—Occupancy holding—Mortgage of, is invalid—Continuance of possession for more than 12 years— Mortgagee prescribes a title as usufructuary mortgagee—Possession is not adverse to mortgagor—Mortgagor can recover possession only by a redemption suit.*

A mortgage of an occupancy holding is not permitted by law, but by entering into possession as mortgagees of the holding and by continuing in such possession for more than 12 years, the mortgagees can only prescribe a title for the limited interest of a usufructuary mortgagee but his possession is not adverse to the mortgagor, and if the mortgagor brings a suit for possession of the holding against the mortgagee within 12 years from the date of the execution of the mortgage the plaintiff can claim an unconditional decree for possession on the ground that the mortgage being of an occupancy holding is void in law; but by the continuance of the defendants' possession for more than 12 years as usufructuary mortgagees there came into existence a legally operative mortgage which the plaintiffs must redeem as a condition precedent to a decree for possession of the holding. (*Iqbal Ahmed, J.*) MAHA MANGAL RAI *v.* KISHUN KANDU. **100 I. C. 346 = A. I. R. 1927 All. 311.**

——*Mortgagor and mortgagee—Oral sale of mortgaged property to usufructuary mortgagee authorising him to hold the property as owner—Altered nature of possession gives rise to a right of prescription to mortgagee.*

A mortgagee cannot by his own assertions of adverse holding acquire a title by prescription, even if the mortgagor knowing of such an assertion, acquiesced in it, unless such acquiescence amounts in some way or other to a release of the mortgage right. But an arrangement with a usufructuary mortgagee by which the mortgagor has attempted to sell the property to the mortgagee and has agreed that the mortgagee should hold possession of the property as a real owner thereafter changes the character of the possession and enables the mortgagee to rely upon that possession for obtaining a title by prescription under Art. 144 of the Limitation Act. A. S. No. 40 of 1913, Dissented from and 37 Mad. 545, Foll.; 32 Cal. 296 (P. C.), Expl. (*Napier and Krishnan, JJ.*) MUSIGADU *v.* M. GOPALA REDDY. **63 I. C. 215 = 13 M. L. W. 400 = 1921 M. W. N. 251 = A. I. R. 1921 Mad. 213.**

——*Mortgagor and mortgagee—Possession of mortgagee after discharge of debt is not necessarily adverse.*

Even if a mortgage debt stands discharged, it does not necessarily follow that from that moment the possession of the mortgagee is adverse. (*Sulaiman, J*). MT. BETI BAI *v.* TANTYA SINGH.

6 L R. A. (Civ). 496 = 89 I. C. 574 = A. I. R. 1926 All. 136 (2) at 138.

——*Mortgagor and mortgagee — Possession under colour of invalid mortgage-deed — Possession is not adverse.*

Where the mortgagee is in possession of land under colour of an invalid mortgage deed, his possession is with the permission of the mortgagor and is not adverse. A. I. R. 1923 All. 191. Foll. (*Kendall, J.*) MT. RAJ RANI *v.* GULAB AND ANOTHER.

9 L. R. A. (Rev.) 212 = 117 I. C. 831 = A. I. R. 1928 All. 552.

——*Mortgagor and mortgagee—Previous suit for redemption—Compromise not embodied in the decree—Suit dismissed for non-payment of Court-fee—Possession of mortgagor from that date is adverse.*

The effect of compromise application, even though invalid for want of registration, was to make the possession of the mortgagor, adverse from that date. (*Daniels and Lyle, A. J. Cs.*) **25 O. C. 115 = 67 I.C. 572 = 9 O. L. J. 173 = A. I. R. 1922 Oudh 7.**

——*Mortgagor and mortgagee—Purchaser of equity under invalid sale prematurely redeeming property—He cannot claim to hold adversely against mortgagor.*

Where a mortgagee is let into possession, his position is to some extent that of a trustee and he is bound to protect the interests of the mortgagor and to prevent any invasion of his rights by a stranger. If the mortgagee by neglect or collusion allows any person to come into possession of the property, for instance a purchaser of equity of redemption under an invalid sale, there will be no invasion of the rights of the mortgagor and when the time for redemption comes, he will be entitled to treat the stranger as a trespasser and the stranger's right by adverse possession against the mortgagor will not commence unless and until the mortgagor had sought to exercise the right of redemption and redeemed the property. A. I. R. 1923 Pat. 592, Foll.

A mortgaged his property for a fixed term of 18 years. Subsequently after *A's* death and during the minority of his son, *B* acting as guardian sold the property to *C* who under a mutual understanding with the mortgagees was allowed to redeem prematurely and was let into possession of the mortgaged property.

Held, that no plea of adverse possession can be successfully raised by *C* against *A's* son on the strength of his possession of the mortgaged property. (124 P. R. 1883, Foll.); The adverse possession, if at all, can be said to commence after the term of 18 years. 4 Cal. 327 and 27 Bom. 43, Rel. on. (*Tek Chand and Agha Haidar, JJ.*) LINDA *v.* MT. ROSHNAI. **10 Lah.L.J. 183 = 113 I. C. 53 = A. I. R. 1928 Lah. 250.**

——*Mortgagor and mortgagee—Simple mortgagee in possession of mortgaged properties under invalid sale—Possession if adverse—Suit for redemption by mortgagor.*

Where a simple mortgagee gets into possession of the mortgaged property by virtue of a sale, but the sale is set aside and the mortgagee is subsequently treated as mortgagee in possession and accountable for the actual realisations made by him, his possession is not adverse to the mortgagor or his assignee so as to bar a suit for redemption brought 12 years after the purchase. (*N. R. Chatterjee and Panton, JJ.*) KALI MAHMUD TALUKDAR *v.* DINA BANDHU DUTT. **62 I. C. 502 (Cal.).**

——*Mortgagor and mortgagee—Transfer of Property Act, S. 75—Possessory mortgage—Adverse possession for more than 12 years of a portion of mortgaged property by a trespasser who also asserts his right to it—Title is indefeasible against both the mortgagee and mortgagor.*

Adverse possession against a mortgagee is generally ineffectual against the mortgagor, especially when it begins at a time when the mortgagee is in possession but when a trespasser takes possession of the mortgaged property and asserts a title which is hostile not only to the mortgagee but which also assails the title of the mortgagor and the mortgagor allows 12 years to elapse, the title of the trespasser will become indefeasible not only against the mortgagee but also against the mortgagor. 6 P. R. 1898 and A. I. R. 1925 Bom. 465, Dist.; *Marquis of Chalmondeley* v. *Lord Clinton*, 22 R. R. 84, Foll. 6 C. W. N. 601, Ref. to. (*Tek Chand, J.*) HANSA *v.* RAMLOK. **107 I. C. 612 = A. I. R. 1928 Lah. 147.**

——*Mortgagor and mortgagee—Usufructuary mortgage becoming void—Possession on its strength is not adverse.*

Possession taken on the strength of an usufructuary mortgage which, being unregistered, is void from the commencement, cannot be said to be adverse. A. I. R. 1924 Nag. 222, Dist. (*Jackson, A. J. C.*) SUKHLAL *v.* BISESAR. **118 I. C. 57 = A. I. R. 1929 Nag. 115.**

Municipality.

——*Municipality—Occasional sweeping is not adverse possession.*

The act of sweeping the land occasionally by the Municipality cannot be said to be adverse possession as against the real owner. (*Phillips, J.*) MUNICIPAL COUNCIL, COCHIN *v.* BAVU DEVUSSI.

22 M.L.W. 671 = 92 I.C. 18 = A.I.R. 1926 Mad. 235.

——*Municipality—Vacant site of plaintiff used by Municipality for deposit of refuse—Such use is not adverse possession against plaintiff.*

Where it was found that the title in one-third of the land was with the plaintiffs, that the plot had been for many years lying unoccupied and that the Municipal Board had been using it for the deposit of refuse,

Held, that this use of the land by the Municipal Board did not amount to adverse possession or to the dispossession of the plaintiffs. (*Daniels, J.*) HAJI MOQBUL HUSAIN *v.* HAFIZ AHMED HUSAIN.

74 I. C. 251 = A. I. R. 1923 All. 557.

Nankar allowance.

——*Nankar allowance—Nankar allowance not received by a person for some years—Right to receive it is not barred by adverse possession—Denial of the right and continuous receipt thereof by the holder must be proved.*

The mere fact that a person has not received his nankar allowance for some years would not destroy his right to the said allowance. It is a recurring right and in order to establish adverse possession in respect of such a right it must be clearly established by cogent evidence that the right to receive the nankar was clearly and openly denied to the claimant's knowledge, and that after such denial, the person setting up adverse possession had been continually in receipt thereof by virtue of such an asserted right. (*Misra and Nanabutty, JJ.*) CHANDRA SHEKHAR SINGH *v.* JAGJIWAN BAKHSH SINGH. **115 I.C. 279 = A.I.R. 1929 Oudh 215 (224).**

Nature of.

——*Nature of.*

An admitted or proved title subsists all through until complete adverse possession is established, 39 Mad. 617, Foll. (*Wazir Hasan, A.J.C.*) INDRAPAL SINGH *v.* THAKUR DIN SINGH. **27 O. C. 77 = 10 O. L. J. 646 = 78 I. C. 895 = A. I. R. 1924 Oudh 266.**

——*Nature of—Occasional acts of trespass do not amount to adverse possession.*

No title by adverse possession can be presumed from a few acts of trespass committed from time to time. (*Dawson Miller, C. J. and Jwala Prasad, J.*) KEDAR NATH GOENKA *v.* AMRIT MANDAL. **88 I. C. 676 = 1925 P.H.C.C. 170 = A. I. R. 1925 Pat. 568.**

——*Nature of— Possession must be continuous.*

Limitation does not continue to run against the rightful owner of land after an intruder has relinquished possession without acquiring title under the Act. Possession so abandoned leaves the rightful owner in the same position in all respects as he was before the intrusion took place. The Act applies not to want of possession by the plaintiff, but to cases where he has been out of and another in, possession for the prescribed time. 29 Cal. 518 (P.C.), Foll. (*Wazir Hasan, A.J.C.*) DURGA *v.* RAM PADARATH. **65 I. C. 749 = 8 O. L. J. 495.**

Neighbours.

——*Neighbours—Vacant site between houses presumably belongs to neighbours.*

Until the contrary is proved, it may generally be presumed, that the open space in a *pole* belongs to the owners of the surrounding houses, and it would be for the owners of the other houses and not the Municipality nor the Government to protest against any obstructions caused by the owner of one house against their common rights. (*Macleod, C. J. and Crump, J.*) THE SECRETARY OF STATE *v.* BHATT LAXMISHANKER. **76 I. C. 591 = A.I. R. 1925 Bom. 27.**

Permissive.

——*Permissive.*

Possession is adverse even if it is not of trespassers. Possession, if not permissive, is adverse. 4 Bom. 89, Rel. on. (*Suhrawardy and Jack, JJ.*) DURGANATH BHATTACHARYA *v.* HARKISHORE CHAKRABARTY. **33 C. W. N. 117 = 119 I. C. 123 = A. I. R. 1929 Cal. 218.**

——*Permissive—Alienee from co-sharer—Possession is not necessarily permissive.*

The possession of an alienee from a co-sharer is not necessarily permissive as regards the other co-sharers. It may amount to adverse possession. (*Coutts and Ross, JJ.*) NEKARI BALL *v.* LAKSHMI KANTHA. **A. I. R. 1922 Pat. 33.**

——*Permissive—Contract Act, S. 201—Dismissed agent's possession is not permissive.*

Where a dismissed agent continues to be in possession of his principal's house, his possession cannot be said to be that of an agent and consequently is not of a permissive character. A. I. R. 1926 Nag. 286, Dist. (*Kolhatkar, A.J.C.*) SHRIRAM *v.* SAMIRMAL. **24 N. L. R. 148 = 111 I. C. 662 = 29 Cr. L.J. 902 = 11 A. I. Cr. R. 166 = A. I. R. 1928 Nag. 284.**

——*Permissive—Decree-holder purchasing property at auction-sale, judgment-debtor remaining in possession —After purchase judgment-debtor agreeing to pay purchaser certain amount in satisfaction of decree in three years—Judgment-debtor's possession for those three years is not adverse.*

The decree-holder purchased at an auction-sale judgment-debtor's property, but the judgment-debtor remained in actual possession. After auction-purchase judgment-debtor entered into an agreement by which decree-holder agreed to accept a certain sum of money in three years in full satisfaction of the decree and then release the property to the judgment-debtor.

Held, that the possession by the judgment-debtor for those three years was on behalf of and not adverse to the decree-holder. (*Banerji and King, JJ.*) GIRDHARI *v.* JODHA. **114 I. C. 893 = A. I. R. 1929 All. 541.**

——*Permissive—Defendant's possession permissive in the beginning—Plaintiff asserting relation of landlord and tenant and failing—Decree for possession can be given to plaintiff.*

Where the plaintiff's title to the property claimed has been established and also the defendant has been in occupation of that property by permission of the plaintiff, the plaintiff would be entitled to a decree for possession in spite of the fact that he may have failed to establish the contract of tenancy set up by him as the basis of his claim. 25 All. 256 (F. B.), Ref. In such cases the principle of law that possession *prima facie* may be considered adverse cannot apply. (*Misra, J.*) AHMED SHERIF *v.* UMRAO BEG. **13 O. L. J. 536 = 3 O. W. N. 460 = 94 I. C. 779 = A. I. R. 1926 Oudh 353.**

——*Permissive—Family arrangement.*

Where a minor widow claims and retains possession under a family arrangement, her possession is not adverse to the other members of the family, 29 Cal. 664 (P. C.) ; 34 All. 8, Dist. ; 8 All. 644, Foll. (*Stuart and Sulaiman, JJ.*) MT. RADHA DULAIYA *v.* RASHIK LAL. **45 All. 1 = 75 I. C. 14 = 20 A. L. J. 814 = A. I. R. 1923 All. 25.**

——*Permissive—Ghat—Ghatia merely being allowed to use ghat for generations does not entitle him against proprietor.*

The mere fact that a Ghatia has been allowed to use a Ghat for generations does not entitle him to do so against the proprietor of the Ghat. (*Tudball and Rafiq, JJ.*) RAMU GHATIA *v.* HEMANTA KUMARI DEBI. **19 A.L.J. 483 = 63 I. C. 498 = A. I. R. 1921 All. 294.**

——*Permissive—Joint Hindu brothers— Death of one—Possession by widow of survivor is not adverse to reversioners.*

Two Hindu brothers were joint. One died shortly before the other and left a widow, surviving him. The two brothers together had owned certain property. On the death of one of them, with the consent of the other, the name of the widow was recorded with respect to half the share. On the death of the other brother the name of the widow was recorded in respect of the remaining share which stood in his name. The widow continued to be in possession of the entire share till her death. Before her death she made a transfer by way of sale of a half share in favour of another.

Held, that ordinarily a Hindu widow would claim to be in possession in the right of her husband. As there was absolutely nothing before the sale-deed to show that there was any assertion of an adverse title by the widow in herself namely, title adverse to her husband's estate and to the estate that would go to the reversioners, her posssession previous to the sale must be held to be permissive and not adverse to the reversioners. (*Sulaiman and Mukerji, JJ.*) BINDRABAN *v.* RAM NARAIN. **85 I. C. 449 = 6 L.R. A. (Civ.) 127 = A. I. R. 1925 All. 330.**

——*Permissive—Limitation Act, Art. 144—Adverse possession—Temporary user, without objection by owner is not adverse possession.*

The owner of a vacant plot not requiring it for his present use, it was used by his neighbour for more than twelve years without objection. *Held*, that mere user of land for temporary purposes without objection would not amount to an assertion of ownership so as to give title by adverse possession. (*Broadway, J.*) CHANDAN *v.* BHADUR. **35 P. W. R. 1922 = 62 P. L. R. 1922 = 68 I.C. 263 = 4 Lah. L.J. 168 = A.I.R. 1922 Lah. 82.**

Plea of.

——*Plea of, may be raised in appeal for the first time if based on original pleadings.*

Ordinarily the principle holds good that adverse possession should be distinctly raised in the pleadings and should also form the subject-matter of an issue, but a party may be allowed to succeed on a title by adverse possession pleaded for the first time in the Court of appeal if such a case arises on facts stated in the pleadings and the party is not taken by surprise. (*Adami and Sen, JJ.*) MT. BALISA KUER *v.* RAJARAM PANDEY. **5 Pat. 441 = 7 P. L. T. 393 = 1925 P. H. C. C. 343 = 92 I. C. 177 = A. I. R. 1926 Pat. 192.**

Possession.

———*Possession—Claimant must have actual possession as against the person entitled to possession—Real tenant executing a sham kabuliyat in favour of a third person—Actual possession with the real tenant with knowledge of sham kabuliyatdar and continuing in possession as owner—No title by adverse possession can be claimed.*

The question of adverse possession is a question of fact and the claim can only arise when a party remains in possession as against the party who held actually the rights to possession. If a real tenant executes a sham kabuliat in favour of a third person, but to continue to be in actual possession, as he was, before the kabuliyat was executed with the knowledge that it was his property of which he was in possession and that the kabuliyat was a sham transaction, the third person cannot claim title by adverse possession. (*Suhrawardy and Graham, JJ.*) SOURINDRA NATH *v.* NIRMALCHANDRA. **32 C. W. N. 863 = 117 I. C. 693 = A. I. R. 1928 Cal. 882.**

———*Possession—Meaning of.*

Possession of tenants is possession of their landlord. (*Kincaid, J. C. and Rupchand Bilaram, A. J. C.*) RAMZAN *v.* FAKIR MAHOMED. **82 I. C. 861 = A. I. R. 1925 Sind 201.**

———*Possession—"Possession follows title" applies only when there is no definite proof of possession.*

The presumption that possession must be deemed to follow title arises only when there is no definite proof of possession by either of the contending parties in the case of land which is incapable of actual possession owing to its nature. (*Jai Lal, J.*) BAHADUR *v.* SAGHAR. **94 I. C. 1048 = A. I. R. 1926 Lah. 383 (1).**

———*Possession—"Possession goes with title" applies where land actually vacant—Otherwise presumption exists in favour of person in actual possession—Limitation Act, Art.* 142.

Where land is admittedly vacant there is no doubt that possession may be presumed to go with title but before possession can be presumed to go with title it must be clearly proved that the land has been lying vacant. Where it is not so proved the presumption is that possession has been with the person in actual possession although he may be holding under an invalid sale. (*Chevis, J.*) SAMPAT RAM *v.* GANGA DATT. **69 I. C. 427 = A. I. R. 1924 Lah 276.**

———*Possession—Possession of part of land with defined boundaries, in assertion of claim to whole is evidence of possession of whole.*

Where a party is in possession of a part of land with defined boundaries in exercise of an assertion to claim the whole, such possession is evidence of the possession of the whole. *Jones* v. *Williams*, 2 M. and W. 326; *Lord Advocate* v. *Lord Blantyre*, 4 A. C. 770; *Clarke* v. *Elphinstone*, 6 A. C. 164 and 9 Mad. 285 and 26 Bom. 410, Foll. (*Kincaid, J.C. and Rupchand Bilaram, A.J.C.*) RAMZAN *v.* FAKIR MAHOMED. **82 I. C. 861 = A. I. R. 1925 Sind 201.**

———*Possession—Symbolical posssession can be obtained only by following the prescribed procedure.*

When the law lays down a definite procedure for the delivery of possession which is purely symbolical that procedure must be strictly followed and any omission therein must, therefore, be regarded as material. Where a decree for possession of certain fields was executed without affixing a copy of warrant to the spot and in fact no actual possession was obtained, *held* that the execution was defective and even symbolical possession was not delivered. 20 P. R. 1917, Foll. (*Moti Sagar, J.*) NIDHI RAM *v.* PARSA RAM. **74 I.C. 1 = 5 Lah. L. J. 507 = A. I. R. 1923 Lah. 693.**

———*Possession—Trespasser setting up adverse possession cannot do so with regard to land not effectively occupied by him.*

It is settled law that a wrong-doer usually gains possession only of that portion of the land which is in his actual control, and the possession of the part of the property does not raise a presumption of the whole. It is the very essence of adverse possession that it must be marked by clear and unequivocal acts of ownership and must be sufficiently definitive as regards duration, continuity and extent. The presumption of adverse possession extends only to the areas which are in the actual possession of the trespasser. 9 Mad. 285; 26 Bom. 410; 3 L.W. 246, Dist. (*Tek Chand, J.*) AMRIT SARYA RAM *v.* DIWAN CHAND. **114 I.C.70 = A.I.R. 1929 Lah. 625.**

Presumption.

———*Presumption—Decree-holder getting into possession without execution—Possession must be ascribed to the decree.*

If a decree-holder obtains possession of property about which a decree has been passed in his favour, his possession would be ascribed to the decree and the other party can turn him out if he can show that he has acquired a good title thereto against the world before the decree-holder enters into possession. (*Macleod, C. J. and Fawcett, J.*) RUKHMABAI *v.* RAMCHANDRA VASUDEV. **45 Bom. 943 = 23 Bom. L. R. 301 = 61 I. C. 414 = A. I. R. 1921 Bom. 470.**

———*Presumption—Defendant in possession of plot of land for nearly 15 years prior to its purchase by plaintiff—It will be assumed, in suit brought to eject defendant, that his possession was adverse till date of conveyance to plaintiff in absence of evidence that such possession was permissive.*

Where the defendant was in possession of a plot of land for nearly 15 years prior to the purchase of the land including the plot by the plaintiff and where there was no evidence that the possession of the defendant was permissive, in a suit brought by the plaintiff after purchase to eject the defendant, it will be assumed that possession of the defendant was adverse till the date of the conveyance to the plaintiff. Special Second Appeal No. 121 of 1916, Rel. on. (*Chari, J.*) MAUNG BA THAN *v.* MAUNG SEIN WIN. **120 I. C. 662 = A. I. R. 1929 Rang. 170.**

———*Presumption—Doctrine that possession of part is possession of whole does not apply to trespasser.*

The doctrine, that possession of part is in law possession of the whole, does not hold good in the case of a trespasser, if the whole is otherwise vacant. Possession by a trespasser is confined to the land actually occupied by him. 12 O. C. 58, Rel. on; 19 Bom. 338 and 8 O. C. 177, Ref. (*Raza, J.*) SYED SADIK HUSAIN *v.* ETIRAD HUSAIN. **13 O. L. J. 798 = 101 I. C. 714 = A. I. R. 1927 Oudh 209.**

———*Presumption—Every owner must be presumed to know boundary of his own land.*

Every owner must be presumed to know the boundary of his own land, and if he allows another person to cross that boundary and occupy an area of 25 acres, and plant thereon a number of trees, and forbid the owner's men

to enter the land, and his possession extends for a period of over 12 years, a title will be obtained by adverse possession. 8 O. C. 177, Dist. (*Raza and Pullan, JJ.*) JAGATJIT SINGH *v.* MAHOMED ASGHAR ALI.
114 I. C. 815 = A. I. R. 1929 Oudh 328.

———*Presumption—Judgment-debtor remaining in possession awaiting execution—He cannot claim to hold adversely to the world.*

When a decree has been passed against a person in possession directing him to give up possession to the successful party, and the former remains in possession waiting for execution, then it cannot be said that that party is holding adversely to the world, although all the time the period of limitation is running out against the successful decree-holder. One must assume that the person against whom decree for possession has been passed recognises the decree, and is not prepared to take up the position that the decree is not binding against him and though such a person remains in possession until execution proceedings are taken, he cannot thereby assert that he has a title against the decree. (*Macleod, C. J. and Fawcett, J.*) RUKHMABAI *v.* RAMCHANDRA VASUDEV. **45 Bom. 943 = 23 Bom. L. R. 301 = 61 I. C. 414 = A. I. R. 1921 Bom. 470.**

———*Presumption —Possession of part is not possession of the whole.*

As a general rule possession of part is in law possession of the whole if the whole is otherwise vacant; but constructive possession of this kind can only be presumed when there is a claim based upon title and possession by a trespasser is confined to the land actually occupied by him. 12 O. C. 58, Foll. (*Wazir Hasan, A.J. C.*) DURGA *v.* RAM PADARATH. **65 I. C. 749 = 8 O. L. J. 495.**

Proof of.

———*Proof of—Actual possession put forward—Evidence of possession not satisfactory—Maxim that possession follows title is not applicable.*

Where evidence of possession on either side is not satisfactory or not quite satisfactory, the party who has succeeded in proving his title is entitled to rely upon the presumption that possession follows title. This presumption does not apply in a case where actual and not mere constructive possession is pleaded. *John Clark* v. *G. H. D. Elphinstone*, (1881) 6 A. C. 164, Ref. (*Mukherji and Bose, JJ.*) HARDUTT RAY *v.* UJIR SHAIKH **117 I. C. 606 = 48 C. L. J. 364 = A. I. R. 1928 Cal. 765.**

———*Proof of—Adverse possession against Government—Affirmative evidence is essential.*

To prove adverse possession against the Government, it is not sufficient to prove possession for a long period but possession for the whole period of 60 years must be affirmatively proved. To hold, on mere probabilities and evidence of long possession that possession was for 60 years is not allowable. 39 Mad. 617 (P C.), Foll. (*Ayling and Odgers, JJ.*) KRISHNA SASTRI *v.* SINGARAVELU. **48 Mad. 570 = 91 I. C. 130 = 1925 M. W. N. 218 = A. I. R. 1925 Mad. 780 = 48 M. L. J. 470.**

———*Proof of—Asserting possession in a written statement is not sufficient to show possession.*

An assertion in a written statement that one is in possession, in the absence of anything else cannot be regarded as actual possession of the land itself which may go to constitute adverse possession. (*Greaves and Mukerji, JJ.*) PANNA LAL GHOSE *v.* ADJAI COAL CO., LD. **31 C. W. N. 82 = 101 I. C. 62 = A. I. R. 1927 Cal. 117.**

———*Proof of—Evidence Act, S. 35—Entry, in road cess return, of lands as held as tenant is* prima facie *evidence against adverse possession.*

The fact that certain lands were entered in a road cess return filed by a person in respect of lands held by him under the zamindar is *prima facie* evidence that they were not held adversely to the zemindar, and the presumption cannot be got over unless it is established that the lands were erroneously included. (*Chatterjee and Greaves, JJ.*) MONMOTHA NATH MITTER *v.* ANATH BUNDHU PAL. **25 C. W. N. 106 = 61 I. C. 469 = A. I. R. 1921 Cal. 754.**

———*Proof of—Occasional catching of fish is not continuous enjoyment.*

To prove title by adverse possession the possession required must be adequate in continuity, publicity and extent. The fishermen going into the tank catching some fish and giving them to defendant does not amount to such possession. 27 Cal. 943 (P. C.), Foll. (*Suhrawardy and Duval, JJ.*) BEJOY CHAND MAHATAB *v.* SARAT KUMAR ROY. **86 I. C. 767 = A. I. R. 1925 Cal. 1253.**

———*Proof of—Ownership.*

Fugitive and intermittent acts of ownership would not establish any effective possession as against the rights of Government. A.I.R. 1924 Mad. 197, Foll. (*Phillips and Odgers, JJ.*) SECRETARY OF STATE *v.* KUTHALANATHASWAMI TEMPLE.
52 Mad. 25 = 1928 M. W. N. 581 = 115 I. C. 49 = 29 M. L. W. 185 = A. I. R. 1928 Mad. 1176 = 56 M. L. J. 24.

———*Proof of—Plea of* jus tertii *—Defendant must specify the third peron having the right.*

Where a plaintiff makes out a *prima facie* title to him in the property in dispute, the defendant has to show a better title either in himself or in some third person. The defendant's plea of *jus tertii* cannot be entertained when he does not state in whom the right resides. The defendant must trace the title to a third party other than plaintiff. A mere suggestion that there may be a third party with better title is nothing. (*Phillips, O. C. J. and Beasley and Anantha Krishna Ayyar, JJ.*) GANSHAMDOSS *v.* GULAB BI BAI. **50 Mad. 927 = 39 M. L. T. 431 = 26 M. L. W. 697 = 106 I. C. 150 = A. I. R. 1927 Mad. 1054 = 53 M. L. J. 709 (F. B.).**

———*Proof of—Shamilat—Village cattle grazing indiscriminately during greater part of the year—Continuity and necessary adversity are not established.*

One of the co-sharers sold a definite portion of the unpartitioned *shamilat*, which did not belong to him exclusively. After the sale the stranger vendees occupied the land and enjoyed it in precisely the same way as the vendor had done. During the greater part of the year all the village cattle grazed indiscriminately over this and every other portion of the *shamilat*, during the hay season and the grass was preserved for their exclusive use by the erection of a temporary fence. *Held*, it not having been shown that it was impossible in the nature of things for the strangers to occupy the land by corporal contact, the element of continuity and the necessary adversity have not been established. (*Broadway and Harrison, JJ.*) BIPJOO *v.* BHIKHU.
64 I. C. 876 = 4 Lah. L. J. 3 = A. I. R. 1922 Lah. 325.

Purchaser.

———*Purchaser—Auction-purchaser obtaining possession of whole property—Only a portion belonging to judgment-debtor, possession of balance becomes adverse —Suit after 12 years is barred.*

Where auction-purchaser obtains possession of the whole property, out of which only a portion belongs to judgment-debtors, the possession of the balance becomes adverse and a suit for possession of the balance after 12 years is barred. (*Daniels and King, JJ.*) SAJJAD HUSAIN *v.* KURBAN ALI BEG. **96 I. C. 687 = A. I. R. 1926 All. 697.**

——*Purchaser—Execution Sale pending suit for declaration as to property being subject to trust—Subsequent declaration does not affect adverse possession of auction purchaser—Limitation Act, Arts.* 134 *and* 144.

Where, pending a suit for a declaration of a certain property being subject to a trust, the same was sold in execution of a decree and the auction-purchaser entered into possession.

Held that the adverse nature of the possession of the auction-purchaser is not affected by the subsequent declaration of trust made in the suit. (*Lord Buckmaster.*) A. SUBAIYA *v.* MD. MUSTAFA.

50 I. A. 295 = 46 Mad. 751 = 40 C. L. J. 20 = 18 M. L. W. 903 = 21 A. L. J. 730 = 25 Bom. L. R. 1275 = 28 C. W. N. 493 = 33 M. L. T. 285 = 1924 M. W. N. 26 = 2 Pat L. R. 104 = 4 L. R. P. C. 180 = 74 I. C. 492 = A. I. R. 1923 P. C. 175 = 45 M. L. J. 588.

Receiver.

——*Receiver—Possession of receiver appointed by Court is possession on behalf of owner.*

The possession of a receiver appointed by Court is possession of the person who is found to be the true owner and consequently his possession cannot be tacked to that of a trespasser previously holding possession. (*Phillips and Odgers, JJ.*) HARI SAHIB *v.* SIVAJI RAJA SAHIB. **97 I. C. 783 = A. I. R. 1927 Mad 61 (62).**

Religious endowment.

——*Religious endowment.*

There can be adverse possession, not only as against the idols but over the idols themselves. (*Sulaiman and Kendall, JJ.*) DASAMI SAHU *v.* PARAM SHAMESHWAR. **51 All. 621 = 1929 A. L. J. 473 = 116 I.C. 433 = A. I. R. 1929 All. 315.**

——*Religious endowment—General trustee may not necessarily be entitled as of right to possession of all endowed property—Endowment property may consist of right to enjoy the revenue only of the property, the property remaining in possession of other persons who pay over and even apportion the revenue to different purposes of the trust—Possession of such persons is adverse to the general trustee.*

The property of an endowment may consist partly or wholly in the right to enjoy the revenues of property which is in the possession of persons who have the right and the duty to manage the property, collect the revenue and hand it over when collected to be used in the proper-manner for the purposes of the endowment. Such persons may even have certain rights of apportionment of the revenue so handed over by them among the several purposes of the endowment. All this is compatible with there being a general trustee of the whole endowment including the revenues when so collected and handed over. But in such a case the general trustee would not be entitled to the possession of the properties out of which this portion of the revenue comes. His rights do not commence until after the collection of the revenues by and under the management of those who hold possession. It must be remembered that after all the general trustee is only a representative of the Idol who is a juridical personage, and who is the true owner and there is nothing legally incongruous in that personage having other subordinate representatives who have the right to manage certain special portions of his property, and pay over the income so collected to the endowment, and even to some degree to control its use. Such rights would not be inconsistent with the existence of a general trustee, but they would be fatal to his claim to possession of the properties from which these revenues are derived. Possession would be in the hands of those entitled to manage these special properties and their possession would be adverse to his. (*Lord Moulton.*) AMBALAVANA PANDARA SANNIDHI AVL. *v.* SRI MEENAKSHI SUNDARESWARAL DEVASTANAM OF MADURA.

43 Mad. 665 = 47 I. A 191 = 56 I. C. 730 = 18 A.L.J. 594 = 28 M.L.T. 83 = 12 M. L. W. 212 = 25 C. W. N. 1 = 1921 M. W. N. 11 = A. I. R. 1921 P. C. 97 = 39 M. L. J. 50 (P. C.).

——*Religious endowment—Idol is juridical person capable of holding property—Possession adverse against mahant is adverse against the idol—Limitation begins to run from the date of taking possession by alienee—Succeeding mahant does not get fresh start.*

An idol installed in a particular Asthan is a juridical person capable of holding property and getting it managed through its manager, shebait or mahant. Such a manager, shebait or mahant would represent the idol or the institution for the time being completely, and possession, if adverse, against the mahant for the time being must be deemed to be adverse against the idol or the institution, unless the character of the alienation under which possession was taken could be deemed to enure only for the lifetime of a particular manager, shebait or mahant. The adverse possession in such a case begins to run from the date the alienee takes possession of the property alienated, and each succeeding manager, shebait or mahant cannot get a fresh start so far as the question of limitation is concerned, upon the ground of his not deriving title from any previous manager, the reason being that the succeeding managers, shebaits or mahants form a continuing representation of the idol or the institution to which the endowed property has been dedicated. A. I. R. 1922 P. C. 123, Dist. 23 O. C. 536; A.I.R. 1922 Oudh 24; 23 Mad. 271 (P.C.); 37 Cal. 885 (P.C.); 36 Cal. 1003; 38 Cal. 526 (P.C.); A.I.R. 1923 P. C. 175 and A. I. R. 1926 Pat. 239, Foll. (*Gokaran Nath Misra and Raza, JJ.*) PARAS DAS *v.* JANKI BALLABHA SARAN. **2 Luck. 239 = 95 I. C. 27 = 3 O. W. N. Sup. 1 = A. I. R. 1926 Oudh 444.**

——*Religious endowments—Property of idol can be possessed adversely.*

Property belonging to an idol can be acquired by adverse possession as against the idol. (*Dalal and Boys, JJ.*) CHITAR MAL *v.* PANCHULAL. **48 All. 348 = 24 A. L. J. 351 = 93 I. C. 652 = A.I.R. 1926 All. 392.**

——*Religious endowments—Temple property—Idol can acquire, by adverse possession.*

Where a land comprised within the precincts of another temple has been acquired by plaintiff by force and a temple has been built by him thereon wherein he has installed and consecrated two idols and has had, for a period of more than fourteen years, free access and opportunity for regular participation in the worship,

Held, the idols to whom it is dedicated have acquired an indefeasible title to the site by adverse possession. (*Mookerjee and Chotzner, JJ.*) ANANDA CHANDRA CHAKRABARTI *v.* BROJALAL SINGHA.

50 Cal. 292 = 36 C. L. J. 356 = 74 I. C. 793 = A. I. R. 1923 Cal. 142.

——*Religious endowments —Wakf —*Mutwalli *in possession—Wakf turning out to be void—*Mutwalli *cannot claim to have been in adverse possession.*

If a person takes possession of certain property as a *mutwalli* and holds possession of it on that basis, he cannot afterwards turn round and say that the wakf being void, he was in possession in his own right and claim the property as his own as against the beneficiaries. Having come into possession under one title, he cannot improve his position by asserting that that title was non-existent, but he held under some adverse right which extinguished the title of the beneficiaries under the deed by virtue of which he entered into possession. (*B. B. Ghose and Roy, JJ.*) RUKEYA BANU *v.* NAZIRA BANU. **55 Cal. 448 = 32 C. W. N. 248 = 105 I. C. 647 = A. I. R. 1928 Cal. 130.**

———*Religious endowment —Wakf property—Appointment of* Mutwalli *does not give fresh starting point for limitation—Defendant in adverse possession for 12 years gets absolute title—A disclaimer of title by persons in possession does not affect character of possession.*

Plaintiff was appointed *Mutwalli* (manager) of a mosque in the year 1918 and defendant was in possession of some rooms of the wakf property since 1903. In a suit by the *Mutwalli* against the defendant to recover possession of the rooms; *Held*, that the suit was barred by adverse possession under Art. 144 and not Art. 142. Each succeeding manager of the endowed property could not get a fresh start so far as the question of limitation is concerned even though he does not derive title from any previous manager. Even though the defendant may have disclaimed all interest still as he had not voluntarily abandoned possession, this admission does not affect the adverse possession. 23 Cal. 536, Foll. (*Lindsay, J.C.*) MAULVI ABDUR RASHEED *v.* JANKI DAS. **66 I. C. 941 = 9 O. L. J. 2 = A. I. R. 1922 Oudh 24.**

Service Tenure.

———*Service tenure—Non-performance of service does not make possession of holder adverse.*

Mere non-performance of service does not in itself make the holding adverse. To make the possession adverse, there must be a refusal to perform service or a claim to hold the lands free of service. (*Coutts and Ross, JJ.*) NAND LAL SAHU *v.* TIKAIT SHRINIVAS HUKUM SINGH. **1 Pat. 292 = 69 I. C. 703 = A. I. R. 1922 Pat. 541.**

———*Service tenure*—Vatan *lands—Possession by tenants cannot be adverse to* Vatandars.

Persons, who and whose predecessors-in-title have been always holding service *vatan* lands as tenants, cannot acquire any title to a permanent tenancy in such lands by adverse possession as against the *vatandars* from whom they held the lands.

Obiter.—It is somewhat difficult to see how a stranger to a *vatan* can acquire a title by adverse possession for 12 years of lands, the alienation of which is, in the interests of the State, prohibited. (*Sir John Edge.*) MADHAVRAO WAMAN SAUNDALGEKAR *v.* RAGHUNATH VENKATESH DESHPANDE. **50 I. A. 255 = 47 Bom. 798 = 25 Bom. L. R. 1005 = 33 M. L. T. 389 = 1923 M. W. N. 689 = 28 C.W.N. 857 = 74 I. C. 362 = A.I.R. 1923 P. C. 205 = 47 M. L. J. 248 (P. C.).**

Submerged Land.

———*Submerged land—Interruption of possession.*

Where land in the possession of a trespasser is submerged on account of floods, the possession of the land during the period of submersion vests in the true owner and operates as an interruption of the possession of the trespasser. (*Wazir Hazan, A. J. C.*) BACHCHA SINGH *v.* SRI KAMLAPAT PRASAD. **65 I. C. 769 = 8 O. L. J. 501.**

———*Submerged land—Land submerged in rainy season every year—No title can be prescribed for.*

Where the lands are submerged every year during the rainy season, acquisition of title by adverse possession

is impossible. (Case-law referred.) Land after subsmersion becomes derelict, and so long as it remains submerged, no title can be made against the true owner. No rational distinction could be drawn between submergence for a few years and submergence for a few months and the principle is applicable where the re-flooding is seasonal and occurs for several months in each year. When the land is re-submerged, the possession of the adverse-holder ceases and the possession of the true owner constructively revives, so that while the land remains submerged, whether for a year or a month, no possession can be deemed to continue in the wrong-doer so as to be available towards the ultimate acquisition of title against the true owner. Recovery of jalkar dues and khutagiri dues, the former taking the shape of levy of money or share of fish from the fishermen who caught fish in submerged areas and the latter assuming the form of a levy from boatmen who, during rainy season tied their boats to pegs driven into the bank, cannot be treated as adverse possession, which must be possession adequate in continuity, in publicity and in extent of area, in order that it may be effective to destroy the title of the true owner. Possession to be adverse must be actual, visible, exclusive and hostile, and a distinction must be made between continuous adverse occupation and isolated acts of trespass. To defeat a title by dispossession of the true owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it, and therefore it is necessary to look at the position in which the true owner stands towards the land as well as to the acts done by the alleged dispossessor. Even if the acts could be treated as acts of adverse possession, when there is no evidence to show that the spots where the acts were exercised were identical from year to year and as the land was periodically submerged, attempt at identification would be fruitless the plea of adverse possession must fail. The doctrine of constructive possession cannot be applied in favour of a wrong-doer, whose possession must be confined to actual possession, that is to say, if he relies on adverse possession, he can succeed, only as regards the portion of the land in suit of which he proves actual possession for the statutory period. (*Mookerjee and Panton, JJ.*) MAHARAJA OF COOCH BEHAR *v.* MOHENDRA RANJAN RAI. **34 C.L.J. 465 = 66 I.C. 923 = A.I.R. 1921 Cal. 277.**

———*Submerged land—When land in suit is under water, title of owner revives and period of adverse possession is prevented from running.*

Persons resisting a suit for declaration of title to certain land solely on the ground of adverse possession cannot be said to be in adverse possession when the land in suit is under water. Whenever the land is subject to submersion and is actually under water, the title of the owners revives and prevents the running of the period of adverse possession. It is for the defendants to show that they have been in proprietary possession for a period of 12 years continuously. (*Jai Lal and Agha Haider, JJ.*) KHAN BEG *v.* KHUDA BAKSH **31 P.L.R. 434 = 122 I.C. 486 = A.I.R. 1930 Lah. 417 (1).**

———*Submerged land—Limitation Act, Arts.* 144 *and* 142—*Constructive possession—Submerged land—Title of rightful owner is revived during submersion.*

Where land becomes submerged it becomes constructively in the possession of its lawful owner. Where a trespasser had been in possession of the lands, which at intervals of 4 or 5 years became submerged, there is an interruption of the possession of the trespasser and a revival of the possession of the true owner during the period of submersion. Consequently the trespasser's possession is not continuous and he cannot acquire a title by adverse possession. (*Gokul Prasad and Sulaiman, JJ.*) RAM NAIN MISIR *v.* DEOKI MISIR. **20 A.L.J. 756 = 69 I.C. 912 = A.I.R. 1923 All. 75.**

———*Submerged land — No title can be acquired against true owner.*

The land after submersion becomes derelict, and so long as it remains submerged, no title can be made against the true owner. (*Mookerjee and Buckland, JJ.*) JOGENDRA NATH *v.* JAGADINDRA NATH RAY **34 C.L.J. 133 = 67 I. C. 170 = A. I. R. 1921 Cal. 577.**

———*Submerged land—Possession must be continuous —Submergence of land under flood before perfection of title revives true owner's possession.*

On the dispossession of a trespasser by the *vis major* of the floods, the constructive possession of the land is in the true owner; in other words, the land after submersion becomes derelict, and so long as it remains submerged, no title can be made against the true owner. The posession required in an adverse possessor of waste lands sufficient to take the title out of the true owner must be adequate in continuity, in publicity, and extent of area to extinguish the title of the rightful owner. (*Mookerjee and Buckland, JJ.*) SECRETARY OF STATE *v.* WAZED ALI KHAN. **34 C.L.J. 141 = 65 I. C. 866 = A. I. R. 1921 Cal. 687.**

Tacking of.

———*Tacking of--Hindu Widow—Reversioner if bound. See also* ADVERSE POSSESSION—LIMITEDO WNER.

———*Tacking of.*

One trespasser cannot tack his own wrongful possession to the wrongful possession of another trespasser through whom the former does not derive title in any way. (*Macleod, C.J. and Fawcett, J.*) RAMACHANDRA BALWANT *v.* BALAJI GANESH. **45 Bom. 570 = 22 Bom. L. R. 1452 = 59 I.C. 805 = A. I. R. 1921 Bom. 48 (1).**

———*Tacking of—Limitation Act, S.* 10, *Arts.* 144, 142 *and* 134—*No tacking is allowed between persons standing in entirely different categories.*

The executor appointed by will (but who had not taken probate) mortgaged for his own benefit the *debutter* property which according to the Will was not to be alienated on any account and the property was purchased at the sale in execution of mortgage decree by defendant. Plaintiff was granted letters of administration so far as the *debutter* property was concerned and he sued for possession of the property. *Held* the defendant against whom the suit was in time cannot be allowed to contend that the possession of the mortgagor (executor) was adverse to the *debutter* and to tack on to his own possession. He was clearly a person in whom the estate became vested in trust for a specific purpose within the meaning of S. 10 of the Limitation Act. The adverse possession of a person so situated in relation to the *debutter* estate is fundamentally different in quality from the hostile holding of a stranger claimant and it would obviously be unsound on principle to tack together the possession of persons who stand in entirely different categories. There is no cause of action until there is a party capable of suing, so that the Statute of Limitation began to run from the time of granting the letters of administration. (*Mookerjee and Cuming, JJ.*) CHARAN CHANDRA PRAMANIK *v.* NAHUSH CHANDRA KUNDU. **50 Cal. 49 = 74 I. C. 630 = 36 C. L. J. 35 = A. I. R. 1923 Cal. 1.**

———*Tacking of—Limitation Act, Arts.* 142 *and* 144 —*Purchaser from trespasser is entitled to tack his possession to that of the trespasser.*

A trespasser cannot tack his own possession to possession of the previous trespasser for purposes of limitation. But where a trespasser sells his claim to possession to a purchaser, that purchaser is entitled to tack the previous possession to his own possession for purposes of limitation and each subsequent purchaser of the claim or right to possession would have similar right to tack the previous periods of his predecessors-in-title. Rustomji's Law of Limitation, Third Edition, 1922, p. 634, Ref. (*Lentaigne, J.*) MA MI *v.* HADJI MAHOMED. **1 Rang. 176 = 75 I. C. 31 = A. I. R. 1923 Rang. 261.**

———*Tacking of—Possession of independent trespassers cannot be tacked.*

Possession of independent trespassers cannot be tacked. 44 Cal. 858 and A. I. R. 1922 Cal. 176, **Foll.** One trespasser cannot add to his own possession the previous independent possession of another trespasser. When the possession passes from the first to the second trespasser, there is a constructive restoration, even if a momentary restoration of the true title to possession. (*Raza, J.*) SUKHDEO *v.* MT. RAM DULARI. **29 O. C. 131 = 13 O. L. J. 400 = 92 I. C. 825 = A. I. R. 1926 Oudh 313.**

———*Tacking of—Possession cannot be tacked unless identical in nature.*

Possession cannot be tacked unless it is identical in nature. Adverse possession as mortgagee cannot be tacked with subsequent adverse possession as vendee. (*Pratt and Fawcett, JJ.*) BAI REVA *v.* VALIMAHOMED MIYAMAHOMED. **46 Bom. 1009 = 24 Bom. L. R. 720 = 70 I.C. 912 = A. I. R. 1922 Bom. 211.**

———*Tacking of—Successive trespassers—Each derivative trespasser gets benefit of the period of his predecessor.*

A succession of trespassers claiming through one another can add and tack the periods of their possession so as to defeat the right of the owner by 12 years' total possession. Rustomji's Limitation Act, p. 634 (3rd edition), Foll. (*Venkatasubba Rao, J.*) NOMULA NARASIMHA *v.* VASAM MANGAMMA. **91 I. C. 556.**

———*Tacking of—Two successive trespassers—Tacking of periods is permissible.*

The tacking of the periods of possession by two successive trespassers is permissible where one derives title from the other. 43 All. 164 and 3 A. L. J. 424, **Foll.** (*Daniels and King, JJ.*) SAJJAD HUSAIN *v.* QURBON ALI BEG. **96 I. C. 687 = A. I. R. 1926 All. 697**

Trust and Trustee.

———*Trust and trustee — Claimant from trustee cannot prescribe against trust.*

Any person claiming from a trustee under an invalid mortgage cannot acquire a prescriptive title against the trust. (*Phillips and Devadoss, JJ.*) JAGGA ROW *v.* GORI BIBI. **17 M. L. W. 521 = 1923 M. W. N. 347 = 72 I. C. 789 = A. I. R. 1923 Mad. 545.**

———*Trust and trustee—Line of succession to trusteeship to be according to terms of wakf deed—Legal heir of last trustee cannot acquire trusteeship by adverse possession against person legally entitled—Even if so acquired trustee would be bound by terms of the deed.*

One *M* on attaining majority ratified a wakf deed executed during his minority by his father and uncle. Under the provisions of the deed a trustee could appoint his successor during his lifetime, could adopt before attaining the age of 25, a boy if he had no natural born son, and could make a will authorising his widow to adopt. The executants of the deed could modify or alter its terms but if in future no mutawalli was alive, the proper authority could appoint as mutawalli a person from the executant's family. *M* became a trustee and died after the age of 25 without appointing a successor from his family but appointed by a will his wife as his successor and gave her an authority to adopt, a boy from his brotherhood. After *M's* death his widow managed the trust property and adopted her sister's grandson.

Held, in suit by certain persons alleging to be *M's* reversioners for a declaration that they were entitled to the trusteeship, that either the devolution of trusteeship or the right to nominate one did not devolve on *M's* widow as the legal heir of executant and so her position was not adverse to any person entitled to the office and even if she has perfected her right as a trustee by adverse possession, she can only become a trustee under the deed and would be bound by its provisions. (*Sulaiman and Kendall, JJ.*) DHARAM NARAIN *v.* GUR SARAN. **1929 A. L. J. 189 = 116 I.C. 278 = A. I. R. 1929 All. 404.**

———*Trust and trustee—Trustee can acquire title as hereditary trustee by prescription.*

Person acquiring title as trustee cannot subsequently acquire a different title, namely, that of hereditary trustee by merely asserting it in proceedings in Court ; he can acquire such title by giving out to the world that he was holding the trust property as hereditary trustee to the knowledge of the real owner of the property. (*Phillips and Ramesam, JJ.*) PICHAI PILLAI *v.* LINGAM IYER. **108 I.C. 199 = A.I.R. 1928 Mad. 268.**

———*Trust and trustee—Trustee cannot make his possession adverse.*

A trustee cannot by any act of his order make his rightful possession adverse to the real *cestui que trust.* (*Anantakrishna Ayyar, J.*) KALATTY MUDALI *v.* MANGAPATHI MUDALI. **31 M. L. W. 526 = 1930 M.W. N. 111 = A. I. R. 1930 Mad. 563.**

———*Trust and trustee—Wrongful recipient of profits of trust property does not acquire title by adverse possession—One beneficiary can, however, acquire right adversely to others.*

Whilst the trustee is in possession of the estate, the right of the beneficiary is safe, so that if the trustee mistakes his beneficiary and makes over the profits of the estate to a wrong person, such wrongful recipient of the profits, does not acquire title by adverse possession against the rightful *cestui que trust.* It being the duty of the trustee to pay over the profits to the beneficiary, payment to a wrong person will not give that person a title, but if one or two beneficiaries is excluded by the other who received the rents to the exclusion of the trustees as well, limitation will commence to run against the excluded beneficiary. *Lister* v. *Pickford*, 34 Bev. 576 and *East Stonehouse Urban Council* v. *Willoughby Brothers, Limited*, (1902) 2 K. B. 318, Ref. Where moneys belonging to the community were being spent for the purposes of the village temple at which the community worshipped, use of the community funds for temple purposes cannot be taken to confer any rights on idols to properties of the communities. (*Anantakrishna Ayyar, J.*) KALATTY MUDALI *v.* MANGAPATHI MUDALI. **31 M. L. W. 526 = 1930 M. W. N. 111 = 125 I. C. 227 = A. I. R. 1930 Mad. 563 (565).**

Under-proprietary rights.

———*Under-proprietary rights—It is not necessary to prove actual litigation with taluqdar.*

To prove adverse possession it is not necessary that there must have been litigation on the subject between the talukdars and the claimant. It is sufficient if it is proved that the title is entirely opposed to the interests of the taluqdar and that the latter being aware of the title has stood by and done nothing. Where the claimants establish that they got under-proprietary rights under a sale which has not been contested by the taluqdar, they are entitled to the rights claimed. A. I. R. 1919 P. C. 62, Ref.; A. I. R. 1927 Oudh 141, Dist. (*Pullan, J.*) SAT NARAIN *v.* DEPUTY COMMISSIONER, MANAGER COURT OF WARDS. **6 O. W. N. 829 = 10 L. R. A. Rev. 351 = A. I. R. 1929 Oudh 433.**

———*Under-proprietary rights—Tenant holding land under permanent lease—Undisturbed possession for twelve years—If effective.*

It cannot be affirmed as a general proposition of law that a person, who is, in fact, in possession of land under a tenancy or occupancy title can, by a mere assertion in a judicial proceeding and the lapse of six or twelve years without that assertion having been successfully challenged, obtain a title as an under-proprietor to the lands. A. I. R. 1923 P. C. 118 ; A. I. R. 1923 P. C. 205 and A. I. R. 1924 P. C. 65, Foll. Where the tenant has a real right to be in possession, the mere fact that a claim was asserted by him to have an unlimited number of years in which their right to the lands would subsist is not a circumstance that enables them to prescribe a permanent tenancy as against their landlords. (*Rankin, C. J. and Mitter, J.*) RAJANI KANTA BANERJEE *v.* RAJ KUMAR DASI. **31 C. W. N. 1099 = 104 I. C. 812 = A.I.R. 1927 C. 913.**

Vacant Site.

———*Vacant site.*

Possession of a vacant piece of land is presumed to follow title. (*Martineau, J.*) GHULAM MOHAMMED *v.* FATEH KHAN. **115 I. C. 534 = A. I. R. 1928 Lah. 896.**

———*Vacant site—Abadi—Landlord must be presumed to be in possession—Abadi.*

The proprietor of a village must be presumed to be in possession of the vacant site in the abadi of the village as in such cases possession goes with title. (*Raza, J.*) SYED SADIK HUSAIN *v.* ETIZAD HUSSAIN. **13 O. L. J. 798 = 101 I. C. 714 = A. I. R. 1927 Oudh 209.**

———*Vacant site—Acts of enjoyment like tethering cattle, etc., in themselves, are not sufficient proof—But, together with building a wall, may amount to sufficient proof.*

Where the defendant, in proof of his plea of adverse possession over a certain land, relied upon various acts of enjoyment, such as dumping of rubbish, tethering of cattle, enclosing the land with wall, etc.

Held, that although such acts, if they had stood by themselves, would not have been sufficient to prove adverse possession on the part of the defendant, they taken in conjunction with the fact that the defendant had enclosed the land in dispute with a wall which had been in existence for a period much longer than 12 years, were sufficient proof of his adverse possession. 16 Bom. 338, Rel. on. (*Dalip Singh and Agha Haidar, JJ.*) DEVI DITTA RAM *v.* WARYAM. **117 I. C. 81 = A. I. R. 1929 Lah. 526.**

———*Vacant site—Evidence as to possession conflicting—Presumption of possession from title should be drawn.*

Where evidence as to possession is conflicting, Court should rely on the presumption that possession follows title in the case of land that was vacant before dispossession occurred. (*Addison, J.*) NAND LAL *v.* LAHRI. **111 I. C. 533 = A. I. R. 1929 Lah. 34.**

———*Vacant site—Formal delivery—Effect against true owner.*

In the case of a vacant site possession follows title and a true owner's rights are not defeated by a person obtaining a formal delivery in execution of a decree against a person having no right to the same. (*Brasher, J.*) ABDULLAH *v.* GIRDHARI. **79 I. C. 692 = 8 P. W. R. 1923.**

———*Vacant site—Lands incapable of occupation until recently—Possession must follow title.*

In the case of lands full of jungle and incapable of occupation and until quite recently possession must follow title in the absence of possession by any body other than the rightful owner. (*Rankin, C. J. and C. C. Ghose, J.*) TARAKESWAR *v.* SATISH KANTA.

51 C. L. J. 297 = A. I. R. 1930 Cal. 411 (417).

——*Vacant site—Plaintiff having title to vacant site—Presumption will be that possession followed title until date when plaintiff admits dispossession.*

Where title to a vacant site is with the plaintiff, it is for the defendants to prove adverse possession and the presumption will be that possession followed title until the date when the plaintiff admits dispossession. 116 P. W. R. 1916; A. I. R 1921 Lah. 202, Ref. (*Dalip Singh, J.*) BHALLA SINGH *v.* JOGAT SINGH.

A. I. R. 1929 Lah. 669.

——*Vacant site—Possession of parti plot of land by ryot is not adverse but permissible—Rule has no application to possession of abadi plots.*

The possession by a ryot of a parti plot of land belonging to a zamindar is not necessarily adverse. The use of parti plots of lands is common in this country and does not usually arrest the attention of a zemindar. Such possession far from being adverse must be deemed to be permissive. But there are cases of possession of abadi plots by a tenant to which the rule has no application. Where a plot of land has been used by a tenant for his domestic and agricultural purposes, for such a long time so as to warrant a presumption that his occupation of the plot is a part of his original contract of tenancy, the zemindar cannot disturb his possession during the subsistence of the contract of a tenancy. 16 Bom. 338; 21 Mad. 53; 8 I. C. 708; A. I. R. 1926 All. 66, Ref. (*Iqbal Ahmad, J.*) KASIM ABBAS *v.* HUNS RAM.

A. I. R. 1929 All. 883.

——*Vacant site—Tying cattle or keeping heaps of dung is insufficient to establish adverse possession or ownership—Landlord and tenant—Abadi.*

Tying up of cattle and keeping of heaps of dung on vacant site in village abadi is precisely such occupation as is wholly insufficient to create an adverse title or to establish acts of ownership. 16 Bom. 338, Foll. (*Harrison and Fforde, JJ.*) KADAR *v.* SHIB RAM.

98 I. C. 880 = 8 Lah. L. J. 535 = 27 P. L. R. 762.

——*Vacant site—Tying cattle on open site does not constitute.*

Tying up cattle and storing cowdung cakes on an open site are not sufficient to prove adverse possession of the site. (*Chevis and Harrison, JJ.*) WAZIRI MAL *v.* GANGA RAM.

69 I. C. 573 =
A. I. R. 1924 Lah. 370.

——*Vacant site—Using land for cattle shed does not prove possession.*

Where the defendants used as a cattle shed a corner of the vacant site belonging to plaintiffs, *held*, the user cannot be tantamount to possession and it is upon the defendants to establish adverse possession for over twelve years. 16 Bom. 338, Foll. (*Zafar Ali, J.*) RULIA *v.* NUR MUHAMMAD.

8 Lah. L. J. 400 = 27 P. L R. 561 =
97 I. C. 705 = A. I. R. 1926 Lah. 615.

——*Vacant site—Vacant land is capable of adverse physical possession.*

Vacant land is capable of adverse physical possession being taken of it if it is enclosed and if the owners are deprived of all power over it. (*Addison, J.*) NAND LAL *v.* LAHRI. **111 I. C. 533 = A. I. R. 1929 Lah. 34.**

Waste Land.

——*Waste land.*

Possession follows title in the case of waste land. (*Zafar Ali, J.*) JIWAN SINGH *v.* KARAM DIN.

103 I. C. 678 = A. I. R. 1927 Lah. 664.

——*Waste land—Possession—Proof of, if necessary.*

A taluqdar cannot be required to prove actual user of jungle and waste land and his possession is assumed until there is definite proof of ouster. 8 O. C. 177, Foll. (*Raza and Pullan, JJ.*) JAGATJIT SINGH *v.* MD. ASGHAR ALI. **114 I. C. 815 = A.I.R. 1929 Oudh 328.**

——*Waste land—Possession—Proof of, if necessary.*

If a particular land bears the character of a parti land, jungle land, or tank land, the owner of such land is not required, in view of the character of the land, to prove his possession over the same by proving overt acts of possession. To expect such a proof from the owner of the land would be tantamount to asking him to prove which is almost impossible to prove. The law presumes his possession to continue till he is dispossessed, which dispossession can only take place if another person asserts clearly that he claims the right to hold possession as owner or shows by his conduct an intention to exclude the actual owner. (*Misra and Raza, JJ.*) PARKASDAS *v.* JANKI BALLABHA SARAN.

2 Luck. 239 = 3 O. W. N. Sup. 1 = 95 I. C. 27 =
A. I. R. 1926 Oudh 444.

——*Waste land—Presumption.*

In the case of waste land possession is presumed to be with the owner, and the mere fact that the owner has allowed his land to remain waste does not amount to a discontinuance of possession. (*Shadi Lal, C. J. and Hilton, J.*) MANGAL SINGH *v.* ALI SHER.

120 I. C. 792 = A. I. R. 1930 Lah. 303.

——*Waste land—Adjoining tenant's house—Use by tenant—If possession adverse.*

The only thing that the defendants have been in possession of the land in suit in the sense that they have been enjoying it because it lies in front of their houses is not sufficient to make their enjoyment adverse. (8 O. C. 177, Rel. on.) In order to dispossess the owner the defendants in possession must show that that they asserted clearly that they claimed the right to hold possession as owner or their conduct must be such as would amount to the assertion of the intention to exclude the actual owner. (*Misra, J.*) HULAS *v.* BARKATUNISSA.

13 O. L. J. 633 = 3 O. W. N. 475 = 1 Luck. 469 =
94 I. C. 1034 = A. I. R. 1926 Oudh 393.

——*Waste land—Acquisition of title in parti land belonging to zamindar—Actual ouster is essential.*

An ordinary inhabitant of the village cannot acquire title by adverse possession by merely using part of the parti land belonging to the zamindars. Title by adverse possession, as regards such land, can only be acquired if there was an assertion of title on his part to the knowledge of the owners. Nothing short of actual ouster will set the law of limitation running against the proprietors who may not object to the residents of the village using parti land without in any way prejudicing their own rights as proprietors. (*Niamatullah, J.*) RAM PHAL SINGH *v.* BACHCHU RAM. **123 I. C. 757 =**
A. I. R. 1930 All. 410.

——*Waste land—Erroneous entry regarding title in the record of rights—Original owner should be considered as real owner unless adverse possession for 12 years by others has been established.*

Where the title to the land in question has been proved to be with the plaintiffs and the land was waste and unoccupied for a short time before the suit and where it had not been shown how the defendants acquired it.

Held, that title being originally with the plaintiffs and the land being banjar, they must, notwithstanding the erroneous entries from 1891 to 1918, be considered to be owners of it, unless overt acts of adverse possession extending for a period longer than 12 years are established.

ADVERSE POSSESSION—Waste Land.

(*Tekchand and Agha Haidar, JJ.*) NUR MAHOMED *v.* QAIM 10 **Lah. L. J. 63 = 29 P. L. R. 381 = 110 I. C. 857 = A. I. R. 1928 Lah. 306.**

———*Waste land—Grama Nattam in Madras villages—Indiscriminate miscellaneous user by villagers does not prove either custom or adverse possession.*

Indiscriminate miscellaneous user of village waste land cannot establish the fact that such user had become a customary law of the place in respect of the persons and things which it concerned. The enjoyment is of too fugitive and patently permissive a kind to afford any support to it. According to the common law of the country the control of Grama Nattam vests in the Revenue authorities and they are at liberty to grant portions of it at their discretion to the persons who apply for it for building purposes. A Court should not decide that a local custom exists unless the Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it had been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise, the usage had become a customary law of the place in respect of persons and things concerned. 4 M. L. T. 440, Foll. (*Ayling and Odgers, JJ.*) TALUK BOARD, DINDIGUL *v.* VENKAT RAMA AIYAR. **46 Mad. 866 = 75 I. C. 38 = 18 M. L. W. 366 = 33 M. L. T. 40 = A. I. R. 1924 Mad. 197 = 45 M. L. J. 333.**

———*Waste land—Landlord and tenant—Waste land is to be considered in possession of person having title thereto—Cutting hogla, wild grass, is not an act of possession or dispossession.*

Waste land is to be considered in the possession of the persons having title thereto and therefore the cutting of hogla, which is a wild grass, where it is not supposed to be the exclusive property of any one, is not an act of possession by any party. (*Suhrawardy and Graham, JJ.*) NANDA KUMAR DAS *v.* EMDAD ALI. **44 C. L. J. 265 = 98 I. C. 849 = A. I. R. 1927 Cal. 49.**

———*Waste land—Occupation by defendant for temporary purposes—Defendant's act is not such adverse possession as would make the true owner eject defendants.*

Where the land in dispute is in the ambit of the zemindar of the plaintiffs and the defendants have been found to be in possession for more than 12 years but the nature of their possession was such that it could not amount to a denial of plaintiff's title or adverse possession and where the plot in dispute is waste land and the defendants had enclosed it by a small wall to keep their cattle in day time.

Held, that this was not such adverse possession as would make the zemindar try to kick the defendants out as the land was of no immediate use to him and was used for temporary purpose by the defendants. 39 Mad. 617 (P. C.) Ref. (*Gokul Prasad, J.*) LAKHU *v.* LAL SINGH. **71 I. C. 265 = A. I. R. 1923 All. 399.**

———*Waste land—Waste lands in South Canara belong to Government.*

There is an undoubted presumption that forest tracts and old wastes in South Canara belong to the Government unless that presumption is displaced by positive evidence that the right has, in any particular tract or piece of land, been granted by the sovereign power to any individual or bodies of individuals; or rights have been consciously allowed to grow up adversely to the Government. 3 Bom. 452 and 28 Mad 257, Affirmed. (*Mr. Ameer Ali.*) AMBU NAIR *v.* SECRETARY OF STATE. **51 I.A. 257 = 47 Mad. 572 = 80 I.C. 835 = 26 Bom. L.R. 639 = 20 M.L.W. 49 = 1924 M.W.N. 572 = 35 M.L.T. 128 = 29 C.W.N. 365 = A. I. R. 1924 P.C. 150 = 47 M. L. J. 35 (P. C.).**

AGENCY RULES FOR AGENCY TRACTS. Ganjam, Vizagapatam and Godavari Districts.

ADVERSE TITLE.

See ADVERSE POSSESSION.
(1) LANDLORD AND TENANT.
(2) LEASE.
(3) MORTGAGOR AND MORTGAGEE.
(4) T. P. ACT, S. 111 (*g*).

ADVERTISEMENT—*See* CONTRACT ACT, S. 2, ETC.

ADVOCACY—*See* LEGAL PRACTITIONER.

ADVOCATE—*See* LEGAL PRACTITIONER.

ADVOCATE-GENERAL.

See (1) C. P. CODE, S. 92.
(2) LETTERS PATENT.

AFFIDAVIT—*See* C.P.C., O. 19, R. 3.

AFFILIATION—*See* BUDDHIST LAW, BURMESE, MAHOMEDAN LAW.

AFFRAY—*See* PENAL CODE, SS. 159, 160.

AFRICAN LAW—*Adverse possession—Exclusive possession by one member of the family for and on behalf of the family generally—Title under the Statute of Limitation—African law.*

The notion of individual ownership is quite foreign to native ideas in Africa. Land belongs to the community, the village or the family; never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon goes to him for it. But the land so given still remains the property of the community or family. Where, therefore, a son holds land after his father's death, he must be deemed to hold for the family and cannot acquire exclusive title to it by lapse of time. (*Viscount Haldane.*) SUNMONEE *v.* DISU RAPHAEL. **47 C.L.J. 333 = 27 M.L.W. 824 = 107 I. C. 344 = A. I. R. 1927 P. C. 270 = 54 M. L. J. 394.**

AGE—Of Ceremonial Competency—*See* HINDU LAW.

———**Of Discretion**—*See* HINDU LAW — ADOPTION.

———**Of Majority**—*See* MAJORITY ACT.

AGENCY.

See (1) CONTRACT ACT, 1872, CH. X.
(2) PRINCIPAL AND AGENT.

AGENCY RULES FOR AGENCY TRACTS. Ganjam Vizagapatam and Godavari Districts.

———*Decree passed by Court outside Agency tracts for sale of property within such area—Execution—Legality of decree—Objection to.*

It is not competent to civil Courts exercising jurisdiction outside the Agency area to pass a decree for the sale of the properties situate within the area. When such a decree is sought to be executed within the Agency area, the Agency Court has a right to refuse execution on the ground that the decree is, on its face without jurisdiction and a nullity. 42 M. 813, Foll.; 43 M. 675, dist. (*Krishnan and Venkatasubba Rao, JJ.*) KRUTHIVENT PERRAZU *v.* SRI RAJA NALLAPARAZU MEERJA SEETHARAMA CHANDRA. **16 M.L.W. 669 = 1922 M.W.N. 728 = 69 I.C. 559 (2) = A.I.R. 1923 Mad. 114 (1).**

——**R. 3, cls. 2 and 3**—*Agent acting under, is a Court—No suit lies against him for what he does as such agent.*

The agent when acting under cls. 2 and 3 of R. 3 of the Godavari Agency Rules acts as a Court, and no suit lies against a Court for what it does as such court. 39 Mad. 808, Dist. (*Spencer and Ramesam, JJ.*) MALLADI VENKATARAMAYYA *v.* SECRETARY OF STATE FOR INDIA. **65 I.C. 345 = 15 L.W. 236 = 30 M. L.T. (H.C.) 76 = 1921 M.W.N. 830 = A.I.R. 1922 Mad. 1 = 42 M.L.J. 148.**

——**Rr. 8, 24 and 25**—*Order of Assistant Commissioner in execution—No appeal lies—Remedy of aggrieved party is to move Commissioner under R. 25 to make reference to the Government.*

R. 8 provides an appeal to the Court of the Agency Commissioner against the decree of an Assistant Commissioner; but the order of an Assistant Commissioner in execution proceedings is not a decree. And there is no provision in the Agency Rules for appeals against orders passed in execution or miscellaneous proceedings. The remedy of the aggrieved party lies by way of petition under R. 24 against the order in execution of the Agency Commissioner, or by moving the Agency Commissioner under Rule 25 to make a reference to the Government as a case not provided for by the Rules. (*Spencer and Venkatasubba Rao, JJ.*) VENKATA RANGABHUSANAM *v.* KARELLA RAMASWAMI. **73 I.C. 131 = 17 M. L. W. 375 = 1923 M.W.N. 244 = A. I. R. 1923 Mad. 500 = 45 M.L.J. 78.**

——**R. 13**—*Petition under R. 13—High Court allowing petition and setting aside the decree—Order held to be faulty in expression but practically a direction to review.*

On a petition under R. 13 the High Court judgment was in the following terms : "On the best consideration I can give to both the facts and law of this case, I am bound to say, I think, that the learned Additional District Judge was wrong in the view he took of this transaction as far as it affects the sons. In my view the petition must be allowed with costs and the decree of the Additional District Judge set aside and the first Court's decree be restored."

Held, that a mere fault of expression could have no effect upon what was the substance of the matter. The Court was sitting to review the petition and what was said was practically a direction for the Judge to review although the phraseology of the order was not quite correct. (*Viscount Dunedin.*) NALLAPARAJU MIRJA ATCHUTHARAMARAJU *v.* KRUTTIVENTI PERRAJU GARU. **121 I. C. 227 = 51 C. L. J. 76 = 31 M.L.W. 199 = 34 C.W.N. 397 = 32 B. L. R. 481 = A. I. R. 1930 P. C. 29 (a) = 58 M.L. J. 101.**

——**(1920) Rr. 14 and 2 (3)**—*District Court is not of equal or superior jurisdiction to the Agency Commissioner's Court—High Court cannot transfer case from latter Court to former.*

The High Court being superior to the Court of the Agency Commissioner can transfer a case therefrom to its own file, but not to the file of a District Court which is not of equal or superior jurisdiction to the Agency Commissioner's Court. 23 M. 329, dist. (*Oldfield and Venkatasubba Rao, JJ.*) RAMACHANDRA DEO *v.* GANGARAJU. **72 I. C. 745 = 46 Mad. 726 = 17 M. L. W. 517 = 32 M. L. T. 269 = 1923 M. W. N. 277 = A. I. R. 1923 Mad. 604 = 45 M.L.J. 8.**

——**Rr. 16 and 20**—*C. P. C.* (*V of* 1908)—*Claim petition in Agency Tracts must be treated as a suit and the decision therein as a decree against which appeal lies—C. P. Code, O. 21, R. 58 does not apply to Agency Tracts.*

The Procedure prescribed by O. 21, Rr. 58 to 63, C. P. C., for claim petition does not apply to the Agency tracts. Where a person in the Agency tracts, whose property was attached in execution, preferred a claim petition to the Assistant Agent.

Held, it must be treated as a suit and the decision of the Assistant Agent as a decree. An appeal lay against it to the Agent and the High Court could interfere with the Agent's decision under R. 20 of the Agency Rules. (*Oldfield and Venkatasubba Rao, JJ.*) RANI OF TUNI *v.* MAHARAJAH OF JEYPORE. **66 I. C. 115 = 46 Mad. 35 = 16 M. L.W. 8 = 1922 M. W. N. 314 = 30 M.L.T. (H.C.) 339 = A. I.R. 1922 Mad. 271 = 42 M. L. J. 487.**

——**Rr. 22 and 16 (4)**—*Agency Munsif cannot attach property within Agency tract at the instance of British Indian Court.*

Rr. 22 and 16, cl. (4) do not confer the power on an Agency District Munsif of attaching properties before judgment at the instance of a British Court situate outside the Agency tracts, nor is such power conferred upon him by R. 2, cl. (4). (*Wallace and Madhavan Nair, JJ.*) ZUBEDA BEGAM *v.* KOMMANYA KANNIAH. **88 I. C. 430 = A. I. R. 1925 Mad. 1100 = 48 M. L. J. 680.**

——**R. 48**—*Petition to review—Order is not appealable.*

Where there is only a petition to review there is no proper decree of the High Court which can be appealed against in the ordinary way and no appeal therefore lies to the Privy Council. (*Viscount Dunedin.*) NALLAPARAJU MIRJA ATCHUTHARAMARAJU *v.* KRUTTIVENTI PERRAJU GARU. **31 M. L. W. 199 = 121 I. C. 227 = 51 C. L. J. 76 = 34 C.W.N. 397 = 32 B. L. R. 481 = A. I.R. 1930 P. C. 29 (b) = 58 M. L. J. 101.**

——**R. 55**—*C. P. Code, S.* 115—*Period for preferring appeal to Agent to Governor expired—Petition presented requesting that it should be treated as appeal or petition under R.* 55 *of Rules—Agent dismissing petition—No revision would lie.*

Where after expiry of the period for preferring an appeal to the Agent to the Governor, under the Agency Rules, a petition was presented to the Agent to be disposed of as an appeal or a petition under R. 55 of the Rules, but was dismissed as not giving satisfactory reasons, High Court would not interfere in revision. A.I.R. 1926 Mad. 218, Ref (*Mackay, J.*) CHEBOLU JAGANNADHAM *v.* DALAPATI CHENDRAMMA. **119 I.C. 320 = A. I. R. 1929 Mad. 489 (1).**

——**R. 55**—*Improper exercise of discretion—Agent can interfere.*

The Agency rules do not provide for any appeal against an order refusing to set aside a dismissal. Therefore the exercise of discretion by the first Court becomes final and is not subject to alteration by the appellate Court. If the Agent to the Governor is satisfied that this discretion had not been properly exercised by the first Court he would be justified in acting under R. 55. (*Phillips, J.*) VENKATA JAGGA RAO *v.* PILLA RANGA NAYAKULU. **39 M.L.T. 458 = 106 I. C. 169 = A. I. R. 1928 Mad. 48 (1).**

——**R. 59**—*Appeal against order of Divisional Officer to Government is not governed by the Rules—No reference can be made by Government to High Court.*

R. 59 or R. 24 of the old rules applies to petitions against the proceedings of the Agent to Governor or the Government Agent in respect of matters not otherwise provided for in these rules. An appeal against the order of the Divisional Officer of the Ghats Agency is

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not governed by the rules, and therefore no reference can be made under these rules to High Court by Government. (*Phillips and Madhavan Nair, JJ.*) RAMCHANDRAYYA PATNAIK *v.* NARAYANA.

38 M. L. T. (H. C.) 14 = 98 I. C. 511 = A. I. R. 1927 Mad. 218.

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See (1) CONTRACT ACT, SS. 182 TO 238.
(2) HUSBAND AND WIFE.
(3) POWER OF ATTORNEY.
(4) PRINCIPAL AND AGENT.

AGRAHARAM.

See (1) GRANT.
(2) INAM.
(3) LAND TENURE.
(4) MADRAS ESTATES LAND ACT.

AGRA PRE-EMPTION ACT (XI OF 1922)—*Interpretation of Statutes—Marginal notes, in Agra Pre-emption Act, inserted under legislature's authority can be referred to while exposing meaning of sections.*

The question whether a marginal note can be referred to for an exposition of the meaning of a section depends upon whether the note has been inserted by or under the authority of the legislature. The marginal notes in the case of Agra Pre-emption Act being inserted under the authority of the legislature can be referred to while interpreting the sections of that Act. *Claydon* v. *Green*, (1868) 3 C. P. 511, Dist.; 26 All. 393 (P. C.), Ref. (*Boys, Kendall and King, JJ.*; afterwards *Mukerji and Sen, JJ.*) RAM SARAN DAS *v.* BHAGWAT PRASAD. **1929 A. L. J. 290 = 113 I. C. 442 = 51 All. 411 = A. I. R. 1929 All. 53 (56, 58) (F. B.).**

——*When Court can decree claim on payment of market value laid down.*

Although a pre-emptor may fail to produce direct, oral or documentary evidence to establish conclusively that any part of the sale consideration, paid before the Sub-Registrar, was subsequently returned, yet it is open to him to rely on circumstantial evidence; and if he can convince the Court on the basis of such evidence that the consideration shown to have been paid was not, in fact, the true consideration, the Court may proceed to enquire into the market value. The fact that the whole consideration was paid before the Sub-Registrar and no part of it is positively proved to have been returned is a strong circumstance in favour of the vendee and, unless the Court does in spite of that circumstance believe that the whole of it did not represent the true and real consideration, it would not be open to the Court to decree the claim on the payment of the market value. (*Sulaiman and Kendall, JJ.*) DHANUKDHARI SINGH *v.* SURESH SINGH. **1930 A. L. J. 561 = A. I. R. 1930 All. 363.**

——*Pre-emptor can show real nature of alienation.*

Pre emptor cannot be prevented from raising the question that the transaction which is ostensibly one of gift is in reality one of sale. (*Sulaiman and Pullan, JJ.*) GADHU SINGH *v.* BANSGOPAL.

122 I. C. 747 = 1930 A. L. J. 399 = A. I. R. 1929 All. 859.

——*Land includes buildings standing on it.*

The definition of "land" is wide enough to cover buildings standing on it, although, in order to be pre-emptible, such buildings must be sold along with the land to which they are attached but not otherwise. (*Sulaiman and Iqbal Ahmad, JJ.*) ABDUL KHAN *v.* SHAKIRA BIBI. **50 All. 348 = 108 I. C. 573 = 25 A. L. J. 1061 = A. I. R. 1928 All. 124.**

——*Petty proprietor.*

A purchaser of a few plots in a village without concern with anything else does not become a co-sharer but is a mere petty proprietor as defined in S. 4 (7). (*Sulaiman and Boys, JJ.*) AMINCHAND *v.* YAD RAM.

24 A. L. J. 727 = 96 I. C. 710 = A. I. R. 1926 All. 537 (2).

——**S. 1 (3)**—*Application of, to plots within municipal limits—Such plots governed by local custom—Pre-emption.*

The Act does not apply to any area within the limits of any municipality. The case so far as plots situated in municipal limits are concerned is therefore governed by a local custom provided it is proved to exist. (*Sulaiman and Kendall, JJ.*) MUSHTAQ ALI BEG *v.* JWALA SHANKAR SAHAI. **1930 A. L. J. 345 = A. I. R. 1930 All. 372.**

——**S. 1 (3) and S. 3**—*A customary right of pre-emption within a municipal area not abolished.*

According to S. 1 it is quite clear that the customary right of pre-emption has been abolished only in areas to which the Act applies. So the Act has not abolished a customary right of pre-emption within a municipal area to which the Act is not applicable. (*Sulaiman and Banerji, JJ.*) BOHRA SRI RAM *v.* JWALA SHANKER SAHAI. **25 A. L. J. 839 = 106 I. C. 192 = A. I. R. 1927 All. 775.**

——**S. 2**—*Act came in force on 17th February 1923—Transfer made before that date though registered after that date cannot be pre-empted—Registration Act, S. 47.*

For purposes of S. 2 a transfer sought to be pre-empted would come into force on the date of the deed of sale and not when it was registered. Therefore, Pre-emption Act of 1922 does not apply to a transfer made before the 17th of February 1923, when the Act came into force although the deed of transfer is registered after that date. A. I. R. 1925 All. 542 and A. I. R. 1927 P. C. 42 (P. C.), Rel. on. (*Sulaiman and Banerji, JJ.*) MD. BASHIR KHAN *v.* MT. KULSUM BIBI.

25 A. L. J. 742 = 103 I. C. 308 = A. I. R. 1927 All. 545.

——**S. 2**—*Applicability.*

Agra Pre-emption Act applies only with respect to sales that took place after it came into force. (*Sulaiman and Mukerji, JJ.*) DWARKA SINGH *v.* ANRUP SINGH. **98 I. C. 511 = A. I. R. 1927 All. 103.**

——**S. 3**—*Applicability—Agreement not amounting to claim for pre-emption—Personal contract — Specific Relief Act, S. 27 (b).*

A sold his house to *B* for Rs. 175 and *B* made an agreement that in case he would transfer the house he would sell it back to *A* for the same price of Rs. 175 and to nobody else unless *A* declines to purchase it for that price. *B* then sold the house to *C* who had notice of the agreement between *A* and *B*, for Rs. 300 disregarding *A's* offer for Rs. 175. *A* then sued for enforcement of the contract.

Held, that the agreement in question was not void on account of ambiguity or as offending against the rule of perpetuity or as being an absolute restraint on alienation. It was merely a personal contract between *A* and *B* and as such *A* could enforce it against the purchaser *C* who had notice of the contract.

Held further, thar *A's* suit did not amount to a claim for pre-emption and hence was not unentertainable by the provisions of S. 3, Agra Pre-emption Act. (*Sulaiman and Pullan, JJ.*) DEBI DAYAL *v.* GHASITA.

119 I. C. 836 = 1929 A. L. J. 1255 = A. I. R. 1929 All. 667.

——**Ss. 3 and 5**—*Village of three mahals—Wajib-ul-arz of two only recording custom of pre-emption—Property sold from third mahal—No wajib-ul-arz of this mahal or village prior to the Act recording custom of pre-emption—Right of pre-emption cannot be enforced.*

A village consisted of three mahals. Wajib-ul-arzes for only two recorded a right of pre-emption, and the third mahal in which the property sold was situated did not record any right of pre-emption. In a suit for pre-emption, *held*, that it was incumbent on the plaintiff to show that there was a wajib-ul-arz prepared prior to the commencement of the Act in respect of this particular mahal or village out of which it was formed which recorded such a custom or right. The mere fact that the wajib-ul-arz of the other two mahals recorded a custom of pre-emption was not sufficient. (*Sulaiman and Kendall, JJ.*) ZALIM SINGH *v.* RAGHUNANDAN.
115 I. C. 455 = 51 All. 604 = 1929 A. L. J. 379 = A. I. R. 1929 All. 379.

———**S. 4**—*Manzooridar is inferior proprietor.*

A manzooridar is an inferior proprietor and a co-sharer is defined as a person other than a petty proprietor entitled as proprietor to any share or part in a mahal or a village. (*Sulaiman and Kendall, JJ.*) DALLU SINGH *v.* CHHAKAN SINGH. **A. I. R. 1930 All. 446.**

———**S. 4**—*Right to receive malikana is not interest of co-sharer.*

The mere right to receive malikana dues is not an interest of a co-sharer in a part of the mahal. 42 All. 262, Rel. on. (*Sulaiman and Pullan, JJ.*) SAKINA BEGUM *v.* HARNAM SINGH. **118 I. C. 667 = 1929 A.L.J. 1166 = 51 All. 971 = A.I.R. 1929 All. 618.**

———**S. 4 (1)**—*Full co-sharer —Mahomedan widow in possession of husband's property in lieu of dower —Transfer of the property—Transferee in possession for more than twelve years—If a full co-sharer.*

Where a Mahomedan widow in possession of her husband's property in lieu of her dower debt sold the property itself to a stranger and the vendee remained in possession of the property for a period of more than twelve years, held that the possession of the vendee became adverse as against the co-sharer of the deceased Mahomedan from the date of the sale-deed, as the widow had no right to transfer the property as distinguished from her right to hold possession of the property, and therefore, the vendee acquired proprietary title to the property by adverse possession and became a full co-sharer within the meaning of S. 4, cl. (1) of the Agra Pre-emption Act. (*Sulaiman and Pullan, JJ.*) MT. MAHMUDA BIBI *v.* ABDUL HAMID. **120 I. C. 557.**

———**S. 4 (1)**—*Proprietor as defined in S. 4—Meaning of—S. 11 applies to transfer by such proprietor and S. 12 gives right to pre-empt.*

There is no reason to suppose that the word " proprietor " in S. 4 is not used in that general sense so as to include both a superior and an inferior proprietor. It, therefore, follows that even if an inferior proprietary interest in land has been transferred, S. 11 would be applicable and, therefore, person in S.12 would have a right to preempt. (*Sulaiman and Kendall, JJ.*) DALLU SINGH *v.* CHHAKAN SINGH. **A. I. R. 1930 All. 446.**

———**S. 4 (1)**—*Meaning of "entitled as proprietor" explained.*

The expression "entitled as proprietor" means that a person must possess proprietary interest in the mahal and not merely possession over a share in the mahal. Merely possessory title would not make a person, whose name is recorded in the khewat as co-sharer, entitled as proprietor to a share. (*Sulaiman and Pullan, JJ.*) PHUL CHAND *v.* GOBARDHAN DAS. **119 I. C. 855 = 1929 A. L. J. 970 = A. I. R. 1929 All. 739.**

———**S. 4 (1)**—*Mere fact that person is recorded as co-sharer and is in possession does not make him co-sharer.*

The mere fact that a person is recorded as co-sharer and is in possession of the property does not make him a co-sharer, that is to say, one entitled as proprietor to the share within the meaning of sub-cl. (1). The title in that clause means actual proprietary title and not merely possessory title. (*Sulaiman and Kendall, JJ.*) CHAUHARJA SINGH *v.* BACHCHA LAL.
1929 A. L. J. 586 = 115 I. C. 799 = A. I. R. 1929 All. 413.

———**S. 4 (1)**—*Proprietor.*

A person in adverse possession without actual title cannot be said to be entitled as proprietor to the property in his possession so long as his title has not matured by prescription within S. 4 (1). (*Sulaiman and Kendall, JJ.*) BACHCHI LAL *v.* DEBI DIN.
119 I. C. 503 = 51 All. 629 = 1929 A. L. J. 430 = A. I. R. 1929 All. 300.

———**S. 4 (3)**—Land includes buildings. A. I. R. 1928 All. 124, Rel. on. (*Sulaiman and Kendall, JJ.*) JAMNAPRASAD *v.* MD. ZAHIR UDDIN. **116 I.C. 874 = 51 All. 658 = 1929 A. L. J. 398 = A. I. R. 1929 All. 366.**

———**S. 4 (7)**—*Scope—Mere fact that person is proprietor of specific plot of land does not make him petty proprietor.*

The definition of petty proprietor given in S. 4 (7) makes it clear that the mere fact that a person is the proprietor of a specific plot of land does not make him a petty proprietor. It should further appear that he is not entitled to such an interest in the joint lands of the mahal or to take part in the administration of its affairs. (*Sulaiman, Ag. C. J. and Sen, J.*) SHEO BALAK RAM *v.* MATHURA PRASAD. **1930 A. L. J. 343 = 122 I. C. 178 = A. I. R. 1930 All. 117.**

———**S. 4 (7)**—*Muafi plots.*

Holders of specific muafi plots are petty proprietors when they do not own any land jointly with the co-sharer in mahal in the administration of the affairs of which they are not entitled to take a part. (*Sulaiman and Kendall, JJ.*) LALTA PRASAD *v.* CHUNNI SINGH.
115 I. C. 800 = 51 All. 594 = 1929 A. L. J. 429 = A. I. R. 1929 All. 385.

———**S. 4 (10)**—*In the case of tangible property of Rs.* 100 *or upwards, mere mutation of names is not sale which can be pre-empted—Transfer of Property Act, S.* 54.

As the sale of a tangible property of the value of Rs. 100 and upwards can be made only by a registered instrument, the mere fact that the name of the supposed vendee has been mutated in place of the name of the supposed vendor does not constitute a sale, which can be pre-empted, in the absence of a registered instrument. (*Sulaiman and Banerji, JJ.*) BHAGWAN SINGH *v.* TASADDUK HUSAIN. **115 I. C. 642 = 1929 A. L. J. 889 = A. I. R. 1929 All. 549.**

———**Ss. 5, 11 and 12**—*Wajib-ul-arz containing mention of right of pre-emption applicable to portion of mahal, right if deemed to exist throughout whole mahal.*

If in any mahal, as to which a question of right of pre-emption has arisen, there be found to exist a wajib-ul-arz which contains a mention of pre-emption, applicable to any portion of the mahal by virtue of the rules enacted by legislature, a right of pre-emption should be deemed to exist throughout the whole mahal and not only in that portion which has come from the original mahal containing such a record. To confine a right of pre-emption to a specified area is contrary to the intention of legislature as is to be gathered from the provisions of Ss. 11 and 12. S. 11 provides that where any proprietary interest in land forming part of any mahal or village in which a right of pre-emption is sold a right of pre-emption shall accrue. Where therefore proprietary interest in land forming part of a mahal is sold the right of pre-emption must be deemed to exist in the whole mahal by virtue of S. 5. A mahal is a complete fiscal unit and for the purposes of the existence of the right of pre-emption the Act refers to mahals or villages and does not refer to portions of mahals or villages. (*Sulaiman, Ag. C. J., Mukerji and King, JJ.*) RIAZUDDIN *v.* MT. PHULA DEVI. **1929 A. L. J. 1212 = A. I. R. 1929 All. 977 (F.B.).**

——**S. 5**—*Right of pre-emption recorded in wajib-ul-arz—Presumption exists regarding right of pre-emption.*

The existence of an entry in the wajib-ul-arz as to the existence of a right of pre-emption raises the presumption under S. 5 that a right of pre-emption exists and that right is to be exercised in accordance with the provisions of Ss. 11 and 12 of the Act. (*Sulaiman and Kendall, JJ.*) DALLU SINGH *v.* CHHAKAN SINGH. **A. I. R. 1930 All. 446.**

——**S. 5**—*Record recognizing right of pre-emption—Wajib-ul-arz is conclusive evidence of custom of pre-emption.*

Once plaintiff shows that there was a wajib-ul-arz prepared relating to a mahal which contained the record recognizing the right of pre-emption, whatever its extent and in whatever form expressed, the Court ought to presume under S. 5 of the Act that there is a custom of pre-emption. From that moment the entry in the wajib-ul-arz ceases to be of any significance. (*Sulaiman and Pullan, JJ.*) GANESHI LAL *v.* CHOB SINGH. **118 I. C. 657 = A. I. R. 1929 All. 755.**

——**S. 5**—*Scope.*

The wajib-ul-arz recited " up to the present time there have been no suits of pre-emption in this village but there is a custom of pre-emption in the surrounding villages. " The clause then gave the details of the order in which the co-sharers were entitled to pre-empt.

Held, that the right of pre-emption must be deemed to exist within the meaning of S. 5. A. I. R. 1927 All. 277, Foll. (*Sulaiman and Sen, JJ.*) RAM LAKSHMAN JANKI *v.* RAM GOPAL. **117 I. C. 106 = 1929 A. L. J. 595.**

——**S. 5**—*Custom in a mauza applies to all its tolas.*

A custom of pre-emption recorded in the wajib-ul-arz of a mauza applies to the lands situated in all the tolas of the mauza. (*Lindsay and Banerji, JJ.*) RAM RACHHA TEWARI *v.* GIRJA DAT PANDE. **107 I. C. 692 = A. I. R. 1928 All. 50.**

——**S. 5**—*"By necessary implication"—Wajib-ul-arz—Construction.*

Where a wajib-ul-arz provided : "Up to the present time there has been no case of pre-emption in this village, but in the surrounding villages there is a custom of pre-emption by which when one co-sharer wishes to sell his land, pre-emption is to be allowed in favour of . . . . and then followed the scheme of pre-emption.

Held, that a custom of pre-emption is necessarily implied within the meaning of S. 5. (*Lindsay and Sulaiman, JJ.*) SHYAM LAL *v.* DWARKA PRASAD. **49 All. 139 = 25 A. L. J. 109 = 98 I. C. 816 = A. I. R. 1927 All. 277.**

——**S. 5**—*Pre-emption.*

Plots in mahal or abadi are not exempt from pre-emption. (*Lindsay and Kanhaiya Lal, JJ.*) BHIKI MAL *v.* DEBI SAHAI. **47 All. 923 = 23 A. L. J. 615 = 6 L. R. A. Civ. 487 = 89 I. C. 219 = A. I. R. 1926 All. 179.**

——**S. 5**—*Wajib-ul-arz and Rubkar must be construed together.*

A *wajib-ul-arz* cannot be read detached from a *rubkar* which professes to correct it. The two documents must be construed together. (*Lindsay and Kanhaiya Lal, JJ.*) KISHUN AHIR *v.* SARAN AHIR. **88 I.C. 433 = 23 A. L. J. 519 = 6 L. R. A. Civ. 482 = A. I. R. 1925 All. 553.**

——**S. 5 (a)**—*Entry in wajib-ul-arz meaning " at transfer of one co-sharer's property, other co-sharers have right of pre-emption according to rights and usages of religion "—Although word " religion " is ambiguous, yet entry could be interpreted as laying down rule of pre-emption according to Mahomedan Law and so could not be taken out of S. 5 (a).*

There was an entry in the wajib-ul-arz which meant that " at the time of transfer of the property of any co-sharer, other co-sharers have a right of pre-emption according to the rights and usages of religion."

Held, that although the word " religion " was ambiguous yet the entry could be interpreted as laying down a rule of pre-emption according to the Mahomedan law and was not possible to be taken out of the language of S. 5 (*a*), and must, therefore, be held to be conclusive evidence of the right of pre-emption. (*Sulaiman and Kendall, JJ.*) RAMESHAR PRASAD *v.* GHISIANAN PRASAD. **121 I.C. 241 = 1929 A. L. J. 665 = 51 All. 820 = A. I. R. 1929 All. 531.**

——**Ss. 6 and 11**—*Sale deed executed in pursuance of decree by Court is sale within meaning of S. 11 and as exception in S. 6 does not apply to such sale-deed. right of pre-emption can accrue in respect of it.*

The transfer of proprietary interest for consideration which is effected by means of a sale-deed executed by the Court in pursuance of a decree for a specific performance is a sale within the meaning of S. 11 and as the sale is not in execution of a decree but only in pursuance of a decree, it does not come within exception contained in S. 6, a right of pre-emption can accrue in respect of it. (*Sulaiman and Sen, JJ.*) SAHU LAL CHAND *v.* L. RAM CHANDRA. **116 I. C. 495 = 51 All. 842 = 1929 A. L. J. 766 = A. I. R. 1929 All. 462.**

——**S. 7**—*Scope.*

Where a person is not entitled to purchase property under Bundelkhand Land Alienation Act he cannot also have the right of pre-emption under S. 7, Agra Pre-emption Act. (*Sulaiman, A.C.J. and Pullan, J.*) SHRI MURAT RAM JANKI BIRAJMAN *v* GOREY LAL. **118 I.C. 233 (All.).**

——**S. 7**—*Bundelkhand Alienation of Land Act (II of 1903), Ss. 3 and 16 (a)—Suit for pre-emption—Pre-emptor not member of same agricultural tribe as that of vendor of property but co-sharer in village—Vendee, member of same agricultural tribe as vendor but not co-sharer in village—The pre-emptor's right of pre-emption cannot be accepted and the vendee has legal right to property purchased.*

Certain persons claimed a right of pre-emption, of a property situated in a District of Bundelkand, which was sold on the 22nd December 1923, and the vendor and vendees were members of the same agricultural tribe but the vendees were not co-sharers in the village at all. The pre-emptors, on the other hand, were not members of the same agricultural tribe as the vendor, but were co-sharers not only in the mahal but in the very khata in which the share sold was situated. Before bringing their suit for pre-emption the pre-emptors did obtain the sanction of the Collector under the Bundelkhand Alienation of Land Act, S. 16 (*a*) as amended by Act IV of 1915. The pre-emptors based their claim mainly on the custom recorded in the wajib-ul-arz of the village and the vendees contested the suit on the ground that the pre-emptors had no right to maintain the suit and that they had no preferential right as against them.

Held, that a right of pre-emption is not the same thing as a right of purchase. It, therefore, follows that the sanction obtained by the pre-emptors to pre-empt the property cannot strictly be taken to be a sanction to purchase it. Moreover, as the pre-emptors are not of such a class as by right to be entitled to purchase the property, but they might, if they obtain the sanction of the Collector, become so entitled to purchase ; their right is conditional, and so they are not absolutely entitled to purchase; their right is conditional, and so they are not "entitled to purchase" the property under the Bundelkhand Act within the meaning of S. 7, Agra Pre-emption Act.

Per *Sulaiman, J.*—It was obviously intended that in areas where the Agra Pre-emption Act applies, there can be no right of pre-emption except in accordance with the Act. The Pre emption Act undoubtedly applies to Bundelkhand, and whatever right the present plaintiffs might have had independently of the Act, cannot now be enforced. They can only succeed if they are entitled under the Pre-emption Act to pre-empt. Although the Act applies to them, and they would come within the classes of persons mentioned in S. 12, they are debarred from taking advantage of these provisions because S. 7 expressly prevents the Act from conferring any benefit on them. The result is that S. 3 takes away any right that they might have had independently of the Act, and S. 7 prevents the conferring on them of any right under the Act. Thus they have lost all right of pre-emption. (*Sulaiman and Ashworth, JJ.*) PHOOLCHAND *v.* RAM NATH. **107 I. C. 570 = 50 All. 430 = 26 A. L. J. 142 = A. I. R. 1928 All. 186.**

———**S. 7**—"*Entitled to purchase,*" *meaning explained.*

Ashworth, J.—The phrase "entitled to purchase" as used in S. 7, Agra Pre emption Act, only refers to the persons given an unqualified right (*i.e.*, a right independent of the Collector's sanction) by S. 3, Bundelkhand Alienation of Land Act. The operation of S. 7, Agra Pre-emption Act, cannot have been intended to depend upon the Collector's sanction. (*Sulaiman and Ashworth, JJ.*) PHOOL CHAND *v.* RAM NATH. **50 All. 430 = 107 I.C. 570 = 26 A.L.J. 142 = A. I. R. 1928 All. 186 (190).**

———**S. 8 (c)**—*Omission of recital in sale deed as to purpose for which property is acquired is not fatal—This can be proved by extrinsic evidence.*

The omission of any recitals as to the purpose for which the property is acquired in the sale deed is not a fatal defect. It is open to the vendee to show by other evidence, even though there may not be any such recital, what the real purpose of the purchase is though of course an omission of such a purpose from the sale deed may be a strong piece of evidence against him. (*Sulaiman and Kendall, JJ.*) SARJU TEWARI *v.* SHAH MOHAMMAD AMIN. **123 I. C. 753 = 1930 A. L. J. 648 = A.I.R. 1930 All. 337.**

———**S. 8 (c)**—*Cultivation of sugarcane crop is agricultural pursuit distinct from industry of manufacturing sugar.*

Sugar plantation or the cultivation of sugarcane crop is an agricultural pursuit quite different and distinct from the industry of manufacturing sugar. The setting up of even a model farm, the main object of which may be to experiment on the quality of the sugarcane produced or to serve as an object lesson to the neighbouring cultivating classes would be to bring about an improvement in the cultivation of sugarcane, *i.e.*, a promotion of agriculture. That object cannot be treated as the purpose of a manufacturing industry itself. A. I. R. 1930 All. 77 Foll. (*Sulaiman and Kendall, JJ.*) SARJU TEWARI *v.* SHAH MOHAMMAD AMIN. **123 I. C. 753 = 1930 A. L. J. 648 = A. I. R. 1930 All. 337.**

———**S. 8 (c)**—*Primary and main object of purchase of entire land should be manufacturing—Burden of proof lies on vendee.*

A vendee who takes up surplus land, intending to hold it in reserve for future use when he can afford to extend his factory will not be protected under S. 8. The primary and main object of the purchase of the entire land should be the manufacturing purpose and the land so purchased should in good faith be substantially utilized for that purpose within one year. The burden of showing that the case falls within the exception contained in S. 8 undoubtedly lies on the vendee. (*Sulaiman and Kendal, JJ.*) SARJU TEWARI *v.* SHAH MOHAMMAD AMIN. **1930 A. L. J. 648 = 123 I. C. 753 = A. I. R. 1930 All. 337.**

———**S. 8 (c)**—*Purchase of land for sowing sugarcane crops to be used as raw material for sugar factory does not come within the meaning of S. 8 (c).*

Sugarcane plantation is an agricultural pursuit quite separate and independent from the industry of manufacturing sugar. No doubt it is raw material which is required by a sugar factory but production of such raw material is not a purpose of manufacturing industry though undoubtedly it is of help. S. 8 (*c*) cannot apply to a case where raw material is to be produced by cultivation on a large scale in order that it may be utilized by the company. (*Sulaiman and Pullan, JJ.*) PUNJAB SUGAR MILLS CO., LTD. *v.* LACHHMAN PRASAD. **119 I. C. 9 = 1929 A. L. J. 1178 = 51 All. 1046 = A. I. R. 1930 All. 77.**

———**S. 8 (c)**—*Express recital of purpose in sale-deed is not necessary.*

S. 8 (*c*) undoubtedly contemplates transfers of immovable property of less than Rs. 100 which can be purchased without any instrument at all, delivery of possession being sufficient, S. 8 (*c*) would apply where the land is not used for the purpose for which it was ostensibly purchased. As there might be no document in such a case the recital in deed of sale cannot be an indispensable requisite. (*Sulaiman and Pullan, JJ.*) PUNJAB SUGAR MILLS CO., LTD *v.* LACHHMAN PRASAD. **1929 A. L. J. 1178 = 119 I. C. 9 = A. I. R. 1930 All. 77 = 51 All. 1046.**

———**S. 9**—*U. P. Land Revenue Act, S. 106—Scope.*

A division of a village into six complete pattis and one joint patti is not a perfect partition, and there being only one mahal an ex-proprietary tenant in any patti can resist a pre-emption against him. (*Sulaiman and Kendall, JJ.*) NASRAT ALI *v.* RUDRA NATH. **1929 A. L. J. 685 = 116 I. C. 443 = A. I. R. 1929 All. 448.**

———**Ss. 10 and 11**—*No right of pre-emption exists where vendee is on same footing as pre-emptor.*

When a vendee is on the same footing as the pre-emptor, there is no right of pre-emption at all and the property cannot be divided between them. A.I.R. 1926 All. 216 and A. I. R. 1925 All. 747; S. A. 586 of 1925, Ref. (*Sulaiman and Banerji, JJ.*) ASHRAF BIBI *v.* MOHAMMAD ABDUL RAOOF. **50 All. 404 = 108 I. C. 113 = 26 A. L. J. 180 = A. I. R. 1928 All. 180.**

———**S. 10**—*Right of pre-emption exists only in respect of sale or foreclosure—Transfer effected under the sanction of a decree of a Court is not sale.*

Under the Agra Pre-emption Act, a right of pre-emption can only be claimed in respect of sale or foreclosure and a transfer under the sanction of a decree, though the decree may be passed on compromise cannot, for purposes of pre-emption, be treated as a sale. 1 A.L.J. 247 and 25 All. 334, Foll. (*Lindsay and Banerji, JJ.*) PARAS RAM *v.* NEKSAI. **50 All. 454 = 107 I. C. 682 = 26 A. L. J. 214 = A. I. R. 1928 All. 67 (68).**

———**S. 11**—*Scope.*

Before a suit for pre-emption can be maintained, it is necessary to find that the interest transferred is not only a proprietary interest but also that of a co-sharer or a petty proprietor. (*Sulaiman and Pullan, JJ.*) SAKINA BEGAM *v.* HARNAM SINGH. **51 All. 971 = 118 I. C. 667 = 1929 A. L. J. 1166 = A. I. R. 1929 All. 618.**

——**S. 11**—*Sale-deed executed in pursuance of decree by Court is sale within meaning of S. 11 and as exception in S. 6 does not apply to such sale-deed, right of pre-emption can accrue in respect of it—Agra Pre-emption Act, S. 6.*

The transfer of proprietary interest for consideration which is effected by means of a sale-deed executed by the Court in pursuance of a decree for a specific performance is a sale within the meaning of S. 11 and as the sale is not in execution of a decree but only in pursuance of a decree, it does not come within exception contained in S. 6, a right of pre-emption can accrue in respect of it. (*Sulaiman and Sen, JJ.*) SAHU LAL CHAND *v.* L. RAMCHANDRA. **51 All. 842 = 1929 A. L. J. 766 = 116 I. C. 495 = A. I. R. 1929 All. 462.**

——**Ss. 11 and 12**—*Isolated plot.*

An isolated plot of land is pre-emptable. (*Sulaiman and Kendall, JJ.*) JAMNA PRASAD *v.* MD. ZAHIR UD-DIN. **51 All. 658 = 116 I. C. 874 = 1929 A. L. J. 398 = A. I. R. 1929 All. 366.**

——**S. 12**—*Petty proprietor has preference over co-sharers if he is coparcener in the very interest sold.*

Under S. 12 a petty proprietor has preference over co-sharers if he is a co-parcener in the proprietary interest sold. But he must be a co-parcener in the very interest which has been sold and not merely a petty proprietor of any other land. (*Sulaiman and Pullan, JJ.*) GANESHI LAL *v.* CHOB SINGH. **118 I. C. 657 = A. I. R. 1929 All. 755.**

——**Ss. 12 and 5**—*Right of pre-emption recorded in* wajib-ul-arz *must be deemed to exist—Who are entitled to that right is to be determined according to S. 12 and not wajib-ul-arz.*

Although when a right of pre-emption is recorded in a *wajib-ul-arz* of the mahal, it must be deemed to exist under S. 5, still the question as to what persons are entitled to exercise this right is to be determined by reference to S. 12 and not to the recitals in the *wajib-ul-arz.* (*Sulaiman and Kendall, JJ.*) LALTA PRASAD *v.* CHUNNI SINGH. **51 All. 594 = 115 I.C. 800 = 1929 A. L. J. 429 = A. I. R. 1929 All. 385.**

——**S. 12, Cls. 1, 2 and 3**—*Sale-deed executed on 23rd June 1922—Act has no application.*

The Act came into force on the 17th February, 1923. S. 12, Cls. 1, 2 and 3, have, therefore, no application to a sale-deed executed on 23rd June 1922. A. I. R. 1925 All. 542, Foll. (*Sulaiman and Banerji, JJ.*) UMRAO SINGH *v.* MT MOHAN KUNWAR. **25 A. L. J. 1095 = 106 I. C. 372 = A. I. R. 1927 All. 699.**

——**S. 12 (1)**—*Petty proprietary interest.*

So long as a plot forming part of the patti has not been excluded from the patti, a co-sharer can enforce his right of pre-emption, even though it has become a petty proprietary interest. (*Lindsay and Sulaiman, JJ.*) YASRAB BANS *v.* ZAHUR HUSAIN. **25 A. L. J. 487 = 100 I. C. 704 = A. I. R. 1927 All. 320.**

——**S. 12 (1)**—*Person owning separate plot of land has no right of pre-emption.*

Where a person who owns specific plots of lands separate from those owned by the vendor is not coparcener in the interest sold and has therefore no right of pre-emption. (*Sulaiman and Kendall, JJ.*) MUSHTAQ ALI BEG *v.* JWALA SHANKAR SAHAI. **1930 A. L. J. 345 = A. I. R. 1930 All. 372.**

——**S. 12 (1)**—"*Coparceners in that interest*" *means co-parceners in interest sold.*

Under Cl. 1, S. 12 by the phrase "where the interest is petty proprietary interest, co-parceners in that interest," obviously co-parceners in the interest sold are meant and not similar petty proprietors. A. I. R. 1929 All. 755, Rel. on. (*Sulaiman and Kendall, JJ.*) MUSHTAQ ALI BEG *v.* JWALA SHANKAR SAHAI. **1930 A. L. J. 345 = A. I. R. 1930 All. 372.**

——**S. 12 (1)**—*Record of custom of pre-emption in* wajib-ul-arz—*Pre emption can be exercised as to petty proprietary interest.*

If there is a record of custom in the *wajib-ul-arz* providing for pre-emption, whatever the extent of custom may be and in whatever way it may be expressed there is a right of pre-emption under the Act which can be exercised in respect of a petty proprietary interest. (*Lindsay and Sulaiman, JJ.*) YASRAB BANS *v.* ZAHUR HUSAIN. **25 A. L. J. 487 = 100 I. C. 704 = A. I. R. 1927 All. 320.**

——**S. 12 (1)**—*Sub-S. (1) contemplates successive exercise of right of pre-emption—If no claim is made by persons of one class, persons falling under the next class can lay claim.*

A scheme of pre-emption laid down in S. 12, sub-S. (1) contemplates the successive exercise of rights of pre-emption so that where no claim of pre-emption is brought by anyone who falls within Class I a right to enforce pre-emption can be enforced successively by those persons who fall within the following classes. (*Lindsay and Sulaiman, JJ.*) LACHMAN PRASAD *v.* FAIZUL HASAN. **49 All. 141 = 25 A. L. J. 134 = 98 I. C. 858 = A. I. R. 1927 All. 273.**

——**S. 12 (2)**—*Scope.*

Khata khewat is the smaller sub-division of the mahal within the meaning of S. 12 (2). (*Sulaiman and Kendall, JJ.*) MURLI TEWARI *v.* MOHAMMAD IDRIS. **1930 A. L. J. 792 = 122 I. C. 595 = A. I. R. 1930 All. 312.**

——**S. 12 (3)**—*Intended vendee is included in* "*person claiming pre-emption.*"

The clause "more persons than one of the same class claiming pre-emption" covers a vendee or proposed vendee, or contemplated vendee or intended vendee. The ordinary meaning of "to pre-empt" is to purchase in preference to others, that is to say, even, the whole world, and pre-emption is the effect of the purchase. The vendee, if he is successful in the end over other competitors, does in fact pre-empt and is therefore properly spoken of as a person claiming pre-emption. A. I. R. 1925 All. 747, Foll. (*Walsh and Kanhaiya Lal, JJ.*) JAGRUP SINGH *v* INDRASAN SINGH. **48 All. 347 = 24 A. L. J. 325 = 92 I. C. 1 = A. I. R. 1926 All. 216.**

——**S. 12 (3)**—*Vendee resisting claim for pre-emption as having better or equal right with plaintiff—S. 12 (3) applies.*

A vendee who is resisting a claim for pre-emption on the ground that he has as good a right as, or a better right of pre-emption than, that of the plaintiff is claiming pre-emption within S. 12 (3). A. I. R. 1925 All. 542 and A.I.R. 1925 All. 747, Foll. (*Lindsay and Sulaiman, JJ.*) RAM BHAROS *v.* SUMESHAR PANDEY. **98 I. C. 1061.**

——**S. 12 (3)**—*Pre-emptor claiming preferential right over vendee by virtue of relationship with vendor—S. 12 (3) applies—Degrees of relationship are to be counted from common ancestor.*

S. 12 (3) applies to a case where the pre-emptor claims a preferential right over the vendee by virtue of the relationship with the vendor and is not confined to cases where there are rival suits brought by various pre-emptors. The pre-emptor is, therefore, entitled to claim preference if he is related to the vendor and not removed from the common ancestor by more than four degrees. A. I. R. 1925 All. 747, foll. The four degrees are to be counted from the common ancestor and not from the vendor and in counting those degrees the common ancestor has to be included. A. I. R. 1927 All. 434, Foll. (*Lindsay and Sulaiman, JJ.*) SYED MAHOMED *v.* JAITUL BIBI. **101 I. C. 499 = A. I. R. 1927 All. 739.**

———**S. 12 (3)**—*Measure of four degrees is not to be applied between pre-emptor and vendor but from the common ancestor—Ancestor himself should be counted as first degree.*

The measure of four degrees under S. 12 cannot be applied to any relationship existing between the pre-emptor and the vendor. Any person who wishes to establish a right of preference under sub-S. (3), must show that he is not further removed than four degrees from the common ancestor and in counting the degrees it is necessary that the common ancestor himself should be counted as the first degree. (*Lindsay and Sulaiman, JJ.*) JADUNANDAN RAI *v.* BINDESHRI RAI. **49 All. 655 = 25 A. L. J. 471 = 101 I. C. 497 = A. I. R. 1927 All. 434.**

———**S. 12 (3)**—*Suit for pre-emption—Defendant pleading equal right of pre-emption as plaintiff claims pre-emption under S. 12 (3).*

A defendant who is resisting a suit for pre-emption on the ground that he has as good a right of pre-emption as the plaintiff is "claiming pre-emption" within the meaning of sub-S. (3) of S. 12. A. I. R. 1925 All. 747, Foll. (*Lindsay and Sulaiman, JJ.*) LACHMAN PRASAD *v.* FAIZUL HASAN. **49 All. 141 = 25 A. L. J. 134 = 98 I. C. 858 = A. I. R. 1927 All. 273.**

———**S. 12 (3)**—*Vendor—Hindu widow—Pre-emptor claiming preference by relationship must not only show that he is related to vendor but also that they have common ancestor.*

When property in the hands of a Hindu widow is sold by her and both the pre-emptors are co-sharers, one cannot be preferred to the other because he is related to the husband of the widow, for the pre-emptor, claiming preference by relationship with the vendor, must not only show that he is related to the vendor but must also show that they are descended from a common ancestor. A.I.R. 1926 All. 216, Ref. S. A. No. 1632 of 1924. Foll. (*Sulaiman and Kendall, JJ.*) MANJI *v.* BHAGOLE. **51 All. 872 = 1929 A. L. J. 854 = 121 I. C. 224 = A. I R. 1929 All. 419.**

———**S. 12 (3)**—*Bahri is sub-division of mahal.*

Bahri is a sub-division of the mahal very much like a thok, which is found in eastern districts of U. P. (*Sulaiman and Kendall, JJ.*) BACHCHI LAL *v.* DEBI DIN. **51 All. 629 = 119 I. C. 503 = 1929 A. L. J. 430 = A. I. R. 1929 All. 300.**

———**S. 12 (3)**—"*The common ancestor*" *explained.*

The meaning of the words "the common ancestor" must be that common ancestor who is the nearest. F. A. 358 of 1924, Rel. on. (*Sulaiman and Banerji, JJ.*) ASHRAF BIBI *v.* MOHAMMED ABDUL RAOOF. **50 All. 404 = 108 I. C. 113 = 26 A. L. J. 180 = A. I. R. 1928 All. 180.**

———**Ss. 13 and 20**—*One pre-emptor getting decree for pre-emption and getting property under it—Other persons equally entitled to pre-empt suing him for a share within limitation are entitled to a share.*

When two or more persons claiming pre-emption are equally entitled, the property shall be equally divided between them, each paying an equal share of the consideration for the transfer. It matters little who comes to Court first, provided that they all come within the period of limitation. The expression "where the purchaser has transferred the property in dispute to a person having a right of pre-emption, etc.," in S. 20 cannot

cover the case of a pre-emptor obtaining a decree for pre-emption and thus getting the property from the purchaser. (*Sulaiman and Banerji, JJ.*) KUNDAN LAL *v.* AMAR SINGH. **25 A. L. J. 739 = 103 I. C. 123 = A. I. R. 1927 All. 664.**

———**S. 13**—*Scope—Joint decree—Payment made by some of several decree-holders—Adjustment of rights.*

S. 13 clearly lays down that persons equally entitled to pre-emption must pay an equal share of consideration. Therefore in order to determine in what proportion the joint plaintiffs are to share the property the circumstances under which the payment was made must in each case be enquired into. (*Sulaiman and Boys, JJ.*) ANRUP MISIR *v.* RAM HARAKH. **51 All. 998 = 1929 A. L. J. 1049 = A. I. R. 1929 All. 953.**

———**S. 13**—"*Persons claiming*" *explained.*

The expression "persons claiming" under S. 13 do not include vendees. (*Sulaiman and Banerji, JJ.*) ASHRAF BIBI *v.* MOHAMMAD ABDUL RAOOF. **50 All. 404 = 108 I. C. 113 = 26 A. L. J. 180 = A. I. R. 1928 All. 180.**

———**S. 14**—*Evidence Act, S. 115—Co-sharer intending to sell his share—Other co-sharer refusing to purchase for want of money, but not showing intention to reserve his right to pre-empt—Vendee induced to purchase—Co-sharer's refusal to purchase amounted to absolute refusal and he was estopped from claiming pre-emption, although no notice was given as required by S. 14.*

Ss. 14 and 15 are not exhaustive ; what they mean is that if a notice as prescribed in S. 14 has been given, a mere failure to reply would extinguish the right. But it does not follow that if no such notice has been given, there can never be a case in which there may be a similar estoppel. A co-sharer intended to sell his share Other co-sharer refused to purchase the share, on the ground that he had no money to make the purchase, but without showing his intention to reserve his right to pre-empt subsequently, and thereby induced the vendee to purchase the share on the belief that this other co-sharer had waived his right to pre-empt. In a suit for pre-emption by the other co-sharer.

Held, that there was absolute refusal to purchase the share and he would now be estopped from going behind his refusal and claiming a right to pre-empt although no notice was given under S. 14, Agra Pre-emption Act. 6 All. 463 ; 27 All. 670 ; and 5 A. L. J. 331, not Appr.; 39 All. 127; 15 A. L. J. 315; 40 All. 690, Dist.; A. I. R. 1926 All. 467, Rel. on. (*Sulaiman and Kendall, JJ.*) RAMESHAR PRASAD LAL *v.* GHISIAWAN PRASAD. **51 All. 820 = 121 I. C. 241 = 1929 A. L. J. 665 = A. I. R. 1929 All. 531.**

———**S. 14**—*Notice to person having pre-emptive right is not obligatory—Refusal to purchase on being informed of sale bars pre-emption suit.*

S. 14 does not make it obligatory on the vendor to give a notice to a person who has a right of pre-emption. The vendor may, by word of mouth, or in any other way, inform a person having a right of pre-emption of his intention to sell. If the person to whom that communication is made states there and then that he refuses to purchase the property, then he is disqualified from maintaining a suit for pre-emption. (*Lindsay and Kanhaiya Lal, JJ.*) OON MAHOMED *v.* MT. BINT ZOHRA. **87 I. C. 414 = 6 L. R. A (Civ.) 300 = A. I. R. 1925 All. 645.**

———**Ss. 14 and 15**—*Notice under S. 14 not issued—Pre-emptor taking active part in sale—Estoppel arises against him.*

S. 14 is only permissive which gives a co-sharer a power to give notice by registered post. In case such a notice is issued the right of such other co-sharers is extinguished. But Ss. 14 and 15 do not quite mean that in no other case can a co-sharer be estopped from claiming his right of pre-emption. If by his conduct, *e.g.*, by taking active part in the sale he has led the vendee to believe that he has waived his right of pre-emption, then the estoppel would remain against him, even though under the circumstances it was not thought at all necessary to issue a notice to him. (*Sulaiman and Banerji, JJ.*) RANJIT SINGH *v.* BHAGWATI SINGH.

48 All. 491 = 24 A. L. J. 581 = 94 I. C. 397 = A. I. R. 1926 All. 467.

——**Ss. 14 and 15**—*Mere posting notice is not sufficient—It must be served.*

Although the word " issue " in S. 15 is ambiguous, mere posting of a notice is not sufficient, but there must be actual service of notice on the persons having right of pre-emption. (*Sulaiman and Pullan, JJ.*) SURAJMAL *v.* SHANKAR. **51 All. 885 = 1929 A.L.J. 936 = 117 I.C. 347 = A. I. R. 1929 All. 600.**

——**S. 16**—*Property sold in several items to different vendees by one document—Pre-emptor can pre-empt one item.*

Where there was only one document executed and different items of properties were sold to different persons,

Held, there were really different contracts, although they were all evidenced by one document and it was open to the pre-emptor to object to one vendee and not the others. 40 I. C. 40, Dist. (*Sulaiman and Mukerji, JJ.*) CHUNNI SINGH *v.* LAKSH PAT SINGH.

48 All. 489 = 24 A. L. J. 534 = 94 I. C. 320 = A. I. R. 1926 All. 468.

——**S. 16**—*Scope of—Pre-emption partly under the Act and partly Mahomedan law—Pre-emption under Mahomedan law failing—Claim under the Act also fails.*

Where the property sold by the vendor consisted of a zamindari share as well as a one-third share in a house and a sugarcane pressing mill and the plaintiff sued to pre-empt the zamindari under the provisions of the Agra Pre-emption Act, and the share in the house and the mill on the basis of the Mahomedan law but he was disqualified under Mahomedan law to claim pre-emption necessary demands not having been made.

Held, his claim based on the provisions of the Act must also fail on the ground of partial pre-emption. 11 All. 108; 21 All. 119; 12 A. L. J. 88 and A. I. R. 1921 All. 201 Foll. (*Sulaiman and Iqbal Ahmad, JJ.*) ABDUL KHAN *v.* SHAKIRA BIBI. **50 All. 348 = 108 I. C. 573 = 25 A. L. J. 1061 = A. I. R. 1928 All. 124.**

——**S. 16**—*Scope—Entire property must be pre-empted.*

The language of S. 16 does not do away with the former interpretation of the law; a pre-emptor must pre-empt the entire property sold whether he has a right of pre-emption on the basis of a custom or the Mahomedan law. (*Sulaiman and Iqbal Ahmad, JJ.*) ABDUL KHAN *v.* SHAKIRA BIBI. **50 All. 348 = 108 I.C. 573 = 25 A. L. J. 1061 = A. I. R. 1928 All. 124.**

——**S. 17**—*Scope.*

When the Court comes to the conclusion that the amount entered in the sale-deed is grossly excessive and it is convinced that the whole of that amount could not have been paid to the vendor and there is no other material on the record to come to a definite finding as regards the actual price of it, it is entitled to proceed to find the market value of the property under S. 17 of the Act. (*Sulaiman and Pullan, JJ.*) SURAJMAL *v.* SHANKAR. **117 I. C. 347 = 1929 A. L. J. 936 = 51 All. 885 = A. I. R. 1929 All. 600.**

——**S. 17 (1)**—*Word "finds" interpreted.*

The word "finds" as used in sub-S (1) does not mean that the Court must come to a definite conclusion that the ostensible price was not the actual price, but the meaning is that some evidence must be given by the plaintiff-pre-emptor in order to raise a presumption that the ostensible price was not the price actually paid. A presumption of this kind having been raised in favour of the plaintiff, the burden of proof then shifts to the vendee and he has to satisfy the Court that the price shown in the deed was the price actually paid by him. In such cases the fact that it is difficult for the pre-emptor to rebut evidence given by the purchaser, must not be treated as sufficient reason for holding that as a matter of fact the price set out in the sale-deed is not fictitious. If the purchaser fails to satisfy the Court, then all the Court can do is to enter into the evidence regarding the market-value of the property and pass a decree for pre-emption on payment of the market value so found. (*Lindsay and Sulaiman, JJ.*) ABDUL GHAFUR *v.* KAMALUDDIN. **49 All. 689 = 25 A. L. J. 441 = 102 I. C. 155 = A. I. R. 1927 All. 441.**

——**S. 18**—*Non-compliance with S. 18 is mere irregularity and does not amount to want of jurisdiction.*

A non-compliance with the provisions of S. 18 would be a mere irregularity, and would in no sense amount to a want of jurisdiction and therefore though a decree of the trial Court is irregular and illegal, inasmuch as it did not comply with the provisions of S. 18, that fact alone would not entitle the appellants to ignore the decree and treat it as a nullity, or resist its execution. (*Sulaiman and Banerjee, JJ.*) RAM SUGHAR *v.* DHARAM RAJ. **24 A. L. J. 602 = 95 I. C. 959 = A.I.R. 1926 All. 555.**

——**S. 19**—*Property re-transferred to vendor during suit—Right to pre-empt does not cease.*

The right to pre-emption does not cease to exist merely because while the suit is pending the vendee has made a re-transfer to the vendor. (*Lindsay and Kanhaiya Lal, JJ.*) BHIKI MAL *v.* DEBI SAHAI.

47 All. 923 = 23 A. L. J. 615 = 6 L.R. A. (Civ.) 487 = 89 I. C. 219 = A. I. R. 1926 All. 179.

——**S. 19**—*Defendants acquiring a share in mahal by gift pending suit—Suit must be dismissed.*

When during the pendency of a suit for pre-emption the defendants have acquired a share in the mahal by deed of gift and therefore get an equal right with the plaintiffs, plaintiffs' suit must be dismissed. A. I. R. 1926 All. 661, Foll. (*Lindsay and Sulaiman, JJ.*) RAM KHELANAN *v.* BANKE BIHARI.

49 All. 268 = 25 A. L. J. 147 = 103 I. C. 367 = A. I. R. 1927 All. 517.

——**Ss. 19 and 20**—*Plaintiff's right to pre-empt must subsist up to date of decree.*

By Ss. 19 and 20 the law as interpreted just before the Act was never intended to be altered. The plaintiff must have a subsisting right of pre-emption not only on the date of the sale and the date of the suit, but also at the time of the decree. If prior to the passing of the decree, the defendant acquires an interest by way of gift, which puts him on an equal footing with the plaintiff, the suit cannot be decreed. 42 All. 268, Foll. (*Sulaiman and Banerjee, JJ.*) MT. QUDRAT-UN-NISSA BIBI *v.* ABDUL RASHID. **48 All. 616 = 24 A. L. J. 773 = 96 I. C. 549 = A. I. R. 1926 All. 661.**

——**Ss. 19 and 20**—*Vendee becoming co-sharer before decree is passed—Plaintiff loses his right.*

When the vendee acquires his share before the passing of the decree so as to become a co-sharer on the same footing as the plaintiff, the plaintiff loses his right under S. 19. A. I. R. 1926 All. 749, Foll. In such a case plaintiff was awarded his costs. (*Lindsay and Sulaiman, JJ.*) JIWAN *v.* MATRWA. **101 I. C. 538 = A. I. R. 1927 All. 735.**

———**Ss. 19 and 20**—*Suit for pre-emption—Plaintiff's claim is defeated by the defendant-vendee becoming co-sharer after institution of suit but before decree.*

In a pre-emption suit the plaintiff must have a subsisting right to be substituted in the place of the transferee at the time of the decree before he can succeed, and therefore a defendant-vendee can defeat the claim for pre-emption on the strength of his having become a co-sharer after the institution of the suit and before decree. A. I. R. 1926 All. 661 and 749; A.I.R. 1927 All. 517, Foll. (*Sulaiman and Banerjee, JJ.*) NARSINGH DAS *v.* B. SHAKAMBARI DAS. **103 I. C. 376 = A. I. R. 1927 All. 697.**

———**Ss. 19 and 20**—*Vendee must have an indefeasible interest.*

The Act contemplates that a vendee cannot acquire the status of a co-sharer unless the interest he acquires before the date of the decree is "indefeasible." Indefeasible interest in S. 20 does not mean interest which cannot be defeated by a suit for pre-emption. (*Lindsay and Sulaiman, JJ.*) DEO NARAIN SINGH *v.* AJODHIYA PRASAD. **49 All. 696 = 25 A.L. J. 603 = 102 I. C. 120 = A.I.R. 1927 All. 575.**

———**S. 19**—*Pre-emption suit*—Ex parte *decree passed —Vendee getting suit restored and then acquiring interest in property cannot defeat suit.*

A vendee against whom an *ex parte* pre-emption decree is passed, cannot, by having the suit restored and then acquiring an interest in the property equal to that of the plaintiff, defeat the plaintiff's suit for pre-emption. A. I. R. 1929 All. 53 (F.B.), Dist. (*Sulaiman and Sen, JJ.*) GURDIAL SINGH *v.* ARJUN SINGH. **51 All. 882 = 1929 A. L. J. 861 = 118 I. C. 527 = A. I. R. 1929 All. 551 (2).**

———**Ss. 19 and 20**—*Defendant, a non-co-sharer in mahal purchasing zamindari house—Plaintiff a co-sharer suing for pre-emption—Defendant obtaining gift of share after institution of suit but before decree—Under S. 20 the acquisition must be made before suit—But under S. 19 plaintiff's claim would be defeated although gift is obtained after suit because he has no "subsisting right" at the time of decree.*

Where purchaser acquires interest in the mahal after the institution of suit for pre-emption by co-sharer but before decree is passed he can under S. 19 defeat pre-emptor's suit by means of such acquisition. Defendant purchased a zamindari house at a time when he was not a co-sharer. Plaintiff who was a co-sharer, brought a suit for pre-emption. After the institution of the suit but prior to the passing of the decree the defendant obtained a gift of a share in the mahal.

Held, that S. 20 as it is worded would only entitle the defendant to rely on an acquisition made prior to the date of suit, because the words "no suit for pre-emption shall lie" are sufficient and clear indication that judgment upon the rights of the parties must be passed on the basis of the facts existing at the date of the suit. The marginal note of the section also clearly indicates that the acquisition must have been made "prior to suit". S. 20 would not, therefore, help the defendant. (A.I.R. 1926 All. 661, not Appr.) But he would defeat plaintiff's claim under S. 19 because the words "subsisting right of pre-emption" in S. 19 must be understood in the same sense in which they were understood before the passing of the Act of 1922. The plaintiff had no "subsisting right" at the date of the decree. Hence plaintiff will not succeed in his suit because his right for pre-emption was defeated by the defendant's gift of a share of the mahal before decree. A. I. R. 1926 All. 749. Ref. (*Boys, Kendall and King, JJ., afterwards Mukerji and Sen, JJ.*) RAM SARAN DAS *v.* BHAGWAT PRASAD. **51 All. 411 = 113 I. C. 442 = 1929 A. L. J. 290 = A. I. R. 1929 All. 53 (F. B.).**

———**Ss. 19 and 20**—*Even under S. 19 vendee must acquire indefeasible title—Ss. 19 and 20 should be consistently interpreted.*

Sections 19 and 20 have to be interpreted so as to be consistent with each other. Even under S. 19 a vendee, in order to defeat the pre-emptor's claim, must possess an indefeasible title to the property acquired by him subsequently to the purchase, the subject-matter of pre-emption. A I. R. 1927 All. 575, Foll.; A. I. R. 1929 All. 53 (F. B.), Expl. and Dist.; A. I. R. 1929 All. 703, Appr. (*Sulaiman and Mukerji, JJ.*) KUNDAN GIR *v.* JASWANT SINGH. **1929 A. L. J. 1270 = A. I. R. 1929 All. 765.**

———**S. 19**—*Purchaser obtaining gift from Hindu father during pendency of pre-emption suit and becoming co-sharer—Gift did not create indefeasible interest and so pre-emption suit could not be defeated.*

By virtue of the provision of S. 19 a purchaser who has become a co-sharer by virtue of a gift taken during the pendency of the suit can successfully resist the plaintiff's claim for pre-emption but such purchaser must show that he has acquired an indefeasible interest by means of the gift. If the gift is one made by the father of a joint Hindu family to which the purchaser is a stranger, the gift being invalid under Hindu Law, does not create an indefeasible interest and so the plaintiff's claim for pre-emption cannot be defeated by such a gift. A. I. R. 1929 All. 53 (F. B.); A. I. R. 1927 All. 575, Rel. on. (*Sulaiman and Pullan, JJ.*) GOVIND SINGH *v.* MANGLU. **51 All. 990 = 1929 A. L. J. 1111 = A. I. R. 1929 All. 703.**

———**S. 19**—*Pre-emptor having preferential right at sale—All pre-emptors equally entitled on date of decree —Property must be divided equally.*

In pre-emption suits the crucial date is the date of the decree of the first Court and so if on that date all the rival pre-emptors are equally entitled to pre-empt there cannot be any preference *inter se* and the property must be divided equally among them although one of them had preferential rights at the date of sale. A. I. R. 1923 All. 53, Ref. (*Sulaiman and Pullan, JJ.*) RAM RAJ TEWARI *v.* SHEORAJ SAITHWAR. **51 All. 968 = 1929 A. L. J. 1109 = 119 I. C. 850 = A. I. R. 1929 All. 663.**

———**S. 20**——*Gift of joint family property by manager to vendee subsequent to institution of pre-emption suit—Vendee does not get indefeasible title.*

Where after institution of a pre-emption suit in respect of property sold, the vendor, the manager of a Hindu joint family property, makes a gift of the property in favour of the vendee, the vendee does not acquire an indefeasible title to it so as to defeat the claim of the pre-emptor. A. I. R. 1929 All. 703 and A. I. R. 1929 All. 765, Foll. (*Sulaiman and Kendall, JJ.*) GAYA PRASAD *v.* JASWANT RAI. **A. I. R. 1930 All. 550.**

———**S. 20**—*Indefeasible interest.*

The expression "indefeasible interest" in S. 20 refers to full proprietary title which is not liable to be defeated and the word interest cannot include an interest less than a proprietary interest. (*Sulaiman and Kendall, JJ.*) BACHCHI LAL *v.* DEBI DIN. **51 All. 629 = 1929 A.L.J. 430 = 119 I.C. 503 = A.I.R. 1929 All 300.**

———**Ss.20 and 19**—"*Indefeasible*" *meaning explained.*

Although the word "indefeasible" cannot be taken in its widest sense so as to include transactions which have a possibility of being challenged, for instance on ground of undue influence, coercion, fraud, etc. it undoubtedly means that on the obvious facts the transaction must confer a valid title on the transferee. (*Sulaiman and Pullan, JJ.*) GOVIND SINGH *v.* MANGLU.

51 All. 990 = 1929 A. L. J. 1111 = 122 I. C. 657 = A. I. R. 1929 All. 703.

——**S. 20**—*If gift of property in dispute to vendees is liable to be defeated they do not get indefeasible right.*

Every gift by a widow is not necessarily defeasible. If it is for the spiritual benefit of the soul of her deceased husband and is allowable under Hindu Law, it may be good and binding on the reversioners and may therefore be indefeasible. If the gift of property in dispute to vendees is liable to be defeated, the vendees do not acquire an indefeasible right. A.I.R. 1926 All. 680, Expl. ; A. I. R. 1927 All. 575 Ref. (*Sulaiman and Pullan, JJ.*) GADHU SINGH *v.* BANSGOPAL.

1930 A. L. J. 399 = 122 I. C. 747 = A. I. R. 1929 All. 859.

——**S. 21**—*Person having a right of pre-emption suing jointly with one having no right at date of sale—Latter acquiring right before institution of the suit—Suit is within the mischief of S. 21.*

The right of pre-emption which is sought to be enforced by suit must be a right which was in existence at the date when the sale sought to be pre-empted was made ; and therefore, where a person entitled to pre-emption sues jointly with another person having no such right at the date of the sale, the suit is within the mischief of S. 21, even though the latter acquires a right of pre-emption before the institution of the suit. (*Lindsay and Sulaiman, JJ.*) RAZA HASAN *v.* MAHOMED YASIN. **98 I. C. 817 = 25 A. L. J. 87 = A. I. R. 1927 All. 155.**

——**S. 21**—*Persons once having right to pre-empt but losing it under equity are not "persons not having such a right".*

S. 21 was not intended to alter the previous law. Under S. 21 a person having a right of pre-emption sues jointly with persons who possessed the right of pre-emption but who are disqualified in equity from claiming it, cannot be said to sue jointly "with persons not having such a right." (*Sulaiman and Boys, JJ.*) LAL BEHARI MISRA *v.* EQUEEN MD. HOJJAM.

97 I. C. 340 = A. I. R. 1926 All. 722 (2).

——**S. 22**—*Right of purchaser.*

Where a purchaser has a defined interest in the sale-deed, he cannot be said to have acquired the property jointly with others, though by the same deed several other properties are conveyed to other persons also. (*Sulaiman and Mukerji, JJ.*) CHUNNI SINGH *v.* LAKSHPAT SINGH. **48 All. 489 = 24 A. L. J. 534 = 94 I. C. 320 = A. I. R. 1926 All. 468.**

——**S. 22**—*Co-sharer does not irrevocably lose his right to resist claim for pre-emption simply because stranger is joined with him in purchase.*

A co-sharer does not irrevocably lose his right to resist a claim for pre-emption simply for the reason that a stranger is joined with him in the purchase.

There was a sale in favour of a co-sharer and a stranger. The stranger transferred his interest in the purchased property to the co-sharer who had purchased the other part. A suit for pre-emption was subsequently brought against the co-sharer and the stranger.

Held, that the co-sharer had not irrevocably lost his claim to resist the suit and having become entitled to the whole property before the suit there could be no right of pre-emption against him. (*Sulaiman, Ag. C. J. and Banerji, J.*) BADRI PANDEY *v.* PURSOTAM SINGH.

26 A. L. J. 1378 = 110 I. C. 869 = A. I. R. 1928 All. 697.

——**S. 22**—*Sale to several vendees—Some vendees aving equal right with plaintiff to a part of the property and others entire strangers—Plaintiff must claim pre-emption in respect of the whole property.*

Where plaintiff claimed pre-emption in respect of only a part of the property on the allegation that one of the vendees had equal right in respect of the remaining portion of the property and that the remaining vendees were entire strangers.

Held, plaintiff was bound to claim pre-emption in respect of the whole property. (*Lindsay and Sulaiman, JJ.*) PAHLAD KOERI *v.* MOHAR GOBIND RAI.

99 I. C. 1000 = A. I. R. 1927 All. 278.

——**S. 24**—*Money left with vendee for payment to creditors of vendor—Money not paid—Pre-emptor cannot claim credit in respect of interest on the unpaid purchase money nor can he question the genuineness of the debts.*

A vendee purchased the property of a vendor and paid to the vendor part of the purchase money and kept the balance for payment to the creditors of the vendor. Some of the creditors were secured and others were money creditors. The creditors were not paid their money. A suit was brought by a pre-emptor for pre-emption of the property of the vendor, and he claimed credits for interest on the amount not paid by the vendee to the creditors and also challenged the genuineness of some of the debts.

Held, that he cannot be allowed to challenge the genuineness nor can be allowed credit for the interest on the debts secured or unsecured (*Sulaiman and Kendall, JJ.*) JAI DEVI KUNWAR *v.* KALYAN SINGH.

26 A. L. J. 541 = 110 I.C. 662 = A.I R 1928 All. 376.

AGRA PRE EMPTION AMENDMENT ACT (VIII OF 1923), S. 12—*Section lays down preference* inter se.

S. 12 lays down an order of preference by which any person in class 1 is entitled to pre-empt as against any person in any of the other classes, namely, classes 2, 3, 4 and 5. Where the pre-emptor and the vendor were co-sharers in one *khata* and the vendee was a co-sharer in another *khata* and was also a joint sharer in a third *khata* which was joint relating to *shamilat* lands.

Held, that the pre-emptor belonged to class 2 and the vendee to some class below class 2, therefore the pre-emptor had the better right. (*Kanhaiya Lal and Lindsay, JJ.*) SARJU PRASAD *v.* BHAGWATI PRASAD.

88 I.C. 297 = 23 A.L.J. 373 = 6 L. R. A. (Civ.) 337 = A. I. R. 1925 All. 542.

AGRA TENANCY ACT (II OF 1901).

——Sir *land sold by one brother—Brother not selling his* sir *land retains only his share of* sir *property.*

Where two brothers own property including *sir*, and one of them sells his *sir* land, the other brother not selling his *sir* land retains only his share of the *sir* property and is not the *sir* holder of the entire land not being in possession of the *sir* lost by his brother. What is really important in these cases is the actual physical cultivating possession of the land. A.I.R. 1925 All. 93 ; Sel. Dec. No. 9 of 1918. Ref. (*Dalal, J.*) GOPI SINGH *v.* KESHO SARAN. **122 I. C. 768 = A. I. R. 1930 All. 459.**

——*Heirs are liable for negligence of the lambardar to the extent of assets.*

The heir or successor-in-title as lambardar cannot be held personally liable for negligence or misconduct of the deceased lambardar. Still the negligence or misconduct of a deceased lambardar does not die with him and can be proved for the purpose of fixing liability on his estate in the hands of heirs. 29 All. 15, Expl. and Dist. (*Boys and Kendall, JJ.*) MT. HAIDARI BEGUM *v.* LAKSHMI NARAINJI. **25 A. L. J. 825 = 8 L. R. A. (Rev.) 172 = 103 I. C. 77 = A.I.R. 1927 All. 636.**

———*Scope—Act does not provide for refusal to exercise jurisdiction.*

The Tenancy Act makes elaborate provisions for the case where the suit is wrongly entertained by a civil or revenue Court on the merits, but fails to provide for the case where either or both courts wrongly refused to exercise jurisdiction. (*Sulaiman and Daniels, JJ.*) BISHESHAR PRASAD *v.* RAGHUBIR. **48 All. 168 = 24 A. L. J. 83 = 90 I C. 353 = A. I. R. 1926 All. 58.**

———*Suit for rent.*

It is not open to a landholder to sue a tenant in the same suit in respect of different holdings. (*Mukerji, J.*) HIRA LAL *v.* MOTI LAL. **22 A. L. J. 459 = 79 I. C. 560 = A. I. R. 1924 All. 720.**

———Lambardar—*Suit for profits—Compensation got for a portion of land acquired is not* sewai *income recoverable in this suit.*

The *lambardar* had received a certain sum from Government as compensation for a small area acquired under the Land Acquisition Act. The amount instead of being paid to all the proprietors was for some reason paid to the *lambardar* who apparently had not given the plaintiff, a co-sharer, his share. *Held*, that this could not properly be treated as *sewai* income recoverable in profits suit under the Tenancy Act. (*Ryves and Daniels, JJ.*) CHHAMMI LAL *v.* MT. SUKHRANI KUNWAR. **74 I. C. 19 = 5 L. R. A. (Rev.) 24 = A. I. R. 1923 All. 537.**

———*Perpetual rent-free tenant of a grove—Landlord is not entitled to eject.*

Where the special provisions of the Tenancy Act permitting landlords to resume rent-free grants have no application, the tenant cannot be ejected so long as the land has not lost the characteristic of a grove. (*Stuart, J.*) MOULVI AHMAD HUSSAIN *v.* SIRAJUDDIN. **75 I. C. 616 = A. I. R. 1923 All. 372.**

———*Oral lease by lambardar to plaintiff—Registered lease by zemindar to defendant—Defendant is entitled to possession.*

Where the lambardar let in the plaintiff as a tenant and after that date the zemindar executes a registered permanent lease in favour of the defendant, the defendant is entitled to get possession of the holding. The fact that he waits a year or more before taking possession seems really to make no difference. The mere acceptance of rent by the lambardar from the plaintiff before the defendant took possession under the lease in no way operates as revocation of the registered lease. (*Ryves, J.*) SITA RAM *v.* CHAIT RAM. **71 I. C. 447 = 4 L. R. A. (Rev.) 291 = A. I. R. 1923 All. 257.**

———*Occupancy holding—Sale of tank is valid.*

A tenant is entitled to sell tank, house or a well on the holding and having sold cannot ignore the same as being invalid. (*Mears, C. J. and Banerji, J.*) RAM NARAIN *v.* MUHAMMAD AKBAR. **79 I. C. 508 = A. I. R. 1923 All. 180.**

———*Usufructuary mortgage of occupancy in contravention of Act—Dispossession—Mortgagee cannot sue for possession on title but can under S. 9, Specific Relief Act.*

A person who has contracted a usufructuary mortgage over an occupancy holding, in contravention of the provisions of the law, will not receive the assistance of the Courts in a suit for recovery of possession based upon title, such title being *ex hypothesi* invalid. The plaintiff, however can, undoubtedly sue to be put back in possession under Section 9 of the Specific Relief Act, without pleading his title at all. (*Piggott and Walsh, JJ.*) SHEO ZOOR KOERI *v.* MUSSAMMAT KAUSILLA. **20 A. L. J. 972 = A. I. R. 1923 All. 81 (1).**

———*Contract Act, S. 23—Public policy—Sale of village—Agreement to surrender* Sir *and* Khudkhast *land and the penalty for its enforcement are both void.*

A stipulation that the vendor of the proprietary interest in a village would surrender actual possession and enjoyment of *Sir* and *Khudkhast* lands in respect of which he would become by statute exproprietary tenant from the date of the execution of the sale-deed is void, as being contrary to public policy, because it is an attempt to defeat the provisions of the Tenancy Act. Any stipulation by way of penalty in order to enforce the fulfilment of such a covenant on the part of the vendor is also void and unenforceable. (*Piggott and Walsh, JJ.*) BITHAL DAS *v.* RAGHUNATH DAS. **70 I. C. 601 = A. I. R. 1922 All. 430 (2).**

———*Transfer of occupancy holding—None but the true owners can evict the transferee.*

Under the Tenancy Act occupancy tenant cannot transfer her occupancy holding. Under the law, therefore, the plaintiff-lessee to whom a permanent lease is granted has a possessory right good against all the world except the true owner, that is, the body of zamindars, and no one who is not a member of such body can forcibly oust him from possession without being liable for damages. (*Gokul Prasad, J.*) RAMESWAR DUBE *v.* S. H. DUBE. **66 I. C. 529 = A. I. R. 1922 All. 277.**

———**S. 1 (2)**—*Land administered by Cantonment Authorities—Act does not apply.*

Occupancy rights cannot be acquired in land administered by the Cantonment Authorities acting directly under the authority of the Government of India. (*Iqbal Ahmad, J.*) RUP NARAIN SINGH *v.* JAGRUP SINGH. **8 L. R. A. (Rev.) 194 = 101 I. C. 638 = A. I. R. 1927 All. 530.**

———**S. 3**—*Landlord unlike a tenant is not prevented from acting to his detriment.*

The provisions of S. 3 prevent the tenant from acting to the detriment of his own interest and do not prevent the landlord from doing so. (*Dalal, J.*) MASOODULZAMAN *v.* RAZA HUSAIN. **10 L. R. A. (Rev.) 73 = 110 I. C. 750 = A. I. R. 1928 All. 698.**

———**S. 4**—*Zamindar accepting person as occupancy tenant in succession to last holder—Mortgagee from previous holder—Right of to set aside.*

Where a zamindar accepts a person as successor to a holder of an occupancy tenancy, such person does in fact succeed to the original tenant it is not open to a mortgagee of the holding from the previous holder to claim that the succession should be set aside. (*Mukerjee and Bennet, JJ.*) JAGNARAIN KUNBI *v.* GAYA KUNBI. **123 I.C. 109 = 11 L. R. A. (Rev.) 107 = A. I. R. 1930 All. 426 (1).**

———**S. 4**—*Rent may include payment on produce of tanks—But where parties are not landlord and tenant, payment by one to other is not rent.*

Rent may include what is paid on account of the produce of tanks, but rent is a payment by a tenant to his landlord. Where the plaintiffs are not the landlords of the defendants but the parties are proprietors in distinct mahals, the payment claimed is not rent. (*Sulaiman and Daniels, JJ.*) SANWALIA *v.* NATHI LAL. **47 All. 920 = 23 A. L. J. 560 = 88 I. C. 504 = A. I. R. 1925 All. 561.**

———**S. 4**—*Tenants.*

Persons who obtained land from the landholder on payment of lump sum as premium without agreement to pay rent for the express purpose of planting trees are not tenants. (*Sulaiman and Mukerjee, JJ.*) BAIJNATH SINGH *v.* CHANDRAPAL SINGH. **47 All. 55 = 83 I. C. 204 = 5 L. R. A. (Rev.) 255 = A. I. R. 1924 All. 795.**

———**S. 4**—*Land let for planting grove is not holding and rights are transferable.*

A plot neither let nor held for agricultural purposes, but let for the planting of a grove is incapable of cultivation, where a grove exists on it, and the rights of such a tenant are transferable. The plot is neither land within the meaning of the Act nor a holding. 19 A. L. J. 616, Foll.

But when the holdings themselves are not transferable they cannot become transferable after the planting of trees. 5 A. L. J. 99 and 14 A. L. J. 833, Dist. (*Sulaiman, J.*) GULAB *v.* BHAGWAN DAS.
21 A. L. J. 907 = 79 I. C. 577 =
5 L. R. A. (Rev.) 13 = A. I. R. 1924 All. 229 (1).

———**S. 4**—*Land turned into grove.*

As soon as the zemindar allows the grantee to convert the land into grove it would cease to be land held for agricultural purposes within the meaning of the definition. (*Ryves and Daniels, JJ.*) KESHO DAS *v.* HANUMAN PANDEY. **45 All. 640 =**
21 A. L. J. 576 = 4 L. R. A. (Civ.) 208 =
74 I. C. 924 = A. I. R. 1924 All. 53.

———**Ss. 4 and 58**—*Suit for ejectment from uncultivated land used for grazing purposes is triable by Revenue Court.*

A suit for ejectment from an uncultivated plot of land held on rent by the defendants for grazing purposes is cognizable by a Revenue Court as a suit for the ejectment of a non-occupancy tenant under S. 58. The Court ought not to import into S. 58 any reference to a " holding " from the previous section (S. 51). 13 A. L. J. 854, Dissented; 42 All. 36, Foll. (*Piggott and Walsh, JJ.*) PARAM HANSMAN *v.* DASRATHMAN TEWARI.
43 All. 445 = 19 A. L. J. 292 = 60 I. C. 770 =
A. I. R. 1921 All. 128.

———**S. 4 (2)**—*Definition of land.*

Land on which a grove stands is not "land" as defined in S. 4, cl. (2) of the Tenancy Act. (*Sulaiman and Mukerji, JJ.*) BAIJNATH SINGH *v.* CHANDRAPAL SINGH. **47 All. 55 = 83 I. C. 204 =**
5 L. R. A. (Rev.) 255 = A. I. R. 1924 All. 795.

———**S. 4 (5)**—*Landholder is also the person to whom only a portion of rent is due, and tenant is he who owes such a portion.*

Where in a suit for the arrears of rent the plaintiff is a person to whom a portion of the rent with respect to certains plots of land is payable and the defendant is a person by whom the rent is payable, the plaintiff is a "landholder" and the defendant, a "tenant" within the meaning of those terms as defined in S. 4 (5) of the Tenancy Act. (*Iqbal Ahmad, J.*) SHEO BALAK RAM *v.* MOHAN LAL. **8 L.R. A. (Rev.) 94 =**
99 I. C. 534 = A. I. R. 1927 All. 745.

———**S. 4 (5)**—*Person liable to pay rent is tenant—Ejectment by Revenue Court—Suit in Civil Court for declaration that the plaintiff is occupancy tenant in spite of ejectment decree is barred by S.* 167.

When a person is liable to pay rent then under S. 2 (5) he is a tenant and the Revenue Court, therefore, has jurisdiction to eject him, and when he has been ejected by the Revenue Court he cannot be allowed to maintain a suit in the Civil Court for a declaration that in spite of the ejectment decree he is still a tenant-in-chief and not a sub-tenant. A. I. R. 1925 All. 637, Rel. on. (*Sulaiman, J.*) PARAM SUKH *v.* DAMBAR.
98 I. C. 263 = A. I. R. 1927 All. 102.

———**S. 4 (5)**—*Landlord and Tenant—Tenant—Meaning of.*

Everybody who cultivates land does not thereby become a tenant. (*Mears, C. J. and Lindsay, J.*) MAHBAB ALI KHAN *v.* CHIDDAN. **24 A. L. J. 599 =**
95 I. C. 291 = A. I. R. 1926 All. 519.

———**S. 4 (5)**—*Landholder with reference to sub-tenant is the occupancy tenant.*

With reference to a sub-tenant the landholder is the occupancy tenant from whom he holds. (*Daniels, J.*) GHISWA *v.* DEO NARAIN. **73 I. C. 947 =**
4 L. R. A. (Rev.) 450 = A. I. R. 1923 All. 568.

———**Ss. 4 (5) and 95**—*Usufructuary mortgagees of fixed rate tenancy paying rent to landlord does not thereby become "Tenants".*

The usufructuary mortgagees of a deceased fixed rate tenancy who, since the mortgagor's death, have been paying rent to the landlord, are not the latter's tenants and a suit by them for a declaration of their position as usufructuary mortgagees is cognizable by a Civil Court. (*Walsh and Wallach, JJ.*) SAUDAGAR SINGH *v.* GANGA SINGH. **19 A. L. J. 702 = 63 I. C. 274 =**
A. I. R. 1921 All. 110.

———**S. 4 (6)**—*Every lessee of proprietary rights is not thekadar.*

A tenant under the Tenancy Act includes a thekadar and the definition of thekadar is fairly wide and includes a farmer or other lessee of proprietary rights. The word "holding" has a special technical meaning given to it by S. 4 and it is, therefore, possible to conceive of a thekadar under the Act who may not be a thekadar of a holding. But every lessee of proprietary rights cannot be a thekadar within the meaning of the Tenancy Act. (*Sulaiman and Boys, JJ.*) ABDUL MAJID *v.* NAGESHAR DAT. **98 I. C. 92 = A. I. R. 1927 All. 78.**

———**S. 4 (12) (d)**—*No right under S.* 4 (12) (*d*) *exists in respect of abadi.*

The right to improve land as given by S. 4 (12) (*d*) does not exist in respect of the land situated in the abadi as such land is not land within the meaning of S. 4 (2). (*Mukerji, J.*) CHHOTKAN KURMI *v.* RAM DEO SAHU.
113 I. C. 756 = 10 L. R. A. (Rev.) 158 =
A. I. R. 1929 All. 76.

———**S. 6**—*Construction—No provision is made for lessees holding under sub-contract.*

Owing to the too rigid classification of tenants in section 6, all lessees including *Thekadar* have to be included in the class of non-occupancy tenants. No adequate provision has been made for lessees holding under a sub-contract and in such cases the intention of the parties is liable to be frustrated. (*Daniels, J.*) INDER DEO RAI *v.* RAM CHARITTER RAI.
74 I. C. 971 = 5 L. R. A. (Rev.) 28 =
A. I. R. 1923 All. 560.

———**S. 8**—*Landlord and Tenant—Fixed rate tenancy cannot be created by contract.*

A fixed rate tenancy cannot be created by contract, because a fixed rate tenant is defined in S. 8 of the Act and no person can be classed as a fixed rate tenant who does not come within the definition. 28 All. 747, Ref. (*Daniels, J.*) INDER DEO RAI *v.* RAM CHARITTER RAI. **74 I.C. 971 = 5 L.R.A. (Rev.) 28 =**
A. I. R. 1923 All. 560.

———**S. 9**—*U. P. Act* (*VI of* 1915), *S.* 6—*Fixed rate tenant.*

Section 9 enacts a rule of evidence, and does not embody a provision to which a fixed rate tenant can be said to be "subject" within the meaning of S. 6 of the U. P. Act (VI of 1915.) (*Iqbal Ahmad, J.*) ADIT NARAIN SINGH *v.* MAHABIR PRASAD SINGH.
102 I. C. 65 = 8 L. R. A. (Rev.) 142 =
A. I. R. 1927 All. 586.

———**S. 9**—*Pargana of Kaswar Raja Act* (*U. P. Act VI of* 1915), *S.* 4 (4)—*Person recorded as tenant in Record-of-Rights prepared in* 1911 *is fixed rate tenant, even though he cannot invoke to his aid S.* 9.

Although a person has been recorded as a fixed rate tenant in the Record-of-Rights prepared in 1911, he cannot invoke the provisions of S. 9 of the Agra Tenancy Act, inasmuch as that section has reference to entries in the Record-of-Rights prepared before the Act. But such a person is a "fixed rate tenant" having regard to the definition of such tenant in S. 4 (4) of U. P. Act VI of 1915. (*Iqbal Ahmad, J.*) ADIT NARAIN SINGH *v.* MAHABIR PRASAD SINGH. **102 I. C. 65 = 8 L. R. A. (Rev.) 142 = A. I. R. 1927 All. 586.**

———**S. 9**—*Applies even to disputes to which landlord is not a party—Presumption under S. 9 can be displaced by subsequent events.*

Per *Sulaiman, J.*—S. 9 in terms is not confined to a dispute between landlord and tenant. The words "as against a landlord" are not there at all. The section is quite general in its scope and is applicable to all cases where a dispute as to the nature of the tenancy arises, no matter whether that dispute arises against a landlord or not. A dispute may very well arise between the rival heirs of a deceased tenant and the question of the true nature of the tenancy may have to be decided in a litigation to which the landlord is no party. In such a case it is not open to either set of these heirs to go behind the entry at the last revision of records and adduce evidence to the contrary. The presumption under S. 9 is conclusive. The only way to displace it is by producing a judicial decision in proceedings instituted before the Act, and in no other way. From this it does not, however, follow that there is a conclusive presumption under the section for all time to come that the true nature of the lands is of a certain nature. The presumption can only be that the lands were of that kind at the time when the entry was made. There is no presumption that the nature of those lands can never in future be altered and therefore evidence can be allowed to show that a new position has arisen since the settlement. 34 A. 285 (F. B.), Dist.

Per *Lindsay, J.*—The scope of S. 9 is strictly limited. The rule laid down in that section can only be applied in litigation arising between a landlord and tenant when the matter in issue between the landlord and tenant is the nature of a tenancy. 34 All. 285 (F.B.), Foll. (*Lindsay and Sulaiman, JJ*). SHEO NANDAN *v.* BALGOBIND MISRA. **45 All. 744 = 74 I. C. 647 = 21 A.L. J. 697 = 4 L. R. A. (Rev.) 333 = A. I. R. 1924 All. 91.**

———**S. 9**—*Nature of tenancy as recorded cannot be challenged.*

The plaintiff's suit for a declaration that the nature of the tenancy as entered in the last settlement was wrongly entered is barred by S. 9 though the suit is not one between tenants and the zamindar. (*Walsh, J.*) RAMSARAN *v.* RAM BHAWAN. **43 All. 615 = 19 A. L. J. 653 = 63 I. C. 711 = A.I.R. 1921 All. 158.**

———**S. 10**—*Mere occupying land for many years professedly as ex-proprietary tenant does not confer upon a person ex-proprietary tenancy.*

The fact that a person has occupied land professedly as an ex-proprietary tenant for so many years does not necessarily confer upon him the ex-proprietary tenancy, inasmuch as such tenancy is the creation of the statute and cannot be acquired otherwise. (*Sulaiman and Kendall, JJ.*) BABU PARAS RAM SINGH *v.* RAJ KUMAR SINGH. **51 All. 760 = 1929 A.L.J. 549 = 10 L. R. A. (Rev.) 266 = 117 I. C. 620 = A. I. R. 1929 All. 498.**

———**S. 10**—*No ex-proprietary right accrues on the passing of a foreclosure decree.*

In order to create an ex-proprietary tenancy there must either be a sale in execution of a decree or order or there must be a voluntary alienation. Mere order by a civil or revenue Court is not sufficient, it being impossible to hold that the word "by" is understood before the word "order." Hence it follows that no ex-proprietary

right accrues on the passing of a foreclosure decree. 10 M.I.A. 340 (P.C.), Ref. (*Sulaiman and Kendall, JJ.*) PARAS RAM SINGH *v.* RAJ KUMAR SINGH. **51 All. 760 = 1929 A. L. J. 549 = 117 I. C. 620 = 10 L.R. A. (Rev.) 266 = A. I. R. 1929 All. 498.**

———**S. 10**—*Mortgage by conditional sale gives rise to ex-proprietary tenancy in* sir.

Mortgage by conditional sale being a voluntary alienation gives rise to ex-proprietary tenancy in the *sir* land. The fact that the mortgagees have not made the application to the Collector to fix ex-proprietary rent for mortgagor is not a matter which would prevent the mortgagor being in possession as ex-proprietary tenants. (*Bennet and Iqbal Ahmad, JJ.*) KOER SINGH *v.* PAHALWAN SINGH. **A. I. R. 1929 All. 864.**

———**S. 10**—*Purchasing share in proprietary rights—Purchaser must get rent assessed on his share of* sir *land and recover it from his vendor.*

The plaintiff was purchaser of a 4-anna share of proprietary interest from the defendants. The parties were in separate possession as regards recovery of rent from tenants. With respect, however, to certain *sir* and *khudkasht* lands cultivated by the defendants alone, it was alleged that the plaintiff should be granted one-fourth of the profits derived by the defendants out of the lands.

Held, that it was the duty of the plaintiff to get rent assessed on his share of the *sir* land and recover rent from defendants. (*Dalal, J.*) SHEO PRASAD SINGH *v.* RAM RAJ SINGH. **9 L. R. A (Rev.) 309 = 112 I.C. 617 = A. I. R. 1928 All. 763.**

———**S. 10**—*Proprietor automatically becomes an ex-proprietary tenant of share of* sir *land sold.*

A proprietor selling a share of property automatically becomes an ex-proprietary tenant of that share of his *sir* land corresponding to the share of the zamindari property sold by him. (*Dalal J.*) SHEO PRASAD SINGH *v.* RAM RAJ SINGH. **9 L. R. A (Rev.) 309 = 112 I. C. 617 = A. I. R. 1928 All. 763.**

———**S. 10**—*Suit for rent—Plaintiff and defendant brothers—Defendant raising ex-proprietary title—Entry in Record-of-Rights.*

Plaintiff sued defendant for arrears of rent. The plaintiff and defendant were brothers. Defendant claimed that he was ex-proprietary tenant of the holding and could not be liable for rent as none had been fixed by the Collector at the time when he lost proprietary rights in the mahal. It was found that the name of the father of the defendant had been entered as the sole zamindar of the mahal up to six years ago, but previous to the death of the defendant's father, the defendant and his brother (the plaintiff) had anticipated their succession by survivorship to their father because their father was insane and had separated between themselves. On the father's death the two brothers succeeded to separate fractional shares in the mahal. The defendant sold his share and lost his proprietary title. The entry of the appellant as a tenant in the register of persons cultivating was entry in the Record-of-Rights both at the last settlement and apparently at the subsisting settlement. Not only was the defendant entered as tenant but the rent was entered.

Held, that in these circumstances the defendant was bound to prove that the entry was wrong by clear evidence that his family was joint and undivided. The mere fact that the defendant and his father and his brother (the plaintiff) were members of a Hindu family was not sufficient to justify the inference that they were joint and the defendant was not a tenant but a co-sharer.

Held, further, that the defendant had not proved that he became ex-proprietary tenant of the land in question and the entries in the village papers must be accepted as correctly describing his interest in the land, namely, as an ordinary tenant. (*Ashworth, J.*) BISHESHAR DAYAL *v.* DASINAT. **9 L. R. A. Rev. 161 = 117 I. C. 818 = A. I. R. 1928 All. 415.**

———**S. 10**—*U. P. Land Revenue Act, S. 36—Less than statutory rate of rent is claimable if agreed upon—Proceedings under S. 36, Land Revenue Act, are not necessary.*

If the rent agreed on between the parties for land in respect of which an ex-proprietary tenancy has arisen is less than the statutory rate laid down in S. 10 of the Tenancy Act, the rent is claimable even though formal proceedings under S. 36 of the Land Revenue Act have not been taken. (*Daniels and Neave, JJ.*) NAND RAM SINGH *v.* HARI SARANDAS. **5 L.R.A. Rev. 235 = 82 I. C. 296 = A. I. R. 1925 All. 100.**

———**S. 10**—*Mortgage of proprietary lands—Sale of equity of redemption—Vendees cannot claim* khudkasht *rights in respect of such land.*

Khudkasht can only be held by a proprietor who is in possession. When a proprietor makes a transfer he loses his *sir* and *khudkasht* rights under S. 10 of the Tenancy Act even in the land which he had been cultivating for 12 years, and becomes an ex-proprietary tenant. A transferee from such a proprietor cannot claim to have *khudkasht* rights in the land purchased by him. (*Ryves and Daniels, JJ.*) GULAB SINGH *v.* SHIB LAL. **21 A. L. J. 331 = 74 I. C. 286 = 4 L.R.A. (Rev.) 206 = A. I. R. 1923 All. 347.**

———**S. 10**—*Mortgage of* khudkasht *lands—Mortgagor becomes ex-proprietary tenant.*

Where an owner of *khudkasht* lands, usufructuarily mortgages the lands, he becomes an ex-proprietary tenant and under law he is liable to pay only three-fourths of the rent which is ordinarily paid in respect of non-occupancy holdings. (*Sulaiman and Kanhaiya Lal, JJ.*) BALDEO SINGH *v.* CHHAIL BEHARI LAL. **59 I. C. 688 = 18 A. L. J. 944.**

———**S. 10 (1)**—*Gift of* sir *land—No ex-proprietary rights are created.*

Under S. 10 (1) no ex-proprietary rights are created where there is an alienation by gift whether the gift is between the co-sharers or in favour of a stranger. If the transfer is by way of a gift the *sir* must retain its character in the hands of the donee. (*Sulaiman, J.*) DUNGAR *v.* JEHANGIR. **87 I. C. 698 = A. I. R. 1925 All. 775.**

———**S. 11**—*N. W. P. Rent Act (XVIII of 1873), S. 7—Possession by mortgagee is possession by proprietor for accrual of ex-proprietary rights.*

For the accrual of the right of occupancy all that is necessary is that the land should be held as *sir* and that the proprietary rights should be lost, after the passing of the N. W. P. Rent Act of 1873. The law does not require for the accrual of the right of an ex-proprietary tenant that the land to which the right would attach itself should be in the immediate possession of the proprietor losing his interest. Although the land is held by a mortgagee, the proprietor-mortgagor may be considered to hold land within the meaning of S. 7. (*Mukerji, J.*) RAM BRICHH SINGH *v.* CHHAKAURI SINGH. **86 I.C. 929 = A. I. R. 1925 All. 748.**

———**S. 11**—*Occupancy rights—Continuous cultivation for 12 years will create—Tenant need not claim it.*

The circumstance that the tenants had not claimed occupancy rights does not affect the fact that they are occupancy tenants under the provisions of S. 11. The right is created by continuous occupation for 12 years and there is no necessity to claim this right. (*Stuart, J.*) B. PRAG NARAIN *v.* ANGAD. **70 I. C. 495 = A. I. R. 1922 All. 55.**

———**S. 11 (e)**—*Acquisition of land for military purpose is "for public purposes".*

Land acquired by Government for military purpose must be deemed to have been acquired "for a public purpose" within the meaning of S. 11 (*e*) of the Tenancy Act and as such occupancy rights cannot be acquired in such land. (*Iqbal Ahmad, J.*) RUP NARAIN SINGH *v.* JAGRUP SINGH. **8 L. R. A. Rev. 194 = 101 I.C. 638 = A.I.R. 1927 All. 530.**

———**S. 13**—*S. 13 applies where landholder has power to re-admit tenant to tenancy and not where he has parted with such power.*

A landlord leased certain land to plaintiff on 11th October 1922 to take effect on 23rd July 1923. No possession was given. The defendants were tenants and had been ejected through a Revenue Court. After ejectment of defendant and after possession was taken, the landlord leased the land to defendant on 17th November 1923. Plaintiff sued for ejectment of the defendant. The lower Court refused to give possession to the plaintiff because the defendant being tenant formerly and being admitted within a year from ejectment to the tenancy it was deemed to have continued from commencement under S. 13.

Held, that the tenancy cannot be deemed to have continued from the commencement of the tenancy under S. 13 because the terms of the section apply where the landholder has power to re-admit the tenant to the tenancy and not where he has parted with such power. 2 A. L. J. 156, Foll. (*Dalal, J.*) BIDHA *v.* BHOLA. **9 L. R. A. Rev. 241 = 111 I. C. 131 = A. I. R. 1928 All. 681.**

———**S. 13 (b)**—*Tenant ejected and re-admitted—Tenancy is continuous only for S. 11—When ejected tenant is re-admitted, agreement changing rent need not be registered—Agra Tenancy Act, S. 47.*

When a tenant is ejected under S. 58 (*a*) or (*b*), the break before his re-admission is to be condoned only for purposes of S. 11. It is nowhere provided in the Act that when a tenant is re-admitted by his landholder after ejectment, the rate of rent is to be the same; the rent can be changed by an agreement, which need not be registered. (*Bennet, J.*) RAM KISHORE SINGH *v.* RAGHUBIR. **111 I.C. 742 = 10 L. R. A. Rev. 101 = A. I. R. 1929 All. 78.**

———**S. 14**—*Widows when can add period of husband's occupation.*

Where there is nothing to show that a widow has directly succeeded to her husband's holding she cannot claim the benefit of S. 14 by adding up the period of her husband's occupation for the acquisition of occupancy rights. (*Harrison, J. M.*) DIPCHAND *v.* TOHFA. **60 I. C. 211 = 2 U. P. L. R. (B. R.) 86.**

———**Ss. 17 and 22**—*Occupancy holding—Division between joint tenants by common consent does not create separate holdings—Joint tenancy continues subject to devolution of inheritance under S. 22.*

When the joint tenants of an occupancy holding by their common consent divide their holding, this has not the legal effect of creating separate holdings so as to affect the integrity of the original holding and notwithstanding the division the joint tenancy continues with the incidents of survivorship subject only to such devolution of inheritance as is possessed by S. 22. (*Mears, C.J. and Sen, J.*) MT. AJAIB *v.* NOOR KHAN. **118 I. C. 709 = 1929 A. L. J. 1184 = A. I. R. 1929 All. 808.**

———**S. 17**—*Occupancy holding—Tenants cannot carve out fresh occupancy tenure without consent of zamindar—Permissive possession is in nature of license.*

Occupancy tenants cannot without the consent of the zamindar carve out a fresh occupancy tenure as regards a portion of original holding under a compromise which gives permissive possession of property. The position of person under possession is no more than that of licensee and the license can be revoked. (*Mears, C. J. and Sen, J.*) MT. AJAIB *v.* NOOR KHAN. **118 I. C. 709 = 1929 A. L. J. 1184 = A. I. R. 1929 All. 808.**

——**S. 18 (b)**—*Ejectment of tenant does not necessarily extinguish mortgage created by him under express terms of lease.*

There is nothing in S. 18 of the Agra Tenancy Act to displace the general principle of law that where a tenant being expressly authorised by the terms of the lease to mortgage his land, does so, the extinction of the lease does not extinguish the mortgage unless the mortgagee has had an opportunity to prevent that extinction. Hence in such a case, when the tenant is ejected by order of a Revenue Court, it does not necessarily follow that the mortgage created by him also comes to an end. (*Sulaiman and Boys, JJ.*) BAHADUR *v.* RAJA MOTI CHAND. **88 I C. 224 = 47 All. 589 = 23 A. L. J. 409 = A. I. R. 1925 All. 580.**

——**Ss. 20 and 21**—*Scope—Ss. 20 and 21 do not forbid or prohibit such transfer but only declare it to be void.*

Ss. 20 and 21 merely make an attempted transfer absolutely void and incapable of being enforced by a Court of Law on the ground of incompetency of the tenant to make the transfer. The language of these two sections does not justify the inference that such a transfer has been expressly forbidden and prohibited by law. Nor can the scope of cases which fall under the category of being opposed to public policy, be widened. (*Sulaiman, Mukerjee and King, JJ.*) DIP NARAIN SINGH *v.* NAGESHAR PRASAD. **122 I. C. 872 = 1930 A. L. J. 45 = A. I. R. 1930 All. 1 (F.B.).**

——**S. 20**—*Landlord can create tenancy which is heritable and transferable.*

The power of transfer, if conferred by lease, is inoperative if it is opposed to some law so as to defeat its provisions or is opposed to public policy and so on this principle under Agra Tenancy Act or any law, there is nothing which prevents a landlord from creating a tenancy carrying heritable and transferable rights. 28 All. 747, Dist.; A. I. R. 1925 All. 63, Diss. from. (*Niamatullah, J.*) RAGHUNATH TEWARI *v.* BUDDHU RAM. **A. I. R. 1930 All. 315.**

——**S. 20**—*Transfer does not cover bequest—But tenancy cannot be bequeathed under S. 22.*

The words "transferable" and "transfer" in S. 20 refer to transfer *inter vivos* and not to bequests, but S. 22 overrides the personal law of the tenant and confines the order of succession to that laid down by it and, therefore, if a tenancy has not been transferred in the way laid down by S. 20 (2), it cannot be bequeathed. (*Sulaiman, J.*) DEO NARAIN SINGH *v.* JAGAT NARAIN SINGH. **8 L. R. A. Rev. 261 = 103 I. C. 237 = A I. R. 1927 All. 662.**

——**S. 20**—*Equity of redemption—Gift of, is not invalid.*

A deed of gift which does not purport to transfer any ex-proprietary rights in mortgaged property but which merely purports to transfer the equity of redemption held by the donors in the property cannot be regarded as invalid. (*Lindsay and Kanhaiya Lal, JJ.*) KUNWAR NIHAL SINGH *v.* CHANDA KUNWAR. **86 I. C. 741 = 23 A. L. J. 201 = 47 All. 424 = A. I. R. 1925 All. 358.**

——**S. 20**—*Settlement between zamindar and the tenant regarding the incidents of the tenure cannot override the section.*

A fixed rate tenancy cannot be created by a contract with the zamindar; and any rights which can be granted by the zamindars must be consistent with the provisions of S. 20 of the Agra Tenancy Act, which forbid the sale of a holding in execution of decree of a Civil or Revenue Court and also a voluntary transfer, except in favour of persons, who are co-sharers in the tenancy. The interest of a *thekedar* is not permitted by law to be transferable. *A* was the tenant of a certain holding from which the zamindars sought to eject him. A settlement was subsequently arrived at between him on the one hand and the zamindars on the other, whereby the latter granted a lease in perpetuity to him of the same holding, giving the lessee heritable and transferable rights. Some time after this lease was executed, *A* made a possessory mortgage of the holding in favour of the predecessor-in-title of the plaintiffs.

Held, that the mortgage was void even as against the zamindars who had succeeded to the interest of the mortgagor, *A*. 28 All. 747, Foll. (*Kanhaiya Lal, J.*) HURBAN ALI *v.* SK. MAJID HUSAIN. **82 I. C. 289 = A. I. R. 1925 All. 63.**

——**Ss. 20 and 31**—*Limitation.*

After the lapse of the period of limitation prescribed by S. 31, the transfer cannot be challenged but the landholder has as against the transferee all the rights possessed by the transferor in case the latter dies without leaving any heirs. (*Kanhaiya Lal, J.*) BAIRANGI SINGH *v.* SHEO BARAT. **78 I. C. 531 = A. I. R. 1924 All. 841**

——**S. 20**—*Occupancy holding cannot be mortgaged.*

Mortgage of occupancy holding is void under the Act and mortgagee cannot recover possession if ejected by mortgagor, who, however, cannot sue for possession without returning mortgage money. (*Banerji, A. C. J. and Piggott, J.*) SAIYED ATA HUSSAIN *v.* RAMAN LAL. **78 I. C. 539 = A. I. R. 1924 All. 710.**

——**S. 20**—*Transfer does not include will.*

Will does not come within the meaning of word 'transfer' in S. 20. An occupancy tenant therefore cannot regulate his succession to his tenancy by making a will. (*Neave, J.*) KALLU *v.* GANGA RAM. **84 I. C. 669 = 5 L. R. A. Civ. 179 = A. I. R. 1924 All. 508.**

——**S. 20**—*Mango trees planted presumably with landlord's consent on occupancy holding are not transferable—Landlord and tenant.*

Where it is found that mango trees were planted presumably with the consent of the zamindar on the occupancy holding by the tenant, *held*, that the tenant acquired no transferable right in the trees. 13 A. L. J. 833, Foll. 34 All. 545, Dist. (*Sulaiman, J.*) ABDUL RAUF *v.* RAJU MUHAMMAD. **75 I. C. 655 = A. I. R. 1923 All. 340.**

——**S. 20**—*Occupancy holding— Mortgage—Surrender by tenant to zemindar—Zemindar can redeem.*

Where an occupancy tenant relinquishes his holding in favour of the zemindar, the zemindar becomes the transferee of any mortgagor's right which might have been created on it. The zemindar therefore is entitled to redeem. (*Stuart and Ryves, JJ.*) SAITHWAR *v.* BISHUN MOHAN SAHAI. **73 I. C. 651 = 21 A. L. J. 120 = A. I. R. 1923 All. 263 (1).**

——**S. 20**—*Occupancy holding—Suit by a tenant to eject a mortgagee in possession—Mortgage invalid—Mortgagee cannot set up adverse possession.*

The possession of the mortgagee being permissive, even though the mortgage was invalid, the occupancy tenant can sue to eject the mortgagee on paying the mortgage money. 16 A. L. J. 747, Foll. (*Kanhaiya Lal, J.*) DURGA CHOUDHURI *v.* JAGROOP. **79 I. C. 232 = A. I. R. 1923 All. 191.**

———**S. 20**—*Occupancy holding— Mortgage—Permanent lease by the landlord—Transferee of the lessee is entitled to redeem the mortgage.*

The holders of a certain occupancy holding mortgaged their rights with possession before the passing of the present Tenancy Act. After they had done so they took a permanent lease of the holding from the Zamindar and transferred their rights under the lease to a certain person who proceeded to redeem the mortgage. *Held*, that he had a right to redeem the mortgage. (*Mears, C. J. and Stuart, J.*) MAHABIR CHAUBE *v.* DIP NARAIN. **76 I. C. 862 = 20 A. L. J. 976 = A. I. R. 1923 All. 140 (2).**

———**S. 20**—*Ex-proprietary tenancy—Relinquishment in favour of person already in possession is valid without fresh delivery of possession.*

A relinquishment of an ex-proprietary tenancy in favour of the defendants who were already in possession is valid without a fresh delivery of possession. (*Gokul Prasad, J.*) BHAGWANT *v.* MARE. **72 I. C. 1024 = A. I. R. 1923 All. 113.**

———**S. 20**—*Provincial Insolvency Act* (*III of* 1907), *S.* 16 (2) (*a*)—*Scope.*

An occupancy holding under the Agra Tenancy Act cannot be dealt with by the Insolvency Court. (*Tudball, Rafiq and Ryves, JJ.*) KALKA DAS *v.* GAJJU SINGH. **62 I.C. 897 = 43 All. 510 = 19 A. L. J. 439 = A. I. R. 1921 All. 13 (F. B.).**

———**S. 20**—*Decree directing sale of occupancy holding—Yet execution court cannot sell—Occupancy holding.*

In view of the provisions of S. 20 a court executing a decree cannot order an occupancy holding to be sold, no matter whether the decree is a decree directing a sale of the holding or is a simple money decree. (*Banerji, Rafiq and Ryves, JJ.*). KATWARI *v.* SITA RAM. **63 I. C. 264 = 43 All. 547 = 19 A. L. J. 473 = A. I. R. 1921 All. 118 (F. B.).**

———**S. 20**—*Occupancy holding—Mortgage—Relinquishment by mortgagor—Right to redeem.*

A relinquishment by the mortgagor of an occupancy holding in favour of the zemindar for a cash consideration is in law a transfer of the right to redeem. (*Stuart, J.*) YAD RAM *v.* BALDEO SINGH. **64 I. C. 418 (1).**

———**S. 20 (2)** —*Mortgage of occupancy holding not being unlawful but merely inoperative, mortgage of such holding along with other property is not wholly unlawful and other property will be liable for whole debt.*

The Tenancy Act of 1901 does not make the mortgage of an occupancy holding unlawful but merely inoperative, and so where an occupancy holding along with another property is mortgaged, the mortgage as a whole will not be unlawful but the other property, mortgaged along with the holding, becomes liable for the whole debt, 39 All. 539, Rel. on ; A. I. R. 1922 All. 134 ; 18 All. 121 and A. I. R. 1925 All. 543, not Foll. (*Ashworth, J.*) GAURI DATT *v.* BANDHU PANDEY. **119 I. C. 505 = 10 L. R. A. Rev. 269 = A. I. R. 1929 All. 394.**

———**S. 20 (2)**—*Mortgage of equity of redemption of ex-proprietary tenancy is forbidden.*

Mortgage of the equity of redemption of existing mortgage of *sir* plots by ex-proprietary tenant is a transfer of an interest in ex-proprietary tenancy which is forbidden by law. (*Dalal, J.*) NAURANG SINGH *v.* PHEKU BHAGAT. **9 L. R. A. Rev. 237 = 116 I. C. 878 = A. I. R. 1928 All. 590.**

———**S. 20 (3)**—*Application.*

The interest of a permanent lessee of agricultural land, although declared to be transferable by the lease, cannot be transferred, as such transfer is barred by the provisions of S. 20 (3). A.I.R. 1926 All. 412, Rel. on; A.I.R. 1926 All. 432, not Appl. (*Dalal, J.*) TILAK SINGH *v.* SHEO NANDAN MISIR. **118 I. C. 527 = 10 L. R. A. Rev. 360 = A. I. R. 1929 All. 612.**

———**S. 20 (3)**—*"Transferable" relates to transfers voluntary or involuntary.*

The word "transferable" is used in sub-cl. (2) in its general sense, no matter whether the transfer is voluntary or involuntary. Although the whole clause is not repeated in sub-cl. (3), there is no reason to suppose that the word "transferable" is not used in the same sense in that clause also and that it is confined to private transfers only. (*Sulaiman and Mukerji, JJ.*) BALLABHA DAS *v.* MURAT NARAIN SINGH. **48 All. 385 = 24 A. L. J. 489 = 95 I. C. 1048 = A. I. R. 1926 All. 432.**

———**S. 20 (3)**—*Interest of a* thekadar

The interest of a *thekadar* is heritable but not transferable, provided there is no provision to the contrary in the lease. (*Sulaiman and Mukerji, JJ.*) BALLABHA DAS *v.* MURAT NARAIN SINGH. **48 All. 385 = 24 A. L. J. 489 = 95 I. C. 1048 = A. I. R. 1926 All. 432.**

———**S. 20 (3)**—*Interest is not transferable though so stated in a lease.*

The interest of a permanent lessee of agricultural land though declared to be transferable by the lease, is not transferable. (*Mears, C.J. and Mukerji, J.*) MAJID HUSAIN *v.* KURBAN ALI. **93 I. C. 1005 = A. I. R. 1926 All. 412.**

———**S. 20 (3)**—*Express condition in lease makes lease transferable.*

S. 20, sub-clause (3) of the Tenancy Act implies that if under the express condition of the lease the right is made transferable, the lease would be transferable. (*Sulaiman and Boys, JJ.*) BAHADUR *v.* RAJA MOTICHAND. **88 I. C. 224 = 47 All. 589 = 23 A. L. J. 409 = A. I.R. 1925 All. 580.**

———**S. 20 (3)**—*Appointment of receiver in execution proceedings against* thekadar, *to collect latter's arrears of rent and utilise them for satisfying decree is legal.*

In execution of a decree passed against a *thekadar*, a receiver was appointed to collect rents recoverable by the *thekadar* from occupancy and non-occupancy tenants, and to utilise them in satisfying the decree against the *thekadar*. *Held*, that the appointment of the receiver did not amount to the transfer of the property from the judgment-debtor to the receiver and hence was not illegal. (*Mukerji and Dalal, JJ.*) KIRTARATH GIR *v.* MATHURA PRASAD. **46 All. 924 = 81 I .C. 741 = A. I. R. 1925 All. 72.**

———**S. 22**—*Collateral not sharing in cultivation with deceased is not entitled to succeed in preference to collateral in possession of holding.*

A collateral who did not share cultivation with the deceased occupancy tenant is not entitled to succeed to the deceased occupancy tenant in preference to a collateral in possession of the holding. (*Mukerji and Bennet JJ.*) RAM BRICH *v.* GOPAL PANDE. **A. I. R. 1930 All. 518.**

———**S. 22**—*S. 22 does not prohibit survivorship of co-tenant.*

S. 22 lays down the succession for a deceased occupancy tenant but it does not lay down that there should be no right of survivorship of one occupancy tenant to a deceased occupancy co-tenant. (*Mukerji and Bennet, JJ.*) MT. RASULAN *v.* BABU. **122 I. C. 404 = 11 L. R. A. Rev. 90 = 1930 A. L. J. 811 = A. I. R. 1930 All. 350.**

———**S. 22**—*Co-sharers—Rule as to survivorship is modified by Contract Act, Ss.* 42 *and* 45.

The rule of survivorship among joint tenants is modified in India by Ss. 42 and 45, Contract Act, which puts the representative of the deceased joint tenant in his place, so long as there is such a representative. On failure of such a representative the rule of survivorship among joint tenants applies. (*Mukerji and Bennet, JJ.*) MT. RASULAN *v.* BABU. **122 I. C. 404 = 11 L. R. A. Rev. 90 = 1930 A. L. J. 811 = A. I. R. 1930 All. 350.**

———S. 22—*Inheritance.*

S. 22 does not deal merely with cases of inheritance upon intestacy. The words "shall devolve" in the section are meant to apply in all cases so as to deprive tenants, of the classes with which the section deals, of any power to alter by will or other testamentary disposition the line of inheritance prescribed by the section. A. I. R. 1924 All. 508, Foll. (*Weir, J.*) NAGESHWAR MURAO *v.* BHIKHI MURAO. **111 I. C. 718 = 13 R. D. 188 = 10 L. R. A. Rev. 75.**

———**S. 22**—*Illegitimate Sudra son is a "male lineal descendant" of his father.*

An illegitimate son of one belonging to a Sudra caste, by a kept woman is entitled to succeed to the holding of his father as a "male lineal descendant" within the meaning of S. 22 of the Agra Tenancy Act, 1901. 30 All. 508, Foll. (*Iqbal Ahmed, J.*) MEWA RAM *v.* LAL SAHAI. **100 I.C. 650 = A.I.R. 1927 All. 410 (e).**

———**S. 22**—*"Sharing in cultivation" does not necessarily mean actual ploughing.*

'Sharing in cultivation' does not necessarily mean actual ploughing A person who helps another in his agricultural pursuits would be 'sharing in cultivation' although he does not actually plough the fields. Sharing is not confined to ploughing, sowing, attending the crops or reaping them. 2 Unp. Dec. 237, Foll. (*Sulaiman, J.*) RAM DEO *v.* SHEO NAIK. **94 I.C. 190 - A.I.R. 1926 All 465.**

———**S. 22**—*One of the co-parceners owning occupancy holding does not bring the case under S. 22.*

Where a joint Hindu family owns an occupancy holding, the death of one of the co-parceners does not bring about a devolution of tenancy under S. 22. 42 All. 668, Foll. (*Walsh, J.*) CHATURI AHIR *v.* JHINNU AHIR. **93 I.C. 98 (All.).**

———**S. 22**—*Succession to tenancy—Tenancy in possession of mortgagee at the time of tenant's death—Prospective heir of the tenant can be said to share in cultivation.*

Although where, when the mortgagor dies, the land constituting the holding is held by the mortgagee, the next heir of the mortgagor at the date of his death can be said to have been sharing in the cultivation of the holding. (*Mukerji, J.*) LALLU SINGH *v.* RAGHUNANDAN. **85 I.C. 690 = A.I.R. 1925 All. 794.**

———**S. 22**—*Hindu Law—Succession—Sons of pre-deceased son are entitled to succeed along with surviving sons even to the tenancy rights of the deceased.*

On the death of a separated Hindu zamindar his property must be divided among his sons and his grandsons by a pre-deceased son, the latter being entitled to the share to which their father would have been entitled had he been alive. The same rule applies to the devolution of the tenancy rights possessed by the deceased by virtue of S. 22 of the Agra Tenancy Act. In S. 22 the word "descendants" would imply that there may be more than one descendant and they also may be in different degrees. No particular principle is involved in the rule which may indicate that the remote descendents were to be excluded by the nearer ones. (*Mukerjee, J.*) RAMRUP PANDE *v.* SARJU PANDE. **87 I.C. 668 = A.I.R. 1925 All. 786.**

———**S. 22**—*Mortgage of property by female absolute owner—Mortgage is valid and husband's heirs cannot oust mortgagee after her death.*

Plaintiff sought recovery of possession as the usufructuary mortgagee of certain plots mortgaged to him under a deed executed in 1914, by a Hindu widow who was the absolute owner of the property mortgaged. She put the plaintiff into possession, and he remained in possession for six years. On the lady's death, the defendants, her heirs, being the nearest reversioners of her late husband, succeeded in ejecting the plaintiff.

Held, that plaintiff was entitled to recovery of possession.

Held further that ex-proprietary tenancy in favour of the lady did not necessarily come into existence from the date of the mortgage but if it did, it was certainly surrendered by her to the only person who could be treated as the land-holder, that is, the plaintiff mortgagee, and if any ex-proprietary tenancy did continue up to the date of her death, it certainly did not devolve on the defendants. A.I.R. 1924 All 737, Foll. (*Mears, C J. and Piggott, J.*) RAM PRASAD SINGH *v.* NEPAL SINGH. **88 I.C. 290 = 47 All. 600 = 23 A.L.J. 368 = A.I.R. 1925 All. 420.**

———**S. 22**—*Ex-proprietary tenant—A daughter's son or a collateral succeeds to the ex-proprietary tenancy only when he shares in actual cultivation.*

A daughter's son or a collateral can only inherit if he shared in actual cultivation of the holding at the time of the tenant's death. When the tenant has sub-let to others, he is not in actual cultivation and therefore nobody could be said to share his cultivation. (*Gokul Prasad, J.*) SHAIKH SAJJAD HUSSAIN *v.* WALI MUHAMMAD. **73 I.C. 1030 = 5 L.R.A. Rev. 21 = A.I.R. 1923 All. 451.**

———**S. 22**—*Tenant grove-holder dying without heirs but indebted—Landlord is not responsible for the debts of the last holder, though the land reverts to him.*

The right of a tenant to reside in a house in the inhabited site of an agricultural village of the United Provinces and the right of a tenant grove-holder in certain villages, are both limited estates. When the last holder of such a house dies without heirs the house reverts to the landlord and in the case of certain villages, when the tenant grove-holder dies without heirs, the trees and land revert to the landlord. The landlord, however, does not succeed as heir and hence the landlord cannot be held responsible for the debts of the last holder. 1 Cal. 391, P. C. and 33 A. 111 (F. B.) Rel. on. (*Stuart, J.*) MT. RAMMAN BIBI *v.* MATHRA PRASAD. **75 I.C. 621 = A.I.R. 1923 All. 374.**

———**S. 22**—*'Devolve', meaning of in case of widow.*

A widow who succeeds to an occupancy holding on the death of her husband may not have anything more than a life interest therein; but she would be an occupancy tenant for the time being and the succession would open out on her death to the heirs of the last male holder and would go to the persons entitled under S. 22, and then in existence, provided that, if those persons are the daughter's sons or collateral male relatives in the male line of descent, they must be co-sharers in the cultivation of the holding at the time when the last occupant died. Case-law discussed. (***Kanhaiya Lal**, J.*) BHAWANI BHIKH *v.* SIDH NARAIN. **70 I.C. 820 = A.I.R. 1923 All. 18.**

———**S. 22**—*No retrospective effect—N. W. P. Rent Act (Act XII of 1881), S. 9—Tenant dying before new Act—Succession is governed by Hindu Law as modified by S. 9 of Rent Act, 1881—Collateral is not entitled to inherit unless he was in joint cultivation with deceased.*

Where the question was whether in the case of a Hindu occupancy tenant who had died before the present Tenancy Act (Agra Tenancy Act II of 1901) came into force, succession was to be governed under the new Tenancy Act or by Hindu Law proper, or by the Rent Act (III of 1881).

Held, that the present Tenancy Act had no retrospective effect so as to affect a succession to the holding of such a tenant. As the succession opened out to the estate of the original tenant when the Rent Act of 1881 was in force, it was governed by Hindu Law as modified by S. 9 of that Act and a collateral (reversioner) was not entitled to inherit his property unless he was joint in cultivation with him. 38 All. 197, Dist. (*Ryves and Gokul Prasad, JJ.*) BECHU SINGH *v.* BALDEO SINGH. **65 I.C. 507 = 44 All. 327 = 20 A.L.J. 165 = A.I.R. 1922 All. 84.**

———**S. 22**—*Tenancy Act of* 1859, *S.* 6—*Death of owner of occupancy holding—His widow remaining in possession for* 12 *years requires holding in her own right—Reversioner cannot question gift by her.*

The next reversioner of a widow brought a suit to recover possession of a certain occupancy holding from one Manpal Singh who held the gift of those holding from the widow, on the allegation that the widow had no right to make the gift. On the question whether the widow got the holding from her deceased husband, who died before the Act of 1873, under ordinary rules of Hindu Law of Inheritance, or had acquired in her own right, the right of occupancy,

Held, the right of occupancy first created by the Act of 1859 was neither transferable nor heritable. The widow acquired the occupancy right in her own right and the succession to her would be governed by S. 22 of the Tenancy Act of 1901. (*Gokul Prasad and Stuart, JJ.*) MANPAL SINGH *v.* RAJ PARTAB SINGH. **65 I.C. 824 = 44 All. 376 = 20 A.L.J. 181 = A.I.R. 1922 All. 31 (2).**

———**S. 22**—*Construction—Interest in part of a holding—Section applies.*

S. 22 governs the devolution of interest of an occupancy tenant in part of a holding. 16 A. L. J. 459, not Foll. (*Piggott and Walsh, JJ.*) MUTASADDI LAL *v.* DAYA SHANKAR. **2 L. R. A. 3 (Rev.) = 62 I.C. 103 = 2 U.P.L.R. (All.) 417.**

———**S. 22**—*Construction—Occupancy tenancy—Devolution—Joint holding.*

The devolution of interest of an occupancy tenant of a joint holding is governed by S. 22 and his successors-in-interest cannot redeem a mortgage effected by him of his interest in the property. (*Piggott and Walsh, JJ.*) MUTASADDI LAL *v.* DAYA SHANKAR. **2 U. P. L. R. (All.) 417 = 62 I.C. 103 = 2 L.R.A. 3.**

———**S. 22**—*Construction—Admission of a non-tenant is not a transfer of right.*

Mere admission by the successor of an occupancy tenant of a person who is not a tenant to a share in cultivation cannot transfer to the latter any right in the tenancy. (*Hopkins, S. M. and Porter, J. M.*) SHREE KRISHNA DATTA DUBE *v.* JOGESHWAR UPADHIA. **60 I. C. 250 = 2 U. P. L. R. (B. R.) 92.**

———**Ss. 23 to 30**—Thekadars *are tenants for applying the Act and the sections apply to them.*

Thekadars are tenants for the purpose of applying the provisions of the Tenancy Act and the provisions of Ss. 23 to 30 regarding the right of sub-leasing are applicable to them. 6 A. L. J. 649, Ref. (*Daniels, J.*) INDER DEO RAI *v.* RAM CHARITTER RAI. **74 I. C. 971 = 5 L. R. A. Rev. 28 = A. I. R. 1923 All. 560.**

———**S. 24**—*Sub-lease—Whole money realized before sub-tenant occupies—No sub-lease is created.*

A sub-lease contemplated by S. 24 must be an agreement whereby a person as sub-tenant promises to pay something in cash or kind in the future and therefore when the whole sum has been realized before the sub-tenant occupies, the transaction does not amount to a sub-lease under S. 24. *Bhavani* v. *Choudry Mangli Singh*, A. I. R. 1927 All. 567, Foll. (*Ashworth, J.*) MAN SINGH *v.* CHUNNI SINGH. **102 I.C. 809 = 8 L. R. A. Rev. 214 = A. I. R. 1927 All. 785.**

———**Ss. 24 and 25**—*Grant of occupancy land for fixed term in consideration of discharging debts is not a sub-lease within Ss.* 24 *and* 25—(*Mukerji, J.*) *Transaction falls entirely within Transfer of Property Act, S.* 58.

A grant of occupancy land for a fixed term free of rent in consideration of a promise to pay certain debts already due and to pay the rent as it became due yearly to the zemindars is not a sub-lease within the term of Ss. 24 and 25 but is a transfer.

Mukerji, J.—The transaction falls entirely within four corners of S. 58 of the Transfer of Property Act and is one of a pure usufructuary mortgage. 25 All. 115 P.C., Expl. (*Mukerji and Ashworth, JJ.*) BHAWANI *v.* MANGALI SINGH. **49 All. 820 = 102 I. C. 205 = 25 A. L. J. 633 = 8 L.R. A. Rev. 139 = A. I. R. 1927 All. 567 (2).**

———**Ss. 24 and 25**—'*Sub-lease*'—*Meaning explained.*

The sub-lease contemplated by Ss. 24 and 25 must mean a contract under which the person given the right of occupation is bound, after entering into occupation to pay something in cash or kind to the person granting that right, and will not apply where nothing at all is to be paid in cash or kind to the person transferring the right of occupation. (*Mukerji and Ashworth, JJ.*) BHAWANI *v.* MANGALI SINGH. **49 All. 820 = 25 A. L. J. 633 = 102 I.C. 205 = 8 L.R. A. Rev. 139 = A. I. R. 1927 All. 567 (2)**

———**S. 25**—*Lease of occupancy holding for five years coupled with arrangement to appropriate rent in lieu of interest for loan advanced—Transactions of loan and lease independent and not referable to each other—Transaction is not usufructuary mortgage.*

A transaction by which an occupancy tenant sub-lets his holding for a period of five years, coupled with an arrangement that the rent was to be appropriated in lieu of interest on a sum due to the sub-tenant does not by the mere fact of the loan advanced make it a usufructuary mortgage. The sub-tenant is liable to be ejected on the expiry of the term and cannot insist or retain the land till the money advanced is paid. To constitute such transaction a usufructuary mortgage, the bond acknowledging the loan, though executed simultaneously, should be referable to and dependent on the lease and further the lease should entitle the sub-tenant to continue in possession till payment of his dues in full. 25 All. 115, Ref.; 17 I.C. 1522 and A.I.R. 1922 All. 134 and 18 I.C. 9, Dist. (*Niamatullah, J.*) CHOTEY LAL *v.* MT. MOHANIAN. **1930 A.L.J. 332 = 11 L.R.A. Rev. 46 = A. I. R. 1930 All. 375.**

———**S. 25**—*Sub-lease in violation of section is not enforceable—Contract Act, S.* 23.

All agreements which are contrary to the law are void and unenforceable and no party to such an agreement can obtain any relief from the Courts. (*Lindsay, J.*) DHARMAN *v.* SUKHI. **73 I. C. 981 = 5 L. R. A. Rev. 31 = A. I. R. 1923 All. 453.**

———**Ss. 28 and 57 (a)**—*Interest of usufructuary mortgagee or sub-lessee of occupancy holding determines on termination of right of occupancy.*

The interest in an occupancy holding of any person, to whom an occupancy tenant sub-lets or to whom he grants a usufructuary mortgage of land comprised in his occupancy holding, will determine if it has not already determined on the determination of the right of occupancy and can subsist no longer than the right of occupancy. 15 All. 219, Rel. on ; A.I.R. 1925 All. 580, Dist. (*Mukerji and Bennet, JJ.*) Shahzad Singh *v.* Bachoo Singh. **1930 All. 599 = A. I. R. 1930 All. 352.**

———**Ss. 31 and 20**—*Limitation—Agra Tenancy Act, S. 31.*

After the lapse of the period of limitation prescribed by S. 31, the transfer cannot be challenged but the landholder has as against the transferee all the rights possessed by the transferor in case the latter dies without leaving any heirs. (*Kanhaiya Lal, J.*) Bajrangi Singh *v.* Sheo Barat. **78 I. C. 531 = A. I. R. 1924 All. 841.**

———**S. 31**—*Landlord must get a sub-lease declared void within one year of the transfer.*

A landholder might accept and recognize a sub-lease created by his tenant but if he wishes to repudiate it, he must do so at an early date and bring his suit within one year of the transfer. Where the defendant was found to be the sub-tenant of a transferee under an invalid lease from the ex-proprietary tenant which lease was not set aside within one year, the defendant is liable to be ejected at the instance of the ex-proprietary tenant. (*Gokul Prasad, J.*) Makhan Lal *v.* Debi Prasad. **A. I. R. 1923 All. 401 (2).**

———**S. 32**—*Scope.*

A suit for possession of a portion of an occupancy holding is not maintainable. 29 All. 66; 30 All. 90, Foll. (*Banerji, J.*) Bir *v.* Gajadhar. **89 I. C. 19 = A. I. R. 1926 All. 140.**

———**S. 32**—*One sharer kept out of possession by co-tenants—Suit by him for profits or damages is not barred.*

S. 32 bars a suit for partition of a holding. It does not bar the maintenance of a suit for damages or profits where one of the parties entitled to a holding is kept out of possession by his co-tenants. 31 All. 348 (F.B.), Appl. (*Mukerji, J.*) Munshi Ram *v.* Bhagwant. **87 I. C. 782 = A. I. R. 1925 All. 697.**

———**S. 32**—*Suit against lawful holder.*

S. 32 does not apply to a suit to recover a fractional share in a holding against a person in lawful possession. 37 All. 336 Foll. (*Daniels, J.*) Ram Kishen *v.* Sheo Sagar Pandey. **73 I. C. 462 = A. I. R. 1924 All. 304.**

———**S. 32 (2)**—*Suit for possession of specific plots, against co-tenants is not barred when the holding has been divided among themselves. But such suit does not lie against landlord.*

When once co-tenants are in separate possession of separate plots out of the holding and one of the co-tenants is dispossessed, he is entitled to sue for specific possession of the plots from which he is dispossessed so long as the suit is instituted against the co-tenants and not the landlord. Such possession does not in any way interfere with the rights of the landlord. 33 All. 143, Foll.; 29 All. 66; 30 All. 90, 31 All. 348, Dist. (*Dalal. J.*) Ghasi *v.* Mt. Bharto. **80 I. C. 941 = A.I. R. 1925 All. 53.**

———**Ss. 34 and 156**—*Person occupying land without consent of proprietor or asserting right in himself acquires right by prescription and is not assessable under S. 34 or 156.*

Where a person enters into occupation of land without the consent of the proprietor and with an assertion of proprietary rights and 12 years have elapsed, that person acquires ownership by prescription and the former proprietor cannot have rent assessed on that person, either under S. 34 or under S. 156. If, however, the period of occupation in the assertion of proprietary rights were less than 12 years, then the zemindar could sue under S. 34, for the determination and recovery of rent. (*Mukerji and Bennet, JJ.*) Baij Nath *v.* Dharam Pal. **A. I. R. 1930 All. 441 (2).**

———**Ss. 34, 58 and 79**—*Suit for ejectment of some co-sharers by tenant—Ss. 34 and 58 and not S. 79 apply.*

Where the dispossession is not by, or on behalf of the whole body of co-sharers, a suit for ejectment of the co-sharers by a tenant can be brought under Ss. 34 and 58: and not under S. 79. A. I. R. 1924 All. 572 ; 9 A. L. J. 771 and 40 All. 300, Rel. on. (*Mukerji and Bennet, JJ.*) Adit Narayan Singh *v.* Mahabir Prasad Singh. **1930 A. L. J. 684 = A. I. R. 1930 All. 398.**

———**S. 34**—*Landlord cannot eject tenant holding by adverse possession.*

A man who has been adversely in possession for more than 12 years cannot be ejected under S. 34 by the landlord, who has lost his title by adverse possession. (*Mukerji, J.*) Daulat Singh *v.* Sheo Nath. **114 I. C. 890 = 10 L R. A. Cr. 179 = A. I. R. 1929 All. 211.**

———**S. 34**—*Several trespassers in possession of land—Suit for fair rent against all—One of them dying during pendency of suit—His representative not brought on record—Suit is maintainable against the remaining trespassers—C. P. Code, O. 22, R. 9.*

There is nothing in the language of S. 34 to preclude any one of several persons, occupying land without the permission of the landlord, from being sued for paying the compensation of fair rent ; thus the liability of tenants for the payment of the rent of any holding is joint and several and so, if in course of such a suit one of the trespassers dies and his representative has not been brought on the record the suit does not abate against the remaining trespassers. 34 All. 604 and A. I. R. 1925 All. 425, Foll. (*Mukerji, J.*) Manak Chand Singh *v.* Khubi. **9 L. R. A. Rev. 215 = 116 I. C. 96 = A. I. R. 1928 All. 555.**

———**S. 34**—*A trespasser is not a tenant under S. 34.*

A trespasser though liable to be assessed to rent is not under an immediate obligation to pay rent and therefore cannot, for the purpose of ejectment, be regarded as a tenant under the section. 9 A. L. J. 771, Expl. (*Ashworth, J.*) Sheoraj Singh *v.* Kunj Behari. **8 L. R. A. Rev. 297 = 105 I. C, 878 = A. I. R. 1927 All. 720.**

———**Ss. 34 and 4 (5)**—*Suit for ejectment—Plaintiff proved to be occupancy tenant—Defendant is liable to be treated as tenant under S. 34 read with S. 4 (5) unless he proves contrary.*

In an ejectment suit where it is admitted that the plaintiffs were once the occupancy tenants of the plots in dispute, the defendant unless he succeeds in proving that the plaintiffs' right as occupancy tenants of the plots in dispute has been extinguished, is liable to be treated as a tenant in accordance with the provisions of S. 34 read with S. 4 (5). (*Iqbal Ahmed, J.*) Munna *v.* Baij Nath. **99 I. C. 531 = 8 L. R. A. Rev. 67 = A. I. R. 1927 All. 212**

———**S. 34**—*U. P. Land Revenue Act, S. 36—Rent fixed by compromise between mortgagee and proprietors in possession as lessees can be recovered by auction-purchasers of proprietary interest.*

Where proprietors mortgaged the zemindari share with possession but instead of handing over possession to mortgagees remained in possession and agreed, in a rent suit by mortgagees, to pay a certain rent.

Held, that the auction-purchaser who purchased the proprietary interest and redeemed the mortgage on payment of principal and arrears of rent was entitled to recover rent from original proprietors at that same rate as the compromise. (*Kanhaiya Lal and Ashworth, JJ.*) PANNA LAL *v.* ROSHAN LAL. **98 I. C. 146 = A. I. R. 1927 All. 109.**

——**S. 34**—*Occupancy right does not arise in favour of a person not paying rent.*

An occupier shall not be deemed to occupy the land for the purpose of acquiring occupancy rights until he begins to pay rent therefor. (*Daniels, J.*) TULSI SINGH *v.* SHEOSARAM RAI. **96 I. C. 187 = A. I. R. 1926 All. 678.**

——**S. 34**—*Suit against person who came into occupation with consent of landlord—Section does not apply.*

S. 34 refers to suits brought against persons whose occupation began without the landlord's consent and not to a suit in which it is found that the defendant was initially in occupation with landlord's consent. 35 All. 123 and 8 A. L. J. 1087, Ref. (*Kanhaiya Lal J.*) MATA DIN *v.* ANAND MADHO. **87 I. C. 590 = A. I. R. 1925 All. 812.**

——**Ss. 34 and 199**—*Defendant can have question of proprietary right referred to Civil Court.*

In a suit for ejectment under S. 34 the defendant can ask to have the question of proprietary right referred to a Civil Court under S. 199. (*Daniels, J.*) IQBAL AHMAD *v.* SURAJ BALI. **82 I. C. 651 = A. I. R. 1925 All. 210.**

——**S. 34**—*Ejectment suit not—Failure to plead S. 34 is fatal—Person in occupation without landholder's consent can be ejected.*

Omission to plead specifically S. 34 of Agra Tenancy Act in a suit for ejectment is not necessarily fatal to suit. A person occupying land without the land-holder's consent can be ejected as non-occupancy tenant. (*Daniels, J.*) IQBAL AHMAD *v.* SURAJ BALI. **82 I. C. 651 = A. I. R. 1925 All. 210.**

——**S. 34**—*Person in possession for more than 12 years becomes tenant when landlord acknowledges him as such.*

Under S. 34 of the Tenancy Act a person who has cultivated land without the consent of the landholder becomes a tenant when the landholder chooses to acknowledge him to be so, either by suing for rent or by suing for ejectment. It is at the option of the landlord to treat such a person either as a trespasser and sue him in the Civil Courts or as a person liable to pay rent and sue him in the Revenue Courts, but until the landlord has exercised this option, such a person cannot be considered to be a tenant. (*Gokul Prasad, J.*) TARIF *v.* ASA RAM. **73 I. C. 212 = A.I.R. 1923 All 419.**

——**S. 34**—*Suit for rent is not tenable, in absence of agreement to pay rent or assessment by Court.*

A *thekadar* of a village from the zemindar sued the defendant for rent under S. 34. Agreement for payment of rent had never been made between the parties, nor was ever any rent formally got assessed by any Court.

Held, that the suit is not tenable. 8 A. L. J. 1087, Ref. (*Ryves, J.*) MANNU LAL *v.* BABU RAM. **A. I. R. 1923 All. 402.**

——**S. 34**—*Vendee of equity of redemption subject to mortgage of proprietary rights—S. 34 applies.*

Where the transfer of equity of redemption of the proprietary interest subject to a usufructuary mortgage was made behind the back of the mortgagees, S. 34 was held to be applicable for the recovery of arrears

of rent from vendees of equity of redemption. (*Ryves and Daniels, JJ.*) GULAB SINGH *v.* SHIB LAL. **74 I.C. 286 = 21 A. L. J. 331 = 4 L. R. A. Rev. 206 = A. I. R. 1923 All 347.**

——**S. 34**—*Suit for rent under S. 34—Remand by District Judge—Appeal does not lie from order of remand.*

There is no appeal from an order of remand passed by a District Judge in an appeal under the Agra Tenancy Act from the Court of an Assistant Collector. The fact that the suit in the Assistant Collector's Court was one for rent brought under the special provisions of S. 34 does not make any difference. (*Piggott and Walsh, JJ.*) JAI PRASAD *v.* DALSINGAR. **60 I. C. 991 = 19 A. L. J. 146 = A. I. R. 1921 All. 85.**

——**S. 34**—*Suit to eject trespasser as tenant.*

Where the landlord treats a trespasser as tenant and sues to eject him, he can do so and S. 34 applies. (*Ferard, S. M. and Harrison, J. M.*) RAM SARAN *v.* TULSHI. **60 I. C. 238 = 2 U. P. L. R. (B.R.) 90.**

——**S. 35**—*Sharing cultivation explained.*

Assisting one's uncle at an advanced age in looking after his holding would amount to sharing in the cultivation. (*Mukerji and Bennet, JJ.*) MOHIUDDIN *v.* DOORI SINGH. **A.I.R. 1930 All.441. = 124 I.C. 559(1).**

——**Ss. 35 and 41**—*Rent of ex-proprietary or occupancy tenant cannot be enhanced on oral agreement.*

Under S. 41 the rent of an ex-proprietary or occupancy tenant cannot be enhanced under an oral agreement, and such an agreement being void under law it does not help the landlord under S. 35 to prove the fact that previous payments of rent were at an enhanced rate. (*Lindsey, J.*) GURNARAIN CHAUBE *v.* NIRAND SINGH. **93 I.C. 1 = A. I. R. 1926 All. 342.**

——**S. 36**—*Landlord going to grove himself and taking mangoes—Suit lies in Small Cause Court and not Revenue Court.*

A suit brought by plaintiff grove-holder on the allegation that the defendant Zemindar being entitled to one-fourth of the fruits of the grove wrongfully appropriated one-half of the fruits is cognisable by Small Cause Court. The verb 'to exact' implies something which the tenant has been commpelled to pay against his will and does not apply to a case in which the landlord has gone to the grove and gathered the produce for himself. (*Daniels, J.*) RABI PRATAB *v.* RAM PRASAD. **74 I. C. 502 = 45 All. 725 = 21 A. L. J. 646 = 4 L. R. A. (Civ) 331 = A. I R. 1924 All. 125.**

——**S. 36**—*Usufructuary mortgage of sir—Possession not given to mortgagee—Contract to pay interest in case possession not delivered—Mortgagee is entitled to interest on failure to get possession.*

Where the ex-proprietary tenant executed a usufructuary mortgage of the *sir* lands knowing full well that the mortgagee could not be given possession over the lands and agreed to pay rent if no possession were given and the mortgagee could not have his name mutated and failed to have rents assessed,

Held, even though a mortgagee of *sir* land fails to have the rent assessed, he is entitled to have interest at the contract rate. (*Ryves, J.*) JANKI RAM *v.* MISRI LAL. **71 I. C. 382 = A. I.R. 1923 All. 377.**

——**Ss. 41 and 35**—*Rent of ex-proprietary or occupancy tennant cannot be enhanced on oral agreement.*

Under S. 41 the rent of an ex-proprietary or occupancy tenant cannot be enhanced under an oral agreement and such an agreement being void under law it does not help the landlord under S. 35 to prove the fact that previous payments of rent were at an enhanced rate. (*Lindsay, J.*) GUR NARAIN *v.* NIRAND SINGH. **93 I. C. 1 = A.I.R. 1926 All. 342.**

———**S. 41**—*Unregistered agreement to enhance is invalid.*

That the rent of an occupancy tenant is liable to enhancement by an unregistered agreement or an oral agreement, is impossible. 33 I. C. 417 of Board of Revenue, Dissented from. (*Stuart, J.*) B. PRAG NARAIN *v.* ANGAD. **70 I. C. 495 = A.I.R. 1922 All 55 (2).**

———**Ss. 43 to 46**—*U. P. Land Revenue Act, Ss. 87, and 88—Recorded rent must be decreed by Civil Court except in case of clerical error.*

In rent suits in the Revenue Courts against occupancy tenants the Courts must award rent at the rates which are fixed upon the papers unless those rates are entered erroneously by a clerical mistake, and where there is a binding order of competent authority the Court has no discretion but must allow the rent at the rates directed. If either the landlord or the tenant has any objection to those rates he must apply to the proper authorities to have those rates altered but the Court trying a suit for arrears of rent has no authority in the matter. (*Stuart and Mukerji, JJ.*) YAQUB ALI *v.* DHAN SINGH. **78 I. C. 863 = 46 All. 316 = 22 A. L. J. 212 = 5 L. R. A. Rev. 52 = A. I. R. 1924 All. 429.**

———**S. 47**—*Agreement to enhance rent is binding only when registered.*

S. 47 lays down that where an agreement to enhance rent is arrived at, it would be binding on the parties only where it is registered. Want of registration is, therefore, fatal to a person claiming the enhanced rent. The fact that the terms had been entered in a decree makes no difference. A. I. R. 1928 All. 352, Foll. (*Mukerji and Boys, JJ.*) SOHAN LAL *v.* RAGHUBIR SAHAI. **122 I. C. 763 = 1930 A. L. J. 324 = A. I. R. 1930 All. 118.**

———**Ss. 47 and 13 (b)**—*Tenant ejected and re-admitted—Tenancy is continuous only for S. 11—When ejected tenant is re-admitted, agreement changing rent need not be registered.*

When a tenant is ejected under S. 58 (*A*) or (*B*), the break before his re-admission is to be condoned only for purposes of S. 11. It is nowhere provided in the Act that when a tenant is re-admitted by his landholder after ejectment, the rate of rent is to be the same · the rent can be changed by an agreement which need not be registered. (*Bennet, J.*) RAM KISHORE SINGH *v.* RAGHUBIR. **111 I. C. 742 = 10 L. R. A. Rev. 101 = A. I. R. 1929 All. 78.**

———**S. 47**—*U. P. Land Revenue Act, S. 55—'Rent payable by a tenant" means rent actually payable at the time of making the record—Settlement operations in progress—Tenant agreeing to a certain rent in future which was more than Rs. 100—Tenants actually paying less at the time of settlement—Agreement for enhanced rent must be by registered document.*

" Rent payable by tenant " can mean only the rent that is actually payable by him at the date of the making of the record and not the rent which may have been agreed to be paid at a future date. In the course of the settlement operations tenants attested to a rent which they were not actually paying, but which they agreed that they would pay at a future date. The rent which they were actually paying was below Rs. 100 and the rent which they agreed to pay in future was more than Rs. 100. The landlord brought a suit to recover rent at the enhanced rate.

Held, that the agreement relied on could not be enforced as an agreement to pay enhanced rent must be by a registered document. 14 A. L. J. 57, Foll. (*Mukerji, J.*) BIBI AHMADI BEGAM *v.* DHAN SINGH. **116 I.C. 273 = 9 L. R. A. Rev. 137 = A. I. R. 1928 All. 365.**

———**S. 47**—*Landlord and tenant—Joint tenants—Rent cannot be enhanced by an agreement entered into between one tenant and the landlord.*

When there are two joint tenants of a holding the rent of that holding cannot be enhanced by an agreement entered into between the landlord and only one of the two tenants. Under the terms of S. 47 of the old Tenancy Act of 1901 to make an enhancement a registered agreement must be made between the landlord and every one of the non-occupancy tenants. (*Dalal, J.*) TUNGAL *v.* CHANDRA BHAN. **108 I. C. 703 = 9 L. R. A. Rev. 63 = A. I. R. 1928 All. 214.**

———**Ss. 49 and 97**—*Agreement to enhance rent not exceeding Rs.100—Attestation by Revenue Court is necessary—Endorsement showing consent and identity of parties is sufficient.*

An enhancement stipulating for rent not exceeding Rs. 100, if not made by registered instrument, may be attested by a Revenue Court, and an endorsement which shows that the Revenue Court satisfied itself as to the identity of the parties, and the fact that they drew up and signed the agreement is sufficient attestation. (*Pullan, J.*) MT. SHO SAHODRA *v.* HURI SINGH. **98 I. C. 503 = A. I. R. 1927 All. 106.**

———**S. 51**—*The word ' tenant ' in S.* 61 *covers a* thekadar *or lessee.*

S. 51 protects a *thekadar* or lessee although there is a clear stipulation in the lease between the Zemindar and *thekadar* or lessee that the rent would be payable irrespective of whether there is any drought or flood or any calamity by which there is no produce in the village. There is nothing in S. 51 which could enable the court to take out the case of a lessee from the provisions of S. 51. (*Mukerji and Dalal, JJ.*) FATEH CHAND *v.* MURARI LAL. **80 I. C. 8 = 46 All. 840 = 22 A. L. J. 758 = 5 L. R.A. Rev. 241 = A. I. R. 1924 All. 906.**

———**S. 56**—*A portion of occupancy-holding sub-let for the sub-tenant's life time—S.* 56 *applies—Civil Courts have no jurisdiction to eject.*

Where an occupancy tenant agreed to sub-let a portion of the holding for a fixed rent during the life time of the sub tenant, the sub-tenant becomes a tenant within the meaning of S. 56 and can only be ejected in accordance with the provisions of the Tenancy Act and not by a Civil Court. (*Stuart, J.*) RAM GAJADHAR *v.* MT. SURTANI. **71 I. C. 381 = A. I.R. 1923 All. 343.**

———**S. 57**—*Tenant cannot be ejected for non payment of rent even if he made such contract.*

A tenant can only be ejected in accordance with the provisions of the Tenancy Act and not on the ground of non-payment of rent even if the tenant made such a contract with the landlord. (*Dalal, J.*) MASOODUL-ZAMAN *v.* RAZA HUSAIN. **10 L. R. A. Rev. 73 = 110 I. C. 750 = A. I. R. 1928 All. 698.**

———**S. 57**—*Landlord granting agricultural lease—Condition in lease that lessee would be liable to ejectment on non-payment of rent only—Lessee using land for non-agricultural purposes—Landlord barrister giving evidence of ignorance of law—No allegation in written statement by lessee that landlord had contracted out of privilege under S. 57—Landlord cannot be presumed to have contracted out of his privilege under S. 57.*

A barrister landlord granted an agricultural lease to the defendant. One of the conditions in the lease was that the defendant lessee would be liable to ejectment on the ground of non-payment of rent and on that ground only. Defendant used the land for non-agricultural purposes. Plaintiff sued for ejectment under S. 57. There was no allegation in the written statement that the plaintiff contracted out of the privilege to which he was entitled under S. 57. The plaintiff gave evidence of his ignorance of law.

Held, that the plaintiff did not contract out of the privilege which he enjoyed under S. 57 and that it cannot be presumed that he fully knew the law on the subject of landlord and tenant at the time of the lease. (*Dalal, J.*) MASOODUL ZAMAN *v.* RAZA HUSAIN.

10 L. R. A. Rev. 73 = 110 I. C. 750 = A. I. R. 1928 All. 698.

———**Ss. 57 and 177**—*Decision by Assistant Collector—Only cases falling under Cls. (a), (b), (c), (e) or (f) of S. 177 are appealable to the District Judge.*

Only those decrees of Assistant Collectors of the first class in suits included in group *B* of 4th Schedule are appealable to the District Judge which come within Cls. (*a*), (*b*), (*c*), (*e*) or (*f*) of S. 177 of the Tenancy Act. 37 All. 272, Dist. (*Iqbal Ahmad, J.*) MAHOMED SHABBIR *v.* ZAIN-UL-ABDIN. **8 L. R. A. Rev. 74 = 102 I. C. 184 = A. I. R. 1927 All. 564.**

———**S. 57**—*Turning into grove creates liability to ejectment within a year.*

An occupancy tenant has no right to convert a portion of the occupancy holding into a grove. If he does so the landholder has got the power to eject him for doing an act detrimental to the purpose for which the land was let. But the power can only be exercised within one year from the date of the conversion. (*Kanhaiya Lal, J.*) MAN SINGH *v.* MADHO SINGH.

22 A. L. J. 70 = 5 L. R. A. Rev. 34 = 79 I. C. 599 = A.I.R. 1924 All. 430.

———**Ss. 57, 63 (a)**—*Alienation by Hindu widow—Suit by reversioners for ejectment of alienees is not competent unless they get the alienations set aside - Hindu law.*

A Hindu widow's estate is not a life estate and it is not an estate held in trust for reversioners. She represents the estate and has power to make alienations subject to the right of reversioners to have those alienations set aside if they are found to be either not for legal necessity or not for the benefit of the estate. They do not cease to be operative until they are set aside. A reversioner therefore cannot institute a suit for ejectment of the alienees in the Revenue Caurt without setting aside the alienation. (*Stuart, J.*) KANDHYA *v.* MT. RAJ KUNWAR. **75 I.C. 681 = A.I.R. 1923 All. 367 (2).**

———**S. 57 (a)**—*Ejectment without decree—Non-payment of rent.*

Upon the death of *K*, the former Mahant, *A* took possession of the property claiming to be the successor of *K*. While in possession of the property he executed usufructuary mortgages of the land in dispute in favour of *R*. *U* instituted proceedings against *A* claiming to be successor of *K*. He succeeded and became the recognised Mahant. He then sued in a Civil Court to eject *R*. The suit was compromised on these terms :—*R* was to retain possession over the plots in dispute at a rental of Rs. 2 a bigha so long as he paid the rent; but in default of payment of the rent *U* could eject him. *U* alleging that *R* had not paid the rent applied to the Rent Court to eject him. On appeal on those proceedings it was held by the first appeal Court that *A* could not be ejected under the provisions of S. 58 but under S. 57 (*a*). It was found on the facts by the lower appellate Court that *R* had paid no rent. The lower appellate Court ordered his ejectment.

Held, on *R's* appeal that the compromise undoubtedly binds the parties but this fact does not render it possible for the appellant to be ejected for non-payment of rent in the absence of a decree against him for arrears and the order for ejectment does not mend the matter. Under the provisions of S. 57 (*a*), mere non-payment is not sufficient to justify ejectment. S. 58 does not apply to the case. 28 All. 610, Applied. (*Mears, C. J. and Piggott, J.*) KUBER DAS *v.* RAM DIN KALWAR.

20 A. L. J. 769 = 45 All. 5 = 77 I. C. 927 = A. I. R. 1923 All. 14 (2).

———**Ss. 57 (b) and 66**—*Applicability.*

Section 66 has no application to a suit based on Cl (*b*), S. 57. (*Mukerji, J.*) MANSA RAM *v.* MOHAMMAD HUSSAIN. **9 L. R. A. Rev. 232 = 12 R. D. 419 = 116 I. C. 283 = A. I. R. 1928 All. 624.**

———**Ss. 57 (c) and 58 (b)**—*Condition relating to evacuation of land leased—S. 58 (b) and not S. 57 (c) applies.*

Section 57 (*c*) contemplates an independent covenant, the breach of which would entail a forfeiture of the lease. For example, if it were a condition that on the planting of trees the lease would come to an end, on the lessee planting trees it would be said that he had committed a breach of condition and thereby forfeited the lease. But the clause does not apply where the condition relates to the evacuation of the lands leased. One of the conditions of the lease was that whenever the plaintiff required the lands either for his *khud khast* or for the purpose of planting trees, the defendants would vacate the lands without waiting for the expiry of the full term of the lease. The plaintiff alleged that he wanted the lands for his *khud khast* and on the lessees not complying with his notice to them to vacate the land, instituted a suit.

Held, that Cl. (*c*), S. 57, had no application as the condition, a breach of which was alleged to have been committed, was the condition relating to evacuation of the lands themselves.

Held, further that the case fell under Cl. (*b*), S. 58 of the Tenancy Act. (*Mukerji, J.*) JHABBA LAL *v.* DEBI RAM. **85 I. C. 575 = A. I. R. 1925 All. 679.**

———**S. 57 (d)**—*Ejectment—Grove land—Tenant cannot be ejected for having sub-let.*

A tenant grove holder is not liable to be ejected from a grove-land on the ground of having sub-let. 17 A.L.J. 971, Dist. (*Stuart, J.*) LALA SHEO PRASAD *v.* BABU RAM. **71 I. C. 350 = A. I. R. 1923 All. 168.**

———**S. 58**—*Landlord and tenant—Right of suit.*

An occupancy tenant is at liberty to treat a squatter as a sub-tenant and sue him as such even though the latter happens to be a landlord. 40 All. 300, Appl. (*Dalal, J.*) GANGA NARAIN *v.* MANIK LAL. **106 I. C. 307 = 8 L. R. A. Rev. 295 = A. I. R. 1927 All. 727 (1).**

———**S 58**—*Ground for ejecting thekadar is the expiry of his theka at or before current agricultural year end—Burden of proof is on the plaintiff and not on the defendants—Allegation in plaint of defendants' having no right to remain in possession is not sufficient.*

The ground on which a thekadar or a person holding under a lease, can be ejected is that the term of his lease has expired or will expire at or before the end of the current agricultural year, and the plaintiff asking for the ejectment of thekadars is bound to show that the theka or lease, under which the land is held, has expired or is about to expire, and it is not for the defendants to prove that they have some permanent right of occupancy which protected them from ejectment. Mere allegation in the plaint that the defendants are thekadars of the land paying a yearly rent and that they have no right to remain in possession is not sufficient. (*Mears, C. J. and Lindsay, J.*) DARIYAI SINGH *v.* CHOB SINGH.

91 I. C. 863 = A. I. R. 1926 All. 248.

———**S. 58**—*Ejectment—Burden is on tenant to prove his tenure.*

The mere fact that the plaintiffs called the defendants lessees does not imply that they said or meant that the defendants were holding for a term. The burden of proof is on the tenant when he is sued by his landlord

for his ejectment, to show that he has a permanent right to stay on the land and cannot be ejected by the proprietor. (*Mukerji, J.*) CHOB SINGH *v.* DARYAI SINGH.
5 L. R. A. Rev. 163 = 82 I. C. 594 = A. I. R. 1924 All. 915.

———**Ss. 58, 177 (Cl. c.) and 198**—*Ejectment suit—Tenant raising question of title—Appeal lies to the District Judge.*

In a suit for ejectment under Section 58 of the Agra Tenancy Act if the defendant raises a question of proprietary title, an appeal lies to the District Judge. (*Gokul Prasad, J.*) TULSI PRASAD SAHAI *v.* RAMRAJ AHIR. **71 I. C. 308 = A. I. R. 1923 All. 414 (2.)**

———**S. 58**—*Holding on sufferance without payment of rent does not create right.*

A person occupying land on sufferance without paying rent does not acquire occupancy right as a tenant and can be ejected as soon as the landlord withdraws the sufferance. (*Ferard, S. M. and Harrison, J. M.*) AMEER HUSSAIN *v.* ALLAHDIA.
2 U. P. L. R. (B. R.) 93 = 60 I. C. 258 = 1 L. R. A. 43 (Rev.)

———**S. 58 (b)**—*Suit in Revenue Court—Suit dismissed—Appeal to District Judge—Appeal allowed — No revision lies to High Court—C. P. C., S.* 115.

The plaintiff brought a suit in the Revenue Court under S. 58 (*b*) of the Agra Tenancy Act. The trial Court dismissed the suit holding that it was not maintainable in the Revenue Court. The plaintiff appealed to the District Judge and he reversed the decree of the Assistant Collector and remanded the case for trial of the remaining issues. Defendants applied for revision of the order of remand.

Held, that no revision lay to the High Court. 41 All. 28, Foll.; 42 All. 83 and 14 A. L. J. 281, Dist. (*Ryves, J.*) SAQIB HUSAIN *v.* NAND KISHORE.
63 I. C. 891 = 19 A. L. J. 596 = A. I. R. 1921 All. 236.

———**S. 59**—*Decision of Revenue Court obtained by fraud—Suit in Civil Court for declaration that it does not affect plaintiff's rights will lie—Jurisdiction.*

A civil court has no jurisdiction to set aside the proceedings in a Revenue Court, but it has jurisdiction to declare that the conduct of the parties to the suit in obtaining orders in their favour, has been, in fact, fraudulent and that the plaintiff's interest, if any, in the property in suit is not affected by any decision so fraudulently obtained. No possible ground can be imagined either in law or equity or common sense for the conclusion that, if a person has really been deceived, he cannot sue in a Civil Court to establish the facts in his own favour and to obtain a declaration of the assertion of his true rights to which he has succeeded or which he has inherited. (*Walsh and Ryves, JJ.*) JAMMU *v.* MAHADEO PRASAD.
66 I.C. 559 = A. I. R. 1922 All. 294.

———**S. 63**—*Muafidars and sub-tenants.*

In a suit by plaintiffs-muafidars for ejectment the defendants pleaded acquisition of occupancy rights. It was found that defendants never paid any rent to plaintiffs, nor did they ever assert their title to the land to the knowledge of plaintiffs.

Held that the defendants were sub-tenants and liable to be ejected. (*Gokul Prasad, J.*) CHHAJJU *v.* JHABBA.
74 I. C. 681 = 4 L. R. A. Rev. 221 = A. I. R. 1924 All. 293.

———**S. 63**—*Co-sharer who can collect rent can also sue in ejectment.*

The co-sharer who is entitled to collect the entire rent of a particular tenant is also entitled to eject him. He is the landholder for the purposes of the Act. Select

Decision No. 2 of 1910, Foll. (*Daniels, J.*) MUNESHUR TEWARI *v.* MT. MAHESHA KUERI. **74 I. C. 197 = 4 L. R. A. Rev. 329 = A. I. R. 1924 All. 165.**

———**S. 65**—*Applicability.*

Where the area used for non-agricultural purposes is small, the case is one where S. 65 may be used. (*Dalal, J.*) MASOODULZAMAN *v.* RAZA HUSAIN.
10 L. R A. Rev. 73 = 110 I. C. 750 = A. I. R. 1928 All. 698.

———**S. 65**—*Benefit of.*

The fact that in a previous suit the ex-proprietary tenants were given benefit of S. 66, does not disentitle them from getting the benefit of S. 65 in a fresh suit. (*Mukerji, J.*) MANSA RAM *v.* MOHAMMAD HUSAIN.
9 L. R. A. Rev. 232 = 116 I. C. 283 = A. I. R. 1928 All. 624.

———**S. 65 (2)**—*Well in a holding—Tenant using water for irrigating other plots of land—Suit for injunction and damages lies in Civil Court and not Revenue Court.*

The defendant was the ex-proprietary tenant of a certain plot of land. There was a well on the plot. The defendant was using the water from this well to irrigate adjacent fields which he held as sub-tenant from another landlord. The plaintiff brought a suit for an injunction prohibiting the defendant from using the water to irrigate any land other than the plot of which the defendant was ex-proprietary tenant and for damages.

Held, that the suit was not cognizable by the Revenue Court but should be brought in the Civil Court. (*Neave, J.*) LACHMI NARAIN *v.* MOOLI. **85 I. C. 537 = A. I. R. 1925 All. 571.**

———**S. 66**—*Applicability.*

Section 66 has no application to a suit based on Cl. (*b*), S. 57, (*Mukerji, J.*) MANSARAM *v.* MOHAMMAD HUSSAIN. **9 L. R. A. Rev. 232 = 116 I. C. 283 = A. I. R. 1928 All. 624.**

———**S. 66**—*Scope.*

A tenant, who has once sub-let his holding and has taken the benefit of S. 66, cannot sub-let the holding again in contravention of the provisions of the Act. (*Mukerji, J.*) MANSARAM *v.* MOHAMMAD HUSAIN.
9 L. R. A. Rev. 232 = 116 I. C. 283 = A. I. R. 1928 All. 624

———**S. 75**—*Option once exercised cannot be resiled.*

The landlord is bound to exercise his option under S. 75 before he comes into Court to make an offer or to apply for immediate possession of the lands and if the option is once exercised the landlord cannot resile from it. (*Banerjee and King, JJ.*) SURAJ PAL SINGH *v.* RANJIT. **1929 A.L.J. 267 = 10 L.R.A. Rev. 166 = A.I.R. 1929 All. 341.**

———**S. 75**—*Compensation for rose trees.*

In awarding compensation under S. 75 for rose trees the Court has to ascertain their present value to the cultivator of the land with reference to their age, condition and prospective flower-producing capability at the material date. 32 All. 458 ; (1893) A. W. N 24, Rel. on. (*Banerji and King, JJ.*) SURAJ PAL SINGH *v.* RAMJIT. **1929 A. L. J. 267 = 10 L.R A. Rev. 166 = A. I. R. 1929 All. 341.**

———**S. 75**—*Practice—Subsequent events—Suit is to be tried as on the date of cause of action—Subsequent events can be considered only in exceptional cases.*

The ordinary rule is that a suit must be tried in all its stages on the cause of action as it existed at the date of its commencement; the doctrine that events that happen after the date of the commencement of the cause of action can be taken into consideration, is of an exceptional character and is applied in cases where the original relief has become inappropriate:

20 C. L. J. 108, Ref. (*Banerji and King, JJ.*) SURAJ PAL SINGH *v.* RAMJIT. **1929 A. L. J. 267= 10 L. R. A. Rev. 166=A. I. R. 1929 All. 341.**

——**Ss. 79, 34 and 58**—*Suit for ejectment of some co-sharers by tenant—Ss. 34 and 58 and not S. 79 apply.*

Where the dispossession is not by or on behalf of the whole body of co-sharers, a suit for ejectment of the co-sharers by a tenant can be brought under Ss. 34 and 58 and not under S. 79. A. I. R. 1924 All. 572; 9 A. L. J. 771 and 40 All. 300, Rel. on. (*Mukerji and Bennet, JJ.*) ADIT NARAIN SINGH *v.* MAHABIR PRASAD SINGH. **1930 A.L.J. 684=A.I.R. 1930 All. 398.**

——**S. 79**—*Scope.*

Tenant not in possession and hence not ejected does not come under S. 79. 13 A. L. J. 329, Ref. (*Mukerji and Bennet, JJ.*) ALI RAJA KHAN *v.* MUHAMMAD ZAFAR KHAN. **A. I. R. 1930 All. 311.**

——**S. 79**—*Heir of Mahomedan occupancy tenant not obtaining possession actual or constructive—Suit by him for possession against other heirs recognized as tenants by landlord in compromise in ejectment suit lies in a Civil Court.*

Where an heir of a Mahomedan occupancy holding has not obtained possession of the holding, either actual or constructive, he can bring a suit for possession in a civil Court against the other heirs who have been acknowledged by the landlord as tenants by effecting a compromise of his ejectment suit against the other heirs. The compromise between the landlord and other heirs in the ejectment suit does not afford a ground for holding that the landlord has wrongfully ejected the plaintiff. (*Mears, C. J. and Bennet, J.*) ABDUL RAHIM *v.* MOHAMMAD SALIM. **118 I. C. 47= A. I. R. 1929 All. 868.**

——**S.79**—*Suit for ejectment by real tenant—Zemindar's acceptance of rent from trespassar is not his recognition as tenant nor it means that the suit is brought through zamindar's agency—Suit can be brought within ordinary limitation.*

The mere fact that a zamindar accepted rent from a trespasser does not mean that the zamindar accepted him as a tenant nor that a suit for his ejectment was brought through his agency when it was brought by the real tenant. Therefore the suit can be brought within the ordinary period of limitation. (*Dalal, J.*) BENI MADHO *v.* SHAMBHU NATH. **114 I. C. 908= 9 L. R. A. (Rev.) 180=A. I. R. 1929 All. 196.**

——**S. 79**—"*Ousting*".

Provisions of S. 79 apply to constructive as well as an actual or physical ejectment of the tenant from his tenancy and no force need be used to eject him. A. I. R. 1924 All. 834, Dist.; A. I. R. 1924 All. 678 and 36 All. 55, Foll. (*Dalal, J.*) PACHUA PASI *v.* RAJ KISHORE. **113 I. C. 721=9 L. R. A. (Rev.) 124.**

——**Ss. 79 and 167**—*Civil Court cannot declare a decree by a revenue Court void especially when tenant has remedy under S. 79.*

Under S. 167 the civil Courts cannot take cognizance of a suit to declare a decree in the revenue Court void and ineffectual on the ground that the proceedings of that Court were contrary to law. The proper procedure for the tenant is to bring a suit under S. 79 for wrongful ejectment. (*Mukerji and Bennet, JJ.*) SUKHA *v.* LACHMI NARAIN. **113 I. C. 829=26 A. L. J. 834= 12 R. D. 628=A. I. R. 1928 All. 621.**

——**S. 79**—*S. 79 only applies when a tenant has been "ejected" otherwise than in accordance with the provisions of the Act.*

S 79 only applies when a tenant has been "ejected" otherwise than in accordance with the provisions of the Agra Tenancy Act. Where the possession of the defendant over a certain property has continued all along and the plaintiffs were never in actual possession of the same, plaintiffs cannot be said to have been dispossessed or ejected. S. 79 has no application to plaintiff's suit for possession and the claim is not barred by the provisions of that section. (*Sulaiman, Ag. C. J. and Weir, J.*) MUHAMMAD ZAFARYAB KHAN *v.* ABDUL RAZZAC KHAN. **50 All. 857=111 I. C. 238= 9 L. R. A. Rev. 238=26 A. L. J. 820= A. I. R. 1928 All. 532.**

——**S. 79**—*Tenant dispossessed by one of many landlords—Suit is cognizable by civil Court.*

Where there are several landlords of a particular plot of land, and one of them dispossesses the occupancy tenant of that plot, a suit brought by the tenant for its recovery is cognizable by a civil Court and not a revenue Court. (*Dalal, J.*) MT. BELASO *v.* MAULADAD KHAN. **9 L. R. A. Rev. 35=108 I. C. 132= A. I. R. 1928 All. 206.**

——**S. 79**—*Ejectment by lambardar jointly with another co-sharer but not under Tenancy Act—S. 79 does not apply.*

If a lambardar, jointly with a co sharer, ejects a tenant otherwise than in accordance with the provisions of the Tenancy Act, the remedy of the tenant cannot be by a suit under S. 79 of the Tenancy Act. A. I. R. 1924 All. 572, Ref. (*Iqbal Ahmad, J.*) SURTA *v.* DALLI. **104 I. C. 465=8 L. R. A. Rev. 237= A. I. R. 1927 All. 629.**

——**S. 79**—*On redemption of occupancy tenancy formal possession obtained by mortgagor—Actual possession not sought for within 6 months—Occupancy tenancy is extinguished.*

Where in execution of a decree for redemption of a mortgage of an occupancy holding, the mortgagor obtains formal possession only and fails to sue for actual possession within six months from the date of obtaining formal possession under S. 79, the occupancy tenancy is extinguished. (*Lindsay, J.*) BHAIRO LOHAR *v.* ABDUL WAHAB. **8 L. R. A. Rev. 106= 101 I. C. 591=A. I. R. 1927 All. 551.**

——**S. 79**—*Landlord and tenant—Usufructuary mortgage of occupancy holding—Tenant applying for his name to be recorded as occupancy tenant—Objection by zamindar successful—No suit by tenant within six months—Tenancy is not extinguished, the tenant not being in actual possession.*

Where the plot is in possession of the mortgagee of the tenant the successful objection by the zemindar to the application filed by the tenant of an occupancy holding in the revenue Court to have his name entered as an occupancy tenant after mortgaging the holding usufructuarily cannot be tantamount to an ejectment of the tenant from the plot as the tenant is not in actual possession of the plot. (*Iqbal Ahmad, J.*) DALIP SINGH *v.* TILAK SINGH. **99 I. C. 561= A. I. R. 1927 All. 270 (2).**

——**S. 79**—*One of the co-sharers ejecting tenant otherwise than the Act—S. 79 does not apply.*

Where one of a body of co-sharers owning the mahal in which the holding in dispute is situate, ejects a tenant otherwise than in accordance with the provisions of the Tenancy Act, S. 79 of the Tenancy Act has no application. A. I. R. 1924 All. 431, Foll. (*Iqbal Ahmad, J.*) MUNNA *v.* BAIJ NATH. **99 I. C. 531= 8 L. R. A. Rev. 67=A. I. R. 1927 All. 212.**

——**S. 79**—*Sale of* sir *land and relinquishment of ex-proprietary rights—Relinquishment repudiated at mutation and in proceeding under S. 36, U. P. Land Revenue Act—Ex-proprietary holding of vendor demarcated—S. 79 would not extinguish vendor's claim.*

The defendants sold their *sir* lands to the plaintiffs and at the same time executed a relinquishment of their ex-proprietary right. The plaintiffs took possession of the *sir* lands. At the time of mutation the defendants repudiated their relinquishment and proceedings under S. 36 of the U. P. Land Revenue Act were taken and defendants' ex-proprietary holding was demarcated. Before these proceedings, the defendants sued plaintiffs in the revenue Court for ejectment and the plaintiffs set up preliminary rights and they were referred to the civil Court to establish their title. In the suit it was contended that the defendants' claim was barred under S. 79.

Held, that the defendants never obtained possession of the holding as ex-proprietary tenants. The ex-proprietary holding itself came into existence as a defined area only after the termination of the proceedings under S. 36 of the Land Revenue Act. Therefore the claims of the defendants could not be treated as determined under S. 79. (*Daniels and King, JJ.*) KISHAN SAHAI *v.* DALIP SINGH. **98 I. C. 907 = A. I. R. 1927 All. 126.**

———**S. 79**—*Suit for possession by transferee of occupancy tenant is not suit by a person "ejected"—Civil Court can try.*

A person who was never in possession but being entitled to possession fails to recover the same cannot be said to have been ejected from the property over which he was entitled to have possession. Therefore a suit for possession by the transferee from occupancy tenant is not "suit" by a tenant who has been "ejected" Such a suit therefore is cognizable by civil Courts and ordinary law of limitation applies. 13 A. L. J. 329, Rel. on.; 27 All. 372; 35 All. 299, and 36 All. 55, Dist. (*Mukerji, J.*) GULAB *v.* DALIP. **97 I. C. 550 = A. I. R. 1927 All. 26.**

———**Ss. 79 and 169**—*Revenue Court cannot entertain suit against a person other than landholder even though landlord authorizes him to eject plaintiff.*

Rules of Procedure cannot override rules prescribing jurisdiction. A Civil Court cannot entertain a suit against a landholder brought by his tenant nor can a Revenue Court entertain a suit against a person other than the landholder, though such other person is authorized by the landlord to eject plaintiff. Mere connivance does not amount to authorization. (*Kanhaiya Lal and Ashworth, JJ.*) BABUNA KOER *v.* BACHCHU TIWARI. **24 A. L. J. 591 = 96 I. C. 36 = A. I. R. 1926 All. 531.**

———**S. 79**—*Grove is not a holding—Dispossession by zamindar for 6 months does not take away grove-holder's right.*

A grove is not a holding within the meaning of S. 79 and, therefore, dispossession of the grove-holder by the zemindar of a portion of the grove for six months cannot take away the grove-holder's right. (*Mukerji, J.*) LODAI RAM *v.* SUKHDEO KOERI. **88 I. C. 540 = A. I. R. 1925 All. 776.**

———**S. 79**—*S. 79 does not apply to auction-purchaser purchasing a tenant's interest after latter's ejectment.*

S. 79 can have no application to the case of an auction purchaser who never actually or constructively was in possession of the tenancy and who in fact acquired his interest at an auction-purchase subsequent to the ejectment. 13 A. L. J. 329, Foll. (*Sulaiman and Boys, JJ.*) BAHADUR *v.* RAJA MOTI CHAND. **47 All. 589 = 23 A. L. J. 409 = 88 I. C. 224 = A. I. R. 1925 All. 580.**

———**S. 79**—*Applies only to forcible ejectment and not to ejectment by mutual consent.*

S. 79 appears to apply to a case where there is more or less forcible ejectment and does not apply where there is an 'ejectment' by mutual consent. (*Mukerji, J.*) BIJAI BAHADUR *v.* PARAMESHWARI RAM. **78 I.C. 1026 = A. I. R. 1924 All. 834.**

———**S. 79**—*Scope.*

The provisions apply to cases where there has been a constructive as well as an actual or physical ejectment of a tenant from his tenancy. (*Dalal, J.*) BIDIYA MISIR *v.* DARYAI KUAR. **79 I. C. 566 = A. I. R. 1924 All 678 (1).**

———**S. 79**—*Tenant dispossessed by subsequent registered lease-holder—S. 79 does not apply—Jurisdiction—Suit for possession cognisable by Civil Court.*

Where the plaintiff claimed to hold land in suit under an oral agreement of tenancy whereas the defendants relied upon a registered lease of later date executed by the zemindars, and on the date of suit the plaintiff admittedly was out of possession and had in the previous month been forcibly dispossessed by the defendants and his crops were cut away by defendants, and appropriated. *Held* that this was not a case of dispossession by the landlord but of a dispossession by trespassers, that S. 79 of the Agra Tenancy Act does not apply, that the plaintiff would be entitled to a decree for compensation for the crops forcibly cut away by the defendants and that a decree for possession and for injunction in his favour would hold good till such time as the plaintiff is ejected in due course of law.

Held also that the suit was cognisable by a Civil Court. 2 A. L. J. 69; 7 I. C. 486; 13 A. L. J. 295, Dist. (*Sulaiman and Kanhaiya Lal, JJ.*) CHET RAM *v.* SITA RAM. **46 All. 717 = 22 A. L. J. 713 = 82 I. C. 251 = A. I. R. 1924 All. 678 (2).**

———**S. 79**—*Illegitimate son in possession of ex-proprietary holding after tenant's death—Suit for recovery of possession by deceased tenant's brother is covered by the section.*

An ex-proprietary tenant died and his illegitimate son got into possession. In a suit by the brother of the deceased tenant to recover the possession of the holding against the illegitimate son and the landlord.

Held, the case was clearly one under S. 79 and the fact that the zamindars did not defend the suit was immaterial. The nature of the suit is not affected by the question whether it is resisted or not. S. 79 covers constructive as well as actual possession. 36 A. 55, Foll. (*Daniels, J.*) AIDAL SINGH *v.* GYAN SINGH. **79 I. C. 318 = 5 L. R. A. Rev. 257 = A. I. R. 1924 All. 615.**

———**S. 79**—*A tenant in an undivided mahal can sue in a Civil Court when dispossessed by one co-owner.*

A suit under S. 79 is maintainable only when the tenant is dispossessed by or on behalf of the whole proprietary body. A tenant in an undivided mahal is a tenant of the whole proprietary body. A suit in a Civil Court by a tenant on dispossession by one of the co-owners is tenable. (*Walsh, Ag. C. J. and Neave, J.*) CHEDDA *v.* ACHHA SINGH **22 A. L. J. 570 = 46 All 690 = 84 I. C. 117 = A. I. R. 1924 All. 572.**

———**S. 79**—*Dispossession by fractional landlord is not dispossession.*

Ejectment by one member of a proprietary body, he being not the Lambardar, is not ejectment by the landholder. (*Daniels, J.*) LAGAN RAI *v.* RAJA RAI. **77 I. C. 1025 = 5 L. R. A. Rev. 116 = A. I. R. 1924 All. 507.**

———**S. 79**—*Rent-free grantee's suit for possession lies in Civil Court only.*

Rent-free grantee cannot sue in the Revenue Court for restoration of possession on wrongful eviction by the Zamindar. He must sue in the Civil Court. (*Sulaiman, J.*) CHAUDHARI HAR SARUP *v.* BRIJNANDAN LAL. **79 I. C. 587 = 5 L. R. A. Rev. 103 = A. I. R. 1924 All. 479.**

———**S. 79**—*Ejectment by landlord means by all cosharers.*

For the application of the rule of six months' limitation and of S. 79 of the Tenancy Act it would be necessary for the whole body of co-sharers to eject the tenant of the lambardar to do so on behalf of the whole body of co-sharers. (*Mukerji, J.*) RANI *v.* AIDAL SINGH. **22 A. L. J. 113 = 5 L. R. A. Rev. 37 = 78 I. C. 1041 = A. I. R. 1924 All 431.**

——**Ss. 79 and 81**—*Suit by tenant against another tenant for dispossession must be brought within 6 months of dispossession.*

A suit for possession by a tenant against a subsequent lessee from the zamindar on the ground that the latter has encroached on his fixed rate holding must be brought within six months of the dispossession. 13 A. L. J. 295 and 27 All. 372, Ref. (*Gokul Prasad, J.*) PARSOTAM *v.* GANPAT RAM. **73 I. C 1012 = 5 L. R. A. Rev. 15 = A. I. R. 1923 All. 517.**

——**S. 79**—*On death of tenant names of wife, brothers and sister's son recorded—Suit by brother after wife's death for possession on declaration that sister's son had no right is barred.*

On the death of the tenant of an occupancy holding the names of his wife, his brothers and sister's son were recorded. On the death of the wife the brother brought the suit for a declaration that the sister's son had no concern with the holding and for perpetual injunction or in the alternative for recovery of possession if plaintiff were proved out of possession.

Held, the suit was barred by S. 79 of the Act. 27 All. 372, Foll. (*Ryves and Stuart, JJ.*) PRAYAG AHIR *v.* MAHABIR AHIR. **69 I. C. 811 = A. I. R. 1922 All. 317.**

——**S. 79**—*Sub-tenant cannot claim adverse possession against permanent lessee from occupancy tenant—Adverse possession.*

A sub-tenant cannot claim adverse possession against the transferee to whom permanent lease has been granted by an occupancy tenant nor can he claim that the suit is barred by time. The appellant having not acquired the status of the Zamindar simply because of his purchase of a fractional share in the village, the appellant-defendant cannot claim the privileges of a *zamindar*, as against the plaintiff who claims through the occupancy tenant. (*Gokul Prasad, J.*) RAMESHWAR DUBE *v.* S. H. DUBE. **66 I. C. 529 = A. I. R. 1922 All. 277.**

——**Ss. 83 and 85**—*Guardian of minor surrendering minor's ex-proprietary holding—Zamindar cannot refuse to accept.*

When the guardian of a minor tenant surrenders the ex-proprietary holding of the minor, the zamindar cannot but accept the surrender. It is not open to the zemindar, when an application for surrender is made under S. 85 to contest it on the ground that the proposed surrender by the guardian of the minor is not for the benefit of the minor. (*Iqbal Ahmad, J.*) BALWANT SINGH *v.* HARDEEN. **8 L. R. A. Rev. 158 = 101 I. C. 804 = A. I. R. 1927 All. 546.**

——**S. 83**—*Tenant can surrender without landlord's consent by simply giving up lands—Liability for rent applies only to first year of non-occupation.*

A tenant may surrender his holding by actually giving up the lands. His liability in the circumstances would only amount to a payment of the rent for the first year of his non-occupation. (*Mukerji, J.*) KHARBAR *v.* ABDUL RAOOF. **86 I.C. 872 = A.I.R. 1925 All. 815.**

——**S. 87**—*Abandonment by leaving village is question of fact depending on tenant's intention.*

The question whether the leaving of the village by a tenant without arranging for the payment of rent to the landlord amounted to an abandonment, is primarily a question of fact dependent on the intention of the tenant. (*Sulaiman, J.*) B. GHURPAT SAHI *v.* MAHABIR. **10 L. R. A. Rev. 201 = 113 I. C. 817 = A. I. R. 1929 All. 218.**

——**S. 87**—*Tenant leaving village for more than 12 years without arranging to pay rent—Zamindar can prove abandonment without filing notice.*

The giving of notice by the landlord is not the only way in which abandonment can be proved. If a tenant has left the village without putting his tenancy in charge of any person and without having made any arrangement for the payment of rent, and neither returned to the village for over 12 years, nor taken any care of his tenancy, the abandonment by him may be proved even though no notice has actually been filed by the zamindar under S. 87. 5 All. Un. Rev. Dec. 371 not Foll.; 1 C. W. N. 198; 3 C. W. N. 46; 4 C. W. N. 493 and 5 All. Un. Rev. Dec. 270, Rel. on ; 3 All. Un. Rev. Dec. 153, Dist. (*Sulaiman, J.*) B. GHURPAT SAHI *v.* MAHABIR. **113 I. C. 817 = 10 L. R. A. Rev. 201 = A. I. R. 1929 All. 218.**

——**S. 88**—*Occupancy tenancy—Trees cannot be planted without landlord's consent.*

Under Tenancy Act, 1901, trees are mere improvements. But an occupancy tenant cannot plant trees without the consent of the zamindar. The provision that tenants would be entitled in future to plant trees with the zamindar's permission does not, by any stretch of reasoning, amount to a grant by the zamindars of a right to occupancy tenants to sell trees standing on the occupancy. (*Mukerji, J.*) PEERJI MOHIB *v.* RAM CHANDER. **87 I. C. 64 = A. I. R. 1925 All. 796.**

——**S. 88**—*Non-occupancy tenant.*

A non-occupancy tenant is not entitled to plant trees without the consent of the zamindar in writing. (*Daniels, J.*) HAZARI *v.* RAM DULAR. **86 I. C. 329 = A. I. R. 1925 All. 702.**

——**S. 88**—*Occupancy tenant—Improvement made by —Consent of 17 out of 18 Zamindars—Court will no interfere at the instance of the 18th zamindar.*

Where 17 out of 18 zamindars consented to the making of an improvement—in this case a masonry well on the waste land belonging to all zamindars.

Held, that the Court will not compel the occupancy tenant making the improvement to close the well, only at the instance of the 18th zamindar as the benefit of that occupancy holding is the benefit of the whole village whether the plaintiff is interested in it or not. (*Stuart, J.*) RESHMA BIBI *v.* BHAWANI SARAN. **79 I. C. 77 = A. I. R. 1923 All. 281.**

——**S. 95**—*Where it is deducible from plaint that plaintiff's sole object is to obtain declaration to tenancy, his suit is triable by revenue Court, although one of the reliefs asked for is such as, if that alone were asked, can be entertained by civil Court—Practice—Jurisdiction.*

Where from the plaint as framed it is possible to deduce that the one and only object of the plaintiff is really to obtain a declaration of his right to a tenancy the suit is triable by a revenue Court only, whether or no one of the reliefs asked for is such a relief as could, if that alone had been asked for, be entertained by a civil Court because it is the essential object of the plaintiff which has to be considered and if he can obtain that object by a suit in the revenue Court the revenue Court is the proper Court. A. I. R. 1928 All. 538, Dist. ; 5 A.L. J. 514 and 36 All. 48, Rel. on. (*Boys and Bennet, JJ.*) MOOLA *v.* BHURIYA. **118 I. C. 583 = 1929 A. L. J. 1026 = 10 L. R. A. Rev. 356 = A. I. R. 1929 All. 613.**

——**Ss. 95 and 167**—*Civil Court is barred to entertain suit by tenant based on wr ong decision of Collector regarding boundary of his holding.*

Section 95 read with S. 167 clearly bars the entertainment of a suit by the civil Court instituted by the tenant against his proprietor on the ground that the Collector fixed a wrong boundary and consequently caused loss to the tenant. (*Ashworth, J.*) JADUNANDAN SINGH *v.* BECHAN KOERI. **10 L. R. A. Rev. 278 = 116 I. C. 870 = A. I. R. 1929 All. 442.**

———**S. 95**—*Suit challenging defendant's adoption—Main object of suit to prevent defendant holding as occupancy tenant—Suit does not lie in civil Court.*

A suit by plaintiff zamindar for declaration that defendant is not an adopted son of the deceased occupancy tenant is not maintainable in a civil Court, where the real object of the suit is to prevent defendant from claiming the status of occupancy tenant. Plaintiff's remedy is under S. 95, Tenancy Act. A.I.R. 1922 All. 372, Foll. (*Iqbal Ahmed and Kendall, JJ.*) SHOEMBAR SINGH *v.* SHOEMBAR SINGH. **25 A. L. J. 799 = 8 L. R. A. Rev. 211 = 103 I.C. 128 = A.I.R. 1927 All. 780.**

———**S. 95**—*Jurisdiction—Civil and Revenue Court Status of tenant—Suit as to is triable only by Revenue Court—Two reliefs claimed one triable by Civil and the other by Rev. Court—Civil Court can grant relief as to portion cognisable by it only.*

Suit for a declaration that the defendant is the subtenant of the plaintiff is cognizable by a Revenue and not by a Civil Court, 35 All. 14 and 7 All. 223, Dist. Where the reliefs claimed with regard to the list A and list B plots were quite different, and one cognizable by a Civil and the other by the Revenue Court.

Held, the Civil Court could grant relief in respect of the part cognizable by it. (*Daniels, J.*) GHISWA *v* DEO NARAIN. **73 I.C. 947 = 4 L. R. A. Rev. 450 = A. I. R. 1923 All. 568.**

———**S. 95**—*Jurisdiction—Civil and Revenue Court—Suit by tenant for damages caused to trees on basis of ownership thereof—Civil Court can try.*

Where the tenant claiming ownership of a grove sued for damages for loss caused to the trees, *held*, the suit was triable by Civil Court as no question of determination of tenancy was raised by the plaint. (*Mears, C. J. and Stuart, J.*) RAM PRASAD *v.* SUMERNATH PANDE. **45 All. 191 = 76 I. C. 12 = 21 A. L. J. 33 = A.I.R. 1923 All. 134.**

———**Ss. 95 and 167**—*Suit for declaration of status in Civil Court with the object of forestalling suit in Revenue Court—Civil Court has no jurisdiction—Suit under S. 95—Order in is not appealable to Dt. Judge—Jurisdiction— Civil and Revenue Court.*

Where the object of a suit brought in a Civil Court, though in form one for declaration of status, is really to forestall a suit under S. 95 in the Revenue Court by the defendants, or to strengthen the hands of the plaintiffs in the event of their having to file a similar suit in the Revenue Court, *held* that the Civil Court has no jurisdiction to entertain the suit. An appeal against an order in a suit under section 95 lies to the Revenue Court and not to the District Judge and, consequently, section 197 of the Agra Tenancy Act does not apply. (*Mears, C. J. and Ryves, J.*) JAGANNATH *v.* BALWANT SINGH. **44 All. 692 = 68 I C. 247 = 20 A. L. J. 570 = A. I. R. 1922 All. 372.**

———**S. 95**—*Applicability.*

S. 95 refers to suits between land-holders and tenants and does not apply to a suit between an occupancy tenant and persons who are alleged to be trespassers. (*Lindsay, J.*) DAULAT SINGH *v.* INDAR SINGH. **63 I C. 97.**

———**S. 96**—*Applicability—S. 96 does not cover the case of a* thekadar.

Even though a *Thekadar* is a non-occupancy tenant under Section 19 of the Act, nevertheless Section 96 can apply only to a non-occupancy tenant of *an agricultural* holding which a *Thekadar* is not; consequently he cannot sue under Section 96 in a Revenue Court. His proper remedy is to bring a suit for specific performance if there was a contract for permanent lease. (*Ryves J.*) GIRJA NAND *v.* PARBHU NARAIN SINGH. **75 I. C. 605 = A. I. R. 1923 All. 398 (2).**

———**S. 97**—*Presentation and not attestation must be within 4 months.*

The presentation of the document to the Kanungo must be within 4 months and not the actual attestation. (*Banerjee, J.*) MUHAMMAD HABIB-UR RAHMAN *v.* DHARAM SINGH. **98 I. C. 521 (All.).**

———**Ss. 97 and 41**—*Mere entry in the* khattauni *signed by landlord, tenant and* qanungo *is not agreement to enhance rent.*

Section 41 of the Tenancy Act provides that the rent of an occupancy tenant shall be liable to enhancement only by a registered agreement or by decree or order of a Revenue Court. Section 97 allows the substitution of the attestation of a Revenue Officer not inferior in rank to a *qanungo* for registration subject to such conditions as the Local Government may direct. The mere entry of a figure in the *khattauni* with the signatures of the landlord, the tenant and the *qanungo* cannot be regarded as an agreement to enhance rent duly attested under these provisions of the Act. (*Neave, J.*) RAM PRASAD *v.* RAJJAN. **82 I. C. 332 = A. I. R. 1925 All. 123 (1).**

———**S. 97 (b)**—*Rent enhanced to more than Rs. 100—S. 97 does not apply.*

When, by an adjustment in a revenue Court, the rent was enhanced from Rs. 70 to Rs. 114. *Held*, that the enhancement being for rent exceeding Rs. 100 the agreement must be registered and S. 97 does not apply. (*Mukerji and Boys, JJ.*) DHANPAT RAI *v.* POORAN. **26 A. L. J. 455 = 9 L. R A. Rev. 157 = 109 I. C. 793 = A. I. R. 1928 All. 352.**

———**S. 99**—*Damages for dispossession from holding—Suit lies or relief can be claimed in civil Court if cause of action arose before Act III of 1926.*

A suit for relief for damages for dispossession from a holding lies in the civil Court if the cause of action arose before Act III of 1926 came into force but not otherwise. A. I. R. 1930 All. 158, Foll. (*Mukerji and Bennet, JJ.*) BASANT LAL *v.* BHAGWATI PRASAD. **1930 A. L. J. 369 = A. I. R. 1930 All. 365 (1).**

———**Ss. 102, 104**—*Suit for rent in kind or its price lies only in Rev. Court.*

A suit for price of rent in kind, where defendant is alleged to have purposely left land fallow, is triable only by a Revenue Court. (*Ryves, J.*) NARENDRA BAHADUR PAL *v.* BAFATI. **45 All. 7 = 68 I. C. 985 = 20 A. L. J. 771 = A. I. R. 1923 All. 50.**

———**S. 108**—*Question whether plaintiff or a third person is entitled to recover rent is question of proprietary title.*

A mortgaged his property to *B* and became his tenant. He subsequently mortgaged the property to *C. C* redeemed *B. B* sued *A* for arrears of rent for a certain period. *A* contended that *B* was redeemed and was not entitled to realize the rent.

Held, that the question as to whether *B* or *C* was entitled to recover the rent from *A* was a question of proprietary title. (*Lindsay, J.*) GIRWAR LAL *v.* KALLAN. **8 L. R. A. Rev. 202 = 103 I. C. 286 = A. I. R. 1927 All. 509.**

———**S. 142**—*Civil Court has no jurisdiction but only the Revenue Court.*

A matter covered by S. 142 is beyond the jurisdiction of a Civil Court and is entirely within the cognisance of a Revenue Court. (*Piggott, J.*) MAN SINGH *v* RAM NATH. **75 I. C. 922 = A. I. R. 1924 All. 828.**

———**S. 146, para. 3**—*Plaintiffs suing for value of crops and alleging that crops were misappropriated shortly after distraint and that some time afterwards decree for arrears of rent was obtained, execution of which was applied for by plaintiff's arrest—S.* 146 *does not apply so as to bring suit within revenue Court's exclusive jurisdiction.*

Section 146, para. 3, provides for a case where the property is under distraint, and continues to be so when it ought to be withdrawn. But in the case where the plaintiffs suing for value of crops allege that the crops were misappropriated shortly after distraint, that sometime afterwards a decree for arrears of rent was obtained and execution of that decree was applied for by arrest of the plaintiffs, S. 146 does not apply so as to make the case exclusively cognizable by revenue Court. (*Niamatullah, and Bennet, JJ.*). JOHARI MAL *v.* BALMAKAND. **116 I. C. 802 = 1929 A. L. J. 890 = 10 L. R. A. Rev. 363 = 51 All. 926 = A. I. R. 1929 All. 669.**

———**S. 146**—*Jurisdiction—Civil and revenue Courts—Question of tort included—Suit can be tried by civil Court.*

Any irregularity in following the procedure laid down by the Tenancy Act regarding distraint of crops and the injury resulting from such irregularity may well be left to be dealt with by the revenue Court; but the broader questions arising in actions based on tort are not excluded from the jurisdiction of the civil Court, which is more competent to deal with them. (*Niamatullah and Bennet, JJ.*) JOHARI MAL *v.* BALMAKUND. **116 I. C. 802 = 1929 A. L. J. 890 = 10 L. R. A. Rev. 363 = 51 All. 926 = A. I. R. 1929 All. 669.**

———**S. 146**—*Suit for damages for wrongful distraint—Time runs from date when distraint ends—Limitation Act, S.* 23.

The wrong inflicted by an unlawful distraint continues and is renewed every day that the distraint lasts, the lawful owner of the property being thereby restrained from making use of it or exercising any right of ownership over it. The cause of action therefore for a suit for damages in respect of a wrongful distraint, takes its origin from the day on which the distraint comes to an end and the suit may be lawfully instituted within the prescribed limitation period of three months calculated from the said date. (*Piggott, Walsh and Lindsay, JJ.*) JHABBU *v.* MUSAMMAT BATUL. **73 I. C. 299 = 45 All. 208 = 4 L.R.A. Rev. 1 = A.I.R. 1923 All. 146.**

———**Ss. 150 to 158, Chap. X**—*Jurisdiction—Civil or Revenue Court—Suit by rent-free grantee for rent wrongfully realised by zamindar from sub-tenant—Suit lies in Civil Court.*

A suit by a rent-free grantee against the zamindar to recover rent wrongfully realised by the latter from the sub-tenant is maintainable in a Civil Court, but a suit for declaration that plaintiff by long and continued holding as rent-free grantee has become the proprietor of the land is not maintainable in a Civil Court. (*Rafique and Ryves, JJ.*) SHAM DAS *v.* BAHADUR SINGH. **60 I. C. 831 = 43 All. 325 = 19 A. L. J. 89 = A. I. R. 1921 All. 195.**

———**S. 150**—*Mahal owned by proprietor entirely separate from "muafi" lands—No relief under Chap. X can be claimed by proprietor.*

Where the full share in the mahal owned by the proprietor is entirely separate from the areas of "muafi" land owned by the "muafidars," the proprietor cannot get relief under Chap. X, because S. 150 only refers to suits by the proprietor of a mahal or part of a mahal for assessment of rent on "any land situated in such mahal or part of a mahal." Moreover, the mere fact that the "muafidars" are entered themselves in the khewat shows that no suit under Chap. X can lie against them. It is only in the case of persons who are not entered in the khewat that suits will lie under this Chapter. (*Mukerji and Bennet, JJ.*) SRI RAM CHANDRA *v.* SATYA NARAIN. **124 I. C. 471 = A. I. R. 1930 All. 353.**

———**Ss. 150 and 167**—*Jurisdiction of civil Courts in respect of grove is not ousted.*

Sections 150 and 167 only exclude the jurisdiction of civil Courts in cases for resumption of land, which means land let or held for agricultural purposes, and a grove is not such land. (*Kanhaiyalal and Ashworth, JJ.*) GOPAL *v.* COLLECTOR OF ALIGARH. **92 I. C. 134 = A. I. R. 1927 All. 232** (236).

———**S. 154**—*Grant of land rent-free to secure performance of certain puja falls within S.* 154 (c).

Where the terms of a wajib-ul-arz state that the lands were in possession of a muafidar for the purpose of performing puja and it was also directed that the muafidar would remain in possession as long as he performed the worship, reserving the right to the landlord to hand over the land to somebody else on failure of the muafidar, so that the puja may be performed.

Held, that the grant fell within the ambit of S. 154 (*c*) and was not resumable under Cl. (*b*). A. I. R. 1927 All. 779, Reversed. (*Mukerji and Bennet, JJ.*) SUKHRAM PURI *v.* MOHAMMAD ASHFAQ. **1930 A L. J. 641 = A. I. R. 1930 All. 291.**

———**S. 154**—*Rent-free grant with condition not to sell or mortgage can be resumed if the condition is broken.*

Where in respect of a muafi land the wajib-ul-arz provided: "The rent of this land has been excused from of old, and no services are required. For the future also, the land shall continue to be rent-free, but the muafidar shall not have the power to sell or mortgage."

Held, that the land was resumable in case of sale or mortgage. (*Ashworth, J.*) MOHAMED FIDA HUSAIN KHAN *v.* HAZARI SINGH. **95 I. C. 717 (All) (2).**

———**S. 154 (1)**—*Grant for worship is within the section.*

Where the terms of wajib-ul-arz stated that lands were in possession of the appellant for the purpose of performing worship.

Held, that under S. 154 (1), service may be either religious or secular, and the grant of such lands need not be construed to be a charitable grant, taking it outside the ambit of S. 154. (*Lindsay, J.*) SUKHRAM PURI *v.* MAHOMED ASHFAQ. **103 I. C. 424 = 8 L. R. A. Rev. 167 = A. I. R. 1927 All. 779.**

———**S. 158**—*No revenue can be assessed on "muafi lekhiraj.*

Section 158 enables a Court to assess revenue if there is revenue payable on the land. Where, therefore, there is no revenue payable on plots described as "muafi lekhiraj" no revenue can be assessed on the plots under S. 158. (*Mukerji and Bennet, JJ.*) SRI RAM CHANDRA *v.* SATYA NARAIN. **124 I. C. 471 = A. I. R. 1930 All. 353.**

———**S. 158**—*Question of proprietary right—Appeal to District Judge legal.*

If in a suit for resumption the defendant sets up a plea based on Section 158 of the Tenancy Act, he is raising a question of proprietary title for, obviously, if the plea is determined in his favour, he is entitled to a declaration of his proprietary right, and the District Judge has jurisdiction to hear appeal. (*Lindsay, J.*) LALTA PRASAD *v.* KHARGA. **21 A. L. J. 189 =**

71 I. C. 773 = 45 All. 336 = 4 L. R. A. Rev. 84 = A. I. R. 1923 All. 313.

——**S. 158**—*Rent of free-grant in favour of an idol—Priest in charge of Temple cannot be regarded as a grantee or his successor.*

The particular priest who for the time being may be in charge as manager of the affairs of the temple in question, or of the worship of the idol as conducted therein cannot be regarded as himself the grantee within the meaning of the section 158 of Act II of 1901 nor can any priest who from time to time may succeed to the office be treated as a successor to the original grantee within the meaning of the same section (*Piggott and Walsh, JJ.*) MATHURA PRASAD *v.* RAMESHWAR. **44 All. 169 = 19 A. L.J. 964 = 65 I. C. 371 = A. I. R. 1922 All. 312.**

——**Ss. 159 and 160**—*Contract Act, S. 70—Lambardar selling his property but continuing to be recorded as lambardar—He paying revenue on citation being issued by revenue authorities—He can recover money so paid—His suit does not lie to revenue Court.*

Where a person continues to be recorded as lambardar in spite of his having sold his property, and on citation being issued to him by the revenue authorities pays the revenue, he can recover the sum so paid from his vendee, for the revenue cannot be said to be paid gratuitously by him. His suit, however, will not lie to the Revenue Court either under S. 159 or S. 160, Agra Tenancy Act. 28 All. 563; 3 All. 66 (F.B.), Foll. and (1882) A. W. N. 150, Dist. (*Dalal, J.*) POKH PAL *v.* LAL MADHO RAM. **51 All. 897 = 117 I. C. 107 = 1929 A. L. J. 1081 = 11 L. R. A. Rev. 39 = 14 R. D. 36 = A. I. R. 1930 All. 302.**

——**S. 159**—*Lambardar continuing to be lambardar after partition and paying revenue for years subsequent to partition on behalf of other co-sharer—In his suit for recovery of such revenue, it does not lie upon him to prove prior collection of arrears and that he paid it from his own pocket.*

Where after partition between the Lambardar and the other co-sharer, the lambardar continues to be the lambardar of the whole mahal, and, having paid the Government revenue on behalf of the other co-sharer for the years after partition, sues the co-sharer for recovery of the revenue so paid under S. 159, it does not lie upon him to prove his collection of the arrears of rent on account of the years prior to partition, and to prove that he paid the revenue from his own pocket. (1892) A. W. N. 72, Dist. (*Niamatullah and Bennet, JJ.*) ISRI SINGH *v.* TEJHIR SINGH. **1929 A. L. J. 869 = 119 I. C. 93 = A. I. R. 1929 All. 689.**

——**S. 159**—*Scope.*

Where there is no evidence of any special agreement among the co-sharers that the lambardar should not get any remuneration whatever, the lambardar is entitled to get 5 per cent. of the land revenue payable by the co-sharers. A. I. R. 1923 All. 41, Foll. (*Sulaiman, J.*) MOHAMMAD ALI HUSAIN KHAN *v.* RAMESHWAR PRASAD. **10 L. R. A. Rev. 155 = 113 I. C. 746.**

——**S. 159**—*Liability of Co-sharer.*

The lambardar can recover from the co sharer revenue paid by him on behalf of the co-sharer where the co-sharer paid revenue subsequently into the treasury without informing the Lambardar. (*Daniels, J.*) MT. AISHAH *v.* ABDUL GHANI. **80 I. C. 916 = A. I.R. 1925 All. 95.**

——**Ss. 159 to 162, 164 and 165**—*Appeal lies to District Judge in case of question of proprietary title.*

Where the appeal raises no question of proprietary title, the appeal lies to the Commissioner, but where the cross-objection introduces a question of proprietary title, as an issue in the decision of the appeal, the Commissioner must return the appeal and the cross-objection to the parties with directions to file them before the District Judge. 31 I.C. 857. Appr. (*Stuart, J.*) LALA BHAGWAN DAS *v.* MOHABHAT SHAH. **77 I. C. 955 = A. I. R. 1923 All. 170.**

——**S. 160**—*C. P. C., O. 21 applies to revenue Courts.*

Order 21, C. P. C., is not excluded from applicability to revenue Courts. (*Sulaiman and Kendall, JJ.*) INDAR KOER *v.* DHARAM NARAIN. **A. I. R. 1930 All. 556.**

——**S. 160**—*Recorded co-sharers made responsible for revenue—Lambardar can still recover from persons on whose land assessment is actually made.*

Although a wajib-ul-arz makes the recorded co-sharers of a mahal primarily liable for the payment of the revenue assessed at the last settlement by the settlement officer on the arazi mutafarriqa, it does not do away with the right of the lambardar to recover it from the persons on whose land it is assessed. (*Dalal, J.*) BHORE *v.* HABIBUR RAHMAN. **8 L. R. A. Rev. 246 = 103 I. C. 305 = A. I. R. 1927 All. 641.**

——**S. 160**—*Usufructuary mortgagee's name entered in revenue records—Court cannot go behind the record.*

Where a person's name is entered as mortgagee in the Government records the Court is not competent to go behind the entry and to find that he was not in possession. 33 A. 799 and 34 A. 250, Foll (*Gokul Prasad, J.*) IRSHAD MAHAMMAD *v.* JWALA PRASAD. **75 I. C. 663 = A. I R. 1923 All. 344.**

——**S. 161.**

A suit for arrears of revenue by assignee of revenue only falls under S. 161. A suit instituted not by an assignee from Government but by an assignee of an assignee and not for arrears of revenue does not fall under S. 161. Assignee clearly means an assignee from Government. (*Ashworth and Sen, JJ.*) BHOOPAL RAI *v.* SHIAM SUNDER. **1929 A. L. J. 724 = 11 L. R. A. Rev. 65 = A I. R. 1929 All. 781.**

——**S. 161**—*Interest.*

No interest is payable under S. 161. The right of interest depends on contract express or implied or some rule of law allowing it. A. I. R. 1918 P. C. 53, Foll. (*Niamatullah, J.*) MAHARAJ SINGH *v.* SHRI RAJU SURYAPAL SINGH. **9 L. R. A. Rev. 306 = 113 I. C. 758 = A. I. R. 1929 All. 29.**

——**S. 161**—*Plot proprietor is co-sharer.*

A plot proprietor, *i.e.*, a person holding specific plots assessed to revenue, is a co-sharer within S. 160. 18 A. L. J. 121, Ref. (*Dalal, J.*) BHORE *v.* HABIBUR. **8 L. R. A. Rev. 246 = 103 I. C. 305 = A. I. R. 1927 All. 641.**

——**Ss. 163 and 164**—*Co-sharers suing Lambardar for profits can join in same suit—C. P. C., O. 1, R. 1.*

Co-sharers suing lambardar for their respective share of profits under S. 164 can join in the same suit because their several rights arise out of the same act, *viz.*, the lambardar's failure to divide profits among co-sharers on the date on which they are divisible which it is the duty of the lambardar to do. (*Boys and Young, JJ.*) PIARE LAL *v.* JHABBA LAL. **1929 A. L. J. 1098 = 10 L. R. A. Rev. 361 = 51 All. 994 = A. I. R. 1929 All. 668.**

——**Ss. 163 and 164**—*Subject to not getting twice, share in gross rental as well as actual realisation can be claimed by co-sharer if it is not barred—Cause of action for share of arrears collected in a subsequent year arises on 1st August following the year of collection.*

There is nothing in the N. W. F. P. Tenancy Act, and particularly in Ss. 163 and 164, which professes to modify or qualify, or in any way cut down the fundamental contractual rights of a co-sharer as against his lambardar. It is true to say that in one year a co-sharer cannot have both the gross rental and the actual collections; subject to his not getting anything twice over, he is entitled to ask the Court for his share of actual collections arising out of one set of circumstances. and gross rental arising out of the other. There is equally nothing to prevent, in a suit against a lambardar by a co-sharer for the arrears claimed in respect of three years, the co-sharer from recovering from the lambardar, not only the gross rental on the ground of negligence for each of the three years in suit, but in addition such amount as he can show or the lambardar admits, that the lambardar has in fact received in respect of rents which were due from the tenants in the years preceding those in suit, but received by the lambardar in the years in suit, in spite of his negligence, always of course provided that no claim made against the lambardar for arrears is barred by statute as against him. As between the co-sharer and the lambardar, the statute begins to run in respect of arrears collected, no matter in what year the rent became due as between the tenant and the zamindar, in the year in which they have been revived by the lambardar. The date in that year is fixed by rule namely, the 1st of August. No co-sharer is entitled in respect of the demand for a particular year to recover more than his share of the gross rental for that year. But subject to this, there is no reason why he should not join a claim to the gross rental of a particular year in which negligence is alleged against the lambardar, with a claim for collections made by the lambardar in that year in respect of previous years where profits of the previous years had been awarded on the basis of actual collections. Where in a suit gross rental is claimed on a plea of negligence, the cause of action arises on the 1st of August following the close of the Fasli year to which the claim relates, but where the claim is for arrears collected on account of past years the cause of action arises on the 1st of August following the year in which those arrears are collected. (*Walsh, Ag. C. J., Sulaiman, Ryves, Mukerji and Daniels, JJ.*) SHEO GHULAM *v.* SALIKRAM. **22 A.L.J. 610= 5 L.R.A. Rev. 189=46 All. 791=84 I. C. 158= A.I.R. 1924 All. 481 (at 490 & 491) (F.B).**

——**S. 164**—*Scope.*

A Revenue Court order subsequent to the presentation of the plaint will not affect the plaintiff's right to sue for the profits for the years during which his name was entered in the village record . A. I. R. 1921 All. 396, Foll. (*Dalal, J.*) TAYYAB UNNISSA *v.* NASARULLA. **10 L. R. A. Rev. 287=119 I.C. 433= A. I. R. 1929 All. 378.**

——**Ss. 164 and 167**—*Co-sharers—Declaratory suit against heirs of lambardar for the share of profits out of the amount of deposit in Court—Civil Court has no jurisdiction.*

A party cannot merely by altering the form of a suit or changing the form of a relief, contravene or evade the provisions of S. 167, Agra Tenancy Act. *P* and *S* were co-sharers in the same mahal ; *S* being the lambardar engaged the services of *N* to make collections in the mahal ; who made collections, but did not hand over the amount to *S*. *N* deposited the money in Court on a suit by the legal representatives of *S*. *P* thereupon filed a suit for a declaration entitling him to get his share of profit from the amount in the Court. It was contended that the civil Court had no jurisdiction to entertain the suit.

Held, that the Civil Court had jurisdiction. (*Sen, J.*) MT. MUBARAK BANO *v.* ALI RAZA. **9 L. R. A. Rev. 192=115 I. C. 769= A. I. R. 1928 All. 556.**

——**Ss. 164 and 201**—*Suit by brother recorded as proprietor of specific area against another brother, a lambardar—Question of jointness or separation of the family cannot be gone into—Presumption under S. 201 (3) applies.*

Plaintiff brought a suit for profits under S. 164 against his brother, the lambardar. Plaintiff was recorded as proprietor of a specific area with a specific share of profits.

Held, that it is not open to the Court to go into the question of jointness or the separation of the parties, and that the presumption under S. 201 (3) is nonetheless applicable because the parties to the suit may be members of a joint Hindu family. A.I.R. 1922 All. 332, Foll. (*Sulaiman and Banerji, JJ.*) GIRDHARI LAL *v.* GOBIND RAI. **25 A. L. J. 706= 8 L. R. A. Rev. 168= 103 I. C. 346=A. I. R. 1927 All. 810.**

——**S. 164**—*Suit for share of profits against lambardar—Large proportion of rents remaining uncollected—Negligence of lambardar cannot be inferred from this alone.*

In a suit for a share of profits against the lambardar the mere fact that a large proportion of the rents remained uncollected does not necessarily lead to the inference that the lambardar was negligent. A. I. R. 1922 All 111, Foll. (*Iqbal Ahmad, J.*) BADRI PRASAD *v.* GIRDHARI. **8 L. R. A. Rev. 92= 100 I. C. 743=A. I. R. 1927 All. 405.**

——**S. 164**—*Suit for profits of several years — Accounts of all years have to be gone into.*

In a suit for profits for several years the accounts of all the years have to be gone into in order to decide whether or not any amount is due to the plaintiff. (*Iqbal Ahmad, J.*) BADRI PRASAD *v.* GIRDHAR. **8 L. R. A. Rev. 92=100 I. C. 743= A.I.R. 1927 All. 405.**

——**S. 164**—*Co-sharer mortgaging his share but continuing in possession as lessee and collecting rents even after lease period—Suit by the mortgagee for profit does not lie—Mortgage.*

An 8 annas sharer who was also a lambardar mortgaged his 3 annas share. The mortgagee gave him a lease for 7 years. After that period the lambardar continued making collections. The mortgagee sued him for recovery of profits.

Held, that such a suit does not lie. (*Gokul Prasad, J.*) TRIBENI SAHU *v.* LACHMI PANDE. **75 I. C. 666=A. I. R. 1923 All. 346.**

——**S. 164**—*Suit by co-sharer against lambardar for recovery of share of profits—Circumstances shifting* onus *indicated.*

When a co-sharer has given general evidence to show that the rents are greatly in arrears, that the tenants are solvent, and that there are no special circumstances why the rents should not have been collected, the *onus* is shifted on to the lambardar of showing that for some reason, not connected with his own negligence or misconduct, he was unable to collect the rent.

Collection charges should be awarded to the Lambardar, even though he does the work of collection himself. 37 All. 595, Foll. (*Sulaiman, J.*) MT. HIRIA *v.* RAM ADHIN SINGH. **75 I. C. 553= A. I. R. 1923 All. 335.**

——**S. 164**—*Suit for profits—Negligence—The fact that certain decrees obtained by Lambardar were unexecutable does not prove negligence—Decree should be on basis of actual collections.*

The amount of the actual collections showed that the Lambardar realised 76 per cent. With regard to the rest he brought suits and obtained decrees against defaulting tenants. *Held*, the fact that some of the decrees could not be realized was no fault of the Lambardar nor can it be said to constitute negligence. The decree in favour of co-sharer for profits should proceed on the basis of actual collections, with 12 per cent. interest which is the proper rate of interest in the case up to realization. (*Rafiq and Lindsay, JJ.*) RAM CHANDRA *v.* KIRPA DEVI. **65 I. C. 648 = A. I. R. 1923 All. 216.**

——**S. 164**—*Purchaser of a share—Suit for profits against lambardar lies only in Revenue Court.*

Where a purchaser of a share in a village is a recorded co-sharer and is entitled to sue the lambardar for the profits for the years in suit, the only Court which has jurisdiction to try the suit is the Revenue Court. (*Ryves and Gokul Prasad, JJ.*) KUNJ BIHARI LAL *v.* GHANSHAM DAS. **65 I. C. 530 = A.I.R. 1922 All. 397.**

——**S. 164**—*Suit for profits—Civil Court decision on title pending suit is binding on Revenue Court.*

When as between parties to a revenue suit, a Civil Court of competent jurisdiction has decided the title to the property adversely to the plaintiff who claims profits, the Revenue Court is not competent to ignore that decision. In suits for profits in Rent Courts based on entries in the *Khewat*, an order or decree of a Civil Court, declaring the rights of the parties, if passed before the end of the litigation, must be followed. (*Ryves and Gokul Prasad, JJ.*) SURJAN SINGH *v.* MT. CHATURA KUNWAR. **44 All. 250 = 20 A. L. J. 61 = 64 I.C. 964 = A. I. R. 1922 All. 356.**

——**Ss. 164 and 163**—*Suit for profits—Time runs from date when they become divisible under S. 163—Limitation.*

The period of limitation for a suit for profits begins to run from the date when profits become payable, *i.e.* when they are divisible in accordance with Section 163 irrespective of the fact that the collections have been actually made at a subsequent date. (*Ryves and Gokul Prasad, JJ.*) NAZIRUDDIN *v.* ACHCHI BEGUM. **64 I. C. 988 = 20 A. L. J. 95 = A. I. R. 1922 All. 348.**

——**S. 164 (a)**—*Suit for profits againit* lambardar—*Profits must be allowed on actual collections unless negligence proved.*

Where the question is whether the profits to a co-proprietor should be allowed on *jamabandi* or actual collection,

Held, unless negligence of the *lambardar* is actually proved, he profits should be allowed on actual collection. A. I. R. 1921 All. 314. Foll. (*Ryves and Gokul Prasad, JJ.*) JODHI RAM *v.* MT. KAUNSILLE. **20 A. L. J. 313 = 67 I.C. 521 = A. I. R. 1922 All. 111.**

——**S. 164 (2)**—Onus *lies on plaintiff to prove gross negligence or misconduct—Proof of circumstances from which gross negligence or misconduct may be inferred shifts burden on defendant.*

The initial *onus* of proving gross negligence or misconduct lies on the plaintiff but such *onus* may be discharged by proof of circumstances from which gross negligence or misconduct may be inferred. It will then be for the defendant to explain by satisfactory evidence that his inability to collect is referable to some excusable cause. (*Niamatullah, J.*) BHARAT SINGH *v.* GANGA. **9 L. R. A. Rev. 303 = 116 I.C. 744 = A. I. R. 1928 All. 767.**

——**S. 164 (2)**—30 *p. c. of rental remaining uncollected during normal years—No accounts produced by defendant—No suit for arrears brought—Tenants being good pay-masters—Defendant offering no explanation of failure to collect—Burden is shifted on defendant.*

30 p. c. of the rental had remained uncollected during normal years. Defendant had not produced any accounts. No suits for arrears of rent were brought. No proceedings of distraint were taken. The patwari whose evidence was believed stated that the tenants of the village were good pay-masters. The defendant had offered no explanation as to why he failed to collect this large percentage of rent if he made reasonable efforts to make collections.

Held: that the facts clearly shifted the burden of proof on the defendants. 10 A. L. J. 529, Foll. (*Niamatullah, J*). BHARAT SINGH *v.* GANGA. **9 L. R. A. Rev. 303 = 116 I. C. 744 = A. I. R. 1928 All. 767.**

——**S. 164 (2)**—*Profits, suit for, by co-sharer against Lambardar—Plaintiff cannot get a decree both on basis of gross rental and for arrears of past years collected during the year in question.*

If a plaintiff claims under S. 164 (2) on the basis of gross rental for his share of the profits of any given year, he cannot also get a decree for arrears of past years, collected in the year in question; because to hold otherwise might be to evade the law of limitation. (1887) A. W. N. 250, Ref. S. A. No. 1762-1915 of All. Foll. S. A.' No. 996 of 1906 of All. Dist. (*Ryves and Gokul Prasad, JJ.*) CHHABRAJI KUNWAR *v.* GANGA SINGH. **43 All. 29 = 60 I. C. 643 = A. I. R. 1921 All. 314.**

——**S. 165**—*Non-lambardar co-sharer suing another for his share of profits on entire rental—Defendant pleading non collection of entire rent but failing to produce his account books—Court is justified in decreeing plaintiff's whole claim.*

Where one non-lambardar co-sharer sues another such co-sharer under S. 165 for his share of the profits on the entire rental, and the latter alleges that he could not collect the entire rent but when called upon to produce his account books fails to do so, the Court is justified in finding that the entire rent was collected and in decreeing plaintiff's claim accordingly. 5 A. L. J. 117, Dist. (*Niamatullah, J.*) GAJRAM SINGH *v.* BALWANT SINGH **11 L. R. A. Rev. 16 = 119 I. C. 499 = A. I. R. 1929 All. 702.**

——**S. 165**—*Method of calculating profits of several co-sharers pointed out.*

In calculating profits of a mahal, *sir* and *khudkasht* lands held by particular co-sharers have to be taken into account and the rent of *sir* land held by a co-sharer is to be assessed at a proper rate and not with reference to the farzi rate of rent entered in the revenue papers. 38 All. 223 and 7 A. L. J. 90, Foll. (*Iqbal Ahmal, J.*) BHAGIRATH *v.* KHETPAL. **8 L. R. A. Rev. 177 = 102 I. C. 139 = A. I. R. 1927 All. 791.**

——**S. 165**—*Suit to recover excess—Right of other sharers to the excess must be considered.*

A suit under S. 165 must be one for accounts primarily. It is necessary that there should be accounts showing that the plaintiff is entitled to the sum claimed. For this purpose it must be shown by figures that the other co-sharers have no claim to the excess which the particular co-sharer, who is plaintiff, is claiming. The fact that the plaintiff may have paid off another co-sharer out of his own pocket any money, will not give the plaintiff a right to recover the money so paid from a third co-sharer under S. 165, unless there is some transfer of the actionable claim.

One co-sharer is not entitled to claim the whole of the excess in the hands of another co-sharer merely because he is short to that extent of his fractional share in the income of the mahal. All the other co-sharers who are similarly short are entitled to share in the excess income enjoyed by any one co-sharer, and they must be made parties to the suit by the one co-sharer. (*Ashworth and Kendall, JJ.*) KOKA *v.* CHUNNI.

25 A. L. J. 1057 = 8 L. R. A. Rev. 323 = 105 I.C. 745 = A. I. R. 1927 All. 623.

——**Ss. 165 and 10 (5)**—*Applicability—Suit for profits by purchaser of Khudkasht land—S. 165 does not apply—But rent must first be assessed by Collector—Land Revenue Act, S. 36.*

In a suit for profits by the purchaser of *khudkasht* land against the vendor, the ex-proprietary tenant of the plots the other co-sharers in the village are not necessary parties. The suit is one for rent and is not governed by Section 165. But having regard to Section 10, Cl. 5 of the Agra Tenancy Act and Section 36 of Land Revenue Act, it seems that as a preliminary step to such a suit it is necessary first to have the rent assessed by the Collector. (*Ryves, J.*) KISHORI MAL *v.* PARSADI.

77 I. C. 382 = A. I. R. 1922 All. 319.

——**S. 165**—*Jurisdiction—Assignee of arrears of profits can sue in Revenue Court.*

An assignee of arrears of profits can sue to recover those profits in the Revenue Court. (*Sulaiman, J.*) ABHAINANDAN PRASAD *v.* BHAGWAN DATT.

88 I. C. 298 = A. I. R. 1925 All. 765.

——**S. 165**—*Lambardar Mortgagor—T. P. Act, S. 36—Mortgage—Deposit for redemption—Lambardar mortgagor is entitled to profits from date of deposit.*

From the day of the deposit to redeem a mortgage the property is transferred to the mortgagor and under S. 36 of the T. P. Act, the Lambardar Mortgagor is entitled to the collections made. (*Gokul Prasad, J.*) LALA GANGA RAM *v.* MEWA RAM.

A. I. R. 1922 All. 275.

——**S. 165**—*Procedure—Suit under S. 165—Person allowed by lambardar to make collections cannot be made defendant.*

A person, who has been allowed by the lambardar to make collections is not a co-sharer or a legal representative or assignee of the co-sharers and therefore no suit under S. 165 can lie against him. So, such a person cannot be impleaded as a defendant to a suit for profits under S.165. (*Neave, J.*) PURAN *v.* KHIALI RAM.

86 I. C. 400 = A. I. R. 1925 All. 701.

——**S. 165**—*Settlement of accounts—Claim under S. 165 for account cannot be joined in a suit by one co-sharer against another for rent.*

A co-sharer having claim against another co-sharer in respect of a separate matter altogether, namely for rent, cannot join that claim in a suit brought under S. 165, for an account. (*Walsh, J.*) KHEM KARANDAS *v.* BALDEO SINGH. **92 I. C. 1046 = A. I. R. 1926 All. 282.**

——**S. 165**—*Settlement of accounts—Suit for profits against lambardar's heirs after his death—Heirs are not liable for uncollected profits.*

The successor-in-title of a deceased lambardar in a suit which was not brought against the lambardar but brought after his death is not liable to account for profits which his predecessor had failed to collect or which he permitted to remain uncollected owing to negligence or misconduct. In such a case profits can be awarded only on the basis of collection. 40 All. 246, Dist. (*Stuart, J.*) RAM SARUP *v.* GAYA PRASAD.

88 I. C. 447 = A. I. R. 1925 All. 810.

——**S. 165**—*Settlement of Accounts—U. P. Land Rev. Act (III of 1901), S. 4—Rights of lambardar to sue the co-sharers.*

A lambardar can sue the other co-sharers of the village, who hold *sir* or *Khudkhasht* land, for a refund of the whole of the profit which they may have realised in excess of their share and not only to the extent of the share of the lambardar in such excess. S. 165 of the Agra Tenancy Act (II of 1901) does not exclude the general authority, which the lambardar possesses to represent his co-sharers in such a litigation. (*Kanhaiya Lal, J.*) KUNDAN LAL *v.* BASANT RAI.

75 I. C. 330 = A. I. R. 1924 All. 935 (2).

——**Ss. 165 and 164**—*Settlement of Accounts—Suit against co-sharers under S. 165—Defendants are not liable for plaintiff's share of rent not collected by them.*

In suits under section 164, it is the duty of the *lambardar* to make collections both of the rents due for the year as well as of arrears of rent, on behalf of the whole body of co-sharers. If, therefore, a decree is to be given on actual collections, those collections must include arrears for previous years also; whereas in a suit under S. 165 against co-sharer defendants, it cannot be said that it was the duty of the defendants to make collections of the plaintiff's share also. The defendants can be held liable, only if they have collected rents in excess of their own legitimate share. That only can be the true basis of accounting between the parties. (*Sulaiman, J.*) LALA DURGA PRASAD *v.* GANGA SARAN.

70 I. C. 763 = A. I. R. 1922 All. 501.

——**S. 167**—*Bar to suit—Suit for ejectment of defendant as sub-tenant dismissed—Second suit for ejectment as trespasser in Civil Court is barred*—(Per *Daniels and Pullan, JJ., Kanhaiya Lal, J., Dissenting*).

Per *Daniels and Pullan, JJ.*—It is not open to a plaintiff, whose suit for ejectment of the defendants as his sub-tenants has been rejected by the Revenue Courts on a finding that they were co-tenants, to come to the Civil Court and sue for their ejectment as trespassers.

Per *Kanhaiya Lal, J.*—A question of sub-tenancy may be excluded by the decision of the Revenue Court, but if the alleged sub-tenancy is negatived there is no reason why the determination of any other question of title, arising on the finding that no such sub-tenancy existed, should be excluded from the determination of the Civil Court: 37 All. 41 and A.I.R. 1925 All. 637, Foll. (*Kanhaiyalal, Daniels and Pullan, JJ.*) BALWANT SINGH *v.* SARABJIT. **48 All. 774 = 24 A.L.J. 1009 = 98 I. C. 983 = A.I.R. 1927 All. 70 (F.B.).**

——**S. 167**—*Ejectment suit—Two rival Zemindars—One fraudulently entering other's name as sub-tenant, obtaining* ex parte *decree for rent, and suing for ejectment—Civil Court not bound by decree of Revenue Court.*

A suit for ejectment was brought by a Zemindar against his rival Zemindar, after having fraudulently entered the other as sub tenant and having obtained a decree for arrears of rent from the Revenue Court. The other Zemindar defended his proprietary possession and in the Civil Court he asked for a declaration of his proprietary title. In such a case the Revenue Court has no power to pass a decree and that the passing of the decree furnishes a fresh cause of action. Such a decree does not bind the Civil Court and does not estop the plaintiff and the findings of the Revenue Court do not bind the Court. The Civil Court can consider the case independently in accordance with the circumstances of the case. An alleged owner cannot bring a claim for declaration of title within the meaning of S. 167 of the Agra Tenancy Act. (*Walsh, J.*) RAM DHARI UPADHIA *v.* BABU LAL UPADHIA. **65 I. C. 101 = 3 U. P. L. R. (A.) 21.**

S. 167—Jurisdiction.

——*Civil Court cannot declare a decree by a Revenue Court void especially when tenant has remedy under S. 79.*

AGRA TENANCY ACT (1901), S. 167.

Under S. 167, the Civil Courts cannot take cognizance of a suit to declare a decree in the Revenue Court void and ineffectual on the ground that the proceedings of that Court were contrary to law. The proper procedure for the tenant is to bring a suit under S. 79 for wrongful ejectment. (*Mukerji and Bennet, JJ.*) SUKHA *v.* LACHMI NARAIN. **26 A. L. J. 834 = 113 I. C. 829 = A.I. R. 1928 All. 621.**

S. 167—Jurisdiction.

——*Suit by a pardanashin lady to obtain a declaration that a perpetual lease made by her through ignorance is not binding on her—Suit is cognizable by Revenue Court and not Civil Court.*

A pardanashin lady, for certain service rendered by the defendant to her, agreed to grant in his favour a lease of certain property for two years. The defendants taking advantage of the fact that she was a pardanashin lady of immature intellect and a minor, obtained from her a document which she subsequently discovered was a perpetual lease for a very inadequate rent. She accordingly brought a suit for obtaining a declaration that the lease was not binding on her. After the parties had adduced evidence, the defendant took up the plea that the suit was not cognizable by the Civil Court.

Held, that the plaintiff's remedy lay by institution of a suit in the Revenue Court leaving it to the defendant to set up the lease complained of by the plaintiff in defence. When the lease is once set up the Revenue Court would be seized of the jurisdiction to try the question how far it was binding on the plaintiff. Such a suit could be either one of ejectment or for recovery of the larger rent which the plaintiff thought she was reserving by the document she was executing or by a suit under S. 95: 37 All. 254; 37 All. 41; and (1901) A.W.N. 49, Foll. (*Mukerji, J.*) MT. MUKHTARI *v.* HARBANS SINGH. **9 L.R.A. Rev. 216 = 118 I. C. 172 = A. I. R. 1928 All. 614.**

S. 167—Jurisdiction.

——*Revenue Court declaring a tenant to be a grove-holder—Landlord's subsequent suit in a Civil Court to eject him on the ground that he was a licensee—Latter suit is barred—Revenue Court has jurisdiction to determine such question—C. P. Code, S.* 11.

In a former suit a landlord declared a tenant to be his non-occupancy tenant and desired his ejectment under S. 58, Agra Tenancy Act, II of 1901. The Assistant Collector held that the tenant was not an occupancy tenant, but that he held the grove under such condition that he could not be ejected under S. 58. His view further was that in the alternative the tenant would be a rent-free grantee of the land for the purposes of planting a grove. Then the landlord sued the tenant in the Civil Court for his ejectment on the ground that the tenant was a licensee of that grove under certain conditions and he desired to eject him as the license terminated.

Held, that the Civil Court, after the refusal of the revenue Court to eject the tenant could not inquire into the matter whether the tenant was a licensee of the landlord or not. The Revenue Court had jurisdiction to hold that the tenant was a grove-holder. (*Dalal, J.*) RAM LAGAN BHAGAT *v.* PHAKKAR DAS, **9 L. R. A. Rev. 141 = 118 I. C. 171 = A. I. R. 1928 All. 343.**

Ss. 167 and 2 (5)—Jurisdiction.

——*Person liable to pay rent is tenant—Ejectment by Revenue Court—Suit in Civil Court for declaration that the plaintiff is occupancy tenant in spite of ejectment decree is barred by S.* 167.

AGRA TENANCY ACT (1901), S. 167.

When a person is liable to pay rent, then under S. 2 (5) he is a tenant and the Revenue Court, therefore, has jurisdiction to eject him, and when he has been ejected by the Revenue Court he cannot be allowed to maintain a suit in the Civil Court for a declaration that in spite of the ejectment decree he is still a tenant-in-chief and not a sub-tenant: A. I. R. 1925 All. 637, Rel. on. (*Sulaiman, J.*) PARAM SUKH *v.* DAMBAR. **98 I. C. 263 = A. I. R. 1927 All. 102.**

Ss. 167 and 79—Jurisdiction.

——*Revenue Court cannot entertain suit against a person other than landholder even though landlord authorizes him to eject plaintiff.*

Rules of procedure cannot override rules prescribing jurisdiction. A Civil Court cannot entertain a suit against a landholder brought by his tenant nor can a Revenue Court entertain a suit against a person other than the landholder, though such other person is authorized by the landlord to eject plaintiff. Mere connivance does not amount to authorization. (*Kanhaiyalal and Ashworth, JJ.*) BABUNA *v.* BECHCHU. **24 A. L. J. 591 = 96 I. C. 36 = A. I. R. 1926 All. 531.**

S. 167—Jurisdiction.

——*Claim to occupancy holding—Civil Court has jurisdiction to entertain.*

There was a dispute between the two brothers *B* and *N* about a certain occupancy holding. *B* claimed to be a joint tenant along with *N*. Each of them brought a suit in the Civil Court to enforce his own claim.

Held, that S. 167 did not apply, because there is no article of the schedule to the Act under which a suit or application could have been made by these rival claimants to an occupancy holding which would have brought the dispute between them to a determination, and therefore Civil Court had jurisdiction to try the suit, (*Piggott, J.*) BIJAI *v.* NARAIN. **88 I. C. 592 = A. I. R. 1926 All. 45.**

——*Mortgagee a recorded co-sharer—Decree for joint possession can be passed but not for mesne profits—Jurisdiction of Civil Courts is barred in such cases.*

A mortgagee of zamindari plots who is entered as such in the khewat is a recorded co-sharer, and if he is obstructed in the collection of rents he is entitled to a decree for joint possession against the other co-sharers, but not to a decree for mesne profits. As he is a recorded cosharer he can only obtain his share of the profits by a suit in a rent Court. Section 167 bars the jurisdiction of the Civil Courts in the matter. A.I.R. 1922 All. 314 and A.I.R. 1922 All. 162, Foll. (*Stuart, J.*) MAHADEO PRASAD *v.* BASANT LAL. **87 I. C. 444 = A. I. R. 1925 All. 746.**

Ss. 167 and 199—Jurisdiction.

——*Ejectment suit—Question of title raised in defence—Defendant directed to file suit in Civil Court—Suit filed after expiry of time prescribed but before the conclusion of suit in Revenue Court is not entertainable—C. P. Code, S*, 10.

If a party has been ordered by a Revenue Court to file a suit in a Civil Court within three months, he is not at liberty to ignore the restriction and file his suit after three months although the suit in the Revenue Court may be pending. A suit instituted after the three months should be dismissed by the Civil Court. (*Case-law discussed*).

Per *Daniels, J.*—S. 10 of the C. P. Code will not apply because the Revenue Court, though its decision may indirectly produce the same result, could not have granted the relief asked for in the Civil Court.

Per *Sulaiman, J.*—Although it is not possible to bring the case within the provisions of S. 10 of the C.P.

Code, as the Revenue Court is not competent to grant the relief asked for in the civil suit, nevertheless the principle underlying that section may be of wider application. (*Sulaiman and Daniels, JJ.*) GANGA CHAMAR *v.* BINDESARI RAI. **47 All. 904 = 88 I. C. 684 = 23 A. L. J. 529 = A. I. R. 1925 All. 615.**

S. 167—Jurisdiction.

——*Suit for declaration that plaintiffs are joint tenants with defendants—Civil Court can try.*

Unless the fourth schedule of the Act is produced before the Court and a suit or application of a precisely similar kind (to the suit in question) and parallel in its results is shown to the Court as being a suit exclusively triable by the Revenue Court, the Civil Court will not only be within its rights in trying the suit but will be bound to determine it. A suit for declaration that the plaintiffs are joint in occupancy with the defendants is cognizable by a Civil Court. (*Mears. C.J. and Piggott, J.*) AMMAR *v.* GOVIND. **47 All. 616 = 88 I. C. 247 = 23 A. L. J. 449 = A. I. R. 1925 All. 465.**

S. 167—Jurisdiction.

——*Matter within* S. 167—*Decision of Revenue Court—Civil Court will not try suit calculated to reverse Revenue Court's decision.*

Where during the continuance in force of an *ex-parte* decree for arrears of rent in defendant's favour and against plaintiffs, plaintiffs sued in Civil Court for declaration that they were joint tenants with defendant.

Held, that as the effect of the suit was to reverse the decision of the Revenue Court, it was barred under S. 167. Civil Courts will not entertain a suit the object of which is to reverse a decision of a Revenue Court in a matter which is, under S. 167 of the Tenancy Act, within the Revenue Court's exclusive jurisdiction, and if this is the substantial object of the suit it is immaterial that the plaintiff may have framed his relief in a form in which it could not have been granted by the Revenue Court. The Courts will look to the substance of the matter and not to the form. (*Daniels, J.*) GOBIND *v.* AMMAR. **5 L. R. A. Rev. 138 = 78 I. C. 628 = A. I. R. 1925 All. 194 (2).**

S. 167—Jurisdiction.

——*Revenue Court's decision cannot be touched even indirectly.*

A plaintiff cannot by merely changing the form of his relief evade the provisions of Section 167. Where the plaintiff had been held by the revenue court as a tenant of the defendants and he then Name to the Civil Courts for a declaration that he was not a tenant, but a grove-holder, *Held* that the civil Court had no jurisdiction. (*Daniels and Dalul, JJ,*) KUNDAN LAL *v.* PARSHADI. **22 A. L. J. 466 = 79 I. C. 960 = 46 All. 570 = A. I. R. 1924 All. 744.**

S. 167—Jurisdiction.

——*Suit between rival claimants is cognisable by Civil Court.*

A suit between rival claimants to a tenancy one for a declaration of title by one against a rival claimant lies exclusively in a Civil Court and such a suit is not one which is covered by S. 167 of the Agra Tenancy Act. 11 I. C. 268 ; 8 A. L. J. 1009 ; 33 A. 795, Foll. (*Sulaiman, J.*) SURJAN SINGH *v.* UMARI SINGH. **78 I. C. 1008 = A. I. R. 1924 All. 609.**

S. 167—Jurisdiction.

——*C. P. Code*, S. 11—*Dispute between rival claimants once decided by Revenue Court cannot be re-opened in a Civil Court.*

Although S. 167 of the Agra Tenancy Act does not apply to suits between rival claimants to a tenancy, nevertheless once a matter has been decided by a Revenue Court it cannot be re-opened in a Civil Court. This view is not based on the provisions of S. 167 nor on the principle of *res judicata* but rather on the general ground that the effect of allowing such a thing to be done would be to nullify the decree of the Revenue Court which is final and binding on the parties, 41 A, 97, Foll. (*Sulaiman, J.*) SURJAN SINGH *v.* UMARI SINGH. **78 I. C. 1008 = A. I. R. 1924 All. 609.**

S. 167—Jurisdiction.

——*Dispute between tenants—Suit for declaration for avoiding provisions of Tenancy Act—Civil Court has no jurisdiction.*

It is a truism to say that a suit for a declaration between two rival tenants may be brought in a Civil Court, though in the more recent rulings of High Court, the doctrine of the "exclusive jurisdiction" of the Revenue Courts in certain matters has been developed, and emphasis directed to the wording of Section 167 which says "no Court other than a Court of Revenue shall take cognizance of any *dispute or matter in respect of which a* suit lies under the 4th Schedule". If the object of the suit is really to prejudice, if possible, the rights which the defendant rival tenant or the zemindar may have, and which if they wish to establish, they must have recourse to the Revenue Court, *i.e.*, if it is an attempt to evade the provisions of the Tenancy Act, it offends against provisions of Section 167 of the Act. Under Section 167 of the Tenancy Act, it is beyond the jurisdiction of the Civil Court to make a declaration. The Civil Court cannot investigate even, much less find, on the allegations of the plaintiffs that he is for one reason or another, an occupancy tenant, nor for the same reasons can it decide whether the defendants are permanent lessees. (*Ryves, J.*) SITA RAM *v.* CHAIT RAM. **4 L. R. A. Rev. 291 = 71 I. C. 447 = A. I. R. 1923 All. 257 (260).**

S. 167—Revision.

——**S. 167** *Bars revisional jurisdiction of High Court.*

Section 167 bars the revisional jurisdiction of the High Court in proceedings under Tenancy Act. (*Lindsay, Daniels and Dalal, JJ.*) BHAGWAN DAS *v.* CHHEDI KOERI. **24 A. L. J. 537 = 95 I. C. 559 = A. I. R. 1926 All. 398 (F. B.).**

Ss. 167 and 177—Revision.

——*Order of District Judge under S.* 177—*Revision lies to High Court.*

Per *Boys, J.* There is nothing in S. 167 precluding the hearing by the High Court under S. 115 of the C. P. Code, of a revision of an order passed by a District Judge under S. 177, and it is reasonable that the High Court should have such power, and to hold that it has such power is in accord with S. 193 of the Tenancy Act. (*Sulaiman and Boys, JJ.*) KEHRI SINGH *v.* THIRPAL. **48 All. 104 = 23 A. L. J. 965 = 92 I. C. 282 = A. I. R. 1926 All. 113.**

S. 167—Revision.

——*No revision lies against an order refusing to entertain appeal under the Act.*

No revision lies against an order of the District Judge refusing to entertain a petition of appeal against the decree of an Assistant Collector in a suit under Agra Tenancy Act (II of 1901), 42 All. 83, Foll. (*Piggot, J.*) ADYA SARAN *v.* KALI CHARAN. **45 All. 567 = 21 A. L. J. 524 = 5 I. C. 280 = 4 L. R. A. Rev. 223 = A. I. R. 1923 All. 580.**

S. 167—Scope.

———S. 167 is only concerned with original proceedings. (*Sulaiman and Boys, JJ.*) KEHRI SINGH *v.* THIRPAL. **48 All. 104 = 23 A. L. J. 965 = 92 I. C. 282 = A. I. R. 1926 All. 113.**

S. 167—Scope.

———Where the suit was for a declaration under S. 95 (*a*) and the real object of this suit was to have a declaration against both the Zemindar and the son of the tenant who was recorded as such that the plaintiffs were the occupancy tenants of the holding.

Held such a suit can only be brought in a Court of Revenue. (*Ryves, J.*) KHAIRUDDIN *v.* SHAHU GULAB. **74 I C 220 = A. I. R. 1924 All. 102.**

S. 177—Appeal.

———*Exproprietary tenant suing sub-tenant—Latter remaining absent but zemindar repudiating plaintiff's right to recover rent—Question of proprietary title is raised and appeal lies to District Judge.*

Plaintiff sued the defendant *A* in the Revenue Court alleging that he, the plaintiff, was an ex-proprietary tenant and that defendant was his sub-tenant. The defendant absented himself, but *N* who was made a party as the zamindar on his own application contested the suit on the ground that he alone realized the rent from the defendant and that the plaintiff had nothing to do with it.

Held, that the dispute between the plaintiff and the zamindar raised a question of proprietary title, and appeal lay to the District Judge and not to the Commissioner. (*Walsh, J.*) ABDUL RAUF *v.* MASHIUD DIN. **9 L. R. A. Rev. 172 = 114 I. C. 901 = A. I. R. 1928 All. 409.**

Ss. 177 and 57—Appeal.

———*Decision by Assistant Collector—Only cases falling under Cls.* (a), (b), (c), (e) *or* (f) *of S.* 177 *are appealable to the District Judge.*

Only those decrees of Assistant Collectors of the first class in suits included in group *B* of 4th Schedule are appealable to the District Judge which come within Cls. (*a*), (*b*), (*c*), (*e*) or (*f*) of S. 177 of the Tenancy Act. 37 All. 272, Dist. (*Iqbal Ahmad, J.*) MAHOMED SHABHIR *v.* ZAIN-UL-ABDIN. **8. L. R. A. Rev. 74 = 102 I. C. 184 = AI R. 1927 All. 564.**

S. 177—Appeal.

———*Remand order by District Judge under S.* 177—*No appeal but revision lies.*

No appeal lies to the High Court against an order of remand passed by the District Judge in an appeal from a Revenue Court under S. 177 of the Agra Tenancy Act. 38 All. 181 and 28 All. 753 (F.B.), Foll. (*Sulaiman and Boys, JJ.*) KEHRI SINGH *v.* THERPAL. **48 All. 104 = 23 A. L. J. 965 = 92 I. C. 282 = A. I. R. 1926 All. 113.**

S. 177—Appeal.

———*C. P. Code, S.* 144—*Application for restitution or restoration of possession—Order passed by Revenue Court under S.* 144, *C P. Code—No appeal lies to Civil Court.*

Under the whole scheme of the Tenancy Act a distinction is made between, an order and a "decree" and the word "decree" in Section 177 of that Act means a decree in a suit and does not include an order which, if the definition of a decree be applied to the case, might be deemed to be a decree under the Code of Civil Procedure. An appeal lies from a decree in a suit, but an order passed by an Assistant Collector of the first class is not a decree and is not open to appeal. In a suit under the Tenancy Act the Court of first instance, is the Revenue Court which hears the suit, and not the Court of appeal. For recovering possession on the ground of reversal of decree the remedy is to apply under Section 144 of the Code of Civil Procedure, and this application for restitution is to be made to the Court of first instance under the provisions of the section. No separate suit will lie therefor. (*Mears, C. J. and Banerji, J.*) KASHI PRASAD *v.* BALBHADDAR SINGH. **44 All. 283 = 65 I.C. 798 = 20 A.L.J. 133 = A.I.R. 1922 All. 71.**

S. 177—Appeal.

———*Claim for Rs.* 70 *or more if plaintiff is found entitled to it—Decree for Rs.* 158—*Value of suit for appeal is Rs.* 158—*Suit valuation.*

In a suit under section 165 of the Tenancy Act the plaintiff claimed Rs. 70 and prayed that if anything more was due to her she should receive it. A decree for Rs. 158-5-1 was passed in her favour. In appeal by the defendant, the plea of the plaintiff was that no appeal lay under section 177, Tenancy Act, as the value of the suit was Rs. 70 only.

Held that under the peculiar conditions of the Tenancy Act, it is obvious that in a case of this kind the valuation should be taken to be the value as found by the Court and therefore an appeal would lie. (*Stuart J.*) MT. UMMER KHAIR *v.* AZIZ ALI. **80 I. C. 183 = A.I.R. 1922 All. 47.**

S. 177 (f)—Applicability.

Where in the written statement filed by the defendants the jurisdiction of the Revenue Court to entertain the suit was challenged but this challenge was withdrawn when the suit proceeded to trial with the result that there was no issue framed by the Assistant Collector on the question of jurisdiction and no such question was decided.

Held, that Cl. (*f*) had no application. (*Iqbal Ahmad, J.*) MAHOMED SHABBIR *v.* ZAIN-UL-ABDIN. **8 L.R.A. Rev. 74 = 102 I.C. 184 = A.I.R. 1927 All. 564.**

S. 177 (f)—Jurisdiction.

———*Plea of jurisdiction must be based on facts as alleged in the plaint.*

A plea of jurisdiction to come within the provisions of S. 177 (*f*), must be a plea to the effect that, assuming the allegations made in the plaint to be true, the Revenue Court has no jurisdiction. If the defendant alleges that the true facts are different from those stated in the plaint, and that on the facts alleged by himself, the case is not cognizable by the Revenue Court, this is not a plea to which S. 177 (*f*) applies. 42 All. 91, Foll. (*Daniels and King, JJ.*) DEO NANDAN SINGH *v.* HAR SHANKAR PRASAD SHUKUL. **96 I. C. 172 (All.) = 7 L. R. All. 382.**

S. 177—Jurisdiction.

It is the business of the trial Court to decide whether the plea is *bona fide* or not. If, however, the Court chooses to treat it seriously it is not for the Court of appeal to treat it as *mala fide* when nobody in the trial Court or in the appellate Court ever suggested it to be so. (*Walsh, Ag. C. J. and Ryves, J.*) KHUB SINGH *v.* MOHAN SINGH. **5 L.R.A. Rev. 183 = 83 I. C. 251 = A. I. R. 1924 All. 476.**

S. 177 (f) and 95—Jurisdiction.

———*Jurisdiction—Suit under S.* 95—*Defendant denying plaintiff's being a tenant and objecting that plaint does not refer to jurisdiction—No plea of jurisdiction is raised.*

In a suit under S. 95, the mere fact that the defendant denies that the plaintiff is a tenant and pleads that as the plaint does not contain any allegation in regard to the jurisdiction of the Court, the plaint is defective, does not involve the raising of a plea of jurisdiction. Although on such pleading, the Court frames an issue as to the maintainability of the suit and the cognizability thereof by the Court and finds on such issue that the suit is maintainable under S. 95 and cognizable by the Court, yet no plea of jurisdiction can be held to have been decided. (*Rafique and Ryves, JJ.*) RATAN SINGH *v.* PRAN SUKH. **43 All. 368 = 61 I.C 44 = 19 A. L. J. 120 = A. I. R. 1921 All 190.**

———**S. 177**—*Jurisdiction of District Judge—Question of proprietary title, a matter in issue when appeal filed—Subsequent abandonment of the plea by respondent rendering decision on it unnecessary—District Judge's jurisdiction to hear appeal is not barred—Practice—Subsequent events.*

If a controversy relating to proprietary right exists at the time when the appeal is filed, subsequent abandonment of the plea by the respondent before the District Judge, which makes it unnecessary for the question of proprietary right being decided, does not deprive the District Judge of jurisdiction to hear the appeal. (*Niamatulla J.*) BHULLAN *v.* DASRATH PANDEY. **10 L. R. A. Rev 134 = 113 I. C. 748 = A. I. R. 1929 All. 67.**

S. 177 (e)—Proprietary Tittle.

———*Question of proprietary title in issue in the Court of first instance as well as in appeal—Appeal lies to the District Judge.*

In all suits in which a question of proprietary title has been in issue in the Court of first instance and is a matter in issue in appeal the appeal lies to the District Judge. 33 All. 553, Ref. (*Lindsay, J.*) RAHMAT *v.* GANESHI LAL. **9 L. R. A. Rev. 61 = 108 I. C 733 = A. I. R. 1928 All. 264.**

———**S. 177**—*Proprietary title—Landlord claiming ejectment on the ground that tenant permitted third person to build on tenancy plot—Defendant asserting that plot built upon was not included in tenancy—No question of proprietary title arises.*

Where in a suit for ejectment on the ground that the tenants had permitted a third person to build a house on the tenancy land, it is pleaded that the plaintiff has no concern with the plot on which the house is built, no question of proprietary title arises in respect of the plot from which tenants are sought to be ejected. (*Iqbal Ahmad, J.*) MAHOMED SHABBIR *v.* ZAIN-UL-ABDIN. **8 L. R. A. Rev. 74 = 102 I. C. 184 = A. I. R. 1927 All. 564.**

———**S. 177**—*Proprietary title—Plea by tenant that he holds the land as* Khudkasht. *Raises question of proprietary title.*

Plaintiff brought a suit for ejectment against the defendants on the allegation that the defendants were his sub-tenants. One of the defendants pleaded that he was not a sub-tenant at all but that he held possession of the land as his *Khudkasht* being himself a proprietor.

Held, the plea raised a question of proprietary title. (*Sulaiman and Mukerjee, JJ.*) GHURIYA *v.* BANESWAR. **5 L. R. A. Rev. 251 = 83 I. C. 202 = A. I. R. 1925 All. 30.**

———**S. 177 (e)**—*Proprietary Title—Mortgagee right, question as to, is one of proprietary title.*

The question whether the defendants are mortgagees of the proprietary right or have no right at all in the land in dispute amounts to a question of proprietary right within S. 177 (*e*). 35 All. 157, Foll. (*Daniels, J.*) DHIRJA *v.* MITHAN LAL. **74 I. C. 914 = A. I. R. 1923 All. 562.**

———**Ss. 177 (e) and 34**—*Proprietary title—Suit under S. 34—Defendant claiming to be mortgagee—Question of proprietary title is involved.*

The plaintiff brought the suit under S. 34 alleging that the defendant was occupying the land without his permission. The defendant pleaded that he was a mortgagee of the proprietary right.

Held, that a question of proprietary right was involved within S. 177 (*e*). 35 All. 157 Foll. (*Daniels, J.*) NANJADIK RAI *v.* RAM JATAN RAI. **5 L.R.A. Rev. 14 = 73 I. C. 584 = A. I. R. 1923 All. 558.**

S. 177—Proprietary Title.

———*Ejectment—Plaintiff alleging defendants to be sub-tenants under Plaintiff—Defendants pleading co-tenancy—Question is not one of proprietary title. 30 All. 133, Fol. (1906) A. W. N. 247 held as overruled.*

In a suit for ejectment by plaintiffs alleging themselves to be the chief tenants and the defendants their sub-tenants, where the defendants plead that they are co-tenants with plaintiffs, the question is not one of proprietary title. 30 All. 133, Foll. (1906) A.W.N. 247 held overruled. (*Tudball and Sulaiman, JJ.*) DAULATIA *v.* HAR GOBIND. **43 All. 18 = A. I. R. 1921 All. 290 (2).**

Ss. 177 and 167—Revision.

———*Order of District Judge under S. 177—Revision lies to High Court.*

There is nothing in S. 167 precluding the hearing by the High Court under S. 115 of the C. P. Code of a revision of an order passed by a District Judge under S. 177 of the Tenancy Act, and it is reasonable that the High Court should have such power and to hold that it has such power is in accord with S. 193 of the Tenancy Act. (*Sulaiman and Boys, JJ.*) KEHRI SINGH *v.* THIRPAL. **48 All. 104 = 23 A. L. J. 965 = 92 I. C. 282 = A. I. R. 1926 All. 113.**

S. 177 (e)—Scope.

———Even where both parties do not claim proprietary title over a plot of land and are not at issue as to who is the proprietor, the plaintiff or the defendant, the Civil Court's jurisdiction will arise as soon as the defendant claims to be in possession of the land as proprietor, *i.e.*, as *khudkasht* holder and an appeal lies from the decision of the Assistant Collector to the District Judge. 36 All. 183 (F.B.), Foll. (*Dalal, J.*) MT. SHEOKALI *v.* GAURI RAI. **114 I. C. 911 = 9 L. R. A. Rev. 183.**

S. 177 (f)—" Question of jurisdiction ".

———*There must be a plea that on the plaint allegations Revenue Court has no jurisdiction.*

In order to make a question of jurisdiction, which can be decided within the meaning of section 177 (*f*), there must be a plea by the defendant that the suit as brought is not cognizable by a Revenue Court. In other words there must be a plea that assuming the allegations made in the plaint to be true, a Revenue Court has no jurisdiction to entertain the plaint. (*Stuart, J.*) POHAP SINGH *v.* MAHAN SINGH. **70 I. C. 578 = A. I. R. 1922 All. 424 (2).**

S. 177 with Sch. 4 (c)—Scope.

———The words "in all suits" in Section 177 would comprise suits of any description in whatever group in Sch. 4 they may be. (*Lindsay, J.*) LALTA PRASAD *v.* KHARGA. **21 A. L. J. 189 = 71 I. C. 773 = 45 All. 336 = 4 L. R. A. Rev. 84 = A. I. R. 1923 All. 313.**

Ss. 179 and 95—Appeal.

———*Sch. IV, Group (c)—Suit under S. 95—Appeal from the decree of First Class Assistant Collector lies to Commissioner.*

A suit under S. 95 falls in group (*c*) of the 4th Schedule and therefore an appeal from the decree of an

Assistant Collector of the First Class, under S. 179 lies to the Commissioner and not to the District Judge. (*Banerji, J.*) RAM BAHADUR SINGH *v.* MUNESHAR CHAMAR. **97 I. C. 241 = A. I. R. 1926 All. 725 (1).**

S. 182—Appeal.

——*A third appeal does not lie to High Court.*

S. 182 only allows a second appeal to the High Court and not a third appeal and so an appeal does not lie from an order passed on an appeal from an appellate order. (*Sulaiman, J.*) KALKA PRASAD *v.* PANNA, **92 I. C. 3 = A. I. R. 1926 All. 233.**

S. 193 (i)—Execution of decree.

——*Suit for profits—Plaintiff assigning his interest in land to one of the heirs—Assignee not brought on record and decree passed in favour of original plaintiff—On death of plaintiff, assignee, as an heir is entitled to execute the decree.*

Section 193 (*i*) does not provide that notwithstanding the vesting of the assignor's interest in the land, to which the decree relates, in the assignee, the latter is not entitled to execute the decree, unless and until mutation of names has been effected in his favour. Therefore, where during the pendency of a suit for profits the plaintiff assigns his rights to another who is an heir of the plaintiff, but the latter is not brought on record and a decree is passed in favour of the original plaintiff, then on the death of the plaintiff, the assignee is entitled to execute the decree as an heir of the decree-holder. (*Iqbal Ahmed, J.*) GOLAB DEVI *v.* MD. ABDUL GHAFOOR. **8 L. R. A. Rev. 113 = 101 I. C. 580 = A. I. R. 1927 All. 492.**

S. 193 (1)—Mahal.

——*Any isolated plot in a mahal is not a share of the mahal.*

Any isolated plot of land within the ambit of a mahal may be a part of a mahal, but it cannot be a share in a mahal under S. 193. (*Mukerji, J.*) NEHAL SINGH *v.* JAGANNATH DAS. **88 I. C. 613 = A. I. R. 1925 All. 743.**

S. 193—Sale.

——*Sale which ought to be held by Collector held by the Assistant Collector—Sale is not vitiated.*

Where in the execution of a decree a property which ought to have been sold by Collector, is sold by an Assistant Collector, the irregularity does not vitiate the sale. (*Mukerji, J.*) NEHAL SINGH *v.* JAGANNATH DAS. **88 I. C. 613 = A. I. R. 1925 All. 743.**

S. 193—Scope.

——*Provincial Insolvency Act (III of 1907), Ss. 56 and 16 (2)—Proceedings under Agra Tenancy Act—Provincial Insolvency Act (1907) does not apply—Suit for rent against tenant who is an undischarged bankrupt can be maintained.*

By S. 193 of the Agra Tenancy Act, Ch. 20 of C. P. Code of 1882 is made inapplicable to proceedings under the Tenancy Act. By S. 56 of the Provincial Insolvency Act, 1907, Ch. 20 of C. P. Code, 1882, was repealed and it was enacted that references to Ch. 20 should be construed as applying to Provincial Insolvency Act of 1907. Hence Prov. Insolvency Act of 1907 does not apply to proceedings under Agra Tenancy Act of 1901. Hence S. 16 (2) of Act III of 1907 does not bar a suit for arrears of rent against a tenant of occupancy holding, although the tenant is an undischarged bankrupt, 34 All. 121 Overruled. (*Tudball, Rafiq and Ryves, JJ.*) KALKA DAS *v.* GAJJU SINGH. **62 I. C. 897 = 43 All. 510 = 19 A. L. J 439 = A. I. R. 1921 All. 13.**

S. 193 (g)—Set off.

——*Separate suit is the only remedy though resulting in a circuity of suits.*

Where the plaintiff claims rent owing to failure of the defendants to pay it and the defendants claim money paid to save their crops from attachment owing to the plaintiff's failure to secure them peaceful possession, the latter claim is clearly a set-off against the former and falls under sub S. (*g*). S. 193 and their only remedy is a separate suit against the plaintiff though resulting in a circuity of suits. A. I. R. 1925 All. 824, Foll. (*Ashworth, J.*) KOKA RAM *v.* SALIG. **9 L. R. A. Rev. 186 = 114 I. C. 900 = A. I. R. 1928 All. 536.**

S. 193 (g)—Set off.

——*Sub-tenant of ex-proprietary tenant paying off rent decree against ex-proprietary tenant—Sub-tenant cannot plead payment as set off in suit for rent against himself by ex-proprietary tenant.*

Under S. 193, Cl. (*g*) only an unsatisfied decree held by a defendant can be pleaded by way of a set-off. Hence where a sub-tenant under an ex-proprietary tenant paid off a rent decree against the ex-proprietary tenant, he (the sub-tenant) cannot plead the payment as a set off in a suit against himself for rent by the ex-proprietary tenant. (*Mukerji, J.*) LALA BRIJ LAL *v.* CHOUDHURI MUHAMMAD. **87 I. C. 713 = A. I. R. 1925 All. 824.**

S. 193 (g)—Set off.

——*In a suit under the Act defendant's unsatisfied decree against plaintiff's vendor can not be set off.*

In a suit under the Agra Tenancy Act the defendant cannot claim a set off in respect of a sum due on an unsatisfied decree held by him against the plaintiff's vendor. (*Lindsay, Sulaiman and Kanhaiyalal, JJ.*) GOVIND RAM *v.* KUNJ BEHARI. **46 All. 398 = 22 A. L. J. 217 = 5 L. R. A. Rev. 65 = A. I. R. 1924 All. 341 = 83 I. C. 403 = (349) (F. B.).**

S. 193 (k)—Standing Timber.

——*Fruit trees are not "standing timber."*

Fruit trees are not included in the term " timber " or " standing timber " and therefore these trees cannot be sold by an officer who has only power to sell moveable property. (*Walsh, A. C. J. and Bannerji, J.*) SURJU SINGH *v.* BIJAR BAHADUR SINGH. **49 All. 330 = 25 A. L. J. 199 = 101 I. C. 287 = 8 L. R. A. Rev. 135 = A. I. R. 1927 All. 254.**

S. 193 (a) and 167—Suit for profits.

——*Suit for profits against lambardar by transferee of co-sharer—Insolvency of co-sharer can be pleaded before transfer.*

On a suit to recover arrears of profits from the lambardar in the Revenue Court lambardar can question title in the co-sharer's transferee on the ground that his transferor had, at the date of the transfer, ceased to have any title to the profits by reason of his having been declared an insolvent.

Per *Lindsay, J.*—A plea based upon S. 28 of the Provincial Insolvency Act raises a question of substantive law and not merely of procedure (Contra *Sulaiman, J.*)

Per *Kanhaiya Lal, J.*—A co-sharer whose name continues to be recorded in the revenue papers after his adjudication as an insolvent has a right to bring a suit to recover arrears of profits and can make a valid transfer of that right. By reason of S. 167 the profits recoverable by a co-sharer are not debts provable under the Insolvency Act and no Court other than a Revenue Court can take cognizance of a suit to recover the same. (*Lindsay, Sulaiman and Kanhaiya Lal, JJ.*) GOVIND RAM *v.* KUNJ BEHARI. **46 All. 398 = 83 I. C. 403 = 22 A. L. J. 217 = 5 L. R. A. Rev. 65 = A. I. R. 1924 All. 341 (F. B.).**

———**S. 194**—*One co-sharer alone suing to recover arrears of whole rent and joining other co-sharers after period of limitation—Suit though bad at inception becomes flawless on joining other co-sharers so far as regards plaintiff's share and he is entitled to recover his share—Limitation Act, S.* 22.

One of the co-sharers cannot sue to recover the arrears of the whole rent even though the right to recover it is conceded to him by the other co-sharers. But if one co-sharer alone sues to recover the whole rent and joins the other co-sharers after period of limitation prescribed for a suit to recover the arrears of rent, though the suit is bad at its inception, it becomes absolutely flawless on other co-sharers being joined as parties so far as the plaintiff's right to recover his own share of rent is concerned and he is entitled to recover his share of rent. (*Niamatullah, J.*) CHAUDHRI JAHANGIRA *v.* SARUP. **123 I. C. 828 = A. I. R. 1930 All. 309 (2).**

S. 194—Co-sharer—rights of.

———*Tenant purchasing proprietary rights gets rights of co-sharer.*

A tenant cannot deny the title of his lessor during the subsistence of the tenancy. But he can purchase a proprietary share in the mahal in which he is a tenant and consequently is entitled to claim the right given to co-sharers by S. 194. The *maxim nemo potest esse tenens et dominus* has no application here. (*Kanhaiyalal and Ashworth, JJ.*) RAM AUTAR *v.* KASHI. **95 I. C. 48 = A. I. R. 1926 All. 544.**

S. 194—Co-sharer—rights of.

———*Co-sharers not agreeing to evict a tenant—Tenant, even if he is co-sharer himsef, is entitled to stay on.*

If two co-sharers are not agreed as to the eviction of a tenant then the tenant must stay on, and it does not make much difference that the tenant happens to be one of the co-sharers themselves. (*Kanhaiyalal and Ashworth, JJ.*) RAM AUTAR *v.* KASHI. **95 I. C. 48 = A. I. R. 1926 All. 544.**

S. 194—Co-sharer—rights of.

———*Lambardar has power to permit tenants to build on land belonging to joint patti.*

A *lambardar* may give permission to a tenant to erect a *kuchcha* house on land belonging to the joint *patti*. Where there were no less than 30 co-sharers in the *patti*.

Held unless such authority is recognised in the *lambardar* it would be practically impossible for a valid permission ever to be given at all. (*Daniels, J.*) ABDUR RAOOF *v.* BACHCHOO. **73 I. C. 495 = 5 L. R. A. Rev. 33 = A. I. R. 1923 All. 532 (1.)**

S. 194—Joint Possession.

———*One co-sharer taking possession of part of joint land and leasing it perpetually without the consent of the other co-sharers—The other co-sharers can claim joint possession without getting the lease cancelled.*

Where a co-sharer took some of the joint land in his cultivatory possession and cultivated it for two years as his khudkasht and subsequently executed a perpetual lease of the land without the consent of the other co-sharers.

Held: that the tenant was a tenant of all the co-sharers in the mahal and it was not open to any one of the co-sharers to execute a lease of the holding on his own authority and without the consent of his other co-sharers. (*King, J.*) KUNWAR SINGH *v.* ABDUR ALI KHAN. **9 L. R. A. Rev. 223 = 114 I. C. 891 = A. I. R. 1928 All. 525.**

S. 194—Procedure.

———*Sir and khudkhast in exclusive possession of a co-sharer and let out by him—Suit to eject the sub-tenant—Other co-sharers are not necessary parties.*

Where certain plots of land have been the exclusive sir and khudkhast of a co-sharer for more than twelve years and are let out to a sub-tenant who is the exclusive co-tenant of such co-sharer, the latter is by himself entitled to eject the sub-tenant without impleading persons who though co-sharers in the khewat of the mahal have no interest in the particular plots. (*Sulaiman, J*). DUNGAR *v.* JAHINGIR. **87 I. C. 698 = A. I. R. 1925 All. 775.**

S. 194—Procedure.

———*Suit for ejectment of non-occupancy tenants by one Co-sharer*—Phatbandi *in existence—Suit lies, without making all co-sharers parties.*

When there are many co-sharers in the village an informal partition between the co-sharers is the only means by which the rent can be realised and the revenue paid and when such a partition or *phatbandi* is in existence in the village and is formally recorded in the wajib-ul-arz; and it has been in force for over forty years, the co-sharer in whose share particular plots fall is perfectly entitled to collect the rents and eject the tenants of those plots, and the land is not removed from his share merely because particular tenant happens to die without heirs. (*Daniels, J.*) JOKHU RAI *v.* BHABHUTI RAI. **77 I. C. 760 = A. I. R. 1923 All. 559.**

S. 194—Suit for rent.

———*Suit by one co-sharer for whole rent is not maintainable.*

Section 194 precludes a suit by one co-sharer except in two cases. One case is where the co-sharer sues as an agent appointed on behalf of all the co-sharers, the other case is where there is a local custom or special contract entitling the co-sharer to receive separately his share of the rent payable by a tenant. In no other case can a co-sharer sue for whole rent. (*Walsh and Ashworth, JJ.*) MANOHAR LAL *v.* BALDEO SINGH. **49 All. 918 = 25 A. L. J. 582 = 103 I. C. 379 = 8 L.R.A. Rev. 225 = A. I. R. 1927 All. 505.**

S. 194—Suit for rent.

———*Vendor of a share becoming ex proprietary tenant is a tenant of whole body of co-sharers—Some co-sharers cannot alone sue for rent of such holding in absence of special contract.*

The vendor of share in the village who becomes an ex-proprietary tenant in respect of his *sir* land is a tenant of the whole body of co-sharers and not merely of his vendees, and under S. 194, therefore, some of the co sharers are not entitled to sue without joining the other co-sharers in the absence of a local custom or special contract entitling them to collect the rent alone from such holding: 35 All. 27, rel. on. (*Ashworth, J.*) RAJA RAM *v.* NARAIN DAS. **99 I. C. 528 = 8 L. R. A. Rev. 77 = A. I. R 1927 All. 206.**

S. 194—Suit for rent.

———*Lambardar is prima facie entitled to recover rent on behalf of all co-sharers—If not so entitled, he cannot recover his share alone—Co-sharers.*

In the absence of a clear indication to the contrary the lambardar is the person who would be entitled to recover the rent: 42 All. 414, foll. Where the record-of rights gives the lambardar a right to recover the rent, the lambardar is the appointed agent of the co-sharers within the meaning of S. 194. If the lambardar is not entitled to bring a suit for arrears of rent he cannot sue to recover only his share of it. (*Mukerji, J.*) MUHAMMAD ABDULLAH *v.* KUNDAN. **87 I. C. 197 = A. I. R. 1925 All. 817.**

S. 194 (1)—Suit for rent.

———*Lambardar suing for rent or ejectment is presumed to act as co-sharers' agent—But presumption is re-buttable.*

If a lambardar sues a tenant either for the recovery of rent or for ejection, the presumption would be that he is appointed as agent to act on behalf of all the co-sharers. But it would be open to the tenant to prove that in that particular mahal the arrangement between the co-sharers was such that lambardar cannot be treated as an agent of all the co-sharers. 36 All. 441, Dist. 18 A. L. J. 435 Foll. (*Dalal, J.*) SYED SIDDIQ ALI *v.* CHANDA. **80 I. C. 732 = A. I. R. 1925 All 49.**

———**Ss. 196 and 197**—*Ejectment suit—Revenue Courts' decision is binding.*

Where the suit was based on the ground that the defendants had incurred forfeiture because of their denial of the plaintiffs' title in the Revenue Courts. *Held*, this is not one of the grounds on which a tenant can be ejected under the provisions of the Tenancy Act. The suit was bad in its inception. No suit like this would lie at all in any Court, Revenue or Civil. The decision of the Revenue Court in the suit for arrears of rent was binding on the Civil Courts. Ss. 196 and 197 have no application to suits which do not lie at all but they only contemplate suits which might have been brought in one Court but have been by mistake or otherwise brought in another. *Narain Singh* v. *Govindram*, 33 All. 523 followed. (*Gokul Prasad, J.*) JANKI *v.* DEBI SHANKAR. **69 I. C. 799 = A. I. R. 1922 All. 274.**

Ss. 196 and 197—Jurisdiction.

———*Suit by one co-sharer for mesne profits against other co-sharer—Plaintiff in present possession—Suit relating to previous years—Ss.* 196 *and* 197 *apply and Civil Court can try.*

A co-sharer sued the other co-sharers in the Civil Court for mesne profits, on the allegation that she was in present possession but that the defendants had contrived to keep her out of possession for the previous years.

Held, that this was just one of those cases on the border line of the jurisdiction of the Civil and Revenue Courts to which the provisions of Ss. 196 and 197 were intended to apply, 3 A. L. J. 767, Dist. (*Rafiq and Piggott, JJ.*) SAID-UN-NISSA BIBI *v.* FIDA HUSAIN. **19 A. L. J. 194 = 61 I. C. 385 = A. I. R. 1921 All. 112.**

Ss. 196 and 197—Scope.

———*Sections should be read together—Both deal with institution of suit in wrong Court.*

Ss. 196 and 197 must be read together. They both deal with a case in which an objection is taken in the appellate Court that the suit was wrongly instituted in the Court below instead of in a civil or revenue Court as the case may be. S. 196 tells the appellate Court what to do if the objection was not raised in the trial Court. S. 197 tells it what to do if the objection had been raised. Both sections assume that the trial Court has entertained the suit and disposed of it on the merits. It is only in such a case that the Court could remand the suit or frame issues or direct additional evidence to be taken as contemplated by sub-S. (2). Where the appeal is against an order returning the plaint the appellate Court, if it agrees with the trial Court, merely affirms its order and if it differs from the trial Court it

directs such Court to restore the case to the file and dispose of it on the merits. (*Sulaiman and Daniels, JJ.*) BISHESHAR PRASAD *v.* RAGHUBIR. **48 All. 168 = 24 A. L. J. 83 = 90 I. C. 353 = A. I. R. 1926 All. 58.**

Ss. 196 and 197—Jurisdiction.

———*Objection to jurisdiction taken in the trial Court—Appellate Court having all the materials necessary for decision before it—Appellate Court should dispose of the case as if it was filed in the proper Court although trial Court has not decided the case on the merits.*

There is no justification for the proposition that both Ss. 196 and 197 assume that the trial Court has entertained the suit and disposed of it on the merits.

If in a suit brought in the Revenue Court which ought to have been brought in the civil Court, objection to jurisdiction is taken in the Court of first instance and the appellate Court has before it all the materials necessary for the determination of the suit, it shall dispose of the appeal as if the suit had been instituted in the right Court. A. I. R. 1926 All. 58, not Foll. (*Walsh, J.*) RAMSUNDER TIWARI *v.* RAM KHELAWAN TIWARI. **96 I. C. 789 = A. I. R. 1926 All. 708.**

S. 197—Jurisdiction.

———*Land situated in Cantonments area—Suit for ejectment from—Rent Court has no jurisdiction—Jurisdiction.*

The rent Court has no jurisdiction in the matter where the land in dispute is situated in Cantonments which are under the direct administration of the Government of India. The Tenancy Act does not apply in the case. But where the owner of the land asserts proprietary title, the appeal necessarily lies to the District Judge. S. 197 of the Tenancy Act has thus application and as all the material necessary for determination was before the High Court, it was justified in disposing of the appeal as if the suit had been in fact instituted in a Civil Court. Therefore the suit is taken as an ordinary suit for ejectment. (*Stuart, J.*) SECY. OF STATE *v.* MULLA. **66 I. C. 582 = A. I. R. 1922 All. 57.**

S. 197—Procedure.

———*High Court can in second appeal treat a suit wrongly brought in a revenue Court as if brought in a Civil Court.*

A District Judge should treat a suit wrongly brought in a revenue Court as if it had been brought in the civil Court and it is open to the High Court in second appeal to treat the suit in the same manner. (*Ashworth, J.*) SHEORAJ SINGH *v.* KUNJ BEHARI. **8 L. R. A. Rev. 297 = 105 I. C. 878 = A. I. R. 1927 All. 720.**

S. 198—"Landholder and tenant".

———*Landholder and tenant does not include a tenant and sub-tenant—No question of proprietary title can arise between a tenant and his sub-tenant.*

Per *Dalal, J.*—Landholder and tenant in S. 198 do not mean tenant and sub-tenant, and, therefore a dispute between a tenant and a sub-tenant raises no question of proprietary title. Consequently in a case where an occupancy tenant sues to eject his sub-tenant, and the latter alleges to be a tenant directly from the landlord, appeal lies to a revenue Court from the decision of Assistant Collector.

Per *Boys, J.*—There is nothing in the heading preceding, S. 198 or in S. 198 (1) to indicate that in a case coming within S. 198 (1) a question of a proprietary title is necessarily in issue. Rather are all the indications to the contrary. The answer to the question whether a matter of proprietary title is in issue cannot be based on any conclusion that the case is or is not within S. 198, but

must be answered independently of S. 198 : 16 A. L. J. 239 and *Tulhi* v. *Ramraj*, (1922) 6 Unreported Decisions of the Board H. C. S. 22, Dissented. 30 All. 133 ; 58 I. C. 760 and 43 All. 18, Foll. (*Dalal and Boys, JJ.*) BALDEO KURMI *v.* KASHI CHAMAR
24 A. L. J. 337 = 92 I. C. 995 = A.I.R. 1926 All. 312.

S. 198—Principles.

Actual payment in good faith is necessary for applying S. 198. Payment subsequent to suit is not enough. 33 All. 61, Foll. (*Ryves and Gokul Prasad, JJ.*) GEONI *v.* KALLOO. **60 I. C. 837 = 43 All. 448 = 19 A. L. J. 298 = A. I. R. 1921 All. 105 (1).**

S. 198 (2)—Res judicata.

——*C. P. Code, S. 11—Previous suit in revenue Court by malguzar to eject tenant—Tenant claiming possession as servant of a third person who was added as defendant—State of land decided but no issue as to status (grove-holder) of third person framed—Ejectment decree passed against tenant—Subsequent suit in civil Court by third person claiming land and grove—Decision in revenue Court does not amount to* res judicata, *nor does it act as estoppel against third person.*

U, the malguzar had brought a suit in revenue Court for ejecting his tenant *M. S.* was added as a defendant on his own application. *M* resisted the suit on the ground that he was looking after the land on behalf of *S*, who had the right of a grove holder. No issue was framed as to whether *S* had the rights of a grove-holder It was found that the land was neither agricultural land nor a grove, and an ejectment decree was passed against *M. S*, then brought a suit in civil Court against *U* for possession of the grove.

Held : that the finding as to state of the land in the previous suit could not be *res judicata* in the subsequent suit (whether *S* had rights of a grove-holder at the time of his suit).

Held further, that the revenue Court not being competent to try the subsequent suit, the finding of the revenue Court could not amount to *res judicata*.

Held further, that S would not be barred by estoppel as the decree granted by revenue Court was merely to eject *M* and a decree in favour of *S* would not in any way affect that decree. (*Bennet, J.*) SHRI DHAR *v.* UDAIBIR SINGH JUDEO. **115 I. C. 454 = 9 L. R. A. Rev. 289 = 12 R. D. 703 = A. I. R. 1929 All. 17.**

S. 198—Res judicata.

——*C.P.C., S. 11—Previous decision--Some co-sharers obtaining exparte decree for arrears—They again suing for subsequent years—Plea of payment to lambardars—Previous decision operates as* res judicata *as to plaintiff's right to sue for rent—Plea of payment disallowed.*

Some of the co-sharers in a mahal in a suit to recover the arrears of rent obtained an ex-parte decree. Some years later they instituted a suit again for recovery of rent of the same holding for subsequent years. The defence was that the lambardars had all along been collecting the rents in respect of the patti in which the holding was situated and that the rent had been paid to them in good faith.

Held, that the decision in the previous suit operated as *res judicata* in respect of the question whether for the years in respect of which that suit was brought the plaintiffs were entitled alone to sue for the rent of the holding, and that they were bound to regard the plaintiffs as their landlords by reason of the decree in the previous suit and that therefore they were not entitled to invoke any presumption that the lambardars are entitled to collect rents in view of the decision in the previous suit.

(*Ashworth, J.*) SARDAR SINGH *v.* MT. BAL KUER.
98 I. C. 981 = A. I. R. 1927 All. 145.

S. 198 (2)—Res judicata.

——*C. P. Code, S. 11—Rent suit—Tenant asserting landlordship of another and payment of rent to him—Latter can be impleaded as party—But question of title decided between him and plaintiff is not* res judicata *between them.*

In a suit filed by a person against another who denies that the relation of landlord and tenant existed between him and the plaintiff, it is open to the Court to implead the person to whom the payment of rent is alleged to have been made by the defendant. But if any question of title is decided between the plaintiff and a third party so added, that decision does not operate as conclusive, and a suit by the defeated party to establish his title can lie in the Civil Court. (*Kanhaiyalal, J.*) SATMATALI *v.* GUJ KUMARCHAND. **85 I. C. 302 = A. I. R. 1925 All. 574.**

S. 198—Suit for rent.

——*Protection offered to defendant by the section, is available only when the relation of landholder and tenant is non-existing between them and the defendant has already paid the rent claimed in good faith to some third person.*

In suits for arrears of rent, the protection afforded by S. 198, Tenancy Act, is available to a defendant only in those cases in which the relation of land holder and tenant does not subsist between the parties and the defendant has in good faith already paid the rent to some third person, 33 All. 61 and A.I.R. 1921 All. 105, Foll. (*Iqbal Ahmad, J.*) SHEO BALAK RAM. *v.* MOHAN LAL. **8 L. R.A. Rev. 94 = 99 I. C. 534 = A. I. R. 1927 All. 745.**

S. 198—Suit for rent.

——*C. P. Code, S. 11—Suit by landlord for rent—Payment to third person pleaded—Third person made party—Decision against third party does not bar civil suit by third party.*

Where in a suit by the landlord for arrears of rent the tenant pleads payment in good faith to a third person who is therefore made a party to the suit and the suit is decided against him, *Held*, that such a decision does not preclude the latter from establishing his title in a civil Court, as the previous suit does not come within the purview of those rulings of this Court which held that a suit will not lie in a Civil Court if its object is to avoid a decision arrived at by a Revenue Court in a matter in which it had exclusive jurisdiction. (*Ryves and Gokul Prasad, JJ.*) HABIB KHAN *v.* FIDA HUSAIN KHAN. **71 I. C. 1017 = 4 L. R. A. Rev. 138 = A. I. R. 1924 All. 270.**

S. 199—Bar to Suit.

——*Suit filed within 3 months of revenue Court's order withdrawn with permission to bring fresh suit—Second suit filed within 4 days is not barred.*

Where a previous suit filed within 3 months of the order of the revenue Court was allowed to be withdrawn with permission to bring a fresh suit and the second suit was filed within 4 days of the date of withdrawal.

Held, that the second suit was in continuation of the first suit and was not barred under S. 199. (*Daniels, J.*) DARBARI SINGH *v.* RAM MURAT SINGH. **98 I. C. 516 = 8 L. R. A. Rev. 5 = A. I. R. 1927 All. 98.**

S. 199 (b)—Bar to Suit.

——*C. P. Code, S. 11—Competent Court—Decision of Assistant Collector under, bars subsequent suit.*

A decision of Assistant Collector acting under S. 199 (*b*), Agra Tenancy Act, bars a subsequent suit to determine title between the same parties. (6 A. L. J. 917, Rel.) (*Daniels, J.*) AMIN UDDIN *v.* ABDULSHAKOOR. **73 I. C. 460 = 5 L. R. A. Rev. 26 = A. I. R. 1923 All. 556.**

S. 199 (1) (a)—Ejectment suit.

The mere fact of the institution of a declaratory suit in the civil Court cannot be a compliance with the direction of the revenue Court under S. 199 (1) (*a*) of the Tenancy Act, unless all the plaintiffs to the ejectment suit are made defendants in the civil suit. (*Iqbal Ahmad, J.*) MT. DHIRAJI *v.* MT. CHANDRA KALI. **100 I. C. 520 = 8 L. R. A. Rev. 108 = A. I. R. 1927 All. 398.**

S. 199—Election.

———*Option exercised cannot be revoked.*

Once a Court has selected between the options given to it in S. 199, the jurisdiction is exhausted and it cannot change its mind subsequently and proceed to adopt the other course which was open to it at the beginning. (*Dalal, J.*) SHEO PRASAD *v.* DODI. **116 I. C. 789 = 10 L. R. A. Rev. 189 = A. I. R. 1929 All. 164.**

S. 199—Jurisdiction.

———*Civil Court has power to give declaration as to plaintiff's rights though they are less than that of a proprietor.*

In proceedings sent to the Civil Court in accordance with the provisions of S. 199 of the Tenancy Act, the Civil Court can give a declaration regarding the right of the plaintiff, who has not succeeded in proving himself to be the proprietor of the land but was found to be entitled to the trees. The following declaration, namely that it be decreed that the plaintiff though not owner of the land is owner of the trees on the plots in suit could be made. (L. P. A. All. No. 44 of 1916, Foll (*Lindsay and Daniels, JJ.*) (RAJA) LALTA PRASAD *v.* RAM BAHADUR. **74 I. C. 349 = 21 A. L. J. 434 = 4 L. R. A. Rev. 159 = A. I. R. 1923 All. 540**

S. 199—Legal Representatives.

———*Question as to, in suit for profits—Court must decide title or refer parties to Civil Court.*

When a person claims that he is the legal representative of the deceased and as such brings a suit for recovery of profits due to his share and the defendants deny his character of legal representative, the question of title must be decided by the Court or the parties must be referred to a Civil Court by a written order under S, 199 of the Act. (*Banerji, J.*) SYED MADAD ALI *v.* SHEIKH SHAMSHER ALI. **63 I. C. 103 = 4 U. P. L. R. (A.) 9.**

S. 199—Question of Title.

———*Except in certain cases revenue Courts cannot decide question of title—Decision of Record Officer on question of title is not res judicata in subsequent ejectment proceedings.*

Ordinarily a revenue Court has no jurisdiction to decide a question of title between two persons, each of whoms claims to be the proprietor of a certain land. The function of decision lies entirely with the Civil Court. But to avoid conflicts of jurisdiction a special provision has been made authorizing the revenue Court in certain cases to decide a question of title, and, therefore, a previous decision of the Record Officer on the question of title cannot operate as *res judicata* on the question raised in the ejectment proceedings. (*Mukerji, J.*) RAM CHAND *v.* SHIAM. **96 I. C. 24 = A. I. R. 1926 All. 682.**

S. 199 (3)—Res judicata.

———*Decision under, operates as* res judicata.

A decision of a revenue Court under S. 199 (3) operates as a decision by a civil Court for the purpose of *res judicata*: A. I. R. 1922 All. 95 and A. I. R. 1924 All. 10, Foll. (*Ashworth and Iqbal Ahmed, JJ.*) AMAR SINGH *v.* GOBfND RAM. **49 All. 606 = 25 A. L. J. 387 = 8 L. R. A. Rev. 122 = 101 I. C. 501 = A.I. R. 1927 All. 717.**

S. 199—Res judicata.

———*Decision under will be* res judicata *in subsequent suit in Civil Court.*

The decision of a rent Court under S. 199 in the exercise of its jurisdiction to decide a question of title is *res judicata*, and will prevent the trial in a subsequent suit in a civil Court of any issue relating to the same proprietary right. (*Lindsay and Stuart, JJ.*) MT. JHAMOLA KUNWAR *v.* HANWANT SINGH. **66 I. C. 915 = A. I. R. 1922 All. 129.**

Ss. 199, 200 and 201—Res judicata.

The decision of a Revenue Court cannot operate as *res judicata* in a civil Court unless the case comes within the purview of Ss. 199 to 201 of the Agra Tenancy Act. In other cases the question is not one of *res judicata* but whether the point before the Civil Court has been decided by a Rent Court under its exclusive jurisdiction in such a manner as prevents the Civil Court having jurisdiction to decide it. 37 A. 41 Foll. Where however the point under the Tenancy Act is itself within the jurisdiction of the Civil Court, it can decide it. (*Stuart, J.*) SARABHAT MAL *v.* RAM KHELAWAN MAL. **66 I. C. 714 = 4 U. P. L. R. (A.) 90.**

S. 199—Scope

———*Court directing to file a suit to establish title raised within a certain period—Party cannot take shelter under another pending suit impleading him as party—Failure to file suit will attract provision of sub-S. (2).*

When the Court taking action under S. 199, sub-S. (1), Cl. (v) directs a party by an order in writing to institute a suit within a certain period for the determination of the question of title raised by him it is not open to such party to take shelter under any other litigation which was pending and in which he was impleaded as a party. If he fails to file a suit as directed, the provisions of sub-S. (2) cannot but be applied. (*Lindsay and Sulaiman, JJ.*) LALJIT *v.* TICAM SINGH. **98 I. C. 1019 = 8 L. R. A. Rev. 46 = A. I. R. 1927 All. 200.**

S. 201 (3)—Presumption.

———*Evidence Act, S. 4—Presumption under, is conclusive.*

The words "shall presume" in the section mean there is irrebuttable and conclusive presumption even if the parties are members of a joint Hindu family. 33 All. 799, (F. B.), Foll. (*Sulaiman and Banerji, JJ.*) GIRDHARILAL *v.* GOVIND RAI. **103 I. C. 346 = 25 A. L. J. 706 = 8 L. R. A. Rev. 168 = A. I. R. 1927 All. 810.**

S. 201 (3)—Res-judicata.

———*Presumption arising under S. 201-(3) will not be removed by inferential decisions of Civil Courts by reason of* res judicata.

The presumption arising under S. 201 (3) is removed only where there exists a definite Civil Court decision regarding the property in suit, but such decisions should not be permitted to cover any inferential decision of the Civil Court by reason of *res judicata.* **31 All. 257,** Disc. and Dist. (*Dalal, J.*) TAYYAB-UNNISSA *v.* NASARULLAH. **119 I. C. 433 = 10 L. R. A. Rev. 287 = A. I. R. 1929 All. 378.**

S. 201—Res judicata.

———*Determination by Rent Court of question of proprietary title is* res judicata.

Ordinarily the Rent Courts in this Province have no jurisdiction to determine questions of title, but under the provisions of Ss. 199 and 201 of the Agra Tenancy Act special jurisdiction has been conferred upon Rent Courts in virtue of which they are empowered, in given circumtances, to decide questions of title. The decision of a Rent Court, passed under S. 201 as well as under S. 199 of the Agra Tenancy Act, in the exercise of its jurisdiction to decide a question of title, is *res judicata* and will prevent the trial in a subsequent suit in a Civil Court of any issue relating to the same proprietary right. (*Lindsay and Stuart, JJ.*) THAKUR HANWANT SINGH *v.* MT. JHAMOLA KUNWAR. **20 All. L. J. 340 = A. I. R. 1922 All. 95.**

Ss. 201 and 164—Revenue Court.

———*Revenue Court removing plaintiff's name from* khewat, *subsequent to institution of suit for profits, does not disentitle him to decree.*

Where plaintiff was recorded as a co-sharer on the date on which he brought his suit for profits and was a recorded co-snarer in the years to which the suit related but subsequently the Revenue Court removed plaintiff's name from the *khewat*, this does not disentitle plaintiff to obtain a decree in his suit. The presumption under S. 201, so far as the Revenue Court is concerned, is irrebuttable. 33 All. 799 (F. B.), Foll. (*Tudball and Sulaiman, JJ.*) LACHMAN PRASAD *v.* MT. SHITABO KUNWAR. **59 I. C. 639 = 43 All. 177 = A. I. R. 1921 All. 396.**

S. 201 (1)—Scope.

———*Suit against person in actual possession, by person who by mistake in record, was compelled to pay former's revenue, comes under S.* 201 (1).

The suit was one brought under the provisions of S. 160 of the Tenancy Act. The plaintiff during the years to which the suit referred stood recorded as the usufructuary mortgagee of a share of 16 biswas and odd in a certain mahal. By reason of this record he was compelled to pay the whole of the land revenue demand in respect of the said share. As a matter of fact a portion of the mortgage had been redeemed and the plaintiff was really in possession as mortgagee over a share of 8¼ biswas only. The defendant was the co-sharer in possession of remainder.

Held, that what the plaintiff had to show was that as a matter of fact he was a co-sharer who had paid arrears of revenue on account of another co-sharer. Because, the revenue record during the years in suit was incorrectly framed, the plaintiff did not on the face of that record appear to have paid any revenue except that which was due from the share recorded in his name as usufructuary mortgagee. His position therefore, was that of a co-sharer not recorded as having the particular proprietary right which would entitle him to maintain the suit brought by him. In reality his case falls under the first clause, and not under the third clause of S. 201 of the Tenancy Act. The Court had jurisdiction to inquire into this matter and to determine the question of possession. (*Mears, C. J. and Piggott, J.*) JWALA PRASAD *v.* IRSHAD MUHAMMAD. **46 All. 512 = 83 I. C. 245 = A. I. R. 1925 All. 50.**

S. 201 (3)—Suit for Profits.

———*Entries in revenue register are conclusive in suit for profits—Judgment prior to years of profits does not operate as res judicata and should be ignored.*

Entries in the revenue register must be given effect to in a suit for profits, in so far as they record the plaintiff's proprietary rights, however clear and incontrovertible the proof to the contrary may be. A judgment or decree previously obtained, declaring rights which are inconsistent with the entries for subsequent years cannot operate as *res judicata*. 33 All. 799 (F. B.) Rel. on. A. I. R. 1921 All. 124 and A. I. R. 1922 All. 356, Cons. (*Niamatullah, J.*) MAHAMMAD ISHAQ *v.* JAFRI BEGAM. **116 I. C. 742 = 10 L. R.A. Rev. 159 = A. I. R. 1929 All. 155.**

———**S. 201** (3)—*Presumption is unrebuttable if person is recorded co-sharer at the date of the suit.*

The presumption under S. 201 (3) is unrebuttable if a plaintiff is a recorded co-sharer on the date of the institution of the suit. But if he is not such a recorded co-sharer on the date of the suit he cannot sue for the period during which his name was wrongly recorded. (*Dalal, J.*) MALKHAN SINGH *v.* GULAB SINGH. **113 I. C. 732 = 9 L. R. A. Rev. 125 = A. I. R. 1929 All. 32.**

S. 201 (3) –Suit for Profits.

———*Usufructuary mortgagee of mortgagor lambardar can sue for profits.*

The usufructuary mortgagee of a co-sharer in possession of the share is entitled to maintain a suit against the *lambardar* for profits. The fact that Lambardar happens also to be the mortgagor of the plaintiffs does not in any way affect the maintainability of the suit. (*Walsh, A. C. J. and Piggott, J.*) LACHMAN PANDE *v.* TRIBENI SAHU. **79 I. C. 538 = 22 A. L. J. 518 = 5 L. R. A. Rev. 174 = A. I. R. 1924 All. 719.**

S. 201 (3)—Suit for profits.

———*Plaintiff and lambardar—Hindu co-parceners but their names entered for each moiety in Khewat—Suit lies.*

In suits for profits brought by the plaintiff appellant against his brother, *lambardar*, defendant, the defendant pleaded that he and his brother were members of a joint Hindu family and that such a suit was not maintainable. The names of the parties to the suit are entered on a moiety share in each of the two *mahals* : *held* that the claim of the plaintiff, whose name was entered on a moiety of the property, ought to have been decreed. All that the presumption under S. 201 (3), results in, is to prevent persons from pleading that the family is a joint Hindu family, as against the entries in the khewat. 32 All. 427 Referred to. (*Lindsay and Gokul Prasad, JJ.*) SHEO NARAIN *v.* BALA RAO. **69 I. C. 208 = 44 All. 616 = A. I. R. 1922 All. 332 (1).**

S. 201—Suit for profits.

———*Revenue papers altered during pendency of suit —Question of title referred to Civil Court but not completely decided—Court holding entries in revenue record during years in suit to be correct—Plaintiff is entitled to decree—Practice—Subsequent events.*

A suit for profits was instituted in Revenue Court wherein the Court held that the plaintiff's name had been rightly recorded in respect of the shares for the profits of which the suit was brought. The question of title was referred to the Civil Court which however did not completely decide the same and during the pendency of the suit the Revenue Court made alterations in the Revenue papers, to plaintiff's detriment.

Held, that the plaintiff was entitled to obtain profits in respect of the share which stood recorded in her name at the date of the institution of the suit and during the years for which profits were claimed. 29 I. C. 509, Dist. 18 A. L. J. 1008, Foll. (*Mears, C. J. and Banerji, J.*)

MUBARAK FATIMA *v.* MUHAMMAD QULI KHAN. **63 I.C. 976 = 43 All. 697 = 19 A. L. J. 732 = A. I. R. 1921 All. 124.**

Ss. 201 and 99—Suit for Profits.

———*Revenue Court itself deciding question of title in suit for profits—Civil suit to re-open question is barred.*

The only circumstance under which a civil suit can be brought to question the correctness of a Revenue Court's decision on title in a suit for profits is one in which the Revenue Court proceeds upon an entry of a certain person's name in the revenue papers as conclusive on the question of title. But where the Revenue Court proceeds to decide the question of title itself, no such right is given, 18 A. L. J. 1030 (F. B.), foll. (*Ryves and Gokul Prasad, JJ.*) MURTAZA HUSAIN *v.* ZIA-UL-HASAN. **62 I. C. 684 = 19 A L. J. 279 = A. I. R. 1921 All. 59.**

S. 202—Agricultural holding.

———*Zamindari property is not Agricultural holding.*

A claim for Zemindari property is not a suit relating to an agricultural holding. A holding is defined in the Tenancy Act to be a parcel of land held under one engagement, and it clearly indicates that it is land which is held by an ordinary agriculturist under one engagement for purposes of agriculture. That cannot be said of a person who claims to be *thekadar* of the zemindari, and does not allege that he held any particular parcel of land under a separate engagement for purposes of agriculture. (*Mears, C.J. and Banerjee, J.*) DHANDEI KUAR *v.* CHHOTU LAL. **64 I. C. 605 = 19 A. L. J. 890 = A. I. R. 1922 All. 442.**

S. 202—Agricultural lease.

When specific areas are leased and express power is given to the lessee to take actual possession of those areas and he has the option to cultivate them himself, the lease is one for agricultural purposes. (*Sulaiman and Banerji, JJ.*) NISAR HUSAIN *v.* SUNDER LAL. **25 A. L. J. 1025 = 8 L. R. A. Rev. 264 = 104 I. C. 292 = A. I. R. 1927 All. 657.**

S. 202 (2)—Appeal.

———*Appeal does not lie from Revenue Court to Civil Court even if parties had been wrongly referred to Revenue Court originally by a Civil Court.*

Once a case has been properly referred to the Revenue Court an appeal from the Revenue Court would not come to the Civil Court. The same rule applies even if it be the case that the parties had been originally wrongly directed by Civil Court to go to a Revenue Court, for the question can be raised again by way of appeal against the decree that will be passed by that Civil Court in accordance with the decision of the Revenue Court. That remedy if necessary against a wrong decision of the Civil Court as to the applicability or otherwise of Section 202 of the Tenancy Act is still open. (*Mukerji, J.*) HIRDEY NARAIN *v.* JAGADISH NARAIN. **22 A. L. J. 909 = 82 I. C. 317 = A. I. R. 1925 All. 125.**

S. 202—Applicability.

———*Suit to eject defendant as trespasser—Plea by defendant of tenancy—Section 202 applies.*

The first defendant, the *lambardar* granted a perpetual lease of the suit land to the second defendant. The plaintiff who was a co-sharer brought a suit in the Civil Court for the cancellation of this lease and for the ejectment of the defendant from a part of land which he the plaintiff, claimed as his *khudkasht*. The defendant

pleaded that the lease was a good and valid lease; and that it was executed with the consent of all the co-sharers, *i.e.*, he was not a trespasser but a tenant of the whole proprietary body including the plaintiff.

Held, that the procedure prescribed by section 202 should be followed. (A. I. R. 1921 All. 58 and 42 All. 222 foll.) (*Lindsay and Daniels, JJ.*) KALI DIN *v.* RAMAPAL. **73 I. C. 953 = 4 L. R. A. Rev. 167 = A.I.R. 1923 All. 534.**

Ss. 202 and 197—Applicability.

———*Defendant pleading that he is tenant not of the plaintiff alone but of entire proprietary body—S. 202 applies.*

If a defendant raises the plea that he is a tenant of the plaintiff, it is the duty of the Court under S. 202 to refer the defendant to the Revenue Court and to decide the case in accordance wiih the decision of the Revenue Court, S. 197 cannot apply to such a case. The fact that in such a case the tenant pleads that he is the tenant not of the plaintiff alone but of the whole proprietary body, does not affect the applicability of S. 202. (*Banerji and Gokul Prasad, JJ.*) BHANNI *v.* RAM DAYAL. **64 I. C. 426 = 19 A. L J. 850 = A. I. R. 1921 All. 58.**

S. 202—Applicability.

A suit was brought in a Civil Court for ejectment and the plea set up in defence was one of sub-tenancy. *Held*, on the pleading S. 202 applied and the procedure laid down therein should be followed. (*Piggott and Walsh, JJ.*) SHEIKH MUHAMMAD YAKUB *v.* BECHU AHIR. **65 I. C. 251 = 3 L. R. A. Rev. 21.**

S. 202—Bona fides.

———*Question of* bona fides—*Claim to tenancy—Civil Court need not decide.*

There is nothing in the section itself to require the Civil Court to decide that the claim to a tenancy is *bona fide* before applying section 202, and a Court in deciding this point would be really usurping the functions of the Revenue Court. (*Daniels, J.*) JASRAM *v.* AMAR NATH. **71 I. C. 47C = 5 L. R. A. Rev. 21 = A. I. R. 1923 All. 439.**

S. 202—Extension of time.

———*Time granted for institution of suit in revenue Court can't be extended.*

Where a defendant has been ordered in writing to institute within three months a suit in the Revenue Court for the determination of the question of tenancy and fails to institute such a suit within three months of the order, the Court must decide the question against him. The Court has no authority to extend time. (*Stuart, J.*) RUP NARAIN *v.* PARTAB PATHAK. **64 I.C. 491 (All.).**

S. 202—Party's rights.

———*Suit for ejectment—Defendants' suit in a revenue Court for declaration that he was an occupancy tenant of the land in question—Civil suit stayed upon defendant's request under S. 10, C. P. Code—Suit in the revenue Court rejected—Civil suit decreed in landlord's favour—In appeal defendant was not allowed to contend that civil Court ought to have proceeded under S. 202.*

A landlord sued for the ejectment of a person in a civil Court on the ground that he was a trespasser. The defence was that he was a tenant of the landlord. It was further submitted that a suit for declaration by the tenant that he was an occupancy tenant of the land in suit was pending at the time in the revenue Court as between the parties and that therefore the civil suit should be stayed under S. 10, C. P. Code. The Court granted this request and trial was proceeded with after the tenant's suit was finally rejected by the revenue Court. The landlord's suit was decreed in the trial Court. It was argued in appeal although the point was not raised in the ground of appeal that the trial Court ought to have taken proceedings under S. 202, Tenancy Act. *Held*: that the tenant was not entitled to any such relief: 33 All. 507; 11 A. L. J. 691; and 38 All. 533; Ref.

(*Obiter*) Even where a matter as to tenancy has been decided by a revenue Court the civil Court is bound to take action under S. 202. (*Dalal, J.*) LALA SINGH *v.* RAGHUBIR NARAIN. **9 L. R. A. Rev. 138 = 116 I. C. 275 = A. I. R. 1928 All. 366.**

S. 202—Powers of Civil Court

———*Suit for possession of land—Reference under S. 202—Case decided in accordance with revenue Court's decision—In appeal from decision, appellate Court finds court wrong in making reference—Party held competent to raise question of competency of the reference and further appellate Court not bound to dispose of suit according to revenue Court's decision.*

S sued for possession of plot of land as a grove and for recovery of damages on account of produce appropriated by *M. M* was the zemindar and was in possession of the grove in question and they had sold their zamindari and the grove in dispute to *S. M* contested the suit on the ground that the grove was his *sir*, and that by the sale he acquired ex-proprietary rights in it. The Court passed order under S. 202 requiring *M* to institute a suit within three months in the revenue Court for the determination of the question. The revenue Court decided in favour of *M* and the civil Court accordingly dismissed the suit. *S* appealed and the appellate Court found that the lower Court was wrong in making reference and so decreed the suit. *M* appealed on this decision. *Held*, that it was open to *S* to raise the question if the decision of the lower Court in refusing the case was correct or not in appeal.

Held further, that if the appellate Court comes to a finding that the Court was not so entitled to refer the case, it was not bound under S. 202 (2) to dispose of the suit in accordance with the decision of the revenue Court: A. I. R. 1922 All. 442 and 39 All. 254, Ref. (*Niamatullah and Bennet, JJ.*) MURTAZA KHAN *v.* AJIT PRASAD. **124 I. C. 403 = A. I. R. 1930 All. 458.**

S. 202—Powers of Civil Court.

———*Validity of lease denied—Civil Court can determine it—Lease of collections, of rent and zemindari dues is not one relating to agricultural holding.*

Subject to the provision of section 202 where a tenancy is denied by one party, the validity or otherwise of the document of title on which the other party bases his right, can always be determined by the civil Court. A lease for collection of rent and *zamindari* dues is not one relating to agricultural holding. (*Lindsay and Kanhaiya Lal, JJ.*) MT. AMINA BIBI *v.* YUSUF. **70 I. C. 968 = 44 All. 748 = 20 A. L. J. 731 = A. I. R. 1922 All. 449.**

S. 242—Appeal.

———*Appeal lies to Dt. Judge in an ejectment suit from the decision of an Assistant Collector, First Class.*

An appeal from the decision of an Assistant Collector First Class, in an ejectment suit lies to the Dt. Judge, 22 I. C. 964 Foll. (*Stuart, J.*) RAM DIN *v.* HAR DAYAL. **82 I. C. 790 = A. I. R. 1923 All. 368.**

S. 273—Civil Suit.

———*Revenue Court deciding lease to be valid—Civil suit for avoiding it can lie.*

The revenue Court's decision that the defendant was a tenant, cannot prevent under S, 273 the plaintiff from bringing a civil suit for avoidance of lease. (*Ashworth, J.*) BANWARI BARHI *v.* RAM RATAN. **119 I. C. 436 = 10 L. R. A. Rev. 293 = A. I. R. 1929 All. 387.**

Sch. IV, No. 16—Suit for profits.

———*Suit for profits for particular year—Decree obtained on gross rental—Another suit for share of uncollected arrears of rental of previous years filed after three years of date when profits for those years became payable—Suit is barred*

The plaintiff co-sharer sued for profits for the year Fasli 1329 and obtained a decree on gross rental from the Court of first instance. The plaintiff also sued for a share of uncollected arrears of rental of the previous years. This suit was filed more than three years after the three dates, on which profits became payable for the years.

Held, that the suit was barred by limitation, (*Bennet J.*) MT. BALI KUAR *v.* KHAWANI RAM. **9 L. R A. Rev. 288 = 116 I. C. 746 = A. I. R. 1928 All. 762**

———**Sch. IV Group C., No. 30**—*Failure to sue within limitation by tenant to recover possessions of holding from which he has been ejected by landlord extinguishes right of tenant.*

The failure of a tenant to apply to recover possession of a holding from which he has been wrongfully ejected by the landholder within the period of six months allowed by the Tenancy Act bars not only his remedy but extinguishes his right. (*Gokul Prasad, J.*) BHIKARI SINGH *v.* JOKHAN. **66 I. C. 856 = A. I. R. 1922 All. 124.**

———**(III OF 1926)**—*Retrospective effect—Suit instituted before but decided after Agra Tenancy Act (III of 1926)—Appeal is governed by old Agra Tenancy Act.*

A suit which was instituted before the coming into force of Agra Tenancy Act (III of 1926) but was decided after it had come into operation is in the matter of appeals governed by Agra Tenancy Act (II of 1901): A. I. R. 1928 All. 437, Rel. on. (*Iqbal Ahmad, J*), MT. JANAK DULARI *v.* BISHAMBHER NATH. **119 I. C. 251 = A. I. R. 1929 All. 745.**

———**S. 3 (11)**—*Damage to landlord—Tenant constructing well close to, but without, his holding—No special damage to landlord—Landlord has no cause of action—(Obiter).*

A tenant can dig a well on party land close to his occupancy holding, though without it, for the benefit of the holding, and no cause of action arises in favour of the landlord unless he suffers special damage by the construction of the well. (*Bennet, J*) KAILASH CHANDAR *v.* RAM LAL. **115 I. C. 637 = 10 L. R. A. Rev. 280 = A. I. R 1929 All. 544.**

S. 3 (15)—Scope.

———*Considerable portion containing trees sufficient to prevent land from being cultivated—Land continues to be grove.*

So long as any considerable portion of a plot granted for a grove is allowed to contain a sufficient number of trees to prevent that portion from being cultivated, assuming the trees to have reached their full size, the whole plot granted will retain the character of grove but not otherwise. Where a certain plot, measuring three bighas was given for the purpose of maintaining a grove and only four fruit trees were in existence on that plot, *Held*, that these four trees did not suffice to prove the retention of the character of grove by that holding. (1886) A.W.N. 138, Dist. (*Ashworth, J.*) DAROPADI *v.* MANNU LAL. **117 I.C. 616 = 10 L. R. A. Rev. 272 = A. I. R. 1929 All. 557.**

S. 3 (4)—Small Cause.

———*Rent payable by licensee for cutting grass can be recovered in revenue Court only.*

Rent payable by a licensee for the cutting of grass cannot be recovered in a Court of Small Causes and the licensor must go to the revenue Court to recover the same: 12 A. L. J. 36. Appr. 31 All. 342, not Foll. (*Dalal, J.*) RAM PRASAD TAMOLI *v.* BANARES COTTON AND SILK MILLS. **123 I. C. 384 = 11 L.R.A Rev. 110 = 1930 A.L.J. 550 = A.I R. 1930 All. 399.**

Ss. 4 and 7—Grove.

———*Planting of grove on sir land—Sir character is not lost.*

The planting of a grove on a *sir* land does not result in the *sir* land losing its character of *sir*: 42 All. 483 and A.I.R. 1924 P.C. 247. Dist. A.I.R 1929 All. 335, Affirmed. (*Mukerji and Bennet, JJ.*) HAR SARAN DAS *v.* HARBANS SINGH. **A.I.R. 1930 All. 655.**

Ss. 5, 11 & 12—Mahal.

———*Mahal.*

The word, 'mahal' in Ss. 5 (1), 11 and 12 applies to existing mahals. (*Sulaiman, Ag. C.J. Mukerji and King, JJ.*) RIAZUDDIN *v.* MT. PHULA DEVI. **1929 A.L.J. 1212 = A.I.R. 1929 All. 977 (F.B.).**

S. 5—Scope.

———*S. 5 lays down rule to determine whether right of pre-emption exists in mahal.*

The object of S. 5 is to lay down a rule to determine whether a right of pre emption exists in an existing mahal or village. Once such a right is presumed to exist the question as to its nature and extent is not to be determined by S. 5 at all but we have to look to sections like 11 and 12 for that purpose. (*Sulaiman, Ag. C.J. Mukerji and King, JJ.*) RIAZUDIN *v.* MT. PHULA DEVI. **1929 A.L.J. 1212 = A.I.R. 1929 All. 977 (F.B.)**

S. 15—Relinquishment.

———*Transfer of share in mahal—Vendor being exproprietary tenant of all co-sharers and not vendee alone, holding cannot be relinquished in favour of vendee alone.*

On a sale of a share in mahal the vendor becomes the exproprietary tenant of all the co-sharers in *sir* plots and not merely the ex-proprietary tenant of the vendee in absence of contrary evidence from the wajib-ul-arz or any special custom or arrangement. Hence he cannot relinquish the exproprietary holding in favour of the vendee alone: 10 A.L.J. 95; 35 All. 27, Ref. (*Bennet and Iqbal Ahmad, JJ.*) RAGHUBIR CHAUBE *v.* GAURI CHAUBE. **1930 A.L.J. 65 = A.I.R. 1929 All. 803.**

S. 16—Joint Family.

———*Joint family can acquire occupancy rights under lease.*

There is nothing to prevent occupancy rights being acquired by a joint Hindu family under a lease. 40 All. 314, Expl. (*Niamatullah, J.*) RAGHONATH TEWARI *v.* BUDDHU RAM. **A.I.R. 1930 All. 315.**

S. 19—"Statutory tenant".

Definition requires that a statutory tenant should be a person in possession as a tenant at the commencement of the Act or a person who is after the commencement of the Act, admitted as a tenant. (*Mukerji and Bennet. JJ.*) MT. RAJI *v.* RAM LAGAN. **1930 A.L.J. 637 = A.I.R. 1930 All. 304.**

S. 19—Tenancy during Mortgage.

———*Tenancy created by mortgagee authorized so to do —On redemption tenancy is binding on mortgagor and if mortgagor desires to bring tenancy to close he must do so by suit under Tenancy Act.*

Where a proprietor of land mortgages it by a mortgage, simple in its inception, authorizing the mortgagee under a special stipulation either to cultivate it himself or to let it out to tenants the act of letting out to tenants becomes an act in the ordinary course of business for proper management of the property and tenancies so created are binding on the mortgagor after the redemption of the mortgage in so far that the relationship of landlord and tenant continues and that if the mortgagor desires to bring the tenancy to a close he must do so by a regular suit under the Tenancy Act, 8 A.L.J. 802, Ref. Unpublished decisions of the Board of Revenue Vol. 3, p. 377, Dist (*Sen, J.*) SHEO SHANKAR *v.* BHUP SINGH. **A.I.R. 1930 All. 413 (2).**

S. 23—Mortgage.

———*Mortgage of occupancy holding is invalid but Mortgagor can regain possession at will.*

The mortgage of occupancy holding is illegal and must therefore be ignored, but the mortgagor as the owner of the occupancy right may recover possession at will. 16 A.L.J. 747, Foll.; A.I.R. 1924 All. 668, Dist. (*Kendall, J.*) MT. RAJ RANI *v.* GULAB. **117 I C. 831 9 L.R.A. Rev. 212 = A.I.R. 1928 All. 552.**

S. 24—(Proviso) Joint Cultivation.

———*N.W. P. Rent Act* (12 *of* 1881). *S.* 9—*Collateral relatives are heirs only if they share in cultivation of holding in question.*

Section 9 makes collateral relatives of a deceased occupancy tenant his heirs only if they share in the cultivation of the particular holding in question. Proving that plaintiffs have been joint with deceased in cultivation of another holding is not enough. (*Niamatullah, J.*) MAHADEO CHAUBE *v.* RAM RAJ CHAUBE. **122 I.C, 414 = A.I.R. 1930 All. 108.**

S. 24—Succession to grove.

———*Occupancy plot becoming grove—Bandhu can succeed as heir.*

If a plot is recorded merely as an occupancy plot a bandhu would not be entitled to succeed after the death of the owner but if the plot becomes the grove land he can be so entitled as an heir (*Bennet and Iqbal Ahmad, JJ.*) SHEO NANDAN *v.* MUHAMMAD KHALIK. **118 I.C. 186 = A.I.R. 1929 All. 777.**

S. 27—Question of title.

When a question arises between two co-sharers as to how much is one co-sharer's *sir* the question is one of title and not of any tenancy. (*Mukerji and Bennet, JJ.*) ABU JAFAR *v.* SYED MOHAMMAD KAZIM. **A.I.R. 1930 All. 657.**

S. 34—Mortgage of Occupancy holding.

Mortgages by occupancy tenants of their holdings are invalid as against the landlord. (*Raza, J.*) RAM RATAN SINGH *v.* BIPEN CHANDRA CHATERJI. **12 Rev. Dec. 597 = 112 I.C. 436 = A.I.R. 1929 Oudh 116.**

S. 37—Partition of grove.

———*Suit for partition of grove holding between tenants—Suit lies in revenue Court.*

Partition of a grove holding between the tenants of the holding is a matter for revenue Court and no such suit lies to Civil Court, nor can a relief to that effect be granted by Civil Courts. (*Mukerji and Bennet, JJ.*) BASANT LAL *v.* BHAGWATI PRASAD.
1930 A.L.J. 769 = A.I.R. 1930 All. 365 (i).

S. 37—Scope.

The term "holding" in S. 37 refers to the engagement under which land is taken and so if subsequently part of the land originally taken for agricultural purposes has been converted into abadi with or without consent of landlord, there is no interference with the original engagement and a suit for division will consequently lie in revenue Court. (*Mukerji and Niamatullah, JJ.*) SHEIKH CHAMRU *v.* BHAGGAN.
1930 A.L.J. 303 = A.I.R. 1930 All. 219.

Ss. 44 and 230—Effect of S. 230.

——*Suit by landlord against trespasser lies in civil Court.*

A suit by a landlord against a trespasser lies in the Civil Court and although S. 44 would also give a remedy with a limited amount of damages in the revenue Court, still S. 230 of that Act does not bar the jurisdiction of the Civil Court. A. I. R. 1927 All. 369, (F.B.), Foll. (*Mukerji and Bennet, JJ.*) MT. RAJI *v.* RAM LAGAN. **1930 A.L.J. 637 = A.I.R. 1930 All. 304.**

S. 44—Lambardar's rights.

——*Lambardar being entitled to let out lands according to S. 3 (6) is landholder—Lambardar ejecting person—Co-sharers stealthily taking possession are liable to be ejected.*

According to S. 44, a person who is in possession without the consent of the landholder is liable to ejectment. According to S. 3 (6) a lambardar can be said to be the landholder as he is entitled to let out the land. The lambardar ejecting a person and taking possession through the Court is entitled to continue in possession of it. Co-sharers taking possession of the land either by stealth or by force in teeth of the lambardar's right to let out the land are liable to be ejected. 18 Cal. 10 (P.C.), Ref. (*Mukerji and Niamatullah, JJ.*) ABDULLAH KHAN *v.* KANHAIYA. **A.I.R. 1929 All. 869.**

Ss. 44 and 273—Scope.

——*Suit for ejectment against trespasser may be filed either in civil or in Revenue Court—Interpretation of statutes.*

It is a well-settled canon of construction that the various sections of an enactment should be so construed as not to render a particular provision in the enactment inconsistent with another provision of the same enactment, and the only possible way to so interpert the provisions of S. 44 of the Act as not to be inconsistent with the provisions of S. 273 of the Act is to hold that all that was intended by S. 44 of the Act was to give an option to the landholder to file a suit for ejectment against a trespasser either in the civil or in the revenue Court. (*Iqbal Ahmed, J.*) DEBI SAHANI *v.* DAULAT.
8 L. R. A. Rev. 104 = 100 I. C. 471 = A. I. R. 1927 All. 346.

S. 45—Managers' powers.

——*Grant of permanent lease of agricultural land by manager in excess of his powers—Tenants in possession and paying rent regularly—The tenant cannot be regarded as trespasser and cannot be ousted by a minor member of the family—Hindu Law—Alienation.*

Where a manager of Hindu joint family has the power to grant leases to tenants in the ordinary course of management of the zamindari property, but exceeds

his power by granting permanent lease of agricultural land, such tenants who retain possession and pay rent regularly cannot be regarded as trespassers and a suit to eject them by the minor member on the ground that the manager exceeded his power in executing a permanent lease cannot succeed. 28 All. 30 and 3 A.L.J. 517, Dist. (*Kendall and Niamatullah, JJ.*) BASDEO NARAIN *v.* MUHAMMAD YUSUF. **51 All. 285 = 116 I. C. 491 = 26 A. L. J. 1313 = 9 L. R. A. Rev. 321 = A. I. R. 1928 All. 617.**

Ss. 58 and 63—Jurisdiction.

——**Ss. 58 and 63**—*Suit for ejectment of tenant with lease only for gathering thatching grass is cognizable by revenue Courts only—And if such suit is dismissed as being non-cognisable by revenue Court, in a suit between same parties in civil Court, if such a one is filed, it is not open to parties to plead the matter of jurisdiction as* res judicata.

A suit for ejectment of a person taking a lease of land on annual rent for the purpose of gathering thatching grass is cognizable by Revenue Courts as a suit for the ejectment of a non-occupancy tenant and if such suit is dismissed as being non-cognizable by Revenue Courts, it is not open to the parties in a suit for ejectment in the Civil Court, on the same cause and between the same parties to plead the matter as *res judicata*: A.I.R. 1921 All. 128 and A. I. R. 1929 All. 132, Rel. on. (*Mukerji and Bennet, JJ.*) NATHAN *v.* HARBANS SINGH.
11 L. R. A. Rev. 42 = 1930 A. L. J. 352 = A. I. R. 1930 All. 254.

S. 79—Rights of purchaser.

——*Tenant ejected—During ejectment proceedings property attached and purchased in execution of money decree against tenant—Purchaser cannot in a subsequent suit by landlord raise the plea that the tenant being grove-holder could not be ejected for arrears of rent.*

The landlord obtained a decree for arrears of rent against an occupancy tenant in respect of a holding which comprised the plot in suit. The arrears of rent not having been paid, an application was made for ejectment of the tenant from his holding. Opportunities were granted from time to time to pay up, but ultimately on 21st October, 1918 the tenant was formally ejected from his holding. The plot in suit had been attached in execution of a simple money decree obtained by a stranger against tenant, who on 24th July, 1918 purchased it himself. He obtained possession through the execution Court on 4th May 1919 *i.e.*, long after the landlord had been put in possession of the land. In a suit by the landlord for a declaration of title and recovery of damages against stranger.

Held, that the question that the tenant was a grove-holder and he could not be ejected in execution of the decree for arrears of rent, could not be raised in these proceedings. The ejectment proceedings being binding on the tenant, the title, if any that could accrue to the purchaser could accrue only subject to the result of the ejectment proceedings. (*Mukerji, J.*) BRIJ NARAIN *v.* MT. MOTIRANI. **116 I. C. 792 = 10 L. R. A. Rev. 175 = A. I. R. 1929 All. 159.**

S. 81—Tenants' rights.

——*Previous application for arrears contested by tenant and converted into suit—Subsequent suit for arrears of rent—Tenant can claim bar of C. P. Code, O. 2, R. 2.*

If a tenant contests the claim of the landlord to arrears of rent, an application becomes a plaint on proper Court-fee being paid and whatever may be the character of the subsequent suit. O. 2, R. 2, will be applicable if the landlord is suing for arrears of rent, though he may be entitled to the additional relief of ejectment in a certain contingency. (*Niamatullah, J.*) MANDHIR THAKURJI *v.* RISAL. **124 I. C. 177 = A. I. R. 1930 All. 527.**

S. 95—Ejectment decree.

———Where a decree passed on 16th April is executed on 24th November, the execution is not in accordance with the law, as laid down in the Act, the ejectment in pursuance of such execution is illegal. An illegal ejectment does not give the zemindar any right of re-entry and the zemindar is not entitled to possession of the land. (*Dalal, J.*) NANDLAL CHAUDHRI *v.* EMPEROR. **112 I. C. 680 = 29 Cr. L. J. 1096 = 11 A. I. Cr. R. 154 = 1929 A. L. J. 92 = 10 L. R. A. Cr. 22.**

Ss. 99 and 230—Civil Court.

———*Suit by alleged tenant against trespasser—Trespasser pleading tenancy—Suit is still maintainable in civil Court.*

Per *Full Bench.*—The jurisdiction of the Court is to be initially determined by the allegations made in the plaint and the allegations made in the written statement cannot oust that jurisdiction unless and until the allegations of fact have been gone into, tried judicially and found to be true, and the plaintiffs' allegations have been found to be false. Where, therefore, a plaintiff alleging himself to be a tenant sues a defendant treating him as a trespasser, for possession and compensation regarding a holding or a part thereof and the defendant pleads tenancy, the suit is maintainable in the civil Court even after having regard to Ss. 99 and 230. (*Boys and King, JJ.*, contra., 118 I.C. 588 = 1929 A.L.J. 940, Overruled. 15 All. 387 (F. B.) and A. I. R. 1929 Pat. 267, Rel. on. (*Sulaiman, Mukerji Boys, Kendall and King, JJ.*) MT. ANANTI *v.* CHHANNU. **124 I. C. 540 = 1930 A. L. J. 256 = A. I. R. 1930 All. 193 (F.B.).**

S. 99—Civil Court.

———*Grove-holder dispossessed from grove and fruit appropriated—Both transactions completed before coming into operation of Act (III of 1926)—Suit for possession and mesne profits lies in civil Court.*

Under the Agra Tenancy Act, 1901 a grove-holder is not a "tenant for grove land" and so where a grove holder has been dispossessed from the grove and fruit misappropriated; each transaction taking place before coming into operation of the Act of 1926, the suit for possession and mesne profits lies in civil Court and not to revenue Courts under S. 99, Agra Tenancy Act III of 1926. (*Young and Mukerji, JJ.*) ABDUL HAKIM *v.* MUKARRAM ALI. **124 I. C. 478 = 1929 A. L. J. 1157 = A. I. R. 1930 All. 158.**

S. 99 (1)—Civil Court.

———*Perpetual lessee suing landholder for possession—Suit number being undivided—Suit involving redemption of mortgage with regard to part of suit number—Civil Court is proper forum for suit for possession and two separate suits are not necessary.*

Although under S. 99 (1) a perpetual lessee can sue a landholder for possession or for preventing him from obtaining possession of his holding, still where the suit number is undivided and the suit involves redemption of a mortgage with regard to part of the number, civil Court is the proper forum for a suit for possession and two separate suits, one in civil Court and the other in

revenue Court, with regard to the two parts of the property are not necessary. (*Bennet, J.*) SHEO SARAN RAI *v.* JAIMANGAL MISIR. **121 I. C. 223 = 10 L. R. A. Rev. 346 = A. I. R. 1929 All. 616.**

S. 99—Interpretation,

———Per *Full Bench.*—Section 99 being susceptible of two interpretations the Court should prefer the interpretation which leaves the law unchanged, to the one which drastically alters it. (Per *Boys* and *King, JJ.*, contra.) (*Sulaiman, Mukerji, Boys, Kendall, and King, JJ.*) MT. ANANTI *v.* CHHANNU. **124 I. C. 540 = 1930 A. L. J. 256 = A. I. R. 1930 All. 193 (F.B.).**

S. 99—Possession.

———The plaintiff sued for possession and compensation for wrongful dispossession by the defendant who, he alleged, was a trespasser. The defendant pleaded that he was a tenant of a share in this holding.

Held, that the suit was one between two rival claimants and would lie to the revenue Court and not to the civil Court. A. I. R. 1928 All. 269, Foll.; A. I. R. 1929 All. 571 (F.B.), Rel. on. (*Boys and Bennet, JJ.*) BABU NANDAN MALLAH *v.* MOHAMMAD ALI. **118 I. C. 588 = 1929 A. L. J. 940 = 13 R. D. 756 = 11 L. R. A. Rev. 14.**

Ss. 99 and 230—Revenue Court.

———*Suit falling under S. 99—Joining relief for injunction does not take the case out of revenue Court.*

If a suit for possession and mesne profits substantially falls under S. 99 and is cognizable by a revenue Court, the mere fact that a relief for perpetual injunction has been asked for will not take the case out of the jurisdiction of the revenue Court. (*Sulaiman, Mukeri, Boys, Kendall and King, JJ.*) MT. ANANTI *v.* CHANNU. **124 I. C. 540 = 1930 A. L. J. 256 = A.I.R. 1930 All. 193 (F.B.).**

Ss. 99 and 121—Revenue Court.

———*Suit for declaration of joint tenancy and possession—Defendants alleging to be tenants—Suit lies in revenue Court.*

The plaintiff brought a suit for declaration that he was a tenant jointly with the defendants and for possession jointly with the defendants. The defendants set up a right in themselves as tenants.

Held: that in view of S. 230 read with explanation and Sch. 4, serial numbers 12 and 15, the suit was not cognizable by the civil Court. (*Sulaiman, Mukerji and Banerji, JJ.*) SAHDEO *v.* BUDHAI. **117 I. C. 337 = 1929 A. L. J. 849 = 51 All. 853 = A. I. R. 1929 All. 571 (S. B.).**

S. 99—Scope.

———*Defendant on basis of document of relinquishment claiming as landholder right to eject plaintiff and ejecting him—Plaintiff's remedy lies under S. 99.*

The Act applies even where ejectment is made by any person claiming as landholder to have a right to eject another. It is not necessary that only the landholder, that is, all the proprietors of a mahal should eject a tenant in order to give jurisdiction to the revenue Court. Thus where a defendent on the basis of the document of relinquishment claimed as landholder a right to eject the plaintiff and ejected him accordingly, the remedy of the plaintiff lies under S. 99 and the period of limitation for bringing a suit by the plaintiff is six months. (*Dalal, J.*) SUBEDAR SINGH *v.* KOMAL SINGH. **119 I. C. 252 = 10 L. R. A. Rev. 367 = A. I. R. 1929 All. 656.**

Ss. 99 and 121—Tenant's liability.

——*Tenant need not declare that he is claiming through landholder.*

Where a person is admitted to be a tenant of a holding it must be taken that he is claiming through the landholder. He cannot claim otherwise than through the landholder. It is not necessary therefore that before a suit is instituted under Ss. 99 and 121 that the Defendant should have declared anywhere, either orally or in writing that he was claiming through the landholder: A. I. R. 1928 All. 269, Confirmed. (*Sulaiman, Mukerji and Banerji, JJ.*) SAHDEO *v.* BUDHAI. **117 I. C. 337 = 1929 A. L. J. 849 = 51 All. 853 = A. I. R. 1929 All. 571 (S. B.).**

S. 103—Zamindar.

——*Zamindar can settle surrendered holding with any tenant.*

When a Hindu widow, holding for her life under thet provisions of S. 22, Tenancy Act, relinquishes a holding the Zemindar is at liberty to settle the land with any other tenant. (*Dalal, J.*) BENI MADHO *v.* SHAMBHU NATH. **114 I. C. 908 = 9 L. R. A. Rev. 180 = A. I. R. 1929 All. 196.**

S. 110—Tenant.

——*Tenant can construct well without proving any local custom.*

In S. 110 the word "except" governs all the words which follow it to the end of the section and so, a well, as it does not come after the word "except" and is not the same as a tank, can be constructed by a tenant without proving any local custom entitling him to do so. (*Bennet, J.*) KAILASH CHANDAR *v.* RAM LAL. **115 I. C. 637 = 10 L.R. A. Rev. 280 = A. I. R. 1929 All. 544.**

S. 121 (2)—Party,

——*Landholder necessary party to suit.*

Section 121 (2) enjoins on the plaintiff the duty of making the landholder a party where the suit is against any person other than landholder. (*Sulaiman, Mukerji and Banerji, JJ.*) SAHDEO *v.* BUDHAI. **117 I. C.337 = 1929 A. L. J. 849 = 51 All. 853 = A. I. R. 1929 All. 571 (S. B.).**

S. 121—Revenue Court.

——*Suit for a declaration and joint possession—Defendant setting up a right in himself as the sole tenant —Plaintiff's suit for declaration of his right lies in a revenue Court.*

The plaintiff brought a suit for declaration and joint possession against the defendant who was setting up a right in himself as the sole tenant of the plot in dispute and claimed to be a tenant on behalf of the landholder.

Held, that the suit would only lie in the revenue Court as the defendant was claiming to hold through the landholder. (*Boys and Iqbal Ahmad, JJ.*) RAM PARTAB SINGH *v.* CHHOTAY LAL SINGH. **26 A.L.J. 431 = 9 L.R.A. Rev. 154 = 109 I. C. 419 = A. I. R. 1928 All 269.**

S. 165—Co-sharer.

——*Co-sharer though member of Hindu joint family with lambardar can obtain his share*

In a suit by co-sharer for profits under the Tenancy Act the co-sharer can obtain his share of profits if he is recorded as entitled to a separate share, notwithstanding the fact that he may be a member of a joint family with the lambardar: 5 U. D. 127, Foll. A. I. R. 1924 Oudh 118, Ref. (1899) A. W. N. 206 *held* no longer

good-law. (*Banerji and King, JJ.*) DIGAMBAR SINGH *v.* BIRENDRA SINGH. **1930 A. L. J. 286 = A. I. R. 1930 All. 313 (2).**

S. 181—Scope.

——*S. 181 merely provides for precedence of rent claim where distraint is genuine—No relief is afforded to third person against fraudulent distraint by zemindar.*

The provisions of S. 181 afford no relief to a third person against a fraudulent distraint collusively brought about by a zamindar against his tenant. These provisions merely provide for the precedence of a rent claim where the distraint is genuine. (*Dalal, J.*) MUKHTAR AHMED *v.* LACHMAN PRASAD. **119 I. C. 284 = A. I. R. 1929 All. 845 (1).**

S. 197—Grove.

——*Occupancy plot becoming grove can be transferred.*

When at the time of transfer a plot though originally an occupancy plot has admittedly become a grove and there is nothing to show that the zamindar has made any objection to the transfer, the transfer must be regarded as valid so far as the particular case is concerned. (*Bennet and Iqbal Ahmad, JJ.*) SHEO NANDAN *v.* MOHAMMAD KHALIK. **118 I. C. 186 = A. I. R. 1929 All. 777.**

S. 197 (a)—Grove.

——*Character of land granted for maintaining grove changed — Ejectment is permissible—No express or implied abandonment is necessary.*

A person who is granted a specific area for the purpose of planting and maintaining a grove, loses his right of occupation when he allows the land to cease to retain the character of a grove. Abandonment, actual or implied, is not necessary: A. I. R. 1923 All. 295, Ref. (*Ashworth, J.*) DAROPADI *v.* MANNU LAL. **117 I. C. 616 = 10 L. R. A. Rev. 272 = A. I. R. 1929. All. 557.**

S. 197—Grove.

——*Interest of grove-holder is transferable—Same rule applies to Oudh—There is no general custom in Oudh to the contrary—Landlord and tenant—Grove.*

There is no general custom in force in Oudh (as distinguished from a village custom proved by a wajib-ul-arz or other evidence) to the effect that a grove-holder has no transferable interest in his trees. In the province of Agra, subject to any custom or contract to the contrary, the interest of a grove-holder shall be transferable by voluntary transfer or in execution of a decree by a civil or revenue Court or otherwise and the same rule applies to the province of Oudh. A. I. R. 1921 Oudh 13; 15 O. C. 91; A.I.R. 1925 Oudh 319; and 13 O. C. 366 Discussed. (*King, J.*) MAHOMED ALI MAHOMED KHAN *v.* MODARISAH. **1 L. C. 91 = 102 I C. 626 = A. I. R 1927 Oudh 297.**

S. 197 (b)—Paramount owner.

——*Interest greater than that possessed by transferor sold—Paramount owner has a right to sue either for cancellation of the deed or for declaration that his title is not to be affected by the deed.*

If in the sale-deed an interest greater than that possessed by the transferor is asserted to be transferred, then the deed of transfer furnishes the paramount owner with a right to sue either for cancellation of the deed or for a declaration that his title is not to be affected by the deed. Otherwise a transfer of land is only a brief way of stating that the transfer is of the interest of the transferor in the land. 3 A. L. J. 385, Dist. (*Ashworth,*

J.) SAHU MUNNA LAL *v.* MAHTAB.
9 L. R. A. Rev. 164 = 116 I. C. 284 = A. I R. 1928 All. 360.

S. 197 (d) and (f)—Grove-holder.

———*Right to sublet for raising crops.*

A grove-holder may sub-let the whole or any portion of his grove land ; sub-s. (*f*) recognises that crops may be grown under and among the trees. (*Mukerji and Bennet, JJ.*) GANGA RAM *v.* BASANT SINGH.
124 I. C. 763 (2) = 1930 A. L. J. 1089.

S. 198—Jurisdiction.

———D *suing for sub-tenant's ejectment—Latter pleading that he was tenant of* Q—*Revenue Court making* P *party and deciding that he was* D's *sub-tenant*—P's *suit to declare his title will not be barred by revenue Court's decision because mistake in making* P *party to suit cannot invest it with iurisdiction to try proprietorship between parties.*

D sued in revenue Court for ejectment of a sub-tenant. The sub-tenant alleged that he was tenant of P and so he was brought on record. The revenue Court holding that he was the tenant of *D* decreed ejectment and *D* consequently got possession. *P* then sued in the civil Court for declaratian of his title.

Held, that the revenue Court had no jurisdiction to bring *P* on record, the mistake of that Court making *P* party cannot invest it with jurisdiction to try the question of proprietorship between the parties. And so the decision of the revenue Court does not bar *P*'s Civil Suit. A. I. R. 1927 All. 70 (F. B.), Dist. (*Dalal, J.*) BRAHMDEO *v.* DUBRI. **118 I. C. 379 = 10 L R. A. Rev. 284 = A. I. R. 1929 All. 548.**

S. 198—Plaintiff's rights.

———*On failure to recover rent, suit brought in civil Court—Plaintiff is entitled to declaration only and not to decree for possession.*

Where a person, on failure to recover arrears of rent brings a civil suit, he is entitled only to a declaration and not a decree for possession. When such declaratory decree is passed he is to seek his remedy in ejectment in a revenue Court. (*Dalal, J.*) SHAMSHER *v.* GAYA
115 I. C. 127 = 10 L. R. A. Rev. 258 = A. I. R. 1929 All. 576.

Ss. 199-220 (Chap. 13)—Powers of Court.

———*Validity of lease can be investigated.*

Even under the old law (Act of 1901) the revenue Court had jurisdiction to go into the question of the validity of a lease, 37 All. 254, Rel. on, A. I. R. 1922 All. 442 and A. I. R. 1922. All. 449 Dist. (*Sulaiman and Banerji, JJ.*) NISAR HUSAIN *v.* SUNDARLAL.
25 A. L. J. 1025 = 8 L. R. A. Rev. 264 = 104 I. C. 292 = A. I. R. 1927 All. 657.

S. 221—Lambardar.

———A lambardar cannot sue as lambardar one or more co-sharers for any sum due from them by reason of their holding as *sir* or khudkasht excess land. 34 All. 98, Foll. 38 All. 223, Diss. from. (*Ashworth and Kendall, JJ.*) KOKA *v.* CHUNNI. **25 A. L. J. 1057 = 8 L.R.A. Rev. 323 = 105 I.C. 745 = A. I. R. 1927 All. 623.**

S. 227—Co-sharer Lambardar's suit.

———*Co-sharer—Lambardar—Accounts filed not showing plaintiff's share as co-sharer, but crediting lambardari* haq—*Plaintiff should be held as suing as lambardar.*

Where the account filed by the plaintiff lambardar does not show the plaintiff's share in the mahal as a co-sharer, it claims from the defendants-co-sharers the whole of the excess in value of their khudkast and *sir* land

over the amount due to the defendants by reason of their fractional share in the mahal and it also credits the plaintiff with lambardari *haq*.

Held, that it was clear that the plaintiff was suing as a lambardar. (*Ashworth and Kendall, JJ.*) KOKA *v.* CHUNNI. **25 A. L. J. 1057 = 8 L. R. A. Rev. 323 = 105 I.C. 745 = A. I. R. 1927 All. 623.**

———**S. 227**—*Suit against co-sharer—Decree cannot be passed for gross rental for negligence in collection.*

In a suit brought under S. 227 against a co-sharer a decree cannot be passed on gross rental against a co-sharer for negligence of that co-sharer in making collections. (*Bennet, J.*) NILKANTH *v.* RUP SINGH.
A.I.R. 1930 All. 640.

———**S. 227 (2)**—*Production of* siyaha *is not sufficient.*

Production of the *siyaha* is not sufficient compliance with S. 227 (2). (*Bennet, J.*) NILKANTH *v.* RUP SINGH. **A.I.R. 1930 All. 640.**

S. 230—Civil Court.

———*Suit for ejectment—Defendants admitted to be joint tenants—Suit does not lie in civil Court.*

In a suit for ejectment if the plaintiffs admit that the defendants are joint tenants, they are precluded by S.230 from going to the civil Court for declaration of their status. Their remedy is to go to the revenue Court under S. 121, A. I. R. 1929 All. 571 (F. B.), Rel. on. (*Sulaiman and Banerji, JJ.*) KHELARI *v.* HAR PRASAD.
124 I. C. 712 = A. I. R. 1930 All 434.

Ss. 230 and 44.

———*Suit by landlord against trespasser—Jurisdiction of Civil Court.*

Held, that a suit by a landlord against a trespasser lies in the Civil Court and that although S. 44 of Act, III of 1926 would also give a remedy with a limited amount of damages in the revenue Court still S. 230 of the Act does not bar the jurisdiction of the Civil Court, 25 A. L. J. 545, Foll. (*Mukerji and Bennet, JJ.*) RAJI *v.* RAM LAGAN. **1930 A. L. J. 637.**

S. 230—Powers of Civil Court.

———*Mere declartion that relinquishment by a third party is not binding on plaintiff cannot be granted by civil Court.*

Plaintiffs brought a suit claiming to be occupancy tenants of the defendants-zamindars, and asking for a declaration that a certain deed of relinquishment executed by defendant 1, a widow, in favour of the zamindar is null and void and not binding on them. The original plaint included an express relief for a declaration that the plaintiffs were the occupancy tenants of the holding, and also in the alternative one for possession. The latter was deleted and the former was withdrawn by the vakil subsequent to the filing of the plaint. The only relief that remained was that defendant 1, the widow, had no concern with the holding, and that the reliquishment by her was fictitious, fraudulent and collusive, and was ineffectual against the plaintiffs,

Held, that the jurisdiction of the civil Court to grant such a relief is barred by S. 167, Agra Tenancy Act, 1901, Case-law, discussed. (*Mukerji and Bennet, JJ. on difference Sulaiman, Ag. C. J.*) MISRI LAL *v.* GOPI CHARAN. **51 All. 114 = 9 L.R.A. Rev. 272 = 1929 A.L. J. 13 = 112 I. C. 391 = A. I. R. 1928 All 538 (545).**

S. 230—Powers of civil Court.

———*C. P. Code., S.* **11**—*Revenue Court deciding whether plaintiffs were agricultural tenants or not—Same question cannot be agitated in civil Court.*

AGRA TENANCY ACT (1926), S. 230.

A decision of the revenue Court on the question whether the plaintiffs were agricultural tenants or not is one within its jurisdiction and the trial of the same question by the civil Court is barred by the principle of *res judicata*. A. I. R. 1927. All. 70, Rel. on. (*Iqbal Ahmed, J.*) BEHARI LAL *v.* RAGHUNATH SINGH.
102 I. C. 887 = 8 L.R.A. Rev 235 = A. I. R. 1927 All. 613.

S. 230—Scope.

Per *Sulaiman, J.*—S. 230 is very wide and mandatory. So long as the suit or application specified in Sch. IV can be heard by the revenue Court the jurisdiction of the civil Court is completely ousted.

Per *Mukerji, J.*—There can be no doubt that if S. 230 excludes a case from the cognizance of the civil Court the civil Court will have no right to have it on the simple ground that all cases of the civil nature should be heard by it. In order to see whether the case falls or not within the purview of S. 230 we must look to Sch. IV and serial numbers and sections corresponding to serial numbers. (*Sulaiman, Mukerji and Banerji, JJ*) SAHDEO *v.* BUDHAI. **117 I. C. 337 = 1929 A. L. J. 849 = 51 All. 853 = A. I. R. 1929 All. 571 (S. B.).**

S. 231—Applicability of Limitation Act.

——*Specific section in Tenancy Act providing for applicability of Limitation Act, S. 5—It is not intended by that section to exclude applicability of rest of Limitation Act to suits and proceedings under Tenancy Act.*

By S. 231 all that the legislature intended to and did provide was that the provisions of S. 5, Limitation Act would apply to all suits and proceedings under that Act, and the mere fact that there is a specific section in the Tenancy Act providing for the applicability of S. 5, Limitation Act, does not lead to the conclusion that it was intended by that section to exclude the applicability of the rest of the Limitation Act to suits and proceedings under the Tenancy Act. Thus a person in computing the period of limitation for the appeals filed by him in the Court of the District Judge is entitled to exclude the time taken in obtaining certified copies of judgments and decrees. A. I. R. 1928 All. 708, Ref. 10 A. L. J. 535, Rel. on. (*Iqbal Ahmad, J*) MT. JANAK DULARI *v.* BISHAMBER NATH. **119 I. C. 251 = A. I. R. 1929 All 745.**

S. 236—Co-sharer.

——*One co-sharer in undivided mahal in possession of property by collecting rent for co-parcenary body—Other co-sharer cannot sue for joint possession and mesne profits in civil Court but must go in revenue Court.*

Where a person is a co-sharer in an undivided mahal and actually in possession of the property in the sense that he was making collection of rent for the coparcenary body, it is not open to one of the co-sharers to institute a suit in the civil Court for joint possession of property or for the mesne profits and his remedy is by a suit in the revenue Court. (1894) A. W. N. 127, Rel. on. (*Sen, J.*) BASHIR HUSAIN *v.* MOHAMMAD ALI.
120 I. C. 558 = A. I. R. 1929 All. 810.

Ss. 242 and 248—Appeal.

——*Appeal lies from order refusing to set aside sale—Appeal lies to High Court where subject matter of suit exceeds Rs.* 5,000.

Under S. 248, Cl. (*c*) an appeal lies from any order of a Collector mentioned in O. 43, R. 1, C. P. Code, and that order includes one refusing to set aside a sale. Under proviso to sec. 242 the appeal from such an order where the subject-matter of the suit exceeds Rs. 5,000 lies to the High Court. (*Sulaiman and Pullan, JJ.*)

AGRA TENANCY ACT (1926), S. 242 (1).

RAM KHELAWAN SINGH *v.* MAHARAJAH OF BENARES. **120 I. C. 125 = 1930 A. L. J. 224 = A. I. R. 1930 All. 15.**

S. 242—Appeal.

——*Appeal lies to District Court when a question of proprietary title is raised.*

When defendants claiming to be zamindar and khudkasht cultivators of land put forward a claim to proprietary title as against the allegation of sub-tenancy put forward by the plaintiff, a question of proprietary title is raised and an appeal lies to the District Court. (*Dalal, J.*) GANGA NARAIN *v.* MANIK LAL.
106 I. C. 307 = 8 L. R. A. Rev. 295 = A. I. R. 1927 All. 727 (1).

S. 242—Retrospective operation.

——*Suit filed while old Act was in force—New Act taking away right of appeal and coming into force before decree—Right of appeal in respect of the suit is not taken away—Interpretation of statutes.*

An appeal is a mere continuance of the original proceeding initiated by the filing of the plaint, and the right to continue that proceeding cannot be affected by a new Act, unless it expressly says so.

A suit for arrears of rent for less than Rs. 200 was filed in the Court of the Assistant Collector when the old Tenancy Act was in force. Before it could be decided, the new Act came into force on 7th September, 1926. The suit was decreed on 23rd December, 1926.

Held, that the right to appeal to the Court of the District Judge was governed by the law prevailing at the date of the institution of the suit, and not by the law that prevailed at the date of its decision, or at the date of the filing of the appeal. *Colonial Sugar Refining Co., Ltd.* v. *Irving*, (1905) A.C. 369 ; A. I. R. 1927 P. C. 242 ; A. I. R. 1927 Mad. 977 ; and A. I. R. 1928 All. 168, Rel on. 26 All. 375, held, overruled by (1905) App. Cas. 369. (*Sulaiman, Ag. C.J. and Mukerji and Boys, JJ.*) RAM SINGHA *v.* SHANKAR DEYAL.
50 All. 965 = 111 I. C. 6 = 9 L. R. A. Rev. 270 = 26 A. L. J. 998 = A. I. R. 1928 All. 437 (F B.).

Ss. 242 and 248—Retrospective operation.

——*Suit for arrears of rent under old Act—Value exceeding* 100 *but below* 200—Ex parte *decree—Application for setting it aside and restoration of suit—Order rejecting it passed after coming into force of present Act—Appeal lies in the Court of the District Judge.*

Where a suit for arrears of rent exceeding Rs. 100 but below 200 was brought in the Court of the Assistant Collector of the first class when the old Tenancy Act, *viz.*, II of the 1901 was in force and was decreed *ex parte*, whereupon an application for the setting aside of the *ex parte* decree and for the restoration of the suit was made but was rejected after the present Tenancy Act had come into force.

Held, that as the order rejecting the application for setting aside the *ex parte* decree was passed after the coming into force of the present Tenancy Act, the right of appeal must be governed and the forum of appeal must be determined with reference to the provisions of the present Act under which an appeal against a decree of an Assistant Collector of the first class can only lie in the Court of the District Judge, and therefore the appeal against the order rejecting the application must be in the Court of the District Judge. (*Walsh and Iqbal Ahmed, JJ.*) SARJU SINGH *v.* HARAKH CHAND.
9 L. R. A. Rev. 18 = 109 I. C. 207 = A. I. R. 1928 All. 143.

S. 242 (1) (a)—Subject-matter.

——"*Subject-matter*" *refers to subject matter of suit and not appeal.*

The words "subject-matter" in S. 242 (1) (*a*) refer to the subject-matter of the suit and not to the subject-matter of the appeal and so where the value of the original suit exceeds Rs. 200, but the value of the appeal is below that amount, the appeal lies to the District Judge. A. I. R. 1929 All. 845, Rel. on. (*Niamatullah, J.*) AMRIT SINGH *v.* BHAGWAN SINGH, **1930 A. L. J. 336 = A. I. R. 1930 All. 97.**

S. 242 (1) (a)—Subject-matter.

———The words "subject-matter" in S. 242 (1) (*a*) refer to subject-matter of the suit and not to the subject-matter of the appeal. (*Dalal, J.*) REGHURAJ SINGH *v.* HARGOBIND. **119 I. C. 3 = 1930 A. L. J. 215 = A. I. R 1929 All. 845 (2).**

S. 243—Appeal.

———*Suit for recovery of rent—Question of proprietary right in issue both in appeal from original decree and also certainly to be in issue in appeal from appellate order—Appeal lies to District Judge.*

Where in a suit for recovery of rent the question of proprietary right has been in issue between the parties, and the same is in issue in appeal before the Collector and is certain to be in issue in appeal from the order of the Collector, an appeal lies from the order of the Collector to the District Judge (*Dalal, J.*) GAMBHIR SINGH *v.* SURENDRA SINGH. **A. I. R. 1930 All. 455.**

Ss. 243 and 270—Appeal.

———*Suit for rent under S. 132—Defence under S. 270 that rent was paid in good faith to third person—No appeal lies to District Judge under S. 243.*

No appeal under S. 243 lies to the District Judge in the case of a suit instituted under S. 132 for recovery of rent, the defence to which was under S. 270 that rent was paid in good faith to a third person for no question of title can be raised in a defence under S. 270. (*Dalal, J.*) KHOTI *v.* KISHOORI LAL. **115 I. C. 638 = 1929 A. L. J. 614 = 10 L. R. A. Rev. 277 = A. I. R. 1929 All. 512.**

S. 243—Third Appeal.

———*No third appeal lies against a decree of Assistant Collector, Second Class.*

A third appeal from a decree of an Assistant Collector of the Second Class does not lie. 29 All. 69; 3 A. L. J. 625 and 38 All. 181, Rel on. (*Mukerji, J.*) MUHAMMAD ABDUL KHAN *v.* UDA. **90 I. C. 996 = A. I. R. 1926 All. 161 (1).**

S. 244—Second appeal.

———*Second appeal is prohibited from order but not decree.*

An appeal is prohibited from an order passed in appeal from another order and not from an order passed in appeal from a decree. (*Dalal, J.*) GAMBHIR SINGH *v.* SURENDRA SINGH. **A. I. R. 1930 All. 455.**

S. 248 (3)—Second appeal.

———*Suit for profits against lambardar—Claim partially decreed—On appeal by plaintiff District Judge setting aside trial Court's order and remanding suit—No second appeal would lie against such remand.*

A suit was brought for the recovery of profits from a lambardar amounting to less than Rs. 200, the suit was decreed partially and on appeal by the plaintiff the District Judge purported to set aside the order of the Assistant Collector, and remand the suit and defendant then filed a second appeal.

Held: that no second appeal would lie from the remand order of the District Judge. (*Mukerji and Niamatullah, JJ.*) GIRWAR SINGH v. SHAH RAM CHANDER. **117 I. C. 110 = 1929 A. L. J. 885 = 11 L. R. A. Rev. 2 = A. I. R. 1929 All. 586.**

S. 249—Scope

———Section 249 has to be read in reference to the heading above S. 247. (*Dalal, J*). GAMBHIR SINGH SURENDRA SINGH. **A.I.R. 1930 All. 455.**

S. 249—Appeal.

———*No appeal lies to High Court under Tenancy Act from order of remand by District Judge in appeal.*

There is no provision in the Tenancy Act which allows an appeal to the High Court from an order of remand passed by a District Judge in appeal. (*Banerji and King, JJ.*) DWARKA PRASAD *v.* OJHA DRIAO SINGH. **115 I.C. 644 = 1929 A.L.J. 863 = 11 L.R.A. Rev. 13 = A.I.R. 1929 All 560.**

S. 249—Second appeal.

———*No second appeal lies from an order in execution.*

An order of a Revenue Court passed in execution ot an order is not an order appealable under S. 249t (*Dalal, J.*) BRIJ RAJ SARAN SING *v.* SISRAM. **122 I. C. 415 = A.I.R. 1930 All. 91 (2).**

S. 253—Revision.

———*No cause for interference arises where lower Court acts within jurisdiction.*

Where the District Judge on appeal from the decision of the Assistant Collector files a complaint under S. 476-B, Cr. P. C., which the trial court refuses to file, he acts within his jurisdiction and there is no irregularity in his procedure necessitating interference. (*Dalal, J*) NARAIN PRASAD *v.* EMPEROR. **120 I. C. 116 = 10 L. R. A. Cr. 147 = 30 Cr. L.J. 1148 = = 13 A.I. Cr. R. 1 = 1929 Cr. C. 490 = A. I. R. 1929 All. 898.**

S. 253--Scope.

———The power of revision is given with respect to the decision of such subordinate revenue court in which an appeal lies to the District Judge, and not with respect to the decision of the District Judge on appeal from the decision of any subordinate revenue Court. A.I.R. 1929 All 560, Ref. (*Dalal, J.*) BACHU LAL *v.* L. DHARAM DEO LAL. **1930 A.L.J. 1055 = 11 L.R. A. Rev. 217 = 14 R. D. 457 = A.I.R. 1930 All. 656.**

S. 253—Revision.

———*High Court has no power of revision except under S. 253—Expression "such revenue court" does not include District Judge—High Court has no power of revision of order by District Judge.*

If revision is governed by the new Act the case must fulfil the provisions of S. 253 before a revision can be entertained. Under S. 264 of the new Act only selected provisions of the Code of Civil Procedure are made applicable to cases under this Act and list I of Sch 2 clearly excludes the provisions of S. 115, C. P.C., from the Act. It is thus clear that the High Cour has no power of revision except under S. 253. Considering the phrasealogy of S. 253 side by side with that of S. 252 there can be no doubt that "such Revenue Court" does not include the District Judge mentioned therein. Therefore, it is clear that, however unfortunate he result may be, the High Court has not got any power of revision of orders passed by a District Judge, however, *ultra vires*, irregular or illegal they may be. (*Sulaiman and Niamatullah, JJ.*) JUGDEO SINGH *v.* KESHO PRASAD SINGH. **118 I.C. 227 = 51 All. 1020 = A.I.R. 1929 All. 735.**

S. 253—Scope.

———As revision lies only in those cases where appeal to the District Judge lies, no revision lies to the High Court in suits for profits decided by the revenue courts if the valuation of the suit does not exceed Rs. 200 because in such cases no appeal lies to the District Judge. (*Mukerji and Niamatullah, JJ.*) GIRWAR SINGH *v.* RAMCHANDER. **117 I.C. 110 = 1929 A.L.J. 885 = 11 L.R.A. Rev. 2 = A.I.R. 1929 All. 586.**

S. 254—Powers of Board.

——*Board of Revenue cannot refer abstract question of law not actually arising in a pending case.*

Section 254 does not give authority for the Board of Revenue to refer to the High Court abstract questions of law detached from any concrete case which may be pending before the Board for decision. When a number of cases are pending before the Board of Revenue involving certain question of law and the Board desires to have the opinion of the High Court the proper course is that one of these pending cases should be submitted to the High Court together with a statement of the facts of the particular case and a statement of the conflicting opinions of the members who are dealing with it. (*Lindsay and Sulaiman, JJ.*) KRISHNA DUTT DUBE *v.* RAM ACHHAIBER RAI **49 All. 711 = 25 A. L. J. 519 = 102 I. C. 261 = A. I. R. 1927 All. 491.**

S. 264—Nankar.

——*Nankar cannot be set off against rent.*

Nankar is a certain allowance which an ex-proprietor receives from a person purchasing his property while his tenancy rights do not depend on any ex-proprietary right. The origin of the two rights, the right for rent and right for nankar, being different, set-off cannot be allowed in a suit for rent, (*Dalal, J.*) AMINULLAH JAMATI *v*, MAKHDOOM BENG **122 I.C. 416 = A.I.R. 1930 All. 179.**

S. 264—Set-off.

——No set-off can be allowed under Tenancy Act, (*Sulaiman and Niamatullah, JJ.*) MOHAMMAD RAZIQDADKHAN *v.* HAJI MOHAMMAD ZAFARYAB KHAN. **120 I.C. 560 = 1929 A.L.J. 1103 = A.I.R. 1930 All. 168.**

——**S. 264**—*Suit by lambardar for ejecting trespassers or squatters from common "abadi" land—Suit is for benefit of whole body of co-sharers.*

The interest of lambardar in the "abadi" land belonging to the body of co-sharers whom he represents is certainly of a character which entitles him to proceed against squatters and trespassers. In suits of ejectment he is not seeking to take exclusive possession of any land belonging to his co-sharers, nor does his action prejudicially affect the rights of his co-sharers. *Prima facie* his action in obtaining ejectment of trespassers is for the benefit of the whole body of co-sharers. 36 All. 441, Rel. on.; 5 Rev. Rep. 33, Ref. (*Niamatullah, J.*) SHAKUR *v.* B. SANWAL DAS. **L.R. 11 A. Rev. 204 = 14 R.D. 425 = A.I.R. 1930 All. 630.**

S. 265—Lambardar.

——Except for the exigency of a particular year or seasons, it is not open to a lambardar to grant a lease of joint property for long years (*e,g,* 7 years) without the consent of the co-sharers. Adequacy of rent alone is not the thing to be considered. 30 All, 163. Foll, (*Mukerji, J.*) MOHAMMAD NUR KHAN *v.* BANDE ALI KHAN. **114 I.C. 752 = 10 L. R. A. Rev. 165 = 13 R.D. 518.**

S. 266—Non-joinder of Parties.

——*Some co-sharers not impleaded—Suit though bad under S. 266, should not be dismissed—Plaintiff should be allowed to bring the co-sharers on record.*

Though a suit is bad in law under S. 266, because certain co-sharers have not been impleaded in the suit, the plaintiffs should not be penalised by the entire dismissal of the suit and an opportunity should be afforded to him to proceed with the suit after bringing the co-sharers on record. (*Sen, J.*) JANKI KUAR *v.* NANDU, **118 I.C. 240 = A.I.R. 1929 All. 847.**

S. 266 (1)—Scope.

——It is wrong for a Revenue Court to decree ejectment at the instance of one co-sharer alone. (*Bennet, J.*) MAHABIR *v*, BAIJNATH SINGH. **117 I.C. 339 = 11 L.R. A. Rev. 7 = 11 L. R. A, Rev. 35 = A.I.R. 1929 All. 609.**

S. 268—Revenue Court.

——*Person ejected by third person through zamindar—Suit for possession of land lies in revenue court.*

A suit for possession of land from which a person has been ejected by a third person through instrumentality of the zamindar lies to the Revenue Court both under the old and the new Tenancy Act. (*Dalal, J.*) BALESHAR *v.* RAM TAHAL. **123 I C. 681 = A.I.R. 1930 All. 519.**

S. 268—Scope.

——Where the plea as regards jurisdiction was not taken in the court of first instance or in the lower appellate court, the High Court cannot allow it in second appeal. A. I. R. 1928 All. 269. Dist. (*Bennet, J.*) BUDHU PASI *v.* BADLU PASI. **118 I.C. 523 = L.R. 11 A. Rev. 20 = 14 R.D. 66.**

S. 271—Effect of Civil Court decree.

——*Suit for profits between co-sharers—Question of proprietary title—Civil Court's decree as to proprietary title must be given effect to even though subsequent to decision of revenue court of first instance.*

In a suit on collection of profits between co-sharers, the courts are bound to give effect in appeal to a decree of proprietary title passed by a civil court, even when the civil court's decree is passed after the decision by the Revenue Court of first instance. A. I. R. 1922 All. 355 and 31 All. 253, Foll. (*Banerji and King, JJ.*) DEGAMBAR SINGH *v.* BIRENDRA SINGH. **1930 A.L.J. 286 = A.I.R. 1930 All. 313 (2).**

S. 271, Expl. 1—Jurisdiction of Revenue Court.

——*Plea of proprietary right solely untenable and intended solely to oust jurisdiction of Revenue Court—Trial court need not act under first-part of S. 271.*

The trial court is not obliged to act under the first part of S. 271, if it is of opinion that the plea of proprietary right is solely untenable and intended solely to oust the jurisdiction of the revenue courts. Where the defendant does not ask the issue about proprietary title to be framed, the trial court is fully justified in believing that the issue could not and would not be pressed, or in other words that it was untenable. It cannot be subsequently said that mere raising of proprietary title made it incumbent on the trial court to frame such issue. (*Boys, J*). MOHAMMAD SADIQ *v.* ALTAF HUSAIN. **A.I.R. 1930 All. 647.**

S. 271, Expl. (2)—Proprietary Title.

——*Plea that a person is holding land as his khudkasht does not involve question of proprietary title.*

Where a suit before Assistant Collector for ejectment alleging defendant to be a sub-tenant is resisted by the defendant on the ground that he is not the sub-tenant of the plaintiff but he holds the land as zamindar and the land in controversy is his khudkasht, the plea raised by the defendant does not involve a question of proprietary title and the appeal lies not to the District Judge but to the Commissioner. (*Sen and Weir, JJ.*) NET RAM

AGRA TENANCY ACT (1926). S. 273.

v. HAR GOVIND. **113 I. C. 755 = 1929 A. L. J. 289 = 10 L. R. A. Rev. 97 = A. I. R. 1928 All. 764.**

Ss. 273 and 44—Ejectment of trespasser.

———*Suit for ejectment against trespasser may be filed either in civil or in a revenue Court.*

It is a well-settled canon of construction that the various sections of an enactment should be so construed as not to render a particular provision in the enactment inconsistent with another provision of the same enactment, and the only possible way to so interpret the provision of S. 44 of the Act as not to be inconsistent with the provisions of S. 273 of the Act is to hold that all that was intended by S. 44 of the Act was to give an option to the landholder to file a suit for ejectment against a trespasser either in the civil or in the revenue Court. (*Iqbal Ahmad, J.*) DEBI SAHAI *v.* DAULAT. **100 I. C. 471 = 8 L. R. A. Rev. 104 = A. I. R. 1927 All. 346.**

S. 273—Ejectment of Trespasser.

———*Ejectment suit against trespasser—Plea of tenancy—Court should follow procedure in S. 273.*

Where a suit for ejectment is brought in a civil Court against a trespasser and the defendant sets up the plea of tenancy, the Court should follow the procedure laid down by S. 273. (*Iqbal Ahmad, J.*) DEBI SAHAI *v.* DAULAT. **100 I.C. 471 = 8 L.R. A. Rev. 104 = A.I R. 1927 All. 346.**

Ss. 273, 230 and 44—Procedure of Civil Court.

———*Suit for ejectment—Defendant pleading tenancy—Civil Court can try suit but should follow procedure as in S. 273.*

Where in a suit for ejectment, though the plaintiff does not admit that the defendant is holding under any tenure, lease, engagement or grant from him, and the defendant is pleading that he is the plaintiff's tenant, the Court is satisfied that the property in dispute in the case is an agricultural holding, S. 273 applies and the Court has no option but to frame an issue on the defendant's plea of tenancy and refer the same to the revenue Court. The jurisdiction of the civil Court to refer such an issue is expressly provided by S. 273, and is not intended to be barred by the provisions of S.230. A. I. R. 1927 All. 346, Affirmed. (*Lindsay, Sulaiman and Mukerji, JJ.*) MANOHAR SINGH *v.* SHEO SARAN. **25 A.L.J. 545 = L.R.8 A. Rev. 250 = 103 I.C. 271 = A.I.R. 1927 All. 369 371 (F.B.).**

Sch. 2, List 2, Serial No. 2.

———*Scope.*

A set-off is not admissible in the revenue Court under Sch. 2, List 2, Serial No. 2. (*Dalal, J.*) MUHAMMAD AKBAR *v.* SYED ALI SAJJAD. **121 I.C. 386 = A.I.R. 1929 All. 691.**

AGREEMENT.

See (1) CONTRACT.
(2) CONTRACT ACT.
(3) REGISTRATION ACT, S. 17.

AGRICULTURAL—Holding.

See (1) LANDLORD AND TENANT.
(2) LEASE.

———Lease.

See (1) LANDLORD AND TENANT.
(2) LEASE.
(3) T. P. ACT, Ss. 107, 108, 116, 117.

———Purposes.

See (1) LANDLORD AND TENANT.
(2) LEASE.
(3) LOCAL TENANCY ACT.
(4) T. P. ACT S. 117.

AJMERE-MERWARA REGULATION (1877), S. 23.

———Tenant.

See (1) LANDLORD AND TENANT.
(2) LEASE.

AGRICULTURISTS' LOANS ACT (XII OF 1884).

S. 5—Jurisdiction.

———*U. P. Land Revenue Act* (1901), *S.* 233 (*m*)—*Civil and Revenue Courts—Jurisdiction.*

A claim arising out of a recovery of money due under the Agriculturists Loans Act (1884) is cognizable by the Revenue and not the Civil Court. (*Tudball, J.*) NIHAL CHAND *v.* KANHAIYA. **62 I.C. 544 = 19 A.L.J. 360 = A.I.R. 1921 All. 80.**

S. 5—Warrant.

———*Warrant though signed by Tahsildar is valid.*

Warrant issued under S. 5 of Act XII of 1884, (Agriculturists' Loans Act) can be signed by the Tahsildar or issued under his order, where he has the authority of the Collector to do so. (*Pullan, J.*) JOWAD HUSSAIN *v.* EMPEROR. **2 Luck. 503 = 1 Luck.C. 159 = 103 I.C 401 = 8 A.I.Cr. R. 321 = 28 Cr.L.J. 673 = A.I.R. 1927 Oudh 296.**

S. 5—Wrongful attachment.

———*Property of a person attached as heir of the debtor—The person paying the amount under protest and getting the property released—Right of, for recovery of the amount but not for damages or mesne profits—U. P. Land Revenue Act* (*III of* 1901), *Ss.* 183 *and* 233 (*m*).

The revenue authorities, in pursuance of the provisions of S. 5 of the Act attached a she-buffalo in the possession of *D*, on the ground that the latter was the heir of *R*, the original debtor, and the she-buffalo was the property of the deceased. *D* objected to the attachment on the ground that he was not the heir of *R* and that the she-buffalo belonged to him; but his petition of objection was summarily dismissed by the Collector. Thereupon *D* paid under protest in writing duly signed by him the amount of the takavi demand and the fees for attachment, and procured the release of the she-buffalo. During the intervening period, *i.e.*, between the date of the attachment and removal of the buffalo from the possession of *D* and the date of its release, the calf of the buffalo died in consequence of its separation from its mother. *D* brought a suit for a refund of the amount with interest and for recovery of damages caused by the death of the buffalo calf and for the price of the milk of which the plaintiff was deprived on account of the unlawful attachment of the she-buffalo.

Held that *D's* right of suit is restricted to the recovery of the amount paid. He is not competent to sue the Government for damages either for the price of milk or the buffalo calf. 21 All. 341, Dist. (*Lindsay, A.C.J., Iqbal Ahmad and Sen, JJ.*) DAYA RAM *v.* SECRETARY OF STATE. **25 A.L.J. 1002 = 8 L.R. A. Rev. 274 = 105 I.C. 621 = A.I.R. 1927 All. 672 (S.B.).**

AIR AND LIGHT.—*See* EASEMENTS ACT.

AJMERE-MERWARA REGULATION (I OF 1877).

S. 23—High Court.

———The Chief Commissioner of Ajmere and Merwara is the High Court for the purposes of the Companies Act for places within its jurisdiction and not the Allahabad High Court. (*Mukerji, J.*) KEKRI PRESS CO., LTD. *In re.* **48 All. 709 = 24 A.L.J. 768 = 96 I. C.753 = A.I.R. 1926 All. 649.**

AJMERE-MERWARA REGULATION, (III OF 1877).

Ss. 6, 9—Pre-emption.

——*Pre-emption—Right of, may arise even where there is no sale deed according to Transfer of Property Act.*

Land was sold in Ajmere, but in order to defeat a possible claim for pre-emption, no sale-deed was executed as required by S. 54 of Transfer of Property Act. In all other respects the sale was complete.

Held, that a right of pre-emption arose. *Held also* where a right of pre-emption is claimed under the Statute law of Ajmere-Merwara, the principles laid down in Allahabad Ruling in 16 All. 344 should be followed. (*Piggott and Walsh, JJ.*) RAM SUKH *v.* MRS. L. E. O'NEAL. **44 All. 239 = 65 I.C. 103 = 20 A.L.J. 59 = A.I.R. 1922 All. 46.**

ALIEN.

Faridkot Raja.

——Raja of Faridkot is not an alien. (*Fforde and Jai Lal, JJ.*) MAHARAJA OF FARIDKOT STATE *v.* ANANT RAM. **114 I.C. 62 = 10 Lah. 447 = A.I.R. 1929 Lah. 1 (6).**

ALIENATION.

See (1) CUSTOM—PUNJAB.
(2) HINDU LAW—ALIENATION.
(3) MAHOMEDAN LAW—ALIENATION.

ALIEN ENEMY—*See* C. P. CODE, S. 83.

ALIMONY—*See* DIVORCE ACT, S. 36.

ALIYASANTHANA LAW—*See* MALABAR LAW.

ALLAHABAD HIGH COURT—Fees of Counsel.

——*Higher scale fees are usually awarded—Fanciful valuation is therefore to be avoided.*

Fees on the higher scale are usually given in the High Court and in the absence of taxing masters they are graduated according to the valuation fixed by the plaintiff. Obviously if a plaintiff is permitted to place any fanciful figure as the value of the suit, he subjects the defendant to an unfair burden as regards the costs which he is *prima facie* liable to pay his counsel and also subjects him to a continuing possible liability to pay the plaintiff an amount by way of costs far in excess of the real value of the case. A minor and less important matter is that the plaintiff may embarrass himself. (*Mears, C.J., and Piggott, J.*) RAJA UDAIRAJ SINGH *v.* SECRETARY OF STATE FOR INDIA. **46 All. 553 = 88 I.C. 212 = 22 A.L.J. 446 = A.I.R. 1924 All. 652 (656).**

Jurisdiction.

——*Revision—Kumaun High Court not a subordinate Court.*

The High Court of Kumaun is not a Court subordinate to Allahabad High Court for purposes of revisional jurisdiction. (*Piggott, J.*) SADAR SINGH KONDARI *v.* AMAR SINGH KONDARI. **71 I. C. 991 = 45 All. 383 = A. I. R. 1923 All. 291.**

ALLAHABAD HIGH COURT RULES.

Ch. I, R. 1 (14)—Jurisdiction.

——*Single Judge has jurisdiction to dispose of an application for notice to printer and publisher of newspaper to show cause why they should not be convicted for contempt of Court and if such application come through jail authorities Judge can dispose it of in chambers.*

Under Chap. 1, R. 1 (14), sub-Cl. (*b*), a single Judge has jurisdiction to dispose of an application praying for a notice to be issued to printer or publisher of a newspaper to show cause why they should not be convicted for contempt of Court, when there is no rule expressly requiring it to be made by a Bench of two or more Judges. Further, when such an application is sent through the Superintendent of Jail, the Judge can dispose of the matter in chambers without fixing any date for its hearing. (*Sulaiman, J.*) DANGE *v.* SHEPPARD. **1930 A. L. J. 665 = 1930 Cr. C. 702 = A. I. R. 1930 All. 483.**

Ch. II, R. 12—Tender.

——*Provincial Small Cause Courts Act, S. 17—Application for setting aside* ex-parte *decree made on 3rd December*, 1926 *with tender of decretal amount—Amount actually paid into treasury on 6th December*, 1926, *the 5th being holiday—Tender is valid.*

An application for setting aside a Small Cause Court decree was made, together with tender of the decretal amount, on 3rd December 1926, but the amount was actually paid into the treasury on the 6th December 1926, 5th December 1926 being a holiday.

Held, that the tender was a good tender in view of R. 12 of Chap. II of the General Rules of the High Court. (*Mukerji, J.*) RAM SARUP *v.* KHANDERAN KOHAR. **102 I. C. 523 = A. I. R. 1927 All. 608**

Ch. III, R. 2—Procedure.

——*C P. Code, O. 41, R. 1, O. 42, R. 1 and S. 122—Allahabad High Court Rules, Ch. III, R. 2, and amended O. 42, R. 1—Memo. of Second Appeal—Copy of Trial Court's judgment must accompany the memo.*

Under Ch. III, R. 2 of the Rules made by the Allahabad High Court and O. 42, R. 1, as amended by the Allahabad High Court, a memorandum of second appeal must be accompanied by a copy of the judgment of the Court of first instance. Otherwise the Court must refuse to accept the memorandum under S. 122 of the C.P. Code. Both Ch. III, R. 22 of the Rules of the Allahabad High Court and the amendment made by that Court in O. 42, R 1, are *intra vires.* The terms of the amended O. 42, R. 1, do not allow the construction that the Court can dispense with the copy of the judgment of the Trial Court. But when a properly constituted appeal is presented out of time, nothing prevents the application of Limitation Act, S. 5, in a proper case. (*Walsh, Lindsay and Sulaiman, JJ.*) BHAIRON GHULAM *v.* RAM AUTAR SINGH. **63 I. C. 338 = 43 All. 660 = 19 A. L. J. 598 = A. I. R. 1921 All. 23.**

Ch. III, R. 3—Procedure.

——*Even after admission to hearing of an appeal without certificate a matter covered by R. 2 cannot be argued.*

Under Chap. III, R. 3 a certificate about absence of evidence or admission is necessary and though appeal is admitted to hearing, the matter cannot be argued. (*Stuart, J.*) ISH NARAIN *v.* RAMESHAR LOHAR. **78 I. C. 164 = 22 A. L. J. 244 = 5 L. R. A. Rev. 91 = A. I. R. 1924 All. 433.**

Ch. III, R. 6-c, para. (2)—Ultra vires.

——*Rule is* ultra vires.

Rule 6-C, para. 2 being inconsistent with the provisions of the Letters Patent is *ultra vires* of the High Court. (*Mukerji and Bennet, JJ.*) PAHUNCHI LAL *v.* BHUP SINGH. **A. I. R. 1930 All. 558.**

Ch. III, R. 37—Preparation of map.

——*Amin alone can be deputed to prepare map and if Court deputes person other than amin on party's prayer, it must give reasons in detail.*

An amin is the only person who may be deputed by a civil Court to prepare a map, and whenever any prayer is made by a party otherwise, the Court has to apply its mind to the question whether it is necessary to employ another person as commissioner or not, and if it decides that another person should be engaged as commissioner it is bound to give reasons in detail for its order. A.I.R. 1922 Mad. 219, Rel. on. (*Dalal, J.*) NAND KISHORE *v.* GANESH PRASAD. **118 I. C. 166 = A. I. R. 1929 All. 446.**

Ch. IV, R. 9—Procedure.

———*Decree transferred to Collector— Procedure of Collector cannot be questioned by Civil suit.*

A decree for execution was transferred to the Collector under S. 68 of the C.P Code, a sale was held and the Collector accepted the highest bid that was made. Before the sale was confirmed, it was brought to his notice that the bid was very much less than the property was worth. Thereupon he ordered a re-sale to take place but directed that unless there was a higher bid the former sale would stand. The auction-purchaser appealed to the Commissioner against this order but the appeal was dismissed. He then instituted a suit for confirmation of the sale and for possession.

Held, that the Civil Court was not concerned with and had not got to decide whether the order of the Collector was a good order or a bad order, as under R. 9 of Ch. IV of General Rules passed by the Allahabad High Court, the Civil Court had no power to interfere with Collector's procedure in execution of the decree. (*Knox and Ryves, JJ.*) CHULHI UPADHYA *v.* BADRI UPADHYA. **62 I. C. 672 = 19 A. L. J. 232 = A. I. R. 1921 All. 225.**

Ch. IV, R. 9—Suit for Profits.

———*Suit for profits as legal representative of deceased person—Right denied—Duty of Court.*

Where a person sues in Revenue Court to recover profits due to certain deceased persons on the ground that he is their legal representative and his right is denied, the Court under S. 199 should decide the question of title as a Civil Court or refer the parties to a Civil Court by an order in writing. (*Banerji, J.*) SYED MADAD ALI *v.* SHEIKH SHAMSHER ALI. **63 I. C. 103 = 4 U.P.L.R. (A.) 9.**

Ch. V, R. 5—Restoration.

———*Case dismissed for default—Counsel not appearing as full fee not paid—Case cannot be restored.*

If a litigant chooses to engage only one counsel in a first appeal, who has plenty of other work to look after, and does not choose to pay his colleague whom also he had engaged at first, he takes the risk, and if subsequently no counsel appears and the case is dismissed for default, the applicant has no right to have the case restored. (*Sulaiman, Ag. C. J. and Weir, J.*) HARNANDAN LAL *v.* SHYAM LAL. **110 I. C. 772 = 26 A. L. J. 1393 = A. I. R. 1928 All. 718.**

Ch. VI, R. 8—Procedure.

———Where a case is once passed over, the appellant has no right to have it passed over a second time. (*Sulaiman, Ag. C. J. and Weir, J.*) HARNANDAN LAL *v.* SHYAM LAL. **110 I. C. 772 = 26 A. L. J. 1393 = A. I. R. 1928 All. 718.**

Ch. VII, R. 3—Irregularity.

———*Non-compliance with R. 3 is only irregularity merely on account of which re-hearing of case cannot be asked for under C. P. Code, S. 151.*

Non-compliance with R. 3, Ch. VII of the Rules, which requires that, when a written judgment is pronounced by one of the Judges it has to be signed by both Judges, is merely an irregularity which does not affect the merits and S. 151, C. P. Code, cannot be invoked to ask to rehear the case merely on account of such technical irregularity. (*Banerji and Kendall, JJ.*) BANARSI DAS *v.* SAGAR MAL. **1929 A. L. J. 713 = 116 I. C. 23 = A. I R. 1929 All. 403.**

Ch. IX, R. 25—Court.

———Where a decree has gone against a party and where that party wants to satisfy an appellate Court that the decree should not have gone in the way it has gone, it is the duty of that party, namely the appellant, to lay before the Court all the evidence on which the decree has been based. A. I. R. 1927 All. 62, Foll. (*Mukerji and Niamatullah, JJ.*) RAMESWAR SINGH *v.* KANYAKUBJA BANK OF INDIA, LTD. **117 I. C. 109.**

Chap. XVI, R. 2—Applicability.

———The R. 2, Chap. XVI, High Court Rules, is applicable to suits and applications which are tried on the original side by the High Court itself and not to suits tried by subordinate Courts. (*Sulaiman and Banerji, JJ.*) BOHRA KANHAIYA LAL *v.* GENDO. **50 All. 238 = 25 A. L. J. 972 = 107 I. C. 34 = A. I. R. 1928 All. 51.**

Ch. XXI, R. 1—Costs.

———*General Rules for Subordinate Civil Courts—Point regarding costs not taken in lower Court should not be raised in High Court—C. P. Code, S. 35.*

It is bad practice to allow an appellant who has taken no objection to an award of costs against him in the lower Court to go to the High Court and argue that point there. (*Mears, C.J. and Piggott, J.*) JAINI LAL *v.* FIRM DURGA PRASAD. **75 I. C. 527 = A. I. R. 1923 All. 334.**

———*Pleader's fees—Certificate of fees.*

Letters of Administration to the estate of a minor were after contest granted to the Nazir of the Court, who was also awarded a sum for vakil's fees; the Nazir under the order raised the money and paid the fees to the pleader who filed his fees receipt.

Held under Chap. XXI, R. 1 of the General Rules for Civil Courts (1911), fees can be allowed only if the Judge is satisfied of payment of fees before the hearing; it gives him no discretion to allow on taxation fees paid after the hearing. (*Ryves and Gokul Prasad, JJ.*) MAGAN LAL *v.* MUHAMMAD TIA-UD-DIN. **61 I.C. 804.**

Ch. XXI, R. 1—Hearing.

———*Rules for Subordinate Court—First day of hearing for purpose of filing certificate of payment of pleader's fees.*

For the purpose of determining whether a certificate of payment of pleader's fee has been filed in time, the first day of hearing is to be interpreted as the first day fixed for hearing after the framing of issues. (*Neave, J.*) MADHO LAL *v.* BANARSI DAS. **5 L. R. A. (Civ). 582 = 82 I. C. 73 = A.I.R. 1925 All. 98.**

Ch. XXI, R. 20—Costs.

———Under Chap. 21, R. 20, the party entitled under a decree or an order to pay costs in a suit by another party shall not be entitled to any larger allowance for legal practitioner's fees in the suit including all proceedings in the execution of the original decree, than the fees provided in R. 22, by reason of the fact that the case has been sent back to the lower Court for trial *de novo*. (*Sulaiman and Kendall, JJ.*) BANSHIDHAR *v.* SURAJ PRASAD SINGH. **121 I.C. 826 (1) = A. I. R. 1930 All. 437.**

Ch. XXI, R. 21—Counsel's fee.

——*Claim withdrawn on the day fixed for contest—Full counsel's fee must be allowed.*

Where the claim against one of the defendants is withdrawn by plaintiff on a day which is fixed for contest but the full fee has already been paid by the defendant to his counsel, the defendant is entitled to full counsel's fee. (*Mukerji, J.*) BHAJAN LAL *v.* KEDARNATH. **48 All. 696 = 96 I. C. 754 = A. I. R. 1926 All. 733.**

Ch. XXI, R. 26—Costs.

——*Taxation of costs in contested application for probate—R.* 26 *and not R.* 22, *applies.*

The rule applicable to the cases of taxation of costs in contested application for probate is R. 26 and not R. 22. (*Sulaiman and Banerji, JJ.*) BOHRA KANHAIYA LAL *v.* GENDO. **50 All. 238 = 25 A. L. J. 972 = 107 I. C. 34 = A. I. R. 1928 All. 51.**

ALLAHABAD HIGH COURT.

Company Rules, Rr. 54 to 59—Notice.

——*List framed and notice issued under R.* 54—*Party applies on date fixed for postponement of entry of their name—Application rejected and name entered—No notice under R.* 57 *necessary to make party liable as contributory.*

A list of contributories was framed by liquidators under R. 54 and notices issued to contributories as per R. 54. On the date fixed, Court settled the list of contributories, rejecting the application of one of the parties for postponement of the entry of their names in the list, without objection to such entry.

Held, that no further notice under R. 57 is necessary to the party to bind them as contributory. (*Mukerjee and Young, JJ.*) DEHRA DUN E. T. CO. *v.* OFFICIAL LIQUIDATORS. **1930 A. L. J. 139 = A. I. R. 1930 All. 357.**

ALLEGATION.

See (1) C. P. CODE.
(2) PLEADINGS.
(3) PRACTICE.

ALLOTMENT.

See (1) HINDU LAW.
(2) JOINT FAMILY—PARTITION.

ALLOWANCE TO BANKRUPT.

See INSOLVENCY ACT.

ALLUVIAL AND DILUVIAL LANDS.

See ALLUVION AND DILUVION.

ALLUVION AND DILUVION.

See also BENGAL ALLUVION AND DILUVION REGN. (XI OF 1825) AND BENGAL ALLUVION & DILUVION ACT OF 1847.

Accretions.

——*Right to accretions by alluvion arise* ex jure naturae *wherever land abuts on river—Riparian owners.*

Rights to accretions by alluvion arise, *ex jure naturae* wherever land abuts on a river, whether the bed of the river be the property of the riparian owners as in the case of private rivers, or the property of the Crown as in the case of public rivers. Case-law discussed. (*Kumaraswamy Sastri and Walsh JJ.*) NAGANNA *v.* SATYANARAYANA. **123 I. C. 131 = 53 Mad. 202 = A. I. R. 1930 Mad. 181.**

——Where it appeared that in the re-formed land there had been a definite change in each year according to the actual course of the river after the inundation season, it cannot be held, that there was any accretion. 13

M.I.A. 467 (P.C.), Appl. (*Milne, A.J.C.*) THAWERDAS SIRUMAL *v.* SECRETARY OF STATE. **A. I. R. 1929 Sind 61 (68).**

——*Sind Commissioner's circulars—Special circular* 23—*Land washed and re-formed is property of proprietor and not of Government.*

Lands washed away and afterwards re-formed on an old site which can be clearly recognized remain the property of the original owner. 13 M. I. A. 467 (P.C.), Rel. on. This is the general law applicable throughout India including Sind. The law laid down in Special Circular No. 23 of the Commissioner in Sind is not different. (*Milne A. J. C.*) THAWERDAS SIRUMAL *v.* SECRETARY OF STATE. **A. I. R. 1929 Sind 61 (67).**

——*Non-tidal river—Change of course by abnormal flood—Plaintiff cannot follow new river bed.*

A non-tidal river ran between the lands of plaintiff and defendants. There was up to 1905, over a period of some 40 or 50 years, a gradual accretion to the land of the plaintiff. But after 1905, further accretion was slow and in 1914, there was an abnormal flood which caused the river substantially to alter the course. Plaintiff claimed land up to the new river bed by the law of alluvion on an accretion to his lands.

Held, that there was no gradual accretion and the plaintiff cannot claim to follow the river and take possession of all the intervening lands. 27 All. 655 (P.C.), Rel. on. 13 M.I.A. 467 (P. C.): A.I.R. 1914 P. C. 48; A.I.R. 1922 P.C. 105; Dist. (*Marten, C.J. and Crump, J.*) SHUSHILENDRA TIRTHASWAMI *v.* SECRETARY OF STATE. **29 Bom. L. R. 1405 = 105 I. C. 715 = A. I. R. 1927 Bom. 616.**

——*Land formed in a river which is identifiable remains the property of the original owner.*

Where land which is formed in a river is identifiable and has been identified, it remains the property of the original owner and cannot be claimed by a neighbour as land formed by accretion 27 Cal. 768 (P.C.) and A.I.R. 1927 P.C. 89, Foll. (*Stuart, C. J. and Raza, J.*) RAJ KUNWARI *v.* UMA PARSHAD. **105 I. C. 148 = A. I. R. 1927 Oudh 559.**

——*Land retaining identity—Question of gradual or sudden change is immaterial.*

If the lands in suit still retain their identity as lands formerly appertaining to the village, the trial of the question as to whether the lands have changed their position by reason of gradual accession or by a sudden change in the course of the river becomes immaterial; A.I.R. 1927 P.C. 89, Appl. (*Wazir Hasan and Misra, JJ.*) SHER BAHADUR SINGH *v.* TAFAZUL HUSAIN. **1 L. C. 315 = 104 I. C. 426 = A.I.R. 1927 Oudh 363.**

——*Proprietors are not entitled to claim the land which remained long under water and appeared again in another village and was taken by the proprietors of the other village as theirs for* 30 *years.*

The lands of a village remained submerged long and again re-appeared as an accretion to the lands of a village of the opposite side of the river, and since their re-appearance they had been measured as a part of the village during the last settlement and possessed by the owners of that village and this exercise of the proprietary title by the owner of the village over the land in suit was continued at least for thirty years before the river again began to change its course and threw out the land in suit on the site of the village.

Held, that the proprietors of the village lose every semblance of title to it and the fact that it belonged to them 30 years ago was of no consequence on the question of their subsisting title. A. I. R. 1927 P. C. 89 and A. I. R 1927 Oudh, 363, Ref. (*Wazir Hasan, J.*)

ALLUVION AND DILUVION—Accretions.

BHAGWAN BAKSH SINGH *v.* BEJAIPAL SINGH.
4 O. W. N. 1008 = 106 I. C. 86 = A. I. R. 1927 Oudh 519.

———The parent estate adjoining a river cannot be said to have included the increment because its boundaries extended in the river *ad medium filum*. 48 I. A. 565, Ref. to and Foll. (*Lord Shaw.*) SECRETARY OF STATE *v.* ROY JOTINDRA CHOWDHRY.
51 I. A. 241 = 1924 M. W. N. 588 = 35 M.L.T. 146 = 51 Cal. 802 = 29 C. W. N. 1 = 80 I. C. 1023 = A. I. R. 1924 P. C. 175 = 47 M. L. J. 48.

———*Separate suit for rent of the accreted land is maintainable.*

Where the accreted lands were formed subsequent to the creation of the parent *howla* tenure and they were not only constituted a separate estate between the Government and the proprietor, but the *deara* lands were separated and formed into new tenancies recorded in the settlement *khewats*, and the plaintiff had previously sued for and obtained a decree for rent in respect of the parent *howla* tenures separately and the parties therefore had treated the accreted lands as separate tenures.

Held, that a separate suit for rent for the accreted lands is maintainable. (*Chatterjee and Cuming, JJ.*) KALI RANJAN CHOWDHURY *v.* RAJESWAR ROY CHOWDHURY. **83 I. C. 602 = 51 Cal. 396 = A. I. R. 1924 Cal. 649.**

———*Riparian owners—Rights of.*

The bed of a public navigable river is the property of the Government though the banks may be the subject of private ownership. If there be slow accretion to the land on either side, due for instance to the gradual accumulation of silt, this forms part of the estate of the riparian owner to whose bank the accretion has been made. (Regulation XI of 1825). If private property be submerged and subsequently again left bare by the water, it belongs to the original owner. (*Lord Phillimore.*) NARESH NARAYAN ROY *v.* SECRETARY OF STATE FOR INDIA. **50 I. A. 121 = 50 Cal. 446 = 1923 M. W. N. 511 = 32 M. L. T. 162 = A.I.R. 1923 P. C. 1 = 45 M. L. J. 444 (P. C.).**

———*Accretions must be "gradual"—Word "gradual" only lays down a test relative to the conditions to which it is applied.*

Assuming that the law of accretions to lands in tidal and navigable rivers applicable to Madras Presidency is the same as the English Common law, and that accretions must be gradual, slow and imperceptible still the words "slow" and imperceptible are only qualifications of the word "gradual" and this word with its qualifications only defines a test relative to the conditions to which it is applied. In other words the actual rate of progress necessary to satisfy the rule when used in connection with English rivers is not necessarily the same when applied to India. 42 Cal. 489; Foll. (*Lord Carson.*) SECRETARY OF STATE *v.* RAJA OF VIZIANAGARAM. **45 Mad. 207 = 49 I. A. 67 = 67 I. C. 1 = 15 M. L. W. 389 = 35 C.L J. 463 = 20 A. L. J. 438 = 26 C. W. N. 348 = 30 M. L. T. (P. C.) 112 = 1922 M. W. N. 381 = A. I. R. 1922 P. C. 105 = 42 M. L. J. 589.**

———*Re-formation* in situ—*Question of slowness of accretion does not arise.*

If the lands are re-formation *in situ*, the question, whether the accretion was slow and imperceptible or not does not arise. (*Chatterjee and Pearson, JJ.*) NAZIR AHMED CHOUDHURY *v.* SECRETARY OF STATE.
69 I. C. 74 = 26 C. W. N. 913 = 35 C. L. J. 580 = A. I. R. 1922 Cal. 337.

ALLUVION AND DILUVION—Right to emerged land.

Dhardhura.

———*Dhardhura custom is not opposed to equity—Occasional hardship on one side or the other is no ground for its abrogation.*

The custom of dhardhura is not opposed to equity and applies not only to cases of shifting of the main channel of a stream from one side to the other in a much wider sandy bed, but also to more violent changes of the course of a stream. All customs of this nature involve occasional hardship for one side or the other, but that is no reason for the abrogation of the custom by a Court. (*Dalal and Pullan, JJ.*) GULAB RAI *v.* GIRWAR SINGH. **49 All. 195 = 25 A.L.J. 213 = 99 I.C. 557 = A. I. R. 1927 All. 221.**

———*Custom—Dhardhura—Meaning.*

The meaning of the custom of dhardhura is that the deep stream is to be regarded as the boundary between two villages. (*Dalal and Pullan, JJ.*) GULAB RAI *v.* GIRWAR SINGH. **99 I.C. 557 = 25 A. L. J. 213 = 49 All. 195 = A.I. R. 1927 All. 221.**

Ownership.

———*One river flowing into another and washing adjoining land—Accreted land still goes with ownership of bank.*

There is in Pergana Farkia a general usage whereby in lands re-formed by a gradual accretion on one bank of the Gandak and cut away from the other bank by diluvion the ownership of the land so accreted goes with the ownership of the bank and it makes no difference even where the overflow of the Gandak was brought about by the Ganges flowing into the Gandak. (*Lord Carson.*) RAJENDRA NARAIN *v.* GANGANAND SINGH. **89 I.C. 737 = 22 M. L. W. 645 = 4 Pat. 788 = 30 C.W.N. 169 = 3 P. L. R. 309 = 1926 M.W.N. 69 = 7 P. L. T. 19 = 52 I. A. 279 = 1925 M. W. N. 549 = A. I. R. 1925 P. C. 213 = 50 M. L. J. 194.**

Presumption.

———In a suit for possession of land which was recorded against the name of plaintiff and is shown to have been under water and likely to have continued under water till within 12 years of the suit, it may be presumed that it did so continue and that the plaintiff's possession continued also, until the contrary is shown. 9 Cal. 744 (F.B.). A.I.R. 1921 Pat. 237 (F. B.) and A. I. R. 1921 Pat. 234, Foll. (*Ross and Chatterji, JJ.*) PARBHU PANDE *v.* RAMESHWAR DAS. **117 I. C. 202 = 10 P. L. T. 122.**

———*Lands diluviated—Abatement of rent will not cause forfeiture.*

Abatement of revenue on account of the lands being diluviated by the action of a river will not cause forfeiture of the lands. However, the question depends upon the intention of the parties. If the circumstances indicate that in taking abatement of the revenue there was an intention to abandon the land, then after re-appearance the person who took the abatement cannot claim the lands as he had already lost all rights thereto. (41 Cal. 683; 41 I. A. 32; 18 All. 290, Foll.; 14 W. R. (P.C.) 11; 13 M. I. A. 467, Dist.) (*Jwala Prasad and Ross, JJ.*) RAMANANDHAN SAHAY *v.* JAIGOVIND PANDEY. **75 I. C. 955 = 2 Pat. 839 = A. I. R. 1924 Pat. 213 (223).**

Right to emerged land.

———*Every zamindar has a right according to his share.*

Where a land has been added to a village by the river changing its course, every zamindar has a right to the alluvial land according to his interest in the village.

ALLUVION AND DILUVION—Right to emerged land.

(*Stuart, C.J. and Raza, J.*) SHIV RAM LAL *v.* GANGASHANKER. **111 I. C. 370 = 12 R. D. 51 = A. I. R. 1929 Oudh 15.**

——*Land settled with defendants for long time—Plaintiffs only mortgagees and never in possession—No gradual accretion—Plaintiffs held to have no right to accretion—Sp. Rel. Act, S. 42—No law or equity in Plaintiff's favour—Declaration will not be granted—Limitation Act, Art. 120.*

This land in suit had emerged out of the river Ganges which lay to the north of the village of Dhanapur of which the defendants were the owners. To the west of that parent village was a village which had apparently been formed since 1836 and is called Arazi Dayara Dhanapur. The plaintiffs sued for a declaration that they were the owners of the village Arazi Dayara Dhanapur; that the land in suit had accreted to that village and therefore formed an accession to the village, it was found that the plaintiffs were only mortgagees of the village, that in spite of objections by the plaintiffs the village had been settled only with the owners of the parent village, namely, the defendants, by the Revenue authorities, and that the plaintiffs were never in possession of the lands at any time.

Held, that there was no law under which the land could be regarded as an accession to the village Arazi Dayara unless it was a gradual accretion to the land within the meaning of Reg. XI of 1825 which was not the case here, and that the plaintiffs had not established their rights to the property.

Held, further, that the suit having been brought more than six years after the cause of action for the declaration arose was barred by time.

Held also that even if it was not barred by time, the Court will be very reluctant to grant the declaration in the circumstances of this case. (*Banerji and Gokul Prasad, JJ.*) BIJAI SHANKER SELKER *v.* RAM CHARITRA SINGH. **75 I. C. 35 = 21 A. L. J. 409 = 45 All. 461 = 4 L. R. A. (Civ.) 206 = A. I. R. 1923 All. 500.**

Submergence.

——*Submerged land.*

An owner of land does not discontinue his possession of it whilst it is diluviated but the land remains the property of the rightful owner during submergence. A.I.R. 1917 P. C. 18, Foll. (*Adami and Chatterji, JJ.*) ALI MUDDIN *v.* SALIM. **117 I. C. 318 = 10 P. L. T. 207.**

——*Part of mouza including defendant's howlas submerged under water—After re-formation zamindar of mouza claiming possession—Defendant not able to prove that re-formed lands were in his howlas—Zemindar is entitled to succeed—Landlord and tenant.*

The plaintiff and his predecessors-in-title were at all material times entitled to a zamindary which included a certain mouza in which there were four howlas, of which three belonged to the defendants. For many years the northern part of mouza (including the defendant's howlas) had been submerged. Later the lands in dispute, which were admittedly within the mouza, were re-formed. Upon their re-formation these lands were taken possession of by the defendants. The plaintiff claimed them and filed a suit for recovery of possession. The defendants failed to prove that the re-formed lands were within their own howlas.

Held that upon such a state of facts the plaintiffs must succeed. (*Lord Tomlin.*) GNANENDRA KUMAR *v.* PRAFULLA NATH THAKUR, **120 I. C. 51 = 33 C. W. N. 984 = 1929 M. W. N. 616 = 50 C. L. J. 509 = 30 M. L. W. 1024 = A. I. R. 1929 P. C. 200 = 57 M. L. J. 776.**

ALLUVION AND DILUVION—Submergence.

——*Mere submergence of ryoti land does not indicate relinquishment but right to retain continues only if rent is paid.*

Mere submergence of land held under ryotwari tenure does not indicate a relinquishment by the holder. If he wishes to retain his right to the submerged lands on the off-chance of their being re-formed *in situ* at some future date he must continue to pay year by year the assessment or rent which is due to Government. (*Lord Salvesen.*) PUSHAVATI ALAKH NARAYAN GAJPATI *v.* SECRETARY OF STATE. **49 Mad. 249 = 53 I. A. 64 = 43 C. L. J. 378 = 94 I. C. 501 = 28 Bom. L. R. 865 = 24 M. L. W. 9 = 1926 M. W. N. 585 = A. I. R. 1926 P. C. 18 = 50 M. L. J. 391.**

——*Bhagdari lands submerged—Remission of rent granted for submerged lands—Existing lands converted into raiyatwari lands—Submerged lands re-formed—Original holders are not entitled to them.*

The general rule is that if private property be submerged and subsequently again left bare by the water it belongs to the original owner. This rule, however, is subject to modification and property absorbed by a sea or a river is not under all circumstances and after any lapse of time, to be recovered by the old owner. It may well be that it may have been so completely abandoned as to merge again, like any other derelict land, into the public domain as part of the sea or river of the State. (*Macleod, C. J. and Coyajee, J.*) SURAJLAL *v.* SECRETARY OF STATE. **28 Bom. L. R. 641 = 95 I. C. 950 = A. I. R. 1926 Bom. 467.**

——*Submerged land is supposed to be in possession of the original owner.*

If private property be submerged and subsequently again left bare by the water, it belongs to the original owner. Possession of the land during the period of its submersion is presumed to continue with the original owner, although he may not have enjoyed the actual usufruct or other benefits accruing from the land had it not been immersed in water. (*Kinkhede, A. J. C.*) LILADHAR *v.* KHETSINGH. **83 I. C. 8 = A. I. R. 1925 Nag. 164 (2).**

——*Adverse possession—Land being submerged in rainy season every year—No title can be prescribed for.*

Where the lands are submerged every year during the rainy season, acquisition of title by adverse possession is impossible. Land after submersion becomes derelict, and so long as it remains submerged, no title can be made against the true owner. No rational distinction could be drawn between submergence for a few years and submergence for a few months and the principle is applicable where the re-flooding is seasonal and occurs for several months in each year. When the land is re-submerged, the possession of the adverse-holder ceases and the possession of the true owner constructively revives, so that while the land remains submerged, whether for a year or a month, no possession can be deemed to continue in the wrong-doer so as to be available towards the ultimate acquisition of title against the true owner. It is necessary to look at the position in which the true owner stands towards the land as well as to the acts done by the alleged dispossessor. Even if the acts could be treated as acts of adverse possession, when there is no evidence to show that the spots where the acts were exercised were identical from year to year and as the land was periodically submerged, attempt at identification would be fruitless the plea of adverse possession must fail. The doctrine of constructive possession cannot be applied in favour of a wrong-doer, whose possession must be confined to actual possession, that is to say, if he relies on adverse possession, he can succeed, only as regards the portion of the land in suit of which he proves actual possession for the statutory period. (*Mookerjee and Panton, JJ.*) MAHARAJA OF COOCH-BEHAR *v.* RAJA MOHENDRA. **66 I. C. 923 = 34 C. L. J. 465 = A. I. R. 1921 Cal. 277.**

ALTERATION.

See (1) DEED.
(2) NEGOTIABLE INSTRUMENTS ACT, S. 87.

——**of Document, etc.** *See* PENAL CODE.

——**of Judgment.** *See* CR. P. CODE, S. 369.

——**of Law.**

See (1) SPECIAL POWERS.
(2) *Stare Decisis.*
(3) STATEMENT OF OBJECTS AND REASONS.
(4) STATUTORY POWER.
(5) SURPLUSAGE.
(6) TECHNICALITY.

——**of Sentence.** *See* CR. P. CODE, S. 367.

ALTERNATIVE CHARGES.

——*See* CR. P. CODE, SS. 235 AND 236.

——**Claims.**

See (1) C. P. CODE, O. 6, PRACTICE.
(2) PLEADINGS.

——**Pleadings.**

See (1) C. P. CODE, O. 6.
(2) PLEADINGS.
(3) PRACTICE.

——**Pleas.**

See (1) C. P. CODE, O 6.
(2) PLEADINGS.
(3) PRACTICE.

AMBIGUITY.

See (1) DEED—CONSTRUCTION OF.
(2) EVIDENCE ACT, S. 93.
(3) INTERPRETATION OF STATUTES.

AMBIGUOUS DOCUMENTS.

——*See* AMBIGUITY.

AMENDMENT.

See (1) C. P. CODE, S. 151 AND O. 6, RR. 17 AND 18.
(2) DECREE

ANNUITY.

——**of Decree.** *See* C. P. CODE, Ss. 151, 152 AND 153.

——**of Order.**

See C. P. CODE, S. 152.

——**of Plaint.** *See* C. P. CODE, O. 6, R. 17.

——**of Pleadings.**

See (1) C. P. CODE, O. 6, R. 17.
(2) LIMITATION ACT, S. 13.
(3) PRACTICE.

ANCESTRAL PROPERTY.

See (1) CUSTOM—PUNJAB.
(2) HINDU LAW.

ANCIENT DOCUMENT.

See EVIDENCE ACT, S. 90.

ANCIENT LIGHTS.

See (1) EASEMENTS.
(2) EASEMENTS ACT.

ANIMALS.

Wild Animals.

——*Property in wild animal killed is not in killer but in the proprietor of the land where the animal is killed—Owner and other assistants can rescue it from the killer.*

If a person killed a wild animal or wild bird on the property of another person, such dead creature does not belong to the killer but to the proprietor and such proprietor either himself or by his duly authorized agent can lawfully demand and if refused seize such dead creature from the possession of the killer: and such persons as help him to exercise his right are doing no wrong: but as against any person other than the proprietor of the estate or his duly authorised agent or those lawfully helping the proprietor or his agent, the killer has a right to retain possession of the dead creature which he has thus killed. (*Adami and Bucknill, JJ.*) KING-EMPEROR *v.* ARTU RAUTRA. **3 Pat. 549 = 81 I.C. 82 = 25 Cr. L. J. 594 = A.I.R. 1924 Pat. 564.**

——*Elephants—Tame elephant escaping—Recaptured by another—Tame at time of recapture—Ownership of former master is not lost.*

By the common law of England which is applicable in India on this subject a person can have only a qualified property in a wild animal, and if such animal escapes to its former liberty, such qualified property in it is lost. Elephants are animals which, though by nature wild, are peculiarly amenable to training and quickly become tame. If any such tame and trained animal should go off with a wild herd of other elephants and remain at liberty so long that when recaptured, it had to be dealt with and trained as if it were a wild animal, which had never before been tamed and trained, it would be correct to say that it had reverted to its natural state and was in fact a wild animal. In such case, the former owner would have lost all property to it. But if on recapture it was found to be tame and could be put to work again almost at once, it would be incorrect to say that it was a wild animal. 35 Cal. 413, Foll. (*Higginbotham, J.*) MAUNG YOUNG SHWE *v.* MAUNG SIN. **11 L. B. R. 71 = 64 I. C. 831 = A. I. R. 1921 L. B. 1.**

ANIMUS POSSIDENDI.

See (1) ADVERSE POSSESSION.
(2) LIMITATION ACT, ARTS. 142 AND 144.

ANNUITY.

See (1) C. P. CODE, S. 60.
(2) HINDU LAW—MAINTENANCE.
(3) T.P. ACT, SS. 6 AND 100.

ANOMALOUS MORTGAGE—*See* T.P. ACT, SS. 58, 98, ETC.

ANTECEDENT DEBT.

See (1) CUSTOM—PUNJAB.
(2) HINDU LAW—(*a*) ALIENATION, (*b*) DEBT, (*c*) JOINT FAMILY.

ANTE-NUPTIAL AGREEMENT.

See CONTRACT ACT, SS. 23 AND 25.

ANTICIPATION—Restraint on.

See HUSBAND AND WIFE.

ANTICIPATORY ATTACHMENT.

See ATTACHMENT.

APOSTASY.

See (1) CASTE DISABILITIES REMOVAL ACT.
(2) HINDU LAW—(*a*) MARRIAGE, (*b*) SUCCESSION.
(3) MAHOMEDAN LAW.

APPEAL.

See also C. P. CODE, SS. 2, 96 AND 105, O. 41 AND O. 43, R. 1.

Abatement—*See* C. P. CODE, O. 22.

APPEAL.

Additional Evidence—*See* C. P. CODE, O. 41, R. 27.
Against Award—*See* C. P. CODE, S. 104 AND SCH. II, PARA. 16.
Against dead person—*See* C. P. CODE, O. 22, R. 6.
Against preliminary decree—*See* C. P. CODE, S. 97.
Amendment—*See also* C.P. CODE, O. 6, R. 17.
Appellate.
Competency.
Conversion to Revision.
See (1) C. P. CODE, S. 115.
(2) PRACTICE.
Criminal.
Evidence.
Forum.
Judgment.
New Case.
New Plea.
Order as to costs.
Practice.
Preliminary and final decree—*See* C. P. CODE, S. 97.
Privy Council, appeal to—*See* C. P. CODE, S. 110.
Question of Fact—*See also* C. P. CODE, S. 100.
Right of.

Amendment.

——*Fresh ground raised with Court's permission—Plea as to its being barred by limitation can be raised at any time before decision.*

A plea of limitation as to the additional ground of appeal can be raised at any moment prior to the decision of the appeal even though the fresh ground of appeal was added with the permission of the Court. (*Mears, C. J. and Dalal, J.*) MITHU LAL *v.* DEOJIT.
49 All. 809 = 102 I.C. 1 = 25 A. L. J. 591 = A. I. R. 1927 All. 589.

——*Decree—Amended decree starts new limitation only with respect to parties affected by the amendment.*

Where the amendment of the decree or the alteration made in it did not affect the appealing defendant and the defendant was not made a party in the review proceeding, *held*, time began to run against defendant from the date of the original unamended decree. If a party who is not affected by subsequent proceedings wants to appeal against the decree the period must be computed from the date when the judgment is pronounced or the decree signed. 28 All. 240; 34 All. 282; 44 Cal. 1011, Dist. (*Suhrawardy, J.*) SATYA RANJAN NAG *v.* KSHITISH CHANDRA PAL. **78 I. C. 525 = A. I. R. 1924 Cal. 898.**

Appellate Courts.

——*Appellate Court should not lightly disturb trial Court's verdict on facts.*

On appeal, the whole case, including the facts, are within the jurisdiction of the Appeal Court. But, generally speaking, it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour especially in cases where the issue is simple and depends on the credit which attaches to one or other of the conflicting witnesses. Nor should his pronouncement with respect to their credibility be put aside on mere calculations of probabilities by the Court of appeal. This does not mean that appellate Courts have no discretion in consideration of the evidence. It only means that where the issue is simple and straightforward and the only question is which set of witnesses is to be believed, the verdict of a Judge trying the case should not be lightly disregarded. (*Kincaid, J.C. and Aston, A. J. C.*) JOSSOMAL VALIRAM *v.* CHELLARAM BHOJRAJ.
78 I. C. 534 = 18 S. L. R. 55 = A. I. R. 1925 Sind 35.

Competency.

——*Conditional order.*

An order which is either conditional or provisional and does not result in a final decree is not appealable. (*Walsh and Ryves, JJ.*) KANHAIYA *v.* KANHAIYA LAL.
46 All. 372 = 79 I. C. 363 = 22 A. L. J. 345 = 5 L. R. A. (Civ.) 238 = A. I. R. 1924 All. 376.

Competency—Extent.

——*Suit for mesne profits against co-trespassers—Decree passed against all—Decree in its entirety only can be challenged in appeal.*

In an action for mesne profits against the trespassers, while it is open to the plaintiff to proceed against one or some or all of several co-trespassers at his own choice, once a decree has been obtained, it is the decree in its entirety that may be challenged on appeal and not otherwise; for so long as the decree against some remains a final and operative decree and not subject to an appeal, even though it is not satisfied but is capable of execution, the plaintiff cannot proceed with the suit further and take an appeal as against the others. (Case-law discussed). (*Mukerji and Mallick, JJ.*) KAMALA PROSAD SUKUL *v.* CHANDRA NATH. **55 Cal. 666 = 106 I. C. 300 = 48 C. L. J. 350 = A. I. R. 1928 Cal. 180.**

——*Appeal from refusal to set aside* ex parte *preliminary decree cannot be filed after final decree.*

Where after the passing of the final decree in a suit, an appeal was preferred against the orders by which the lower Court dismissed (1) the appellant's application under O. 9, R. 13 to set aside the *ex parte* preliminary decree and later on (2) his application under O. 9, R. 9 for restoration of his application under O. 9, R. 13, *held*, that the appeal was incompetent. (*Suhrawardy and Duval, JJ.*) JOGENDRA NARAYAN DAS *v.* SATYENDRA CHANDRA GHOSE. **29 C. W. N. 640 = 90 I. C. 380 = A. I. R. 1925 Cal. 790.**

Competency—Grounds.

——*Appeal from preliminary order in execution—Execution subsequently dismissed—Appeal is still maintainable—Execution will proceed as per appellte judgment— C. P. Code, S. 97.*

After the order limiting right of mesne profits and subsequent to the appeal of the decree-holder, the Judge proceeding with the execution required the decree-holder to put in the Commissioner's fees for making enquiry according to the terms of his order. The decree-holder failed to put in the money and, therefore, the execution case was dismissed.

Held, that the mere fact that the Judge dismissed the application for execution subsequently would not debar the decree-holder from maintaining his appeal. If the appeal succeeds, the whole of the judgment of the lower Court goes and the execution will be proceeded with in accordance with the judgment of Court of appeal. (*B. B. Ghose and Bose, JJ.*) KHATEMANNESSA BIBI *v.* UPENDRA CHANDRA. **115 I.C. 591 = A.I.R. 1928 Cal. 804.**

——*Lower appellate Court having no jurisdiction—Whether second appeal lies.*

Where no appeal lay to the lower appellate Court but it entertained and decided it,

Held, Per (*Mukerji J.*), possibly, if no appeal lay to the lower appellate Court, an appeal lies from its decision to the High Court. (*Mukerji and Roy, JJ.*) MAHARAJ BAHADUR SINGH *v.* KARANI MAI.
45 C. L. J. 566 = 104 I. C. 199 = 32 C. W. N. 57 = A. I. R. 1927 Cal. 633.

——*Decree on review supersedes original decree for purposes of appeal.*

Where a decree has been supported by a decree passed in review, the original decree remains no longer in existence and cannot be appealed against. (*Cuming and B. B. Ghose, JJ.*) SAILAJA NATH GUHA ROY *v.* CHARU BALA DASSI. **30 C. W. N. 738 = 96 I. C. 384 = A. I. R. 1926 Cal. 943.**

——*Order passed without jurisdiction—Appeal lies if the order, when passed with jurisdiction, is appealable.*

Where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order could not be defeated on the ground that the order was made without jurisdiction. 13 All. 575; 12 A. L. J. 1113; and 24 C. L. J. 235, Rel. on. (*Sulaiman and Daniels, JJ.*) BILAS SINGH *v.* EMPEROR. **47 All. 934 = 89 I. C. 630 = 23 A. L. J. 845 = A. I. R. 1925 All. 737.**

——*Decision open to appeal—Refusal to pass decision is also appealable.*

If a decision by a Court is open to appeal, presumably its refusal to pass a decision is also appealable. (*Suhrawardy and Duval, JJ.*) NAYAN TARA DASSI *v.* SAMBHU NATH MIDHYA. **52 Cal. 662 = 89 I. C. 761 = A. I. R. 1925 Cal. 932.**

——*Appellate Court should decide at the hearing whether appellant is really affected by the order appealed from.*

When a party to a suit feels himself aggrieved by a decree or an order from which he has a right of appeal the question as to whether the decree or order appealed from is to be revised at his instance, he not being materially affected by it, is one for the appellate Court to decide at the hearing of the appeal. (*Suhrawardy and Chotzner, JJ.*) BAHADURMULL RAMPURIA *v.* TRICUMDAS CALLIANJI. **78 I. C. 881 = A. I. R. 1925 Cal. 561.**

——*Offer by one party to be bound by the decision of the trial Court—Offer not accepted by opposite party—Former can appeal against the decision.*

Where the defendants in a suit offered to be bound by the decision of the trial Court arrived at on inspection of the locality but the plaintiffs did not, an appeal by defendants against the decision of the trial Court is competent. The case is different where there is an agreement of both the parties agreeing to be bound by the decision of the trial Court. (43 All. 266, Dist.). (*Gokul Prasad, J.*) GHULAM HUSSAIN *v.* GANESH LAL. **75 I. C. 619 = A. I. R. 1923 All. 373.**

——*Parties requesting the Court to have a local inspection and agreeing to abide by its decision after such inspection—Right of appeal is not lost.*

A suit came before the District Munsif as to whether the defendants had unlawfully diverted some water from the land of the plaintiff and so injured his land. Certain plans and documents were put before him and then the plaintiff and some of the defendants agreed in writing and the pleader, acting for the other defendants, agreed to what appeared in writing that the learned Munsif should himself go and inspect the land. The agreement ran as follows:—"We agree to the matter being decided according to the opinion which the Court might entertain on the aforesaid local inspection without going into any further evidence." The plaintiff endorsed on that affidavit an agreement to abide by any decision which the Court may arrive at, after making a local inspection of the land and perusing certain plans and other records. The learned Munsif agreed to act on that agreement and inspected the place. The case was again before the

Court when some documents were put in according to the plaintiff's statement and the judgment was given and a decree passed in the ordinary form of a decree. In due course there was an appeal to the Subordinate Judge who held that no appeal lay to him by reason of the agreement referred to above. *Held*, that the Court did not act as arbitrator nor the agreement before the Court in that case amounted to an agreement that the Court should act *extra cursum curiae.* The right of appeal of the parties is not therefore barred. (*Schwabe, C. J., and Wallace, J.*) SANKARANARAYANA PILLAI *v.* RAMASWAMI PILLAI. **72 I. C. 149 = 17 M. L. W. 303 = 1923 M. W. N. 154 = 47 Mad. 39 = A. I. R. 1923 Mad. 444 = 44 M. L. J. 258.**

——*Rent suit—Defendant denying plaintiff's title to land—Contention overruled but suit dismissed as plaintiff did not prove relationship of landlord and tenant—Plaintiff can appeal.*

A suit for rent was contested on the ground that the plaintiff had no title to the land. The Court decided in favour of the plaintiff on the question of title but dismissed the suit as he had not established the relationship of landlord and tenant.

Held, that if there was a right of appeal on behalf of the defendant there was also a right of appeal on behalf of the plaintiff, and that the plaintiff was entitled to appeal. 1 C. W. N. 687, Foll. (*Shamsul Huda, J.*), DINABANDHU *v.* JAGABANDHU. **33 C.L. J. 384 = 63 I. C. 520 = A. I. R. 1921 Cal. 380.**

——*Person cannot appeal against decree in his favour with a view to attach the grounds of the decree.*

A party cannot appeal against a decree in his favour, solely with a view to attack the propriety of the grounds assigned in the judgment in support of that decree. (*Mookerjee and Panton, JJ.*) BOMKESH SETH *v* BHUT NATH. **34 C. L. J. 489 = 64 I. C. 689 = A. I. R. 1921 Cal. 217.**

——*Order appealed against being in appellant's favour and being already set aside on review—Appeal fails.*

Where an appeal was filed against an order which was in appellant's favour and not against him and which had already been set aside on review, *held*, the appeal must fail. (*Martineau, J.*) UTTAMCHAND *v.* GANESHA MAL. **3 Lah. L. J. 572 = A. I. R. 1921 Lah. 395.**

Competency—Interlocutory Order.

——*Finding as to the status of agriculturist is not appealable.*

There can be no appeal against the finding that a party is not an agriculturist. 45 Bom. 627 and A. I. R. 1924 Bom. 33, Expl. (*Macleod, C. J. and Coyajee, J.*) RUPCHAND *v.* BHOGILAL. **28 Bom. L. R. 307 = 94 I. C. 72 = A. I. R. 1926 Bom. 237.**

——*Right of appeal from interlocutory orders is merged in the right of appeal from the decree.*

The right of appeal from interlocutory orders ceases after disposal of the suits. The rule applies even to cases where there are preliminary and final decrees, and even where the decree is not formally drawn up. (*Mookerjee and Suhrawardy, JJ.*) NANIBALA DASI *v.* ICHHAMOYEE DASI. **40 C. L. J. 291 = 84 I. C. 674 = A. I. R. 1925 Cal. 218.**

Competency—Joint order.

——*C. P. Code, S. 11—Two separate cases disposed of by one order—Separate appeals are necessary.*

Where an order dealt with two separate cases, two appeals are necessary, although in the Trial Court, Counsel received one fee for the two cases which he there fore considered to have been consolidated. But in a proper case, the appellant may be permitted to rectify the error by putting in a properly stamped appeal. (*Scott-Smith and Wilberforce, JJ.*) DEVI DITTA MAL *v.* OFFICIAL LIQUIDATOR, AMRITSAR BANK, LTD. IN LIQUIDATION. **53 P. L. R. 1921 = A. I. R. 1921 Lah. 346.**

Competency—Order within S. 2.

——*C. P. Code, O. 43, R. 1 (u) and S. 96—Remand under inherent powers—Order is appealable as a decree.*

Where a case is remanded for re-trial, not under O. 41, R. 23, but under inherent powers of Court, an appeal lies from the remand order not under O. 43, R. 1 (*u*) but under S. 96 read with S. 100, as an appeal from a decree. 44 C. 929, Ref. (*Mookerjee and Chotzner, JJ.*) BHAIRAB CHANDRA DUTT *v.* KALI KUMAR DUTT. **37 C. L. J. 491 = 71 I. C. 453 = 74 I. C. 1038 = A. I. R. 1923 Cal. 606.**

——*Order rejecting memorandum of appeal for deficient Court-fee is appealable—C. P. Code, S. 2 (2).*

Once a memorandum of appeal is registered it cannot be rejected. A rejection of the appeal for deficient Court-fee is, in effect, an order dismissing the appeal for deficient Court-fee and should be treated as on the same footing as the rejection of a plaint for the purpose of determining whether it amounts to a decree or not. An appeal therefore lies against the order. (*Drake-Brockman, J. C.*) GABBA *v.* KANCHHEDI LAL. **67 I. C. 225 = 18 N. L. R. 15 = A. I. R. 1922 Nag. 62.**

Competency—Party aggrieved.

——*Plaintiffs' suit, to declare temple committee's order suspending him and some others from pujariship and thereby constituting defendants sole pujaris illegal, decreed—Defendants can appeal against the decree.*

Plaintiffs sued for the cancellation of the order of suspension passed against them and defendants 3 to 5, by the defendant 10 as a member of the temple committee. The plaintiffs and defendants 1 to 5 were pujaris in a temple and defendants 1 and 2, purporting to act under the order of suspension, obstructed the plaintiffs and defendants 3 to 5 from performing their functions. The suit was decreed in plaintiffs' favour, the Court declaring that the order of suspension was invalid and illegal and that the plaintiffs should be placed in possession of the pujariship for themselves and on behalf of some of the defendants. By the decree defendants 1 and 2 were also restrained from interfering with the enjoyment of the pujariship by the plaintiffs. As against this decree, appeal was filed by defendants 1 and 2 but this was dismissed on the preliminary ground, that defendants 1 and 2 had no right of appeal.

Held, that there was a decree against defendants 1 and 2 and that they were aggrieved, inasmuch as it disturbed the sole right of pujariship which had accrued to them consequent upon the order of the committee and, therefore, they had a right of appeal. (*Waller and Madhavan Nair, JJ.*) PERIA MANIVAN *v.* PERIA PAYYAN. **110 I. C. 702 = A. I. R. 1928 Mad. 854.**

——*C. P. Code, S. 96—No appeal lies simply because finding on a particular matter was against appellant though suit against him was dismissed.*

There is no right of appeal vouchsafed to a party against whom a suit has been dismissed, simply because the finding on a particular matter in controversy has been against him. (*Devadoss and Jackson, JJ.*) M. LATCHAYYA *v.* S. KOTTAMMA. **20 M. L. W. 734 = 1925 M.W.N. 141 = A.I.R. 1925 Mad. 264 = 84 I. C. 945 = 47 M. L. J. 743 (2).**

Competency—Second appeal.

——*Right to second appeal—First appellate Court hearing appeal, where no appeal lay—Second appeal lies.*

Where no appeal lay to the lower appellate Court, but an appeal was entertained and decided, *held*, a second appeal lies to the High Court. (*Das and Ross, JJ.*) SAGAR MULL *v.* HIRA MAHARAJ. **7 P. L. T. 264 = 1925 P. H. C. C. 324 = 91 I. C. 799 = A. I. R. 1926 Pat. 164.**

——*Second appeal lies from lower appellate Court's decree, entertaining first appeal without jurisdiction.*

Where a Court of first appeal entertained an appeal in a case in which no appeal lay to that Court a second appeal would lay to the High Court from the order or decree passed in such an appeal, although no such objection was raised in the lower appellate Court. 13 All. 575 ; 12 A. L. J. 1113 ; 45 Cal. 926, Foll. (*Kanhaiya Lal, J.*) BHAGWANDAS *v.* MT. MAHMUD BANU. **4 L. R. A. (Civ.) 447 = 75 I. C. 1053 = A. I. R. 1924 All. 183 (2).**

Competency—Small cause.

——*Provincial Small Cause Courts Act (Act IX of 1887), S. 35—Jurisdiction—Suit instituted in Court of Munsif with Small Cause Court powers—Munsif succeeded by one not having such powers—Suit tried by latter officer—Appeal lies from decree.*

Where a suit for damages for cutting a branch of a tree was instituted in the Court of a Munsif having Small Cause Court powers, but before the suit was heard the Munsif went on leave and was succeeded by a Munsif who was not vested with Small Cause Court powers and who therefore tried the suit as a regular suit. *Held*, that under the provisions of S. 35 of the Provincial Small Cause Courts Act, if a Court vested with the powers of a Court of Small Causes ceases to have such powers, the officer who tries the case should try it as a suit which he would have ordinarily tried and an appeal lay from the decree passed. *Sarju Prasad* v. *Mahadeo Pande*, (1915) 37 All. 450, Ref. to. (*Banerjee, J.*) ZAMIR-UL-HASAN KHAN *v.* IMDAD ALI KHAN. **44 All. 59 = 64 I. C. 573 = 19 A. L. J. 838 = A. I. R. 1922 All. 161.**

Competency—Unappealable order.

——*C. P. Code, O. 22, R. 10—Application under the rule rejected—Appeal under O. 43, R. 1 (1) is the only remedy.*

Where an application by an assignee *pendente lite* under O. 22, R. 10, is rejected, his only remedy is to file an appeal against this order under O. 43, R. 1, and he has no *locus standi* to come in appeal against the *ex-parte* decree in the suit against other defendants, and it is not open to these defendants to raise in the appeal against the *ex parte* decree a plea in support of assignee's position. (*Findlay, J. C.*) PANDURANG RAMCHANDRA *v.* DOMA. **103 I. C. 643 = A. I. R. 1927 Nag. 307.**

——*Letter of instructions from Court to Receiver appointed by it—No appeal lies.*

There is no provision of law which would authorise an appeal from instructions, issuing from a Court to a Receiver appointed by it. The question of the validity of the instructions is to be decided in the appeal against the appointment of the Receiver. (*Broadway, J.*) MT. ISHRI *v.* SHIB RAM. **71 I. C. 743 = A. I. R. 1923 Lah. 239 (2).**

——*Order for amendment of decree is not appealable.*

There can be no appeal against an order amending a decree. (*Campbell, J.*) ASA SINGH *v.* JAGJIT SINGH. **73 I. C. 679 = A. I. R 1923 Lah. 147 (2).**

——*Execution—Order refusing to stay—No appeal lies.*

Order refusing to stay execution is not appealable (*Harrison, J.*) KANHAYA LAL *v.* RAM GOPAL.

68 I. C. 49 = A. I. R. 1922 Lah. 400.

Forum.

——*In partnership suits aggregate of specific amounts represent value of subject-matter of suit.*

It is the amount ascertained by the trial Court to be due to plaintiff and not the sum at which he had valued his claim tentatively and approximately which should be regarded as the value of the suit for the purposes of determining the forum of the appeal. (*Broadway and Tapp, JJ.*) ARURA MAL UTTAM CHAND, DIWAN CHAND *v.* MAKHAN MAL-AMIR CHAND.

31 P. L. R. 258 = 122 I. C. 730 = A. I. R. 1930 Lah. 725.

The amount which determines the jurisdiction of the appellate Court is the amount found by the trial Court as the price payable by the pre-emptor. A. I. R. 1926 Lah. 376; A. I. R. 1928 Lah. 157 and A. I. R. 1923, Lah. 107, Appl. 101 P.R. 1900, Not Foll. (*Zafar Ali and Jai Lal, JJ.*) MT. ILAHI JAN *v.* RAHMAN ULLAH. **10 L. L. J. 277 = 111 I. C. 129 = A I. R. 1928 Lah. 670.**

——*Value of appeal is the amount found due to plaintiff by Court.*

The amount ascertained by the Court to be due to the plaintiff, and not the sum at which he values his claim tentatively and approximately, should be regarded as the value of the suit for the purpose of determining the forum of the appeal. 58 P. R. 1902; 46 P. R. 1906; 34 Cal. 954 (F. B.); and 20 Bom. 265, Foll. 40 Mad. 1 and A. I. R. 1925 All. 376, Diss. from. (*Shadi Lal, C. J. and Zafar Ali, J.*) BUDHA MAL RALLIA RAM. **9 Lah. 23 = 29 P. L. R. 320 = 110 I C. 631 = A. I. R. 1928 Lah. 157 (2)**

Obiter: When the value of the mesne profits decreed, taken along with the value of the land, exceeds Rs. 5,000, the value of the suit must be taken to exceed Rs. 5,000, though the suit was valued at less than Rs. 5,000 by the plaintiff, and an appeal from a decree therein lies to the High Court. (*B. B. Ghose and Panton, JJ.*) JOGENDRA NATH MAITI *v.* RAM GOPAL DAS. **45 C. L. J. 462 = 103 I. C. 639 = A. I. R. 1927 Cal. 616.**

——It is the money value of the original suit that fixes the jurisdiction throughout the subsequent litigation in its several stages. 7 M. H. C. R. 356, Rel. on. (*Phillips, O C. J., Beasley and Anantakrishna Aiyar, JJ.*) DAIVANAYAGA REDDIAR *v.* RENUKAMBAL AMMAL. **50 Mad. 857 = 39 M. L. T. 417 = 26 M. L. W. 539 = 1927 M. W. N. 863 = 106 I. C. 616 = A. I. R. 1927 Mad. 977 = 53 M. L. J. 637.**

——*Suit for possession and mesne profits prior to suit valued at less than Rs. 5,000—Decree passed for more than Rs. 5,000—Appeal lies to High Court*

Where in a suit for possession with mesne profits prior to the suit valued at Rs. 4,000, and instituted in the Court of the Subordinate Judge a decree was passed for a sum above Rs. 5,000.

Held, that an appeal lay to the High Court and not to District Judge. 34 Cal. 954, (F.B.), Foll.; A.I.R. 1925 Cal. 1076 (F. B.), Not Foll. (*Chatterjee and Graham, JJ.*) JOGENDRA NATH *v.* BHAGABAT DAS **42 C. L. J. 267 = 91 I. C. 9 = A. I. R. 1926 Cal. 378.**

——*Forum depends upon claim made and not to decision thereon—Jurisdiction.*

The question of jurisdiction has to be determined with reference to the claim made and not to the decision on the claim. (*Martineau and Moti Sagar, JJ.*) UDHE RAM *v.* NARAIN SINGH. **72 I. C. 389 = A. I. R. 1923 Lah. 284 (1).**

New Case.

——*Plea in argument for the first time is not entertainable.*

A will was never set up either in the pleadings, at the hearing, or in argument, or in the grounds of appeal to High Court; *held*, this would be a sufficient ground for refusing to entertain it. (*Daniels and Lyle, A. J. Cs.*) NAGESHAR SAHAI *v.* MATA PRASAD.

9 O. L. J. 235 = 25 O. C. 189 = 69 I. C. 730 = A. I. R. 1922 Oudh 236 (246).

New Plea.

——New points of law which are involved in the pleadings can be raised in appeal. (*Duckworth and Godfrey, JJ.*) MA E KHIN *v.* MAUNG SEIN.

2 Rang. 495 = 88 I. C. 167 = A. I. R. 1925 Rang. 71 (74).

——*New point for first time—Landlord and tenant—Forfeiture—Ejectment suit on basis of—Invalidity of lease as a permanent lease of trust properties—Case not set up.*

Where a landlord sues in ejectment basing the suit on the alleged forfeiture for non-payment of rent and it is found against, he cannot for the first time in appeal claim relief on the basis that the properties being trust properties, a permanent lease was invalid. (*Devadoss, J.*) LAKSHMINARAYANA AIYAR *v.* PACKIRI CHETTIAR. **88 I. C. 392 (Mad.).**

——*Practice—New point of law can be taken if no further evidence is necessary.*

Although a point of law may be taken in appeal for the first time yet it is subject to the well-recognized rule that the evidence on the record is complete and no further evidence is necessary to substantiate the point. (*Jwala Prasad and Foster, JJ.*) NAGESHWAR BUX RAI *v.* BISESHWAR DAYAL SINGH. **3 Pat. 236 = 2 Pat. L. R. 58 = 78 I. C. 889 = 5 Pat. L. T. 576 = A. I. R. 1924 Pat. 446.**

——*Interpretation of deed, question as to, may be raised in appeal.*

Interpretation of a clause in the deed is not a simple question of fact, and it may be raised in first appeal. (*Robinson, C. J. and Macgregor, J.*) KO THINE *v.* ISMAIL CASSIM MORAD. **11 L. B. R. 356 = 1 Bur. L. J. 117 = 68 I. C. 887 = A. I. R. 1923 Rang. 61.**

——*Objection to validity of notice cannot be raised for the first time.*

Where an objection to the validity of a notice was taken for the first time in appeal, *held*, failure to take objection in the trial Court amounts to a waiver and cannot be allowed to be raised for the first time in appeal. 18 Bom. 110, Dist.; 19 Ch. Div. 119, Ref. (*Robinson, C. J. and Macgregor, J.*) THE PUNJAB MOTOR CO. *v.* SHAIK JUMON. **1 Bur. L. J. 87 = 70 I. C. 834 = A. I. R. 1923 Rang. 13.**

——*Practice—Pleadings—New point requiring evidence not to be allowed in appeal.*

When it is impossible for the Court to come to a decision on a new point in the absence of any evidence, the Court ought not to allow the point to be taken for the first time in appeal. (*Ryves and Gokul Prasad, JJ.*) AJODHIA PRASAD *v.* MT. MAJIDAN.

20 All. L. J. 92 = 64 I. C. 952 = A. I. R. 1922 All. 346.

——*Evidence Act, Ss.* 65 *and* 58—*Admission of a copy without objection—Objection cannot be raised in appeal.*

When a copy of a document has been admitted in the Court of first instance without any objection, the appellate Court is not entitled to allow any objection to be taken to its admissibility at the appellate stage and it is not open to the Judge at the appellate stage to consider whether in fact the provisions of the S. 63 have been complied with or not, when it was admitted without objection. (*Coutts and Das, JJ.*) Ramlochan Misra *v.* Harinath Misra. **1 Pat. 606 = 67 I. C. 628 = 3 Pat. L. T. 397 = A. I. R. 1922 Pat. 565.**

Order as to costs.

——*Appeal against order of costs when entertainable considered—C. P. Code, S.* 35.

Where a person's suit is dismissed and where without filing an appeal against its dismissal he appeals against the order awarding costs, such appeal lies only where an order as to costs involves a matter of principle or where there has been no real exercise of discretion in making the order as to costs or where the order as to costs proceeds upon a misapprehension of fact or law. (*Addison, J.*) Arya Ram *v.* Harinder Singh. **114 I. C. 710 = A. I. R. 1930 Lah. 234.**

——*Appellate Court interfering with lower Court's orders as to costs—Second appeal lies.*

Where the Lower Appellate Court has interfered with the order of the Court of hearing as to costs there is no reason why the legality of the Lower Appellate Court's order should not be open to question in second appeal. (*Ashworth, J. C.*) Ram Kishan Das *v.* Jagannath Prasad. **25 O. C. 385 = 73 I. C. 222 = 10 O. L. J. 20 = A. I. R. 1923 Oudh 155.**

——*Suit held not maintainable but another defendant substituted—Costs not awarded—Latter portion of order can be appealed against—C. P. Code, S.* 35.

The trial Court dismissed the suit with costs of defendant. The appellate Court held that the suit was not maintainable but ordered that another must be substituted in place of the existing defendant. In doing so, the lower appellate Court deprived him of his costs which had been awarded by the trial Court and did not award him any costs in the appellate Court.

Held, that although he could not contest the order in so far as another party was substituted in his place, yet, he could appeal to the High Court in so far as he was deprived of his costs in the trial Court and was not awarded his costs in the lower appellate Court. (*Mookerjee and Panton, JJ.*) B. N. W. Ry. Co. *v.* Jagannath Agarwalla. **34 C. L. J. 475 = 66 I. C. 903 = A. I. R. 1921 Cal. 156.**

Practice—Appellate Court.

——*Judgment stating that certain admission was made—Appellate Court should not lightly doubt the statement.*

A statement in a judgment as to an admission made before the Court of first instance should not be doubted lightly by the appellate Court, specially in the absence of an affidavit by the Vakil who appeared in the Court of first instance. In cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment. 38 Cal. 432. (P. C.) and 40 Mad. 687, Ref. (*Mookerjee and Panton, JJ.*) Sarat Chandra Maiti *v.* Bibhabati Debi. **34 C. L. J. 302 = 66 I.C. 433 = A. I. R. 1921 Cal. 584 (591).**

Practice—Appellate Court's power.

——*Memorandum insufficiently stamped—Rejection of appeal is not proper—C. P. Code, O.* 41, *R.* 3.

An appellate Court has no right to reject an appeal on the ground that it is insufficiently stamped. (*Rafique and Lindsay, JJ.*) Jai Singh Gir *v.* Sita Ram Singh. **21 A. L. J. 333 = 74 I. C. 757 = 4 L. R. A. (Civ.) 188 = A. I. R. 1923 All. 349 (1).**

Practice—Burden of proof.

——*Appellant must prove that lower Court's judgment is wrong.*

In appeals it is the duty of the appellant to satisfy the Court that the judgment appealed against is wrong. If the arguments advanced before the appellate Court and the evidence presented to it only create mere doubts as to the correctness of the lower Court's decision, then the proper thing for the appellate Court to do would be not to interfere with the lower Court's judgment, not being satisfied that it was wrong. 29 Cal. 187 (P. C.) and 28 C. L. J. 306, Rel. on. (*Beasley and Anantakrishna Aiyar, JJ.*) Palaniappa *v.* Syed Gulam Ghouse. **1928 M. W. N. 98 = 110 I. C. 21 = A. I. R. 1928 Mad. 489.**

——*Burden of proving judgment appealed from to be wrong is on appellant.*

The burden of showing in appeals that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculations which lead to equal possibilities of the judgment on either the one side or the other being right, he has not succeeded. A. I. R. 1922 P. C. 39, Foll. (*Raza, J.*) Narotam Das *v.* Muhammad Raza. **96 I. C. 14 = A. I. R. 1926 Oudh 522.**

——*Burden of proving the lower Court's decision to be wrong is on appellant.*

The burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded, A. I. R. 1922 P. C. 39, Foll. (*Raza, J.*) Faqir Mohammad Khan *v.* Shambu Datt. **91 I. C. 1014 = 13 O. L. J. 167.**

——*Appellant must prove judgment appealed from to be wrong.*

The burden of proving that the judgment appealed from is wrong lies on the appellant. If the utmost that he can show is nicely balanced calculation which leads to the equal possibility of the judgment on either the one side or the other being right, the appellant cannot succeed. (*Wazir Hasan, J, C.*) Manni Lal *v.* Mool Chand. **80 I. C. 683 = A. I. R. 1925 Oudh 224.**

——*Burden of proof.*

In an appeal, the appellant has a greater duty to perform than showing that on a balance of inference there is a possibility of judgment being given in his favour. The burden is on him to show that the judgment appealed against is wrong. (*Wazir Hasan, A. J. C.*) Mt. Mariyan Begam *v.* Mt. Qamrunnissa Begam. **89 I. C. 703 (Oudh).**

——*Appellant cannot succeed by merely showing equal probability of his case being true as the respondents.*

In appeals the burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded. (*Mukerjee and Chotzner, JJ.*) Bhuban Mohini Dasi *v.* Kumud Bala Dasi. **28 C. W. N. 131 = 39 C.L.J. 140 = 82 I. C. 934 = A. I. R. 1924 Cal. 467.**

APPEAL—Practice—Burden of proof.

——*Appellant must show that lower Court's judgment is wrong.*

Where the facts found by the lower Court stand uncontested, the onus is on the appellant to satisfy the appellate Court that the deductions made by the Judge from those facts are wrong. (*Sanderson, C. J. and Richardson, J.*) RASH BEHARI KARURI *v.* NARAIN DAS DONI LAL. **50 Cal. 399 = 80 I. C. 485 = 27 C. W. N. 231 = A. I. R. 1923 Cal. 182.**

——*Evidence Act, S. 10—Appellant must show that judgment appealed from is wrong.*

In appeal the burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculations which lead to the equal possibility of judgment on either the one side or the other being right, he cannot be said to have succeeded. (*Lord Buckmaster.*) NABA KISHORE MANDAL *v.* UPENDRA KISHORE MANDAL.
20 A. L. J. 22 = 35 Cal. L. J. 116 = 65 I. C. 305 = 1922 M. W. N. 95 = 26 C. W. N. 322 = 3 Pat. L. T. 311 = 24 Bom. L. R. 346 = 15 M. L. W. 417 = 30 M. L. T. (P. C.) 234 = A. I. R. 1922 P. C. 39 = 42 M. L. J. 253.

Practice—Criminal.

——*Appeal cannot be dismissed for default.*

There is no provision in Cr. P. C. for the dismissal of an appeal on account of the non-appearance of the appellant or his pleader. Having admitted the appeal and fixed a date for its hearing, the appellate Court is bound to peruse the record and to decide the appeal judicially. 13 All. 171, Foll. (*Stuart, J.*) RAM CHANDAR *v.* EMPEROR. **21 A. L. J. 100 = 73 I. C. 694 = 4 L. R. A. (Cr.) 7 = 24 Cr. L. J. 622 = A. I. R. 1923 All. 175 (2).**

Practice—Discretion.

——*Proper exercise by lower Court—Interference is not justified.*

Where the discretion vested in the Court below is properly exercised and not arbitrarily, the appellate Court ought not to interfere with the exercise of that discretion. (*Suhrawardy and Cuming, JJ.*) NISHI KANTA SARKAR *v.* UMAR LAL SARKAR.
41 C. L. J. 186 = 86 I. C. 1029 = A. I. R. 1925 Cal. 711.

——*Court should not interfere save in extreme cases in cases of discretion exercised under S.* 148 *or S.* 149—*C. P. Code, Ss.* 148 *and* 149.

Questions like the exercise of discretion under S. 148 or 149, C. P. Code, should be left to the discretion of the Trial Court and in the absence of a very strong case, the Appellate Court must not interfere with the trial Court's discretion. (*Dawson-Miller, C. J. and Mullick, J.*) RAGHUNANDAN SAHAY *v.* RAM SUNDER PRASAD. **4 Pat. 190 = 85 I. C. 172 = 3 Pat. L. R. (Civ) 22 = 6 P. L. T. 4 = 1924 P. H. C. C. 355 = A. I. R. 1925 Pat. 299.**

——*Discretion—Appeal against discretion of one Judge is difficult to succeed.*

Appeals against the discretion of a single Judge are appeals which will prove in practice to be very difficult of success. (*Mears, C. J. and Piggott, J.*) DR. SADIQ ALI *v.* ANWAR ALI. **45 All. 66 = 70 I. C. 805 = 20 A. L. J. 801 = A. I. R. 1923 All. 44.**

——*Discretion of lower Court—Appellate Court may interfere but with caution.*

A Court of appeal must exercise great caution when invited to interfere with an order of the trial Court made with jurisdiction in the exercise of its discretion. Each case must depend upon its own circumstances and no rule as to the exercise of that discretion could be laid down. If the Court saw that discretion had been wrongly exercised, if it saw that the case in all its bearings was not laid before the court below, if it saw that the court below misapprehended an important part of the case, the High Court would interfere. (*Mookerjee and Panton, JJ.*) KUMAR SARAT KUMAR RAY *v.* RAM CHANDRA CHATTERJEE.
35 C. L. J. 78 = 68 I. C. 9 = A. I. R. 1922 Cal. 42.

Practice—Estoppel.

——*Party accepting benefit under conditional decree is precluded from appealing.*

So far as a final decree in a suit is concerned there is no reason for saying that the decree-holder cannot approbate a decree in respect of the sum which it awards to him and reprobate it in respect of the sum which it refuses to him. There is no rule that acting on any order necessarily debars a party from appealing against the order on any point. The only principle is that a party is precluded from challenging the validity of an order after accepting the benefit of a term imposed in his favour as a condition of that order upon the opposite party at whose instance the order is made : A.I.R. 1924 Cal. 380, (Rel. on. Cases Referred). (*Rankin, C. J. and C. C. Ghosh, J.*) HURRYBUX DEORA *v.* JOHURMULL. **33 C. W. N. 711 = A. I. R. 1929 Cal. 796.**

——*Party accepting benefit under decree can't appeal but can appeal if benefit is his even if appeal failed.*

A party who has adopted an order of the Court and acted under it, cannot, after he has enjoyed a benefit under the order contend that it is valid for one purpose and invalid for another. But the principle does not apply where the benefit accepted would in any case be his whether the appeal succeeded or failed. Where in a suit on a money bond payable with compound interest the Court awards simple interest only, an appeal against the decree is not rendered incompetent though the decree-holder accepts the costs deposited by the judgment-debtor on the basis of simple interest, subsequent to the filing of the appeal. (*Chatterjea and Cuming, JJ.*) JOGENDRA NATH BANERJEE *v.* KHODA BUKSHA BISWAS. **72 I. C. 554 = A. I. R. 1924 Cal. 380.**

——*Parties agreeing to decision of the Board on appeal on the validity of an award—Objection to jurisdiction cannot be raised in appeal.*

Where the order appealed from is to some extent a consent order inasmuch as it contemplates that the question of the validity of the award should be finally decided by the Board, it is difficult to see how any technical objection to the jurisdiction can now be maintained. (*Viscount Cave.*) E. D. SASSOON AND CO. *v.* RANDUTT RAMKISAN DAS. **37 C. L. J. 336 = 70 I. C. 777 = 27 C. W. N. 660 = 1923 M. W. N. 372 = 18 M. L. W. 537 = 50 Cal. 1 = 49 I. A. 366 = 32 M. L. T. 19 = A. I. R. 1922 P. C. 374 = 44 M. L. J. 758.**

Practice—Ex-parte decree.

——*C. P. Code, S.* 96 *and O.* 9, *r.* 13—*In appeal from* ex parte *decree, question of service of summons cannot be considered which can be considered only under O.* 9.

In an appeal from an *ex parte* decree, the only question with which the appellate Court is ordinarily concerned is whether the evidence on the record is sufficient to support that decree, and that the question of due service of summons is the subject-matter not of an appeal from the decree but of the special proceeding under O. 9. 39 All. 143 and 27 Cal. 738, Foll. (*Young,* *Offg. C. J. and Carr, J.*) RAJ CHANDRA DHAR *v.* MESSRS. K. D. O. C. RAY. **2 Bur. L. J. 282 = 79 I. C. 506 = 2 Rang. 108 = A. I. R. 1924 Rang. 137.**

Practice—Final decree.

——*Preliminary decree set aside on appeal—Appeal against final decree is not necessary.*

It is not necessary to appeal against a final decree when the preliminary decree on which it is based has been set aside on appeal : 37 Mad. 29 and 36 All. 532, Foll. (*Le Rossignol, J.*) RAMDITTA *v.* MARU. **27 P. L. R. 180 = 93 I. C. 851 = A. I. R. 1926 Lah. 534.**

Practice—Finding of fact.

——*Conflict between testimony of parties—No sufficient ground to reverse trial Court's judgment—Finding of reversal was disturbed.*

There was a direct conflict of testimony between the parties. The trial Judge came to the conclusion, after seeing all the witnesses, that the story of the plaintiff's witnesses was true. Appellate Court reversed the finding.

Held, that there was not sufficient ground to warrant the appellate tribunal coming to a contrary conclusion. (*Lord Atkin.*) KESSARBAI *v.* JETHABHAI JIVAN. **111 I. C. 169 = 28 M. L. W. 737 = A. I. R. 1928 P. C. 277.**

——*Application of evidence.*

In matters of evidence due regard must be had to findings of the trial Court which is placed in a more advantageous position than the Appellate Court. But where some of the principal witnesses have been examined on commission the advantage of the Lower Court disappears. (*Raymond and Kennedy, A. J. Cs.*) HARIRAM ISARDAS *v.* MT. HARDEVI BAI. **A. I. R. 1925 Sind 16.**

Practice.

——*Trial Court holding that certain witnesses should be disbelieved—Appellate Court should not differ but on basis of important fact not within knowledge of Trial Court may come to different conclusion.*

Although the finding of the Trial Court that certain witnesses should be disbelieved, should not be set aside, by the appellate Court, which does not see the witnesses, yet an important fact of which the appellate Court is in possession but of which the trial Court is not aware, may well warrant a different conclusion from that which is arrived at by the Court of first instance. 39 Bom. 386 P. C., Dist. (*Lord Phillimore.*) BHERAT INDU *v.* H M. H. ALI KHAN. **42 All. 487 = 47 I.A. 177 = 18 A. L. J. 717 = 22 Bom. L.R. 1362 = 28 M. L. T. 98 = 1920 M. W. N. 413 = 58 I. C. 386 = 2 U. P. L. R. 179 = 25 C. W. N. 73 = 13 M.L.W. 4 = A. I. R. 1921 P. C. 93 = 39 M. L. J. 41.**

Practice—Ground of appeal.

——*No finding—Question of mortgage by widow being for legal necessity is included in the question whether the purchaser at auction in suit on the mortgage got any title on extinction of widow's interest—Practice.*

The appellate Court did not in its judgment express a finding on one of the grounds of appeal which was as follows :—"7. That the Lower Court should have held that the deed dated the 10th September, 1894, was executed for legal necessity." The deed of the 10th September, 1894, was a mortgage of the village Pakauri granted by the widow while she was in possession of a Hindu widow's interest in the estate. On that mortgage a decree for sale was made and at the sale the two thirds share in the village claimed by the appellant was purchased by some of the defendants to this suit. The Trial Court had found in this suit that the mortgage was not made for necessity. The appellate Court said in its judgment : "They, the defendants, denied the adoption and they denied the widow's power to adopt. They also plead that even if the adoption was proved, it could not affect the interest acquired by the purchasers before the adoption ; on this last pleading no issue was framed and nothing has been said in argument in appeal. It must therefore be taken to have dropped."

Held, the question as to whether the mortgage was or was not granted for necessity was involved in the question as to whether the purchasers at the sale under the decree had acquired title by their purchase. Under the circumstances the lower Appellate Court was justified in holding as it did, that the only question which remained for it to decide in the appeal was the question as to the validity of the adoption. (*Sir John Edge.*) BISWANATH *v.* JUGAL KISHORE. **26 O. C. 228 = 73 I. C. 244 = 50 I. A. 179 = 1923 M. W. N. 620 = 38 C. L J. 299 = 33 M. L. T. 289 = 10 O.L. J. 379 = 28 C. W. N. 790 = 18 M. L. W. 88 = A. I. R. 1923 P. C. 90 = 45 M. L. J. 215 (P. C.).**

Practice—Interlocutory Order.

——*Jurisdiction—Appeal from interlocutory order—Jurisdiction of trial Court is not suspended thereby.*

Even if in case of interlocutory appeals the High Court sends for the record for the purpose of dealing with that particular matter, for all other purposes the suit is pending in the trial Court. Therefore the trial Court has jurisdiction during the pendency of such appeal to entertain the application of the representative of the deceased party, to be joined in the suit. (*Macleod, C. J. and Crump, J.*). BHOGILAL KIRPASHANKER *v.* DARASHA KOOVERJEE CONTRACTOR. **75 I.C. 743 = 25 B.L.R. 308 = A.I.R. 1923 Bom. 303.**

Practice—Parties.

——*C. P. Code, O. XL r.* 1 *and O. XLIII, r.* 1, *cl.* 8—*It is enough to include in an appeal from interlocutory order only persons materially prejudiced by appointment of Receiver.*

If a Receiver is appointed, in an appeal from interlocutory order, the only person materially prejudiced thereby would be the person entitled to present possession. Where there is no suggestion that any of the defendants is entitled to present possession, *held*, that it is not necessary to have them on the record in the appeal. (*Mookerjee and Chotzner, JJ.*) BHUPENDRA NATH MOOKERJEE *v.* MONOHAR MUKHERJEE. **28 C. W. N. 86 = 77 I. C. 783 = A. I. R. 1924 Cal. 456.**

——*Order confirming sale of insolvent's property—Auction-purchaser and Official Receiver are necessary parties to the appeal.*

The persons who have purchased the property at the sale, the validity of which is being contested, and the Official Receiver, who represents the insolvent's estate, are the persons principally interested and are clearly necessary parties and the omission to make them parties is fatal to the appeal. 188 P R. 1882 and 51 I. C. 935, Foll. (*Martineau, J*). MT. TARLOK DEVI *v.* GOTI RAM. **68 I. C. 716 = A. I. R. 1923 Lah. 58.**

——*One defendant not made party in appeal—His rights will stand unaffected by appeal.*

Where the decree of the Munsif was in favour of defendant No. 2 and, therefore, he could not appeal, and in the first appeal by plaintiff defendant 2 was not made a party.

Held, as defendant 2 was not made a party to the first appeal by the plaintiff his rights could not be determined in that appeal nor could they be determined in second appeal, and his right stood unaffected. (*Ross, J.*) DASI CHAMAR *v.* RAM AUTOR SINGH. **71 I. C. 475 = A. I. R. 1923 Pat. 404.**

——*Party, against whom no relief is claimed may be impleaded.*

A party to the suit against whom no relief is claimed could be made a respondent to the appeal. (*Hallifax, A. J. C.*) KUKSA *v.* DAJIBA BHAN. **66 I. C. 217 = 5 N. L. J. 192 = A. I. R. 1922 Nag. 213.**

——*Decree for joint possession—One of the plaintiffs not made respondent—Bringing him on record after the death of another respondent after limitation—Appeal is barred and cannot be heard—C. P. Code, O.* 1, *Rr.* 3, 10 (5).

The defendants appealed against a decree for joint possession in favour of 5 plaintiffs to the High Court but only four plaintiffs had been made respondents.

Held, the appeal could not be heard because the decree was one for joint possession so that even if the appeal were successful it would be infructuous because the plaintiff who was not made a respondent would still be able to execute the decree.

Where after the death of one of other respondents, the plaintiff, who had been omitted from the category of respondents was, after the period of limitation, substituted in his place.

Held, the appeal could not be maintained. 19 Cal. W. N. 290, Foll. (*Coutts and Das, JJ*). TEJ NARAIN SAHA *v.* DAL RAM SAHU. **69 I. C. 624 = 1 Pat. 699 = 1 Pat. L. R. 103 = 4 P. L. T. 170 = 1923 P. H. C. C. 207 = A. I. R. 1922 Pat. 606.**

Practice—Party's default.

——*Pleadings — When defendant is obviously at default Court can treat plaintiff's pleadings as amended and allow him to claim any equitable relief to which he may be entitled even in appeal.*

When it appears to the Court that the plaintiff is entitled to an equitable relief it would be well advised to allow the plaintiff where the defendant has been obviously in default, to avail himself of any such equitable relief to which he is entitled under the law and if necessary to treat his pleadings as amended for that purpose even at the appellate stage of the suit. (*Pearson and Graham, JJ*). DINANATH SARMA KATAKI *v.* GOUR NATH SARMA KATAKI. **•82 I. C. 964 = A. I. R. 1925 Cal. 434.**

Practice—Powers of High Court.

——*Memorandum insufficiently stamped — High Court can reject it—C. P. Code, O.* 41, *R.* 2*—Court-fees Act*, S. 4 [*But see A. I. R.* 1923 *All.* 349 (1)].

High Court has full power to refuse to accept a memorandum of appeal when it has the endorsement of the stamp Reporter, that the amount of the Court-fees paid is insufficient, otherwise the provisions of S. 4, Court-fees Act, would be evaded indirectly. 38 Bom. 41, Diss. from ; 1 Lah. 234; 3 Pat. L.J. 74 ; 27 M.L.J. 677, Rel. on. A. I. R. 1923 All. 349, Ref. (*Sulaiman, Ag. C. J.*) BRIJBHUKHAN *v.* TOLA RAM. **50 All. 980 = 118 I. C. 228 = 26 A. L. J. 1199 = A. I. R. 1929 All. 75.**

Practice—Printing documents.

——*Duty of printing documents is on the party for whom they are necessary and essential in appeal—Party impugning the correctness of a document must print it.*

The party on whom the duty of printing documents falls is not the party which relies on the document in the sense that he produced it, but the party for whose case in appeal the document is necessary and essential, and it is as necessary and essential to an appellant who impugns the correctness of a document, or contends that it has not been correctly weighed and interpreted, that it should be printed as that the judgment, which he attacks, should be printed. The test is whether the appeal can proceed and can be argued without it, and whether the appeal is self-contained. If in addition to the documents considered by the lower Court in its judgment or referred to in the plaint other documents are required by the other side, it is for that side, which requires them, to have them printed. (*Abdul Raoof and Harrison, JJ.*) BHAI JAWAHIR *v.* SECY. OF STATE. **8 L. L. J. 114 = 27 P. L. R. 301 = 94 I. C 635 = A. I. R. 1926 Lah. 292.**

Practice—Relief given up.

——*Prayer for possession not properly stamped—Prayer for possession given up—Appeal should not be dismissed but prayer for possession should be struck out.*

Where the memo. of appeal asks for possession but is not properly stamped for such a prayer and the appellant gives up the claim for possession and merely seeks a declaration, the appeal should not be dismissed but the proper order to pass is that any prayer in the memorandum of appeal relating to possession must be struck out and the appeal be heard upon the remaining prayers. (*Fforde and Campbell, JJ.*) KALWA *v.* HIRA LAL. **95 I. C. 905 = A. I. R. 1926 Lah. 477.**

Practice—Revision.

——*Revision.*

What cannot be obtained by an appeal, a party ought not to be able to obtain by a Civil Revision Petition. A. I. R. 1927 Mad. 335, Ref. (*Odgers and Curgenven, JJ.*) KARUPPANNA PILLAI *v.* ETHUMALAI PILLAI. **103 I. C. 670 = A. I. R. 1927 Mad. 859.**

Practice—Second appeal.

——*C. P. Code, S.* 97*—Second appeal, from preliminary decree, is not competent if appeal from final decree, is not filed.*

A second appeal was filed on the 7th May, 1920 from the decree of the lower Appellate Court affirming the preliminary decree passed by the Court of first instance but no appeal was preferred against the final decree.

Held, that the appeal against the preliminary decree is not maintainable unless there is also an appeal against the final decree. 48 C. 1036 :— 20 C. W. N. 231,—18 C.L.J. 321,—36 C. 762, Foll. (*Chatterjee and Pearson, JJ.*) MONOHAR PESHAKAR *v.* HARAN CHANDRA KARMAKAR. **71 I. C. 290 = A. I. R. 1924 Cal. 543.**

Practice—Second appeal.

——*Decision of Lower Court on Preliminary point—High Court, will not hear respondents on other points without affidavit.*

It was urged on behalf of respondent in second appeal that had the Lower Appellate Court not decided the appeal against the plaintiff on the preliminary point of notice, they would have supported the judgment of the first Court on grounds that had been decided against them by the first Court, *Held*, in the absence of an affidavit that such grounds would have been argued before the Appellate Court, the High Court did not feel bound to hear the respondents on those points. (*Le Rossignol and Harrison, JJ.*) PARTAP SINGH *v.* NATHU. **3 Lah. 285 = 69 I. C. 706 = A. I. R. 1922 Lah. 416.**

Question of fact.

——*Question not depending on witnesses demeanour or manner in box—Appellate Court is as good Judge as trial Court.*

Generally speaking it is undesirable for an appellate Court to interfere with the finding of fact of the trial

Judge who sees and hears the witnesses and has an opportunity of noting their demeanour, and the view of the trial Judge as to the credibility of the witnesses should not be put aside on a mere calculation of probabilities by the appellate Court [39 Bom. 386 (P. C.) Foll.] But this doctrine must not be allowed to become a fetish, and where the question does not depend upon witnesses' demeanour and manner in the box, but upon inference from facts the appellate Court is as good a Judge of fact as the Trial Court A. I. R. 1922 P. C. 315, Foll. (*Newbould and Graham, JJ.*) ANANDA PRIYA *v.* BIJOY KRISHNA. **91 I. C. 705 = A.I.R. 1926 Cal. 643.**

——*Lower Court's finding on facts is not to be disturbed merely because a different view is also possible—The lower Court's finding can only be disturbed by proof of the facts being wrong.*

Where a case tried by a judge without jury comes to the Court of appeal, the presumption is that the decision of the Court below on the facts was right, and that presumption must be displaced by the appellant. If he satisfactorily makes out that the judge below was wrong, then inasmuch as the appeal is in the nature of a rehearing the decision should be reversed; if the case is left in doubt, it is clearly the duty of the Court of appeal not to disturb the decision of the Court below. If all that the appellant can show is nicely balanced calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he cannot succeed: (1896) F. B. 38 and *Savage* v. *Adam*, W. N. 95, 109, Foll. (*Dawson-Miller, C.J., Mullick and Foster, JJ.*) HARIHAR PRASAD *v.* KESHO PRASAD. **5 P. L.T. Sup. 1 = 93 I. C. 454 = A. I. R. 1925 Pat. 68 (88) (F.B.).**

——*When trial Court's opinion as to witness depends not on honesty of witness but on reason not acceptable to appeal Court, trial Court's finding on fact can be disturbed.*

It is with great hesitation that an appeal Court differs with the trial Court on its estimate of witnesses whom the trial Court has had an opportunity of seeing; but where the opinion of the trial Court depends not upon the honesty of the witness but upon reasons which the appeal Court cannot accept, it is obviously the duty of the appeal Court to record its disagreement with the trial Court and to set aside findings of fact arrived at by it. (*Dawson-Miller, C. J., Mullick and Foster, JJ.*) HARIHAR PRASAD *v.* KESHO PRASAD. **5 P. L. T. Sup. 1 = 93 I.C. 454 = A.I.R. 1925 Pat. 68 (94) (F. B.).**

——*Witnesses—Opinion of trial judge as to, is entitled to weight—Evidence—Appreciation of.*

In an a appeal on pure question of fact sufficient weight should be given to the opinion of trial Judge as regards the demeanour, intelligence, position and character of the witnesses who are brought before him. He is in a better position to form a judgment on the points than the appellate Judge who has no advantage of seeing the witnesses. (*Lord Wrenbury.*) BANUBAI FRAMJI *v.* MANI LAL. **18 M L.W. 148 = 1923 M. W. N. 580 = 4 L. R. P. C. 147 = 84 I. C. 696 = A. I. R. 1923 P. C. 62 = 45 M. L. J. 242 (P.C.).**

——*Inference from fact is a question of law.*

Whether on the facts found by the Court below, the proper inference has been drawn is a question of law, and not a question of fact. (*Schwabe, C. J. and Wallace, J.*) ABDUR SALAM *v.* KANDASAMI CHETTIAR. **1922 M. W. N. 639 = 71 I. C. 330 = 16 M. L. W. 473 = A. I. R. 1923 Mad. 54 = 43 M. L. J. 556.**

——*Cannot be raised for the first time.*

Any ground of appeal raising question of fact ought to be pleaded in the Court of trial and cannot be taken at any later stage of the case. (*Simpson, A. J. C.*) MOHKAM *v.* BANSIDHER. **9 O.L.J. 350 = 68 I.C. 972 = 26 O. C. 125 = A.I.R. 1923 Oudh 14.**

Question of fact cannot be gone into in appeal. (*Das and Adami, JJ.*) L. N. NATH SAHIDEO *v.* M. P. U. SEHIDEO. **1922 P. H. C. C. 363 = 69 I. C. 613 = 1 Pat. L. R. 55 = 2 Pat. 243 = 4 P. L. T. 367 = A. I. R. 1923 Pat. 29.**

——*C.P.Code, (1908), S. 100—Rate of interest—Finding as to, is one of fact—Discretion exercised by lower Court—Appellate Court will not interfere—Appeal.*

In each case where the question is "what is a reasonable rate of interest," the finding as to the reasonable rate of interest is really a finding of fact; moreover it is within the discretion of the courts below to interfere in certain cases with the contract rate of interest, the High Court sitting in appeal, would not be justified in interfering with the exercise of the lower appellate court's discretion unless it is made to appear that this discretion was arbitrarily exercised. (*Lindsay and Gokul Prasad, JJ.*) BINDESHRI PRASAD *v.* JAG PRASAD RAI. **69 I.C. 758 = A. I. R. 1922 All. 335.**

——*Inference from facts by Trial Court need not be adhered to.*

In general it is well to abide by the view of the facts taken by the tribunal of first instance. But while this is so, when any question of credibility is involved, it does not follow when the view of facts rests rather upon inference from facts as to which there is no dispute than a difference of view as to the facts themselves. (*Lord Dunedin.*) BAIN *v.* CENTRAL VERMANT RAILWAY COMPANY. **A. I. R. 1921 P. C. 221.**

——*Court of appeal must form its own conclusion on the recorded evidence but must respect the opinion of the trial Judge.*

In considering the duty of a Court of appeal on a question of fact two conflicting view-points have to be reconciled, namely, on the one hand, the undoubted duty of the Court of Appeal to review the recorded evidence and to draw its own inferences and conclusions, and on the other hand, the unquestionable weight which must be attached to the opinion of the Judge of the primary Court who had the advantage of seeing the witnesses and noticing their look and manner. (*Mookerjee and Fletcher, JJ.*) SURENDRA KRISHNA *v.* RANEE DASEE. **33 C. L. J. 34 = 59 I. C. 814 = A.I.R. 1921 Cal. 677.**

Right of.

(*Obiter*).—An appeal does not necessarily lie from every judicial decision. (*Bhide, J.*) SAIN DAS *v.* PUNJAB INDUSTRIAL. BANK. **30 P. L. R. 417 = 115 I. C. 533 = A. I. R. 1929 Lah. 815.**

There is no inherent right of appeal but a right of appeal must be given by a statute or by some authority equivalent to a statute. (*Shadi Lal, C. J. and Broadway Fforde, Zafar Ali and Jai Lal, JJ.*) DUN) CHAND *v.* COMMR., INCOME TAX. **10 Lah. 596 = 117 I. C. 69 = 30 P. L. R. 613 = A. I. R. 1929 Lah. 593 (F. B.).**

——*Appeal from consent decree—Review also filed—Appellate Court should grant relief in appeal if party is entitled, although same can be obtained in review.*

Where a person after preferring an appeal against a consent decree has also filed an application for review, the appellate Court should not refuse the person the relief by way of appeal if he is entitled to it merely because it is open to him to get the same relief by way of review. (*Wild, J.C. and Rupchand Bilaram, A.J.C.*) MT. UMMAKULSUM *v.* GHULAM RASUL KHAN. **114 I.C. 101 = A.I.R. 1929 Sind 32.**

———*Right of, is substantive and cannot be taken away by subsequent amendment in Act conferring such right.*

The right of appeal is a substantive right and if a party is vested with such a right, any subsequent amendment in the Act conferring such right cannot take it away. (*Sulaiman, Ag. C. J.*) BAIJNATH *v.* DOOLAREY HAJJAM. **50 All. 865 = 110 I. C. 719 = 26 A. L. J. 1317 = A. I. R. 1928 All. 708.**

———*Right of appeal existing on the day of decree—No appeal allowed under subsequent statute—Statute cannot act retrospectively so as to deprive party of its right to appeal.*

Where a party to a suit acquires a right to appeal against the decree when it is passed the passing of a statute subsequently under which no appeal under the same conditions is allowed cannot affect retrospectively so as to deprive a party of the right: A. I. R. 1927 P. C. 242 and *Colonial Sugar Refining Co.* v. *Irving*, (1905) A.C. 369, Rel. on. (*Dalal, J.*) BALA PRASAD *v.* SHYAM BEHARI LAL. **9 L. R. A. Rev. 38 = 26 A. L. J. 406 = 108 I. C. 575 = A. I. R. 1928 All. 168.**

———*Right of is vested right—Statute abolishing right of appeal must do it expressly or by necessary implication—Interpretation of statutes.*

It is now authoritatively settled that the right of appeal is not a mere matter of procedure, but is a vested right which inheres in a party from the commencement of the action in the Court of first instance. If according to the law in force at the time when the action was started in the Court of first instance the ultimate decision of such Court was appealable, the right to prefer or prosecute an appeal therefrom is not affected by subsequent change of the law abolishing the appeal or modifying its forum unless it is so provided expressly in the amending statute or follows by necessary implication from its terms. *Colonial Sugar Refining Co., Ltd.* v. *Irving*, (1905) A. C. 369, Rel. on. (*Broadway, Addison and Tekchand, JJ.*) (BHAI) KIRPA SINGH *v.* RASALLDAR AJAIPAL SINGH. **10 Lah. 165 = 113 I.C. 529 = A.I.R. 1928 Lah. 627 (F. B.).**

———*Right to appeal not inherent right.*

The right of appeal is not an inherent right of the subject but only exists where it is expressly conferred by statute. 11 Mad. 26; 40 Cal. 21, Ref. to (*Lindsay, Kanhaiya Lal and Daniels, JJ.*) ABDUL RAHMAN *v.* ABDUL RAHMAN. **47 All. 513 = 23 A. L. J. 385 = 87 I.C. 51 = 6 L. R. A. (Civ.) 191 = A. I. R. 1925 All. 380 (F. B.).**

———*Appeal does not exist save under expressed or implied rule.*

An expressed rule or a rule by unavoidable implication alone, can be the basis of the right of appeal. (*Wazir Hasan, A. J. C.*) SURAJ NARAIN SINGH *v.* BISHAMBHAR NATH BHAN. **78 I. C. 138 = A. I. R. 1925 Oudh 260.**

———*Depends on actual order*

The right of appeal does not depend on what the Court ought to have done but on what it actually did. 3 All. 519 and 8 All. 20, Dist. (*Ryves and Daniels, JJ.*) NASIR KHAN *v.* ITWARI. **45 All. 669 = 21 A. L. J. 667 = 74 I.C. 905 = 5 L.R.A. (Civ.) 26 = A. I. R. 1924 All. 144.**

———*Tenant can appeal against decree against lessor.*

The transferee of a tenancy can maintain an appeal against a decree against the lessor in which the legality of the transfer of the tenancy is also questioned by the plaintiffs. (*Mookerjee and Chotzner, JJ.*) RAGHUPATI CHATTERJEE *v.* NRISHINGHA HORI DAS. **36 C. L. J. 491 = 71 I. C. 1 = A. I. R. 1923 Ca. 90.**

———*Does not exist, if not conferred by law.*

A right of appeal is a creature of statute and in order to sustain an appeal, it must be clearly shown that the law confers a right of appeal. (*Shadi Lal, C. J. and Campbell, J.*) FIRM JAIN NARAIN *v.* FIRM NARAIN DAS. **3 Lah. 296 = 69 I.C. 583 = A.I.R. 1922 Lah. 369.**

———*Canada—Cities and Towns' Act of Quebec* (1909), *Art.* 5755—*Rights of appeal existing from judgments of the various Courts mentioned, applied to proceeding under Art.* 5755.

The power given to take proceedings before the different Courts mentioned in Article 5755 enables those proceedings to be taken as part of the ordinary business of the Courts mentioned, and the rights of appeal that exist from judgments given by those Courts are applicable to such proceedings, although no rights of appeal are found in the statute. (1913) A. C. 546 and Statement of Dorion, J. in Q. R. 45 S. C. 109. Referred. (*Lord Buckmaster,*) CANADA CEMENT COMPANY, LIMITED *v.* LA VILLE DE MONTREAL EST. **A. I. R. 1921 P. C. 219.**

———*Canada—Quebec Civil Procedure Code, Ss.* 54, 55 *and* 52—*No appeal lies from Circuit Court.*

There is no right of appeal from the judgment of Circuit Court. (*Lord Buckmaster.*) CANADA CEMENT COMPANY, LTD. *v.* LA VILLE DE MONTREAL EST. **A. I. R. 1921 P. C. 219.**

———*Party not aggrieved cannot appeal.*

A party not adversely affected by the decree is not competent to appeal 6 Mad. 185, Foll. (*Le Rossignol and Campbell, JJ.*) ALLAHABAD BANK, LTD., DELHI *v.* MRS. LENA MACDONALD OF DELHI. **67 I. C. 868 = 98 P. L. R. 1922 = A. I. R. 1921 Lah. 349.**

APPELLATE COURT—*See* APPEAL.

APPELLATE ORDER.

See (1) APPEAL.
(2) C. P. CODE, O. 41.

APPLICATION.

See (1) C. P. CODE.
(2) PRACTICE.

APPOINTED DAUGHTER—*See* HINDU LAW.

APPOINTMENT—*See* WILL.

APPORTIONMENT.

See (1) LEASE.
(2) MORTGAGE.
(3) T. P. ACT.

———**of Rent.**

See T. P. ACT, S. 36.

APPROPRIATION.

See (1) ACCOUNTS.
(2) CONTRACT ACT, S. 60.

APPROVER.

See (1) CR. P. C., SS. 337-339.
(2) EVIDENCE ACT, SS. 144, 133.

ARBITRATION.

See also (1) ARBITRATION ACT.
(2) C. P. CODE, SCH. II.

Award.
Clause in Contract.
Family Arrangement.
Family Settlement.
Interest.
Powers of Arbitrators.

ARBITRATION.

Powers of Court.
Rights of Arbitrators.
Rights of Parties.
Trade Custom.
Validity.
Waiver.
Miscellaneous.

Award.

——The mere fact that the objections to an award were filed by no means shows that they were pressed before the Court. (*Percival, J.C. and Wild, A. J. C.*) SUGNOMAL VASANDMAL *v.* PARUMAL.

A. I. R. 1930 Sind 255.

——*Arbitration—Award filed in Court—Decree based on—Allotment of properties—Suit for possession of properties allotted – If lies—Execution of decree—Limitation.*

A disputed claim to lands was submitted by the parties to arbitration; the award given therein was filed in Court and based on the award a decree was passed allotting certain specific properties to each of the parties. One of them without executing the decree and getting possession of the items allotted to him within the period allowed by law, filed a suit for possession. *Held*, the remedy being in execution, the suit was not maintainable.

Obiter.—If after the award the parties had obtained possession of the properties allotted to each of them and subsequently one of them trespassed on the lands allotted to the other, a suit could then be founded on the award itself and not upon the decree following it. (*Lord Dunedin.*) SASI SEKHARESWAR ROY *v.* LALIT MOHAN MAITRA. **52 I. A. 79 = 52 Cal. 314 = 27 Bom. L. R. 166 = 6 L. R. P. C. 23 = 21 M. L. W. 286 = 86 I. C. 245 = 29 C. W. N. 633 = 23 A. L. J. 717 = A. I. R. 1925 P. C. 34 = 48 M. L. J. 20 (P.C.).**

Award—Binding nature of.

——*Vests title immediately—Non-filing of award or refusal by Court to decree on it if affects binding force.*

The effect of an award of the arbitrator is to vest the title to the property in the parties according to the award and a decree on the award merely declares the right. A sale after award by a party not entitled under the award, in pursuance of an agreement to sell prior to the award but after the reference to arbitration is not effective as against the owner. An award is not valid merely because the party, in whose favour it was, never applied to have it filed in Court. The refusal to file an award or of an application made to do so would have the effect that the award could never be relied upon in any suit relating to the subject-matter dealt with by it. As between the parties and their privies, an award is entitled to that respect, which is due to the judgment of a Court of last resort. The award is in fact a final adjudication by a Court of the parties' own choice, and until impeached upon sufficient grounds in an appropriate proceeding, an award which is on the fact of it regular is binding. (*Mookerjee and Chotzner, JJ.*) BAIDYANATH *v.* PANCHANANI.

28 C. W. N. 140 = 37 C. L. J. 542 = 72 I. C. 128 = A. I. R. 1924 Cal. 72.

——*C. P. Code, O. 22, R. 4—Death of one party before close of hearing of arbitration—Subsequent award if binding on the representatives if they never agreed to the submission.*

In a submission to arbitration if before the death of a party the hearing of the case has been completed and nothing remains to be done except the delivery of the award, and it is also shown that the intention of the parties was that not merely themselves but the legal representatives should also be bound by the decision of the arbitrator, the award delivered after the death of the party would be binding upon his representatives-in-interest. But where the hearing had not terminated and a great deal remained to be done before the arbitrator could come to a final decision, the representatives of a deceased party who had never agreed to the submission could not be bound by the award. (*Moti Sagar, J.*) TEGHA *v.* RAM SINGH. **79 I. C. 67 = A. I. R. 1924 Lah. 725.**

——*Reference to settle a scheme—Arbitrators appointing themselves managers—Award outside reference.*

Where the arbitrators were asked to lay down a scheme of management, by which the parties to the reference should be bound but the arbitrators appointed some of themselves as managers of temple property, *held*, the award was not within the terms of the reference which did not contemplate that the arbitrators should substitute a managing body in supersession of the parties to the agreement of reference. (*Ashworth and Simpson, A.J.Cs.*) R.B. PANDIT SANKATA PRASAD *v.* JAGANNATH. **9 O. L. J. 410 = 69 I. C. 714 = 26 O. C. 1 = A. I. R. 1922 Oudh 276.**

Award—Construction.

——*Estate conveyed under award—Widow and brother of deceased Mahomedan—Disputes between, as to proper construction and effect of deceased's will—Award settling and dividing properties between widow and brother—Estate taken by widow in properties allotted to her—Absolute or not.*

However much an award may be complained of by a stranger to the submission of his representatives, it cannot be rejected by a party to the submission or those representing him; and the representatives of a party to the submission are equally entitled to avail themselves of the benefit conferred upon him by the award. An Oudh Talukdar possessed of talukas entered Lists 2 and 5 of the Lists of the Oudh Estates Act, 1869, died leaving a will by which he bequeathed the said taluks in the manner stated therein, to his brother, widow and daughter and her male issue. After his death disputes arose between his widow and his brother, and they referred their disputes, with reference to the properties dealt with by the will and with reference to other properties of the deceased to the arbitration of certain persons, authorising them to settle the disputes after perusing the clauses given in the will and considering other matters. The arbitrators ultimately made an award which awarded some of the taluks to the widow and divided the other properties of the deceased in a certain way.

Held that, upon the true construction of the award, the brother was entirely excluded from any interest in the property awarded to the widow, and that at any rate, as far as he was concerned, the widow must have taken to have got the absolute ownership of the property awarded to her.

Held further, that the arbitrators must be deemed to have had full authority to put such interpretation on the clauses of the will as they thought proper. (*Lord Phillimore.*) THE DEPUTY COMMISSIONER OF BARABANKI *v.* THE RECEIVER IN BANKRUPTCY. **3 Luck. 372 = 32 C. W. N. 1120 = 48 C. L. J. 418 = 5 O. W. N. 565 = 113 I. C. 113 = 29 M. L. W. 793 = A. I. R. 1928 P.C. 202 = 56 M. L. J. 601 (P. C.).**

Award—Definition of.

——*Award is an agreement of parties expressed by third person chosen by parties.*

ARBITRATION—Award—Enforceability of.

An award is no more than the embodiment of the agreement of the parties and the order of a third party chosen by them to ascertain its terms and equitable relief may be given by the Court in a suit to enforce the terms of the award. Wood *v.* Griffith. 18 R. R. 18 Ref. (*Kotwal, A. J. C.*) BISAN SINGH *v.* FATECHAND. **89 I. C. 829 = A. I. R. 1926 Nag. 52.**

Award—Enforceability of.

———*Suit to enforce—Absence of arbitrator's jurisdiction pleaded—Evidence on issues involving question of jurisdiction should not be excluded—C. P. Code, O. 15, R.* 3 (1).

When in the suit on an award objection is raised as to the jurisdiction of the arbitrators it would be illegal for the Court to shut out evidence on the issues involving the question of arbitrator's jurisdiction and to decide the case on other issues as preliminary issues. (*Zafar Ali and Addison, JJ.*) RAGHUNATH *v.* SULZER BRUDERER. **7 Lah. 42 = 7 L. L. J. 611 = 27 P. L. R 287 = 92 I. C. 712 = A. I. R. 1926 Lah. 125.**

———*Dismissal of application to file award on ground of some parties being unrepresented minors, does not render award void or otherwise unenforcible.*

Dismissal of application to file an award on the ground that certain parties were minors and were not properly represented may *per se* deprive the adult parties to the award, of the power of enforcing it by certain effective statutory methods, but it does not render the award void or otherwise unenforcible as against those parties. (*Lord Atkinson.*) KIRKWOOD *v.* MAUNG SIN. **89 I. C. 773 = 30 C. W. N. 529 = 5 Rang. 186 = 52 I. A. 265 = 6 L. R. P. C. 160 = A. I. R. 1925 P. C. 216.**

———*Limitation Act, Art.* 120—*Suit to enforce award —Art.* 120 *applies.*

A suit to enforce an award is governed by Art. 120. (*Macleod, C.J. and Fawcett, J.*) RAJMAL GIRDHARI LAL *v.* MAROTI SHIVARAM. **45 Bom. 329 = 59 I. C. 755 = A. I. R. 1921 Bom. 389.**

Award—Finality of.

———*Room should not exist for further litigation.*

The award of the arbitrator is intended to be final both in fact and law, and the Courts will not interfere except on certain well-recognised principles and in certain well-defined circumstances. An award made in a form in which it is calculated to have an effect, which is the opposite of finality, should be deemed as falling below the standard. The arbitrator ought not to include evidence or refer to or discuss authorities, making his award more like the judgment of a judge which is subject to appeal than the award of an arbitrator. (*Sanderson, C.J., and Walmsley, J.*) SREE LAL MANGTU LAL *v.* J. F. MADAN. **88 I.C. 49 = 52 Cal. 100 = A.I.R. 1925 Cal. 599.**

———*Statement of arbitrators as to the details of the proceedings is* prima facie *conclusive.*

In cases where the parties are at variance on the question as to what took place before the arbitrators, the proper course is to take the statement of the arbitrators as to the facts as *prima facie* representing the true state of affairs as to what took place at the time of the enquiry unless there is very strong reason for doubting the accuracy of their statement. (*Kumaraswami Sastri, J.*) NARASIMHULU CHETTY *In the matter of.* **17 M. L. W. 648 = 75 I.C. 850 = A.I.R. 1924 Mad. 274.**

———*Award—Final except where there is error of law arising on the face of the award.*

ARBITRATION—Award—Invalidity of.

Where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted is now firmly established, *viz.*, where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. An error in law on the face of the award means that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. (*Lord Dunedin.*) CHAMPSEY CO. *v.* JIVRAJ BALOO CO. **73 I. C. 436 = 38 C.L.J. 130 = 47 Bom. 578 = 50 I. A. 324 = 28 C.W.N. 397 = 33 M.L.T. 419 = 25 Bom. L. R. 588 = 1923 M.W.N. 596 = 4 L.R. P.C. 99 = A.I.R. 1923 P.C. 66 = 44 M.L.J. 706 (P. C.).**

Award—Invalidity of.

———*Reference not* bona fide—*Award incomplete—Necessary party not present—Award is invalid.*

Where the reference is not a *bona fide* reference for the settlement of civil disputes only, and award is incomplete and the parties whose presence was absolutely necessary to make it valid were never before the arbitrator, the award is not valid. (*Sir Binod Mitter.*) KAMINI KUMAR BASU *v.* BIRENDRA NATH BASU. **123 I.C. 187 = 32 Bom. L.R. 639 = 34 C.W.N. 484 = 51 C.L.J. 400 = 31 M.L.W. 811 = A.I.R. 1930 P.C. 100.**

———*Omission without consent of parties to decide anything material, undertaken to be decided vitiates award—Parties' consent to omission need not be express—Consent is unnecessary for omission to do anything which was practically impossible for the arbitrators to do.*

If an arbitrator chooses to undertake the decision of a variety of matters with the consent of parties, and he deliberately, or by an oversight without the consent of the parties omits from his decision anything really material, it is sufficient to destroy the award. But if in the course of events which have happened since an arbitrator took upon him his office, it has become impossible, or no longer desirable either in the view of the arbitrator, or in the view of the parties themselves to decide any one or another of the points originally submitted, and the parties themselves realise that the arbitrator should disregard that point, the defect which would otherwise invalidate the award, ceases to be a defect. The consent for such a purpose may take various forms : an expressed withdrawal, a mutual understanding not to submit the necessary materials, a mutual recognition by the parties that a condition of things exists which makes a decision impossible, or a diplomatic silence with regard to a mutual understanding. Even in absence of parties' consent, the award is not invalidated by arbitrator's omission to do a thing which was impossible for him to do. Where it was the duty of the arbitrators to divide certain villages between the parties but where it was practically impossible to go over the ground and to make the necessary partition by metes and bounds, *held*, that the omission to make the partition did not invalidate the award though the parties had not consented to the omission. (*Walsh, A. C. J. and Ryves, J.*) KHUB LAL *v.* BISHAMBHAR SAHAI. **22 A.L.J. 919 = 5 L.R.A. (Civ.) 649 = 82 I.C. 219 = A.I.R. 1925 All. 103.**

ARBITRATION—Award—Invalidity of.

——*Award made without survey of goods provided in the agreement to refer is invalid.*

Where the arbitration clause provided that "the Chamber shall arrange for survey in accordance with its rules, that surveys shall be held on the actual goods and not on shipment samples..." and without such surveys the arbitrators made their award. *Held*, that the award made by the arbitrators was made without jurisdiction and was invalid. (1923) A. C. 480; 47 Bom. 578; (1857) 3 C. B. (N. S.) 189 Foll. (*Buckland, J.*) CHANDMUL MULCHAND *v.* S. AND C. NORDLINGER.
80 I.C. 151 = 28 C.W.N. 261 = A.I.R. 1924 Cal. 490.

——*Mistaken view of real rights invalidates.*

Where the parties to an arbitration were obviously acting under quite a mistaken view of their real rights and the arbitrators seemed also to have adopted that view, *held*, that the arbitration proceedings and the award therein cannot be supported. 45 Cal. 590 and 6 Pat. L.J. 604, Foll. (*Bucknill and Ross, JJ.*) RAM BAHADUR SEN *v.* MAHANTH GANESH BHAGAT.
73 I.C. 542 = 2 Pat. 554 = 5 P.L.T. 255 = A.I.R. 1924 Pat. 49 (59).

——*No provision for decision by majority—Award by majority is invalid.*

A dispute was referred to arbitration. The agreement of reference provided for the settlement of the dispute by four arbitrators and a *sarpanch* acting together. There was no provision between them that the opinion of the majority was to prevail. All the five arbitrators entered into the reference but the award was signed by only four of them. It was found that the fifth man did not sign, because he did not concur in the award.

Held, that the award was invalid. 7 M. 174; 8 All. 64, Foll. (*Kanhaiya Lal, J.C.*) NAND KISHORE *v.* KISHORI LAL. **74 I.C. 299 = 10 O.L.J. 29 = 26 O. C. 350 = A.I.R. 1923 Oudh 181.**

——*Some arbitrators absent during evidence—Award is invalid.*

Where all the arbitrators do not attend at all the meetings and where the evidence is taken in the absence of one or more of the arbitrators the award is invalid. (*Ashworth and Simpson, A. J. Cs.*) R. B. PANDIT SANKATA PRASAD *v.* JAGANNATH.
69 I.C. 714 = 9 O.L.J. 410 = 26 O.C. 1 = A.I.R. 1922 Oudh 276.

——*Arbitration without intervention of Court—One of the arbitrators refusing to take part—Award is invalid and submission cannot be pleaded as bar to suit.*

When the reference provides for a decision of all the arbitrators, the refusal of any of the arbitrators to take part in the arbitration invalidates the award. The submission no longer remains in force and cannot be pleaded as a bar to the suit. (*Daniels, J. C.*) LACHMAN PRASAD *v.* PRAN NATH. **65 I.C. 339 = 8 O.L.J. 585 = A.I.R. 1922 Oudh 108.**

——*Award based on documents—Parties not having opportunity to meet the inferences deducible from the documents—Award should be set aside.*

Where an arbitrator received certain documents from the defendants in a suit referred to his arbitration and made extracts therefrom and placed them on file and made his award without giving the parties an opportunity of seeing the said documents and of meeting the inference deducible from them.

Held, that there was such a breach of duty on the part of the arbitrator, as entitled the party to have the award set aside. 18 Bom. 299, Rel. on. (*Martineau, J.*)

ARBITRATION—Award—Scope.

DELHI CLOTH AND GENERAL MILLS CO., LTD. *v.* KIDARI PERSHAD CHEDDI LAL.
64 I. C. 363 = 22 P. L. R. 1922 = A.I.R. 1921 Lah. 396.

——*Notice not given—Award is illegal.*

An award given in the absence of one of the parties and without any notice as to the time or the place where the arbitrators would sit to decide the dispute, is illegal. (*Scott-Smith and Abdul Qadir, JJ.*) RAJA RAM PUNAM CHAND *v.* JOGAL KISHORE RAM RICHPAL.
65 I.C. 577 (Lah.).

Award—Irregularity.

——*Arbitration taking place in England as per clause in contract providing therefor, in accordance with English law—Irregularity in award—Steps not taken under English Procedure to set aside—Award becomes final.*

The respondent at Madras agreed to supply sheep skins to the appellants in London and any dispute arising was agreed to be referred to arbitration. On the ground that quantity supplied was of inferior kind the appellants sold it with the consent of the respondent and claimed the difference, and appointed an arbitrator and gave the respondent notice to appoint his arbitrator and to the effect that if no arbitrator was appointed the arbitrator appointed by the appellants was to be the sole arbitrator. The arbitrator awarded the difference having read the contract and correspondence. A suit was brought in Madras High Court on the award. The respondent pleaded he had no notice from the arbitrator who acted irregularly. Their Lordships held as the contract was made and was to be performed in England, and as the arbitration clause provided for an arbitration which was to take place in London and in accordance with English Law and procedure, under the Law by which both parties agreed to be bound. any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator must be taken by motion under Arbitration Act of 1889 to set aside or remit the award, and if not so taken cannot be pleaded in answer to an action on award. If no such motion is made within the time limited by Order 64, R. 14 of the Rules of the Supreme Court of England, or at all, the award becomes as fully binding on both parties as if it had been incorporated in the contract. Any difference going to the root of the award, *e.g.*, that the arbitrator had no jurisdiction or that the matter was tainted with fraud could have been pleaded in the suit; but a defence on the ground of irregularity not appearing on the face of the award was excluded by law by which both parties had agreed to be bound. (*Viscount Cave.*) OPPENHEIM AND CO. *v.* HAJEE MAHOMED HANEEF SAHEB. **74 I. C. 616 = 45 Mad. 496 = 1922 M. W. N. 396 = 16 M. L. W. 33 = 26 C. W. N. 642 = 30 M. L. T. (P. C.) 291 = 49 I. A. 174 = 24 Bom. L. R. 1245 = 36 C. L. J. 444 = A. I. R. 1922 P.C. 120 = 43 M. L. J. 422 (P. C.).**

——*Irregularity in procedure—No proper hearing—Award is vitiated.*

If irregularities in procedure are proved which amount to no proper hearing of the matters in dispute, that would be misconduct sufficient to vitiate the award, without any imputation on the honesty or impartiality of the arbitrator. (*Mookerjee, A.C.J. and Fletcher, J.*) HARI SINGH *v.* KANKINARAH CO., LTD.
34 C. L. J. 39 = 66 I. C. 389 = A. I. R. 1921 Cal. 657.

Award—Scope.

——*C. P. Code, O. 34—O. 34 has no application to award decrees.*

ARBITRATION—Award—Scope.

The provisions of C. P. Code, O. 34, do not apply to decrees passed in accordance with an award on a reference to arbitration. A.I.R. 1924 Pat. 263, Foll. (*Bhide, J.*) PUNJAB NATIONAL BANK, LTD., LYALLPUR *v.* THAKAR DAS MATHRA DAS. **121 I. C. 79 = A. I. R. 1930 Lah. 116.**

——*Compromise sanctioned by arbitrators operates as contract.*

A judgment by consent will in many cases operate as a contract. Where parties submitted a dispute to arbitrators, but they submitted a razinama which concluded the dispute, *held*, the razinama, as sanctioned by the arbitrators, was nothing more than a contract between the parties. (*Coutts-Trotter, C.J. and Sundaram Chetty, J.*) MUNISAMI NAICKEN *v.* VEDACHALA NAICKEN. **101 I. C. 386 = A.I.R. 1928 Mad. 23.**

——*Award must not exceed submission in substance or form.*

An arbitrator has no right to traverse beyond the limits of the particular matters submitted to him for decision. His award must strictly conform both in substance and in form to the submission. (*Rupchand Bilaram, A. J. C.*) FIRM OF MAHOMED ALI A. KARIMJI & SONS *v.* CHARATSING BUDSING. **80 I. C. 596 = A. I. R. 1925 Sind 51.**

Award—Setting aside.

——*Passed* ex parte.

An award passed *ex parte* will not be set aside in absence of sufficient cause for absent party's non-appearance. (*Rupchand Bilaram, A. J. C.*) FIRM MOTHARAM DAWLATRAM *v.* FIRM MAYADAS DAWLATRAM. **19 S. L. R. 251 = 78 I. C. 521 = A. I. R. 1925 Sind 150.**

——*Award can be set aside—Where the arbitrator has been paternal cousin to one of the parties and the other has not known this.*

A person who is related to one of the parties as his first paternal cousin is disqualified from sitting as an arbitrator if the other party was not aware of such relationship existing between him and the party mentioned. In such a case the fact of the relationship affords a real likelihood of an operative prejudice on his part. It is not necessary when the award is sought to be set aside to prove actual bias or partiality on the arbitrator's part or that the existence of the relationship produced any influence on his mind. (*Rupchand Bilaram, A. J. C.*) FIRM MOTHARAM DAWLATRAM *v.* FIRM MAYADAS DAWLATRAM. **19 S. L. R. 251 = 78 I. C. 521 = A. I. R. 1925 Sind 150.**

——*Award can be set aside for error in law in reasons stated in award.*

An award in which an arbitrator gives his reasons for his decision, which reasons are erroneous on a point of law, is an award in which there is an error of law on the face of the award and should be set aside. 47 Bom. 578; A.I.R. 1923 P.C. 66, Foll. (*Rupchand Bilaram, A.J.C.*) FIRM OF MAHOMED ALI A. KARIMJI & SONS *v.* CHARATSING BUDSING. **80 I. C. 596 = A. I. R. 1925 Sind 51.**

——On the very day on which an award was filed in the Sind Judicial Commissioners' Court the non-applicants filed a suit at Lahore and got an *ex parte* decree cancelling the contract and holding that the reference to arbitration was invalid and restraining the applicant and the arbitrator from filing the award. On objection by the non-applicant on the basis of the Lahore decree, *held*, that the Lahore decree operated as *res judicata* and was sufficient to justify the taking off the file of the award filed at Karachi. (*Kennedy, A.J.C.*) MOHAN SHAH *v.* MESSRS. DEWANCHAND & CO. **81 I.C. 1024 = A. I. R. 1924 Sind 60.**

ARBITRATION—Award—Validity.

——*Decision of a question of construction referred to can be set aside only if procedure is illegal, such as admitting inadmissible evidence but not on the ground of Court coming to a different conclusion.*

Where a question of construction is referred to arbitration, the decision of the arbitrator on that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion but where it appears that the arbitrator has proceeded illegally, for instance, that he has decided on evidence which in law was not admissible then there is error in law which may be proved. (*Raymond and Rupchand Bilaram, A.J.Cs.*) MESSRS. DUTTON MASSEY & CO. *v.* MESSRS. JAMNADAS HURPRASAD. **19 S. L. R. 152 = 76 I. C. 84 = A. I. R. 1924 Sind 51.**

Award—Validity.

——*Where arbitrator lays down principles according to which accounts are to be settled, award cannot be said to be indefinite or incomplete.*

If the arbitrator lays down the principles according to which the accounts have to be settled, no valid objection can be raised to the awards on the ground of their being indefinite or incomplete. 14 C.L.J. 188 and 15 C. L.J. 360, Ref. (*Jai Lal and Bhide, JJ.*) NANAKCHAND *v.* BANARSI DAS. **A. I. R. 1930 Lah. 425.**

——Where the agreement to refer leaves the matter to be decided by the majority of the arbitrators, the fact that only three of five arbitrators signed the award cannot render the award invalid if none of the arbitrators have refused to act. 7 All. 523, Dist. (*Nanavutty, J.*) BHOJ NATH *v.* SHIVA NANDAN. **A. I. R. 1930 Oudh 389.**

——*Limitation Act, Art.* 178—*Award not made rule of Court within limitation period—Award does not become invalid.*

An arbitrator's award does not become invalid merely because it has not been made a rule of the Court within the prescribed period of limitation. 4 O. L.J. 487, Rel. on. (*Pullan, J.*) THAKUR DIN SINGH *v.* BHAGWANDIN SINGH. **11 L. R. A. (Rev.) 32 = A. I. R. 1930 Oudh 51.**

——*Proof of award is sufficient evidence of fact and validity of award in the absence of agreement to refer to arbitration.*

Where a party is put to the proof of the arbitration award on which he bases his claim, the award is sufficient evidence of the fact of the award and of validity of the award in the absence of the agreement to refer to arbitration, because the fact of the award raises the presumption that there was a reference and that the award was in accordance with the reference. (*Ashworth, J.*) BALU RAM *v.* LALA RAM. **116 I.C. 853 = A.I.R. 1929 All. 415.**

——*Plaintiffs appearing under protest—Arbitrators returning proceedings to Court—Court writing to arbitrators with request to resume work, protest being unjustified—Further proceedings of arbitration were not vitiated as Court did not compel them.*

Certain arbitrators returned proceedings to Court on the ground that plaintiffs appeared before them under protest. The Court wrote to them requesting to finish the work and saying that the protest did not matter, it was unjustified and that the Court had confidence in them.

Held, that the writing did not amount to an order forcing or compelling arbitrators to resume their work. It was simply a request to reconsider their decision and to resume the arbitration if they were agreeable to do so. And so the writing does not vitiate further proceedings in arbitration. 7 All. 20, Dist.; 10 All. 137 and 23 W. R. 429 and A. I. R. 1921 All. 361, Rel. on. (*Fawcett and Mirza, JJ.*) Keshav Lal Mohan Lal *v.* Bai Lakshmi. **52 Bom. 568 = 30 Bom. L. R. 950 = 112 I. C. 284 = A.I.R. 1929 Bom. 50.**

———*Validity should be determined by looking to its operative portion only.*

Per *Gokaran Nath Misra, J.*—The award of the arbitrators should, according to the ordinary rule of law, be read as a whole and portions out of it cannot be picked up to show that the finding of the arbitrators was inconsistent with those portions. According to Form No. 5 in the appendix attached to the second schedule, the only thing which arbitrators are required to state in their award is their conclusion and nothing else. Therefore, in order to find out what the award means, one has only to refer to the operative portion of the award ; and the legality or illegality of the award must depend upon that portion and not upon anything else. (*Wazir Hasan and Gokaran Nath Misra, JJ.* afterwards *Stuart, C.J., Raza and Pullan, JJ.*) Ganesh Singh *v.* Bhikham Singh. **3 Luck. 1 = 107 I.C. 545 = 4 O.W.N. 1085 = A.I.R. 1928 Oudh 1 (F.B.).**

———*Arbitration—Award bad on face of it—Error in law—Contract incorporated into award.*

Parties who submit their disputes to arbitration are bound by the arbitrator's conclusions in point of law or of fact. An arbitrator is guilty of judicial misconduct if he makes a mistake of law visible on the face of his award. But the error in law must be distinctly collected from the face of the award or from some document incorporated into the award. Where an award recites a contract, but only for a particular purpose, namely, to earmark the disputes referred to arbitration, the contract does not thereby become a document forming part of the award. 47 B. 578 ; 44 M. L. J. 706 (P.C.), Foll. (*Viscount Sumner.*) Firm of Saleh Mahomed Umer Dossal *v.* Seth Nathoomal Kessamal. **21 S.L.R. 101 = 104 I.C. 476 = 31 C.W.N. 1027 = 29 Bom. L.R. 1150 = 46 C.L.J. 9 = 39 M.L.T. 61 = A.I.R. 1927 P.C. 164 = 53 M.L.J. 18 (P.C.).**

———*Minority absenting and rendering award by majority of arbitrators infructuous—Award is not invalid merely on that ground.*

Where the minority of the arbitrators appointed refrain from having anything more to do with the further proceedings in arbitration and render infructuous the award by the majority the award will not be set aside merely on that ground. (*Srinivasa Aiyangar, J.*) Sanjivappa *v.* Venkatanarappa. **100 I.C. 634 = A.I.R. 1927 Mad. 436 = 52 M.L.J. 357.**

———*Arbitrator authorized by the parties to proceed* ex parte—*His award cannot be objected to on the ground of failure of one party to attend.*

Where the solehnama expressly provides that if the parties do not appear after due notice the arbitrator can proceed *ex parte*, the award made by the arbitrator cannot be objected to on the ground that the arbitrator carried on an *ex parte* enquiry owing to the failure of one of the parties to the reference to appear before him after proper notice. (*Newbould and Pearson, JJ.*) Hem Chandra Kundu *v.* Jnanendra Chandra Kundu. **90 I.C. 624 = A.I.R. 1926 Cal. 116.**

———*Award on a reference in a pending suit embodying compromise is valid.*

An award passed by arbitrators in a pending suit which merely embodies a compromise of the parties themselves before the arbitrator is a valid award and the arbitrators are powerless to do anything more than recording the compromise and passing it on to the Court to deal with it. Accepting compromise is an adjudication of the case as is a decree of the Court founded on a compromise and to admit that an award may be challenged on the ground as the arbitrators did not themselves independently consider and decide the matter, will be contrary to the principle of paragraph 15 of C.P. Code, Sch. II. (*Wallace, J.*) Ramu Naidu *v.* Nayanappa. **19 M. L. W. 562 = 1924 M. W. N. 356 = 80 I.C. 571 = A.I.R. 1925 Mad. 56.**

———*Error in law—Question of law specifically referred—Error is not fatal—Otherwise error is fatal if apparent on face of award.*

Where the arbitrators are judges both of facts and of law, error in law, if any, does not vitiate the award. Where a specific question of law is specifically referred by the parties, to the arbitrators who arrive at a wrong decision of law, their award cannot be challenged though the error of law is apparent on the face of the award itself. Where, however, a specific question of law is not so referred, an erroneous decision of law may be attacked provided such error appears on the face of the award itself, or any document so closely connected as to form part of the award. (*Rupchand Bilaram, A.J.C.*) Firm Madhowram Hardevdas *v.* Mitsui Bhusan Kaisha, Ltd. **19 S.L.R. 54 = 78 I.C. 230 = A.I.R. 1925 Sind 186.**

———*Damages granted in pounds—Exchange rate not specified—Award is not uncertain—C. P. Code, Sch. II, Para. 14.*

An error in law on the face of the award must be distinctly collected from the face of the award or from any paper so connected with the award as to form part of it. Where, in an arbitration, the arbitrator had awarded the amount claimed in pounds sterling and the rate of exchange for payment was not specified, *held*, that the award was not bad for uncertainty. (*Raymond, A.J.C.*) Messrs. Beith Stevenson & Co. *v.* Firm of Narooman Khemchand. **17 S.L.R. 86 = 80 I.C. 1009 = A. I. R. 1924 Sind 117.**

———*Arbitrators—Collusion with one of the parties.*

An award based on the collusive action of the arbitrators is necessarily wholly invalid owing to their misconduct.

An award based on the collusive action of the arbitrators found that the appellant was the Keittima adopted daughter of *K*, and was entitled to a fourth share of his estate, or Rs. 30,000. In pursuance of the award the respondent, the other party to the arbitration, paid the sum of Rs. 30,000 to the appellant and obtained a deed of release from her. *Held*, that the finding in the award, that the appellant was the Keittima daughter of *K* could not be relied upon by her, and that the payment of Rs. 30,000 under the terms of the award could not be regarded as a valid release of the claims of the appellant against the estate of *K*. (*Lord Parmoor.*) Ma Than Than *v.* Ma Pwa Thit. **1 Rang. 451 = 2 Bur. L. J. 260 = 29 C.W.N. 610 = 1923 M.W.N. 711 = 33 M.L.T. 361 = 77 I. C. 63 = A. I. R. 1923 P.C. 156 = 46 M.L.J. 334 (P.C.).**

———*Misconduct of arbitrator—Omission of point no longer in controversy does not vitiate award—C.P. Code, Sch. II, Para. 15 (a).*

The mere fact that the arbitrator is silent in his award, as to a point which was one of the points originally submitted to him, but on which in fact he finds there is no longer any controversy between the parties does not vitiate the award. *Randall* v. *Randall*, (1805) 7 E. R. 81 ; 13 C. L. J 399 and 14 C. L. J. 188, Dist. (*Mears, C. J. and Ryves, J.*) HARAKH RAM JANI *v.* LAKSHMI RAM JANI. **43 All. 108 = 60 I. C. 626 = A. I. R. 1921 All. 384.**

———*Umpire—Parties having notice of umpire's appointment—No notice of the date of hearing served on parties—Failure to take evidence in presence of parties will not vitiate award if parties do not apply for.*

An umpire is bound to re-hear the evidence taken in absence of parties if an application is made to him to that effect, and if he fails to do so, his award will be bad for misconduct, but if the parties do not apply to him to hear the evidence again, having knowledge of his appointment, although notice is not sent by umpire of the date of hearing, he may well conclude that they have waived their right to do so and are content with his deciding the case on the materials before him. 5 S.L.R. 89, Diss. (*Raymond, A.J.C.*) E. MILLER *v.* DHANSINGH RAM LAL. **15 S.L.R. 68 = 63 I. C. 141 = A.I.R. 1921 Sind 27.**

Award—Miscellaneous.

———*Award must be produced when exclusive title is set up on its strength.*

Where exclusive title is set up on the strength of an award, the award must be produced. (*Raza, J.*) NAROTAM DAS *v.* MUHAMMAD RAZA. **96 I. C. 14 = A. I. R. 1926 Oudh 522.**

———*Extension of time.*

A written application is not necessary for extension of time for filing the award. 3 Mad. 59, Dist. (*Macleod, C. J. and Shah, J.*) SAKALCHAND MOTI *v.* AMBARAM HARIBHAI. **26 Bom. L. R. 280 = 80 I. C. 260 = A. I. R. 1924 Bom. 380.**

Clause in Contract.

———*Arbitration clause providing that in case one party fails to appoint arbitrator, decision given by arbitrator appointed by other party shall be binding—Clause covered case of appointment of fresh arbitrator when one already appointed had declined to act—Arbitrator appointed by other party could not act as sole arbitrator.*

An arbitration clause provided as follows: " It is further agreed that if within 20 clear days . . . . . . after being requested by letter addressed to his or their usual place of business either party fail to appoint an arbitrator or surveyor ready and willing to act, the decision of the arbitrator or surveyor appointed by the other party shall be in like manner binding on both parties."

Held, that the clause covered the case of appointment of a fresh arbitrator when the arbitrator already appointed had declined to act and so the party whose arbitrator had refused to act should have been given a chance to appoint a fresh arbitrator. Hence the arbitrator appointed by the other party was not competent to give award acting as the sole arbitrator. A. I. R. 1922 P.C. 374, Rel. on. (*Mukerji and Bennet, JJ.*) SHANKAR LAL LACHHMI NARAIN *v.* PHULCHAND FATEH CHAND. **A. I. R. 1930 All. 584.**

———*Mercantile—Court should be careful of setting it aside.*

Where in a mercantile contract the parties have deliberately entered into a contract involving an arbitration clause, the Court should be careful of setting it aside. (*Kemp, Ag. C. J. and Murphy, J.*) MARITTIMA ITALIANA STEAMSHIP CO. *v.* BURJOR FRAMROZE RUSTOMJI JOSHI. **32 Bom. L. R. 43 = A. I. R. 1930 Bom. 185.**

———*Contract Act, S. 28—One party to contract agreeing to abide in case of dispute regarding contract by decision of another—Such decision is binding on him unless it is arbitrary or unjust.*

Where a party to a contract agrees that in case of any dispute arising out of the contract or in any matter concerning the contract he will abide by the decision of the other party, he cannot afterwards be allowed to say that such decision is not binding upon him, being a decision by a person in his own cause unless it be shown to be arbitrary or otherwise unjust. A. I. R. 1927 Sind 253, Foll. (*Percival, J. C. and Rupchand, A. J. C.*) DETARAM *v.* FORBES. **117 I. C. 778 = A. I. R. 1930 Sind 17.**

———*Buyer and seller—Contract providing appointment of arbitrator by one party for the other after seven days from despatch of notice—Notice not delivered to other party for a fortnight—Sufficient cause for not enforcing terms of clause not shown—Terms must be enforced.*

Where according to the terms of the indent the seven days, after which the other party should have power to appoint an arbitrator on behalf of the defaulting party, were to count not from the date of the receipt of the notice, but from the date of its posting ; but the notice was actually delivered to the defaulting party after a fortnight and no sufficient ground had been urged why these provisions of reducing the period of notice to seven days from the date of despatch and agreed to by the parties with open eyes should not be given effect to, *held*, that the objection by the defaulting party to the appointment of arbitrator on their behalf by the other party on that ground must fail. (*Rupchand, A. J. C.*) SHAW WALLACE &CO. *v.* GURBAXSING BESHENSING. **109 I.C. 262 = A. I. R. 1929 Sind 58.**

———*Articles of Association of a Chamber of Commerce providing for compulsory arbitration of disputes arising between its members—Chamber has no jurisdiction to decide disputes arising out of transactions prior to its incorporation.*

There was an unregistered Marwari chamber of commerce which by one of its by-laws provided for optional arbitration among its members. This was turned into a registered chamber of commerce on 25th November, 1925 and by one of the articles of association provided. " It shall be compulsory for every member or associate member in the first instance to have all disputes arising out of or in course of all dealings and transactions in seeds, wheat and hundi-chittis between himself and any other member or associate member and optional in the case of disputes in gold, silver, cotton, cloth, etc., settled by or before the board or such person or persons as may be nominated by the board to act as arbitrators or umpires and subject to any special rules as may be prescribed in that behalf from time to time by arbitration and without recourse to a Court of Law."

Held, that the provision regarding compulsory arbitration applied to arbitration subsequent to the incorporation of a registered chamber and though the parties were members of the prior unregistered chamber, the registered chamber would have no jurisdiction to decide disputes among them arising out of transactions prior to the incorporation of the registered chamber. (*Marten, C.J. and Blackwell, J.*) CHETANDAS DAGA *v.* RADHAKISSON RAMCHANDRA. **29 Bom. L. R. 1087 = 104 I. C. 174 = A. I. R. 1927 Bom. 553.**

———*Interpretation—Submission clause in contract allowing so many days for appointing arbitrator—So many clear days commencing from midnight to midnight are to be allowed.*

When a period of time allowed in a submission clause for the nomination of an arbitrator is as so many days it is to be construed as so many clear days commencing from midnight to midnight. 3 S. L. R. 237 and 7 S.L. R. 1, Foll. (*Lobo, A. J. C.*) MACDONALD & CO. *v.* NARAINDAS POKERDAS. **99 I. C. 554 = A. I. R. 1927 Sind 126.**

——*Submission clause—Submission to two arbitrators by one party alone instead of each party nominating his own arbitrator according to submission clause in contract—Reference is complete when arbitrators are nominated—Drawing up of reference and acceptance by arbitrators may be subsequent.*

A submission clause in a contract followed by the nomination of an arbitrator by the parties, whether each of the parties to a contract nominates his own arbitrator or whether one party nominates both arbitrators on failure by the other party to nominate his arbitrator having been called upon to do so renders the reference complete when the arbitrators have been nominated in terms of the submission clause, and the appointment of an arbitrator is complete even when a reference is drawn up and has been accepted by the arbitrator subsequently. 8 S. L. R. 302, Dist.; A. I. R. 1924 Sind 91, Expl. (*Lobo, A. J. C.*) MACDONALD & CO *v.* NARAINDAS POKERDAS. **99 I. C. 554 = A. I. R. 1927 Sind 126.**

——*Policy of Insurance providing for reference to arbitration—Reference and award under Arbitration Act are not bad—Arbitration Act, S. 7.*

Where the Policy of Insurance provided by a clause for reference to arbitration but there was no reference to such clause of the policy in the reference, *held*, the fact that the arbitration proceedings were under the reference before a Tribunal other than that contemplated by the clause of the policy but in itself legal was no ground for holding that the award was in any way bad. (*Kennedy, J.C. and Raymond, A.J.C.*) HIMALAYA ASSURANCE CO., LTD. *v.* ASSUDAMAL HARBHAGWAN DAS. **88 I. C. 878 = A. I. R. 1926 Sind 8.**

——*Contract providing that any dispute arising should be referred to arbitration—Disputes arising at different times—Arbitration can be held at different times in respect of the same contract.*

Where the submission clause in the contract provides that any dispute arising from the contract would be referred to arbitration, it is open to the construction that there can be more than one award in respect of the same contract, if different disputes arise at different times, and the submission of any one dispute which may have arisen at any one time cannot be pleaded as a bar to a reference of any subsequent dispute to arbitration under the clause. (*Rupchand Bilaram, A. J. C.*) FIRM OF R. B. BRIJLAL JAGANNATH *v.* FIRM OF ALLAH DITTA MAHBOOB ILLAH. **86 I. C. 393 = A. I. R. 1925 Sind 242.**

——*East India Cotton Association Rules—Rule 43-A, D 58—Purposes of arbitration includes appointment as umpire—Nominate means finally appoint—Rules about extension relate to arbitrators, not umpires—Rules in Rule 58 refer to Trading Rules.*

The word " nominate " in clause *B* would mean there " finally appoint, " *i.e.*, when the arbitrator has accepted the appointment. Assuming, however, that the word " nominate " has a more restricted meaning than these rules apparently appear to give to it, there is no effective nomination until nominee agrees to act as an arbitrator. The expression "purposes of arbitration" is comprehensive enough to include acting as an arbitrator or as an umpire. Under the rules the umpire is bound

to make his award within ten days from the date of his appointment, and the provisions as to the extension of time under rule 43, clause (*a*) apply only to arbitrators, and not to umpires. Practice to the contrary is not relevant, where the language of the rule is unambiguous as it would involve the incorporating of a new term in the contract which cannot be reasonably implied. Time allowed for any purposes under these rules in the said clause in Rule 58 appears to refer to any purposes under the Trading Rules and not under all the rules of Association generally. (*Shah, Ag. C.J. and Crump, J.*) CHATURBHUJ BHAWANIDAS *v.* DEOKARAN NANJI. **26 Bom. L. R. 84 = 79 I. C. 769 = A. I. R. 1924 Bom. 370.**

——*Interpretation—Agreement to refer to—Interpretation—*"Any dispute" *was held to include case of non-delivery of a portion.*

The written contract between the parties contained a clause providing that any claim or dispute of any sort whatever in connection therewith, unless an amicable settlement could be arrived at, must be referred to arbitration. Upon a claim being made for non-delivery of a portion of the goods contracted for, the defendants referred the matter to arbitration, under the provisions of this clause. The plaintiffs, however, refused to attend the arbitration. The arbitration, thereupon, proceeded in the absence of the plaintiffs and ultimately an award was made dismissing the claim. The plaintiffs then brought their suit upon the same cause of action as had already been disposed of by the award. The defendants set up the award in defence to the contention of the plaintiffs that the arbitration clause does not apply in the case of non-delivery.

Held, the plaintiff's claim for damages arising out of the failure of the defendants to fulfil their contract to supply the goods comes within the meaning of the words "any claim or dispute arising in connection with this contract" in the contract and the plaintiff's suit was not maintainable. (*Scott-Smith and Fforde, JJ.*) GHANANDI LAL *v.* CHURANJI LAL. **5 Lah. L. J. 146 = 4 Lah. 168 = 73 I.C. 459 = A. I. R. 1923 Lah. 453.**

Clause in Contract.

——*Other clauses in contract not complied with—Clause for arbitration cannot be resisted — Award made under, is invalid—Contract.*

According to clause (14) of indent which was the basis of the contract between the parties : " No claim or dispute of any sort whatever could be recognised if not made in writing within sixty days from due date of payment." Cl. 15 provided for arbitration in case of disputes. The first letter written by the plaintiff firm after the defendant firm had refused delivery and repudiated the contract in which the former preferred any claim for damages was written considerably more than sixty days after due date of payment. The arbitrator appointed under the agreement decided the point of limitation in favour of plaintiff saying the condition of making the claim within 60 days under the contract did not apply to seller but only to buyer, and made an award in favour of plaintiff. Plaintiff then applied for filing the award.

Held, the plaintiff firm was not entitled to claim the benefit of the arbitration clause unless and until the provisions of cl. 14 had been complied with. The award of the umpire is not the decision of a tribunal to which the defendant firm was bound to submit. (*Piggott and Walsh, JJ.*) KEDARNATH MOTILAL *v.* SUKHAMAL BANSIDHAR. **44 All. 481 = 20 A. L. J. 385 = 66 I.C. 691 = A. I. R. 1922 All. 522.**

——*Submission to arbitration—Agreement between buyer and seller stating that all the terms of contract with importing firm to apply—Arbitration clause in latter contract referring to disputes arising under that agreement alone—Arbitration clause would not apply to agreement between buyer and seller—Deed—Construction.*

The contract between the parties contained a clause "all terms according to the importing firm." The contract with the importing firm contained a clause: "Any dispute or claim under this contract is to be settled by. . . ."

Held, that the terms of the contract with the importing firm should be read *verbatim* into the contract between the parties and as the arbitration clause referred to disputes arising under the contract with the importing firm and not under the contract between the parties, the arbitration clause was not applicable to disputes under that contract. *Temperley Steamshipping Co.* v. *Smyth & Co.*, (1905) 2 K.B. 791, Dist.; *Thomas & Co. Ltd.* v. *Portsea Steamship Co. Ltd.*, (1912) A. C. 1 and *Hamilton & Co.* v. *Mackie & Sons*, (1889) 5 T.L.R. 677, Foll. (*Mookerjee and Fletcher, JJ.*) CHATURBHUJ CHANDANMULL *v.* BASDEO DAS.

33 C. L. J. 145 = 60 I. C. 909 = A. I. R. 1921 Cal. 767.

Family arrangement.

——*Award—Principles are more lenient in case of family arrangements than in arbitration awards.*

The principles under which the validity of an arbitration should be judged are more rigid than those which apply when a family agreement is under consideration. There is ample authority indicating that in some instances in which, although as an arbitration proceeding the result of an award cannot be supported, it is still capable of support on the ground that the award represented what is in effect the outcome of a family compromise. Even assuming that much greater latitude may be extended to the support of a family arrangement than is the case in maintaining an award under an arbitration, nevertheless where a reversionary interest is in fact affected by a family arrangement, such a compromise cannot be supported; much more so when the reversionary interest is that of a minor. Case-law discussed. (*Bucknill and Ross, JJ.*) RAM BAHADUR SEN *v.* MAHANTH GANESH BHAGAT.

2 Pat. 554 = 5 P.L. T. 255 = 73 I. C. 542 = A. I. R. 1924 Pat. 49 (59 and 60).

Family settlement.

——*Rejection as partly invalid does not cease to be enforceable as a family arrangement.*

Where one party to the award led another to believe to his prejudice that he is going to abide by the award he is estopped from contesting it. The fact that he signed the award does not however by itself render it more binding on him. 6 C. P. L. R. 95, Foll. It has always been the policy of Courts of equity to uphold family settlements, even when they are not in legal form. 42 All. 1 and 42 Cal. 801, Foll. (*Baker, Offg. J. C.*) CHOWDHARI MANOHARLAL *v.* MT. AMANO.

77 I. C. 41 = A. I. R. 1924 Nag. 14.

——*Comparison—Principles are more lenient in cases of family arrangements than in arbitration awards.*

The principles under which the validity of an arbitration should be judged are more rigid than those which apply when a family agreement is under consideration. There is ample authority indicating that in some instances in which, although as an arbitration proceeding the result of an award cannot be supported, it is still

capable of support on the ground that the award represented what is in effect the outcome of a family compromise. Even assuming that much greater latitude may be extended to the support of a family arrangement than is the case in maintaining an award under an arbitration, nevertheless, where a reversionary interest is in fact affected by a family arrangement, such a compromise cannot be supported. Much more so when the reversionary interest is that of a minor. Case-law discussed. (*Bucknill and Ross, JJ.*) RAM BAHADUR SEN *v.* MAHANTH GANESH BHAGAT.

2 Pat. 554 = 5 P. L. T. 255 = 73 I.C. 542 = A. I. R. 1924 Pat. 49 (59 & 60).

——*Award is not a family settlement—It is binding only on the contending parties and those represented by them.*

A family settlement implies a mutual settlement by certain contending parties, belonging to the same family of some disputed claims and rights and an award of arbitration is not a settlement of that character. It is the decision of a tribunal constituted by the contending parties for the settlement of their disputes and in so far as it is a valid and lawful award, it is binding on the parties to the arbitration proceedings and their privies. Whether such an award is binding on persons whose interests are analogous to those of the parties to the arbitration proceedings is a matter which is not capable of an inflexible answer. In each case it has to be determined whether the person who agreed to the reference to arbitration was seeking to assert a right common to himself and others and acted fairly in representing those whose interest he had undertaken to protect. (*Kanhaiya Lal and Dalal, A. J. Cs.*) ZARIF-UN-NISA *v.* SHAFIQ-UZ-ZAMAN.

26 O. C. 133 = 10 O. L. J. 535 = 75 I. C. 626 = A. I. R. 1923 Oudh 185 (198).

Interest.

——*Interest as damages can be awarded.*

The arbitrators have authority to make a decree for such damages as might have been assessed by the Court. (*Mookerjee and Rankin, JJ.*) BHAWANI DAS RAMGOBIND *v.* HARASUKHDAS BALKISHENDAS.

27 C. W. N. 933 = 80 I. C. 510 = A. I. R. 1924 Cal. 524.

——The right to interest is a question of fact of which the arbitrator is the sole Judge; there is no rule of law on the subject. 54 I. C. 285; 46 Cal. 534, Foll. (*Raymond, A. J. C.*) JAMES FINLAY & CO. *v.* GURDAYAL PAHLAJRAJ.

17 S. L. R. 93 = 76 I. C. 660 = A. I. R. 1924 Sind 91 (96).

——*Interest after award cannot be given.*

An arbitrator is not entitled to award interest after the date of his award. (*Greaves, J.*) SEWDUTRAI NARSARIA *v.* TATA SONS, LTD.

27 C. W. N. 494 = 77 I. C. 769 = A. I. R. 1921 Cal. 576.

Powers of Arbitrators.

——*Arbitrator giving no indication that his award was merely preliminary—Award impeached by plaintiff by suit—Subsequently arbitrator purporting to make final award and decree passed in its terms—Plaintiff's suit was not premature and subsequent conduct of arbitrator would not vitiate it—Decree passed in terms of his final award would not operate as* res judicata*—C. P. Code, S. 11.*

An arbitrator gave no indication in his award that it was only a preliminary stage to the final decision to be given by him. On the other hand he framed issues and gave decision on them. And although he did not state that so many rupees were to be paid by one party to the other he gave sufficient indications as to how the liabilities were to be assessed. Plaintiff brought his suit impeaching this award; and after the institution of the suit the arbitrator purported to give his final award and a decree was made in terms of it.

Held, that the suit was not premature since the award could not be said to be merely a preliminary award, and the subsequent conduct of the arbitrator could not vitiate the suit already instituted.

Held further, that the decree passed in terms of the final award could not operate as *res judicata*. (*Mukerji and Bennet, JJ.*) SHANKER LAL-LACHHMI NARAIN *v.* PUL CHAND-FATEH CHAND.

A. I. R. 1930 All. 584

Powers of Arbitrators—Creation of new estate.

———*Ordinary principles of personal law cannot be varied.*

An arbitrator has no power to alter the course of legal devolution in a mode at variance with the ordinary principles of law applicable to the parties. An award directing that the son of a particular party to the award should not be competent to devise his property as he would ordinarily be entitled to devise by law, but should be confined to appointing a person of a particular class as his successor, is void. 23 All. 383 (P. C.), Rel. on. (*Stuart, C. J. and Raza, J.*) SHAMBHU SINGH *v.* SUKHRAJ KUER.

112 I. C. 296 =
A. I. R. 1929 Oudh 178 (184).

Powers of Arbitrators—Delegation.

———*Arbitrator may delegate ministerial work to be done by others.*

It is open to the arbitrator to have ministerial and other works performed by a third person, and therefore, where in an arbitration for partition the measurements were made and the maps prepared by the amin,

Held, that it cannot be said that the partition was effected by the amin and not by the arbitrator. (*Mullick and Kulwant Sahay, JJ.*) SHAIKH MUHAMMAD KHALIL *v.* SHAIKH ABDUL RAHIM. **4 Pat. 670 =**
7 P. L. T. 644 = 93 I. C. 261 =
A. I. R. 1925 Pat. 810 (817).

Powers of Arbitrators—Ex-parte proceeding.

———Taking evidence in the absence of the party by an arbitrator is illegal. (*Devadoss, J.*) PALAVESAM CHETTIAR *v.* NARAYANA AYYAR.

1925 M. W. N. 503 = 88 I. C. 660 =
A. I. R. 1925 Mad. 1086 = 49 M. L. J. 115.

———*Notice in* ex parte *proceeding is necessary—Omission is not material if party not prejudiced.*

Arbitrators should give notice of their intention to proceed *ex parte* if one of the parties should not appear, but their award is valid if the complainant has not been prejudiced in any manner by the failure of the arbitrators to give such notice. (*Mookerjee and Rankin, JJ.*) BHOWANI DAS RAMGOBIND *v.* HARASUKHDAS BALKISHENDAS. **27 C. W. N. 933 = 80 I. C. 510 =**
A. I. R. 1924 Cal. 524.

Powers of Arbitrators—Error of law.

———Arbitrators are judges of law as well as of fact and error of law does not vitiate the award of the arbitrators. (*Das and Ross, JJ.*) KOKIL SINGH *v.* RAMASRAY PRASAD CHAUDHURY. **3 Pat. 443 =**
81 I. C. 994 = 1924 P. H. C. C. 110 =
6 P. L. T. 122 = 3 Pat. L. R. Civ. 52 =
A. I. R. 1924 Pat. 488.

———Arbitrators are judges of both law and facts and an erroneous decision on a point of law will not justify an interference with their award. (*Raymond, A. J. C.*) JAMES FINLAY & CO. *v.* GURDAYAL PAHLAJRAJ.

17 S. L. R. 93 = 76 I.C. 660 =
A. I.R. 1924 Sind 91.

Powers of Arbitrators—First principles.

———*Arbitrators are bound to observe ordinary rules of justice—Procedure in Civil Procedure Code does not* ipso facto *apply to arbitration proceedings.*

Proceedings before arbitrators are judicial proceedings and they like other Judges are bound where they are not expressly absolved from doing so to observe in the proceedings ordinary rules which are laid down for administration of justice. But it does not follow that every rule of procedure laid down in the Civil Procedure Code for trial of suits *ipso facto* applies to arbitration proceedings. *Haigh* v. *Haigh*, (1862) 31 L.J. Ch. 420, Foll. (*Rupchand and Barlee, A.J.Cs.*) DATTARAM MUNSHILAL *v.* HARJWAL & SONS. **24 S.L. R. 145 =**
121 I. C. 161 = A. I. R. 1930 Sind 170.

———*Adjective law does not apply—Principles of justice apply.*

An arbitrator is ordinarily free from the fetters of adjective law, but that does not make him free from the fundamental principles of justice. (*Foster, J.*) ABDUL HALIM *v.* ISMAIL MOMIN. **6 P. L. T. 544 =**
3 Pat. L. R. Civ. 59 = 86 I. C. 773 =
A. I. R. 1925 Pat. 465.

———*First principles of justice apply in all cases—Arbitrator should not receive information, oral or documentary, from one side which is not disclosed to the other.*

Although the Court must not insist upon a too minute observance of the regularity of forms among persons who naturally, by their education or by their opportunities cannot be supposed to be very familiar with legal procedure, there are some principles of justice which it is impossible to disregard. Whether the arbitration is conducted on the footing that it is a mercantile or a legal arbitration, the first principles of justice must be equally applied in every case. One of these elementary principles is that an arbitrator must not receive information from one side which is not disclosed to the other, whether the information is given orally or in the shape of documents. Case-law referred to. (*Mookerjee, A.C.J. and Fletcher, J.*) HARI SINGH *v.* KANKINARAH CO., LTD.

34 C. L. J. 39 = 66 I.C. 389 = A. I. R. 1921 Cal. 657.

Powers of Arbitrators—Functus officio.

———*Arbitrator after award becomes* functus officio *and his authority cannot be revived by the award being set aside.*

The proposition of law is firmly established that an arbitrator becomes *functus officio* as soon as he delivers the award. *Mordue* v. *Palmer*, (1870) 6 Ch. 22 and *Brooke* v. *Mitchell*, 9 L.J. (N.S.) Ex. 269; 38 All. 83 and A. I. R. 1921 Pat. 161, Foll. It is also beyond question that an arbitrator's authority once exhausted is not resuscitated by the award being set aside or becoming otherwise void, so as to enable him to make a fresh award. 35 P. R. 1884; 67 P. R. 1886, Dist. (*Tekchand, J.*) MT. PARBATI *v.* MT. DURGA DEVI.

108 I.C. 186 = A. I. R. 1928 Lah. 170.

———*C.P. Code, Sch. II, Para.* 15 (1) (*c*)—*Mere filing of a suit does not take away arbitrator's jurisdiction.*

The filing of a suit regarding the same subject-matter does not *ipso facto* render the arbitrators *functus officio*

and their award void. (*Raymond, A. J.C.*) Tyebally Abdul Hussain *v.* James Finlay & Co.
17 S. L. R. 15 = 80 I.C. 969 = A. I. R. 1924 Sind 105 (116).

Powers of Arbitrators—Judicial procedure.

———*Judicial procedure need not be followed in all cases.*

Odgers, J.—Where the parties have referred the matter to an arbitrator related to all of them, one cannot expect too precise an insistence on the forms of judicial procedure.

Curgenven, J.—It is not essential that in every case the ordinary rules of judicial procedure should be followed by an arbitrator inquiring into a matter. (*Odgers and Curgenven, JJ.*) Subbayya *v.* Seshayya.
105 I. C. 105 = A. I. R. 1928 Mad. 48.

Powers of Arbitrators—Jurisdiction.

———*Clause of reference decides jurisdiction.*

The question of whether an arbitrator acts within his jurisdiction or not depends solely upon the clause of reference. (*Lord Dunedin.*) Champsey Co. *v.* Jivraj Baloo Co. **50 I. A. 324 = 38 C. L. J. 130 = 47 Bom. 578 = 28 C. W. N. 397 = 73 I. C. 436 = 33 M. L. T. 419 = 25 Bom. L. R. 588 = 1923 M. W. N. 596 = 4 L. R. P. C. 99 = A. I. R. 1923 P. C. 66 = 44 M. L. J. 706 (P. C.).**

Powers of Arbitrators—Limits.

———*Arbitrator should make award in conformity to reference.*

An arbitrator derives his power from the reference which furnishes the source and prescribes the limits of authority. He is bound to make an award in conformity with it both in substance and in form. (*Rupchand and Barlee, A. J. Cs.*) Dattaram Munshilal *v.* Harjimal & Sons. **24 S. L. R. 145 = 121 I. C. 161 = A. I. R. 1930 Sind 170.**

———*Arbitrator must decide according to legal rights of parties and not according to his notions as to the equities of the case.*

An arbitrator has no jurisdiction to pass an award according to what he considers to be an equitable arrangement under the circumstances of the case but he is bound to decide according to the legal rights of the parties. (*Rupchand Bilaram, A. J. C.*) Firm of Mahomed Ali A. Karimji & Sons *v.* Charatsing Budsing. **80 I.C. 596 = A.I.R. 1925 Sind 51.**

Powers of Arbitrators—Majority opinion.

———*Case referred to five arbitrators—Majority opinion to prevail—Two not acting—Award is void.*

A dispute was referred to five arbitrators, it being agreed that the opinion of the majority should prevail. Two of the arbitrators did not act.

Held, that the award was null and void. 12 Mad.113; A. I. R. 1924 Rang. 153; 8 M. L. W. 171 and A. I. R. 1927 Mad. 436, Rel. on; *Dalling* v. *Matchett*, 94 E. R. 804, Expl. (*Ramesam, J.*) Atchayya *v.* Pedenti. **112 I. C. 669 = A. I. R. 1928 Mad. 983.**

Powers of Arbitrators—Misconduct.

———Where all that was done was that the documents and the correspondence had been perused, *held*, this fact by itself did not constitute misconduct on the part of the arbitrators, but an arbitrator would entirely misconceive his duty if he takes upon himself to hear evidence behind the back of the party interested in controverting it. (*Raymond, A. J. C.*) James Finlay & Co. *v.* Gurdayal Pahlajraj. **17 S. L. R. 93 = 76 I. C. 660 = A. I. R. 1924 Sind 91.**

———*Appointing themselves to manage property is misconduct.*

Arbitrators are guilty of misconduct in appointing themselves on a committee to manage a property. (*Ashworth and Simpson, A. J. Cs.*) R. B. Pandit Sankata Prasad *v.* Jagannath. **9 O. L. J. 410 = 26 O. C. 1 = 69 I. C. 714 = A. I. R. 1922 Oudh 276.**

Powers of Arbitrators—No evidence.

———*No materials produced before arbitrator in regard to certain claim—Award on that claim is final.*

Where in respect of certain claims in dispute between the parties with reference to accounts no material was produced before the arbitrator on which he could decide that there was any liability from one party to another, *held*, that the effect of the finding if the award is filed will be that no party to the proceedings can make any claim against any other party in respect of the accounts as they had an opportunity to make out their claims and they failed to take advantage of it and that the arbitrator's award is final for all time settling the dispute between the parties relating to the accounts. (*Newbould and Pearson, JJ.*) Hem Chandra Kundu *v.* Jnanendra Chandra Kundu.
90 I. C. 624 = A. I. R. 1926 Cal. 116.

Powers of Arbitrators—Obiter dictum.

———Obiter dictum *of arbitrator does not bind parties.*

The *obiter dictum* of the arbitrator on a question which had not been formally referred to him by the parties in the agreement of reference is not binding on the parties. 18 Cal. 414 (P. C.) and 33 Bom. 401, Dist. (*Mukerji, Kendal and Niamatullah, JJ.*) Fazal Ahmad *v.* Har Prasad. **1929 A. L. J. 620 = 116 I. C. 1 = A. I. R. 1929 All. 465 (471) (F.B.).**

Powers of Arbitrators—Oral evidence.

———*Bengal Chamber of Commerce, Rr.* 13 *and* 14—*Arbitrators must allow opportunity to adduce oral evidence in certain cases—Oral evidence as to market rate on a particular date need not necessarily be heard.*

There may arise occasions when having regard to the facts involved it is incumbent on the Bengal Chamber of Commerce to give parties suitable opportunities of adducing evidence. But each case must depend on its own facts. Where the question is one relating to the market rate on a particular date, *prima facie* it is not necessary for the arbitrators to hear oral evidence as market rates are, as a rule, well within their own knowledge and within the special experience for which arbitrators are selected. (*Rankin, C. J. and C. C. Ghosh, J.*) Bhican Chand *v.* G. &. M. Fogt. **44 C. L. J. 422 = 100 I. C. 299 = A. I. R. 1927 Cal. 227.**

Powers of Arbitrators—Personal knowledge.

———*Arbitrator having personal knowledge of matter in dispute specially selected—Personal knowledge can be used to decide the matter referred to—C. P. Code. Sch. II, p.* 15.

Where a particular arbitrator has been selected only because of his personal knowledge in the matter in dispute, it would not be a misconduct on his part to use his personal knowledge in coming to a certain decision, although in such cases it is desirable that he should tell parties what his personal knowledge is and give an opportunity to them to adduce evidence sufficient to vary his views. *Johnston* v. *Cheape*, 5 Dow. 247 and *Eade* v. *Williams*, (1854) 24 L. J. Ch. 531, Rel. on. (*Marten and Madgaonkar, JJ.*) Daulat Sing *v.* Ratna Anand Sing. **28 Bom. L. R. 986 = 97 I. C. 673 = A. I. R. 1926 Bom. 527.**

ARBITRATION—Powers of Arbitrators.

Power of Arbitrator.

——*Powers and duties of arbitrators defined.*

Once the arbitrator is appointed by a party and undertakes to discharge his duty as such he becomes a Judge in the case and is bound to act impartially and with scrupulous regard to the ends of justice. He should in no sense consider himself to be the advocate of the cause of the party appointing him, nor is such party to be deemed as his client. He should refrain from identifying himself with the interest of such party and from looking forward to future employment as arbitrator, an office, which it should be mentioned, carries emoluments Each doing his utmost, in utter disregard of propriety and sense of proportion, to try to further the interests of the party nominating him, amounts not merely to a misconduct in the legal or technical sense but is grossly improper and inconsistent with their plain duty as arbitrators seriously disposed to settle a dispute referred to them for arbitration. (*Sen and Niamatullah, JJ.*) GAJANAND SITA RAM *v.* PHUL CHAND FATEH CHAND. **A. I. R. 1930 All. 675 (677).**

Powers of Arbitrators—Receivers' appointment.

——*Receivers may be appointed by arbitrators when option is given to so appoint.*

Where the arbitrators have the option of determining the liabilities payable by a firm, of collecting outstandings due to the firm, or discharging the mortgage debts either themselves or of appointing a receiver to carry out all these purposes, the arbitrators are right in exercising the option in appointing a receiver to carry out all these details that would take necessarily a pretty long time. 21 Cal. 590 (P. C.), Rel. on ; A. I. R. 1928 Sind 144, Ref. (*Barlee, J. C. and Kalumal, A. J. C.*) DAYARAM *v.* NARAINDAS. **119 I. C. 529 = A. I. R. 1929 Sind 200.**

Powers of Arbitrators—Rules.

——*Arbitrators authorized to sell can make rules for their guidance but cannot then go beyond the rules.*

A power to sell conferred on arbitrators naturally carries with it the power to make rules for the conduct of the sale, and such rules subscribed to by the bidders would, in the case of such parties to the reference as subscribed to these rules, extend to the arbitrators authority to sell according to these rules, but would not extend to them any power to act outside these rules or any power to decide in a case of controversy whether or not these rules had been complied with. (*Wallace and Madhavan Nair, JJ.*) RAMASWAMI CHETTIAR *v.* VENKATARAMA AIYAR. **91 I. C. 745 = A. I. R. 1926 Mad. 201 = 49 M. L. J. 523.**

Powers of Arbitrators—Successive awards.

——*Arbitrator can make successive awards if authorised by parties to do so and such awards are binding and can be filed under provision of Civil Procedure Code.*

It is open to arbitrator to make successive awards in respect of the matters in dispute referred to him by one agreement, provided that it can be inferred from the agreement or the subsequent conduct of the parties that the arbitrator was authorised to make successive awards and was not bound to wait for the decision of all the disputed matters before he made his final award and that the successive awards made by him are binding awards which can be filed in Court under the provisions of Civil Procedure Code. *Wrightson* v. *Bywater*, 49 R. R. 570 ; 21 Cal. 590 ; 4 C. L. R. 92 and A. I. R. 1923 Mad. 576, Ref. (*Jai Lal and Bhide, JJ.*) NANAK CHAND *v.* BANARSI DAS. **A.I.R. 1930 Lah. 425.**

ARBITRATION—Powers of Court—Arbitration pending.

Powers of Arbitrators—Terms of contract.

——*Agreement to refer to—Arbitrators can decide what are the terms of contract.*

Where a contract, *viz.*, an advice note—provided that disputes arising on or out of the contract should be referred to arbitration under the Rules of the Bengal Chamber of Commerce for decision, the arbitrators can, on a submission made to them, decide what the terms of the contract are and whether or not a particular term was included in the contract when originally made. (*Greaves, J.*) BAIJNATH KALOO RAM AND ALIBHOY MAHOMED. *In the matter of an arbitration between.* **59 I. C. 439 = 24 C. W. N. 567.**

Powers of Arbitrators—Whole dispute.

——*Dissolution of partnership—Agreement referring whole dispute to arbitrator including taking accounts—Agreement includes power to decide what property was to be taken into account.*

A reference to arbitration provided that the parties had been carrying on work as contractors in partnership for a considerable period, and had decided to end the partnership business but that for certain reasons, not given, they were unable to dissolve the partnership amicably. They therefore referred their mutual disputes which related to the settlement of partnership accounts to an arbitrator who was to be the sole arbitrator and whose decision on the matter was to be binding on both. *Held*, that the agreement to refer to the arbitrator the settlement of the partnership accounts necessarily included a reference of all the disputes that might arise during the arbitration proceedings as to what property was to be taken into account. 42 All. 277, Rel. on. (*Broadway and Jai Lal, JJ.*) AGYA SINGH *v.* SUNDAR SINGH. **9 Lah. 380 = 107 I. C. 756 = A. I. R. 1928 Lah. 137.**

Powers of Court—Altering award.

——*Court has no jurisdiction to delete anything from an award of arbitrators.*

An arbitration in substance ousts the jurisdiction of the Court except for the purpose of controlling the arbitrators and preventing misconduct and for regulating the procedure after the award. So far as the hearing of the merits is concerned and the decision contained in the award the Court has nothing to say good, bad or indifferent. It has no right to review it or to consider it ; to hear an appeal from the arbitrator and delete from the award something with which it did not agree is beyond the jurisdiction of court. (*Walsh, A.C.J and Ryves, J.*) MT. AFTAL BEGAM *v.* HAJI ABDUL. **22 A. L. J. 816 = 81 I. C. 525 = 5 L. R. A. Civ. 783 = A. I. R. 1924 All. 800.**

Powers of Court—Appeal incompetent.

——*Decree passed in accordance with award after dismissing objections is not appealable—Entertaining appeal can be revised.*

Where a District Judge entertained an appeal against a decree passed in accordance with an award after dismissing objections, *held*, that the appellate decree was liable to be upset and the High Court is entitled to pass such orders as the justice of the case might require. (*Mukerji, J.*) SIDH NATH *v.* JHARBANDHAN PRASAD. **5 L. R. A. Civ. 191 = A. I. R. 1924 All. 688.**

Powers of Court—Arbitration pending.

——*Order of Court to continue proceedings, without giving time to parties, upon non-receipt of award up to a certain date is undesirable.*

While the arbitration was pending, the trial Court ordered that if the award was not received back on a certain date the arbitration would be superseded and proceedings continued by Court. The parties were not given time and opportunity to present themselves and to produce evidence. *Held*, that this was an undesirable order. 10 A. L. J. 23, Foll. (*Dalal, J.*) KRISHNA KISHORE *v.* BANWARILAL. **1929 A. L. J. 100 = 113 I. C. 749 = A. I. R. 1929 All. 259.**

Powers of Court—Award in favour of minor.

——*Compromise setting aside not to be accepted by Courts unless beneficial to minor.*

Where the Judge had before him an arbitration award which was valid and binding upon the parties unless set aside for any of the reasons stated in the schedule dealing with references to arbitration, the question which he had to consider was whether the next friend of the minor plaintiffs in whose favour an award had been made, could so compromise the dispute (as to the validity of that award) as to give the Court no option but to accept the compromise and therefore to preclude the Court altogether from considering whether it was one which in the interests of the minors ought to have been entered into. (*Piggott and Walsh, JJ.*) JHINKU SINGH *v.* SITAL SINGH. **21 A. L. J. 81 = 45 All. 263 = 4 L. R. A. Civ. 329 = 74 I. C. 133 = A. I. R. 1923 All. 267.**

Powers of Court—Court as arbitrator.

——*Parties asking Court to decide by local inspection —No intention to be bound by decree—Decision is not award—Appeal lies.*

The plaintiff claimed that the plaint-wall and land were his private property. He complained that the defendant interfered with his right of possession in certain ways. At the trial of the suit the counsel for the parties stated that they were not prepared to adduce any oral evidence. They suggested that the judge should inspect the locality and should decide the case on the basis of what he might see on the spot and on an examination of such documentary evidence as might be adduced by the parties up to 3 p.m. of the day on which the statement was recorded.

Held, that no intention on the part of the parties to bind themselves by the decision that might be given by the Court could be gathered from the language used in the case, and as all that the parties did was to make a statement that they were not going to adduce oral evidence and that they requested the Court to exercise its inherent power of inspection of the locality, the Court was not constituted an arbitrator and its judgment was not an award and was open to appeal. (*Mukerji, J.*) RAGHUBIR SARAN DAS *v.* RAM DAS. **6 L. R. A. Civ. 122 = 85 I. C. 608 = A. I. R. 1925 All. 348.**

——*Parties consenting to abide by Court's finding — Court's decision is final and no appeal lies.*

Where both parties agree in a particular matter to abide by the finding of the Court in respect of it, such finding is final and binding on the parties and no appeal lies against it; the decision in such cases being in the nature of an arbitrator's award. (*Prideaux, A. J. C.*) SAMBA *v.* MT. PAIKI. **21 N. L. R. 84 = 90 I. C. 550 = A. I. R. 1925 Nag. 463.**

——*C. P. Code, S. 96—Consenting to a course of decision by a judge does not constitute a decree by an arbitrator—Arbitration, appeal against award.*

Where the parties ask the Judge to dispose of a case on documentary evidence alone or request him to dispose of a case on the examination of the marks in a trade mark case, the Judge is not converted into an arbitrator so long as the parties have not bound themselves to

abide by his decision. (*Kennedy, J. C. and Raymond, A. J. C.*) TILLOOMAL JESSOMAL *v.* HARBHAGWANDAS. **18 S. L. R. 306 = 76 I. C. 309 = A. I. R. 1924 Sind 134.**

Powers of Court—Effect of exceeding.

——*Judge cannot put himself in position of arbitrator without consent of parties.*

The Judge has no power without the consent of the parties to put himself into the position of an arbitrator, so as to decide otherwise than on the evidence. (*Heald, Offg. C. J. and Mya Bu, J.*) CRESCENT INSURANCE CO. *v.* MAUNG PO HTAIK. **A. I. R. 1930 Rang. 8.**

——*Award—Award not specifying definite amount but only indicating manner of calculation is not final—Court allowing execution of such award acts without jurisdiction.*

An award not specifying a definite sum as payable by one party to another but merely indicating the manner by which the accounts should be taken by the parties is not final and is not capable of immediate execution.

If on the basis of such an award, one party files an application for execution of the award against the other for a definite sum arrived at by his own calculations, and the Court proceeds to execute the decree, such order of the Court directing immediate execution is without jurisdiction and may be treated as nullity. 22 Cal. 434, Foll.; 6 All. 269; 8 Cal. 51, Dist. In such a case an order in the nature of a preliminary decree would be proper. (*Robinson, C. J., Young and Brown, JJ.*) CHOKKALINGAM CHETTY *v.* RAMAN CHETTY. **2 Rang. 587 = 84 I. C. 824 = A. I. R. 1925 Rang. 155 (F.B.).**

Powers of Court—Examination of Arbitrator.

——*Arbitrator must not be examined on commission —He may be examined as to procedure adopted by him, the materials before him, etc., but not as to why or how he arrived at a decision—His decision that as a fact the parties had consented to anything is final.*

An arbitrator is not in the position of an ordinary witness. A judge ought never to issue a commission to an arbitrator. He ought not to submit an arbitrator to a roving commission by way of examination by the parties uncontrolled by the Judge himself. When the arbitrator appears before a Judge, the Judge ought to exercise the severest possible control and circumspection over the examination. The practice of calling arbitrators indiscriminately as though they were witnesses to the issues of fact is not only an unreasonable burden upon the arbitrators and certain to lead to a great deal of irrelevant evidence, but it also tends unfortunately to lead the Judge unconsciously into a kind of re-hearing of the arbitration while from an arbitration, appeal does not legally lie. But more than that, a Judge ought to exercise a severe control over the interrogatories or the examination of the arbitrator when summoned. An arbitrator is a judicial person in respect of the matter to which he has been appointed. He is entitled to the respect and consideration due to a person occupying that position, and his evidence ought to be confined strictly to the points which are in the eyes of the law material as coming from him. That is to say, any question of fact upon some evidence, or allegation tending to establish or disprove his own misconduct, may no doubt be put to him if he is charged with misconduct. Where an arbitrator finds as a fact that a party did withdraw or did agree to certain things, that is a finding of fact which a Court of law cannot go behind. In short an arbitrator may be examined upon the course of procedure which he has adopted, the material which he has utilised in arriving at his decision and all matters affecting the award itself, that is to say, the drawing up of the award, the piece of paper and so forth. The slightest attempt to get to the materials of his decision, to get to the back of his mind, and to examine him as to why and how he arrived at a particular decision should be immediately and ruthlessly excluded as undesirable. *O'Rourke* v. *Commissioner of Railways*, 15 A. C. 371, Foll. (*Walsh, A. C. J. and Ryves, J.*) KHUB LAL *v.* BISHAMBHAR SAHAI.

22 A. L. J. 919 = 5 L. R. A. Civ. 649 = 82 I.C. 219 = A. I. R. 1925 All. 103.

Powers of Court—Extent of.

———*Courts are not to investigate beyond award and documents incorporated therein.*

The Courts are not to investigate beyond the award of the arbitrators and documents actually incorporated therein and thus where there is no error so patent on the face of the award, it is not open to the Court to go into the proceedings of the arbitrator. (I.A. 2, 1923, page 324, Foll.) (*Kennedy and Rupchand Bilaram, A. J. Cs.*) A. RAMJIBHOY & CO. *v.* YOUSUFALI MUHAMMAD ALI. **18 S. L. R. 78 = 80 I. C. 403 = A.I.R. 1924 Sind 151.**

———*Jurisdiction of Court exists to set aside award only in case of fraud or misconduct or error of law on face of the award or when award leaves points for Court's decision—Case-law discussed.*

It is a fundamental principle of the law of arbitration that, so long as an arbitrator acts within jurisdiction and without fraud or misconduct, an award cannot be set aside by the Court, unless there is an error in law which appears on the face of the award or in some document so closely connected that it must be regarded as part of the award or unless the arbitrator states that he had made a mistake of law or fact leaving it to the Court to review his position. Arbitrators are judges of both facts and law and therefore an error in law does not vitiate their award. An error on the face of the award must be an error in the award or in a document actually incorporated thereto such as a note appended by the arbitrators stating their reasons for the judgment, some legal proposition which is the basis of the award and which is erroneous. Extraneous considerations not appearing on the face of the award are not to be introduced into the matter. (*Raymond and Rupchand Bilaram, A.J. Cs.*) MESSRS. DUTTON, MASSEY & CO. *v.* JAMNADAS HARPASAD. **19 S. L. R. 152 = 76 I. C. 84 = A. I. R. 1924 Sind 51.**

———*Parties having agreed to refer disputes to a certain official—Court has jurisdiction to entertain suit if good reasons exist for not compelling plaintiff to resort to the mode of settlement provided for in the agreement.*

Where the parties have agreed to refer disputes to some other tribunal, the Court will take into consideration all those grounds which it would consider were there an application before it to stay the suit on the ground that the parties had made a submission to arbitration. *Law* v. *Garret*, (1877) 8 Ch. D. 26, Dist. *Hamlyn & Co.* v. *Talisker Distillery and others*, (1894) A.C. 202 *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Co.*, (1903) 1 K. B. 249, *Kitchner & Co.* v. *Gruban*, (1909) 1 Ch. D. 413, Ref. Where a condition in a bill of lading stated that any disputes thereunder, etc., should be decided by the British Consul at Bushire,

Held, that the clause should be treated as a submission to arbitration, for the intention of the parties was that the dispute should be settled by the British Consul whoever he might be, personally, and not in exercise of any judicial office. But even if it be taken that the reference was to be to the Court of the British Consul, even then a Civil Court would be justified in considering whether or not there were good and substantial reasons for not compelling the plaintiffs to resort to that remedy. (*Crouch, A. J. C.*) KURESHI & SONS *v.* SOOMAR HAJI. **15 S. L. R. 88 = A. I. R. 1921 Sind 202 (204).**

Powers of Court—Grounds.

———*Award, setting aside—Error must appear on face of award or document forming part thereof—Court cannot examine contract where all disputes therein have been referred to arbitration.*

An error of law on the face of the award does not mean that, if in a narrative a reference is made to a contention of one party, that opens the door to seeing, first, what that contention is, and then going into the contract on which the parties' rights depend to see if that contention is sound. An error of law which vitiates an award should be apparent on the face of the award itself or of any document so connected with the award as to form part of it as, for instance, a note appended by the arbitrator stating reasons of their judgment, some legal proposition which is the basis of the award and which the Court can say is erroneous.

Where the buyers were bound to take delivery of the goods in the event of late shipment owing to *force majeure* and the buyers alone had the option to cancel the contract in the case of late shipment due to causes other than *force majeure* and where the sellers had rescinded the contract of their own motion, but where all the differences between the parties were referred to arbitration,

Held, that the fact that arbitrators did not grant damages to the buyers did not amount to an error apparent on the face of the award. (*Rupchand Bilaram, A. J. C.*) FIRM MADHOWRAM HARDEVDAS *v.* MITSUI BHUSAN KAISHA LTD. **19 S. L. R. 54 = 78 I. C. 230 = A. I. R. 1925 Sind 186.**

———*Award can be set aside only if error of law is apparent in the award or document which is part of award.*

"An error in law on the face of the award is, what Court can find in the award or a document actually incorporated therewith, as, for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which one can then say is erroneous." (*Buckland, J.*) CHANDMUL MULCHAND *v.* S. AND C. NORDLINGER. **28 C.W.N. 261 = 80 I. C. 151 = A.I.R. 1924 Cal. 490.**

Powers of Court—Indivisibility of award.

———*Award—Part of award cannot be enforced.*

There is no provision either under C. P. Code or the Arbitration Act empowering a Court to make part of an award a rule of Court. The award should be looked into as a whole. (*Kumaraswami Sastri, J.*) NEMI CHAND *v.* KESARIMULL. **29 M. L. W. 227 = 114 I. C. 818 = A. I. R. 1929 Mad. 31 = 56 M. L. J. 35**

———*Award partly bad—Court cannot declare it valid in part, or remit it for amendment.*

Where an arbitration is made without the intervention of a Court and an application is made to file the award, then if the award is good in part and bad in part, the Court cannot remit to the arbitrator for amendment or declare valid the part to which no exception is taken even if it is separable from the bad part. 19 C. W. N. 476 and 4 P.L.J. 394, Foll. (*Mullick and Bucknill, JJ.*) JALDHARI RAI *v.* ABDUL KADIR. **1 Pat. L. R. 244 = 4 P. L. T. 669 = 74 I. C. 649 = A. I. R. 1923 Pat. 470.**

Powers of Court—Misconduct of arbitrators.

———*Award appealed to Committee of Calcutta Baled Jute Association—Parties not satisfied on question of fact—Committee not precluded by rules to take fresh evidence—Failure to take fresh evidence amounts to misconduct—Instead of referring back the matter to same Committee Court can set aside award and deal with the matter itself.*

A dispute between the buyer and the seller of jute was referred to arbitration of two arbitrators relating to its quality or condition. The arbitrators disagreed and the matter was dealt with by an umpire. The umpire made his award and the aggrieved party appealed against his award to the Appeal Committee of the Calcutta Baled Jute Association. Before the Committee both parties contended that the issue of fact upon which the award was based, was not correctly decided, but the umpire refused to go into fresh evidence. Under the practice of the Committee its position was not like that of a Court of Appeal, *i. e.*, they did not bind themselves by the materials before the umpire was examined on question of fact.

Held, that Committee's refusal to take new evidence and afford the parties an opportunity to be present at the hearing and adduce rebutting evidence constituted clear misconduct on their part and their award must be set aside.

Held further, that the contractual forum which the parties intended to erect for the purpose of settling their disputes having failed to operate, the Court of law was entitled to deal with the matter on the award being set aside, as sending back the matter to the same Committee would be unfair to the parties. (*Rankin, C. J. and C. C. Ghose, J.*) SURAJ MULL ASKARAN *v.* CHANDMULL MULCHAND. **31 C. W. N. 686 = 103 I. C. 634 (2) = A. I. R. 1927 Cal. 601.**

Powers of Court—Party.

———*Party interested not joining in reference—Court has no jurisdiction to refer to arbitration—Defect vitiates the proceedings.*

Where a party interested in a dispute does not joint in making the reference, the Court has no jurisdiction to refer the dispute to arbitration and this defect vitiates the reference all subsequent proceedings ending in the decree based on the award. 42 Mad. 632; 25 C. L. J. 339; A. I. R. 1925 Mad. 621 and A. I. R. 1927 Mad. 1154, Ref. (*Tek Chand, J.*) AHMAD *v.* SARDARA. **114 I. C. 712 = A. I. R. 1929 Lah. 171.**

Powers of Court—Power to appoint umpire.

———Where the Court is empowered to appoint an umpire, in case the arbitrators fail to appoint, appointment of umpire, on the umpire appointed by arbitrators refusing to act, is not illegal. (*Coldstream, J.*) KHALLU RAM *v.* JAI CHAND. **99 I. C. 654 = A. I. R. 1927 Lah. 123.**

Powers of Court—Remitting back.

———*Award should not be remitted to arbitrator when circumstance in his situation is likely to prejudice him.*

When any circumstance in the situation of the arbitrator is such as to tend to produce a bias in his mind the Court should in its discretion decline to remit an award to an arbitrator. 114 R. R. 429, Foll. (*Rupchand Bilaram, A. J. C.*) FIRM OF MAHOMED ALI A. KARIMJI & SONS *v.* CHARATSING BUDSING. **80 I. C. 596 = A. I. R. 1925 Sind 51.**

Powers of Court—Re-opening award.

———*Award by arbitrator chosen by parties—Claims irrecoverable in law Courts settled—Court cannot re-open the award.*

Per *Walsh, J.*—If parties choose to submit their disputes informally to a mutual friend and to agree to accept and do respectively, whatever he decides, it is no business of anybody else that they choose to include claims or demands which might not be recoverable in a Court of law, or which might be recoverable with great difficulty. (*Walsh, Kanhaiya Lal and Mukerji, JJ.*) GAJENDRA SING *v.* DURGA KUMARI. **47 All. 637 = 23 A. L. J. 561 = 88 I. C. 768 = A. I. R. 1925 All. 503 (F. B.).**

Powers of Court—Revision.

———*Award—Revision—On objection that arbitrators had made secret enquiries—Court's decision apart from award is not revisable.*

Where an award was attacked as vitiated by misconduct on the ground that the arbitrators had made secret enquiries and the Court thereupon took up the case and proceeded to dispose of it without reference to the arbitration, *held*, no revision lay. (*Daniels, J.*) RAM LAL *v.* BEHARI SINGH. **5 L. R. A. (Civ.) 367 = 87 I. C. 371 = A. I. R. 1924 All. 761 (1).**

———*Award—Decree on, after considering objections—Decree ordinarily not revisable—C. P. Code, S.* 115.

It is the clear intention of the Legislature that objection to the award on the ground of invalidity from any cause whatever should be decided by the Court which had made the order of reference and by no other Court. Therefore it is clear that where the Court has considered the objections and has come to a wrong decision as to whether there had been any irregularity on the part of the arbitrator, no revision lies under S. 115, C. P. C., although it is not the law that in no possible case could a revision be entertained against a decree passed in accordance with an award if the procedure of the Lower Court had been altogether irregular and illegal. (*Daniels, A. J. C.*) SHEO PATTAN *v.* SUKHDEO SINGH. **26 O. C. 107 = 74 I. C. 401 = A. I. R. 1923 Oudh 235.**

Rights of Arbitrators.

———*Private arbitrator cannot be compelled to act against his own will.*

The Court has no authority to compel a private arbitrator to arbitrate against his own will.

It is one of the most essential principles of the law of arbitration that the adjudication of disputes by arbitration should be the result of the free consent of the arbitrator to undertake the duties of arbitrating between the contending parties who have agreed to repose confidence in his judgment. The Court will not be justified in sending a notice to the arbitrator calling upon him to send his award by a particular date or to explain why he should not be proceeded against for contempt of Court. (*Sulaiman and Kanhaiya Lal, JJ.*) BASDEO MAL GOBIND PRASAD *v.* KANHAIYA LAL LACHMI NARAIN. **43 All. 101 = 59 I. C. 667 = A. I. R. 1921 All. 361.**

Rights of Parties.

———*Award directing payment of money—Party directed to pay is bound to seek other party and offer payment—Debtor and creditor.*

There is no law prohibiting a party from discharging the obligations imposed on him by the award until the passing of the decree in accordance with it. On the other hand, it is settled law that if the award directs payment of money to a particular person, at a particular time, the party, who is to make the payment, is bound to seek out the other party and to offer payment to him at the appointed time, and if he fails in this, he does so at his own risk. (*Tekchand and Dalip Singh, JJ.*)

KAIKABAD *v.* KHAMBATTA.
A. I. R. 1930 Lah. 26 (31).

——*Two out of three defendants confessing judgment—Third can refer to arbitration.*

Where two out of three defendants have confessed judgment, the third is competent to refer it to arbitration. (*Jai Lal, J.*) FAIZ ALI *v.* MT. ASHRAF KHATUN. **30 P.L.R. 600 = 118 I.C. 464 = A.I.R. 1929 Lah. 177.**

——*Decree based on award—Award embodying razinama between parties—Decree creating charge in favour of third person—Charge can be enforced.*

Where decree, proceeding on the award of arbitrators, which itself only embodied the terms of a razinama between the parties, created a charge on immovable property in favour of a third person, that person could enforce the charge although he was not a party to the transaction in which the charge was created. 32 All. 410 and 33 Mad. 238, Rel. on; 6 All. 322 (P. C.), Expl. (*Jackson and Reilly, JJ.*) ARUMUGASAMY NADAR *v.* K. E. MANIAGARAR. **29 M.L.W. 609 = 117 I. C. 302 = A. I. R. 1929 Mad. 379 = 56 M. L. J. 295.**

——*Parties cannot be allowed to show that arbitrator's award was wrong on merits.*

The arbitrators are judges of both the questions of fact and of law and the parties cannot be allowed to show subsequently that their decision was wrong on the merits. (*Misra, J.*) RAMMAN SINGH *v.* DILLA SINGH. **4 Luck. 243 = 10 L.R.A. (Rev.) 190 = 114 I.C. 803 = 6 O.W.N. 1315 = A.I.R. 1929 Oudh 334.**

——*Award—Neither acted upon nor replacing original rights of parties—It is no bar to a suit on original rights.*

Where an award has replaced the original rights of the parties, it is of itself a good defence to an action based on those rights; but where an award has merely ascertained and defined those rights, not only the award but also its performance must be established to complete the defence. 11 Bom. L. R. 20, Dist.; *Allen* v. *Milner*, (1831) 2 Cr. & J. 47, Appl.; *Commings* v. *Heard*, (1869) L. R. 4 Q. B. 669, not Appl. (*Shah and Fawcett, JJ.*) SWAMIRAO KONHER *v.* CHANNAPPA UPPINA HUBLI. **29 B.L.R. 301 = 101 I.C. 398 = A.I.R. 1927 Bom. 237.**

——*Parties to a dispute agreeing to abide by the decision of mediators—Decision is binding on parties and is relevant in a suit about the subject of arbitration.*

If there are disputes between two parties and if they agree to refer the matter to mediators also agreeing beforehand that they should abide by the decision of the mediators, and such a mediation is completed, *i.e.*, ended in a decision that so much be paid by one party to the other, that decision is binding on the parties and is not irrelevant, in a suit involving the subject-matter of the arbitration. (*Ramesam, J.*) S. RAMACHANDRA IYER *v.* T. S. NARAYANASAMI AIYAR. **99 I.C. 620 = A.I.R. 1927 Mad. 426.**

——*Submission—Submission cannot be revoked unless for good cause.*

When parties have agreed to submit the matter in difference between them to the arbitration of one or more specific persons, no party to such an agreement can revoke the submission to arbitration unless for good cause and a mere arbitrary revocation of the authority is not permitted. 12 M.I.A. 112 and 20 All. 145, Foll. (*Ka va Lal J.*) GOPAL RAM *v.* BANKEY LAL. **96 I.C. 325 (All.).**

——*Award is no bar to suit if suit is not stayed on application under para. 18, C.P. Code, 2nd Schedule or S. 19 of Arbitration Act.*

Where an application for stay of the suit under paragraph 18 of the 2nd Schedule of the C.P. Code or S. 19 of the Arbitration Act is not filed in proper time, or is dismissed, the award is no bar to the suit. (*Rupchand Bilaram, A. J. C.*) F. O. K. S. PARDANANI & CO. *v.* JOHN BATT & CO., LTD. **95 I.C. 481 = A.I.R. 1926 Sind 86.**

——*Agreement to refer to arbitration—Agreement cannot affect party's common law right to go to Court.*

An agreement to refer a dispute to arbitration does not oust the jurisdiction of the Court. Notwithstanding such an agreement, at Common Law the parties or any of them are at liberty to invoke the assistance of the Court to settle the controversy which has arisen and the Court is bound to entertain the suit. The only remedy at Common Law open to a party to the agreement is to seek damages for the breach of the agreement to refer the matter to arbitration. But this remedy would usually be found to be nugatory for under the circumstances the plaintiff would not be able to prove more than nominal damages. Of course, the parties to such an agreement either before or after action is brought are at liberty to settle the dispute by submitting the subject-matter thereof to arbitration and obtaining an award thereon. But in the absence of such an award the Common Law right of the parties or any of them to have recourse to the Court for the purpose of settling the dispute remains unaffected by an agreement to refer the matter to arbitration. (*Page, J.*) BHOWANIDAS RAMGOBIND *v.* PANNACHAND LUCHMIPAT. **52 Cal. 453 = 88 I.C. 929 = A.I.R. 1925 Cal. 801.**

——*Appointment of arbitrator* uberrima fides *all round is necessary—Each party should have every opportunity to consider whether particular person should or should not be appointed.*

Where a person is appointed by two parties to exercise judicial duties there should be *uberrima fides* on the part of all the parties concerned in relation to his selection and appointment and every disclosure which might in the least affect the minds of those who are proposing to submit their disputes to the arbitrament of any particular individual as regards his selection and fitness for the post ought to be made so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made. (*Rupchand Bilaram A. J. C.*) FIRM MOTHARAM DAWLATRAM *v.* FIRM MAYADAS DAWLATRAM. **19 S.L.R. 251 = 78 I.C. 521 = A.I.R. 1925 Sind 150.**

——*Rights awarded under arbitration cannot be denied by defendant on the pretext that property is public trust property.*

Where while question of the validity of the waqf and of lawful appointment of mutwalli was still open the parties referred certain differences to an arbitrator who by his award determined their rights and held each to be entitled to an equal share in the management and profits of the property. *Held*, that one of the parties could not exclude the other from his civil rights under the cloak of public right. 7 A. L. J. 761, Dist. (*Walsh A.C.J. and Ryves, J.*) MOAZZAM ALI *v.* RAZA ALI. **46 All. 856 = 81 I.C. 851 = 22 A.L.J. 776 = 5 L.R.A. (Civ.) 585 = A.I.R. 1924 All. 818.**

——*Arbitrator changed with consent of parties, but without Court's intervention—Award is valid.*

ARBITRATION—Rights of Parties.

Where a change in the personnel of the arbitrators was made with the approval of the defendant, but without the intervention of the Court, *held*, that defendants cannot object to the validity of the award. (*Walmsley and Subrawardy, JJ.*) MAHMUD SHEIKH *v.* KANKINARAH CO. LTD. **28 C. W. N. 634 = 81 I. C. 574 = A. I. R. 1924 Cal. 665.**

——*Award—Acceptance of award does not bar right to file objections nor can Court shorten time for filing objections.*

A Court has no power to cut short the period of limitation provided by statute for filing objections against an award.

Where the plaintiffs once agreed to the award, *held*, they were not estopped by any rule of law or procedure from filing objections to the award within the time prescribed by law for that purpose. (*Wazir Hasan, A. J. C.*) KAMPTA PERSHAD *v.* UMA PRASAD. **76 I.C. 33 = A.I.R. 1924 Oudh 344.**

——*Estoppel—Protracted proceeding – Objection—Evidence Act, S.* 115.

By consenting to the order of reference to arbitration and extension of time, the party is not estopped from objecting to the continuance of the proceedings *ad infinitum* or after they have proved themselves incorrigible. (*Rankin, J.*) ROBINDRA DEB MANNA *v.* JOGENDRA DEB MANNA. **27 C.W.N. 420 = 80 I.C. 459 = A.I.R. 1923 Cal. 410.**

——*Award—Decree on award—Remedy is by way of execution and not by way of separate suit.*

A decree under S. 526 has the same effect as regards execution as a decree under S. 522. Consequently a decree upon an award stands precisely in the same position with regard to its execution as any other decree of Court. A fresh suit does not lie on the same cause of action. *Sreenath* v. *Kailash* 21 W. R. 248, Foll. (*Woodroffe and Ghose, JJ.*) LALIT MOHAN MOITRA *v.* SASI SEKHARESWAR ROY BAHADUR. **70 I.C. 300 = A.I.R. 1922 Cal. 73.**

——*Award—Party is not bound by, unless it is valid, and proceedings of arbitrator is above board.*

Before a party can be held bound by an award, it must be shown that it was a valid award and that all the requirements of the law with respect to the appointment of an arbitrator and with regard to the actual reference to arbitration, had been duly fulfilled. The proceedings of the arbitrator must also be above board, and it must be shown that he had given full opportunities to both parties to appear and represent their case to him. (*Broadway and Moti Sagar, JJ.*) MAUSA RAM GORDHAN DAS *v.* MANGAL SAIN DUNI CHAND. **65 I. C. 497 = A. I. R. 1922 Lah. 149 (154).**

——*Civil Procedure Code, Schedule II, Para.* 16—*Agreement not to object to the award does not debar party from objecting to its illegality—Court cannot pass decree before the* 10 *days—Limitation Act, Art.* 158.

A clause in the *Muchalka* precluding the parties from bringing actions against the arbitrators or impeaching their awad, unless for fraud, does not debar a party to the deed from moving to set aside the award for illegality on the face of it, though no fraud or collusion appeared.

The Court has no power to pass a decree before the expiry of the 10 days allowed by Art. 158 of the Limitation Act. (*Odgers, J.*) T. L. RANGIAH CHETTY *v.* T. GOVINDSAMI CHETTY. **45 Mad. 466 = 15 M. L. W. 160 = 71 I. C. 266 = 1921 M. W. N. 793 = A. I. R. 1922 Mad. 179.**

ARBITRATION—Trade Custom.

——*Party cannot institute suit as to part of an instalment and resort to arbitration as to rest of same instalment.*

A party cannot, in respect of one portion of an instalment, institute a suit, and in respect of the remaining portion of that very instalment, take recourse to arbitration. 46 Cal. 1041, Dist. (*Mookerjee and Fletcher, JJ.*) CHATTURBHUJ CHANDANMULL *v.* BASDEO DASS. **33 C. L. J. 145 = 60 I.C. 909 = A. I. R. 1921 Cal. 767.**

Trade Custom.

——Where by custom disputes as to liabilities under transactions of the nature of speculations on the rise and fall of the market are determinable by a Committee of Experts, unless a party proves fraud, either in the inception or the proceedings of that body, mere error on the part of the expert tribunal would not suffice to set aside their decision of matters of skill. (*Lord Macnaghten, Lord Robertson Andrew Scoble and Arthur Wilson.*) PESTONJI JEHANGIRJI *v.* JAISINGDAS. HANSRAJ. **76 I. C. 630 = 22 Bom. L. R. 420 (P. C.).**

——*Arbitration—Umpire—Powers of—Finality of award—Award—Construction—Extrinsic evidence.*

Whenever there is a difference of opinion between the parties as to the authority conferred on an umpire under an agreed submission, the decision is ultimately with the Court and not with the umpire. (1916) A.C. 314 Ref. It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question, which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding contrary to the fact that the matter, which he affects to decide, is within the submission of the parties. In considering the question whether an umpire has included in his report any items not within the terms of the agreement of reference, it must be borne in mind that the report is a written document which speaks for itself and which cannot be interpreted, or varied or contradicted by extrinsic evidence. If there is any doubt as to the subject-matter over which the umpire was purporting to exercise jurisdiction evidence may be given showing what was the subject-matter into which he was enquiring in order to enable the Court to determine whether he has exceeded the limits of his jurisdiction. Such evidence may be given by the umpire himself or by any other competent witness; but it should be limited to the issue of fact and is not admissible to explain or add much less to attempt to contradict what is to be found on the face of the written instrument itself. *Buccleuch* v. *Metropolitan Board of Works*, (1871) 5 H. L. 418, Ref.

In a submission in which the parties have agreed that the decision of the umpire, on the matter referred to him, shall be final the courts will not enquire whether the conclusion of the umpire on the matters referred to him is right or wrong, unless an error appears on the face of the award, or on some document so closely connected with it that it must be regarded as part of his award, or unless the umpire himself states that he has made a mistake of law or fact, leaving it to the Court to review his decision. (1891) A. C. 31 ; (1912) A. C. 673, Rel.

The umpire is entitled to form his own opinion in respect of all matters submitted from his own knowledge, inspection or examination or from such other source as he may deem proper. It may not be possible for the Court to have before it all the materials on which the umpire based his decision and even if the Court should remit the report it could have no effective control over

the ultimate decision. (*Lord Parmoor.*) THE ATTORNEY-GENERAL OF MANITOBA *v.* KELLEY.
31 M. L. T. 238 (P. C.)

Validity—Authority to refer.

———*Pleader's authority to refer to arbitration should be express—Pleader not appointed by vakalatnamah but signing jawabdawa—Authority to refer to arbitration cannot be inferred—Legal practitioner.*

A pleader engaged to act or plead in a suit does not possess the power to refer it to arbitration without express authority from the client. Such authority cannot be inferred by the mere circumstance that the pleader, though not formally appointed by a vakalatnamah, was allowed to sign a jawabdawa. (*Tek Chand, J.*) AHMAD *v.* SARDARA. **114 I. C. 712 = A. I. R. 1929 Lah. 171.**

Validity.

———*Award made during pendency of suit between same parties regarding same subject-matter is unenforceable.*

Where a reference to arbitration is proceeded with and the award made during the pendency of a suit between the same parties in respect of the same subject-matter, the award is bad and unenforceable. (*Raymond, A. J. C.*) MITSUI BUSSAN KAISHA LTD. *v* FIRM OF TOTARAM BHGWANDAS. **85 I. C. 893 = 17 S. L. R. 223.**

Validity—Binding nature of.

———*Proceedings* ex parte *and no relief sought against a party—Party is not necessarily not interested—Reference to arbitration without his joining is void.*

The facts that proceedings were *ex parte* against a party and that no relief was sought against him are not sufficient to hold that he is not an interested party. A reference to arbitration without his joining it is void. (*Dalip Singh, J.*) LACHHMAN SINGH *v.* NAMAN.
118 I. C. 434 = A. I. R. 1929 Lah. 174

———*Reference by some of the persons having common interest—No express authority from other interested persons—Award binds only the persons referring.*

Where parties have a common interest it is not sufficient that certain persons should go and seek to refer the dispute pending between them and the other party to arbitration, without taking steps to consult the other persons who had such common interest and get their authority to represent them on their behalf. If one or more interested parties submit a dispute to arbitration, they cannot bind the other interested parties without express authority, but still bind themselves none-the-less effectually for that; and if they undertake that such other parties shall perform the award, the fact that those parties are not bound will form no excuse for the breach of that undertaking. (*Kanhaiyalal and Ashworth, JJ.*) HASHMAT HUSSAIN *v.* SIDDIQ HUSAIN.
98 I.C. 998 = A.I.R. 1927 All. 128.

———*C. P. Code, O. 1, R. 8—Private award—Signatories to reference professing to represent larger body—R. 8 does not apply—Representatives must have express authority and they must be capable of representing.*

Rule 8 has no bearing on a private award which is made on a reference made by certain persons who were signatories to the reference, though they might have described themselves as representatives of a larger body. The fact that they were such representatives has to be proved by evidence of some form of reference, referendum or other mode of authorization.

In the eyes of the law representation must be based on some authority legally expressed and the persons who pose to act as such representatives must be capable in law of representing the persons or the community whom they profess to bind. (*Kanhaiya Lal and Ashworth, JJ.*) HASHMAT HUSSAIN *v.* SIDDIQ HASAN.
98 I.C. 998 = A.I.R. 1927 All. 128.

———*Award—Award by Judge who had ceased to be judge is valid only if parties fully understood the effect thereof.*

Where a judge who has ceased to be a judge is alleged to have been appointed arbitrator, it must be shown not merely that the parties wished him to write and pronounce judgment but that they understood what they were agreeing to. It would not be a question of their making a mistake of law. For a consent to be valid, the consenting parties must agree upon the same thing in the same sense. Unless the parties understood that, if he wrote and pronounced a judgment, that judgment would amount only to an award and that they would have no right of appeal, their agreement would be void. (*MacColl, J.C.*) MAUNG BA *v.* MAUNG YE.
4 U.B.R. 171 = 76 I.C. 170 = A.I.R. 1924 Rang. 358.

———*C. P. Code, Sch. II, Para. 1—Failure to pay is a matter in difference.*

A mere failure to pay a claim constitutes a difference between the parties to a submission. (*Raymond, A.J.C.*) TYEBALLY ABDUL HUSSAIN *v.* JAMES FINLAY & CO. **80 I.C. 969 = 17 S.L.R. 15 = A.I.R. 1924 Sind 105 (116).**

———*Award is binding on persons who are actually parties to reference though some persons concerned did not join reference.*

Though some of the persons concerned do not join in submitting the dispute to arbitration, the award does not become invalid or ineffectual as between the persons making the reference. It is binding upon them, especially when it has been acted upon. (*Dhobley, A.J.C.*) DHARNEDHAS *v.* SAKHARAM. **71 I.C. 860 = A.I.R. 1921 Nag. 176.**

Validity—Clause in contract.

———*Suit on contract brought within time—Defendant, however, relying on clause to refer in that contract and getting suit stayed—It is immaterial if reference is made beyond peroid of limitation.*

Where on the basis of the contract, which contained a clause to refer disputes to arbitration, the plaintiff sued and his suit was within time, but the defendant relying on the clause to refer, got the suit stayed and the matter was referred to arbitration, it is immaterial if the reference itself was made after the statutory period, the suit being within time. (*Percival, J.C. and Rupchand, A.J.C.*) UTTAMCHAND BRIJLAL *v.* BALMOKAND S. L. **107 I. C. 435 = A.I.R. 1929 Sind 55.**

———*Providing reference to arbitration but not barring suit to enforce claim—Claim not enforced either by suit or arbitration during limitation period—There subsists no dispute under contract to be enforced by arbitration.*

Per Rupchand, A. J. C.—Where a contract provides for a reference to arbitration of disputes arising out of the contract and does not purport to bar the right of a party to enforce his claim in Court before he has obtained an award in respect thereof, but the claim is not enforced within time either by suit or arbitration, there subsists no dispute between parties under the contract which may be enforced by arbitration. A.I.R. 1926 Sind 209, Foll.; *Hirji Mulji* v. *Cheong Yue Steamship Co.*, (1926) A.C. 497, Ref. (*Percival, J. C. and Rup-*

chand, A. J. C.) UTTAMCHAND BRIJLAL *v.* BALMOKAND S. L. **107 I. C. 435 = A .I. R. 1929 Sind 55.**

Validity—Criminal Complaint.

———A criminal complaint cannot be referred to arbitration and therefore, the award following it cannot be made a rule of a Civil Court. (*Addison, J.*) MALKA *v.* SARDAR. **30 P.L.R. 122 = 11 Lah. L. J. 89 = 116 I.C. 215 = A.I.R. 1929 Lah. 394.**

Validity—Decree.

———*Suit not maintainable as to subject-matter of arbitration—No decree can be passed on the award.*

If a Court is not initially competent to entertain a suit in respect of the dispute which is the subject-matter of the reference to arbitration, it cannot pass a decree on an award made as a result of such reference by the parties whether before the suit was instituted or during its pendency. In the latter case the Court is incompetent to refer the matter to arbitration. (*Jailal, J.*) LADHA RAM *v.* RALLARAM. **10 Lah. L. J. 242 = 112 I.C. 262 = A.I.R. 1928 Lah. 730.**

Validity—Enforceability of.

———*Dispute referred to arbitration during suit—Reference superseded—Proceedings taken in higher Courts against order of supercession:—Suit not stayed—Suit dismissed—Order of supercession finally quashed by High Court afterwards—Award passed by arbitrators subsequently is unenforceable.*

A lower Court superseded a reference to arbitration and proceeded to try the suit itself. The order of supercession was taken to higher tribunals, but the suit was not stayed. The suit was dismissed by the lower Court. After this the High Court finally set aside the order of supercession. After this, the arbitrators passed their award.

Held, that after the suit was dismissed, there was nothing for the arbitrators to decide so far as the claims covered by the suit were concerned. *Held further*, that even had the judgment of the Court been referred and arbitrators passed an award to the effect that it was erroneous and improperly obtained, the award could not have had the effect of annulling the judgment. The only remedy which a party would have against a party enforcing the judgment would be a suit for damages for breach of the contract to abide by the award. *Barry* v. *Grogan* (1868) 16 W. R. 727, Foll. (*Kennedy, J. C. and Aston, A. J. C.*) DEOMAL *v.* KHANOOMAL JOTHMAL. **89 I.C. 335 = A.I.R. 1926 Sind 5.**

Validity—Finality of.

———*Private tribunal arranged by agreement between parties—Decision is operative if proceedings are conducted regularly.*

Where under an agreement between the Shebaits of a deity and the Pujaris the latter are liable, on misconduct to be removed after being judged, by a committee of a certain number of respectable gentlemen of the village, the decision of a body, so constituted in accordance with the agreement of the parties, is operative, if their proceedings are regularly conducted. (*Mookerjee, A.C.J. and Fletcher, J.*) NAFAR CHANDRA *v.* KAILASH CHANDRA. **25 C.W.N. 201 = 62 I.C. 510 = A.I.R. 1921 Cal. 328.**

Validity—Guardian.

———*Guardianship proceeding can't be settled by arbitration.*

A guardianship application is not a suit *inter partes.* It is a proceeding designed to satisfy the Court that it is for the welfare of a minor that a guardian should be appointed and as to the most suitable person for appointment. The selection of the guardian is a matter which is not of private interest between the parties and cannot be settled by a reference to arbitrators. 30 All. 137, Foll. (*Krishnan and Waller, JJ.*) SAMI CHETTY *v.* ADAIKALAM CHETTY. **47 Mad. 459 = 34 M.L.T. 15 = 1924 M.W.N. 222 = 84 I.C. 613 = A.I.R. 1924 Mad. 484 = 46 M.L.J. 179.**

Validity—Mistake.

———*Mistaken view of real rights invalidates.*

Where the parties to an arbitration were obviously acting under quite a mistaken view of their real rights and the arbitrators seemed also to have adopted that view.

Held, that the arbitration proceedings and the award therein cannot be supported. 45 Cal. 590 and 6 Pat. L. J. 604, Foll. (*Bucknill and Ross, JJ.*) RAMBAHADUR SEN *v.* MAHANTHA GANESH BHAGAT. **2 Pat. 554 = 5 P. L. T. 255 = 73 I. C. 542 = A. I. R. 1924 Pat. 49 (59).**

Validity—Mutuality.

———*Submission to arbitration should be mutual—Effect of subsequent insolvency of one party on mutuality.*

It is of the very essence of an arbitration that the submission should be mutual and that the award should be mutual and binding. If the subsequent insolvency of one party destroys this mutuality and prevents the opposite party from enforcing the submission against the Official Receiver, the Official Receiver may not in his turn enforce the submission clause, if the insolvent's estate is the claimant instead of being the debtor. (*Rupchand Bilaram, A.J. C.*) OFFICIAL RECEIVER *v.* KERSONDAS MAVJI. **19 S. L. R. 24 = 95 I. C. 750 = A. I. R. 1926 Sind 209.**

Validity—Private arbitration.

———*Private arbitration—Award set aside—Another award cannot be ordered without fresh agreement freely entered into by parties.*

Where in a private arbitration the arbitrator has once delivered the award, and that award has for some reason or other been set aside, the Court cannot direct the arbitrator to make another award without a fresh agreement freely entered into by both the parties. (*Tek Chand, J.*) MT. PARBATI *v.* MT. DURGA DEVI. **108 I. C. 186 = A. I. R. 1928 Lah. 170.**

Validity—Procedure.

———*Suit filed after reference to arbitration—Award is nullity unless suit is stayed.*

When a party to a contract files a suit in respect of any matter that he has contracted to refer to a private tribunal, the Court is not ousted of its jurisdiction to try the suit. It is open to the other party to apply for stay of the suit on the ground of the contractual liability to refer the matters in dispute to arbitration and the Court may, in a proper case, hold its hand and refuse to proceed with the trial of the suit. But in the event of no application being made to the Court for a stay of the suit, the Court has seisin of the disputes between the parties, can proceed to adjudicate upon them and its decision is binding upon the parties. Where an application for stay of the suit was made after the award, but the arbitrators had held their sitting and passed their award during the pendency of the suit.

Held, that they were not competent to do so. 13 S. L. R. 93; *Doleman and Sons* v. *Osset Corporation*, 3 K. B. 257 ; 47 Cal. 752 ; A. I. R. 1921 Cal. 244 and 41 Mad. 115, Foll. **Though filing of the suit does not invalidate the reference to arbitration, yet the effect of**

the institution of the suit is that from that very moment the arbitrators become *functus officio*, and a conflict of jurisdiction is avoided. The Court in which the suit is filed acquires seisin of the suit immediately on its institution and its jurisdiction to try it cannot remain suspended till such time as an application for stay of the suit had been made to it and it decides whether it should proceed with the suit or not. 13 S. L. R. 8, Dist.; A. I. R. 1921 Cal. 244, Foll. (*Raymond, A. J. C.*) MITSUI BUSSAN KAISHA *v.* TOTARAM BHAGWANDAS.
17 S. L. R. 223 = 85 I. C. 893 = A. I. R. 1921 Sind 166 (172).

Validity—Reference.

——*Dispute not detailed in agreement of reference—Arbitrators examining parties fully on nature of dispute—Reference is not invalid on account of vagueness or indefiniteness.*

Where a dispute between the parties is not detailed in the agreement of reference to arbitration but the parties are examined at length by the arbitrators at the very outset and the nature of the disputes is made sufficiently clear, the reference to arbitration cannot be held invalid on account of any vagueness or indefiniteness. (*Fforde and Bhide. JJ.*) MIAN NATHU *v.* ABDUL GANI. **119 I. C. 726 = A. I. R. 1930 Lah. 22.**

——*Restitution of conjugal rights — Cannot be referred to arbitration.*

The question of restitution of conjugal rights cannot be referred to arbitration as that matter must be decided by the Court itself. 37 P. R. 1895, Foll. (*Addison, J.*) MALKA *v.* SARDAR **30 P. L. R. 122 = 11 Lah. L.J. 89 = 116 I. C. 215 = A. I. R. 1929 Lah. 394.**

——*Dispute whether the marriage is valid can be referred to arbitration.*

In a suit for restitution of conjugal rights, the question as to the validity of a marriage can be referred to arbitration. 78 P. L. R. 1918, Dist. (*Jailal, J.*) FAIZ ALI *v.* MT. ASHRUF KHUTUN. **30 P. L. R. 600 = 118 I. C. 464 = A. I. R. 1929 Lah. 177.**

——*Award—Reference made by a minor's next friend without leave of the Court has an important bearing on validity of award.*

How far a reference can be made by a minor's next friend without the leave of the Court expressly recorded in the proceedings is a question which has an important bearing on the validity of the award. (*Kinkhede, A. J. C.*) RAMKUMAR *v.* KUSHALCHAND GANESHDAS. **107 I. C. 668 = A. I. R. 1928 Nag. 166.**

——*C. P. Code, Sch.* 2, *Para.* 1—*Dispute as to user of a mosque by particular community can be validly referred.*

Where an award does not purport to deal with the question of tauliat or management of a mosque but only determines which party is entitled to the use of the mosque and decides one of them to be so entitled, the award of that character is not open to objection. (*Kanhaiya Lal and Ashworth, JJ.*) HASHMAT HUSSAIN *v.* SADDIQ HASAN. **98 I. C. 998 = A.I. R. 1928 All. 128.**

——*Claim time barred at the time of reference can form subject matter of reference.*

A claim time-barred according to the Limitation Act at the time of making the reference can validly form the subject-matter of a reference, to arbitration. A. I. R. 1926 Sind 209, Diss. (*Tyabji, A. J. C.*) S. L. BALMOKAND *v.* UTTAM CHAND BRIJLAL. **100 I. C. 890 = A. I. R. 1927 Sind 177.**

——*Reference to arbitration without the intervention of Court, pending suit in competent Court —Reference and award are valid.*

A reference to arbitration, pending a suit in a competent Court, without the intervention of the Court is not illegal and the award passed on such a reference is valid and legal: 16 S. L. R. 174 (F. B.) Rel. on. (*Lobo, A. J. C.*) OFFICIAL RECEIVER *v.* TIRTHDAS MEWARAM. **97 I.C. 321 = A.I.R. 1927 Sind 66 c.(72).**

——*Absence of dispute as to a point precludes reference of that point to arbitration.*

A point as to which there is no dispute cannot be referred to arbitration. A mere failure or refusal to pay on demand any amount admitted to be due may be a dispute. But where there is no allegation that the one party had made a demand on the other to pay the sum, it cannot be said that there is a dispute with regard to the item. (*Rupchand Bilaram, A. J. C.*) FIRM OF R. B. BRIJLAL JAGANNATH *v.* FIRM OF ALLAH DITTA MAHBOOB ILLAH. **86 I. C. 393 = A. I. R. 1925 Sind 242.**

——*Submission to arbitration requires agreement in writing though unsigned by either party—Invalid submission vitiates arbitration.*

A valid submission must be supported on the basis of a previous agreement in writing between the parties to submit their disputes to arbitration. But the parties need not have signed the writing. The invalidity of a submission infects also the reference to arbitration on the basis of such submission. (*Rupchand Bilaram, A. J. C.*) KISHINDAS PURSUMAL *v.* MEAGHRAJ KHIALDAS. **20 S. L. R. 335 = 81 I. C. 834 = A. I. R. 1925 Sind 144.**

——*Subsequent suit about the same matter—Failure to apply for stay of hearing within limitation—Arbitrator becomes* functus officio—*C. P. Code, Sch. II, Para.* 18.

The parties referred their dispute to arbitrators for decision. Plaintiff filed a suit against defendant but the plaint was returned for presentation to the proper Court. Sometime after the passing of this order, the arbitrators gave an *ex parte* award though after a long delay after giving notice to the parties. *Held*, the institution of a suit had not *ipso facto* the effect of superseding a previous reference to arbitration dealing with the same subject matter. But where either party fails to apply for stay of the hearing of the suit under para. 18, the effect is to supersede the arbitration for good and the arbitrator becomes *functus officio*. Also where no application for stay is made within limitation the effect of the institution and the decision of a suit would be to supersede the arbitration and render the award unenforceable. (*Kanhaiya Lal, J.C.*) MT. ZAINAB *v.* MT. BUDHANA. **25 O. C. 63 = 68 I. C. 235 = A. I. R. 1922 Oudh 158.**

——*Reference on behalf of minor without sanction of Court is not invalid—Court should see if reference is for the benefit of minor.*

A reference to arbitration on behalf of minor without the sanction of the Court is not void but only voidable and it is entirely within the province of the Court before which an award is filed in pursuance of such a reference to determine whether the reference was void from its inception. When an order is made on a reference to arbitration and some of the parties concerned are minors the Court should endeavour to ascertain as far as possible that the reference is for the benefit of the minors as in the case of compromise to which minors are parties. (*Kennedy, J.C. and Raymond, A. J. C.*) EMNABI WIDOW *v.* FAKIR MOHAMMAD. **15 S. L. R. 165 = 65 I. C. 50 = A. I. R. 1922 Sind 1.**

——*Dispute implies assertion of right by one party and repudiation by another—C. P. Code, Sch. II, Para.* 1.

A dispute implies an assertion of a right by one party and a repudiation thereof by another. The appellant wanted a variety of information from the respondents to enable him to judge whether the goods supplied were or were not according to the contract. Amongst other things, he demanded the production of the basis and shipment samples. The respondents declined to comply with the request. But there was at no stage an assertion by the appellant that the goods had not been supplied according to the contract and consequently there was not and could not be a repudiation by the respondents of any such possible assertion.

Held, that there was no "dispute" which could be and had been validly referred to arbitration. (*Mookerjee and Fletcher, JJ.*) CHANDMULL GONESHMULL *v.* NIPPON MUNKWA KABUSHIKI KAISHA.
33 C. L. J. 545 = 64 I. C. 798 = A. I. R. 1921 Cal. 342.

——*Reference to arbitration made—Suit instituted subsequently invalidates future proceedings but not former proceedings of arbitrators.*

When a reference to arbitration has been made and the private tribunal has come into existence, the effect of the institution of a suit by one of the parties to the reference is that, from that very moment, the aribitrators become *functi officio*, that is, their authority to deal further with the matter becomes extinguished. The institution of the suit cannot, however, retrospectively affect the validity of the reference which, when it was made, was in exact conformity with the agreement of the parties. (*Mookerjee and Fletcher, JJ.*) JOKHIRAM KAYA *v.* GANESHAMDAS KEDARNATH.
25 C. W. N. 62 = 61 I. C. 380 = A. I. R. 1921 Cal. 244.

Waiver.

——*Agreement to refer different causes of action to arbitration—Parties waive objections as to misjoinder of causes of action—Evidence Act, S.* 115.

By agreeing to refer different causes of action against different parties on one and the same reference the parties to it do not only waive objections as to misjoinder of causes of action but agree to a joint trial and cannot afterwards be permitted to challenge the award. (*Rupchand and Barlee, A. J. Cs.*) DATTARAM MUNSHILAL *v.* HARJMAL & SONS.
24 S. L. R. 145 = 121 I. C. 161 = A. I. R. 1930 Sind 170.

——*Irregularity or improper conduct may be waived by party —This principle of waiver applies to every kind of irregularity not affecting jurisdiction of arbitrator —C. P. Code, Sch.* 2, *Para.* 15.

An objection to irregularity or improper conduct of an arbitrator may be waived by parties either expressly or by their conduct provided the party waiving it has full knowledge of the defect. The principle of waiver is not confined merely to irregularities in the examination of witnesses during the absence of one of the parties; it applies to every irregularity which does not affect the jurisdiction of the arbitrators. *Queen* v. *Sir Richards Dobson*, (1844) 14 L. J. Q. B. 17; *High* v. *Haigh* (1861) 31 L. J. Ch. 420; A. I. R. 1923 Rang. 187, Rel. on. (*Rupchand, A. J. C.*) C. & I. ENGINEERING CO. *v.* MALIK THAKURDAS MATHURDAS. **123 I. C. 234 = A. I. R. 1930 Sind 79.**

——*Suit for enforcement of award—Signature of party may not estop him from disputing correctness— C. P. Code, Sch.* 2, *Para.* 15.

The mere signature by a party to an award does not necessarily in all cases estop him from afterwards disputing the correctness of the award. A. I. R. 1923 Rang. 187, Dist. (*Brown J.*) GUNNU MEAH *v.* RAHMAN. **7 Rang. 136 = 117 I. C. 574 = A. I. R. 1929 Rang. 166.**

——*Arbitrators having no jurisdiction—Mere appearance of the parties before them under protest and examining witnesses will not amount to waiver of objection as to jurisdiction or estoppel—Evidence Act, S.* 115.

Per *Blackwell, J.*—If arbitrators enter upon the consideration of a matter when they have no jurisdiction to do so by the arbitration clause or submission between the parties, then they cannot be given jurisdiction under that submission by a mere appearance of the parties before them at a preliminary meeting followed by a protest against their jurisdiction before they have entered upon a consideration of the matters upon which they subsequently purport to make an award. Even if a party under protest continues to attend before arbitrators and cross-examines witnesses, he does not thereby waive his objection, nor is he estopped from saying that the arbitrators have exceeded their authority by awarding on the matter. (*Marten, C. J. and Blackwell, J.*) CHETANDAS DOGA *v.* RADHA KESSON RAMCHANDRA.
29 B. L. R. 1087 = 104 I. C. 174 = A. I. R. 1927 Bom. 553 (556).

——*Award—Objection about want of notice can be waived.*

Where a party did not raise any objection to the award on the ground that arbitrator did not give him any opportunity of being heard.

Held, it was open to the Court to draw the inference that he had waived this particular objection to the award. For the purposes of the waiver knowledge of the essential facts is necessary. (*Shah, Ag. C. J. and Crump, J.*) CHATURBHUJ BHAWANIDAS *v.* DEOKARAN NANJI. **26 Bom. L. R. 84 = 79 I. C. 769 = A. I. R. 1924 Bom. 370.**

——*Irregularity—Award cannot be set aside.*

A party having knowledge of an irregularity cannot lie by without objection and take his chance of an award in his favour and then, when he finds that award has gone against him, seek to set it aside on the ground of the irregularity to which he failed to object. (*Heald and May Oung, JJ.*) U GUNUWA *v.* U PYINNYADIPA.
74 I. C. 6 = 1 Rang. 15 = 2 Bur. L. J. 30 = A. I. R. 1923 Rang. 187.

——*Arbitrator deciding matter not included in reference—Parties accepting and acting upon award cannot afterwards repudiate it.*

Where arbitrators include in their decision also some matter which was not referred to them, the parties by taking part in the final award and acting upon it must be deemed to have made a second submission in respect of that matter and cannot subsequently repudiate the award. 2 C. P. L. R. 202 and 18 C. W. N. 1325, Foll. (*Dhobley, A. J. C.*) DHARMDHAS *v.* SAKHARAM.
71 I. C. 860 = A. I. R. 1921 Nag. 176.

Miscellaneous.

——*Parties intending that no further steps should be taken in Court and that the arbitration should be one without the intervention of Court Rules in Sch.* 2, *C. P. Code, apply.*

Where the parties intend that no further steps should be taken in court and that the arbitration should be one without the intervention of court the rules in Second Schedule apply to such cases also. (*Newbould and Pearson, JJ.*) HEM CHANDRA KUNDU *v.* JNANENDRA CHANDRA KUNDU. **90 I. C. 624 = A. I. R. 1926 Cal. 116 (121).**

ARBITRATION.

——*Agreement.*

A new agreement between the parties for the enlargement of time is tantamount to fresh admission to arbitration. (*Das and Ross, JJ.*) Ko Kil Singh *v.* Ramasray Prosad Chaudhury. **3 Pat. 443 = 1924 P. H. C. C. 110 = 6 P. L. T. 122 = 3 Pat. L. R. Civ 52 = 81 I. C. 994 = A. I. R. 1924 Pat. 488.**

ARBITRATION ACT (9 OF 1899).

——*Awards under Aribitration Act—Applicability of provisions, O. 21, R. 2, C.P. Code.*

The provisions of O. 21, R. 2, relating to adjustment of decrees are equally applicable to awards under Indian Arbitration Act. A. I. R. 1925 Sind 293, Rel. on. (*Lobo, A. J. C.*) Official Receiver *v.* Tirathdas Mewaram. **97 I. C. 321 = A.I.R. 1927 Sind 66 (75).**

Costs.

——*Determination of by court not by arbitrator.*

Under the Arbitration Act all costs incurred in the process of filing the award in the court must be determined by the court to which the petition is presented and are outside the province of the arbitrators. (*Raymond, A. J. C.*) James Finlay & Co. Gurdayal Pahlajraj. **17 S. L. R. 93 = 76 I.C. 660 = A.I.R. 1924 Sind 91 (96).**

Court's powers.

——*Court has no power to issue commission to witness to give evidence before private arbitration.*

Civil Courts have no power under the Act or under rules of this High Court made under the Act to issue a summons or commission to a witness to give evidence in a private arbitration. Consent of parties cannot confer this power. (*Marten, J.*) James Mackintosh & Co. *v.* Scindia Steam Navigation Co., Ltd. **24 Bom. L. R. 853 = 75 I.C. 221 = 47 Bom. 250 = A.I.R. 1922 Bom. 444.**

Duty of umpire.

——*Award attacked—Duty of umpire not to refuse hearing.*

An umpire has to make his award within a month of his appointment and where he does not extend the time or make his award within such time his award is worthless. Where questions of fact under the Arbitration Act as to the conduct of arbitrators or the umpire the procedure adopted and the instructions and so forth are raised, the court should have evidence properly brought before it, as in the trial of a suit which was deliberately withdrawn or abandoned by the parties raising the objection to enable the Appellate court to consider whether there really has been any grievance in the matters disposed of by it. Such questions of fact are determined upon hearing the evidence. Where a party wishes to show that the umpire had gone contrary to the established principles of justice and refused him hearing the onus is upon him to call evidence, to establish the fact in answer to the application to file the umpire's award. The party who makes an objection must prove that he objected at the time to the umpire's proceedings in making final award without hearing his witnesses. Where such a party had the opportunity of doing so and no reasonable opportunity was refused to him of doing so, his conduct amounts to acquiescence in the procedure adopted and he cannot, in law, be allowed to question the regularity, if there was any. Decision upon merits, that is to say, from the interests on the record, as to controversy arising out of claim for damages between the parties is a matter entirely between the arbitrators and the umpire. All courts, even arbitration courts, must act according to the principles of natural justice and not deliberately refuse a hearing or take evidence from one side behind the back of the other. *Prima facie* the duties of an umpire are the same as those of the arbitrators. The umpire must hear the evidence of the parties and their witnesses, if application is made to him to do so by either party notwithstanding that the same evidence had already been adduced before the arbitrators. The umpire is not justified in the face of an objection by either party in taking any part of the evidence from the notes of the arbitrators unless there are specific provisions in the submission permitting him to do so. (*Walsh and Ryves, JJ.*) Firm Sita Ram Nathu Mal *v.* Firm Sushil Chandra Das. **64 I.C. 706 = 3 U.P.L.R. (A.) 60.**

Effect of award.

——*Award under, upheld by Court becomes enforceable as a decree—Court is not to pass a decree as in one under C.P. Code, Sch. 2, para. 20.*

Where an award filed under the Act is upheld by the Court as a good award, it is enforceable as if it were a decree of the Court; in other words, although it was not a decree and not a judgment of the Court, execution can be taken out on it in the same manner as though it were a decree and the Court is not to pronounce a judgment and decree as under C. P. Code, Sch. II, para. 20. (*Rankin, C.J. and C.C. Ghose, J.*) Jnanendra Mohan *v.* Annapurna Debi. **31 C.W.N. 517 = 45 C.L.J. 597 = 102 I.C. 108 = A.I.R. 1927 Cal. 562.**

Jurisdiction.

——Where sellers had fulfilled their part of the contract by tendering the documents of title to buyers which was done at Amritsar and no part of the cause of action arose at Karachi.

Held the fact of the goods lying at Karachi was immaterial so far as the sellers' cause of action was concerned and the Karachi Court has no jurisdiction to file an award of arbitrators. (*Raymond, A.J.C.*) Mehta & Co. *v.* Messrs Parmeshar Das, Parsottam Das. **16 S.L.R. 293 = 80 I.C. 303 = A.I.R. 1924 Sind 4.**

Limitation Act.

——*Applicability of provisions of by analogy.*

Although the Limitation Act does not in terms apply to arbitrations in mercantile references it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract, and that every defence which would have been open in a court of law can be equally proposed for the arbitrator's decision unless the parties have agreed to exclude that defence. S. 3 therefore applies to arbitration proceedings. *Tyldesley's* case, 68 L.J.Q.B. 252; *Board of Trade* v. *Cayzer Irvine & Co.*, (1927) 1 K.B. 269, Rel. on. (*Lord Salvesen*). Ramdutt Ramkissen Das *v.* E. D. Sassoon & Co. **56 Cal. 1048 = 115 I. C. 713 = 56 I.A. 128 = 1929 A.L.J. 254 = 33 C.W.N. 485 = 29 M.L.W. 682 = 6 O.W.N 473 = 49 C.L.J. 462 = 31 B.L.R. 741 = 1929 M.W.N. 546 = A. I. R. 1929 P. C. 103 = 56 M.L.J. 614 (P.C).**

Motion for administration.

——*Motion is not available under the Act for administration of an estate.*

If persons want to administer an estate, they can bring an administration suit, or if they want a partial administration in certain circumstances, they can do so by originating summons, but the court has no right to do it on a motion under the Indian Arbitration Act or to do it without properly bringing in the parties either by a suit or by an originating summons. (*Rankin, C.J. and C.C. Ghose, J.*) Jnanendra Mohan *v.* Annapurna Debi. **31 C.W.N. 517 = 102 I.C. 108 = 45 C.L.J. 597 = A.I.R. 1927 Cal. 562**

ARBITRATION ACT (1899).

Scope.

———*Suit to set aside an award will lie.*

A person dissatisfied with an award made without the intervention of a Court of justice is entitled to bring an action to set it aside on the ground that no contract providing for a reference to arbitration was made or that the contract if made was not enforceable by reason of fraud or misrepresentation. He is not bound to have recourse to the Court dealing with the award under the Arbitration Act. 31 C. L. J. 283; 47 Cal. 806; 2 U. B. R. 10; 25 B. 10 Foll ; 10 L. B. R. 106 Dist,. *Obiter* : Even if the action rests on misconduct or corruption, suit is maintainable although a person has another remedy open to him under the Arbitration Act. 20 Mad. 89, Dist. 2 U. B. R. 1 Foll. (*Shadi Lal, C.J. and Campbell, J.*) FIRM GAINARAIN *v.* FIRM NARAIN DAS. **3 Lah. 296 = 69 I. C. 583 = A. I. R. 1922 Lah. 369 (378).**

S. 2—Property outside jurisdiction.

———*Although suit in respect of portion outside ordinary jurisdiction of High Court is barred reference to arbitration with regard to such property can be made under S.* 2.

A reference was made to arbitration in a dispute relating to property only a portion of which was within the ordinary jurisdiction of the Court. The arbitrator filed an award which was amended by the consent of the parties and a decree was passed accordingly. Subsequently execution was sought with regard to portion of the award which was not amended. *Held* : that although a suit could not have been instituted with regard to property without leave under Letters Patent, a reference to arbitrator could be made under S. 2 of the Act. (*B. B. Ghose and S. K. Ghose, JJ.*) GANENDRA MOHAN BHADURI *v.* BHAVANI CHARAN CHAKARAVARTI. **34 C. W. N. 268 = A. I. R. 1930 Cal. 468.**

———*Parties living in Presidency Town—One of the properties situate in that town—Award relating to such property can be filed in Presidency Town.*

Where parties live in a Presidency Town and one of the properties is situate in it, a suit for partition can be filed in that Presidency Town, although other properties are outside British India. Arbitration Act is, therefore. applicable with regard to award regarding such property. (*Kumaraswami Sastri, J.*) NEMICHAND *v.* KESARI MULL. **29 M. L. W 227 = 114 I. C. 818 = A. I. R 1929 Mad. 31 = 56 M. L. J. 35.**

S. 3—C. P. Code, Sch. 2, Para. 17.

———*Agreement to refer to arbitration made with company—Court has no jurisdiction to file it under Para.* 17.

Where an agreement is made with a company to refer to arbitration under certain contingencies, a Court has no jurisdiction to file the agreement to refer inasmuch as Arbitration Act is made applicable to such agreements by S. 152, Companies Act, and S. 3, Arbitration Act, excludes Sch. 2, Para. 17, from the operation of that Act. (*Dalip Singh, J.*) ATTOCK OIL CO., LTD. *v.* ABDUL MAJID. **118 I.C. 533 = A. I. R. 1929 Lah. 246 (1).**

S. 4—Appointment.

———*Until acceptance which need not be in writing, by arbitrator on reference signed by both parties, there is no appointment of arbitrator—Submission includes both arbitration clause and a reference.*

Submission is the first step in an arbitration and it should be in writing in order to satisfy the Act. It is usual on differences arising, that a second document called a reference is drawn up sometimes defining the disputes oftener referring all the disputes between the parties in reference to the particular contract to named arbitrators. The definition of submission in S. 4 covers both what is ordinarily termed an arbitration clause and also what is commonly called a reference. The former is a contract to refer, the latter is delegation of authority to a named arbitrator aud an agreement to be bound by the award. Ss. 7, 8 and 9 of the Indian Arbitration Act do use the word " reference " but this does not necessarily involve a formal reference to arbitration on stamped paper, for by S. 8, when the power of the Court is invoked for the appointment of an arbitrator and the Court appoints one, no formal reference need be drawn up. The appointment of a certain person as arbitrator is not complete until such person has accepted the reference and consented to act. 29 Ind. Cas. 602 ; 8 S. L. R. 302, Foll. (*Raymond, A. J. C.*) JAMES FINLAY AND CO., LTD. *v.* GURDAYAL PALAJRAJ. **17 S. L. R. 93 = 76 I. C. 660 = A. I. R. 1924 Sind 91.**

S. 4 (b)—Submission.

———*Agreement to submit if must be signed by all parties.*

The Arbitration Act does not require that an agreement to submit should be signed by both the parties. What it requires is only that there should be a written agreement to submit. *In re E.D. Lewis Ex parte Munro*, (1876) 1 Q. B. D. 724 ; *Caerleon Tinplate Co. Ltd.* v. *Hughes*, 60 L. J. Q. B. 640 ; 33 Cal. 1237 ; 42 All. 525 ; A. I. R. 1926 Cal. 938 ; Not Foll. *Baker* v. *Yorkshire Fire and Life Assurance Co.*, (1892) 1 Q. B. 144 ; *Hickman* v. *Kent*, (1915) 1 Ch. 188 ; and *Anglo Newfoundland Development Co.* v. *Regem*, (1920) 2 K B. 214, Appr. (*Rankin, C. J. and C. C. Ghose, J.*) RADHA KANTA *v.* BAERLEIN BROS., LTD. **56 Cal. 118 = 32 C. W. N. 1101 = 117 I. C. 540 = A. I. R. 1929 Cal. 97.**

———*Submission must be in writing and signed by both parties or their agents authorized therefor.*

It is an essential ingredient in a valid submission to arbitration, alike under the English Arbitration Act and under the Indian Arbitration Act, that the agreement to arbitrate should be contained in a written document signed by the parties to the submission, or by their agent or agents duly authorized in that behalf. 33 Cal. 1237 and 42 All. 525, Ref. (*Page, J.*) JOHN BATT AND CO. *v.* KANOOLAL AND CO. **53 Cal. 65 = 95 I. C. 21 = A. I. R. 1926 Cal. 938.**

———*Bill-of-lading giving option to one party only to choose forum—There is no submission within S.* 4.

By a clause in a bill-of-lading it was provided that all claims arising under the said bill-of-lading shall be determined at the port of destination of the goods according to British Law, or, at the ship-owner's option, shall be determined in the United Kingdom and to the exclusion of the jurisdiction of any other country.

Held, that unless the ship-owners exercised their option the parties would be able to file proceedings in the Court of the port of destination. The definition of submission in S. 4 of the Arbitration Act cannot be extended so as to include an agreement such as the one appearing in the bill. A submission to arbitration, according to S. 4, is a submission which provides that *either* party in case of a dispute arising on the contract is at liberty to take the necessary steps to get the dispute decided by arbitration. A. I. R. 1924 Bom. 381, Dist. (*Macleod, C.J. and Coyajee, J.*) BURJOR F. L. R. JOSHI *v.* ELLERMAN CITY LINES, LTD. **49 Bom. 854 = 89 I.C. 866 = 27 Bom. L. R. 1098 = A. I. R. 1925 Bom. 449.**

———' *Submission* ' *includes reference.*

The definition of submission in S. 4 appears to cover a contract to refer as well as the reference, the reference amounting to delegation of authority to the arbitrator.

10 S. L. R. 1, Foll. (*Broadway and Abdul Qadir, JJ.*) BAKHSH ILAHI *v.* ABDUL RAHMAN. **71 I. C. 817 = A. I. R. 1924 Lah. 405.**

———*One party submitting claim to Association—Arbitrators appointed by latter presenting claim to other party and he writing his answer to the claim—Document comes under S. 4 (b).*

The claimants submitted to the Association a claim against the respondent which they signed and sent to the Association. The arbitrators appointed by the Association laid the document before the respondent and he wrote thereon in his own hand and over his signature, his answer to the claim. He was well aware that the object of the document was to lay before the arbitrators in writing the difference which was to be decided between the parties.

Held, that the document constituted a written agreement to submit the present difference to arbitrators within S. 4 (*b*). *Baker* v. *The Yorkshire Fire & Life Assurance Co.*, (1892) (1 Q. B. 144 Ref.) (*Piggott and Walsh, JJ.*) NAINSUKH DAS *v.* GAJANAND SHYAM LAL. **43 All. 348 = 61 I. C. 269 = 19 A. L. J. 132 = A. I. R. 1921 All. 273.**

———*Inference from documents—Clause fixing time for appointment of arbitrator—Waiver.*

A submission is a written agreement signed by both parties to submit differences to arbitration and this agreement may be collected from a series of document even though connected by parol evidence. Where on the indent from it was shown that disputes arising between the vendor and the vendee would be referred to arbitrators one appointed by each party. *Held*, the submission was binding on them. Where the purchaser refused to make the appointment of an arbitrator, denying there was a submission whereupon the sole arbitrator appointed by the seller passed an award before the period of 20 days had elapsed. *Held*, that the failure to give requisite number of days for the appointment was fatal to the award of the sole arbitrator who had no jurisdiction to pass it. The refusal and failure to appoint an arbitrator did not amount to the waiver of his right by the purchase as the period of 20 days had not elapsed and the awards made by the sole arbitrator was bad in law. When a Court is asked to file an award, it has to see whether it is enforceable in the same way as a decree would be enforceable if it were a decree. (*Piggott and Walsh, JJ.*) SUKHAMMAL BANSIDHAR *v.* BABU LAL KHEDIA & CO. **42 A. 525 = 2 U. P. L. R. (A). 243 = 59 I. C. 75 = 18 A. L. J. 652.**

S. 4—Subsisting differences.

———*Where claim is statute-barred, there are no subsisting differences.*

Where, at the date of the reference, the claim, the subject-matter of submission, is statute-barred there are no subsisting differences to be referred to arbitration and a party cannot be compelled to refer such differences. (*Rupchand Bilaram, A. J. C.*) OFFICIAL RECEIVER *v.* KERSONDAS MANJI. **19 S. L. R. 24 = 95 I. C. 750 = A. I. R. 1926 Sind 209.**

S. 4—Unilateral option.

———*Option to submit to arbitration exerciseable by one party only—Award is valid.*

S. 4, Arbitration Act, like S. 27 Arbitration Act, 52 and 53 Vict. c. 49, only requires an agreement in writing to submit present or future differences to arbitration and provided the agreement is a valid agreement in writing it makes no difference whether the provision for the submission of present or future differences to arbitration is unconditional or subject to a contingency, such as the exercise of an option by one of parties. *Woodall* v. *Pearl*

Assurance Co. (1919) 1 K. B. 593, Foll. (*Aston, A. J. C.*) CHETOOMAL BULCHAND *v.* SHANKERDAS GIRDHARI LAL. **118 I. C. 220 = A. I. R. 1929 Sind 83.**

——*Option to one of the parties does not remove the agreement from the operation of S. 4.*

Where the agreement was a written agreement to refer subject to a condition, *i. e.*, the exercise of the option given to one of the parties, the fact that the agreement was subject to an option does not prevent it from being an agreement within the meaning of S. 4 of the Indian Arbitration Act. (*Aston, A.J.C.*) MULCHAND SOBHRAJ *v.* RADHAKISIN PARUMAL. **90 I. C. 932 = A. I. R. 1926 Sind. 27.**

S. 5—When to revoke.

———*Powers of revoking submission to named arbitrators ought to be sparingly used—They should be exercised only where substantial miscarriage of justice would otherwise result.*

The discretionary powers vested in the Court of revoking a submission to named arbitrators ought to be exercised in a most sparing and cautious manner ; and such powers should be exercised only when the Court is satisfied that a substantial miscarriage of justice will take place in the event of its refusal. *Scott* v. *Van Sandan*, 1 Q. B. 102 ; *Belcher* v. *Roedean School Site and Buildings, Ltd.*, 85 L. T. 469 ; *Dean of Airlie Steamship Co.* v. *Mitsui*, 106 *L. T.* 451 ; and *James* v. *James*, 22 Q. B. D. 669 ; Rel. on. (*Rupchand Bilaram, A. J. C.*) KEWALRAM TOLALDAS *v.* DIVANCHAND SEBAL & SONS. **111 I. C. 700 = A. I. R. 1928 Sind 195.**

S. 7—Insurance Policy.

———*Arbitration—Policy of Insurance providing for reference to arbitration—Reference and award under Arbitration Act, are not bad.*

Where the Policy of Insurance provided, by a clause for reference to arbitration but there was no reference to such clause of the policy in the reference, *Held* the fact that the arbitration proceedings were under the reference, before a Tribunal other than that contemplated by the clause of the policy but in itself legal was no ground for holding that the award was in any way bad. (*Kennedy, J. C. and Raymond, A. J. C.*) HIMALAYA ASSURANCE CO., LTD. *v.* ASSUDAMAL HARBHAGWAN DAS. **88 I. C. 878 = A. I. R. 1926 Sind 8.**

S. 8 (2)—Appeal.

———*C. P. Code, S. 47—Compromise not embodied in decree—Order under S. 8 (2) if appealable.*

Parties to a suit for accounts entered into a compromise and agreed to a preliminary decree being passed in accordance therewith. The compromise also provided that one of the parties would have a certain share in the profits of a contract with a tobacco firm and that the profits would be determined by a firm of Chartered Accountants. Any dispute relating to this share of the profits was to be referred to arbitration under the provisions of the Arbitration Act. A preliminary decree was passed as to past accounts and the petition of compromise was attached to it, but no mention whatsoever was made of the clause relating to the sharing of the profits of the contract as, the compromise in para. 3 expressly provided that this matter would be entirely distinct and separate from the rest. When the accounts of this contract were about to be audited, the party entitled to a share in its profits insisted upon its right to be represented at the audit. The other party denied this right, whereupon the former claimed to refer the matter to arbitration, nominated its arbitrator, called upon the other party to nominate its arbitrator and on its failure to do so made an application to the District Judge under S. 8 (2). The learned District Judge decided that a dispute had arisen and that there had been a valid submission to arbitration within the meaning of Ss. 4 and 8 of the Arbitration Act and directed that the parties were to nominate their arbitrators by a fixed date. In an appeal from that order.

Held, that the question before the Court was not one relating to the execution of any decree and that, therefore S. 47 had no application and no appeal was competent. (*Broadway and Abdul Qadir, JJ.*) BAKHSH ILAHI *v.* ABDUL RAHMAN. **71 I. C. 817 = A.I.R. 1924 Lah. 405.**

S. 8 (1) (b)—Appointment.

———*Joint submission to two arbitrators—One refusing to act—No provision for filling up—Procedure—'An appointed arbitrator', meaning of.*

There was a mutual agreement to refer to two arbitrators, specified and named in the clause of agreement itself. One of these appointed arbitrators refused to act. The submission did not show that the place of the arbitrator who refused to act should not be filled up. It was clear that the parties had not cared to fill up the vacant place.

Held, S. 8 (1) (*b*) applies, as the expression "an appointed arbitrator" can mean one of two appointed arbitrators: 43 *Bom.* 809, *Diss. from. Yeates* v. *Caruth*, (1895) 2 *Ir.* R. 146, *Dist.*; *Smith & Service* v. *Nelsons & Sons.* (1890) 25 Q. B. D. 545; *The Manchester Ship Canal Co.* v. *S. Pearson & Son, Ltd.*, (1900) 2 Q.B. 606 and A. I. R. 1921 Bom. 185, Dist. (*C. C. Ghose and Buckland, JJ.*) GENERAL ELECTRIC TRADING CO. *v.* SIEMENS (INDIA), LTD. **56 Cal. 848 = 49 C.L.J. 19 = 33 C. W. N. 418 = 116 I. C. 625 = A. I. R. 1929 Cal. 177.**

S. 8—Nomination.

———*Nomination without prejudice whether valid nomination—In presence of willing nominated arbitrators appointment of a new arbitrator is nullity—Refusal of the arbitrators brings S. 8 into play—Refusal of arbitrator to act entitle parties to appoint another arbitrator only when appointment is subject to acceptance—Communication in clear and unequivocal language of appointment* ipso facto *confers powers on the arbitrators.*

A nomination "without prejudice" is an evasion of the right or duty of a party to name an arbitrator as it is not a communication in clear and unequivocal terms. Where arbitrators who are willing to act are nominated, any subsequent nomination of a new arbitrator is a nullity and does not affect the competency of the arbitrators who are previously appointed. Nomination or appointment of an arbitrator is complete when a party has communicated it in clear and unequivocal language in writing to other party or when it is communicated to both the parties by a third person as intended by the parties themselves and by such communication authority to arbitrate is conferred *ipso facto* on the arbitrators. But if a valid nomination has been made and the arbitrator has refused to act the right of the party or a third person is exhausted and S. 8 comes into play. When the parties intend the word 'appoint' to mean 'appointment' of a willing arbitrator or when the parties make an appointment subject to acceptance, the party has the right to appoint another arbitrator if the arbitrator previously appointed refuses to act. In no other case can such a new arbitrator be appointed. (*Aston, A.J.C.*) MESSRS. A. RAMJIBHAI AND CO. *v.* MESSRS. YUSIFALI MAHOMMEDALLI ANTRIA & BROS. **76 I. C. 261 = A. I. R. 1925 Sind 12.**

Ss. 8 (1) (b) and 9 Scope

———*Arbitrator appointed sole arbitrator under S. 9 (b) refusing to act—Procedure to be applied.*

Where an arbitrator appointed by one party is made sole arbitrator under S. 9, the other party having refused to appoint its own, but he afterwards refuses to act, the procedure to be followed is not that laid down in S. 8 (1) (*b*); but that in S. 9 will be repeated and the party, who appointed the arbitrator, who became the sole arbitrator, may appoint a fresh arbitrator after giving notice to the other side: 43 Bom. 809, Rel. on. (*Percival, J. C. and Rupchand, A. J. C.*). UTTAMCHAND BRIJLAL *v.* BALMOKAND S. L. **107 I.C. 435 = A. I. R. 1929 Sind. 55.**

Ss. 8 and 9—Scope.

———*Applicability does not depend upon whether ultimately a single arbitrator or two are appointed.*

The applicability of Ss. 8 and 9 depends on the provisions in the submission whether it contemplates the appointment of a single arbitrator or two arbitrators and does not depend on the question whether ultimately two arbitrators become empowered to conduct the arbitration proceedings or one. (*Tyabji, A. J. C.*) S. L. BALMOKAND *v.* UTTAMCHAND BRIJLAL. **100 I. C. 890 = A. I. R. 1927 Sind 177.**

S. 8—Scope.

———*Any order to be made must be under Arbitration Act and conditions of S. 8 of that Act must be fulfilled.*

Any order, which in the event of the death of an arbitrator should be made, can only be made under the Arbitration Act and then only if the conditions as to written notices prescribed by S. 8 have been fulfilled. (*Sanderson, C.J. and Buckland, J.*) NARENDRA NATH DAS *v.* HARAN CHANDRA GHOSE. **43 C. L. J. 292 = 94 I. C. 177 = A. I. R. 1926 Cal. 730.**

———*Does not apply to independent appointment of second arbitrator.*

Where the proposal to refer disputes to arbitration and the nomination of first arbitrator were abandoned owing to the assurance of one party to come to an amicable settlement and as the latter proved futile, there was fresh nomination of an arbitrator.

Held, that the nomination was not in the place of first arbitrator but an independent one and S. 8 did not apply. (*Kennedy, J. C. and Raymond, A. J. C.*) FIRM OF KHALSA BROTHERS *v.* HARI RAM SRI RAM & CO. **17 S. L.R. 164 = 83 I.C. 539 = A. I. R. 1924 Sind 29.**

S. 9—Scope.

———It is not proper to import S. 9 into the contract entered into by the parties themselves to refer disputes to arbitration. (*Mukerji and Bennet, JJ.*) SHANKAR LAL LACHHMI NARAIN *v.* PHUL CHAND FATEH CHAND. **A. I. R. 1930 All. 584.**

S. 9—Appointment.

———*Contract Act, S. 52—Submission clause—Construction—Party desiring to enforce submission clause must specify nature of dispute and nominate his arbitrator first.*

Where a party intended to enforce the clause providing submission of disputes to arbitration, he should in the first instance perform his own part of the contract for the proper and expeditious disposal of the arbitration proceedings. He should, therefore, not only specify the nature of the disputes which are to be referred but also intimate to the opposite party the name of the arbitrator selected by him so as to enable the opponent to choose another person as his nominee. Where according to the terms of the indent between sellers and buyers, there was no express provision that in case of failure by one party to appoint its arbitrator, the other party could appoint both arbitrators at once.

Held, that the party desiring to enforce the submission clause ought to nominate his own arbitrator first and if both arbitrators are appointed at once, the award is liable to be set aside: A.I.R. 1921 Mad. 58 Dist ; *Muir* v. *City of Glasgow Bank*, (1879) 4 A. C. 337 ; and *Burton* v. *English*, (1884) 53 L. J. Q. B. 133, Rel. on. (*Rupchand, A. J. C.*) SHAW WALLACE AND CO. *v.* GURBUXSING BESHENSING. **109 I. C. 262 = A. I. R. 1929 Sind 58.**

S. 9 (a) and (b) Appointment.

———*Reference to two arbitrators one by each party—Arbitrators refusing to act, each party has right to appoint another in place of its retiring arbitrator—On refusal by one party other party can appoint sole arbitrator.*

S. 9 provides for supplying vacancy in case where the submission provides that reference shall be to two arbitrators, one to be appointed by each party. Under S. 9 (*a*), where both arbitrators refuse to act each party has a right to appoint an arbitrator in the place of the arbitrator appointed by that party, and if one party so appoints and the other party refuses to appoint an arbitrator in place of his arbitrator, the provisions of sub-section (*b*) would come into force and the party so appointing would be entitled after giving notice to the other party, to appoint his own arbitrator as sole arbitrator. (*Taraporewala, J.*) VALLABHDAS MEGHJI *v.* CAWAJI FRAMJI AND CO. **49 Bom. 706 = 88 I. C. 90 = 27 B. L. R. 568 = A. I. R. 1925 Bom. 469.**

S. 9 (b)—Contravening contract.

———*Contract in contravention of provision of S. 9—Procedure according to S 9 is illegal in such case.*

Each of the contracts provided that any dispute should be referred to arbitration " in accordance with the rules and by-laws of Calcutta Baled Jute Trade Association endorsed on this contract " and By-law 15 was to the effect that where one of the parties to a dispute fails to appoint an arbitrator within the time limited, " the Chairman of the Association shall appoint an arbitrator whose appointment shall be as lawful and binding upon the defaulting party as though he himself had appointed such arbitrator." The contracts further provided that both arbitrators and umpire must be persons engaged in the Baled Jute Trade and that their award would be final, subject only to a right of appeal to the Committee of the Association. Respondents failed to appoint their arbitrator and declared that the chairman had no authority to appoint an arbitrator for them as it was in contravention of the provisions of S. 9 of Arbitration Act. Thereupon appellants' arbitrator proceeded as the sole arbitrator under S. 9 in contravention of Rules of the Association and made his awards. In respondent's suit the awards were declared void. *Held*, the effect of these provisions is that on a failure by either party to appoint an arbitrator, which includes a failure to appoint a substituted arbitrator on the death or retirement of an arbitrator originally appointed, the appointment was to be made by the Chairman on behalf of the defaulting party so that in every such case there were to be two arbitrators one appointed by one of the parties and the other by the Chairman on behalf of the other party. Both were to be men engaged in the trade and the decision of these skilled men or their umpire was subject to an appeal to the Committee of the Association. It was to such a domestic tribunal so constituted that the parties had agreed to submit their differences and this agreement was quite inconsistent with S. 9 (*b*) of the Act and the contract, therefore, excludes the operation of the section. The decision made by a single arbitrator chosen by one party only would be invalid. (*Viscount Cave*) E. D. SASSOON & CO. *v.* RAMDUTT RAMKESSEN DAS. **70 I. C. 777 = 37 C. L. J. 336 = 27 C. W. N. 660 = 1923 M. W. N. 372 = 18 M. L. W. 537 = 50 Cal. 1 = 49 I. A. 366 = 32 M. L. T. 19 = A. I. R. 1922 P. C. 374 = 44 M. L. J. 758.**

S. 9—Effect of election.

———*Election of sellers to have private arbitration puts an end to buyer's remedy to arbitrate through public tribunal.*

Where an arbitration clause in contract provided for arbitration under the rules of the Bengal Chamber of Commerce or at the option of the sellers by two European sugar importers and the sellers exercised such option and decided to take the latter course but did not appoint their arbitrator or take any further step, nor did the buyer follow the procedure laid down in S. 9 of the Arbitration Act.

Held that the buyers were not entitled to revert to the other mode of arbitration by the Tribunal of Arbitration of the Bengal Chamber of Commerce. (*Buckland, J.*) SUNDERMULL PORESHRAM *v.* TRIBUBHAN HIRACHAND AND CO. **51 Cal. 657 = 82 I.C. 769 = A. I. R. 1924 Cal. 828.**

S. 9 (b)—More than one arbitrator.

———*One has to be appointed convener—Effect of arbitrator not attending on date fixed will under certain circumstances be construed as refusal to act as arbitrator and on such refusal followed by non-appointment of another man one arbitrator would suffice.*

Where more than one arbitrator is appointed it is absolutely necessary to appoint a convener in view of the possibility that the arbitrators may not agree as to the time and date of sitting, or one of them may refuse to attend on the date fixed by the other without refusing to act as an arbitrator, in which case alone he is to be deemed as having vacated his place giving rise to the necessity of another arbitrator being appointed. If then one of them has the power to convene the meeting of arbitrators so as to make it compulsory on the others to attend, and the latter refuse to attend, his conduct could, under certain circumstances, be construed as amounting to refusal to act as an arbitrator, in which case the party nominating him would be called upon to appoint another arbitrator; and if he has failed to do so within a certain time, only one arbitrator would suffice, under S. 9 (*b*), Arbitration Act of 1899. (*Sen and Niamatullah, JJ.*) GAJANAND SITA RAM *v.* PHUL CHAND FATEH CHAND. **A. I. R. 1930 All. 675 (b) at 677.**

S. 9 Party.

———*Official Receiver or trustee in bankruptcy is not party within S. 9 nor can he be compelled to be a party where the bankrupt's estate is debtor.*

According to the literal or ordinary meaning a "party" would refer to the contracting party, and whatever doubts may exist as to the expression "party" having been used in Ss. 8 and 9 in an extended or wider sense so as to include parties and persons claiming through or under them, so as to include their legal representatives, the Official Receiver or the trustee in bankruptcy does not come within the purview of this extended meaning. The Official Receiver claims adversely to the bankrupt by operation of the statute. He cannot be compelled to be a party to the submission in a case where the bankrupt's estate is the debtor and not the creditor. Even where there is a reference to a named arbitrator, the trustee in bankruptcy is not as a general rule bound by the submission. (*Rupchand Bilaram, A. J. C.*) OFFICIAL RECEIVER *v.* KERSONDAS MAVJI. **19 S. L. R. 24 = 95 I. C. 750 = A. I. R. 1926 Sind 209.**

Ss. 9 and 8 (1) (b)—Scope.

——*Arbitrator appointed sole arbitrator under S. 9 (b) refusing to act—Procedure to be applied.*

Where an arbitrator appointed by one party is made sole arbitrator under S. 9, the other party having refused to appoint its own, but he afterwards refuses to act, the procedure to be followed is not that laid down in S. 8 (1) (*b*); but that in S. 9 will be repeated and the party, who appointed the arbitrator, who became the sole arbitrator, may appoint a fresh arbitrator after giving notice to the other side. 43 Bom. 809, Rel. on. (*Percival, J. C. and Rupchand, A. J. C.*) UTTAMCHAND BRIJLAL *v.* BALMOKAND, S. L. **107 I. C. 435 = A. I. R. 1929 Sind 55.**

S. 9—Scope.

——In a fire insurance policy there was a clause for reference to arbitration in case of dispute as to the compensation. There was, however, no provision to meet the contingency of one arbitrator after appointment refusing to act. According to English Arbitration Act (1889), S. 6 (corresponding to S. 9, Arbitration Act, 1899), in such a case, the arbitrator who has not refused to act, can act alone but according to R. 218 (3) of the Rules framed under Art. 129 of the Ottoman Order in Council, it is provided that where an arbitrator refuses to act and the other parties decline to make an appointment to fill the vacancy the Court may appoint an arbitrator. A dispute having arisen and after it was referred to two arbitrators, one by each party, one of the arbitrators refused to act after appointment and, therefore, the other acted as sole arbitrator and made an award.

Held, that the English Arbitration Act does not apply and the award must be set aside. (*Lord Buckmaster, J.*) SOUTH BRITISH INSURANCE CO., LTD. *v.* GANLI BRO. AND CO. **110 I. C. 290 (P.C.).**

——Where the submission provides that the reference shall be to two arbitrators and an arbitrator appointed by one of the parties is duly declared to be the sole arbitrator and, he thereafter, refuses to act, the then vacancy has to be supplied in accordance with S. 9. (*Tyabji, A. J. C.*) S. L. BALMOKAND *v.* UTTAM CHAND BRIJLAL. **100 I. C. 890 = A. I. R. 1927 Sind 177.**

S. 9 (b)—Scope.

——*Section applies only in absence of contract providing otherwise.*

Where the contract provides otherwise, an appointment, cannot be made under S. 9, cl. (*b*) and the proviso enabling the Court "to set aside any appointment made in pursuance of cl. (*b*)" has no application in such a case. *Gumm* v. *Hallet.* (1872) L. R. 14 Eq. 555, Ref. It cannot make any difference merely because the contract provides also that the arbitration is to be conducted in accordance with the Arbitration Act. The words in the contract "shall be at liberty to nominate both the arbitrators" express a different intention not only in so far as two arbitrators are contemplated by the clause in place of the sole arbitrator referred to in S. 9 (*b*) but are inconsistent with any obligation on the part of the nominating party to appoint an arbitrator before calling on the other party to do so. (*Wallis, C. J. and Ramesam, J.*) SHAW WALLACE & CO. *v.* K. M. SUBBIER & SONS. **44 Mad. 406 = 14 M. L. W. 42 = 1921 M. W. N. 148 = 62 I. C. 205 = A. I. R. 1921 Mad. 58 = 40 M. L. J. 166.**

S. 9—Submission.

——*Submission to arbitration—Number of arbitrators is not limited—Parties can add new arbitrators—Party acquiescing in such addition is estopped from objecting on this ground.*

The Act does not limit in any way the number of arbitrators nor does it prevent the parties, if they choose to do so as a matter of business by common consent altering either the number or the constitution of the tribunal to suit their own needs. Where the original appointment of the arbitrators and the Umpire is in writing a variation of it by addition of more arbitrators cannot be enforced against either party against its will without some writing by common consent. But a party who has co-operated in and acquiesced in the altered state of things is estopped from raising any objection on this ground subsequently. (*Walsh and Ryves, JJ.*) ABDUL SHAKUR *v.* MUHAMMAD YUSUF. **43 All. 456 = 19 A. L. J. 348 = 62 I. C. 426 = A. I. R. 1921 All. 64.**

S. 9—Suit.

——*Suit filed despite reference—Specific performance cannot be enforced but only stay of suit can be asked for.*

Where, for the determination of the controversy between the parties, two competent tribunals are available, the Court and the arbitrators, and one party chooses the latter but in fact has recourse to the former, it is not open to his opponent to enforce specific performance of the contract or to plead the contract as a conclusive bar to the suit : but he may apply to the Court to stay the suit in the exercise of its judicial discretion, so as to leave the plaintiff no other remedy than to proceed by arbitration. A Court invited to exercise its judicial discretion to deprive a party of the remedy by suit must be satisfied that the remedy to proceed by arbitration is really available. (*Mookerjee and Fletcher, JJ.*) JOKHIRAM KAYA *v.* GANESAMDAS KEDARNATH. **25 C. W. N. 62 = 61 I. C. 380 = A. I. R. 1921 Cal. 244.**

S. 10—Courts powers.

——*S. 10—Party cannot apply to Court for order directing umpire to state a case.*

Under the Indian Act parties to the arbitration have no right to apply to the Court for an order directing the umpire to state a case and his refusal to so state a case on request of a party does not amount to legal misconduct. (*Ramesam and Cornish, JJ.*) ARUNACHALA IYAH *v.* LOUIS DREYFUS & CO. **39 M.L.T. 563 = 27 M. L. W. 267 = 1928 M. W. N. 132 = 107 I. C. 793 = A. I. R. 1928 Mad. 107 (114).**

S. 10 (b)—Opinion of Court.

——*Opinion of Court is not binding on the arbitrators nor can it operate as* res judicata.

In India arbitrators have the discretion to state a special case for the opinion of the Court, and Courts cannot compel them to do so. But if an opinion is sought by the arbitrators, that opinion of the Court does not in any case under all circumstances bind them. They still remain final judges of law and facts and they are not legally bound to follow it. However, they may not lightly flout the opinion so obtained because they would in that case run the risk of having their award set aside on the ground of dishonesty or immorality but there may exist special circumstance which may not make their conduct dishonest or immoral even if they do not act upon it. The order of the Court on application under S. 10 (*b*) is an opinion given by the Court in what is merely the consultative jurisdiction of the Court and it is not a judgment and cannot operate as *res judicata*. Further one of the arbitrators who had not joined in seeking the opinion of the Court is certainly not bound by it. (*Lobo, A. J. C.*) ADAMJI AND LUKMANJI AND LOUIS DREYFUS & CO. *v.* IN THE

MATTER OF ARBITRATION. **79 I. C. 986 = A. I. R. 1925 Sind 83.**

S. 10—Umpire's duty.

——*Umpire is not bound to state special case—Aggrieved party not applying immediately to revoke submission cannot question award after it is passed.*

The power to state a special case is merely permissive and enabling and not compulsory and the umpire is not bound to state a special case at the request of a party to the submission. The party who asks the umpire to state a special case and is refused, should on such refusal apply to the Court forthwith to revoke the submission. If he does not do this, it is too late to come to the Court when the reference is concluded and an award has been made against him. (*Greaves, J.*) SEWDUTRAI NARSARAI *v.* TATA SONS, LTD. **27 C. W. N. 494 = 77 I. C. 769 = A. I. R. 1921 Cal. 576.**

S. 11 (2)—Appeal.

——*Letters Patent (Rangoon), Cl.* (13)—*Order returning the award for complying with S.* 11 (2), *Arbitration Act, is not a judgment and no appeal lies therefrom.*

Where the trial Court held that the arbitrators, by not giving notice to the parties before sending the award to the Court, acted with material irregularity and in breach of the statutory obligation imposed by S. 11 (2), Arbitration Act, and ordered the award to be sent back to the arbitrators to enable them to act according to law.

Held, that such an order was not a judgment within the meaning of Cl. 13 of the Letters Patent and no appeal lay on it. 45 Cal. 502 and A. I. R. 1925 Rang. 43, Foll. (*Rutledge, C. J. and Carr, J.*) I. E. ABOWATH *v.* A. E. ABOWATH. **114 I. C. 521 = 6 Rang. 25 = A. I. R. 1928 Rang. 110.**

S. 11—Appellate committee's award.

——*Award of Committee of appeal, on appeal from umpire according to contract by parties, can be filed—Committee are arbitrators.*

Where according to the contract between the parties, a dispute was referred firstly to arbitrators, then to an umpire and then to a Committee of appeal from him.

Held, (*C. C. Ghose, J.*), that the committee are really a fresh set of arbitrators called in by the parties and the award of the committee can be filed in Court. *Buckland, J.*—Successive awards are not *per se* to be condemned, inasmuch as the process of infinitesimal repetition is at once arrested when the Court of law becomes entitled to give effect to the award and that the Committee is a body other than a Court of justice to whom the parties have agreed to refer their dispute. Such a proceeding is known to the law as an arbitration, and those in whom the arbitrament is lodgedare known as arbitrators or an umpire, and their award as such is one which the successful party is entitled to require to be filed. (*C. C. Ghose and Buckland, JJ.*) HEERALAL AGARWALA & CO. *v.* JOAKIM NAHAPIET & CO., LTD. **55 Cal. 180 = 31 C. W. N. 730 = 103 I. C. 648 = A. I. R. 1927 Cal. 647.**

——*Award by a private appellate tribunal, hearing appeal from award of umpire by agreement between parties cannot be filed.*

Ss. 10 to 15 are general sections applying to all awards under the Act, whether the provisions of the first schedule are applicable to the particular arbitration or whether they are excluded by the expressed intention of the parties. Under these sections the only persons or tribunals considered as having seisin of the arbitration are the " arbitrators or umpire." There is no recognition

to be found in the Act for an award by a tribunal superior to the umpire. Umpire does not mean " umpire or any higher domestic tribunal upon which the parties may agree." Therefore where, according to the terms of a contract between the parties, the award made by the umpire is submitted to a Committee of Appeal and reversed by them the Committee's award cannot be filed as an award under the Indian Arbitration Act. (*Pearson, J.*) HEERALAL AGARWALA & CO. *v.* JOAKIM NAHAPIET & CO. **31 C. W. N. 446 = 102 I. C. 395 = A. I. R. 1927 Cal. 391.**

S. 11—Enforceability of award.

——*Award on submission under this Act only can be filed in Indian Court.*

Only an award made pursuant to a submission under the Indian Arbitration Act can be filed in an Indian Court for it is only over such an award that the Court has complete control, the provisions of the Act in many respects being inapplicable to awards made under any other Act, whether in England or elsewhere. A. I. R. 1922 P. C. 120, Ref. (*Page, J.*) JOHN BATT & CO. *v.* KANOOLAL & CO. **53 Cal. 65 = 95 I. C. 21 = A. I. R. 1926 Cal. 938.**

——*C. P. Code, Sch. II, Para.* 1—*Parties to a suit pending in Court having jurisdiction can refer the subject-matter to arbitration without Court's intervention but award cannot be filed either under Sch. II or Arbitration Act—It can be filed only as adjustment under C. P. Code, O.* 23, *R.* 3.

Per *Kennedy, J. C.*—The parties have power to refer a matter without the leave of the Court, which matter forms subject-matter of suit pending in a Court of competent jurisdiction, to arbitration. But if they do so, the Court has not the power to file the award as an award and pass a decree on it under the Second Schedule of the C. P. Code or to allow the award to remain filed under the Indian Arbitration Act, but should act under O. 23, R. 3, C P. Code, A. I. R. 1921 Bom. 310, Rel. on.

Per *Madgavkar, A. J. C.*—When parties to a suit desire to refer the subject-matter of the suit to Arbitration, the Indian Arbitration Act has no application and the procedure which the law contemplates and favours is that they should apply to the Court, as laid down in paragraph 1 of the Second Schedule of the C.P. Code. This paragraph is not, however, mandatory nor is the 2nd Schedule exhaustive, and reference by parties without the leave of the Court is not illegal or invalid. But paragraphs 17 to 22 of the Second Schedule of the C.P. Code do not apply to such references, which can only be treated as ordinary agreements. If on such a reference an award is passed by private arbitration the Court cannot file it under the Arbitration Act nor pass a decree under the Second Schedule but the award can be brought to the Court's notice under Order 23. Rule 3, C.P. Code as an adjustment by lawful agreement and if proved to the satisfaction of the Court, can be recorded, and a decree passed in accordance therewith. A.I.R. 1921 Bom. 310, Rel. on.

Per *Aston, A. J. C.*—The parties to a suit pending in a Court of competent jurisdiction have the power to refer without the leave of the Court the matter which forms the subject-matter of the suit to arbitration both under C. P. Code and under the Indian Arbitration Act. If they do so and an award is passed in such matter by private arbitration, the Court has jurisdiction to file the award and pass a decree thereon under paragraph 21 of the Second Schedule of the C.P. Code it has also jurisdiction to file it under Ss. 11 and 15 of the Arbitration Act and enforce it as a decree of the Court ; it has also jurisdiction to record the award as an adjustment by lawful agreement or compromise of the suit under Order 25, Rule 3, and pass a decree in accordance therewith, provided the award recorded is an adjustment in the strict sense. What is an adjustment is a question of fact. (*Kennedy, J. C. and Madgavkar and Aston, A. J. Cs.*) HAJI UMAR *v.* SHIVALDOS. **81 I. C. 653 = 16 S. L. R. 174 = A. I. R. 1921 Sind 65 (67, 68, 71, 72) (F B.)**

Ss. 11 and 15—Enforceability of award.

———*Notice of filing is not necessary—*Ex parte *procedure without notice is bad.*

An award becomes enforceable as soon as it is filed in Court and it is not necessary before it is enforced to show that notice of filing was given to the parties by the arbitrator. Where an arbitrator proceeds *ex parte*, he should give notice to the parties, before he so proceeds; otherwise his award is liable to be set aside. (*Mookerjee and Fletcher, JJ.*) UDAICHAND PANNALAL *v.* DEVIBUX JIWANRAM. **47 Cal. 951 = 60 I. C. 987.**

S. 11—Filing.

———Any one arbitrator can on behalf of himself and the others send the award to the Court. (*Chari, J.*) KHATIZA BEE BEE *v.* I. E. ABOWATH. **5 Rang. 171 = 102 I. C. 800 = A. I. R. 1927 Rang. 197.**

S. 11—Forum.

———*Contract to send goods from Cawnpore to Karachi—Goods not sent—Breach at Cawnpore—Arbitration award can be filed in Karachi.*

A Cawnpore firm sold to a Karachi firm certain goods on " Karachi Pass Terms." The sellers, under the condition, were to deliver the goods at Cawnpore Railway station and obtain a Railway receipt in the name of the buyers ; the goods were subject to inspection at Karachi and if found not according to the contract might be either rejected or accepted with allowance, and 9 per cent. of the price was to be advanced to the sellers at Cawnpore in exchange for the Railway receipt. The sellers failed to deliver any goods. The buyers who went to arbitration filed the award in the Karachi Court.

Held, the sellers failed to consign the goods at Cawnpore and therefore breach of the contract occurred at Cawnpore. But according to the decision arrived at by a Bench in *Mayamal Bishindas* v. *Sanday Patrick and Co.* (5 S. L. R. 97) the award might be allowed to be filed in Karachi Court. (*Kemp, A. J. C.*) C. H. PENNY *v.* ATRAUSS & CO., LTD. **64 I.C. 674 = 15 S.L.R. 74 = A. I. R. 1922 Sind 32.**

S. 11 —Functus officio.

———*Umpire becomes* functus officio *after the award is published and cannot be examined as to the meaning of the award—Patent ambiguity in award—Court will not enter into enquiry as to its correct meaning.*

It is not permissible to the Court to send for the umpire and examine him as to the meaning of his award. The umpire is a *functus officio* after he has published his umpirage or award, and the document must speak for itself. Where the ambiguity is patent on the face of the document it would not be competent to the Court to launch into an inquiry to ascertain which of the two possible interpretations of the document the Court should accept as the correct one. (*Mirza, J.*) VALLABHDAS NARANDAS & CO. *v.* KESHAV LAL HIMAT LAL. **29 Bom. L. R. 660 = 104 I. C. 94 = A. I. R. 1927 Bom. 428.**

S. 11 (2)—Notice.

———*Failure to serve notice is fatal.*

Failure to serve notice by the arbitrators as required by S. 11, Cl. (2), is fatal. (*Chari, J.*) KHATIZA BEE BEE *v.* I. E. ABOWATH. **5 Rang. 171 = 102 I.C. 800 = A. I. R. 1927 Rang. 197.**

———*Failure to give notice of filing award is not a ground for setting aside.*

Failure to give notice of filing of award does not by itself vitiate an award which is otherwise valid or afford any grounds for having it set aside. (*Rupchand Bilaram, A.J.C.*) LOUIS DREYFUS & CO. *v.* TARACHAND GHANSHAMDAS. **95 I.C. 378 = A.I.R. 1926 Sind 242.**

S. 11—Remuneration not illegal.

———*Receiving fees by arbitrators beforehand is within the scope.*

There is nothing in the section which precludes the arbitrators from either fixing the fees or receiving the fees beforehand. The section only lays down that in case the award is given, the arbitrators shall state in the award what amount is payable to them for their fees. That assumes that the fees were not paid beforehand, and, to hold that the arbitrators are bound to conduct the arbitration on the off-chance of their being paid or not at the end of the enquiry would be going beyond the provisions of S. 11. In India at least the arbitrators would not be guilty of misconduct in getting payment of a reasonable fee beforehand. (*Kumaraswamy Sastri, J.*) NARASIMHULU CHETTY, *In the matter of.* **17 M. L. W. 648 = 75 I.C. 850 = A. I. R. 1924 Mad. 274.**

Ss. 11, 7 and 12 to 15—Scope.

———There is no express provision in the English law as to what is to happen to an award, when it is made, with the single exception of the section which enables the party to enforce it as though it were a judgment. The reason for that is that the machinery is so familiar and habitual that no provision on the subject is necessary. Either party on receiving notice from the arbitrator that the award has been made, can take it up from him. Once the arbitrator has parted with it, he is *functus officio* and he cannot exercise the power given to him by S. 7 of Act IX of 1899, none-the-less the Court is able to remit to him if satisfied that an honest mistake has been made. There are express provisions to be found in S. 11 of the Act as to what is to be done by an arbitrator, if he has made his award. When the question when an arbitrator in India becomes *functus officio* comes to be decided, the line will have to be drawn somewhere in the procedure which is laid down in S. 11 for getting the award into Court. It is difficult to hold that an arbitrator is *functus officio*, while there are still express statutory duties laid upon him by the Act. The procedure laid down by the Act is that the various stages to be found in Ss. 11 to 15 are to be followed in the same chronological order as the numerical order of the sections and that an application to set aside is not as a rule within the jurisdiction of the Court, until some application or attempt has been made to file the award or some other similar step is taken to enforce it. (*Walsh and Ryves, JJ.*) FIRM RAM KISHAN DASS BRIJ MOHAN *v.* FIRM SUSHILCHANDRA DASS. **A. I R. 1923 All. 31.**

S. 11 (2)—Signing necessary.

———*Written submission to arbitration not filed with award—Award not signed by all arbitrators—Award cannot be enforced—Madras High Court Original Side Rules O.* 38, *R.* 7*—C. P.Code, Sch.* 2, *Paras.* 10 *and* 20.

An award was brought to Court by one of several arbitrators at the instance of a party. Written submission to arbitration by the parties was not filed along with the award as required by the Original Side Rules. Further the award was signed only by one of the arbitrators and not by all.

Held, that the award could not be made a rule of the Court either under Arbitration Act or under Sch. 2, C. P. Code. (*Kumaraswami Sastri*, *J.*) NEMICHAND *v.* KESARIMULL. **29 M. L. W. 227 = 114 I. C. 818 = A. I. R. 1929 Mad. 31 = 56 M. L. J. 35.**

——*Award is not valid unless written and signed.*

Award under S. 11 must be in writing and must be signed. The arbitrators no doubt must arrive at a decision before reducing it to writing but having done so they are bound to make an award in writing and sigining of the award is not a mere formality. (*Robinson, C. J. and May Oung, J.*) LALJEE JAISING *v.* S. P. TEWARI. **3 Bur. L. J. 102 = 82 I. C. 802 = A. I. R. 1924 Rang. 319.**

S. 11—Some arbitrator not acting.

——*S. 11—Resignation of one arbitrator and his refusal to sign the view of majority does not render the award invalid.*

Where the third arbitrator resigned because there was a majority against his view and did not sign the award.

Held, that this did not affect the validity of the award. (*Broadway, J.*) MANSA RAM *v.* KARTA RAM. **76 I.C. 1007 = A. I. R. 1923 Lah. 411.**

S. 12—Award.

——*Award made after expiry of period—Application lies to extend time.*

The Court has power under S. 12 to extend the time for making the award even when the period originally allowed has already expired and the award has been in fact made. 46 Cal. 1069 and A. I. R. 1928 Mad. 69 (F. B.. Foll. ; 13 All. 300 (P. C.) and 38 Cal. 622 Expl. ; 18 C W. N. 1325 ; *Knowles and Sons Ltd.* v. *Bolton Corporation*, (1900) 2 Q. B. 253 and *May* v. *Harcourt* (1884) 13 Q. B. D. 688, Ref. (*Rangnekar, J.*) LALLTBHAI BRIJMOHAN *v.* JAMNADAL HARAKHJI SANGHAVI. **A. I. R. 1930 Bom. 462 at 463.**

S. 12—Extension of time.

——*Court can extend time for award whether original period has expired or not.*

The Court has power under S. 12 to extend the time for making the award whether the time originally fixed has expired or not. (*Kennedy, J.C. and Raymond, A. J.C.*) HIMALAYA ASSURANCE CO., LTD. *v.* ASSUDAMAL HARBHAGWAN DAS. **88 I. C. 878 = A.I.R. 1926 Sind 8.**

——*Court must consider all circumstances of the case.*

All the circumstances of the case must be taken into consideration by the Court when deciding under Section 12 of the Arbitration Act if the arbitrator should be granted the indulgence of having the time extended for making an award. (*Rupchand Bilaram, A.J.C.*) FIRM MOTHARAM DAWLATRAM *v.* FIRM MAYODAS DAWLATRAM. **19 S.L.R. 251 = 78 I.C. 521 = A.I.R. 1925 Sind 150.**

——The arbitrators themselves cannot extend, the time for passing of the award and an award passed after the time fixed therefor has expired is bad. But the Court has got the power for extending the time even though the award has been completed. (*Schwabe, C.J. and Wallace, J.*) LOUIS DREYFUS AND CO. *v.* RAJAGOPALA & BROS. **16 M.L.W. 657 = 70 I.C. 353 = A.I.R. 1923 Mad. 222.**

S. 13—Award—Validity of.

——*Error-in-law must be one which appears on the face of the award or of a document forming part of it —Amount payable not specified but rule of calculation given—Award is valid—C.P. Code., Sch. II, para.* 14.

The error-in-law must be distinctly collected from the face of the awards, or from any document accompanying or forming part of the awards. Where the awards did not specify the amounts, which had to be paid *held* that it is not sufficient ground for remitting the awards, if the arbitrator has given the rule for calculating the amounts to be paid. In re *Keighley Masted & Co. and Durant & Co.* (1893) 1 Q.B. 405, *Hodgkinson* v. *Fernie*, (1857) 3 C B. (N.S.) 189 Ref. (*Sandarson, C.J. and Richardson, J.*) U. M. CHOWDHURY & CO. *v.* JABAN KRISHNA GHOSE & SON. **49 Cal. 646 = 69 I.C. 995 = A.I.R. 1922 Cal. 447.**

Ss. 13, 14 and 15—Enforceability.

——*Portion of the award not remitted for reconsideration nor set aside is enforceable as decree under S.* 15.

According to the provisions of the Arbitration Act the arbitrator only files the award in the Court and after that the Court may remit the award for re-consideration or set it aside under Ss. 13 and 14 of the Act. When this is not done the award is enforceable as if it were a decree under S. 15 of the Act. A dispute relating to property only a portion of which was within original jurisdiction of the High Court was referred to arbitration. The award was amended by the consent of the parties and a decree passed accordingly. Subsequently a widow sought execution of the portion of the original award relating to her maintenance.

Held, that although the decree made was itself of no force the portion of the award as originally made and not amended or remitted by the Court of which execution was sought could be enforced as regards the widow as a decree of the Court under S.15. *Pisini* v. *Attorney-General of Gibraltar*, (1880) 5 P.C. 516 and 2 I.A. 219, Ref. (*B.B. Ghose and S. K. Ghose, JJ.*) GANENDRA MOHAN BHADURI *v.* BHAVANI CHARAN CHAKRAVARTI. **34 C.W.N. 268 = A.I.R. 1930 Cal. 468.**

S. 13—Extension of time.

——*Letters Patent (Madras), Cl.* 15—*Appeal.*

An order refusing to enlarge the time for the submission of an award remitted to the umpire on an application under S. 13, Arbitration Act is a judgment and is appealable. 35 Mad. 1 (F.B.) and 42 Bom. 260, Rel. on. (*Coutts-Trotter, C.J. and Kumaraswami Sastri and Reilly, JJ.*) G. MARTIROSI *v.* SUBRAMANIAM CHETTIAR. **51 Mad. 103 = 109 I.C. 70 = 27 M.L.W. 51 = 1928 M.W.N. 107 = A.I.R. 1928 Mad. 69 = 54 M.L.J. 49 (F. B.)**

——*Party not to blame for not applying for extension of time—Time should be extended.*

Where both parties appeared and went on before the umpire without taking any objection as to the expiry of the time limited under S. 13, Arbitration Act, and the parties as well as the umpire overlooked the fact that the order remitting the matter for the consideration of the umpire did not specify any time within which the award was to be returned and that under S. 13 the law imposes a limit of three months and thus there was no default on the part of the petitioner in asking for an extension of time.

Held, that the time should be extended. (*Coutts, Trotter, C. J. and Kumaraswami Sastri, and Reilly JJ.*) MARTIROSI *v.* SUBRAMANIAM CHETTIAR. **51 Mad. 103 = 1928 M.W.N. 107 = 27 M.L.W. 51 = 109 I.C. 70 = A.I.R. 1928 Mad. 69 = 54 M.L.J. 49 (F.B.).**

——*Award remitted without fixing time—Award given—Court can extend time for delivery of the award.*

Per *Full Bench.* In cases where an award is remitted for the decision of the arbitrators or umpire without fixing any time for the return of the award the Court has power to extend the time fixed by S. 13, Arbitration Act, after the arbitrators or umpire have, after the remission, given their award. 13 All. 300 (P.C.), Expl. and Dist. (*Coutts-Trotter, C. J. and Kumaraswami Sastri, and Reilly, JJ.*) MARTIROSI *v.* SUBRAMANIAM CHETTIAR. **51 Mad. 103 = 1928 M.W.N 107 = 27 M.L.W. 51 = 109 I.C. 70 = A.I.R. 1928 Mad. 69 = 54 M.L.J. 49 (F.B.).**

S. 13 (1)—Remission of award.

——*Order remitting an award on the ground of arbitrator's misconduct is not appealable.*

Where the submission is good but the Court remands the case for making a fresh award on the ground of misconduct of the arbitrator, the order is not appealable. 45 C. 502, Dist. 12 Bom. L. R. 852, Foll. Arbitration Act is complete in itself and is not affected by rules as to appeal as laid down in the Civil Procedure Code with reference to the proceedings taken under the Second Schedule of that Act. (*Duckworth and Po Han, JJ.*) SAYA PYE *v.* U. KUNDINNYA. **2 Bur. L.J. 193 = 1 Rang. 661 = 76 I.C. 525 = A.I.R. 1924 Rang. 47.**

——*Power is confined to grounds in S.* 14.

A Court's power of remitting an award under S. 13 of the Arbitration Act is limited to the grounds specified in S. 14 of the Act. Where the Court laid down the law in remitting an award though no case was stated for its opinion and had given a decision on the point which was within the competence of the arbitrators.

Held, such an order was revisable under S. 115, C.P. Code. (*Raymond and Rupchand Billa Ram, A.J.Cs.*) MESSRS. DUTTON MASSEY AND CO. *v.* JAMNADAS HARPARSAD. **19 S.L.R. 152 = 76 I.C. 84 = A.I.R. 1924 Sind 51.**

S. 13—Remission of award.

——*Discretion not judicially exercised can be interfered with by appellate Court.*

Ordinarily an appellate Court will not interfere with the discretion of the first Court in declining to remit an award, but the discretion being a judicial one, the appellate Court will interfere where no grounds have been shown why the award should not be remitted to the arbitrators. In the absence of anything to show that the umpire was either prejudiced or was otherwise unfitted to hear and determine the case, the Court ought to remit the award to the arbitrators. (*Schwabe, C.J. and Wallace, J.*) LOUIS DREYFUS & CO. *v.* RAJAGOPALA & BROS. **16 M.L.W. 657 = 70 I.C. 353 = A.I.R. 1923 Mad. 222.**

Ss. 13 (1) and 14—Remission of award.

——*Arbitrator not guilty of fraud, partiality or like misconduct—Award may be remitted, not set aside.*

The Court may remit the award where the arbitrator has been guilty of misconduct in a technical sense, that is, if the misconduct is of such a nature as does not disqualify him from acting or render it impossible for the Court to trust him. If the arbitrator is guilty of fraud or partiality or such like misconduct, as would justify his removal, the Court will not remit the award. But where the arbitrator has merely failed to exercise all his powers or has improperly exercised a discretion, such as, hearing witnesses or consulting documents in the absence of the parties, and this has happened in spite of a complete absence of dishonest motive, the Court will not hesitate to remit the award to the arbitrator instead of setting it aside. An arbitrator is the Judge chosen by the parties ; he has a wide measure of discretion as to the manner in which the proceedings are to be conducted and a due knowledge of the whole case is to be brought to his mind. His award will not be set aside, merely because the Court differs in opinion from him upon the merits of the dispute submitted for his decision. Case-law Ref. to. (*Mookerjee, A.C.J. and Fletcher, J.*) HARI SINGH *v.* KANKINARAH CO., LTD. **34 C.L.J. 39 = 66 I.C. 389 = A.I.R. 1921 Cal. 657.**

Ss. 14 and 9 (b)—Adjournment.

——*Case not falling within S. 9 (b)—Arbitrator is not bound to grant adjournment to enable Court being moved for setting aside appointment.*

In cases not falling within S. 9 (*b*) the arbitrators are not bound to adjourn for enabling parties to move the Court to set aside the appointment of arbitrators. Refusal to adjourn is not misconduct in such circumstances. Even if S. 9 (*b*) applied, the arbitrators are bound to adjourn only if the parties have not had a reasonable opportunity to move the Court to set aside the appointment; and adjournment can also be refused if the arbitrators are of opinion that the application is made merely for the purpose of causing delay. (*Wallis, C.J. and Ramesam, J.*) SHAW WALLACE & CO. *v.* K. M. SUBBIER & SONS. **44 Mad. 406 = 62 I. C. 205 = 14 M. L. W. 42 = 1921 M. W. N. 148 = A. I. R. 1921 Mad. 68 = 40 M. L. J. 166.**

S. 14—Applicability.

——*S.* 14 *applies where arbitration is improperly procured e.g. by misrepresentation.*

Section 14 applies not only to cases, where there had been misconduct on the part of the arbitrators, it also applies to cases, where the arbitration itself has been improperly procured. An objection therefore alleging that consent to submission had been obtained by misrepresentation would come within the purview of that section. (*Aston, A. J. C.*) ISRIBAI *v.* PEVIBAI. **121 I. C. 164 = A. I. R. 1930 Sind 195.**

S. 14—Award—Finality of.

——*No evidence led on date of hearing—Still decision on objection to filing of award under S.* 14 *is* res judicata—*C. P. Code, S.* 11.

The principle of finality of adjudication is not limited to the final adjudication of matters in issue in a suit. It applies eqully to an adjudication by the arbitration Court of objections to an award falling within the purview of Arbitration Act. And the mere fact that no evidence was led at the date fixed for hearing would not prevent the principle of finality of adjudication from applying. And the discovery of additional evidence of misrepresentation would not entitle the plaintiff to have the matter retried. A. I. R. 1925 Sind 42; 13 M. I. A. 160; 12 Cal. 563; Marriat *v.* Humption, 7 T. R. 269 Rel. on. (*Aston, A.J.C.*) ISRIBAI *v* PEVIBAI. **121 I. C. 164 = A. I. R. 1930 Sind 195.**

S. 14—Award—Reference.

——*Propriety of reference should be determined by Court.*

It is for the Civil Court to find whether there was a proper reference to arbitration and whether the matters were validly before the arbitrators and the umpire. (*Ramesam and Cornish, JJ.*) ARUNACHALA AYYAR *v.* LOUIS DREYFUS & CO. **39 M. L. T. 563 = 27 M.L.W. 267 = 1928 M.W.N. 132 = 107 I. C. 793 = A. I. R. 1928 Mad. 107.**

S. 14—Award—Setting aside.

——*Application to set aside an award—It is entertainable only by Court in which award is filed.*

The only Court which has jurisdiction to entertain an application under S. 14 to set aside an award or to decide whether the award has been improperly procured or not, is the Court in which the award has been caused to be filed. A. I. R. 1925 Sind 42, Foll. (*Rupchand Bilaram, A. J. C.*) MALOTRA & CO. *v.* SUKDAYAL KAPUR. **112 I. C. 318 = 23 S. L. R. 427 = A. I. R. 1928 Sind 169.**

——*C. P. Code, S.* 10—*Award passed at* K—*Suit to set aside award in* M. *Court—Subsequent Application under S.* 14, *Arbitration Act at* K—*Application to stay proceedings at K on account of the pendency of the suit at* M *is not competent, M Court having no jurisdiction to entertain application under S.* 14.

A brought a suit at *M*. The matter in dispute was already referred to arbitration and an award was passed at *K*. during the pendency of the suit. An application was filed at *K* under S. 14, Arbitration Act. *A* subsequently filed another application to stay proceedings in *K* Court under S. 10, C. P. Code, on the ground that he had filed a suit in *M* Court, where the award was being enforced against him as a decree, to have the award set aside.

Held, that the only Court competent to entertain the application under S. 14, Arbitration Act, was the *K* Court and hence the suit instituted by *A* at *M* was not pending in a Court having jurisdiction to grant relief claimed in *K*. Court and therefore *K* Court was not barred to go into the same grounds. (*Rupchand Bilaram, A. J. C.*) S. R. MALOTRA & CO. *v.* L. SUKDAYAL KAPUR. **112 I. C. 318 = 23 S. L. R. 427 = A. I. R. 1928 Sind 169**

S. 14—Award—Legality of.

——*Arbitrators' absence at sitting held by umpire or want of their signatures on award is not an illegality.*

The fact that the arbitrators were not present at the sitting held by the umpire or that they have not signed the award does not vitiate the award or render it illegal. (*Rupchand Bilaram, A. J. C.*) LOUIS DREYUS & CO. *v.* TARACHAND GHANSHAMDAS. **95 I. C. 378 = A. I. R. 1926 Sind 242.**

S. 14—Award—Setting aside.

——*C. P. Code, S.* 104 (*f*)—*Order setting aside award—No appeal lies.*

An order, under the Arbitration Act, setting aside an award is not appealable. (*Kincaid, J. C. and Kennedy, A. J. C.*) MESSRS. G. P. GUNNIS & CO., LTD. *v.* MESSRS. AMANMAL TULSIDAS. **79 I. C. 920 = A. I. R. 1925 Sind 218.**

S. 14—Award—Validity.

——*Acts of arbitrators in the absence of parties are valid if not judicial.*

Where the act done by arbitrators is not of a judicial nature but merely ministerial in its character, it is competent to one of the arbitrators or all the arbitrators to have those acts performed in the absence of one or more of the parties. (3 Cl. and F. 26, Ref.) Receiving statements and documents before the enquiry commences are acts purely ministerial in their character. (*Kumaraswami Sastri, J.*) NARASIMULU CHETTY, *In the matter of.* **75 I. C. 850 = 17 M. L. W. 648 = A. I. R. 1924 Mad. 274.**

S 14—Award—Setting aside.

——*Discretion—Arbitration.*

Whether an award should be set aside or remitted can be determined by the Court of first instance and an appellate Court will not set aside its decision unless discretion is misused. (*Raymond, A. J. C.*) FIRM OF N. D. JAGGI & CO. *v.* FIRM GANGA RAM VISHENDAS. **76 I. C. 275 = A. I. R. 1924 Sind 132.**

S. 14—Award—Reference.

——*Specific Relief Act, S.* 39—*Suit to stay arbitration because of there being no contract at all is maintainable.*

A suit for a declaration that a certain contract entered into between plaintiffs and defendants is not binding on the plaintiff, inasmuch as they did not enter into such contract and for an injunction to restrain arbitration in respect of breach of the alleged contract, is maintainable if the plaintiff reasonably apprehends serious injury to result from the arbitration. In such a case the remedy under S. 14 of the Arbitration Act is not his sole remedy and does not take away the remedy open to him under the provisions of S. 9, C. P. Code of bringing an action to set aside the award on the ground that no contract providing for a reference to arbitration was made or that the contract if made was not enforceable by reason of fraud or misrepresentation. S. 39 of the Specific Relief Act confers the right of suit in such cases and Ss. 42 and 56 are no bar to the suit, A. I. R 1922 P. C. 374, A. I. R. 1922 Lah. 369, Foll. (1920) 47 Cal. 733, Dist. (*Raymond, A.J.C.*) TYEBALLY ABDUL HUSSAIN *v.* JAMES FINLAY&CO. **80 I.C. 969 = 17 S. L. R. 15 = A. I. R. 1924 Sind 105 (109).**

S. 14—Award—Setting aside.

——*A party to a contract can file a suit to set aside award regarding the contract.*

A person dissatisfied with an award, made without the intervention of a Court of justice, is entitled to bring an action to set it aside on the ground that no contract providing for a reference to arbitration was made or that the contract if made was cancelled before the reference in favour of the arbitrator had been executed, 3 Lah. 296, 50 Cal. 1 (P. C.), Ref, and Foll. (*Raymond and Aston, A. J. Cs.*) DEWANCHAND *v.* MOHANSHA. **81 I. C. 782 = A. I. R. 1924 Sind 25.**

S. 14—Award—Reference.

——*Reference proceeded with without notice to parties—Award is bad.*

Award is vitiated by the legal misconduct of the umpire, if he proceeds with the reference without giving any notice to the parties of the enquiry by him. (*Schwabe, C. J. and Wallace, J.*) LOUIS DREYFUS AND CO. *v.* RAJAGOPALA & BROS. **16 M. L. W. 657 = 70 I. C. 353 = A. I. R. 1923 Mad. 222.**

S. 14—Award—Binding nature of.

——*C. P. Code* (*V of* 1908), *O.* 7, *R.* 10—*Suit for declaration that award is not binding on plaintiff lies in Subordinate Judge's Court—Specific Relief Act, S.* 42—*Jurisdiction.*

A suit for a declaration that a certain award, not filed in Court, is not binding on the plaintiff falls under Specific Relief Act, S. 42 and not under Indian Arbitration Act (IX of 1899), S. 14, and as such can be filed in the Sub-Judge's Court and not in the District Judge's Court only. (*Le Rossignol and Campbell, JJ.*) HIRA NAND MURLIDHAR *v.* FLEMING SHAW & CO. **4 L. L. J. 12 = 68 I. C. 187 = A. I. R 1922 Lah. 26.**

S. 14—Enforceability.

——*Award under English Arbitration Act cannot be set aside on the ground of misconduct—It can be enforced by suit.*

An award under the English Arbitration Act of 1889 duly made in accordance with English Law, can be enforced by a suit in an Indian High Court but cannot be set aside by an Indian Court on any ground of misconduct or irregularity on the part of the arbitrator, A. I. R. 1922 P. C. 120, *Ref.* (*Page, J.*) JOHN BATT AND CO. *v.* KANOOLAL AND CO. **53 Cal. 65 = 95 I. C. 21 = A. I. R. 1926 Cal. 938.**

S. 14—Estoppel.

———*Party accepting benefit is precluded from objecting—Party making payments is not so estopped—Evidence Act, S.* 115.

There is a distinction between performing an award and accepting a benefit under an award. When a benefit is accepted by a party he may be precluded. The acceptance of a benefit even under protest might amount to acquiescence. But a party is not precluded by estoppel or acquiescence from challenging the validity of an award merely because certain payments have been made as directed by the award. (*English Cases Referred.*) (*Aston, A. J. C.*) ISRIBAI *v.* PEVIBAI.

121 I. C. 164 = A. I. R. 1930 Sind 195.

S. 14—Jurisdiction.

———*Jurisdiction of Court to review awards is very narrow.*

Anantakrishna Ayyar, J.—The jurisdiction of Courts to review awards passed by umpires is not the jurisdiction of a Court of appeal while reviewing the decisions of inferior Courts. It is much narrower. (*Coutts-Trotter, C. J. and Anantakrishna Ayyar, J.*) MARTIROSI *v.* SUBRAMANIAM CHETTIAR.

122 I. C. 516 = A. I. R. 1930 Mad. 723.

Ss. 14 and 15—Jurisdiction.

———*Award can be questioned by a separate suit, if it is alleged that arbitrator acted wholly without jurisdiction.*

Any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought no doubt to be taken by motion to set aside the award, but, where it is alleged that an arbitrator has acted wholly without jurisdiction, his award can be questioned in a suit brought for that purpose. Nor is the fact, that the award has been enforced by execution under S. 15, a bar to a suit to have it declared void and for consequential relief. S. 15 does not enact that the award when filed is to be deemed to be a decree of the Court but only that it is to be enforceable as if it were a decree. (*Viscount Cave, J.*) E. D. SASSOON & CO. *v.* RAMDUTT RAMVISON DAS. **49 I. A. 366 = 70 I. C. 777 = 37 C. L.J. 336 = 27 C. W. N. 660 = 1923 M. W. N. 372 = 18 M. L. W. 537 = 50 Cal. 1 = 32 M.L. T. 19 = A. I. R. 1922 P. C. 374 = 44 M. L. J. 758 (P. C.).**

S. 14—Misconduct.

———*No misconduct where arbitrators act within authority given by reference—Such award is not improperly procured.*

Where the parties to the reference clothe the arbitrators with authority to make one award concerning all of them and they act within the four corners of that authority, it is not open to some of the parties to contend that the arbitrators have misconducted themselves in making one award. In such case neither the arbitration nor the award is improperly procured. (*Rupchand and Barlee, A. J. Cs.*) DATTARAM MUNSHILAL *v.* HARJIMAL & SONS. **24 S. L. R. 145 = 121 I. C. 161 = A. I. R. 1930 Sind 170.**

———*Legal misconduct.*

An arbitrator is guilty of misconduct if he has taken independent legal opinion on the question to be decided. *Dobson* v. *Groves*, 115 Eng. Rep. 239 and 4 A. L. J. 159, Rel. on. (*Ramesam and Cornish, JJ.*) ARUNACHALA AYYAR *v.* LOUIS DREYFUS & CO. **39 M. L. T. 563 = 27 M. L. W. 267 = 1928 M. W. N. 132 = 107 I. C. 793 = A. I. R. 1928 Mad. 107.**

———*Before determining whether the arbitrator has misconducted in overvaluing property he must be heard.*

For determining whether an arbitrator has misconducted himself in arriving at a certain valuation of the property in question (alleged to be overvalued) the arbitrator should be examined as a witness and the matter should be put fairly and squarely to the arbitrator so that he might give his explanation. A. I. R. 1914 P. C. 105, Rel. on. (*Tyabji, A. J. C.*) TEJIBAI *v.* GOURMAL.

22 S. L. R. 295 = 113 I. C. 360 = A. I. R. 1928 Sind 171.

———Misconduct contemplated is before making the award and not subsequent. (*Rupchand Bilaram, A.J. C.*) LOUIS DREYFUS & CO. *v.* THARACHAND GHANSHAMDAS. **95 I. C. 378 = A. I. R. 1926 Sind 242.**

———*Misconduct does not imply moral turpitude but includes neglect of duties and responsibilities.*

Misconduct does not necessarily imply any moral turpitude, dishonesty, partiality or bias on the part of the arbitrator but includes neglect of the duties and responsibilities of the arbitrators and of what Courts of justice expect of them before allowing finality to awards. An arbitrator misconducts himself by refusing to give reasonable opportunity to a party to be heard; such misconduct however is technical misconduct in law and is not moral misconduct and the Court in such a case can remit back the award to him for reconsideration. (*Raymond, A. J. C.*) FIRM OF N. D. JAGGI & CO. *v.* FIRM OF GANGA RAM VISHENDAS. **76 I. C. 275 = A. I. R. 1924 Sind 132.**

———*C. P. Code, Sch. II, Para.* 15—*Patent error of law vitiates award—Breach of duty though honestly caused is legal misconduct.*

The Court will set aside an award if there is an error of law patent on the face of it. The term "misconduct" has in the legal sense a wider significance than personal misbehaviour. "Legal misconduct" means misconduct in the judicial sense of the word, not from a moral point of view and means some honest though erroneous breach of duty causing a miscarriage of justice. Where the arbitrators had admitted improper evidence, and were misled by it,

Held, that they had committed an error of law patent on the face of the award and that this could amount to legal misconduct.

Per *Madgavkar, A.J.C.*— Patent errors of law are legal misconduct on which Courts can in their inherent power set aside the award under S. 14 of the Arbitration Act. Whether the Courts should do so or should only remit the award is a matter on which no hard and fast rules can be laid down, depending as it does on the peculiar circumstances of each case. (1918) 13 S.L.R. 201, Foll., (1920) 44 Bom. 780, Rel. on ; (1907) 1 S. L. R. 86, Ref. (*Kincaid J. C., Aston and Madgavkar, A. J. Cs.*) G. P. GUNNIS & CO. *v* FIRM AMANMAL. **17 S. L. R. 133 = 83 I. C. 353 = A. I. R. 1924 Sind 75 (F. B.).**

S. 14—Scope.

———Objections to the award within S. 14 raised and disallowed, bar a suit on the very same ground. Matters falling within S. 14 are exclusively within the jurisdiction of the arbitration Court. (*Rupchand Bilaram, A.J.C.*) KHIMJI *v.* NATHIBAI.

19 S. L. R. 360 = 76 I. C. 953 = A. I. R. 1925 Sind 42.

S. 14—Setting aside.

———Where an award is challenged on the ground that there was no submission to arbitration by the parties, the remedy lies in a regular suit and not in an application under S. 14 of the Arbitration Act. (*Mookerjee and Fletcher, JJ.*) MATULAL DALMIA *v.* RAM KISSENDAS. **69 I. C. 568 = 47 Cal. 806.**

ARBITRATION ACT (1899), S. 14.

———*Umpire required to ascertain damages on basis of future profits that would have accrued if breach of contract had not occurred—He stating that there were no material to arrive at his estimate but passing award having considered all circumstances— Award was not bad on the face of it.*

An umpire who had to ascertain the amount of damages on the basis of future profits that would have accrued if a breach of contract had not been committed, stated that there were no sufficient materials before him from which to arrive at his estimate, but passed his award duly considering all the circumstances placed before him.

Held, that there was nothing to show that the arbitrator misconducted himself in any way in the sense that his award was bad on the face of it and so the Court had no jurisdiction to set it aside. (*Coutts-Trotter, C. J. and Anantakrishna Ayyar, J.*) MARTIROSI *v.* SUBRAMANIAM CHETTIAR. **122 I. C. 516= A. I. R. 1930 Mad. 723.**

S. 14—Validity.

———*Award during pendency of suit—Dispute before arbitration and suit different – Award is not invalid.*

Law does not permit the same question to be decided by a Court of law as well as by an arbitrator and it is only when the dispute before two tribunals is identical that the decision given by the arbitrator must be treated as *ultra vires*. But where the dispute before arbitration and Civil Court is not the same the jurisdiction of the arbitration is not ousted. A. I. R. 1922 Lah. 369, Ref. (*Shadi Lal, C. J. and Broadway, J.*) TEK CHAND *v.* MARJAS RAI. **30 P. L. R. 445=117 I. C. 74= A. I. R. 1929 Lah. 564.**

———*Award given during the pendency of suit—Dispute before arbitrator and in suit different—Award is not invalid.*

An award made after the commencement of an action in Court can be held invalid only if the action embraces the dispute decided by the arbitrator. It is only when the dispute before the two tribunals is identical that a decision given by the arbitrators must be treated as *ultra vires*. Where the award deals with matters which are not the subject-matter of the action, it cannot be said that the arbitrators in taking cognizance of those disputes encroached upon the jurisdiction of Court. (*Shadi Lal, C. J. and Campbell, J.*) FIRM JAINARAIN BABULAL *v.* FIRM NARAIN DAS. **3 Lah. 296= 69 I. C. 583=A. I. R. 1922 Lah. 369.**

———*Words " arbitration and award " in S. 14 and " award " in para. 15, Sch. II, C. P. Code, are same—C. P. Code, Sch. II, para. 15.*

The words "arbitration and award" and "award" in S. 14, Arbitration Act, and para. 15, Sch. 2, C.P. Code, respectively allow of no distinction and the difference in phraseology is immaterial. (*Kemp and Murphy, JJ.*) RAOJI NARAINJI *v.* RATANSI KANJI. **A. I. R. 1930 Bom. 432.**

S. 15—Appeal.

———*Order in execution of award is appealable—C.P. Code, S. 47.*

An award filed under Arbitration Act is enforceable as if it were decree and must be executed in the manner laid down by the C. P. Code. Hence S. 47, C. P. Code, is applicable for the purpose of an appeal. 40 Cal. 21 (P.C.), Expl.; 40 All. 89 and 35 Bom. 196, Dist.; A. I. R. 1921 Sind 132 and A. I. R. 1924 Lah. 544, Rel. on. (*Bhide, J.*) E. D. SASSOON & CO. *v.* SHIVJI RAM DEVIDAS. **115 I. C. 536=A. I. R 1929 Lah. 228.**

ARBITRATION ACT (1899), S. 15.

———*C. P. Code, S. 47—Award under Arbitration Act—Execution—Order in —Appeal lies.*

For the purposes of S. 47 an award under the Arbitration Act must be considered to be a decree in a suit and the award proceedings must be deemed to be a suit for the purposes of that section. An appeal would therefore lie against an order in execution of such award although that execution was of an award and not of a decree in suit. (*Kennedy, J. C. and Madgavkar, A. J. C.*) DONALD GRAHAM & CO. *v.* KEWALRAM. **16 S. L. R. 245=79 I. C. 477= A. I. R. 1921 Sind 132**

S. 15—Award—Enforceability.

———*C. P. Code, O. 21, R. 50 — Rule applies to award against firm, filed under the Arbitration Act—Such award has status of decree—Courts cannot refuse enforcement of award, owing to mandatory nature of S. 15.*

Rule 50 applies to an award obtained without the intervention of the Court against a firm and made rule of the Court under the provisions of Arbitration Act. An award filed under the Arbitration Act has the status of a decree of the Court, though it is not a decree of the Court. The provisions of S. 15 of the Act are mandatory. They afford no scope to the Court to refuse to enforce an award in the same manner as a decree of the Court, except in cases when the Court either remits the award back to the arbitrator for re-consideration or sets it aside. A.I.R. 1927 Bom. 428, Diss. from; 47 Cal. 29, Foll.; A. I. R. 1924 Cal. 117 and A.I.R. 1921 All. 199, Rel. on. (*Rupchand Bilaram, A. J.C.*) MANGAIRMAL TEKCHAND *v.* AKBARALI & CO. **23 S. L. R. 422= 112 I. C. 126=A. I. R. 1929 Sind 28**

———An award is a decree for the purpose of enforcing that award only. (*Rankin, C. J. and C. C. Ghose, J.*) RAMSAHAI MULL *v.* JOYLAL. **32 C. W. N. 608= 115 I. C. 584=A. I. R. 1928 Cal. 840.**

———*Award against a firm—Individual partners not served with notice—Award cannot be executed against them individually.*

It is doubtful whether a firm can be lawfully made a party to a reference to arbitration. The term "parties" used in the Arbitration Act cannot apply to a firm apart from the partners of which the firm consists. Therefore, an award obtained against a firm cannot be executed against a party who is alleged to have been a partner in the firm but who was not served either with the notice of arbitration or of filing of the award. (*Mirza, J.*) VALLABH DAS NARANDAS & CO. *v.* KESHAVLAL HIMAT LAL. **29 B. L. R. 660=104 I. C. 94= A. I. R. 1927 Bom. 428.**

S. 15—Award—Legality of.

———*Rangoon High Court Rules—Filing of award by Registrar before provisions of Act and rules are complied with is illegal and Court can begin afresh under its inherent powers.*

It is only when all the provisions of the Act and the rules are complied with that the Registrar is enabled to file an award and issue notices. When they have not been complied with, he can neither file the award nor issue any notice ; the issue of the notice is beyond his jurisdiction and the appearance of the party in answer to such notice cannot be held to legalise it.

When the attention of the Court is drawn to such irregularities, the effect of which is to make the filing of the award improper and illegal, the Court in the exercise of its inherent jurisdiction, is bound to take steps to rectify matters and the proper procedure is to begin from the beginning again. (*Chari, J.*) KHATIZA BEE BEE *v.* I. E. ABOWATH. **5 Rang. 171= 102 I. C. 800=A. I. R. 1927 Rang. 197.**

S. 15—Award—Enforceability.

———*C. P. Code, O.* 21, *R.* 50, *applies to awards—C. P. Code, O.* 21, *R.* 50.

The fact that an award is enforceable as a decree would attract to itself the applicability of the provisions regarding the execution of decrees. Where the award has been made against the two firms the question as to partners constituting the firms would very rightly fall within the province of the executing Court. A.I.R. 1924 Cal. 117 ; 6 S. L. R. 127 ; 47 Cal. 29 ; 43 All. 394, Foll. (*Raymond, A.J.C*) ADAMJI JAFFERJI & CO. *v.* SHAMSUDIN IMAMDIN. **19 S. L. R. 1 = 86 I. C. 1013 = A. I. R. 1925 Sind 293.**

S. 15 (1)—Award—Decree.

———*"Enforceable as if it were a decree" do not mean that an award filed in Court is still not equal to decree.*

The words "enforceable as if it were a decree" in S. 15 (1) do not exclude the right of decree-holder to make an application in execution periodically until 12 years have elapsed. The fact that the award is enforceable as a decree of Court makes all the actions of the successful party in enforcing his rights under the award amenable to the provisions of the C. P. Code, and the Limitation Act which governs the execution of decrees. (*Harrison, J.*) POKHAR DAS *v.* RADHA KISHEN. **6 Lah. L. J. 564 = 75 I. C. 927 = A. I. R. 1924 Lah. 544.**

S. 15—Award—Execution of.

———*Execution of award is not execution of order under Dek. Agri. Relief Act, S.* 22.

S. 15 makes an award directly enforceable as a decree of Court, and therefore an application to execute the award is not an application in execution of an order within S. 22 of the Dek. Agri. Relief Act. (*Fawcett, J. C. and Kennedy, A. J. C.*) UDHAV DAS *v.* UKAMAL FATAMAL. **60 I. C. 942 = 14 S. L. R. 217.**

S. 15—Execution.

———*Limitation Act, Art.* 183—*Award filed in High Court under S.* 15, *Act IX of* 1899—*Execution applications are governed by Art.* 183.

Where an award has been filed in the Court properly, it is not only to be enforceable as if it were a decree in general, but, having been filed in a particular Court, it is to be enforceable as if it were a decree of that Court and, therefore, shall for purposes of limitation be governed by Art. 182 or 183 according as it is filed in a Chartered High Court or not. A. I. R. 1924 Lah. 544, Rel. on ; *In re* A Bankruptcy Notice, (1907) 1 K. B. 478, Ref. (*Rankin, C.J. and Mitter, J.*) RE BELVEDERE JUTE MILLS, LTD. *v.* HARDWARI MULL & CO. **31 C. W. N. 1097 = 104 I. C. 808 = A. I. R. 1927 Cal. 853.**

S. 15—Procedure.

———*Award on submission cannot be made decree of, but is only to be filed in Court.*

Under S. 15 of the Act an award on a submission on being filed in Court is made enforceable as if it were a decree of the Court. The Arbitration Act does not authorize the Court to make the award the decree of the Court. All that the Court can direct is that the award be filed ; where therefore an order in connection with an award was passed containing the words "are made decrees of the Court" held that the words "be filed" should be substituted instead. (*Jai Lal, J.*) DAMODAR DAS *v.* BISHESHAR DAS. **A. I. R. 1929 Lah. 882.**

———*Order directing award to be filed is not necessary under the Act—C. P. Code, Sch. II, para.* 20.

Under Arbitration Act, no order, directing that the award should be filed, is necessary. Under the Civil Procedure Code the matter is different. The person who wants to convert an award into a decree of Court has to apply for an order that it should be filed, and after notice and hearing the objections of the opposite side such an order has to be made. (*Ramesam and Cornish, JJ.*) ARUNACHALA IYAH *v.* LOUIS DREYFUS & CO. **39 M. L. T. 563 = 27 M. L. W. 267 = 1928 M. W. N. 132 = 107 I. C. 793 = A. I. R. 1928 Mad. 107.**

S. 17—Costs.

———*C. P. Code, S.* 35—*Court holding that reference to arbitration was not valid—Court cannot pass order as to costs.*

The costs incurred before the arbitrator or umpire cannot be regarded as the costs of "a proceeding in the High Court" but are costs of a tribunal unconnected with Court. Where the Court holds that there is no valid reference to arbitration, it has no jurisdiction to pass an order as to costs of the award. (*Jackson, J.*) ARUNACHALA IYAH *v.* LOUIS DREYFUS & CO. **1928 M. W. N. 228 = 27 M.L. W. 803 = 109 I. C. 175 (2) = A. I. R. 1928 Mad. 370 = 54 M. L. J. 580.**

S. 19—Appeal.

———*Order refusing to stay proceedings under S.* 19 *is not appealable not being judgment under Letters Patent (Rangoon), Art.* 13.

If an application is made to the Court under the provisions of S. 19 and the Court after hearing the parties on the application passes an order refusing to stay proceedings, the order is not a judgment within the meaning of Art. 13, Letters Patent and is not appealable. C. M. 82 of 1925, Cons. ; 47 Cal. 611, not Foll. ; A.I.R. 1929 Rang. 41 (F. B.), Rel. on. (*Rutledge, C. J. and Brown, JJ.*) AH KWAY *v.* ADMINISTRATOR-GENERAL, BURMA. **7 Rang. 481 = 120 I. C. 226 = A. I. R. 1929 Rang. 287.**

———Order granting stay of suit pending arbitration is appealable. (*Mukerji and Dalal, JJ.*) KACHAURI MAL KALYAN MAL *v.* WALI MUHAMMAD ABDUL LATIF. **47 All. 179 = 85 I. C. 341 = 5 L. R. A. Civ. 756 = 22 A. L. J. 1031 = A. I. R. 1925 All. 154.**

———*C. P. Code, S.* 104—*Order under is not appealable.*

No appeal lies under S. 104, C. P. Code, from an order passed under S. 19 of the Arbitration Act staying a suit. 1 S. L. R. 86, F. B.; 28 A. 349, Foll.; 45 B. 245; 16 S. L. R. 174, Appr. (*Kincaid, J. C., Aston and Madgavkar, A.J. Cs.*) FIRM OF MENGHRAJ KHIALDAS *v.* LANGLEY BILLIMORIA & CO. **17 S. L. R. 195 = 81 I. C. 759 = A. I. R. 1923 Sind 38 (F. B.).**

———*C. P. Code, S.* 104—*Order under—No appeal lies.*

No appeal lies from an order staying a suit under S. 19 of the Arbitration Act. (*Kemp, A. J. C.*) (On difference between *Kincaid, J. C. and Madgavkar, A. J. C.*) (FIRM OF A.) SODAWATERWALA *v.* MESSRS. VOLKART BROTHERS. **82 I. C. 81 = A. I. R. 1923 Sind 25 (32).**

———It is largely in the discretion of the Court to make an order staying proceedings in a matter and when the discretion has been exercised, the Appellate Court will interfere only when a strong case is made out. Before an order staying proceedings can be made, it must be proved that there is a valid submission, that there is no sufficient reason why the matter should not be referred according to the submission and that the applicant was

and is ready to all things necessary to the proper conduct of the arbitration. (*Mookerjee and Fletcher, JJ.*) KEDARNATH BABULAL *v.* SUMPATRAM DOOGUR.
60 I. C. 951 = 47 Cal. 1020.

S. 19—Agreement to refer.

——S *at Calcutta ordering goods from* Q *at Manchester through* P—P *doing indenting business*—S *signing indent form containing clause empowering to refer disputes to arbitration*—P *telegraphing order without referring to arbitration clause—Arbitration clause is still part of bargain and is binding on* S.

S, a merchant in Calcutta intending to order goods from Manchester, signed and sent an indent form to *P* who did indenting business. The indent form contained a clause that in case disputes arose regarding the order, *P* or his agents (meaning thereby the company from whom goods were to be ordered) had power of referring them to certain arbitrators; *P* telegraphed the effect of the order to England without making any express reference to the indent or to its arbitration clause. *Held*, that the indent form signed by *S* was a part of the offer which the company accepted and that the Court should require *S* to abide by the arbitration clause. (*Rankin, C. J. and C. C. Ghose, J.*) RADHA KANTA DASS *v.* BAERLEIN BROS., LTD.
56 Cal. 118 = 32 C. W. N. 1101 = 117 I. C. 540 = A. I. R. 1929 Cal. 97.

——*Time to be determined in respect of readiness and willingness to refer to arbitration is when a party brings suit and the other party is called upon to appear and answer.*

The time, with reference to which the readiness and willingness of a party to an arbitration to refer to arbitration is to be determined, is the time when a party brings the suit and the other party is called upon to appear and answer. (*DeSouza, A. J. C.*) FIRM KHIMCHAND *v.* UDHAVDAS. **22 S. L. R. 286 = 106 I. C. 565 = A. I. R. 1928 Sind 97.**

——*Mere threat to file suit does not show unwillingness to resort to arbitration.*

A threat by one of the parties to an arbitration to the other party to file a suit does not necessarily mean that the party giving the threat is unwilling to have the matter referred to arbitration. (*DeSouza, A. J. C.*) FIRM KHIMCHAND *v.* UDHAVDAS. **22 S. L. R. 286 = 106 I. C. 565 = A. I. R. 1928 Sind 97.**

——*Marine insurance policy.*

A policy of marine insurance provided "all disputes must be referred to in England for settlement and no legal proceedings shall be taken to enforce any claim except in England where the under-writers are alone domiciled and carry on business." *Held*, that the clause amounted to a submission to arbitration. (*Macleod, C. J. and Shah, J.*) HAJI ABDULLA HAJI CASSUM *v.* G. R. STAMP. **26 Bom. L. R. 224 = 80 I. C. 523 = A. I. R. 1924 Bom. 381.**

——*Clause for arbitration in contract—Suit to impeach is not barred.*

Where a contract contains a clause for arbitration in case of disputes and a party thereto brought a suit to impeach the clause, *held*, that as the object of the suit was to impeach the validity of the clause and not in respect of any matter agreed to be referred to arbitration. S. 19 of the Act does not apply. (*Kemp, A. J. C.*) ATMARAM *v.* GAJANMAL. **61 I. C. 141 = 14 S. L. R. 123.**

Ss. 19 and 2—'Court'—Meaning.

——*High Court has power to stay proceedings pending in Presidency Small Causes Court in spite of Cl.* 12, *Letters Patent, Calcutta—C. P. Code, Sch. II, para.* 8.

The words "Presidency town" in S. 12 include suits instituted in the Presidency Court of Small Causes and although Cl. 12, Letters Patent (Calcutta), provides that the High Court shall not have original jurisdiction in cases falling within the jurisdiction of the Presidency Small Causes Court, in which the debt or damage does not exceed one hundred rupees, nevertheless the legislature intended and deliberately provided that application for stay of a suit pending in the Presidency Small Causes Court arising out of a contract which contains an agreement to refer all disputes to arbitration, should be made to the High Court. The High Court, therefore, has jurisdiction to allow the application for stay of such a suit. 31 Bom. 36, Foll.; A. I. R. 1921 Bom. 185; A. I. R. 1921 All. 219 and A. I. R. 1928 Bom. 275, not Foll.; *Morrison Tinplate Co.* v. *Brooker & Co.*, (1908) 1 K. B. 403, Ref. (*Lort Williams, J.*) RADHAKISEN DHANUBA *v.* BOMBAY CO., LTD.
56 Cal. 755 = 121 I. C. 574 = 33 C. W. N. 888 = A. I. R. 1930 Cal. 51.

——*"Court" means Court in which a suit to which the Act applies is pending.*

The word "Court" contemplated in S. 19, Arbitration Act, is the Court before which a suit is pending provided that the suit is one to which the Act would apply under S. 2, namely, that it is a suit which could, whether with leave or otherwise, be instituted in a Presidency town in respect of its subject-matter and is not restricted to the High Court. 45 Bom. 1 and A. I. R. 1921 All. 219, Foll.; 31 Bom. 236, not Foll. (*Fawcett and Mirza, JJ.*) TATYA ROWJI *v.* MATHIBHAI BULAKHIDAS.
52 Bom. 420 = 30 Bom. L. R. 661 = 111 I. C. 641 = A. I. R. 1928 Bom. 275.

——*C. P. Code, Sch. II, para.* 18—*Presidency Small Cause Courts Act* (15 *of* 1882 *as amended by* 1 *of* 1895), *S.* 9—*Stay of proceedings—Reference to arbitration—Presidency Small Causes Court is empowered to order stay of a suit.*

Schedule 2, C. P. Code, is made applicable to the Bombay Court of Small Causes under the rules that were framed by the High Court in 1895 under S. 9, Presidency Small Cause Courts Act, 1882, as amended by the Act of 1895, and as there is nothing contained in S. 19, Arbitration Act, which is in substantial opposition to the provisions in para. 18, Sch. 2, C. P. Code, para. 18, C. P. Code, should be considered applicable in preference to the provisions of S. 19, Arbitration Act, and therefore under para. 18, Sch. 2 of the Code, the Judge of Bombay Presidency Small Causes Court is empowered to stay a suit. (*Fawcett and Mirza, JJ.*) TATYA ROWJI *v.* MATHIBHAI BULAKHIDAS.
52 Bom. 420 = 30 Bom. L. R. 661 = 111 I. C. 641 = A. I. R. 1928 Bom. 275.

Ss. 19 and 4 (a)—'Court'—Meaning.

——*Meaning of "Court" in S.* 19—*"Court" refers to Court in which the suit or other proceedings is in fact instituted and not necessarily District Court.*

The Court spoken of in S. 19 is the Court before whom the legal proceedings or other attempt to bring a suit are in fact instituted, and not necessarily the District Court. The definition in S. 4 (*a*) of the Act only applies where there is nothing repugnant to it in the context. The context of S. 19 is repugnant to the interpretation of the word "Court" therein being confined to the District Court. (*Walsh and Ryves, JJ.*) SITA RAM NATHMAL *v.* SUSIL CHANDRA DAS & CO. **43 All. 553 = 19 A.L.J. 495 = 63 I.C. 813 = A.I.R. 1921 All. 219**

S. 19—Injunction to refer.

———*C. P. Code, O. 39, R. 1—Injunction restraining arbitration—Question depends on balance of convenience—*Onus *of proof lies on the applicants for injunction.*

In dealing with an interlocutory application for injunction restraining a party to refer to arbitration, the Court must be governed by consideration as to the comparative mischief or inconvenience to the parties which may arise from granting or withholding the injunction and the burden lies upon the plaintiffs as the persons applying for the injunction, of showing that their inconvenience exceeds that of the defendants. (*Raymond, A. J. C.*) FIRM OF KIRPALDAS KALIANDAS *v.* FIRM OF GAJANMAL BHAGWANDAS.

15 S.L.R. 5 = 70 I.C. 864 = A.I.R. 1921 Sind 114.

S. 19—Jurisdiction.

———*Suit disputing validity of contract—Reference relating to the payment of loss during pendency of suit is competent.*

The institution of a suit by one of the parties to a contract disputing the factum or validity of the contract containing a submission clause was no bar to the arbitrators proceeding with the reference the matters referred to the arbitrators not being the same as those which are the subject-matter of the action. In such a case there is no encroachment by the arbitrators on the jurisdiction of the Court. A. I. R. 1922 Lah. 369, Foll. (*Rupchand Bilaram, A. J. C.*) DONALD GRAHAM & CO. *v.* BASANTRAM JINGAN.

22 S.L.R. 429 = 107 I.C. 220 = A.I.R. 1928 Sind 91.

———*Point of law arising—Arbitrators do not necessarily lose jurisdiction—Court should decide whether question should be dealt with by Court or arbitrators.*

Where the contract between the parties provides for reference to arbitration, the arbitrators are not deprived of their jurisdiction merely because a question of law has arisen between the parties; but it is for the Court to exercise a judicial discretion whether the nature of the dispute between the parties is of such a character as could be more satisfactorily disposed of by a Court than an arbitrator. The question whether there is a sufficient reason why the dispute should not be referred to arbitration in accordance with the submission is a matter largely in the discretion of the Court which no doubt must be judiciously exercised. 47 Cal. 1020, Ref.

The Court has a discretion and where the point is one of law and more fitted to be decided by a Judge, the Court will refuse the application for stay. (*Raymond, A. J. C.*) HOLLAND, BOMBAY TRADING CO. *v.* P. O. ESSARDAS DHARAMCHAND. **19 S.L.R. 168 = 98 I.C. 151 = A.I.R. 1926 Sind 286.**

S. 19—Plea—Time for.

———*S.* 19 *cannot be reconciled with the Calcutta Small Causes Court, R.* 43*—Application under S.* 19 *should be made promptly before costs are thrown away—Application in High Court is sufficient appearance—Memorandum in Small Causes Court is not necessary.*

S. 19 and R. 43 cannot be reconciled and a defendant cannot obey both. The object of the legislature in providing that the application under S. 19 shall be made after appearance and before taking any steps in the proceedings, is to ensure that such applications shall be made promptly before costs are thrown away in the suit; memorandum in Small Causes Court is not necessary. Application in the High Court is a sufficient appearance to satisfy the terms of S. 19, and when such an application is intended, no further costs need be thrown away by unnecessary proceedings in the Small Causes Court. 12 S.L.R. 34, Ref. (*Lort Williams, J.*) RADHAKISEN DHANUBA *v.* BOMBAY CO., LTD.

56 Cal. 755 = 121 I.C. 574 = 33 C.W.N. 888 = A.I.R. 1930 Cal. 51.

———*Party to submission apply to the Court for stay at the earliest opportunity.*

All that S. 4 of the English Act and S. 19 of the Indian Act comtemplate is that a party to a submission who is sued should apply to the Court for stay at the earliest opportunity, that is to say, immediately after appearance and before filing a written statement or taking any other steps in the proceedings, and that such party should have been ready and willing at the time when the proceedings were commenced and should continue thereafter to be ready and willing to do all things necessary to the proper conduct of the arbitration. To hold that a party to the submission may refuse to appoint an arbitrator and thereby frustrate the arbitration would be nothing short of permitting a party to take advantage of his own wrong. *Manchester Ship Canal Co., Ltd.* v. *S. Pearson & Son, Ltd.*, (1900) 2 Q.B. 606, Foll.; In re *Smith & Service and Nelson & Sons*, (1890) 25 Q. B. D. 545, Dist. (*Rupchand Bilaram, A. J. C.*) SHIVALDAS *v.* JAPAN COTTON TRADING CO. **22 S.L.R. 269 = 107 I.C. 434 = A.I.R. 1928 Sind 94.**

———*Agreement to refer to arbitration not pleaded at earliest time cannot be relied upon later.*

The defendant having submitted to the jurisdiction of the trial Court and not having pleaded the agreement to submit to arbitration at the earliest possible moment as required by law, was precluded from relying upon this objection at a later stage. (*Piggot and Walsh, JJ.*) KHARIDAR KAPRA CO. *v.* RUKMANAND RAMDEO.

20 A.L.J. 975 = 4 L.R. A. Civ. 22 = 71 I.C. 144 = A.I.R. 1923 All. 139.

S. 19—Setting aside.

———*Suit stayed—Award passed—Decree passed on award—Stay order cannot be set aside—Stay order is sufficient to dispose of suit.*

After an award has been passed and also a decree in accordance therewith, a previous order of stay of suit under S. 19 cannot be set aside and the suit revived. Ordinarily a stay is permanent unless the order directing it provides otherwise by imposing some terminus.

A stay order under S. 19 when arbitration has in fact taken place, is sufficient finally to dispose of the suit. No final decree dismissing the suit is necessary. 12 A. L. J. 757, Dist. (*Piggot and Walsh, JJ.*) STRAUSS & CO. *v.* RAGHUBAR DAYAL PRASAD.

43 All. 279 = 59 I.C. 784 = 19 A.L.J. 19 = A.I.R. 1921 All. 275.

S. 19—Stay.

———*Consignment arriving in damaged condition—Clause in bill of lading to refer disputes to Court at Genoa—Suit for damages brought in Bombay stayed pending decision of Court at Genoa.*

A shipped goods by *B's* steamer for conveyance to Bombay under a bill of lading of which the material portion of Cl. 27 was "Failing an amicable understanding, either the shipper or consignee, desiring to proceed against the company in Court of law, can do so . . . . only before the judicial authority in Genoa . . . . . the shipper and the receiver or any other person interested in the cargo expressly renouncing the competence of any other judicial authority." The goods on arrival were found to be damaged. *A* brought a suit in the Bombay High Court for damages; but *B* took out a summons for stay of the suit under S. 19 by virtue of the above clause. The trial Judge refused to stay.

Held, that the clause is a valid submission under S. 2, to the judicial authority in Genoa and that the suit should, in the absence of any other circumstances, be stayed pending the decision of that Court. A. I. R. 1928 Bom. 175, Foll. (*Kemp, Ag. C. J. and Murphy, J.*) MARITIMMA ITALEANA STEAMSHIP CO. *v.* BURJOR FRAMROZE RUSTOMJI. **32 Bom. L. R. 43 = A. I. R. 1930 Bom. 185.**

——*Avoidance of contract arising from terms of contract—Arbitration clause would be enforced—But if avoidance is due to reasons* " dehors " *it cannot be enforced.*

Where an arbitration clause is inserted in the contract the general rule is that the dispute is referable to arbitration in a case where the avoidance of the contract arises out of the terms of the contract itself. Where, however, a party seeks to avoid the contract for reasons "*dehors*", it, the arbitration clause cannot be resorted to as it, together with the other terms of the contract is set aside. In other words, a party cannot rely on a term of the contract to repudiate it and still say the arbitration clause should not apply. If he relies on the contract he must rely on it for all purposes. (*English cases relied on.*) (*Kemp, J.*) A. E. G. INDIAN ELECTRIC CO. *v.* GENERAL ELECTRIC TRADING CO. **53 Bom. 573 = 31 Bom. L. R. 426 = 121 I. C. 437 = A. I. R. 1929 Bom. 242.**

——*Courts should refer parties to forum of their deliberate choice*—Onus *is on plaintiff to show why stay should be refused.*

The discretion given by S. 19 should be judicially exercised, and the *onus* of showing that the stay should not be granted lies on the party who opposes the stay as the Court will as a rule refer the parties to the forum which they have deliberately selected as the one to which they wish to refer their disputes. On a breach of an agreement of a commercial contract, which provided for arbitration in case of disputes, a suit was filed. Stay of suit was prayed for under S. 19 and was opposed on three grounds, *viz.*, (1) that a difficult question of law concerning the construction of the agreement in question was likely to arise ; (2) that question as to a fraud in relation to S. 18, Limitation Act, was likely to arise and (3) that the arbitrators would be unable to enforce discovery and attendance of witnesses.

Held, that the order for stay should be granted and in such a commercial case there ought to be very strong grounds for refusing the order. *Wilesford* v. *Waston*, (1873) L. R. 8 Ch. 473 ; *Bristol Corporation* v. *John Aird & Co.*, (1913) A.C. 241; *Produce Brokers Co.,Ltd.* v. *Olympia Oil and Cake Co., Ltd.*, (1916) 1 A. C. 314 and *Metropolitan Tunnel and Public Works* v. *London Electric Ry. Co.*, (1926) 1 Ch. 371, Ref.

Per *Kemp, J.*—(1) The arbitrators could not only determine a point of law but could also determine a question of the construction of the agreement and a mere allegation that a difficult point of law arises is no ground for refusal to stay. (2) The alleged fraud cannot be properly coupled with an alleged difficult question of law so as to have a cumulative effect justifying the refusal to stay, and an allegation of fraud, is no proof of it. The party charged with fraud, who might prefer to clear its character in a Court of law, is content that its commercial integrity should be submitted to arbitration of businessmen. (3) The non-production of documents and non-attendance of witnesses is a mere possibility and there is no reason to apprehend that the difficulty is certain to occur and is no reason for a refusal to stay because otherwise all arbitrations would be restricted to cases where there are no witnesses and no discovery is sought and such restriction is not warranted by the Arbitration Act.

Per *Fawcett, J.*—(i) The question of construction of agreement does not really arise and if it did, it can be considered by the arbitrators ; (ii) no question of law as to whether there was fraud arises. (*Fawcett and Kemp, JJ.*) RANEEGUNGE COAL ASSOCIATION, LTD. *v.* TATA IRON AND STEEL CO., LTD. **53 Bom. 271 = 31 Bom. L. R. 21 = 117 I. C. 417 = A. I. R. 1929 Bom. 119.**

——*English decisions subsequent to English Arbitration Act should not be applied—English Courts exercising greater control over arbitration—It is no reason to refuse stay.*

Per *Kemp, J.*—It is erroneous to apply the English decisions subsequent to the English Arbitration Act and to deduce that applications for stay here should be more strictly dealt with. The greater control exercised by Courts in England over arbitrations under the English Arbitration Act should not be applied as a main reason for refusing a stay under S. 19. (*Fawcett and Kemp, JJ.*) RANEEGUNGE COAL ASSOCIATION LTD. *v.* TATA IRON AND STEEL CO., LTD. **53 Bom. 271 = 31 Bom. L. R. 21 = 117 I. C. 417 = A. I. R. 1929 Bom. 119.**

S. 19—Stay—Powers of Court.

——*Court can only stay proceedings and the arbitration takes place by reason of the submission as per parties' contract.*

The power of the Court under S. 19 is to stay the suit or proceedings, if the conditions referred to in the section are fulfilled. If a stay is granted the arbitration then takes place by reason of the submission contained in the contract and in acccordance with the provisions of the Arbitration Act, and all that need be considered is whether there were (1) submission by the parties to the dispute, (2) a reference before arbitrators duly appointed by them under the submission, and (3) an award properly made by such arbitrators. (*Sanderson, C. J. and Buckland, J.*) MITSUI BUSSAN KAISHA, LTD. *v.* HOGARTH SHIPPING CO. LTD. **43 C. L. J. 297 = 94 I. C. 182 = A. I. R. 1926 Cal. 722.**

S. 19—Stay—Jurisdiction.

——*Suit stayed and matter referred to arbitration—During arbitration mistake in plaintiff's name corrected by Court—Suit does not become new suit—Arbitrators do not lose their jurisdiction on the original reference—C. P. Code, O. 1, R. 10 (1).*

Where the suit was stayed under S. 19 and matter was referred to arbitration, but during the arbitration proceedings the name of the plaintiff was found to be wrong and an application was made to the Court to correct the mistake in the plaintiffs' name and the Court ordered the substitution of the correct name,

Held, that O. 1, R. 10 (1) of the C. P. Code, applied and the Court had jurisdiction to amend the cause title by substituting the correct name for the wrong one. That the order was merely an order for the correction of a *bona fide* mistake by means of the amendment of the cause title and by substituting as plaintiffs the real owners of the vessel in the suit which was to remain stayed until further order of the Court. The suit did not become a new suit and the arbitrator's jurisdiction was not lost. (*Sanderson, C. J. and Buckland, J.*) MITSUI BUSSAN KAISHA, LTD. *v.* HOGARTH SHIPPING

Co., Ltd. **43 C. L. J. 297 = 94 I. C. 182 = A. I. R. 1926 Cal. 722.**

S. 19—Stay.

———*Arbitration—Award is no bar to suit if suit is not stayed on application under para.* 18, *C. P. Code, 2nd Schedule or S.* 19.

Where an application for stay of the suit under paragraph 18 of the 2nd Schedule of the C. P. Code, or S. 19 of the Arbitration Act is not filed in proper time or is dismissed, the award is no bar to the suit. (*Rupchand Bilaram, A. J. C.*) Pardanani & Co. *v.* John Batt. **95 I. C. 481 = A. I. R. 1926 Sind 86.**

———Prima facie *leaning is towards stay but in cases of grave fraud Court may refuse stay—Where* prima facie *case of fraud is made out by plaintiff, Court will not stay suit.*

Under S. 19 of the Indian Arbitration Act, the Court has a discretion in the matter of staying actions which it is bound to exercise judicially and in accordance with certain well-settled rules. The *prima facie* leaning of the Court is to stay the action and leave the plaintiff to the tribunal to which he has agreed but the Court may in its discretion after considering all the circumstances of the case, refuse a stay on the ground that the matters in dispute between the parties involve the investigation of grave charges of fraud and may hold that in such circumstances arbitration is not the most suitable method of determining the questions raised between the parties. Where fraud is charged the Court will in general refuse to send the case to arbitration if the party charged with fraud desires that the matter should be given publicity of a public trial and where it is the party who is making the charge that desires that the matter should be given publicity of public trial the Court is much less inclined to free him from the undertaking to go to arbitration into which he has seen fit to enter. Provided a *prima facie* case of fraud is made out the action will be allowed to proceed although it is the party alleging the fraud who desires the public enquiry. (*C.C. Ghose, J.*) Sir Manindra Chandra Nandy *v.* H. V. Low & Co., Ltd. **39 C.L.J. 504 = 83 I. C. 934 = A.I.R. 1924 Cal. 796.**

———*Court should stay suit upon proof of agreement —Plaintiff must prove grounds for not staying suit.*

The parties having agreed that every dispute, whatever be its nature, shall be referred to a domestic forum of their choice it is the *prima facie* duty of a Court to act upon such agreement and the *onus* is on the plaintiff to show why it should not be bound by the agreement to refer to the arbitration and that sufficient reasons exist why the matter should not be so referred. The discretion to stay or to refuse to stay must be guided by judicial principles. Refusal to stay the suit on the sole ground that there was a breach of warranty on the part of one of the defendants is irregular exercise of jurisdiction and is revisable. 12 S.L.R. 41 ; 56 I.C. 76, Foll. (*Raymond and Rupchand Bilaram, A. J. Cs.*) Messrs. Forbes, Forbes, Campbell & Co., Ltd. *v.* Versinel Dewanmal.

75 I. C. 1041 = A. I. R. 1924 Sind 49.

———*Suit not on contract—Application for stay does not lie.*

Plaintiff signed an indent on the defendants for certain things. The indent contained an arbitration clause referring all matters in dispute arising out of the contract to arbitrators. The defendants instead of accepting the indent as it was, sent a memo. for the signature of the plaintiff containing a slightly different term of the contract. The plaintiff signed this, but, when disputes arose and the defendants referred the matter to the arbitrators, alleged that the change in the memo. was a misrepresentation by the defendants and that the contract was void and not referrable to the arbitrators.

Held per *Kincaid, J.C.*—Where the misrepresentation or fraud alleged was something quite distinct from and previous to the contract, application for stay of suit does not lie but the dispute in the present case is a dispute which arises out of the contract itself. That a party misread the acceptance memo. and believed it to be something different from what it was would not vitiate the contract.

Authority to decide disputes arising out of a contract necessarily confers authority to decide what were the terms of that contract. It would be impossible for any Judge or arbitrator to determine whether any particular dispute arose out of a contract unless and until he knows what the contract is. (1916) A. C. 314 ; 24 Cal. W. N. 567, Foll.

Per *Madgavkar, A. J. C.*—An application by the defendant for the stay of the suit must, in law, be clearly distinguished from an application for a stay of the arbitration proceedings, in which a different set of considerations would arise involving equitable grounds and permitting perhaps a *prima facie* view of the dispute. If the cause of action is definite misrepresentation to avoid the contract set up by the opposite party, such a dispute is not a dispute arising out of a contract, within the submission clause in the contract and the Court has no power to stay. (1919) 24 C. W. N. 567, Diss.; A. I. R. 1922 All. 219 and 44 All. 472—481, Foll. (*Kemp, A.J.C.* on difference between *Kincaid, J.C. and Madgavkar, A. J. C.*) Sodawaterwala *v.* Messrs. Volkart Bros. **82 I. C. 81 = A. I. R. 1923 Sind 25.**

———*Disputes referred to arbitration—Suit must be stayed absolutely.*

Where the parties have referred their disputes to arbitration, the Court ought to stay the suit absolutely. (*Walsh and Ryves, JJ.*) Sita Ram Nathmal *v.* Sushil Chandra Das & Co. **43 All. 553 = 19 A.L.J. 495 = 63 I. C. 813 = A.I.R. 1921 All. 219.**

———*Submission to three arbitrators—Court has jurisdiction to stay suit.*

Where there is a submission providing for a reference to arbitrators, the Court has jurisdiction to stay the suit under S. 19. (1900) 2 Q. B. 606 and 43 Bom 809, Ref. The words in S. 19 "a submission to which this Act applies" are intended to provide for the case where a suit is filed in an up-country Court in an area to which the Act has not been applied though part of the cause of action has arisen in a Presidency town. That Court, though not the Court defined in S. 4 (*a*), would have power to stay the suit if the submission was one to which the Act applies or in other words if the suit could with leave or otherwise have been filed in a Presidency town. 31 Bom. 236, Dissented from. (*Pratt, J.*) *In re* Indian Arbitration Act. **45 Bom. 1 = 57 I. C. 997 = 22 Bom. L. R. 842 = A.I.R. 1921 Bom. 165.**

S. 19—Stay—Refusal—Effect.

———*Suit instituted despite reference to arbitration under arbitration clause in contract between parties—Award is of no effect unless suit is stayed.*

Where an action has been commenced upon a contract which contains a provision for reference to arbitration, even if a reference to arbitration has been made before the commencement of the suit, the award is of no effect unless the suit has been stayed pending the arbitration. *Doleman & Sons* v. *Ossett Corporation*, (1912) 3 K. B. 257 ; 46 C. 1041 and 41 M. 115, Foll.

If the Court has refused to stay an action or if the defendant has abstained from asking it to do so, the Court has seisin of the dispute and it is by its decision and by its decision alone, that the rights of the parties are settled. The private tribunal, if it has ever come into existence, is *functus officio*, unless the parties agree *de novo* that the dispute shall be tried by arbitration and that the action itself shall be referred. (*Mookerjee and Fletcher, JJ.*) RAM PRASAD *v.* MOHANLAL.

38 C. L. J. 67 = 60 I. C. 895 = A.I.R. 1921 Cal. 770.

———*It must be established that the matter has been agreed to be referred to arbitration.*

Before an order can be made under S. 19, it must be established that the suit has been instituted in respect of a matter agreed to be referred. (*Mookerjee, A. C. J. and Fletcher, J.*) JNANENDRA KRISHNA BOSE *v.* SINCLAIR MURRAY & CO. **34 C. L. J. 173 = 66 I. C. 741 = A. I. R. 1921 Cal. 255.**

S. 19—Stay—Jurisdiction.

———*Bengal Chamber of Commerce—Rules of Tribunal of Arbitration, R. 8—Suit stayed under S. 19—New arbitrator can be appointed and can proceed with arbitration.*

If the suit is stayed, it would be competent to the Chamber to substitute and appoint new arbitrators, and the Court so reconstituted will then be able to proceed with the arbitration. (*Mookerjee and Fletcher, JJ.*) JOKHIRAM KAYA *v.* GANASHAMDAS KEDARNATH.

25 C. W. N. 62 = 61 I. C. 380 = A. I. R. 1921 Cal. 244.

S. 19—Stay.

———*Agreement to refer to arbitration—Burden of showing why it should not be given effect to is on party opposing stay petition.*

The burden of showing cause, why the agreement to submit should not be given effect to, is upon the party opposing the application for stay, and it is for him to induce the Court to exercise its discretion in his favour with a view to allow the action to proceed. (*Mookerjee and Fletcher, JJ.*) JOKHIRAM KAYA *v.* GANASHAMDAS KEDARNATH. **25 C. W. N. 62 = 61 I. C. 380 = A. I. R. 1921 Cal. 244.**

S. 19—Step—Meaning.

———*Mere intimation of future application for stay is not a step in suit.*

A mere intimation to the Court at the very outset that an application for stay will be made does not amount to a submission to the Court's jurisdiction; on the contrary it is a step in bar of the proceedings in Court. (*De Souza, A. J. C.*) FIRM KHIMCHAND *v.* UDHAVDAS. **22 S. L. R. 286 = 106 I. C. 565 = A. I. R. 1928 Sind 97 (c).**

———*Defendant not served and not having entered appearance, applying for copy of plaint and for leave to enter appearance—Acts were held not to be "step in proceedings."*

The plaintiff and the defendant were parties to an agreement to refer to arbitration the matter in dispute in the suit instituted by the plaintiff in spite of the agreement. The defendant not having been served, did not originally enter an appearance as directed in the summons, and the suit was placed in the undefended list. Then the defendant's attorney wrote to the plaintiff's attorney: "An order has this day been made directing our client to make an application for leave to enter an appearance herein. We shall be obliged if you will send us a copy of the plaint and the affidavit of service at once on the usual terms." Then the defendant applied for leave to enter appearance.

Held, that as regards the defendants having applied for a copy of the plaint, a step in the proceedings meant something in the nature of an application to the Court, and not mere talk between solicitors or the solicitors' clerks nor the writing of letters, but the taking of some step such as taking out a summons or something of that kind which was in the technical sense a step in the proceedings. Moreover, to apply for a copy of the plaint was merely to seek information in order that the defendant might ascertain the nature of the plaintiff's claim. In so doing the defendant did not and was not to be deemed to indicate acquiescence in the course adopted by the plaintiff for the purpose of settling the dispute which had arisen. As regards the defendant having applied to enter an appearance, any act in the nature of an application to the Court which indicated that a party was willing that the suit should proceed, would be a step in the proceedings within S. 19 of the Indian Arbitration Act. The intention of the party was to be gathered from the nature of the application which was made, and if having regard to the form of application, the Court was of opinion that a step had been taken it would so hold, notwithstanding that the party might in truth and in fact have no such intention, or that the application, was coupled with a protest that the party desired that the matters in dispute should be referred to arbitration. Applying this test the defendant's application for leave to enter an appearance was not a step in proceedings within S. 19 of the Arbitration Act. (*Page J.*) BHOWANIDAS RAMGOBIND *v.* PANNACHAND LUCHMIPAT. **52 Cal. 453 = 88 I.C. 929 = A.I.R. 1925 Cal. 801**

———*Verbal prayer is taking step.*

A verbal prayer by defendant's counsel for further time to file a written statement in reply to the Court's question is taking a step in the proceedings. (*Sanderson C.J. and Richardson, J.*) THE KARNANI INDUSTRIAL BANK LTD. *v.* SATYA NIRANJAN SHAW.

28 C.W.N. 771 = 81 I.C. 846 = A.I.R. 1924 Cal. 789.

S. 19—Validity.

———*Failure in the endeavour to solve differences by arbitration does not affect the validity of the arbitration clause.*

The fact that the parties endeavoured to solve their differences by recourse to arbitration and failed, does not in the slightest degree affect the validity of the arbitration clause and it is no answer to say that the parties went through, what all of them actually believed at the time was an arbitration in due form, if, when examined by the Court, the arbitration was found to have been of no legal effect. (*Mears, C.J. and Young, J.*) RIKHAB KUMAR *v.* TRIVEDI & CO. **51 All. 874 = 116 I.C. 444 = 1929 A.L.J. 877 = A.I.R. 1929 All. 455 (a) at 456.**

———*Award passed during pendency of a suit relating to the same dispute—Award is not invalid but is only suspended during its pendency—Suit withdrawn or dismissed—Award is revived.*

A dispute between *A* and *B* was referred to arbitration. In the meantime *A* brought a suit regarding the same dispute asking for injunction restraining *B* from proceeding with the arbitration. In spite of the suit, the arbitration proceeded and during the pendency of the same an award was passed by the arbitrator. The suit has been withdrawn or dismissed and was not pending.

Held, that the arbitrator was not *functus officio* during the pendency of the suit and the operation of the award was only suspended and the suit having been withdrawn or dismissed the award was revived. (*Rup-*

chand Bilaram, A.J.C.) MALOTRA & CO. *v.* SUKHDAYAL KAPUR. **112 I.C. 318 = 23 S.L.R. 427 = A.I.R 1928 Sind 169.**

——*Suit filed before arbitration began—Award come to during suit—Stay of suit not obtained—Award is not invalid but remains suspended till stay application is disposed of.*

Where before the arbitration proceedings had begun a suit had been filed in respect of the same matter and the award was come to during the pendency of the suit before any stay order was obtained. *Held*, that the mere fact of the suit being filed does not invalidate the arbitration proceedings, and it is for the Court to decide whether it should try the suit or not. If however, an order under S. 19 of the Act to stay the suit is refused or if the party applying under that Act has by pleading in the suit waived his right of going into arbitration, the arbitration proceedings are invalidated and the Court alone is seized of the dispute. Therefore until the Court has made up its mind under S. 19, the arbitrators are not *functi officio*. But until that application is disposed of by Court staying the proceedings, the award could not be filed. The award of the arbitrators however is not a nullity and is not bad, but is in suspense. In such cases the correct order is to reject the award and order it to be represented after the Court disposes of the application under S. 19 or otherwise ceases to be seized of the case without adjudication on the merits.

Per *Aston, A.J.C.*—It cannot be laid down as a principle that a party who has obtained an award after the institution of the suit and has applied for the stay of the suit, and for the filing of the award, has abandoned his rights under the arbitration, or that a Court which has refused to stay a suit has decided that it alone shall be seized of the dispute. (1912) 111 K.B. 257, Dist.; *Messrs. Khilloram* v. *Messrs. Louis Dreyfus*, 13 S. L. R. 8, Foll. (*Kennedy, J. C. and Aston, A. J. C.*) MESSRS. MITSUE BUSSAN KAISHA LTD. *v.* MESSRS. TATA RAM BHAGWAN DAS AND MESSRS BHOORJI BHAGWANDAS. **17 S.L.R. 228 = 87 I.C. 83 = A I.R. 1924 Sind 146 (147).**

S. 19—Waiver of plea.

——*Where there is agreement to refer party may choose the alternative in the action unless he is estopped but defendant may be mulcted in costs if he led plaintiff to file suit.*

If there is a submission for reference to arbitration and a party chooses to bring his suit, the other party can then decide whether or not he will remain before the Court, which he indicates by taking some step in the action, or whether he will avail himself of his contractual rights to have the dispute referred to arbitration. If he had misled the plaintiff in some way into bringing the suit, it might be a good ground for punishing him in costs and if the misleading had been definite enough to amount to a particular statement that he would not apply to have the matter referred to arbitration and would submit to the jurisdiction of the Court, it might even amount to an estoppel, so as to prevent him from making an application thereafter. The Court, where there is a submission to arbitration, in order to refuse to stay the proceedings, must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the submission, that is, really saying in other words, that the onus is on the party resisting the application for stay to show some sufficient reason why in the particular case the parties should be relieved from the obligation which they have contracted, namely, that their case should go before arbitrators selected by them and not before the ordinary tribunals of the land. There are certain well-defined instances where a court almost invariably refuses to stay, such as a case where there are serious allegations of fraud. There are cases where the point involved is a novel or difficult point of law which the Court is satisfied is bound to come back by way of special case to it to decide or where it comes to the conclusion that the sending of the case to the arbitrators will involve a waste of time and expense. (*Schwabe, C.J. and Krishnan, J.*) ANGLO PERSIAN OIL CO. *v.* PANCHAPAKESA IYER. **47 Mad. 164 = 18 M.L.W. 752 = 76 I.C. 1011 = 33 M.L.T. 103 = 1923 M.W.N. 772 = A.I.R. 1924 Mad. 336 = 45 M.L.J. 653.**

——*Suit filed in contravention of agreement for reference—Defendant not applying for stay of suit under S. 19 must be deemed to have waived his right to arbitration.*

Two firms *A* and *B* entered into a contract in writing and under the terms of the said contract agreed to refer all disputes arising out of the same to arbitration. A dispute arose subsequently and *A* (firm) appointed their arbitrator and asked *B* by letter to nominate another arbitrator on their behalf and *B* replied that they had already filed a regular suit against *A* and therefore an arbitration was unnecessary, Upon this the arbitrator appointed by *A* gave his award, meanwhile the suit brought by B against *A* was proceeding. Subsequently A as defendant applied to file the said award under Section 11 of the Indian Arbitration Act. *B* the plaintiff objected to its being filed.

Held, that the objection made by the plaintiff is well founded, on the simple ground that the defendant, having deliberately refused to utilise the machinery provided by S. 19, namely by applying for a stay of the suit brought against him, must be taken to have waived his right to arbitration. Ram Prasad Surajmal *v.* Mohanlal Lachminarayan (47 Cal. 752) and Appavu Rowther *v.* Seeni Rowther (41 Mad. 115) criticised and distinguished. (*Piggott and Walsh, JJ.*) CHIMMAN LAL POSTIMAL *v.* PHOOL CHAND FATEH CHAND. **44 All. 292 = 20 A. L. J. 128 = 65 I. C. 795 = A. I. R. 1922 All. 48.**

Sch. I, Para. 3—Limitation.

——*Reference entered upon—Award within three months thereafter is valid.*

The provisions "entering of the reference" and "having been called upon to act by notice in writing" are alternative in this sense, that where no reference is entered upon at all the time runs from the notice calling upon the arbitrators to act. But on the other hand, even although the arbitrators may be called upon to act by entering upon the reference, if they enter upon the reference, they have three months from that moment for making their award and for enlarging the time for making the award if the circumstances at the reference satisfy them that they cannot complete the award within three months. (*Piggott and Walsh, JJ.*) SARDAR MAL *v.* SHEO BAKSH. **44 All. 432 = 66 I.C. 907 = 20 A. L. J. 272 = A.I.R. 1922 All. 106.**

ARBITRATOR.

——*If can give power to parties to apply to Court for directions in future.*

No arbitrator can give to anybody any right to apply to the Court for any direction. (*Rankin, C.J. and C. C. Ghose, J.*) JNANENDRA MOHAN *v.* ANNAPURNA DEBI. **31 C. W. N. 517 = 102 I. C. 108 = 45 C. L J. 597 = A. I. R. 1927 Cal. 562.**

Payment on Court's behalf.

——*Cannot receive payment on behalf of Court.*

An Arbitrator as such is not such an officer of the Court as is authorized to receive on behalf of the Court

ARBITRATOR—Prejudice.

deposits of money made by the parties. He is appointed to arbitrate on matters in dispute, make his award and file it in Court, therefore, a payment to arbitrator does not amount to payment of money into Court. (*Heald and Lentaigne, JJ.*) U PO SAN *v.* MA NGWE HNIT. **3 Bur.L.J. 6 = 80 I. C. 238 = A.I.R. 1924 Rang. 263.**

Prejudice.

———*Will not be lightly presumed to be biassed—Unless known to be impervious to conviction, can be appointed.*

Unless it is shown that the arbitrator to be appointed is one who has made up his mind so as not to be open to change it upon argument, or that he will most certainly tilt the scales against the opponent, there is no bar to his being appointed such arbitrator. (*Jackson* v. *Barry Ry. Co.*, Rel. on.) (*Aston, A. J. C.*) MULCHAND SOBHRAJ *v.* RADHAKISHIN PARUMAL. **90 I.C. 932 = A. I. R. 1926 Sind 27.**

Witness.

———*Arbitrator is a competent witness but not on matters which are within his jurisdiction and on which his decision is final—Extraneous evidence prohibited by S. 92 cannot be admitted with respect to the award.*

An arbitrator can be examined as a witness where an award is challenged for misconduct or want of jurisdiction or for its being improperly procured. Such examination cannot be extended to scrutinise the reasons of his decision on matters within his jurisdiction and on which his decision is final. Evidence to explain or to add or to contradict the award is not admissible. (*Raymond and Rupchand Bilaram A.J.Cs.*) MESSRS. DUTTON MASSEY AND CO. *v.* MESSRS. JAMNADAS HARPARSAD. **19 S. L. R. 152 = 76 I. C. 84 = A. I. R. 1924 Sind 51.**

ARMS ACT (XI of 1878.)

Construction.

———A penal enactment like the Arms Act must be construed in favour of the individual person where any doubt exists. (*Findlay, J.C.*) SETH BALKISHAN *v.* EMPEROR. **11 N. L. J. 84 = 29 Cr. L. J. 575 = 109 I. C. 511 = 10 A. I. Cr.R. 348 = A. I. R. 1928 Nag. 219.**

Solitary Confinement.

———*Penal Code, S. 73—Solitary confinement cannot be awarded for convictions under Arms Act.*

Solitary confinement cannot be awarded for offences under Special or Local Acts. 17 P.R. 1889, (Cr.), 20 P. R. 1870 (Cr.), 4 P.R. 1875 (Cr.), 24 P.R. 1879 (Cr.), Ref. (*Abdul Raoof, J.*) EMPEROR *v.* NAZIR SINGH. **25 Cr.L.J. 120 = 76 I.C. 184 = A.I.R. 1924 Lah. 667.**

S. 4—Ammunition.

———*Empty cartridges are ammunition.*

Empty cartridges come within the definition of ammunition in S. 4 of the Arms Act, (32 All. 152, Foll.) (*Sulaiman and Ryves, JJ.*) EMPEROR *v.* ALADIN. **46 All. 107 = 81 I. C. 215 = 21 A L. J. 879 = 5 L.R.A. Cr. 22 = 25 Cr.L.J. 727 = A.I.R. 1924 All. 215.**

Ss. 4, 13 & 19 (e)—Arm—Meaning.

———*Purpose regulates whether an implement should be deemed to be arms—C clasp-knife 5½ inches long is an arm.*

The criterion whether an implement should be deemed to be arms is the purpose for which the implement is primarily intended. A clasp-knife which has a blade 5½ inches long with a pointed end and is fitted to a long handle and turns over into the handle falls within the meaning of the word "arms". 1 L.B.R. 271; 3 L.B.R. 1

ARMS ACT (1878), S. 13.

and A.I.R. 1924 Cal. 714, Rel. on. (*Mya Bu, J.*) EMPEROR *v.* NGA LU GALE. **5 Rang. 710 = 106 I.C. 707 = 29 Cr.L.J. 115 = A.I.R. 1928 Rang. 49.**

Ss. 4 & 19—Arm—Meaning.

———*Primary purpose and not use for which an implement is used is the test—Axe or knife does not become "arm" within S. 4 by merely using it for offending or defending on particular occasions.*

It is always the purpose for which an implement is primarily used which determines the question whether it does or does not fall within the definition of "arms" in S. 4. Implements of ordinary domestic use such as an axe or knife cannot fall within the definition of arms by the mere fact that they have been used as weapons of offence or defence on particular occasions. (*Jailal, J.*) MEHRDIN *v.* EMPEROR. **28 Cr. L. J. 199 = 99 I.C. 935 = A.I.R 1927 Lah. 162.**

S. 4—Arm—Meaning.

A hunting knife sharpened on one side only is "arms" within S. 4. (*Greaves and Panton, JJ.*) BISHAN SINGH *v.* EMPEROR. **51 Cal. 573 = 81 I.C. 943 = 25 Cr. L. J. 1119 = A. I. R. 1924 Cal. 714.**

———*Parts of arms, are arms.*

Bolts and bars of rifles are arms within S. 4. (38 P. R. 1889 (Cr.) Ref.) In order to fall within S. 4, the weapon need not be in a serviceable condition, (21 Mad. 360, F. B., Rel.) (*Moti Sagar, J.*) KARM DIN *v.* THE CROWN. **25 Cr. L. J. 539 = 77 I. C. 1003 = A. I. R. 1923 Lah. 617.**

———*Arms*—Dahs—*Criterion is the intended purpose of the weapon.*

The true criterion is not whether any given *dah* is an "u-pyat" but what was the intention of the maker as regards its purpose 5 L. B. R. 207, Ref. (*Duckworth, J.*) POME *v.* KING EMPEROR. **23 Cr. L. J, 594 = 68 I. C. 818 = 11 L. B. R. 340 = 1 Bur. L.J. 238 = A.I.R. 1923 Rangoon 23 (1).**

Ss. 5 & 19—Manufacturing Kirpans.

———*Manufacturing* Kirpans *without license is an offence.*

The exemption only applies to *kirpans* actually in existence and possessed or carried by Sikhs and not to the manufacture of *kirpans* by Sikhs. A Sikh is not prevented by any provision in the Arms Act from dealing with a *kirpan* which he possesses in any way he likes. A Sikh, however, is not exempted by the entry in Schedule II from the operation of the prohibition as to manufacture contained in section 5 of the Act. (*Scott-Smith and Harrison, JJ.*) EMPEROR *v.* BASTA SINGH. **3 Lah. 437 = 77 I. C. 230 = 25 Cr. L. J. 342 = A.I.R. 1923 Lah. 267.**

S. 13—Going armed.

———*Taking blunt spear, capable of being sharpened, to parade ground for gymnastic purposes is "going armed"*

A spear would not cease to be a spear by reason of its points and edges becoming blunt if they are capable of being sharpened at any time; and taking of such spear to the parade ground for gymnastic purposes amounts to going armed within the meaning of S. 13. (*Mirza and Broomfield, JJ.*) EMPEROR *v.* SATTOGOWDA. **32 B.L.R. 571 = A.I.R. 1930 Bom. 174.**

———*License need not be carried whenever the person has the gun with him.*

A person who holds a license for a gun or any other weapon is not obliged to carry it on his person whenever

he has the gun with him. 20 Cal. 444 Foll. (*Daniels, A.J.C.*) EMPEROR *v.* MUHAMMAD IBRAHIM.
24 O. C. 265 = 64 I. C. 275 = 22 Cr. L. J. 755 = A. I. R. 1921 Oudh. 149.

Ss. 14 & 19 (f)—Empty Cartridges.

———*Two empty brass* 405 *used cartridge cases found in accused's house in a locked box—Accused was held not liable.*

While the police were searching accused's house for stolen property (which was not present) they discovered in a locked box two empty brass 405 used cartridge cases which were incapable of being re-loaded in India.

Held, that accused was not guilty. (*Stuart, J.*) AMIR *v.* EMPEROR. **47 All. 629 = 87 I. C. 927 = 23 A. L. J. 455 = 6 L.R. A. Cr. 127 = 26 Cr.L.J. 1039 = A.I.R. 1925 All. 498.**

S. 14—Possessing arm.

———*License for a full-sized gun—Possessing half barrel gun is an offence.*

Where a license granted relates to a full-sized gun, the person holding such a license cannot keep a half-barrel gun under it. (*Dalip Singh, J.*) MURLI SINGH *v.* EMPEROR. **10 A. I. Cr. R. 206 = 29 Cr. L. J. 472 = 109 I.C. 120 = 10 L.L.J. 302 = A.I.R. 1928 Lah. 759.**

Ss. 15 & 17—Possessing arms.

———*U. P. Arms Rules and Orders* (1924), *R.* 35—*Repairer of arms in possession of guns for repairs cannot be convicted of offence of being in possession of arms without license—Length of time of possession depends upon circumstances.*

From the provisions of the U. P. Arms Rules and Orders (1924) it is perfectly clear that a person who repairs arms and is in possession of guns made over to him for repairs cannot be convicted of an offence of being in possession of arms without license. Once it is found that a person was in possession of arms for *bona fide* purpose of repairing them the length of time during which his possession thereof is justified depends upon the circumstances of each case. (*Niamatullah, J.*) MURLI *v.* EMPEROR. **30 Cr. L. J. 984 = 119 I.C. 13 = 10 L. R. A. Cr. 145 = 1930 A.L.J. 201 = 12 A. I. Cr. R. 464 = 1929 Cr. C. 304 = A. I. R. 1929 All. 720.**

S. 19 (f) Arm—Meaning.

———*Instrument consisting of a* lathi *and an axe-like blade and not one used for domestic purposes is " Arm."*

An instrument consisting of two separate pieces, namely, a *lathi* 6' 3" long, at one end of which a hallow screw and an axe-like blade 5" by 4½" having a screw to allow of its being fixed into the long *lathi* was held to be an arm within the meaning of S. 19 (*f*), Arms Act, as no instrument like that is ever used for domestic or agricultural purposes. 33 P. L. R. 1914 ; 16 P. R. (Cr.) 1900 ; and 32 P. R. Cr. 1918, Foll. (*Addison and Johnstone, JJ.*) EMPEROR *v.* PURAN SINGH.
9 Lah. 137 = 29 P. L. R. 306 = 10 L. L. J. 538 = 29 Cr. L. J. 961 = 112 I. C. 49 = A. I. R. 1928 Lah. 295.

Ss. 19 & 20—Concealing.

———*In order to apply S.* 20 *indication of intention to conceal arms from public servant must be shown.*

Each case of concealment of arms must be decided on its own facts as to whether it falls under S. 19 or S. 20, Arms Act, but for S. 20 to apply there must be some special indication of an intention to conceal the possession of the arms from a public servant, railway official or public carrier. 8 P. R. 1915 Cr.; A. I. R. 1923 Lah. 79 ; A. I. R. 1923 Lah. 434 ; and A. I. R. 1926 Lah.

262, Foll. ; 9 P. R. 1912 Cr. and A. I. R. 1925 Lah. 395, Diss. from. (*Tek Chand, J.*) KARIM BAKHSH *v.* EMPEROR. **9 Lah. 550 = 29 Cr. L. J. 577 = 109 I. C. 593 = 10 A. I. Cr. R. 293 = A. I. R. 1928 Lah. 193.**

S. 19 (f)—Empty Cartridges.

———*Possession of empty cartridges which cannot be re-loaded in India is not an offence.*

To support a conviction for possession of empty cartridges it should be proved that the cartridges can be re-loaded in India and used as ammunition by the persons with whom they are found. If this is not found the cartridges are not ammunition and so no prosecution can be made on their basis. 32 All. 152, Dist. ; A. I. R. 1925 All. 498, Foll. (*Walsh, J.*) KALLU *v.* EMPEROR. **24 A. L. J. 208 = 7 L. R. A. Cr. 15 = 27 Cr. L. J. 136 = 91 I. C. 808 = A. I. R. 1926 All. 255.**

S. 19 (a & d)—Going armed.

———*Sikh carrying* kirpans *is not guilty.*

Sikh found in possession of *kirpans* of the length varying from nine to ten inches is not guilty of the offence under S. 19 (*a*) and (*d*) as such *kirpans* are not swords. A. I. R. 1924, Lah. 600 Dist. (*Patkar and Wild, JJ.*) DALJITSING FATTESING *v.* EMPEROR.
32 B. L. R. 106 = A. I. R. 1930 Bom. 153.

S. 19 (e)—Going armed.

———*Going armed means carrying weapon intending to use it if necessary—Going need not be habitual.*

S. 19, Cl. (*e*) does not include the word " habitually" and the words " goes armed " connote carrying a weapon with the intention of using it when the necessity arises. Even an isolated act of carrying a weapon in contravention of the license would amount to an offence under S. 19, Cl. (*e*). The words " goes armed," would imply a motion as well as the possession of the arms in contravention of the license, and mean nothing more than carrying a weapon with the intention of using it as a weapon when the necessity or opportunity arises for its use. The words do not necessarily connote a habitual course of conduct. Where, therefore, an accused gets himself possessed of a sword with the intention of using it as a weapon for the purpose of attacking his opponents and uses it, while using that weapon he must have moved about and he would therefore be considered to have gone armed within the meaning of Cl. (*e*), S. 19. A. I. R. 1923 Bom. 35 ; 24 All. 454 and 37 Bom. 181, Rel. on. (*Mirza and Patkar, JJ.*) MANJUBHAI GORDHANDAS *v.* EMPEROR.
53 Bom. 604 = 31 Bom. L. R. 536 = 119 I. C. 641 = 1929 Cr. C. 38 = 30 Cr. L. J. 1059 = A. I. R. 1929 Bom. 263.

Ss. 19 (f) & 20—Going armed.

———*Intention specified in S.* 20 *cannot be inferred by merely carrying a small arm in pocket.*

If a person carries on his person a small weapon such as a pistol, a dagger, or a blade of a *chhavi*, he naturally puts it in his pocket or dab, and if with that weapon in his pocket or dab he is in his house or in his village or in a bazaar or in a Court compound, it cannot be inferred that he was so carrying the weapon with the intention specified in S. 20. (*Zafar Ali J.*) GHULAM MAHOMED *v.* EMPEROR. **28 Cr. L. J. 671 = 103 I. C. 207 = A. I. R. 1927 Lah. 561.**

S. 19 (e)—Going armed.

———*Intention and possibility of using are essential.*

The offence of going armed with fire-arm is considerably more narrow than the offence of being in possession merely of fire-arms. The expression ' going armed ' clearly indicates two things, namely, firstly an intention to use it as a fire-arm and secondly the possibility of using it. (*Srinivasa Ayyangar, J.*) SONAIMUTHU AMBALAM *v.* EMPEROR.

26 Cr. L. J. 1028 = 87 I. C. 916 = 21 M. L W. 644 = 1925 M. W. N. 217 = A. I. R. 1925 Mad. 585 = 48 M. L. J. 502.

——*" Armed " includes carrying an arm not capable of immediate use.*

A person who carries about a gun without any ammunition can be said to go "armed". To define "armed" as meaning " one who is equipped with an arm capable of immediate use as an arm " seems contrary to the vernacular meaning of the word " armed " and is also not safe. (*Kincaid, J. C. and Kennedy, A. J. C.*) EMPEROR *v.* MAHOMED PUNJAL. **18 S.L.R. 272 = 77 I. C. 736 = 25 Cr. L. J. 448 = A. I. R. 1925 Sind 177.**

S. 19 (f)—Joint possession.

Where a *Chhavi* was found in a house admittedly in the joint possession of both the accused, *Held*, it could not be said with any degree of certainty that one of them was in exclusive possession thereof. The accused must be given the benefit of this doubt. (*Abdul Raoof, J.*) ALI *v.* THE CROWN. **25 Cr. L. J. 399 = 77 I.C. 447 = A. I. R. 1923 Lah. 513.**

——*Possession of arms—Evidence doubtful—Conviction is illegal.*

Where it was found that the two accused were found lying on a bed in the house of another and in the bedding a *chhavi* was found wrapped in a cloth, *held*, that it was impossible to say which of the two was actually in possession even if it was proved that the owner of the house was not the owner and therefore that the conviction of the accused was illegal. (*Harrison, J.*) NARINJAN SINGH *v.* EMPEROR.

4 U. P. L. R. (h) 32 = 65 I. C. 447 (1) = 23 Cr. L. J. 95 (L.) = 13 P. W. R. 1922 Cr.

S. 19 (f)—Liability of relation.

——*House occupied by person, his wife and father aged* 80—Chhavi *blade in wife's possession—Mere fact of father being* 80 *years old is not sufficient to establish person's possession of* chhavi.

In the case of a house occupied by a joint family there is an initial presumption that an article found therein is in the possession of the head of the family. A. I. R. 1928 Lah. 272, Rel. on. Thus where a house was occupied by a person, his father who was 80 years old, and the person's wife and a *chhavi* blade was found in wife's possession the mere fact that the father is 80 years old is not sufficient to establish that the person was in possession of the *chhavi*. (*Bhide J*) KARAM SINGH *v.* EMPEROR. **1929 Cr. C. 544 = 116 I. C. 718 = 30 Cr. L. J. 668 = 13 A. I. Cr. R. 111 = A. I. R. 1929 Lah. 872.**

——*Accused's brother holding licence—Accused firing blank shots to warn would-be mischief makers—Accused is not guilty.*

When communal riots were taking place in different quarters of the town, the accused, brother of a licence holder, took out his brother's gun and fired shots in the air so that people mischievously inclined might know that it was not safe for them to do any mischief to the people living in the house.

Held, that the possession of the gun was on behalf of the brother and the accused was not guilty under S.19 (*f*) A.I.R. 1925 All. 175 Dist. (*Mukerji, J.*) BABU RAM *v.* EMPEROR.

47 All. 606 = 87 I. C. 523 = 23 A. L. J. 356 =

26 Cr. L.J 987 = 6 L. R. A. Cr. 121 = A.I.R. 1925 All. 396.

——*Son of a licensee (the latter not being entitled to hand over gun to retainer) was convicted for possessing father's gun for shooting birds.*

The accused's father held a license for a gun. The license which had been issued to him did not mention that he was entitled to hand over his gun to a retainer. The accused took out the gun of his father for the purpose of shooting birds. While thus possessing the gun near a pond, he was found out by an officer of the police and the Tahsildar.

Held, that though the spirit of the law was not contravened yet, the letter was certainly contravened but that a fine of Rs. 25 would answer the purpose. (*Mukerji, J.*) MUHAMMAD HASAN *v.* EMPEROR. **47 All. 267 = 22 A. L. J. 1095 = 6 L. R. A. Cr. 23 = 26 Cr. L. J. 479 = 85 I. C. 159 = A. I. R. 1925 All. 175.**

S. 19 (f)—Offence under.

——*Penal Code, S.* 120-B—*Agreement of parties makes offence complete—Conspiracy to possess fire arms—Conspiracy in respect of particular firearms need not be proved.*

An offence under S. 120-B consists in the conspiracy without any reference to the subject-matter of the conspiracy. It is true that the law does not take notice of the intention or the state of mind of the offender and there must be some overt act to give expression to that intention, but that overt act in a case of conspiracy under S. 120-B consists in the agreement of the parties. *Mulcahy* v. *The Queen*, (L. R. 3 H. L. 306, 1868) Rel. on. The definition of conspiracy in S. 120-B excludes the agreement to commit an offence, from the category of such conspiracies, in which it is necessary that the agreement should be followed by some act. It is not therefore necessary in a case of conspiracy to possess fire-arms, for the prosecution to specify in the charge or to prove that the accused conspired to possess any particular fire-arms. 42 Cal. 957, Rel. on. (*Suhrawardy and Panton, JJ.*) NIRMAL CHANDRA DE *v.* EMPEROR. **31 C. W. N. 239 = 100 I. C. 113 = 28 Cr. L. J. 241 = A. I. R 1927 Cal. 265.**

——*Forbidden weapon discovered by reason of information from accused—His conviction is valid—Evidence Act, S. 27.*

Where an article, the possession of which is forbidden by the Indian Arms Act, has been discovered by reason of information given by an accused person, his conviction based upon that evidence is valid. 72 P. L. R. 1916, Foll. (*Fforde, J.*) NAURANG SINGH *v.* EMPEROR.

9 L. L. J. 211 = 28 P. L. R. 626 = 100 I. C. 122 = 28 Cr. L. J. 250 = A. I. R. 1927 Lah. 900.

S. 19 (f)—Possessing arm.

——*Possession of jambia is not offence in Bombay Presidency under S.* 19.

Possession of a jambia or a kind of dagger is not an offence under S. 19 unless the prohibition contained in S. 15 has been retained by some notification of the Local Government. The only prohibition retained by the Bombay Government by its notification published at p. 2093 of the Bombay Government Gazette is that contained in S. 13, and therefore possession of a jambia does not constitute an offence in Bombay Presidency under S. 19 (*f*). (*Mirza and Broomfield, JJ.*) EMPEROR *v.* BABAJI MANAJE. **32 B. L. R. 350 = A. I. R. 1930 Bom. 159.**

——*Before entering house to be searched police seeing some men throwing something from their persons—*

Police discovering cartridges under Chowki on which accused sat conversing with others—Charge against them resting on suspicion—Their possession or knowledge not proved—They cannot be convicted under S. 19 (*f*).

Before the police entered the house which was to be searched, certain persons inside were seen throwing down something from their person, and on a search being made certain cartridges were discovered under the Chowki on which the accused were sitting conversing with others. The cartridges were not proved to be in their possession, nor was it proved that they knew that they were there.

Held, that the charge against them rested on suspicion and their guilt not being proved they cannot be convicted under S. 19 (*f*). (*C. C. Ghose and Jack, JJ.*) BAZLAR RAHMAN *v.* EMPEROR. **33 C. W. N. 202 = 30 Cr. L. J. 1038 = 119 I. C. 297 = A. I. R. 1929 Cal. 302.**

S. 19 (d)—Possessing arms.

———*Ordering gun from dealer in Bombay ostensibly for another but really for himself does not amount to offence under S.* 19 (d).

Where a person orders a gun from a dealer in Bombay ostensibly for an intending purchaser but in fact upon his own account, the act does not amount to offence of transporting without license under S. 19 (*d*). Under R. 24, Arms Rules, it is for the consignor and not for the consignee to apply for and obtain license and when the transporting is done by dealer in Bombay, it is fully covered by the license. Conviction under S. 19 (*d*) cannot in such a case be sustained. It is sufficient that the person ordering the gun should under R. 22 hold a license to possess the gun and if he is found without one he is liable to prosecution, on receipt of the weapon for possessing it without license. (*Curgenven, J.*) VIRASWAMI NAIDU *v.* EMPEROR. **52 Mad. 999 = 30 M. L. W. 945 = 1929 M. W. N. 807 = 2 M. Cr. C. 296 = 1929 Cr. C. 607 = 121 I. C. 617 = 31 Cr. L. J. 273 = A. I. R. 1929 Mad. 864 = 57 M. L. J. 520.**

S. 19 (f)—Possessing arm.

———*Cartridges found during an investigation in a theft case in house of accused—Accused not knowing who kept them—Offence under S.* 19 (f) *is not made out.*

During the investigation of a certain theft case the house of the accused was searched by the police and two cartridges of a rifle were discovered from an earthen pitcher placed in his house. The accused admitted the recovery of the cartridges but stated that it was not within his knowledge, and that his brother, who was an ex-military employee may have placed them in the house which was jointly occupied by the accused and his brother.

Held, that the accused was not guilty under S. 19 (*f*). (*Harrison, J.*) MANIGIS *v.* EMPEROR. **7 A. I. Cr. R. 571 = 100 I. C. 819 = 28 Cr L. J. 339 = A. I. R. 1927 Lah. 726.**

S. 19—Possessing arms.

———*Pistol found in room frequented by many persons other than accused—Accused is not in possession.*

Where the evidence does not exclude a reasonable possibility of a pistol having been placed there by some other of the persons who frequented the rooms, or even by the person in whose possession it was at the time of the arrest.

Held, that it cannot be said that it has been proved beyond reasonable doubt that the pistol was in the possession of the accused. (*Daniels, J.*) KRISHNA GOPAL *v.* EMPEROR. **92 I. C. 589 = 27 Cr. L. J. 301 (All).**

S. 19 (f)—Possessing arm.

———*Sikhs are exempt from prosecution for possessing a sword.*

Sikhs are exempt in virtue of Schedule II, 3 (6) from prosecution under S. 19 (*f*) for possessing a sword or Kirpan. (*Scott-Smith and Harrison, JJ.*) HARI *v.* THE CROWN. **26 Cr. L J. 661 = 86 I. C. 37 = 5 Lah. 308 = 6 L. L. J. 265 = A.I.R. 1924 Lah. 600.**

S. 19—Possessing arms.

———*Recovery of arms not in presence of witnesses—Recovery list though signed by them is not of much weight.*

Where the head constable made a false report that a dacoity had been committed and that he had arrested some dacoits and after a delay of three days, as he said recovered the arms from the petitioner not in the presence of witnesses, who signed the list but who distinctly recorded that the arms were produced before them by the constable.

Held, the petitioner was not guilty. (*Moti Sagar, J.*) ALIF DIN *v.* THE CROWN. **A. I. R. 1923 Lah. 466.**

———Kirpan—*Punjab Government Notification of* 11*th May*, 1917—*Person claiming exemption must prove that he comes within it.*

Where on the gound that the sword which he carried was a *kirpan*, the accused claimed exemption from prosecution under S. 19, Arms Act on the notification of 11th May, 1917 which permits Sikhs to carry *kirpan* with impunity.

Held, the petitioner, who claims the benefit of an exception to the broad rule of law, must establish that he comes within that exception. Though *kirpan* means sword, every sword cannot be a *kirpan* within the meaning of the word. (*Le Rossignol, J.*) BACCHITTAR SINGH *v.* EMPEROR. **23 Cr. L. J. 78 = 65 I. C. 430 = 8 P. W. R. 1922 Cr. = A. I. R. 1922 Lah. 141.**

S. 19—Public assemblage.

———*Condition of license being not to carry arms in religious procession or public assemblage—Marriage procession is neither religious procession nor public assemblage within condition of the license—Words.*

A licensee was granted a license for gun on certain conditions one of which was " licensee shall not go armed otherwise than in good faith for the purpose of sport, protection, display and save where he is specially authorized in this behalf by the District Magistrate, he shall not take any such arms to a fair, religious procession or other public assemblage." The licensee was convicted under S. 19, Arms Act, in respect of his having gone armed with his gun in a marriage procession.

Held, that a marriage procession neither comes necessarily under the category of a religious procession nor of a public assemblage within the condition and therefore no special permission of the District Magistrate was required for the carrying of arms in such a marriage procession. (*Findlay, J. C.*) SETH BALKISHAN *v.* EMPEROR. **11 N. L. J. 84 = 29 Cr. L. J 575 = 109 I. C. 511 = 10 A. I. Cr. R. 348 = A. I. R. 1928 Nag. 219.**

Ss. 19 & 13—Public assemblage.

———*Marriage Procession is such.*

The accused, who was not a licensee, borrowed a gun from his cousin who held a license, and fired some shots while proceeding in a marriage procession through streets. The license forbade the taking of a gun to a public assemblage. *Held*, that the accused in handling and firing the gun had committed the offence under S.19, since the marriage procession became a public assemblage as soon as it emerged into a public road (*Macleod, C.*

J. and Shah, J.) KALYAN CHAND GOPAL CHAND *v.* EMPEROR. **24 Bom. L. R. 487 = 67 I. C. 722 = 23 Cr. L. J. 450 = A. I. R. 1923 Bom. 35.**

S. 19 (f)—Sanction.

——*In Aligarh District, for prosecution under S.* 19 (*f*), *District Magistrate's sanction is not necessary.*

According to S. 29, sanction of the District Magistrate was necessary to prosecute a person under S. 19 (*f*) for possessing arms without a license in the District of Aligarh, only for three months after 15th March, 1878 and not subsequently. A. I. R. 1926 All. 143 and A. I. R. 1929 All, 68, Rel. on. (*Dalal and Kendall, JJ.*) EMPEROR *v.* ANGADI. **1929 A. L. J. 215 = 117 I. C. 822 = 10 L. R. A. Cr. 38 = 11 A. I. Cr. R. 255 = 30 Cr. L. J. 856 = A. I. R. 1929 All. 69.**

Ss. 19 (f) & 29—Sanction.

——*Where unlicensed possession is clear, previous sanction is unnecessary.*

Where the accused is clearly in possession of arms and ammunition without a license, no sanction is necessary for starting prosecution under S. 19 (*f*). A. I. R. 1926 All. 143, Foll. (*Banerji and Bennet, JJ.*) EMPEROR *v.* ABDUL GHAFUR. **1929 A. L. J. 28 = 116 I. C. 29 = 10 L. R. A. Cr. 17 = 11 A. I. Cr. R. 149 = 30 Cr. L. J. 566 = A. I. R. 1929 All. 68.**

S. 19 (f)—Sanction.

——*Prosecution under S.* 19 (*f*)—*Sanction of District Magistrate is not necessary in some part of United Provinces.*

In the Bijnor District and other parts of the United Provinces to the north of the rivers, Jumna and Ganges, the sanction of the District Magistrate for a prosecution under S. 19 of the Arms Act is not necessary. (*Daniels, J.*) AMIR AHMAD *v.* EMPEROR. **24 A. L. J. 30 = 6 L R. A. Cr. 196 = 27 Cr. L. J. 15 = 91 I. C. 47 = A. I. R. 1926 All. 143.**

Ss. 19 (f) & 20—Sanction.

——*Conviction under S.* 19 (*f*) *is bad if no express sanction obtained—No sanction is necessary for prosecution under S.* 20.

The appellant was in secret possession of local-made guns and the cartridges. Sanction was obtained for prosecution under S. 20. He was convicted both under S. 20 and S. 19 (*f*).

Held, that conviction under S. 20 was legal but the conviction under S. 19 (*f*) was bad for want of sanction. (*May Oung, J.*) NGA THA HLA *v.* EMPEROR. **2 Bur. L. J, 203 = 25 Cr. L. J. 203 = 76 I. C. 571 = A. I. R. 1924 Rang. 85.**

S. 19 (c)—Servant's liability.

——*Even servant carrying master's gun in British India for having it repaired—No acknowledged license—Servant will not be protected.*

Even a servant who is found in British India carrying a gun for the purpose of having it repaired, which has no license acknowledged by the British Government, will not be protected from the provisions of S. 19 read with S. 6. 24 All. 454, Dist. (*Raza and Pullan, JJ.*) EMPEROR *v.* ORI. **6 O. W. N. 131 = 115 I. C. 839 = 30 Cr. L. J. 543 = 12 A. I. Cr. R. 357 = A. I. R. 1929 Oudh 157.**

S. 19 (e)—Servant's liability.

——Use of a gun by the servant of a licensee for his own purposes is an offence though the servant can carry legally the gun for the purposes of his master or in the presence of his master. (*Krishnan and Waller, JJ.*) VAIRAVAN SERVAI, *In re.* **47 Mad. 438 = 81 I. C. 623 = 19 M. L. W. 507 = 1924 M. W. N. 375 = 34 M. L. T. 97 = 25 Cr. L. J. 975 = A. I. R. 1924 Mad. 668 = 46 M. L. J. 401.**

S. 20—"Arms" meaning.

——*'Arms'—Instrument of attack and defence, not being ordinary implement for domestic use is 'Arms'*

Whether or not any particular instrument is included in the expression " arms " used in the Arms Act, must necessarily depend on the circumstances of each case. Whatever can be used as an instrument of attack or defence and is not an ordinary implement for domestic purposes, falls within the purview of the Act. (*Wilberforce and Martineau, JJ.*) MANGAL SINGH *v.* EMPEROR. **2 Lah. 291 = 64 I. C. 847 = 12 P.L.R. 1922 = 23 Cr. L.J. 63 = 101 P.L.R. 1921 = A. I. R. 1922 Lah. 138.**

S. 20—Concealing.

——*Spear held next to skin—Intention to conceal from public servant cannot be inferred.*

The fact that the accused secreted the spear head next to his skin does not indicate any intention that the possession by the accused of the spear head might not be known to any public servant. (*Milton, J.*) HARNAM SINGH *v.* EMPEROR. **31 Cr. L.J. 79 = 120 I.C. 273 = 1929 Cr. C. 142 = 13 A. I. Cr. R. 225 = A. I. R. 1929 Lah. 576.**

——*Person running away when challenged—Companion also running away with him—Intention under S.* 20 *cannot be inferred.*

The fact that the accused ran away when challenged by the constable indicates an intention of the character mentioned in S. 20. But where accused had a companion who also ran away but upon whose person nothing incriminating could be found, as no such intention can be credited to the companion on the ground he also ran away, it cannot be attributed to the accused as well. (*Milton, J.*) HARNAM SINGH *v.* EMPEROR. **1929 Cr. C. 142 = 120 I. C. 273 = 31 Cr. L. J. 79 = 13 A. I. Cr. R. 225 = A. I. R. 1929 Lah. 576.**

——*Possession of arms—Person concealing weapon while on railway platform—S.* 20 *of the Act is applicable.*

In every case it is a question of fact whether the person found in possession of a concealed weapon is carrying the weapon in such a way as to indicate an intention to hide the article from the classes of persons referred to in S. 20. But the fact that a person is concealing a weapon while he is on a railway platform must indicate an intention to conceal that weapon from *inter alia* railway officials who are about that platform. A. I. R. 1926 Lah. 262, Foll. (*Fforde, J.*) ABDUL WAHID *v.* EMPEROR. **9 Lah. 302 = 9 L. L.J. 533 = 107 I. C. 495 = 29 Cr. L. J. 256 = 29 P. L. R. 329 = 9 A. I. Cr. R. 454 = A. I. R. 1928 Lah. 110.**

——*Special indication of intention to conceal must exist.*

Each case of concealment of arms must be decided on its own facts as to whether it falls under S. 19 or 20 of the Arms Act. 1 S. L. R. 18 Cr. (F. B.) and 8 P. R. Cr. 1915, Foll.

For a conviction to fall under S. 20 there must be some special indication of an intention that the possession of the arms was being concealed from a public servant or from a railway official. (*Addison, J.*) CHET SINGH *v.* EMPEROR. **7 Lah. 65 = 27 Cr. L. J. 625 = 27 P. L. R 523 = 94 I. C. 401 = A. I. R. 1926 Lah. 262.**

Ss. 20 & 19—Concealing.

———*Keeping ammunition and parts of arms hidden under clothes falls under S. 20 and not under S. 19.*

Keeping ammunition and parts of arms in a bag hidden under a *chaddar* or hidden under the clothes falls clearly under S. 20 and not merely under S. 19 of the Act. 44 P. W. R. 1912 Cr.; 1 P.W.R. 1914 Cr. Diss., (*Martineau, J.*) MT. BABO *v.* EMPEROR. **26 Cr. L. J. 1459 = 89 I. C. 1027 = A. I. R. 1926 Lah. 61.**

———Where the circumstances under which a pistol was recovered from the accused, who had come on a visit to Lahore from his village, led to a clear inference that his intention was that the possession of the pistol by him may not be known to any public servant.

Held, that it was not a case of an ordinary concealment and conviction should be one under S. 20. (*Jailal, J.*) FAIZ *v.* EMPEROR. **8 L. L. J. 301 = 96 I. C. 390 = 27 P L. R. 446 = 27 Cr. L. J. 934.**

———*S. 20 applies only where export or import of arms is attempted.*

S. 20 applies only where the possession is such as to indicate an intention that such act may not be known to any public servant as defined in the Indian Penal Code, or to any person employed upon a railway or to the servant of any public carrier. The section applies only to cases where the import or export of arms is attempted and not to every case of possession or concealment of arms. Something more than a mere ordinary concealment should be established in order to bring the possession within the meaning of S. 20. Where the gun was upon a *charpoy* upon which the accused was sitting and was covered with a *dotahi* and the accused had been convicted under S. 20, the conviction was altered into one under S. 19 (*f*) of the Arms Act. 9 P. R. 1912, Cr.; 15 L. R. 18 Cr. (F.B.) and 27 Cal. 692 Foll. (*Scott-Smith, J.*) CHANAN SINGH *v.* CROWN. **6 Lah. 151 = 86 I. C. 221 = 7 L. L. J. 329 = 26 Cr. L. J. 733 = 26 P. L. R. 49 = A. I. R. 1925 Lah. 395.**

S. 20—Concealing.

———Where the arms were discovered on the information given by the accused, the concealment of the *chhavis* and other arms recovered from the possession of the accused is clearly with the intention referred to in S. 20 of the Indian Arms Act. (*Moti Sagar, J.*) **A. I. R. 1923 Lah. 434.**

———*Concealment of weapon—Knowledge of where weapon was, does not show that he concealed it.*

Petitioner was alleged to have given information which led to the discovery of a rifle. One of the prosecution witnesses deposed that the petitioner said where the rifle had been buried, the other deposed that he said "I buried it."

Held, in absence of any other evidence of possession by the petitioner it cannot be presumed that because he knew where the rifle was, he had concealed it himself. (*Campbell, J.*) KHUDA BAKSH *v.* EMPEROR. **A. I. R. 1923 Lah. 238.**

———*Each case must be decided on its own facts.*

Each case of concealment of arms must be decided on its own facts.

Held, on the facts proved in the case the gun appeared to have been placed in the corn-bin in order to conceal it from the Police and therefore S. 20 was applicable. 8 P. R. 1915 Cr.; 9 P. R. 1912 Cr., Not Foll. (*Abdul Qadir, J.*) SHER ALI *v.* EMPEROR. **23 Cr. L. J. 609 = 68 I. C. 833 = A. I. R. 1923 Lah. 79.**

Ss. 20 and 19—Concealing.

———Where the weapon which the accused was carrying was originally concealed but the appellant voluntarily took it from its place of concealment in order to threaten a railway servant who caught him for travelling without a ticket. *Held*, it indicates an indifference as to whether the weapon was seen or not. The intention requisite for an offence under S. 20 had not been established and conviction must be altered to S. 19 of the Act. (*Brasher, J.*) SURJAN SINGH *v.* EMPEROR. **26 Cr. L.J. 166 = 83 I. C. 726 = A.I R. 1923 Lah. 10.**

Ss. 20 and 19 (f)—Sanction.

———*Conviction under S. 19 (f) is bad if no express sanction obtained—No sanction is necessary for prosecution under S. 20.*

The appellant was in secret possession of local-made guns and the cartridges. Sanction was obtained for prosecution under S. 20. He was convicted both under S. 20 and S. 19 (*f*).

Held, that conviction under S. 20 was legal but the conviction under S. 19 (*f*) was bad for want of sanction. (*May Oung, J.*) NGA THA HLA *v.* KING-EMPEROR. **2 Bur. L. J. 203 = 76 I. C. 571 = 25 Cr. L. J. 203 = A. I. R. 1924 Rang. 85.**

S. 20—Sentence.

———*Carrying* chhavi *concealed—Maximum sentence must not be inflicted in every case.*

The maximum sentence must not be inflicted in every case merely because the weapon found concealed by the accused is a *chhavi*. 8 P. R. 1915 Cr. Dist. (*Chevis, J.*) FAQIRIA *v.* THE CROWN. **66 I.C. 995 = 3 L.L.J. 145.**

S. 20—Suspicion.

———*Suspicion that accused was about to take part in some criminal offence is no consideration in passing sentence.*

The fact that there was a suspicion in the mind of the police that the accused was about to take part in a criminal undertaking is not a circumstance which a Court can take into consideration in arriving at an appropriate punishment for the actual offence which has been proved under S. 20. (*Fforde, J.*) ABDUL WAHID *v.* EMPEROR. **9 Lah. 302 = 9 L.L.J. 533 = 107 I. C. 495 = 29 Cr. L. J. 256 = 29 P. L. R. 329 = 9 A. I. Cr. R. 454 = A. I. R. 1928 Lah. 110.**

S. 22—Servant's liability.

———*Making over an arm to person not licensed merely to carry to its owner is no offence.*

Where a gunmaker acting under the directions of the license-holder made over his gun to a person merely to carry it to its owner and not with any authority to use it as an arm.

Held, that the gunmaker did not commit an offence under S. 22, Arms Act. A license-holder of a gun can permit another person who is not so licensed to carry his gun. (*Dalal, J.*) MANZUR HUSAIN *v.* EMPEROR. **8 A. I. Cr. R. 560 = 8 L. R. A. Cr. 166 = 26 A. L. J. 162 = 29 Cr. L. J. 97 = 106 I. C. 689 = A. I. R. 1928 All. 55.**

S. 22—Scope.

———Section 22 deals with persons without licenses dealing with licensed vendors or purchasers or with persons with licenses dealing with unlicensed vendors or purchasers. (*Suhrawardy and Panton, JJ.*) NIRMAL CHANDRA *v.* EMPEROR. **31 C. W. N. 239 = 100 I. C. 113 = 28 Cr. L. J. 241 = A. I. R. 1927 Cal. 265.**

Ss. 25, 19 and 20—Non-compliance.

———*Non-compliance with S. 25 is not fatal.*

Want of compliance with the provisions of S. 25 will not render conviction under Ss. 19 and 20 illegal. (*Dalal, J.*) SHIAM LAL *v.* EMPEROR. **8 L.R.A. Cr. 7 = 8 L. R. A. Cr. 92 = 28 Cr.L.J. 652 = 103 I. C. 108 = A. I. R. 1927 All. 516.**

ARMS ACT (1878), S. 27.

S. 27—Construction.

——*Notifications imposing penalty must be construed strictly.*

Notifications relating to the Arms Act imposing a penalty upon the subject must be construed very strictly. (*Patkar and Wild, JJ.*) DALJITSING FATESING *v.* EMPEROR. **32 Bom. L. R. 106 = A. I. R. 1930 Bom. 153.**

Ss. 27 & 19—Sword stick.

——*Sword-stick is not a* kirpan.

A sword-stick is a weapon different from a *kirpan.* The two expressions cannot be regarded as synonymous, and so the possession of a swordstick by a Sikh is not exempted by S. 27 of the Arms Act. A. I. R 1924 Lah. 600, Ref. (*Shadi Lal C.J. and Agha Haidar, J.*) RANDAIR SINGH *v.* EMPEROR. **29 Cr. L. J. 425 = 108 I. C. 596 = 10 A. I. Cr. R. 81 = A. I. R. 1928 Lah. 239.**

S. 29—Illegal possession.

——*When unlicensed possession is clear accused cannot question legality of search.*

Whether the search was legal or illegal, arms having been found in the possession of the accused, no question of the legality of the search or otherwise can be raised by him. A I.R. 1925 All. 434, Rel. on. (*Banerji and Bennet JJ.*) EMPEROR *v.* ABDUL GHAFUR. **1929 A. L. J. 28 = 10 L. R. A. Cr. 17 = 116 I. C. 29 = 11 A. I. Cr. R. 149 = 30 Cr. L. J. 566 = A. I. R. 1929 All 68.**

S. 29—Institution of proceedings.

——*Entering case in a case-book and making out a charge is not institution of proceeding.*

Entering a case in the case book and making out a charge is not institution of proceedings under S. 29. The proceedings really start when the accused is placed before the Court. The word "proceeding" in S. 29 does not mean that no action can be taken by any officer, police or otherwise in the matter without a previous sanction of the Commissioner of Police 17 Cal. 574, Expl. and Dist. (*Suhrawardy and Cammiade, JJ.*) ISMAIL KHAN *v.* EMPEROR. **46 C. L. J. 35 = 104 I. C. 433 = 28 Cr. L. J. 817 = A. I. R. 1927 Cal. 721.**

S. 29—'Proceedings' meaning.

——*Proceedings mean legal proceedings in Court.*

As in the case of a suit, a proceeding is instituted when for the first time the adjudication of a Court of competent jurisdiction is sought. Therefore the expression "proceedings" in S. 29 mean legal proceedings in Court and not searches or arrests or investigations made by the police in exercise of the powers conferred upon them by the Cr. P. Code, or any other law. A. I. R. 1925 All. 434, Rel. on. (*Mullick, Ag. C.J. and Wort, J.*) EMPEROR *v.* GHULAM NABI. **6 Pat. 768 = 9 A. I. Cr. R. 385 = 107 I. C. 835 = 29 Cr. L. J. 301 = A. I. R. 1928. Pat. 146.**

Ss. 29 and 19 (f)—Sanction.

——*In Aligarh District, for prosecution under S.* 19 (f), *District Magistrate's sanction is not necessary.*

According to S. 29, sanction of the District Magistrate was necessary to prosecute a person under S. 19 (*f*) for possessing arms without a license in the District of Aligarh, only for three months after 15th March, 1878 and not subsequently. A.I.R. 1926 All. 143 and A.I.R. 1929 All. 68, Rel. on. (*Dalal and Kendall, JJ.*) EMPEROR *v.* ANGAD. **1929 A. L. J. 215 = 117 I. C. 822 = 10 L. R. A. Cr 38 = 11 A. I. Cr. R. 255 = 30 Cr. L. J. 856 = A. I. R. 1929 All. 69.**

S. 30—Officer's powers.

——***In U. P., Officer in charge of Police Station is empowered to conduct search—Officer taking action must be presumed to be empowered.***

ARMY ACT (1911), S 120.

In the United Provinces, an officer in charge of a Police Station is empowered to conduct a search. An officer who takes action under a particular section must be deemed to have full powers until the contrary is proved. (*Banerji and Bennet, JJ.*) EMPEROR *v.* ABDUL GHAFUR. **1929 A. L. J. 28 = 10 L. R. A. Cr. 17 = 116 I. C. 29 = 11 A. I. Cr. R. 149 = 30 Cr. L. J. 566 = A. I. R. 1929 All. 68.**

S. 30—Search, legality of.

——*Search illegal yet if evidence is conclusive conviction is proper* obiter ; *two persons must be present at the search—One making the search and the other officer specially appointed.*

Although the search is illegal, a person can be convicted where the evidence against him is conclusive. 35 A. 75, Foll. The ordinary meaning of "in the course of any proceedings instituted" in S. 30, 'is in the course of any legal proceedings which have already begun.

Obiter : The words "in the presence of some officer specially appointed" mean that there must be at least two persons, namely the person making the search, and the officer especially appointed, within the meaning of S. 30 who is present at the search. (*Walsh and Boys, JJ.*) EMPEROR *v.* KUTROO. **47 All. 575 = 23 A. L. J. 364 = 88 I. C. 280 = 6 L. R. A. Cr. 124 = 26 Cr. L. J. 1112 = A. I. R. 1925 All. 434.**

ARMY ACT (VIII OF 1911), Ss. 2 and 120.

Attachment.

——*Army Assistant Surgeon is Warrant Officer—His pay is not attachable—C. P. Code, S.* 60.

An Army Assistant Surgeon is included under S. 2, Army Act as Warrant Officer, and his pay is not attachable even if he is recruited in India. (*Mears, C. J. and Mukerji, J.*) A. L. BROWNE *v.* H. A. PEARCE. **48 All. 73 = 23 A. L. J. 929 = 6 L. R. A. Civ. 578 = 89 I. C. 882 = A. I. R. 1926 All. 122 (124).**

Ss. 69 and 70—Applicability.

——*Military servant committing criminal breach of trust and absconding—Military Court having concurrent jurisdiction as regards criminal breach of trust but exclusive jurisdiction as to desertion—Mere fact that accused was arrested by police, put up before Magistrate and that case proceeded to some length does not make S. 70 applicable.*

Where a military servant was accused of criminal breach of trust and desertion,

Held, that since the offence of criminal breach of trust was triable both by criminal Court and by a Court-martial, it rested with the military authority to decide whether the accused should be tried by Court-martial or not.

Held, further, that since the offence of desertion could be tried by the military Court only, S. 70 could not apply and that the mere fact that the accused was arrested by the police and was put up before the Magistrate and the case had proceeded to some length, could not make any difference. (*Sulaiman, Ag, C.J.*) EMPEROR *v.* LACHMI DATT. **26 A. L. J. 942 = 9 L. R. A. Cr. 143 = 10 A. I. Cr. R. 453 = 29 Cr. L. J. 803 = 111 I. C. 307 = A. I. R. 1928 All. 672 (673).**

S. 120—Attachment.

——*Portion of pay set aside for security is pay and not liable to attachment although ordered to be refunded.*

After enrolment of certain store-keepers, the setting aside of the portion of the pay towards security was continued but subsequently it was directed that storekeepers would be exempted from lodging security deposit and that security deposit taken from them were to be refunded.

Held, that the refunded amount was pay withheld, and still continued to be pay though set apart as security and was not liable to attachment. It did not cease to be pay, merely because the military authorities withheld it for a time. (*Johnstone, J.*) GYAN CHAND *v.* MEHAR SINGH. **120 I. C. 676 = A. I. R. 1930 Lah. 105.**

Ss. 120 and 2—Attachment.

———*Army Asst. Surgeon is a Warrant Officer—His pay is not attachable.*

An army Assistant Surgeon is included under S. 2, Army Act as Warrant Officer and his pay is not attachable even if he is recruited in India. (*Mears, C.J. and Mukerji, J.*) A. L. BROWNE *v.* H. A. PEARCE. **48 All 73 = 23 A. L. J. 929 = 6 L. R. A. Civ. 578 = 89 I. C. 882 = A. I. R. 1926 All. 122 (2) (124).**

S. 120—Protection under.

———*Person enrolled is protected in respect of pays and allowances—Regimental order providing that such persons are to be treated as civilians and will have no connexion with military officers, does not take away the protection.*

Once a person is enrolled under the Act he is protected by S. 120 in respect of pays and allowances, and the regimental order " although enrolled under the I.A.A. and subject to the provisions of that Act for discipline, they will be serving directly under the Officer Commanding unit and will in all other respects be treated as civilians and will have no connexion with the Indian Officers and British and other ranks," does not remove that protection. (*Johnstone, J.*) GYAN CHAND *v.* MEHAR SINGH. **120 I.C. 676 = A. I. R. 1930 Lah. 105.**

ARMY REGULATIONS.

Vol. II, App. IV ultra vires.

———The rules in App. IV of Vol. II have no force as law, and a transfer which is valid under the ordinary law cannot be invalidated by contravention of those rules but where a person takes a grant of cantonment land subject to those rules he would be bound by them. (*Lindsay and Sulaiman, JJ.*) RAGHUBAR DAYAL *v.* SECRETARY OF STATE. **46 All. 427 = 78 I. C. 642 = 22 A. L. J. 354 = 5 L. R. A. Civ. 242 = A. I. R. 1924 All. 415.**

ARREARS.

See (1) MESNE PROFITS.
(2) LANDLORD AND TENANT.
(3) C. P. CODE, S. 60.
(4) HINDU LAW—MAINTENANCE.

ARREST.

See (1) C. P. CODE, SS. 55 TO 59 AND 134 TO 136.
(2) CR. P. CODE, S. 54.

ARTICLED CLERK—*See* LEGAL PRACTITIONER.

ARTICLES—*See* COMPANY.

ARTISAN.

See (1) WORKMEN'S BREACH OF CONTRACT ACT.
(2) C. P. CODE, S. 60.
(3) WORDS AND PHRASES.

ASCETICS.

See (1) HINDU LAW.
(2) SUCCESSION TO RELIGIOUS PERSON.

ASSAM LABOUR AND EMIGRATION ACT (VI OF 1901).

S. 213—Abetment.

———*Emigration or assisting in the emigration is not an abetment within S.* 213—*Penal Code, S.* 107.

Emigration or assisting in the emigration cannot be taken as forming an abetment of the offence of illegal recruitment within S. 213 of the Act, S. 213 expressly refers to abetment as meant by the Penal Code. (*Mukerji, J.*) ASHITA RANJAN BOSE *v.* EMPEROR. **48 C. L. J. 92 = 32 C. W. N. 1062 = 10 A. I. Cr. R. 572 = 29 Cr. L. J. 795 = 111 I. C. 123 = A. I. R. 1928 Cal. 339 (341).**

ASSAM LAND AND REVENUE REGULATION (I OF 1886).

S. 80—Limitation.

———*Purchaser at revenue sale suing for possession—Suit within 12 years from symbolical possession—Defendants defaulting proprietors—Suit is governed by Art.* 142 *or* 144 *and not by Art.* 121 *and is within time—Limitation Act, Arts.* 142 *and* 121.

A suit by an auction-purchaser at a revenue sale under S. 80 to recover possession of the purchased property is governed not by Art. 121 but by Art. 142 or 144, and the fact that symbolical possession was obtained is a good defence so far as any defaulting proprietor was concerned if the suit is brought within 12 years from such possession : 44 Cal. 412, Appl. (*Rankin, C. J. and C. C. Ghose, J.*) BAIKUNTHA NATH DAS *v.* AZIDULLA. **32 C. W. N. 778 = 115 I. C. 606 = A. I. R. 1928 Cal. 870 (872).**

S. 80—Presumption.

———*Date of confirmation in the certificate is not conclusive.*

The statement in the sale-certificate of the date of confirmation of sale is not final and conclusive : 24 C. L. J. 62, Rel. on. (*Rankin, C. J. and C. C. Ghose, J.*) BAIKUNTHA NATH *v.* AZIDULLA. **32 C. W. N. 778 = 115 I. C. 606 = A. I. R. 1928 Cal. 870 (871).**

S. 86—Applicability.

———*Purchase by a member of a joint Hindu family with family funds—Suit against purchaser.*

The application of S. 86 of the Assam Land and Revenue Regulation must be restricted to a suit brought in a Civil Court against the certified purchaser on the ground that the purchase was made on behalf of another person and not on behalf of the certified purchaser. The provisions of the section do not affect the rights of the members of a joint Hindu family who are entitled by operation of law and not by virtue of a contract, are entitled to treat as part of their common property an acquisition, however made, by a member of the family in his sole name, if made by the use of the family funds. (*Mookerjee, A. C. J. and Fletcher, J.*) PHAINDHAR SARMA *v.* JIBAKRISTA SARMA. **64 I. C. 260 (Cal.).**

S. 97—Partition.

———*Joint lands of several estates—Right to partition is not negatived—Interpretation of statutes—Statute conferring jurisdiction—Power to carry its execution is also implied.*

The section confers upon every recorded proprietor of a permanently settled estate, subject to the qualifications specified therein, the right to claim partition of the estate. It makes no reference directly or by implication, to the mode in which the lands of the estates are held. If some or all the lands included in the estate are the joint lands of several estates there is no reason that the right to partition should be negatived. The duty is imposed upon the Revenue Court to effect a partition of an

ASSAM LAND AND REVENUE REGULATION (1886), S. 97.

estate on an application by a person competent to claim partition under S. 97. The first step in the performance of that duty is to ascertain the lands which constitute that estate. It is a well known rule of interpretation of statutes that where a statute confers jurisdiction, it impliedly grants also the power to do such acts, adopt such measures and employ such means as are essentially necessary to its execution. 23 Cal. 514, Foll. (*Mookerjee and Panton, JJ.*) YASIN ALI MIRDHA *v.* RADHA GOBINDA CHOWDHURY. **26 C. W. N. 381 = 69 I. C. 814 = A. I. R. 1922 Cal. 118 at 120.**

——**S. 97**—*Partition of portion of estate—Application for—Maintainability—Revenue Court.*

A Revenue court alone has jurisdiction to entertain an application for partition of a portion of a revenue paying estate, when the applicant has no interest in the remainder. S. 97 of Regulation does not require that the applicant should be in actual physical possession. The provisions of the section are sufficiently complied with if at the time of the application, the interest of the applicant had not been transferred or otherwise lost. (*Woodroffe and Walmsley, JJ.*) BIRENDRA KISHORE MANIKYA *v.* KRISHNA CHANDRA DEB. **65 I. C. 83 (Cal.).**

S. 154 (1)—Jurisdiction.

——*Right of the Civil Court is not ousted by the section.*

Although, under S. 154 (1) (*e*) read with S. 96 of the Act, partition, whether perfect or imperfect, of revenue-paying properties must be made by the revenue authorities, the jurisdiction of the Civil Court to determine the right of the parties to the property in dispute, as well as the shares to which they are entitled, has not been taken away by S. 154 (1). (*B. B. Ghose and Roy, JJ.*) RUKEYA BANU *v.* NAZIRA BANU. **55 Cal. 448 = 32 C. W. N. 248 = 105 I. C. 647 = A. I. R. 1928 Cal. 130 (a) at 135.**

S. 154—Jurisdiction.

——*Does not always bar a suit for partition of a revenue paying estate.*

Where the case for the plaintiff was that the specific area which he sought to divide as between himself and the contesting defendants represented a share of the taluk and what was asserted was not that there was a previous partition of the taluq but that the persons interested in all the lands of the Taluk had by mutual arrangement, held possession of specific lands as corresponding more or less approximately, to the shares held by them in the entire property. *Held*, that S. 154 did not bar the partition of lands, in these circumstances, by a Civil Court, merely because the lands were comprised in a revenue paying estate. (*Mookerjee and Rankin, JJ.*) RAJENDRA NARAIN CHOWDHURY *v.* SATISH CHUNDRA CHOWDHURY. **50 Cal. 948 = 77 I. C. 795 = A. I. R. 1924 Cal. 233 (b) at 234, 236.**

ASSAM MUNICIPAL ACT (I OF 1923).

S. 30—Delegation of Power.

——*Chairman can delegate his powers only by written order—Act done by Vice-Chairman with Chairman's express or implied consent is not invalid.*

A written order is essential for delegation of authority to the Vice-Chairman by the Chairman of the Municipality, but if there is no such delegation, an act done by the former shall not be invalid if done with the express or implied consent of the latter previously or subsequently obtained. (*Mukerjee, J.*) RADHAKISHAN *v.* GAUHATI MUNICIPALITY. **48 C. L. J. 293 = 112 I. C. 780 = 11 A. I. Cr. R. 387 = 30 Cr. L. J. 12 = A. I. R. 1928 Cal. 357 (c) at 359.**

ASSIGNMENT.

Ss. 220 to 223—Procedure.

——*Attention of sanctioning officer should be directed to person or persons to be proceeded against.*

Sections 220 to 223 involve that the attention of the officer, who is to give order or consent to the institution of the proceedings, should be directed to the person or persons against whom such proceedings are to be instituted, though a general order or consent to the prosecution may be made. (*Mukerjee, J.*) RADHA KISHEN *v.* GAUHATI MUNICIPALITY. **48 C. L. J. 293 = 112 I.C. 780 = 11 A. I Cr. R. 387 = 30 Cr. L. J. 12 = A. I. R. 1928 Cal. 357 (b) at 358.**

S. 221—Sanction.

——*Person against whom sanction is not obtained cannot be convicted.*

G was the agent of *M* who dealt in mustard oil which was found to be not genuine. Order for prosecution was sanctioned against *G* alone, but during trial *M* appeared and took upon himself the responsibility. *G* remained absent. *M* was convicted under S 221. *Held*, that the order obtained for prosecution was against *G* alone and, therefore, *M* could not be convicted. (*Mukerjee, J.*) RADHA KISHEN *v.* GAUHATI MUNICIPALITY. **48 C. L. J. 293 = 112 I. C. 780 = 11 A. I. Cr. R. 387 = 30 Cr. L. J. 12 = A. I. R. 1928 Cal. 357 (a) at 359.**

ASSAULT.

See (1) PENAL CODE, SS. 349—358.
(2) TORT.

ASSESSORS.

See CR. P. CODE, S. 309.

ASSETS.

See (1) INSOLVENCY ACTS.
(2) C. P. CODE, SS. 50, 53—73.

ASSIGNMENT—of decree.

See C. P. CODE, O. 21, R. 16.

Binding nature of.

——*Rent paid in advance to landlord who had assigned—The assignee is not bound by such payment.*

Where rent is paid in advance to the landlord, but on the dates when the rent becomes payable, the landlords, having assigned the reversions had rendered themselves incapable of giving a valid release of the same, or a valid discharge for the sums so paid as rent, payment of rent to them was not payment of rent to persons entitled to receive it, and such payments would afford no defence to a claim for payment of the rent by the person to whom the reversion had been transferred. Such payment cannot therefore be regarded as having been made as rent at all. (*Page, J.*) TILOKECHAND *v.* BEATTIE & Co. **91 I. C. 113 = A. I. R. 1927 Cal. 270 (a) (272).**

——*Vendee's vendee not bound by personal covenants against first vendee.*

Vendee's vendee is not personally bound by any covenant made by first vendee with vendor to pay off a mortgage on the property sold. (*Spencer and Devadoss, JJ.*) VENKATARATNAM *v.* OFFICIAL RECEIVER, GODAVARY DISTRICT. **18 M.L.W. 610 = 76 I.C. 1006 = 1923 M.W.N. 780 = A.I.R. 1924 Mad. 358 (b).**

Mortgage.

——*Mortgagee privy to collateral agreement between mortgagor and tenant—Assignee of mortgagee's interest is bound.*

If a mortgagee is privy to and has sanctioned a collateral agreement between the mortgagor and the tenant, a subsequent assignee of the mortgagee's interest is not to be permitted to assert that his interest in the premises

ASSIGNMENT.

is not affected by the agreement, because the agreement was entered into at a date subsequent to that on which the mortgage was executed. (*Page, J.*) TILOKECHAND *v.* BEATTIE & CO. **91 I.C. 113= A.I.R. 1927 Cal. 270 (c) (273).**

Rights of assignee.

——*Property in possession of tenant—Assignee is bound to enquire from tenant as to extent of his rights in the premises.*

In cases where the proprietary title to premises in the occupation of a tenant is assigned, it is incumbent upon the assignee to make enquiries of the tenant as to the extent of his rights and interest in the premises. If the tenant in answer to such an enquiry represents his rights in the premises to be other than those which he possesses, in a case where the assignee has accepted the assignment in reliance upon such a representation he will thereafter be precluded as against the assignee from asserting his rights to be other than those which he has stated. But assuming that a correct answer is received, or that no enquiry is made by the assignee, in either case, the assignment will be subject to the tenant's rights and interests in the premises. (*Page, J.*) TILOKECHAND *v.* BEATTIE & CO. **91 I. C. 113= A. I. R. 1927 Cal. 270 (b) (273).**

Rights of assignor.

When right to rents and other dues is assigned for the purpose of collection, the assignor and the assignee being entitled to certain proportions of the collections, the assignor has a lien of the nature of a trust or charge on the moneys received under the assignment and the right can even be enforced in case of the assignee's bankruptcy, against the person holding his estate for the time being. The assignor's position is not that of an unsecured creditor. (*Phillips and Odgers, JJ.*) R. VENKATAPATHI *v.* K. RAMADAS RAO. **1924 M. W. N. 701=82 I.C. 960= A. I. R. 1924 Mad. 780=47 M. L. J. 528.**

ASSOCIATION.

See (1) COMPANY.
(2) COMMUNITY.

ASURA MARRIAGE—*See* HINDU LAW—MARRIAGE.

ATTACHABLE PROPERTY.

See (1) ATTACHMENT.
(2) C. P. CODE, S. 60—64.

ATTACHMENT—*See* C. P. CODE, S. 60, O. 21, Rr. 46, 63, O. 38, R. 5.

ATTEMPT—*See* PENAL CODE, S. 511.

ATTESTATION.

See (1) EVIDENCE ACT, SS. 68 AND 115.
(2) HINDU LAW.
(3) ALIENATION.
(4) T. P. ACT, SS. 3, 59 AND 123.

——**Proof**—*See* EVIDENCE ACT, S. 71.

ATTESTING WITNESS.

See (1) ATTESTATION.
(2) EVIDENCE ACT, S. 115.
(3) T. P. ACT, S. 59.

ATTORNEY.

See (1) LEGAL PRACTITIONER.
(2) POWER OF ATTORNEY.

ATTORNEY'S CLERK—*See* LEGAL PRACTITIONER.

AUSTRALIA COMMONWEALTH PATENTS ACT (1908-1909), S. 87.

ATTORNMENT.

See (1) LANDLORD AND TENANT.
(2) LESSOR AND LESSEE.
(3) T. P. ACT, S. 116.

AUCTION-PURCHASER.

See (1) C. P. CODE, S. 65 AND O. 21, Rr. 62-66, 90-93.
(2) EXECUTION SALE.

AUDITOR—*See* COMPANY.

AUSTRALIA COMMONWEALTH PATENTS ACT (1903-1909).

S. 4—Definition of "patents."

——*"Commonwealth" is used in geographical sense—Interpretation of statutes, meaning of words.*

The word "Commonwealth" can and may have both meanings. It may both be a political description and a geographical area and in the Commonwealth Patents Act both meanings occur. The question is in each section what the true meaning may be; it is a pure question of construction. In the definition of Patent in Section 4 the word "Commonwealth" is used in its geographical sense. (*Lord Buckmaster.*) WESTRALIAN POWELL WOOD PROCESS *v.* REGEM. **A. I. R. 1921 P. C. 228.**

S. 6.

——*Power to make a contract (as distinct from right under contract already made) is not what S. 6 safeguards.*

A right acquired does not mean a potential privilege enabling a contract to be made, but an actual right which was then enjoyed. If the contract has been made before the Commonwealth Statute came into force, the privilege of S. 6 would have been conferred; but the power to make such a contract is a different thing from the right which the contract confers and it is the latter and not the former, which in this connection this section safeguards. (*Lord Buckmaster.*) WESTRALIAN POWELL WOOD PROCESS *v.* REGEM. **A.I.R. 1921 P.C. 228.**

Ss. 87 (2) and 92—Invention.

——*Government may use invention under licence from patents and in such a case may end contract by notice.*

Although the Crown is at liberty to use the invention it is only at liberty to use it on condition which in the absence of an agreement, involves the settlements of the terms in the manner which the statute provides. There is nothing to compel them to exercise their right, and the Crown is at liberty, if it thinks fit, to accept the ordinary grant of a licence containing terms which may differ from those which might have been settled either by arbitration or the Court. This may only amount in the end to an agreement of the terms between the parties; but that is not necessarily the case, since, if in effect an arrangement by way of licence does confer upon the Crown, rights of termination not otherwise enjoyed, the Crown are at liberty to contract that the use of the patent shall take the form of a licence. Where the parties have in fact contracted that the relationship between themselves shall be that of licensor and licensee, although it might have been possible that the same result could have been reached by other means, this does not prevent the arrangement being what in name it purports to be and consequently its being within the provisions of Section 87 (*b*), sub-Section 2. (*Lord Buckmaster.*) WESTRALIAN POWELL WOOD PROCESS *v.* REGEM. **A. I. R. 1921 P. C. 228.**

AUSTRALIA CROWN LANDS ACT (1884) OF NEW SOUTH WALES.

Grant.

———*Grant with reservation of minerals—Question whether limestone also reserved—If question should be answered without reference to Act, circumstances as at date of grants should be examined.*

In order to determine whether the reservation of minerals in a certain grant by the Crown had the effect of reserving the limestone in the land, if the question fell to be decided on the terms of the grant alone and without reference to the Crown Lands Act of 1884, it must be ascertained whether, having regard to the facts and circumstances existing at the date of the grant, and the meaning then given to the word "minerals," the reservation of minerals included the limestone. (Case-law referred. (*Viscount Cave.*) AUSTRALIA COMMONWEALTH *v.* HAZELDELL. **A. I. R. 1921 P. C. 224.**

———*Grant not referring in terms to Act but containing indications that, it was issued under that Act must be treated as so issued.*

A grant although not in terms referring to the Act of 1884, yet containing provisions which indicate that it was intended to take effect under that Act, must be treated as issued under that Act. (*Viscount Cave.*) AUSTRALIA COMMONWEALTH *v.* HAZELDELL. **A. I. R. 1921 P.C. 224.**

Minerals.

———*"Minerals" do not include limestone.*

The expression " minerals " as defined in the Crown Lands Act (1884) of New South Wales excludes limestone. (*Viscount Cave.*) AUSTRALIA COMMONWEALTH *v.* HAZELDELL. **A. I. R. 1921 P. C. 224.**

AUSTRALIA NEW SOUTH WALES MINING ACT (1906).

Ss. 46 and 70—Grant.

———*Act does not throw open to public mining minerals granted by the Crown to private purchasers.*

No clear intention appears in the New South Wales Mining Act of 1906. Therefore the Act cannot be construed as throwing open to public mining, minerals granted by the Crown to private purchasers. (*Viscount Cave.*) AUSTRALIA COMMONWEALTH *v.* HAZELDELL. **A. I. R. 1921 P. C. 224.**

AUTHORIZED AGENT.

See (1) PRINCIPAL AND AGENT.
(2) CONTRACT ACT, CH. X.

AUTREFOIS ACQUIT—*See* CR. P. CODE, S. 403.

AUTREFOIS CONVICT, PLEA OF—*See* CR. P. CODE, S. 403, CRIMINAL TRIAL.

AWANS—*See* CUSTOM—PUNJAB.

AWARD.

See (1) ARBITRATION.
(2) ARBITRATION ACT.
(3) C. P. CODE, O. 23, R. 3 AND SCH. II.
(4) LAND ACQUISITION ACT.

———**Registration.**

See REGISTRATION ACT, S. 17 (2).

AZIAS.

See MAHOMEDAN LAW—WAQF.

BABUANA.

See (1) GRANT.
(2) HINDU LAW.
(3) IMPARTIBLE ESTATE.
(4) MAINTENANCE.

BAI-BIL-WAFA.

See (1) MORTGAGE—CONSTRUCTION.
(2) T P. A [illegible] ,SS. 58 AND 98.

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BAIL.

See (1) CR. P. CODE—SS. 496 to 502.
(2) CRIMINAL TRIAL.

BAILMENT.

See (1) CARRIER.
(2) CONTRACT ACT, S. 148.
(3) RAILWAYS ACT.

BAIRAGIS—*See* HINDU LAW —ASCETICS AND SUCCESSION.

BALANCE OF ACCOUNT.

See (1) ACCOUNTS.
(2) LIMITATION ACT.

BALCONY—*See* MUNICIPAL ACTS.

BALLAVACHARYA GOSWAMI—*See* HINDU LAW—CUSTOM.

BANDHUS—*See* HINDU LAW—SUCCESSION.

BANK—*See* BANKER AND CUSTOMER.

BANKER AND CUSTOMER.

Appropriation.

———*Contract Act, S. 171—Amount due under fixed deposit receipt, and payable to either or survivor—Whether Bank can appropriate the money towards debt due by one of them alone.*

A bank issued a fixed deposit receipt for Rs. 500 in favour of *B* and *R*, the amount being payable to either or survivor. *R*. obtained an overdraft from the bank. The bank credited the amount due under the fixed deposit receipt to this overdraft and on *B* demanding payment informed him of the action taken on it and refused to pay. *B* thereupon brought an action against the bank for the recovery of the amount due under the fixed deposit receipt.

Held, that the bank could not appropriate the money towards the debt due by *R* alone. (*Shadi Lal, C. J. and Broadway, J.*) SIMLA BANKING CO. *v.* MT. BHAGWAN KUAR. **111 I. C. 554 = A. I. R. 1928 Lah. 316.**

Assets on liquidation.

———*Where cheques were treated as not finally cleared the money represented by the cheques not part of the assets on liquidation.*

The Calcutta Bankers' Clearing House is a place where an exchange of cheques, etc., takes place in lieu of direct presentation at the offices of the respective banks where such drafts are made payable. Balances are struck between each of the clearing banks in the manner provided for by Rules 7 and 9, of dishonour by it or by the drawee bank of any cheque or any other document included in the said aggregate debit or credit entry in the regulations for the Calcutta Bankers Clearing House. The object of the arrangement is really to dispense with the use of the coin or bank notes in the settlement of large transactions that necessarily take place there. Where the Alliance Bank of Simla, Ltd., received certain cheques from their customers for the credit of their accounts which were dishonoured by the Chartered Bank and upon which the Alliance Bank reversed their original credit to their constituents' account, in respect of these very cheques.

Held, the action of the Alliance Bank in reversing the credit was consistent with their having received cheques only as agents for collection and with the fact that they never placed any money to their customers' credit to draw upon. If, as a matter of fact, the proceeds of the cheques were actually collected and the relation of the banker and customer established it would not have been open to the Alliance Bank to reverse their original credit to their constituents' account. Therefore the cheques in question must be deemed to have not been finally cleared and consequently the moneys represented by the cheques are not part of the assets of the Bank on its going into liquidation. (*C. C. Ghose, J.*) ALLIANCE BANK OF SIMLA IN LIQUIDATION, *In re.* **40 C. L. J. 223 = 84 I. C. 1018 = = A. I. R. 1925 Cal. 54.**

Banker's lien on Securities.

———Bankers can set-off what is due from a customer on one account against what is due to him on another, though the moneys due to him may in fact belong to other persons. But no lien exists on securities delivered for a special purpose inconsistent with the lien.

Bankers have a general lien on all securities deposited with them as Bankers by a customer unless there be an express contract or circumstances that show an implied contract inconsistent with lien. A Banker is entitled to set-off what is due to a customer on one account against what is due from him on another account, although the moneys due to him may in fact belong to other persons. But they cannot successfully claim a lien on securities delivered to them for a special purpose inconsistent with the existence of the lien claimed. (*Aston, A. J. C.*) ROCHALDAS GIDOOMAL & CO. *v.* THE MERCANTILE BANK OF INDIA, LTD. **78 I. C. 596 = A. I. R. 1925 Sind 142 (143).**

Branches.

———*Branches are agencies—Cheque drawn on one branch cashed by another—Cashing done on credit of person presenting.*

The different branches of a Banking Corporation are not separate and distinct banks but are agencies of one principal, but if a cheque drawn on one branch of a bank is in fact cashed by another, the latter does not act, on the matter of cashing it, as the bank of the drawer, but is held to rely upon the credit of the person presenting it. *Woodland* v. *Fear*, 7 El. & Bl. 519, Foll.; *Prince* v. *Oriental Bank Corporation*, 3 A. C. 325, *Expl.*; *Clode* v. *Bayley*, 12 M. & W. 51 and *Timmins* v. *Gibbins*, 18 Q. B. 722, Ref. (*Das and James, JJ.*) JYOTI PRASAD *v.* CHOTA NAGPUR BANKING ASSOCIATION. **8 Pat. 430 = 10 P. L. T. 73 = 115 I. C. 558 = A. I. R. 1929 Pat. 193.**

Interest.

———*Demand of notice—Suit on security furnished by employee—Suit to enforce security, interest not allowed until demand in writing.*

A claim in a suit based on an agreement between the Bank and one of its servants as to security to be given by the servant is outside the ordinary banking business on which alone interest is claimable without notice of demand. (*Dawson Miller, C. J. and Adami, J.*) RAGHUNATH PRASAD *v.* THE BANK OF BENGAL. **69 I. C. 212 = A. I. R. 1924 Pat. 295.**

Liability.

———*Bank making payment through mistake in respect of cheque countermanded by drawer is not entitled to refund of amount from payee—Negotiable Instruments Act, S.* 31.

The firm *S* arranged with *P* a Mercantile Bank, for an overdraft. On 14th September, 1922 the firm *S* drew a cheque on the said Bank for Rs. 2,000 in favour of *D*. Before the cheque was presented for payment *S* countermanded payment by a letter to the Bank dated 3rd January, 1923. *D* presented the cheque for payment on 3rd February, 1923 to the Bank and the cheque was cashed in forgetfulness of the order of countermand by *S*. On 19th March the Bank discovered the mistake and demanded refund of the amount paid from *D* and on refusal by *D* filed the present suit.

Held, that the Bank *P* was not entitled to recover money after a cheque had been cashed on a plea of mistake unknown entirely to the payee of the cheque. There was no equitable right of restitution and *D* could not be asked to refund the money : *Chambers* v *Miller*, 134 R. R. 479, Ref. ; A. I. R. 1923 Mad. 17, *Kelly* v. *Solari*, 60 R. R. 666 and 3 Q. B. D. 1877, 371, Dist. (*Zafar Ali and Dalip Singh, JJ.*) PUNJAB INDUSTRIAL AGENCY, LTD. *v.* MERCANTILE BANK OF INDIA, LTD. **A. I. R. 1930 Lah. 852.**

———*Promissory Note—Bank note issued by bank—Note mutilated by accident—Note identifiable but its number missing—Bank was held liable.*

The appellants were the Hongkong and Shanghai Banking Corporation carrying on the business of banking in Hongkong. In the course of their business they issued bank notes for various sums ; such notes were not legal currency, but owing to the high credit of the appellants they were used as if they were. The notes they issued were in the ordinary form of a bank note. The respondent was given by her husband two of such notes, each for five hundred dollars. She placed them in the pocket of some garment, and then having forgotten their hiding-place she washed, dried and starched the garment and was proceeding to iron it when she found a wad of paper in the pocket ; this upon extraction proved to be the remains of the two bank-notes which, together with the coat, had been subjected to all the above processes. Considerable effort was made with the help of the bank, to restore these agglutinated fragments to their original shape and, as to one note, this met with complete success and the note was accordingly paid. The full restoration of the other was more difficult ; with the utmost skill the number could not be recovered. Apart from this, a very considerable portion of the note was replaced and its most critical characteristics were made plain : the name of the bank, the amount of the note, the definite promise to pay the " Bearer " on demand at the appellants' office, and the signatures by the chief accountant and the chief manager, were all clearly and definitely evidenced. The bank, however, refused payment mainly upon the ground that the number was missing and the respondent accordingly brought an action against them upon the note.

Held, that when once honest accident is accepted as the cause of damage, the only remaining question is whether the extent of the damage is such as to prevent the note being sued upon, and it may be also whether the missing material parts can be supplied by verbal evidence ; that to some extent this must depend upon verbal evidence as well as upon the pieces of the document, that the number is no part of the operative portion of a bill-of-exchange or promissory note and that the claim of respondent was therefore sustainable : *Davidson* v. *Cooper* : 13 L. J. Exch. 276, Dist. ; *Suffel* v. *Bank of England* : 9 Q. B. D. 555, Expl. (*Lord Buckmaster.*) HONGKONG AND SHANGHAI BANKING CORPORATION *v.* LO LEE SHI. **28 M. L. W. 880 = 110 I. C. 127 = A.I.R. 1928 P. C. 116 = 55 M. L. J. 627.**

———*Negotiable Instrument—Money cashed on forged cheque—Owner of cheque book is not to bear loss unless gross negligence is proved.*

Where all that was alleged against appellant the customers on the score of negligence was that they were negligent in the custody of their cheque book and their rubber stamps which were consequently used on their cheques.

Held, that it would not be sufficient to make appellants bear the loss which resulted from the forgery of a

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cheque stolen from their cheque book and the fraudulent use of their stamps, if the respondents Bankers cashed the forged cheque and have not been able to establish such negligence as would in law render appellants liable. In order to make the customer liable for the loss, the neglect on his part must be in or intimately connected with the transaction itself and must have been the proximate cause of the loss. (1909) 2 K. B. D. 1010, Foll. (1855) 5 H. L. C. 389, Foll. (*Heald and May Oung, JJ.*) AHMED MOOLLA DAWOOD *v.* S. R. M. M. C. T. PERIANNAN CHETTY FIRM. **80 I. C. 261 = 3 Bur. L. J. 22 = A. I. R. 1924 Rang. 264.**

——*Cheque—Payment in good faith—Attachment — Knowledge of manager.*

Where a Bank cashes a cheque in good faith, its title is not affected by the fact that the manager of the Bank had knowledge that the cheque would probably be attached by the creditors of the payee. Nor is it affected by any transaction between the manager and the payee after the payment has been made. (*Wilberforce and Abdul Qadir, JJ.*) SHANKAR DAS *v.* THE PUNJAB NATIONAL BANK, LIMITED, LUDHIANA BRANCH. **62 I. C. 792 (Lah.).**

Set off.

——*Principal and agent—Principal also a banker under another name and agent having deposit in that Bank—Suit by principal for sale proceeds in agent's hands—Agent can set off amounts deposited.*

A, a Company was a sugar manufacturer and *B* its selling agent who also used to collect and hold the purchase money from the purchasers. *B* had deposited certain sums in a Bank *AA* as security. The Bank *AA* and the Sugar Company *A* though separate legal entity were virtually one as the capital of one came from the other and both were under one control. In a suit by *A* against *B* for balance of sale proceeds *B* pleaded to set off the amount of deposit which was held by *AA* and which was more than the claim of *A*.

Held, that the claim of *A* was not maintainable.

If the Company *A* could bring actions for sums due from *B* in respect of sales of sugar, they could bring them only as principals in this sense that they take the benefit of these sums subject to every equity which affects these sums in the hands of *AA*. (*Viscount Haldane and Lords Moulton and Parmoor.*) OFFICIAL TRUSTEE OF MADRAS *v.* A. SUNDARAMURTHI MUDALIAR. **15 M. L. W. 201 = 76 I. C. 944 = 24 C. W. N. 1004 = A. I. R. 1921 P. C. 103.**

BANKER'S LIEN—*See* CONTRACT ACT, S. 171.

BANKRUPTCY—*See* INSOLVENCY ACT.

BANKRUPTCY ACT (ENGLISH) (1813).

S. 44—Interpretation.

——*Presidency Towns Insolvency Act, S.* 52 *on difference between the two sections.*

There is no difference in effect between the two sections. The English arrangement of the section is preferable because more lucid. S. 44 (1), English Act, and S. 52 (1) (a), Indian Act, can never be in conflict with S. 44 (iii) and S. 52 (2) (c) respectively because where one holds property in trust he is the real owner and, therefore, the real and reputed ownership are in the same person and S. 44 (iii) and S. 52 (2) (c) do not apply. *Joy* v. *Campbell*, (1804) 1 Sch. and Lef. 328, Rel. on. (*Lort Williams, J.*) NRIPENDRA KUMAR BOSE, *In re.* **56 Cal. 1074 = 121 I. C. 745 = A. I. R. 1930 Cal. 171.**

BAR COUNCILS ACT (1926).

Ss. 53 and 167—Procedure.

——*C.P. Code, O.* 1, *R.* 10 (2)—*Defendant adjudged bankrupt in England is not proper party to suit relating to property.*

P purchased the interest of one of two plaintiffs in a suit and on the death of his vendor who had been subsequently made a defendant was substituted in his place. *P* was adjudged bankrupt in England and on the application of the sole remaining plaintiff his name was removed from the record.

Held, that under Ss. 53 and 167, English Bankruptcy Act, *P* had no right left in the property in suit which vested in the trustee in bankruptcy and *P* therefore was not a proper party to a suit relating to that property and his name was rightly removed from the record by the lower Court. (*Suhrawardy and Jack, JJ.*) PRINCE VICTOR N. NARAYAN *v.* KUMAR BHOIRABENDRA NARAYAN DEB. **34 C. W. N. 53 = A. I. R. 1930 Cal. 388.**

S. 102—Interpretation.

——*Provincial Insolvency Act* (1920), *Ss.* 4 *and* 53 —*Application under S.* 53 *barred—Recourse to S.* 4 *can be had—S.* 4 *is very wide in scope and gives the same powers as S.* 102 *of English Bankruptcy Act.*

The fact that the application as one under S. 53 is time barred does not prevent the Official Receiver from having recourse to S. 4. The section is extremely wide and empowers the Court to decide all questions whether of title or priority or of any nature whatsoever, and whether involving matters of law or of fact which may arise in any case of insolvency or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case. An Insolvency Court in India would be right in assuming jurisdiction under S. 4 of the Provincial Insolvency Act in cases where the Bankruptcy Court in England would exercise jurisdiction under S. 102 of the English Bankruptcy Act 37 All. 65, Rel. on ; A. I. R. 1926 Sind 140 and A.I.R. 1926 Sind 133. Dist. (*Lobo, A. J. C.*) OFFICIAL RECEIVER *v.* TIRATHDAS MEWARAM. **97 I. C. 321 = A. I. R. 1927 Sind 66 (70, 71).**

BAR COUNCILS ACT (XXXVIII OF 1926).

Disciplinary Jurisdiction.

——*Legal Practitioner cannot now be proceeded under inherent jurisdiction.*

Per *Sulaiman, Bannerji and Sen, JJ.*—Independently of the Indian Bar Councils Act the High Court does not any longer possess any inherent jurisdiction to punish an advocate for professional misconduct or to adopt a procedure for enquiry other than that laid down in the Act or to pass an order for costs against him or impose a fine which are not contemplated by the Act. A.I.R. 1926 All. 623, Ref. (*Mears, C.J. Sulaiman, Boys, Banerji, Young, Sen and Neamatullah, JJ.*) SANTHA NAND *v.* BASUDEVA NANDA. **1930 A. L. J. 402 = A. I. R. 1930 All. 225 (239, 240) (F. B.).**

——*Proceeding against legal practitioner—Counsel appearing before High Court on behalf of Bar Council —Direction to guilty legal practitioner regarding fees of counsel.*

Where the High Court went into the report of the Bar Council and inflicted punishment on a legal practitioner and a counsel appeared on behalf of the Bar Council all the time, *held*, that the legal practitioner should be directed to pay a fee to the counsel. In all such cases it is desirable that a fee should be paid to the counsel appearing on behalf of the Bar Council. (*Beasley, C.J., Walsh and Pandalai, JJ.*) *In the matter of* T. N. P. AN ADVOCATE. **1930 M. W. N. 216.**

———*Proceeding against legal practitioner—Verdict of Bar Council—High Court whether can come to independent conclusion on facts.*

Held that in a proceeding against a legal practitioner under the Bar Councils Act it is open to the High Court to consider the case on the evidence and arrive at a different conclusion to that of the Bar Tribunal. (*Beasley. C. J., Walsh and Pandalai, JJ.*) *In the matter of* T. N. P. AN ADVOCATE. **1930 M. W. N. 216.**

Ss. 8 and 14—Advocate.

———*Advocates of Madras under the Act can act and plead in High Court insolvency jurisdiction—Presidency Towns Insolvency Act, S.* 121—*Letters Patent* (*Madras*), *Cl.* 9.

Advocates enrolled in the Madras High Court under the provisions of the Bar Councils Act are entitled to act and plead in the insolvency jurisdiction of the High Court. (*Coutts-Trotter, C. J. and Kumaraswami Sastri and Walsh, JJ.*) *Re* NEWLY ENROLLED ADVOCATES. **82 Mad. 92 = 113 I. C. 876 = 28 M. L. W. 545 = 1928 M. W. N. 856 = A. I. R. 1928 Mad. 1182 = 55 M. L. J. 551.**

S. 8—Bar Council—Powers of.

———*Weight should be attached to recommendations of Bar Council.*

Weight should be attached to the recommendations of the Bar Councils which represents the view of the legal profession regarding enrolment of legal practitioners. (*Sulaiman and Pullan, JJ.*) *In re* AN ADVOCATE. **123 I. C. 683 = 1929 A. L. J. 1105 = A. I. R. 1930 All. 22.**

Ss. 8 and 9 (d)—Bar Council—Powers of.

———*Applicant enrolled af first-grade pleader in* 1922 *—His application for re-admission as odvocate of chief Court—Bar Council objecting on ground of suspicious conduct of applicant—Applicant held to have right to apply for admission under Oudh Civil Rules, R.* 285 (1) (c) *and* (d)*—Bar Council held to have acted honestly —Application refused.*

The applicant passed his law examination in 1919 he was enrolled as a pleader in 1920 and as a pleader of the first grade 1922. He applied for admission as an advocate of the Chief Court, which application was objected to by the Bar Council. It was found from record that in a suit wherein he had appeared, even though he had received a payment of sum which was due on a decree passed in favour of the decree-holder the pleader had retained the money from August 1924 till April 1926, and had then paid to the decree-holder, under circumstances not free from suspicion.

Held that the applicant had the right to apply for admission under Oudh Civil Rules R. 285 (1) (*c*) and (*d*)

Held also that in this instance the Bar Council had not acted otherwise than honestly, fairly and without prejudice and therefore the applicant was refused admission as an advocate of the Chief Court. (*Stuart, C. J. and Raza, J.*) *In re* R. A PLEADER. **6 O. W. N. 1080 = A. I. R. 1930 Oudh 121.**

S. 9—Advocate.

———*Bar Council should treat application for admission as advocate on its merits—Bar Council must be convinced that certain member of profession does not deserve to be enrolled as advocate.*

If the Bar Council can establish that as fair-minded men, who have treated the application for admission as advocate on its merits and in a reasonable manner, they are convinced that a certain member of the profession does not deserve to be enrolled as an advocate and that

his enrolment will be prejudicial to the credit of the body of advocates their objections should prevail. It may not be that the conduct in question deserves suspension or removal. Such conduct may not be such as to debar the applicant from practising in the Courts subordinate to the Chief Court. It may well be said that a man is not good enough to be an advocate, although he may be allowed to practise in such Courts. (*Stuart, C.J. and Raza, J.*) *In re* R. A PLEADER **6 O. W. N. 1080 = A. I. R. 1930 Oudh 121.**

———*Rules of the Allahabad High Court, R.* 1 *proviso — Subordinate Court — Meaning — Courts at Ajmere.*

The Subordinate Courts referred to in the proviso to R. 1 of the Allahabad High Court Rules framed under S. 9 of the Bar Councils Act are Courts within the province. *Held*, that Courts in Ajmere are not Courts subordinate to the Allahabad High Court within the meaning of the rule and that a practitioner in Ajmere cannot be enrolled.

Per *Curiam*. The mere fact that the Ajmere Court might have power to deal with a legal practitioner and did not choose to exercise that power would not prevent the Allahabad High Court from taking action against a legal practitioner if he was in the Court either as an advocate or as a vakil. (*Boys and Kisch, JJ.*) *In re*, A VAKIL OF BEWAR. **(1930) A. L. J. 839.**

Ss. 10, 11 and 12.

———*Reference to the Bar Council —Charge compromised and complaint withdrawn—Bar Council, if* functus officio—*Further investigation—Necessity of a finding.*

Though during the pendency of the enquiry by the Bar Council of a complaint referred to it by the High Court under S. 10, the charge was compromised and the complaint withdrawn, the Bar Council has, nevertheless the power to proceed with the enquiry. The complainant after reference, is not in any way, a person who is like a plaintiff *dominus lites*. The Act requires that the Tribunal should come to a finding one way or the other. The Bar Councils is in the position of a trustee and guardian of the dignity and privileges of the Bar and the rights and duties of its members and it is to the interest of the profession that when a charge is made against an advocate, it should either be cleared up or be brought home to him. (*Rankin, C.J., Buckland and Suhrawardy, JJ.*) *In re*, THE BAR COUNCIL'S ACT. **57 Cal. 724 (S. B.).**

Ss. 10, 11 and 13,

———*Complaint referred by High Court to the tribunal through Bar Council—Tribunal must come to some decision either way—It cannot drop proceedings for want of prosecution.*

Where a complaint has been made to the Chief Justice and the Judges of a High Court under S. 10, Bar Councils Act, and such complaint has been referred to the Bar Council to be enquired into by a tribunal, it is incumbent upon the tribunal to come to some finding or other and it cannot abandon the proceeding merely because the complainant withdrew the complaint.

Per *Rankin, C. J.*—It is highly unsatisfactory from the point of view of advocates and of the public that anyone should make a solemn complaint against one of them to the High Court and have the matter referred to the tribunal and that then, without any finding which could clear the advocate, the enquiry should be dropped. The complainant after the matter has been referred to the tribunal is not in any way a person who is like a plaintiff *dominus lites* and if such complainant withdraws the complaint, and if from circumstances and evidence the tribunal is of opinion that there is no need to investigate and the charge preferred has no substance it can so report. In other circumstances it is open to the tribunal to exercise its own discretion whether to employ its power to summon the complainant personally or other people. The Act requires that the tribunal should come to a finding.

Per *Buckland, J.*—Bar Council is in the position of a trustee and guardian of the dignity and privileges of the Bar and the rights and duties of its members, and it is to the interest of the profession that when a charge is made against an advocate it should either be cleared or brought home to him. The rules are so designed that on a charge of misconduct there should be a finding one way or the other. (*Rankin, C. J. and Buckland and Suhrawardy, JJ.*) THE BAR COUNCILS ACT, *In re.*

A. I. R. 1930 Cal. 574.

Ss. 10 and 19 (2)—Procedure.

——*Notice issued by High Court on 13th June*, 1928 *—Act coming into force on* 1*st June—Notice is* ultra vires—*Procedure in S.* 10 *must be followed—Letters Patent* (*Allahabad*), *S.* 8.

A notice was issued on 13th June, 1928 by High Court against a pleader calling upon him to show cause why he should not be dealt with under the Legal Practitioner's Act for professional misconduct. Objection was taken by the pleader in view of the Bar Councils Act which had come into force on 1st June, 1928.

Held, that the provisions of the Letters Patent, in so far as they may conflict with the provisions of the Act, were abrogated by S. 19 (2) and therefore it was necessary for the case to be either referred to the Bar Council or at any rate for the Bar Council to be consulted. The Court was not properly seised of the case and that the notice issued to show cause was, as framed *ultra vires* and a nullity. (*Boys, Weir and King, JJ.*) A VAKIL OF AZAMGARH, *In the matter of.*

51 All. 76 = 26 A. L. J. 1039 = 112 I. C. 214 = 29 Cr. L. J. 998 = A. I. R. 1928 All. 439 (F. B.).

S. 13—Inherent Powers.

——*Legal Practitioners Act* (*XVIII of* 1879)—*High Court.*

Per *Full Bench.*—Inherent powers of the Supreme Court of Calcutta were not conferred on the Allahabad High Court by the Indian High Courts Act of 1861 and no power to exercise inherent disciplinary jurisdiction over legal practitioners independently of the Legal Practitioners Act and the Indian Bar Councils Act now exists in the Allahabad High Court in respect of their professional or other misconduct. (*Mears, C. J., Boys and Young's, JJ.*, Contra.) (*Mears, C. J., Sulaiman, Boys. Banerji, Young, Sen and Niamatullah, JJ.*) MAHANT SHANTAH NAND *v.* BASUDEVA NAND.

1930 A.L.J. 402 = A.I.R. 1930 All. 225 (234) (F. B.)

BAR COUNCILS RULES (Allahabad).

R. 1—Interpretation.

——"*High Court*" *means Chartered High Court.*

"High Court" referred to in Bar Council R. 1 is a Chartered High Court. (*Sulaiman and Kendall, JJ.*) AN ADVOCATE, *In re.* **1929 A.L. J. 1195 = 122 I.C. 894 = A.I.R. 1930 All. 91. (1).**

——*Benares State Chief Court is neither High Court nor Court subordinate to Allahabad High Court.*

Benares State Chief Court is neither High Court within the meaning of Bar Council, R.1, nor is it subordinate to the Allahabad High Court, and hence a legal practitioner who enrols himself as a pleader in Allahabad District Court and practises in the Benares State Courts cannot be treated as having practised in any High Court or a Court subordinate to Allahabad High Court and as such he is not entitled to be enrolled as an advocate

of Allahabad High Court (*Sulaiman and Kendall, JJ.*) AN ADVOCATE, *In re.* **1929 A. L. J. 1195 = 122 I. C. 894 = A. I. R. 1930 All. 91 (1).**

BARKI SERVICE.

See (1) GRANT.
(2) INAM.

BAR OF SUIT—*See* C. P. CODE, O. 2, R. 2.

BARRISTER—*See* LEGAL PRACTITIONER.

BARRISTER'S CLERK—*See* LEGAL PRACTITIONER.

BAR TO FRESH TRIAL. *See* CR. P. CODE, S. 403.

BAR TO PROSECUTION—

See (1) CRIM. PRO. CODE, S. 403.
(2) CRIMINAL TRIAL.

BENAMI.

Burden of Proof.
Consideration.
Effect of.
Estoppel.
Evidence of.
Fraudulent transfer.
Nominal and Sham transfer.
Presumption.
Test of.

Burden of Proof.

——*Person's name inserted in conveyance—Person alleging that he is not the real owner must prove the same.*

Where properties are purchased in the joint names of two persons and it is alleged that the properties belong to only one of them and the name of the other was inserted merely to enable to present the deeds for registration the party alleging must prove that the other was not a joint owner. A. I. R. 1926 P. C. 77 and A. I. R. 1928 Rang. 220, Rel. on. (*Heald, Ag. C.J. and Otter, J.*) MA SAN *v.* MA CHIT SU.

A. I. R. 1930 Rang. 218.

——A person alleging that a sale standing in another's name is really *benami* for himself has to prove that it is a benami transaction and to succeed in this it is necessary for him to prove among other things that the purchase-money was supplied by him. (*Fforde and Bhide, JJ.*) MOHAMMAD YAKUB *v.* BISHAN SARUP. **119 I. C. 757 = 11 Lah. L. J. 267.**

——Where a party alleges that a certain transaction is *benami*, the burden of establishing that the ostensible owner in whose name the transaction stands, is the benamidar, lies upon the person who makes the allegation, A. I. R. 1926 P. C. 77, Foll. (*Sir Louis Stuart, Kt. C. J. and Pullan, J.*) COLLECTOR OF CAWNPORE *v.* HAMID ALI KHAN. **114 I. C. 506 (Oudh).**

——*Burden of proving that person named in sale deed as purchaser is benamidar lies on person alleging it and he must prove that the purchase money came from him.*

If a person alleges that he is the real purchaser and the person named in the sale deed as purchaser is his benamidar, the onus lies heavily on him to prove by cogent and satisfactory evidence that the other is a benamidar and that the transaction is not what it purports to be. He must prove that the puchase money came from his pocket. In order to discharge this burden it is not sufficient merely to point to matters of suspicion or even to plausible conjecture. 13 W. R. (P. C.)14; 14 M. I. A. 235 (P. C.); 11 M.I.A. 28 (P.C.); 25 Cal. 473 (P. C.) and 6 C. L. J. 472, Rel. on. (*Percival, J.C. and Rupchand, A. J. C.*) KAISER KHAN *v.* RATTNCHAND.

A. I. R. 1929 Sind 195.

———*Evidence Act, S.* 101—*Vendor and vendee near relations—Sale-deed with vendor—Vendee must prove that sale was not nominal* (*Obiter.*)

Where the vendor and vendee are near relations and the sale deed is in possession of the vendor, the burden of proving that the sale is not bogus is on the vendee. (*Macnair, A. J. C.*) MOHANSINGH *v.* PUNJI. **103 I. C. 812 = A. I. R. 1927 Nag. 327.**

———*Burden is on person alleging ownership.*

In all benamidar transactions the very object of the parties is secrecy ; but still the person who alleges that property conveyed to another belongs to himself must prove his allegation and prove it beyond reasonable doubt. (*The Lord Chancellor*) MAUNG PO KIN *v.* MAUNG PO SHEIN. **4 Rang. 518 = 24 A. L. J. 758. 96 I. C 142 = 31 C. W. N. 252 = 3 O. W. N. 845 = 38 M. L. T. 70 = A. I. R. 1926 P. C. 77.**

———*Registered conveyance*—Onus *of proof is on party raising plea of benami—Strong evidence is necessary—Source of purchase money and other circumstances must also be considered besides oral evidence.*

When a conveyance has been executed and duly registered in favour of a certain person, it requires strong and clear evidence to justify a Court in holding that the person in whose favour the conveyance was executed was a mere benamidar for some third person. The burden of proof lies on the person who raises the plea of benami.

In cases of alleged benami transactions, the determination of the question must depend not merely on direct oral evidence but also upon circumstances such as the source of the purchase-money, the possession of the property, the custody of title-deeds, the adequacy of the consideration and the like. A. I. R. 1924 Cal. 523, Foll. (*Wadegavkar. A.J.C.*) RAMDHAN *v.* PURUSHOTTAM. **22 N. L. R. 49 = 88 I. C. 699 = A. I. R. 1926 Nag. 109.**

———Onus *is heavily on him who propounds benami nature of the transaction.*

The burden of establishing that an ostensible owner in whose name the deeds stand is a benamidar for another is upon the party who alleges it. The burden is no doubt a difficult one to discharge, because in all these benami transactions the very object of the parties is secrecy ; but still the person who alleges that property conveyed to another belongs to him must prove his allegation and prove it beyond reasonable doubt. A. I. R. 1926 P.C. 77, Foll. (*Wazir Husan and Raza, JJ.*) BANSIDHAR *v.* MATA DIN. **98 I. C. 303 = 3 O.W.N. 849.**

———Onus *of proof is on party setting up plea.*

An ostensible purchaser must be assumed to be the real purchaser until the contrary is shown. (*Das and Adami, JJ.*) SRIPAT SINGH *v.* NARESH CHANDRA BOSE. **1925 P. H. C. C. 239 = A. I. R. 1926 Pat. 94 (98).**

———Onus *is on the propounder.*

The *onus* of establishing benami is on the person alleging it. He has to lead evidence in proof of benami and the opposite party is entitled to give rebutting evidence. (*Adami and Sen, JJ.*) MABUD BAKSH *v.* MT. MAHAMUDAN. **7 P. L. T. 445 = 93 I. C. 273 = 1926 P. H. C. C. 24.**

———*Property bought in wife's name—Burden of proving* benami *nature lies on party asserting it.*

The burden of proving the transaction to be a *benami* one lies on the persons alleging it to be so, when a large portion of the purchase-money was paid by a husband for property bought in the name of his wife. When a long period has elapsed since the transaction the burden is greatly enhanced. (*Kendall and Pullan, A.J.Cs.*) MT. RAJ KUNWARI *v.* MT. RANI MAHARAJ KUNWAR KUNWARI. **82 I.C. 832 = A.I.R. 1925 Oudh 243.**

———Onus *lies on person setting up.*

The *onus* of proving any transaction to be a sham or a *benami* one lies on the person asserting it to be so, but even a very small quantity of evidence is enough for such a purpose. But such a transfer cannot be considered as nothing and it is necessary for the person impugning its apparent character to show something or other to establish that it is a *benami* or sham transaction. (*Kendall and Pullan, A. J. Cs.*) MT. RAJ KUNWARI *v.* MT RANI MAHARAJ KUNWAR KUNWARI. **82 I. C. 832 = A. I. R. 1925 Oudh 243.**

———*Burden of proof is on party setting up.*

The party alleging that a person is a *benamidar* is bound to prove it. (*Newbould and Cuming, JJ.*) TUKA MEAH *v.* NABIN CHANDRA MAZUMDAR. **65 I. C. 701 = A. I. R. 1923 Cal. 292 (2).**

When the deed is in the name of the Defendant, the *onus* is on the plaintiff to show that it was a *benami* transaction. (*Coutts and Ross, JJ.*) RAMPATI RAUT *v.* MAHANTH HANUMAN SARAN. **1923 P. H. C. C. 142 = 76 I.C. 1049 = 1 Pat. L. R. 235 = 5 P. L. T. 347 = A. I. R. 1923 Pat. 303.**

———*Burden is on those who set it up.*

The burden of proving that a grant is benami for another is on that other who sets it up. (*Lord Atkinson.*) ARAB ALI KHAN *v.* MAHAMAD ALI KHAN. **20 All. L. J. 545 = 67 I. C. 444 = 35 C. L. J. 554 = 24 B. L. R. 951 = 31 Mad. L. T. 94 = A. I. R. 1922 P.C. 84 = 43 Mad. L. J. 104 (P.C.).**

———*Evidence Act, S.* 101—*Admissions will shift* onus.

Where a party had admitted the gift by *A* to *B* and the transaction is undisputed for several years even after the death of *A*, *Held*, that the burden of proving the transaction was fictitious lies heavily on the party and is not discharged by proving that the donor managed the property especially where the donee was almost illiterate. (*Daniels and Lyle, A. J. Cs.*) MT. ANJUMAN-UN-NISA *v.* SHAIK ASHIQ ALI. **8 O. L. J. 439 = 66 I. C. 222 = A. I. R. 1922 Oudh 178.**

———Onus *is on party pleading benami.*

The burden of proof lies upon the person who alleges that the apparent is not the real state of things, and although circumstances of suspicion might exist, the Court should not decide upon mere suspicion but upon legal grounds established by evidence. But if the evidence on neither side is wholly convincing, specially upon the fundamental criterion, namely the source of the purchase money, when the evidence given and withheld is open to adverse criticism, the Courts must rely on the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct. (*Mookerjee, A.C. J. and Fletcher, J.*) PROTAP CHANDRA *v.* SARATCHANDRA. **25 C.W.N. 544 = 62 I.C. 348 = 33 C. L. J. 201 = A.I.R. 1921 Cal. 101.**

Consideration.

———*Transfer in lieu of debt actually due cannot be regarded as benami.*

A transfer in consideration of a debt which is actually due cannot be held to be a *benami* transaction. 44 Cal.

662 (P. C.), Foll. (*Coutts and Macpherson, JJ.*) Bibi Saira *v.* Bibi Saliman. **63 I. C. 111= 2 P. L. T. 577=A. I. R. 1921 Pat. 395.**

Effect of.

———*Setting aside a benami transaction not contravening the provisions of the law—Courts are bound to give effect to it.*

So long as a benami transaction does not contravene the provisions of the law, the Courts are bound to give it effect. The benamidar has no beneficial interest in the property or business that stands in his name; he represents the real owner, and so far as their relative legal position is concerned he is a mere trustee for him. (*Mitter, J.*) Afiran Bibi *v.* Narimtulla Saha. **48 C. L. J. 135=112 I. C. 458= A. I. R. 1928 Cal. 666.**

———*C. P. Land Revenue Act* (1917), *S.* 107—*Lease in* A's *name—Money belonging to* A *and* B—B's *right against* A *is not affected— Principle applies whether lease is granted voluntarily or lessor is compelled to give it.*

When any person takes in his own name a lease in perpetuity, or indeed any other lease or any other contract, with money belonging to himself and others, the rights of these others against him are not affected by his omission to mention their names, though their rights and liabilities in respect of the other party to the contract may be. There is no difference in principle when the lessor does not grant the lease voluntarily but is compelled to do so under the provisions of S.107 of the Land Revenue Act. (*Hallifax, A. J. C.*) Sukhdeo *v.* Ujal. **100 I. C. 772=A. I. R. 1927 Nag. 207.**

———*Simple benami without indication of fraud—Defendant must aver and prove fraud.*

If a simple benami is alleged in the plaint without any suggestion indicating that a fraud or an illegal act was contemplated, the defendant would have to aver and prove the fraud or the unlawful act that was intended and carried out. (*Suhrawardy and Mukerji, JJ.*) Rajani Kanta *v.* Abani Kanta. **94 I. C. 33= A. I. R. 1926 Cal. 850.**

So long as the *benami* transaction does not contravene the provisions of law, the Courts are bound to give effect to it. (*Wazir Hasan and Pullan, A. J. Cs.*) Bansi Dhar *v.* Ajudhia Prasad. **27 O. C. 175=82 I. C. 333=11 O. L. J.619= A. I. R. 1925 Oudh 120.**

———*Benamidar is constructive trustee of the real owner.*

Ostensible vendee holds possession for the benefit of real owner. Benami arrangement gives rise to a constructive trust and benamidar is the real owner under an obligation to hold the property in trust for and not for any benefit of his own. 46 Cal. 566 P. C Foll. (*Wazir Hasan and Cuming, A. J. Cs.*) Raunaq Ali *v.* Syed Najir Husain. **11 O. L. J. 92= 78 I. C. 359=A. I. R. 1924 Oudh 321.**

———*The beneficial owner is the legal owner.*

In a benami purchase of land, the person who is proved, as a fact, to be the beneficial owner is the actual legal owner. (*Ross, J.*) Munshi Gobind Prasad *v.* Lala Jagdeep Sahai. **1 Pat. L. R. Civ. 316= 77 I.C. 252=A. I. R. 1924 Pat. 185.**

———*Parties in* pari delicto-*Fraud carried out—Court would dismiss claim—T. P. Act, S.* 5—3*Maxim in* pari delicto—*Practice—Plea—Defendant can plead in* pari delicto.

A defendant can properly plead and rely on facts showing that he and the plaintiff were in *pari delicto* (4 Q. B. p. 312, 1869, Ref.) If the Court finds that parties were acting together with a view to perpetrate fraud and did in fact perpetrate that fraud, and that there is no difference in the degree of the plaintiff and defendant's guilt, the duty of the Court is to dismiss the claim. A. I. R. 1923 Cal. 90, Ref. (*Mears, C. J. and Banerji, J.*) Vilayat Hussain *v.* Mt. Misran. **21 A. L. J. 303=72 I. C. 92=45 All. 396= 4 L. R. All. Civ. 418=A.I.R. 1923 All. 504.**

———*Strangers can challenge the payment of consideration when the deed is challenged as fictitious.*

The principle, enunciated by the Judicial Committee in 27 All. 271,that a stranger to a deed which is intended to be real and operative between the parties thereto cannot dispute the payment or non-payment of consideration. Its adequacy,or inadequacy has no bearing in a case where a deed is challenged as fictitious and never designed to operate as a real deed or to effect a transfer of title. (*Mookerjee and Rankin, JJ.*) Kamini Kumar Deb *v.* Durga Charan Nag. **37 C. L. J, 122= 74 I. C. 392=A. I. R. 1923 Cal. 521.**

Estoppel.

Although tenancy is personal, there is nothing in the C. P. Tenancy Act to prevent a tenancy being held benami. If a recorded tenant holds land benami for the real tenant with the knowledge and consent of the landlord, the latter cannot oust the real tenant on the ground that he is a trespasser : A. I. R. 1926 Nag. 239, Foll. (*Subhedar, A. J. C.*) Pura *v.* Jalam Singh. **118 I. C. 684 (Nag,).**

———*Defendant purchasing benami in plaintiff's name and remaining in possession and defrauding a stranger in collusion with plaintiff—Plaintiff suing for possession—Defendant cannot successfully plead benami and fraud—Fraud.*

Defendant sold part of her husband's estate, purchased a house in plaintiff's name out of the proceeds and successfully deluded the reversioner into believing that the proceeds had been devoted to the payment of debts binding on the estate. Defendant was in possession of the house. In a suit by plaintiff for possession.

Held, that it was not open to defendant to show that it was she that provided the funds for the purchase, by means of a fraud on the reversioner, to which she and plaintiff were parties on the principle that that party fiails who *first* has to allege the fraud in which he participated. 2 M. L. J. 484 and 31 Bom. 405 Foll. A. I. R. 1923 Cal. 90, not foll. (*Waller, J*). Pachyammal *v.* Devanai Ammal. **22 M. L. W. 313=91 I.C. 776= A. I. R. 1925 Mad. 1016.**

Evidence of,

———*Mortgage in favour of A—B alleging himself to be real mortgagee—Mortgagor living with her sister's husband* B—*Mortgagor's property in danger of being sold in execution of her step-daughter's decree—A being law agent to* B's *brother—A not very well-to-do and unlikely to advance large sum on property which was subject of litigation—Oral evidence showing that* B *had handed over to* A *that amount to save mortgagor's property—Mortgage-deed in* A's *possession —B not producing his accounts—Mortgage amount not mentioned by* B *in his insolvency petition nor in partition proceedings in his family—*A *held benamidar for* B.

A was mortgagee of certain property and the money advanced on the mortgage was Rs. 1,750. *B* claimed that it was really he who advanced the money and that *A* was merely his benamidar. *B* was the mortgagor's sister's husband who was living with him. The mortgaged property was already subject of litigation. *A* was a law-agent of *B*'s brother. He was not a very well-to-do person and was unlikely to advance such a large sum on the property which was subject of litigation. The mortgagor's property was in danger of being sold in execution of decree brought against her by her step-daughter. There was also oral evidence which showed that the said Rs. 1,750 were handed over to *A* by *B* in order to save the mortgagor's property from Court-sale.

Held, that *A* was benamidar for *B* though the mortgage-deed was in *A*'s possession. *B* did not produce the accounts of his trade, and further the mortgage amount was not mentioned by *B* in the insolvency petition filed by him, nor was it mentioned in the partition proceedings in *B*'s family. (*Devadoss and Walsh, JJ*). PITCHAYYA *v.* RATTAMMA.

29 M. L. W. 56 = 115 I. C. 340 = A. I. R. 1929 Mad. 268 = 55 M. L. J. 856.

——*Motive for benami purchase held to be not reasonable.*

Where a person said that as he was a resident of native State and owned vast lands in British India and as he wanted somebody to attend to revenue authorities in British India he got the sale-deed executed benami in the name of another, such motive cannot be said to be a reasonable one as a simple power of attorney would have served the purpose. (*Percival, J.C. and Rupchand, A. J. C.*) KAISER KHAN *v.* RATTAN CHAND. **A. I. R. 1929 Sind 195.**

——*Suit by* N *against* K *for a declaration that he is a real purchaser and* K *mere benamidar—Entry by* K *into account book of* N *of whole amount spent in purchasing property—Such entry is not acknowledgment that all money was paid by* N.

Per *Rupchand, A. J. C.*— Where a suit was brought by *N* against *K* for a declaration that he was the real purchaser of property and *K*, who was mentioned in the sale-deed as purchaser was a mere benamidar, the fact that *K* made an entry into account book of *N* of the whole amount spent in purchasing the property; is in no sense an acknowledgment that all the money was paid by *N* but is consistent with an entry made by a partner in a book showing the total cost to the debit side of their joint purchase. (*Percival, J. C. and Rupchand, A. J. C.*) KAISER KHAN *v.* RATTANCHAND. **A. I. R. 1929 Sind 195.**

——*Slight evidence is sufficient to prove.*

As benami transactions are very common in Indian practice, even a slight quantity of evidence may suffice to show that it was a sham transaction : 15 Cal. 20 (P. C.) Rel. on. (*Cuming and Page, JJ.*) TIRTHA MAI DASI *v.* ALI KULLAH. **98 I. C. 129 = A.I.R. 1927 Cal. 140.**

In view of the extraordinary prevalence of benami transactions in India, even slight quantity of evidence may suffice to prove it : 23 C. W. N. 321 (P. C.) Foll. (*Findlay, O. J. C.*) MIRZA AHMAD BAIG *v.* MODEL MILLS NAGPUR, LTD. **9 N. L. J. 130 = 92 I. C. 25 = A. I. R. 1926 Nag. 262.**

——*Though slight evidence is sufficient, probabilities are not enough.*

Per *Das, J.*—As benami transactions are very familiar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose. The person who impugns its apparent character must not rely, however, solely on probabilities. He must show something definite to establish that it is a sham transaction, on the principle that the burden of proof lies upon the person who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things. (*Dawson Miller, C. J. on difference between Das, and Foster, JJ.*) HITENDRA SINGH *v.* RAMESWAR SINGH. **4 Pat. 510 = 88 I. C. 141 = 87 I.C. 849 = 6 P. L. T. 634 = A. I. R. 1925 Pat. 625.**

——*Suspicion is no ground, but direct evidence and circumstances Such as source of purchase money or possession are grounds—Burden is on him who alleges Benami.*

Though in cases of alleged benami transactions, there may be grounds for suspicion, yet the Court's decision must rest not upon suspicion, but upon legal grounds established by legal testimony. In cases of this character, the determination of the question must depend not merely upon direct oral evidence but also upon circumstances, such as the source of the purchase-money, the possession of the disputed property, the custody of the title-deeds, the adequacy of consideration and like facts. The burden of proof lies on the person who claims against the tenor of the deed. (*Mookerjee and Rankin, JJ.*) ABDUL LATIF KAZI *v.* ABDUL HUQ KAZI. **28 C. W. N. 62 = 81 I. C. 667 = A. I. R 1924 Cal. 523.**

——*Slight evidence, but not mere probabilities may suffice to show* benami *nature—Source of purchase-money is the test but in absence of conclusive evidence, probabilities and conduct of parties are to be considered (case-law discussed).*

As *benami* transactions are very familiar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose. The person who impugns its apparent character must not rely however, solely on probabilities. He must show something definite to establish that it is a sham transaction on the principle that the burden of proof lies upon the person who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things. The most important test to be applied in these cases is the source whence the consideration came. Where, however, from the lapse of time direct evidence of a conclusive or reliable character is not forthcoming as to the payment of consideration the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. If the evidence on neither side is wholly convincing as to the fundamental criterion namely the source of the purchase-money, if the evidence given and withheld is open to adverse criticism, the Court must rely on the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct, including their dealings with or enjoyment of the disputed property. The doctrine of advancement in favour of wife or child does not apply in India but the relationship is a circumstance which is taken into consideration in India in determining whether the transaction is *benami* or not. 1 M. L. W. 451, Diss ; 32 C. L. J. 490 (P. C.), Foll. (*Mukerjee and Chotzner, JJ.*) BHUBAN MOHINI DASI *v.* KUMUD BALA DASI. **28 C. W. N. 131 = 82 I. C. 934 = 39 C. L. J. 140 = A. I. R. 1924 Cal. 467.**

——*Benami* transactions require conclusive evidence to prove that they are such. Mere suspicion is insufficient. (*Jwala Prasad and Kulwant Sahay, JJ.*) RAJESHWAR PRASAD NARAIN SINGH *v.* MOHAMMAD KHALIL-UL-RAHMAN. **3 Pat 522 = 78 I. C. 796 = 5 P. L. T. 223 = A. I. R. 1924 Pat. 459.**

——*Vendor living with vendee (his wife) and his being involved in debt is not sufficient proof.*

The circumstances that the vendor who was the husband of the vendee continued to live in the house up to his death and that he was in debts and therefore had some motives in entering into a *benami* transaction, is not sufficient to establish the *benami* character of the transaction. (*Mullick and Kulwant Sahay, JJ.*) PURAN MALL *v.* MT. DILWA. **4 P. L. T. 54 = 72 I. C. 1003 = A. I. R. 1924 Pat. 333.**

——*Onus of proof is on party pleading benami—Suspicious circumstances are not enough to vitiate transaction.*

The burden of proof lies on the party assailing a transaction as benami, although the circumstances may be suspicious. In such cases it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds, established by legal testimony. 11 M. I. A. 28 (P. C.), Foll. (*Lord Phillimore.*) SETH MANIKLAL MANSUKHBHAI *v.* RAJA BIJOYSINGH DUDHURIA. **25 C. W. N. 409 = 1921 M. W. N. 80 = 62 I. C. 356 = A. I. R. 1921 P. C. 69.**

Fraudulent Transfer.

——*Trust Act, S. 84—Colourable transfer to defraud creditors—Intention not carried out—Transfer can be revoked—Transfer of Property Act, S. 53.*

A transfer which is merely colourable and made with the intention of defrauding creditors can be set aside by the transferrer at any time before the fraud has actually taken place: 33 Cal. 967 and 20 Mad. 326, Ref.; 52 I.C. 866. Foll. *English cases Disc.* (*Courtney-Terrell, C. J. and Jwala Prasad. J.*) SURYA MULL MARWARI *v.* DWARKA PRASAD MARWARI. **10 Pat. L. T. 138 = 115 I. C. 890 = A. I. R. 1929 Pat. 127.**

——*Benami transfer of property for fraudulent purpose—Purpose carried out—Person in possession will be entitled to possession.*

A conveyed her lands benami to *B* to save them from attachment in a decree against her and actually succeeded in so saving them. But *A* remained in possession of the lands all along exercising the rights of an owner. She was disturbed from possession by the adopted children of *B* on *B*'s death. *A* filed a suit for possession of and declaration of ownership over the lands.

Held, that the fraudulent purpose of conveyance was carried out inasmuch as the lands were saved from attachment and therefore the maxim *in pari delicto potior est conditio possidentis* would apply. *A* would not however get declaration that she was the owner of the lands. (*Rutledge, C. J. and Carr, J.*) MA MAN CHA *v.* MA E. **4 Rang. 429 = 99 I C. 949 = A. I. R. 1927 Rang. 86.**

——*Carrying out the fraud—Suit for recovery of property—If maintainable.*

Where in order to defeat his creditors, a debtor conveyed his property to another and when the same was attached by the creditors, the transferee successfully objected to the same and got the attachment raised, the debtor cannot afterwards maintain a suit for recovering the properties on the ground the transfer was fictitious. A party guilty of entering into a fraudulent contract would be entitled to recover the property conveyed provided the fraudulent purpose has not been executed. Case-law referred to. (*Wazir Hasan and Cuming, A. J. Cs.*) RAUNAQ ALI *v.* NAZIR HUSSAIN. **11 O. L. J. 92 = 78 I. C. 359 = A. I. R. 1924 Oudh 321.**

——*Suit by fraudulent grantee for recovery of property—Fraudulent purpose carried out—Whether suit maintainable*

One *S*, executed a mortgage in favour of *D*. This transaction was ascertained to be fictitious, and the conveyance was never intended to pass title and the mortgage was effected solely with a view to delay, if not to defeat the creditors of *S*. The fraudulent purpose was accomplished. *D* obtained a decree on the mortgage and became purchaser. The successors of *D* commenced the present action for a declaration of their title by purchase at auction sale for recovery of possession from the successors of *S*. *Held*, that the plaintiff must fail. The rules that guide the Court in the matter of fraudulent conveyances are as follows: (1) when recovery of property is claimed by the fraudulent grantor from the grantee, the modern rule is that although where intended fraud has been carried into effect, the Court will not help the owner to recover the property which he has once cast off in order to defraud others, yet if he has not defrauded any one, the Court will not punish his intention by giving his estate away to another whose retention of it is an act of gross fraud. *Taylor* v. *Bowers*, 1 Q.B.D. 291, ref. (2), When recovery of property is sought by the fraudulent grantee against the grantor the rule is:—If a Benamidar, who has used a fraudulent transfer to defeat an execution levied by his ostensible transferor, were to seek the assistance of Court to obtain possession from the latter, the Court might well allow the transferor to plead the real facts even though the plea involved a declaration by the defendant of his own turpitude, (20 Mad. 326, p. 332). This is allowed not for his own sake but on grounds of public policy. 31 Bom. 405; 37 Bom. 217 Not followed. Case law discussed. (*Mookerjee and Chotzner, JJ.*) RAGHUPATI CHATTERJEE *v.* NRISINGA HORI DAS. **36 C. L. J. 491 = 71 I. C. 1 = A. I. R. 1923 Cal. 90.**

——*Plaintiff when can succeed.*

Where the purpose of a *benami* transaction is fraudulent, a party trying to avoid the transaction must show that the purpose did not go beyond the stage of mere intention, otherwise the maxim *In Pari delicto* will apply. (*Mittra, Offg. A. J. C.*) ISMAIL *v.* WASUDEO. **59 I. C. 285 = 16 N. L. R. 129.**

Nominal and Sham Transfer.

——*Benami and sham transfer are different—In former legal title is intended to be transferred—In latter no interest, legal or beneficial, is transferred.*

The essence of a sham transaction is that though a registered deed is brought into existence no title of any kind, either legal or beneficial, is intended to be passed thereby to any person whatsover, *i,e.*, the deed of transfer is not intended to effect any transfer of property. The difference between sham transactions and benami transactions is one of intention. If the deed of transfer is made with the intention of placing the property in the name of a third person, the intention clearly amounts to a transfer of the legal title, and such a transaction can scarcely be called a sham transaction, but comes directly within the meaning of benami transactions properly so called.

If a sale-deed is got up to fight certain third parties, the intention to be drawn from the transaction is irresistible that the legal title at any rate was intended to be passed by the transaction from the transferor to the transferee; otherwise the very object of the transfer fails. 27 M.L.J. 445, Dist. (*Spencer, Og.C. J. and Srinivasa Aiyangar, J.*) RANGAPPA NAYAKAR *v.* RANGASAMI NAYAKAR. **1925 M. W. N. 232 = 88 I. C. 249 = A. I. R. 1925 Mad. 1005.**

Presumption—Advancement.

——Principles and distinction between benami and advancement pointed out. (*Stuart, C.J, and Raza, J.*) MIZRA MD. SADIQ *v.* FAKHR JAHAM BEGAM. **3 Luck. 521 = 117 I. C. 385 = 6 O. W. N. 1251 = A. I. R. 1929 Oudh 97 (108).**

Presumption—Burmese.

——*Deed of partition by a Burmese in favour of his daughter by first wife, he being heavily indebted—Paternal grandmother appointed guardian of daughter and she successfully objecting to creditors' attaching the property—Father subsequently compromising with creditors for a very small sum—Daughter all the while living with her maternal uncle—Father continuing in possession of property but contributing for daughter's support—Father always assuring daughter that her property would be restored to her—Burden lay heavily on father for proving fictitiousness of the deed as his indebtedness would equally lead him to make real partition in favour of his daughter.*

One *T*, a Burmese, who was heavily indebted soon after his second marriage took all the steps necessary to carry out a legal partition and to vest the appropriate share in his daughter by first wife. The family were consulted and the formal document was executed by the father. The paternal grandmother of the daughter undertook to take charge of the daughter's share until the daughter's majority. Subsequently *T*'s creditors who had obtained decrees against him by way of execution attached the property given in partition to the daughter. The grandmother acting on behalf of the daughter took proceedings to have the attachment set aside and succeeded. The father subsequently made a composition with his creditors at a very low amount. About the time of the deed of partition the daughter went to live with her maternal grandmother with whom she continued to live until her marriage. *T*, however, continued in possession of the property receiving the rents and produce but contributing to the daughter's support. *T* was all the while assuring his daughter and his relations that the property was safe and would be restored to her. Representations had been made by *T* on various occasions to various revenue officers that the lands in question were the daughter's and that he was leasing them on her behalf. In a suit by the daughter for possession of the lands from her father it was contended that the deed was fictitious.

Held: that *T* failed to discharge the *onus* which lay heavily upon him in the circumstances to show that the transaction was fictitious. As the plea of defrauding the creditors was set up, *T* ought to have proved by cogent evidence the averment. The case differed from the usual form of benami transactions in that there was an undoubted legal right of the transferee existing independently of the impugned transaction to receive a transfer of some property and the very fact that *T* was heavily indebted would as likely lead the father to make a real partition as a fictitious one. (*Lord Atkin.*) MA NGWE NAING *v.* MAUNG THA MAUNG.
7 Rang. 4 = 114 I. C. 595 = 29 M. L. W. 669 = 1929 M. W. N. 235 = 33 C. W. N. 513 = 31 Bom. L. R. 311 = 49 C. L. J. 167 = A. I. R. 1929 P. C. 55 = 56 M. L. J. 244.

——*The practice of benami is not common in Burma—Purchase by father in the son's name cannot be presumed to be for the father's benefit.*

Benami transactions are never made among Burmans except for purposes of fraud. They are much less common in this country than they are in India proper where they are supposed to be customary. Even in cases where the money with which the property is bought is provided by a person who claims the beneficial ownership, the presumption that the purchase in the name of the ostensible owner is a benami transaction is weaker in Burma than in other parts of India. In Burma it may in particular cases be too weak to displace the presumption of advancement which would arise in the absence of a presumption that a transaction is benami. A Burman Buddhist purchased land in the name of himself and his son in 1910 and it was registered in official registers in the joint names. In 1913 the land stood in the sole name of the son. In 1923 the father's name was added along with that of the son. The son objected to the mutation and his sole name was restored as the mutation was made without the son's knowledge and consent. The father sued for a declaration that he was the sole owner of the land from the time when it was bought and the conveyance was taken in the names of himself and his son for the purpose of excluding his second wife.

Held, that the mutation of names in the Revenue Register could not have been made by mistake or without the knowledge of the father and that the father intended that the son should be the sole owner of the land. 6 M. I. A. 63; 13 M. I. A. 232; Special Second Appeal No. 268 of 1909; A. I. R. 1924 Rang. 283; F. A. No. 36 of 1925; A. I. R. 1926 P. C. 77; and A. I. R. 1927 Rang. 102. Cons. (*Heald and Cunliffe, JJ.*) MAUNG KYAN PE *v.* MAUNG KYI. **6 Rang. 203 = 110 I. C. 646 = A. I. R. 1928 Rang. 220.**

——*There is no presumption of benami among Burmans.*

Among Burmans the practice of benami is not indigenous, and though it has to some considerable extent taken root it is yet not so common as among natives of India proper. The device is very seldom employed except as a means of defeating or delaying the immediately impending claim of some creditor or other person. In view of these considerations there is no presumption of benami among Burmans. (*Rutledge, C.J. and Carr, J.*) MA GYI *v.* MA ME. **4 Rang. 522 = 100 I. C. 250 = A.I.R. 1927 Rang. 102.**

Presumption—Father and son.

——*Purchase by father in son's name should be presumed to be benami—Source for the acquisition is the criterion.*

When a purchase of real estate is made by a Hindu in the name of one of his sons the presumption is in favour of its being a benami purchase and the burden of proof lies on the party in whose name it was purchased to prove that he was solely entitled to the legal and beneficial interest in the permanent estate. The source from which the acquisition is made,is the main criterion for deciding whether the person in whose name a benami purchase is made, is, or is not, the real owner. 6 M.I.A. 53 (P.C.) and 12 A.L.J. 79 (P.C.), Foll. (*Harrison and Coldstream, JJ.*) KANSHI RAM *v.* SHANKAR DAS. **10 Lah. L.J. 93 = 111 I.C. 596 = A.I.R. 1928 Lah. 397 (409).**

——*Ostensible purchaser only a school boy and minor and having no source to pay purchase money—Father all along in possession — Inference that the sale is benami is correct.*

Where by reason of the antiquity of the transaction it is not possible for the defendant to prove who actually paid the consideration-money, the court is to be guided by reasonable probabilities, legal inferences, surrounding circumstances of the time, the relations between the actual purchaser and the alleged benamidar and the future dealings of the two parties with the property. A.I.R. 1924 Cal. 467 and 17 O. C. 173, Ref. Where it was in evidence that the ostensible purchaser was a minor and a school boy living with his father at the time of the sale and had no independent means of his own and that his father had been practically in possession of the property, *Held*, that the lower courts were right in holding that father was the real purchaser and not the son. (*Dalal, J. C.*) MT. ZAITOON BIBI *v.* SYED ABID.

12 O.L.J. 142 = 86 I.C. 874 = A.I.R. 1925 Oudh 366.

——*Intention to gift presumed.*

Where the father purchased the property in the name of the son but with the father's money and the intention was to make a gift to son and the interest was acted upon :

Held, it is a gift to the son. (*Jwala Prasad and Adami, JJ.*) MAHOMED YAKUB *v.* ABDUL QUDDUS.

4 P. L. T. 17 = 68 I. C. 372 = A.I.R. 1923 Pat. 187 (194).

Presumption—Hindu female.

——*C. P. Code, S. 66—Hindu joint family purchasing property in name of female member entitled to maintenance—Purchase is benami.*

Where property is purchased by a joint Hindu family in the name of a female member thereof who has right to maintenance out of joint family property, she cannot be said to have such an interest in the purchase as would take her case out of S. 66. 12 B.L.R. 317 and 29 All. 557, Foll. (*Tudball and Sulaiman, JJ.*) BAIJNATH DAS *v.* BISHEN DEVI. **43 All. 711 = 19 A.L.J. 787 = 63 I. C. 676 = A.I.R. 1921 All. 185.**

Presumption—Husband and wife.

——*Trusts Act, S. 82—Money deposited by husband in the name of himself and wife payable to either or survivor—Money belongs to husband's estate.*

The general principle of equity, applicable both in England and in India, is that in the case of a voluntary conveyance of property by a grantor, without any declaration of trust, there is a resulting trust in favour of the grantor, unless it can be proved that an actual gift was intended. An exception has, however, been made in English law, and a gift to a wife is presumed, where money belonging to the husband is deposited in a bank in the name of a wife, or where a deposit is made, in the joint names of both husband and wife. This exception has not, however, been admitted in Indian law. Where money was deposited by a husband in a bank in the name of himself and his wife "payable to either or survivor,"

Held, that the money belonged to the estate of the husband. A.I.R. 1921 P.C. 56, Ref. (*Lord Parmoor.*) GURAN DITTA *v.* T. RAM DITTA.

55 I. A. 235 = 55 Cal. 944 = 32 C.W.N. 817 = 29 P.L.R. 429 = 109 I. C. 723 (2) = 48 C.L.J. 119 = 28 M.L.W. 66 = 5 O. W. N. 668 = 30 B.L.R. 1384 = 26 A. L. J. 1215 = 1928 M.W.N. 917 = A.I.R. 1928 P.C. 172 (174) = 55 M.L.J. 651 (P.C.).

——*Wife purchasing property with her own money—Property must be presumed to be her property.*

There is clearly no warrant for the proposition that there is a presumption that a female in whose name the property stands is not the owner of it. The correct rule, however, is that, if it is found that the purchase money came from a certain source, it is assumed, until the contrary is shown, that the person who supplied the purchase money is the owner of the property. Where a wife had moneys belonging to herself and purchases were made in her name, it would be a fair inference that the price on each occasion was paid out of her funds. A. I. R. 1927 Mad. 194, Ref. (*Venkatasubba Rao, J.*) SHANMUGA MUDALIAR *v.* KAVERI AMMAL.

109 I.C. 539 = A. I. R. 1928 Mad. 708.

——*English presumption of advancement does not apply in India—Money deposited in wife's name—There is no presumption of gift—Hindu Law.*

The English Law presumption of the wife's advancement does not exist in the Indian Law, but on the contrary the presumption here is that where a document is taken in the name of a man and his wife, the former providing the money, the transaction is, so far as the wife is concerned, benami for the husband. The mere fact, therefore, that money was deposited in the name of the wife does not justify a presumption that she was the beneficial owner of the money. A. I. R. 1925 P. C. 81, Rel. on. (*Phillips and Odgers, JJ.*) PARVATHI AMMAL *v.* M. R. SIVARAMA IYER. **97 I.C. 998 = A. I. R. 1927 Mad. 90.**

——*Purchase in the name of wife—Presumption of advancement does not arise from the fact that purchase-money came from husband—The fact that money borrowed on property goes in husband's business is not conclusive proof that property does not belong to her.*

There is no presumption that what stands in the name of the wife belongs to the husband. In India, if it is shown that the money to purchase the estate was the husband's money in origin, then in contradistinction from the law of England, the fact of the wife's relationship does not raise any presumption of advancement ; but until it is shown that the husband's money was the origin of the purchase, that line of argument does not commence at all. In the absence of direct evidence that the origin of the property, the purchase-money was from the husband, indirect evidence, no doubt, can be entertained and it can be shown from the dealings of the parties with the property that as between them the property must have belonged to the husband. But in the case of husband and wife the mere fact that money which is borrowed goes to the husband or is put into the husband's business is no convincing evidence that the property was not the wife's. There are other possible explanations and it is not possible in such a case for a Court to proceed by an abstract deduction upon so ambiguous a circumstance as that. (*Sanderson, C. J. and Rankin, J.*) JNANENDRA BALA DEBI *v.* OFFICIAL ASSIGNEE, CALCUTTA. **54 Cal. 251 = 30 C. W. N. 346 = 93 I. C. 834 = A. I. R. 1926 Cal. 597.**

——*Purchase by husband in wife's name should be presumed to be for husband's benefit.*

A purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a *benami* transaction by which the beneficial interest in the property is in the husband although the ostensible title is in the wife. The rule of the law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply in India. Where a party pleads that a purchase by the husband in the name of the wife was in pursuance of an ante-nuptial agreement by the husband to make some provision for the wife, the *onus* of proof is on that party. Subsequent dealings with the property by the husband are material evidence on the point. 6 M. I. A. 53; 13 M. I. A. 232 and 37 All. 557 (P. C.), Foll. (*Sir John Edge.*) LAKSHMIAH *v.* KOTHANDARAMA.

52 I. A. 286 = 27 B. L. R. 1076 = 88 I. C. 327 = 29 C. W. N. 1013 = 1925 M. W. N. 717 = 48 Mad. 605 = 3 Pat. L. R. 290 = 23 A. L. J. 662 = 42 C. L. J. 8 = 23 M. L. W. 138 = A. I. R. 1925 P. C. 181 = 49 M. L. J. 109.

——*Presumption as known in English law applies to Anglo-Indians.*

The presumption of advancement, as it is known in English Law, may arise in the case of Anglo-Indians where a husband transfers property in the name of his wife. (*Robinson, C. J. and May Oung, J.*) (EUGENE HUGH CONRAD) LECUN *v.* MAY JULIA LECUN. **2 Rang. 253 = 82 I. C. 686 = 3 Bur. L. J. 85 = A. I. R 1924 Rang. 283.**

Presumption—Joint Hindu Family.

———*Two Hindu brothers—Joint family—Purchase by one brother is not presumed to be* benami *for other.*

Where two brothers constitute a joint Hindu family there is no presumption, that one brother must necessarily buy property for the benefit of the other brother. (*Devadoss, J.*) VENKATARAMA CHETTIAR *v.* MARUTHAPPA PILLAI. **21 M. L. W. 226 = 86 I. C. 886 = A. I. R. 1925 Mad. 448.**

Presumption—Mortgagor and mortgagee.

———*Evidence Act, S.* 114—*Deed in possession of mortgagor—No presumption can be made that mortgagee is benamidar for mortgagor.*

The mere fact that the deeds are in the possession of the mortgagor does not itself prove that the mortgagee was a mere benamidar for the mortgagor. (*Macleod, C. J. and Crump, J.*) HIRAJI *v.* VISHNU. **79 I. C. 186 = A.I.R. 1923 Bom. 429.**

Presumption—Principal and agent.

———*Possession of title-deeds—Evidence against* benami *character—Burden of proof.*

Where the vendee and his father bear the relation of agents and servants of the vendor the possession of the title-deeds by these persons is not a circumstance which can carry any weight. Where the purchaser is a stranger to the vendor the fact of his possessing the title-deeds might bear a strong argument in favour of the sale-deed held by the purchaser not being a nominal document. Where the vendor was of affluent means, had embarked in litigation and had been unsuccessful and a decree was pending against her but she was apprehensive of a claim for mesne profits being put forward against her.

Held, that she had a good motive for transferring the house in such a way as to enable her afterwards to protect the property. The purchaser being her servant, it lay very heavily upon him to prove by cogent evidence that the transaction was above board and that no advantage had been taken of the lady's age and position. (*Banerji and Gokul Prasad, JJ.*) KEDAR NATH SINGH *v.* SHEO SHANKAR. **45 All. 515 = 76 I. C. 370 = 21 A. L. J. 421 = 4 L. R. A. Civ. 512 = A. I. R. 1923 All. 613 (2).**

Presumption—Source of money.

———*He who pays the money is presumed to be owner.*

Where one person pays the price and the instrument of sale is obtained in the name of another, the presumption is that the person paying the price is the owner and the person in whose name the sale is obtained, occupies the position of a trustee only. 6 M.I.A. 53 (P.C.); 13 M.I.A. 232 (P.C.) and 37 All. 557 (P.C.), Foll. (*Abdul Raoof, J.*) MAQSUDAN LAL *v.* RAM CHANDER RAM RACHHPAL. **7 L.L.J. 298 = 88 I. C. 289 = 26 P. L. R. 358 = A.I.R. 1925 Lah. 511.**

———*Test is the source of purchase-money—No presumption of advancement exists in favour of son or wife.*

The criterion is to consider from what source the purchase money comes. The presumption is that a purchase made with the money of *A*, in the name of *B*, is for the benefit of *A*; and that from the purchase by a father, whether Mahomedan or Hindu, in the name of his son, one is not at liberty to draw the presumption which the English Law would draw—of an advancement in favour of that son. Again the mere fact that property was purchased, not in the sole name of the son but in the name of the wife as well as of the son, affords a strong argument in favour of the hypothesis that it was a benami purchase to the absence of such community of interest between the wife and the son as would render it probable that they had been made joint owners of the property and the reason for putting two names rather than one into a trust applies almost as strongly in India as it would in England. The presumption in favour of benami will be strengthened if almost all the property was purchased in the name of the wife and the man purchased really next to nothing in his own name. (*Spencer and Kumaraswami Sastri, JJ.*) MOLLAYYA PADAYACHI *v.* KRISHNASWAMI IYER. **21 M. L. W. 336 = 85 I. C. 855 = A. I. R. 1925 Mad. 95 = 47 M. L. J. 622.**

———*Doctrine of advancement does not apply in India—Test is source of purchase-money where other circumstances fail—Trusts Act, S.* 82.

In India the doctrine of advancement in favour of a wife or a son has no application but the test to find out whether a transaction is *benami* or not is the source from which the purchase-money is got, but even this test becomes relevant only in the absence of all other explanatory circumstances. (*Kendall and Pullan, A. J. Cs.*) MT. RAJ KUNWARI *v.* MT. RANI MAHARAJ KUNWAR KUNWARI. **82 I. C. 832 = A. I. R. 1925 Oudh 243.**

———*Presumption exists that purchase is for benefit of person providing purchase-money—But presumption is strong or weak according to circumstances and is rebuttable—Trusts Act, S.* 82.

Where property is acquired in the name of one person but the purchase price is paid by another a presumption arises that the transaction is one for the benefit of the person providing the money. 6 M.I.A. 53; 42 I.A. 202; 45 I. A. 97; 46 I. A. 1 and A.I.R. 1923 Cal. 228, Ref. to. But apart from the fact that the presumption is rebuttable, its strength or weakness can only be gauged by reference to all the surrounding circumstances.

Per *Mullick, J.*—It is true the payment of the consideration money is not everything in a case of *benami*. But after all it is a question of fact whether the payment of the money was a gift or a transaction for the benefit of the owner of the money. There is no question of presumption or of onus of proof the matter is simply one of balance of evidence.

Per *Foster, J.*—Where the cost of acquisition has a double source and is only in part traceable to the plaintiff, the Court should, in the absence of an unambiguous criterion of ownership take into consideration the surrounding circumstances, the position of the parties, and their relation to one another, the motives which could govern their actions, and their subsequent conduct including their dealings with or enjoyment of the disputed property. There is no presumption on either side. A.I.R. 1923 Cal. 228; 35 I. A. 104; 30 All. 258 and 14 M. I. A. 433, Foll. (*Dawson-Miller, C. J. Mullick and Foster, JJ.*) HARIHAR PRASAD *v.* KESHO PRASAD. **5 P. L. T. (Sup.) 1 = 93 I. C. 454 = A. I. R. 1925 Pat. 68 (a) (F. B.).**

Presumption.

———The apparent title must be assumed to be the real title until the contrary is established. (*Das and Ross, JJ.*) AMBIKA PRASAD *v.* CHANDRAMANI KUER. **8 Pat. 396 = 10 P. L. T. 607 = 117 I. C. 867 = A. I. R. 1929 Pat. 289.**

———*Purchase in son's name—No presumption of advancement.*

There is no presumption in India that where a father pays the money and the purchase is taken in the name of his son, he intended his son should benefit thereby or that there should be a resulting trust in favour of the son in respect of the property purchased with that money. 55 Cal. 944 ; 55 M. L. J. 651 (P. C.), Foll. (*Percival, J. C. and Rupchand Bilaram, A. J. C.*) ABDUL NABI KARIMDINO *v.* MAZHARALI NUR MAHOMED. **125 I. C. 33.**

——*Lease in favour of concubine—Cultivation by lessor—Concubine permanent and living with lessor—Presumption is that the cultivation was for her.*

Where a person executes a deed of lease in favour of his permanent concubine, living with him and gets her name transferred in the jamabandi, but carries on the cultivation himself, the only possible presumption from that fact was that he carried on the cultivation for her. A. I. R. 1927 P. C. 22, Foll. (*Hallifax, A. J. C.*) LALU DHIMAR *v.* SUDANI BAI. **103 I. C 143 = A. I. R. 1927 Nag. 386 (2).**

——*Every apparent transaction must be presumed to be real until contrary is proved by evidence not by conjectures.*

Every apparent transaction must be presumed to be real until the contrary is established. That contrary can only be established by evidence, and not by conjectures and speculations, however attractive they may be. (*Das and Bucknill, JJ.*) BRIJKISHORE NARAIN SINGH *v.* HARBANS NARAIN SINGH. **2 P.L.T 728 = 62 I. C. 611 = A. I. R. 1921 Pat. 397.**

Test of.

——*He who pays the consideration and enjoys possession and profits is presumed to be the owner.*

Where *A*, alleging that the property standing in the name of *B*, was purchased benami for *A*, has proved the motive for such benami transaction and also that the consideration came from his (*A*'s) purse and that he has been in the enjoyment of the profits of that property, the fact that *B*'s name appears in all the public records is not sufficient to disprove that *A* was the real owner, such fact being consistent with the theory that *B* was the benamidar. (*Wazir Hasan and Pullan, JJ.*) JUGAL KISHORE *v.* MT. GAURA. **105 I. C. 191 = A. I. R. 1928 Oudh. 28.**

——*Source of purchase money is important factor but not conclusive.*

Though the source of the purchase money is an important criterion, it is not conclusive where there are other circumstances showing that the purchaser intended the property to belong to the person in whose favour the sale-deed was executed. 26 Cal. 227 (P. C.), Foll. (*Daniels, J.*) KUNJ BEHAR SINGH *v.* BANS GOPAL TEWARI. **97 I. C. 487 = A. I. R. 1927 All. 59.**

——*Source of purchase money or custody of documents is not conclusive criterion.*

In considering whether a purchase is benami, the source of the purchase money is only one criterion though an important criterion ; similarly, the custody of documents is not also conclusive criterion. (*Ramesam and Reilly, JJ.*) GANGAMMA, *In re.* **86 I. C. 272 = A. I. R. 1925 Mad. 980.**

——*Test is source of consideration—Absence of direct evidence—Court must rely on circumstances and probabilities from proved facts—Substance of transaction must be looked into.*

As benami transactions are very familiar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose. The person who impugns its apparent character must not rely however solely on probabilities, but must show something definite to establish that it is a sham transaction on the principle that the burden of proof lies upon the person who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things. The most important test to be applied in these cases is the source whence the consideration came. Where, however, from the lapse of time, direct evidence of a conclusive or reliable character is not forthcoming, as to the payment of consideration, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. If the evidence on neither side is wholly convincing as to the fundamental criterion, namely, the source of the purchase money, if the evidence given and withheld is open to adverse criticism, the Court must rely on the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subseqent conduct including their dealings with or enjoyment of the disputed property. We must further look to the substance of the transaction as evidence in the deeds of the parties, not permitting the real question to be obscured by exhibitions of the art of the conveyancer in the shape of recitals of obviously untrue statements introduced to import some additional solemnity to an instrument. (*Mookerjee and Chotzner, JJ.*) PROMODE KUMAR ROY *v.* MADAN MOHAN SAHA. **36 C. L. J. 396 = 70 I. C. 555 = 27 C. W. N. 305 = A. I. R. 1923 Cal. 228.**

——*Burden of proof lies upon him who raises the plea—Source of consideration and possession are the tests for finding out real purchaser.*

The burden of proving that a certain conveyance is a *benami* transaction, lies on the person who so raises the plea of *benami*. In the process of this investigation the Court must take care to rest its decision not upon suspicion but upon legal evidence established by legal testimony although the Court need not approach the transaction with that scrupulous rigour, which in other systems of jurisprudence may demand the existence of the clearest positive evidence that the *ex facie* owner of a property holds the same for another. Where it is asserted that an assignment in the name of one person is really for the benefit of another person the vital test is the source whence the consideration came. The Court should take into consideration the question of possession and the surrounding circumstances. (*Mukerjee and Cuming, JJ.*) JASOD LAL PAL CHOUDHURY *v.* BALARAM PODDAR. **35 C.L.J. 589 = 69 I. C. 67 = A. I. R. 1922 Cal. 488.**

——*Presumption is against benami nature—Tests of benami—Source of purchase money and possession of property are tests.*

The Court would presume in the first instance that the transaction, as it appears on the surface, is true. Transactions are to be pronounced fictitious not merely on the ground of suspicion and doubt as to the truth of the case, but only on legal grounds established by the evidence. 6 C.L.J. 472, Foll. One of the tests to determine whether a transaction is benami or not is to find out from what source the purchase money comes, another is the inference arising from the fact of possession of the property in question. (*Kincaid, J. C. and Raymond, A. J. C.*) MT. PAWANDBAI *v.* CHATANMAL. **15 S. L. R. 84 = 62 I. C. 1002 = A. I. R. 1921 Sind 20.**

BENAMIDAR.

Estoppel.

——*Relation to real owner—Proceedings against him are fully binding on real owner.*

BENAMIDAR.

A benamidar though has no beneficial interest in the property that stands in his name represents in fact the real owner and the proceeding against him is fully binding on the real owner. A. I. R. 1918 P. C. 140, Foll. (*Adami and Chatterji, JJ.*) DEO LAL *v.* BINDESHWARI NARAYAN. **10 P. L. T. 469= 120 I. C. 776=A. I. R. 1929 Pat. 440.**

———*Suit by or against benamidar binds the real owner.*

The benamidar has no beneficial interest in the property or business that stand in his name ; he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him. 46 Cal. 566, Foll. Suit by or against benamidar binds the real owner. (*Macleod, C. J. and Coyajee, J.*) KONDI SAVLA BACHAL *v.* BANACHAND CHENIRAM MARWARI. **27 Bom L. R. 667=89 I. C. 220= A. I.R. 1925 Bom. 422.**

———*Payment made to, will bind real owner.*

A payment made to a *benamidar* in discharge of a bond will bind real owner if made without notice and objection by him. (*Krishnan and Odgers, JJ.*) ANTHIYA HEGDE *v.* MANJAIYA SHETTY. **45 Mad. 84=69 I.C. 642=14 M. L. W. 371= 1921 M. W. N. 642=A. I. R. 1922 Mad. 176= 41 M. L. J. 393.**

Rights of.

———*Trusts Act, S. 82—Benamidar is not strictly a trustee—He has some of the liabilities but not all rights of a trustee.*

A benamidar is not a trustee in the strict sense of the term. He has the ostensible title to the property standing in his name but the property does not vest in him but is vested in the real owner. He is only a namelender or an *alias* for the real owner. The real owner, unlike the *cesti que trust*, has got the legal title, though the property is in the name of the benamidar The real owner could enforce his remedy in respect of property standing in the name of a benamidar, without reference to the latter. The benamidar has some of the liabilities of a trustee but not all his rights. A benamidar in possession is, in a sense, the trustee for the real owner. 35 Cal. 551 and 2 B. L. R. A. C. 284, Rel. on ; 5 B. L. R. 234, Ref. (*Devadoss and Walsh, JJ.*) PITCHAYYA *v.* RATTAMMA. **115 I. C. 340=29 M. L. W. 56= A.I.R. 1929 Mad. 268=55 M. L. J. 856.**

———*Transfer of Property Act, S. 41—Benamidar can lease out benami property to bind real purchaser.*

A benamidar being a certified purchaser has at least all the authority of an agent under law of agency and a deed of lease, executed by him of property of which he is the benamidar, is binding on the real purchaser in the absence of notice to the lessee that he has withdrawn the authority from the benamidar or that there was reservation of it. (*Percival, J. C. and Rupchand, A.J. C.*) KAISER KHAN *v.* RATTANCHAND. **A. I. R. 1929 Sind 195.**

———*Admission by benamidar of ownership of third person does not pass title to that person.*

A statement by the benamidar in a compromise in a suit that certain properties standing in his name belong to a person other than the true owner of those properties has not the effect of conveying their interest to the person in whose favour the admission is made. Assuming that the admission could have the effect of a conveyance, such a conveyance being a transfer of the office of the trustee is invalid in operation. (*Phillips and Venkatasubba Rao, JJ.*) VISVANATHAIYER *v.* VENGAMA NAIDU. **19 M. L. W. 567=78 I. C. 52= 34 M. L. T. 264=A. I. R. 1924 Mad. 749.**

BENAMIDAR.

———*Person with voidable title can give good title to the transferee—T. P. Act, S. 8.*

A person who has acquired property under a voidable title can himself give a good title to that property to a *bona fide* purchaser or mortgagee from him who deals for value and has no notice of the defects in the title. (*Schwabe, C. J. and Wallace, J.*) PARTHASARATHY AIYAR *v.* SUBBARAYA GRAMANY. **17 M.L.W. 763= 72 I. C. 559=A. I. R. 1924 Mad. 67= 45 M. L. J. 175.**

———*Pronote—Assignment cannot be made.*

No assignment can be made in favour of benamidar. (*Kanhaiya Lal, J.C.*) RAMSING *v.* MT. RAGHUBANSA. **26 O. C. 201=72 I. C. 877= A. I. R. 1923 Oudh 3.**

Right to sue.

A benamidar has a right to maintain a suit in his own name : A. I. R. 1918 P. C. 140; 24 Cal. 34; 22 Bom 672 and 21 All. 380 Foll. (*Macnair and Subhedar, A. J. Cs.*) NARAINRAO *v.* SETH HANUMANTRAM. **A. I. R. 1930 Nag. 273.**

———*All parties to transaction knowing benami nature of contract—Defence raised that party suing is benamidar—Meaning of such defence is that real owner is unwilling to enforce his claim—Real owner coming as witness for defendant—Suit by benamidar to enforce claim in such circumstances is not tenable.*

No doubt a benamidar can maintain a suit in respect of contracts and can maintain a suit in respect of immoveable property though he is merely a benamidar, but when all the parties to the transaction know that the person appearing as party to the contract is not the real party and when a defence is raised that the party suing is a benamidar, the real meaning of that defence is that the real owner or the person really entitled to the benefit of the contract, is not willing to maintain the suit to enforce his claim and that the benamidar is maintaining it in spite of the unwillingness of the real owner to do so. Therefore a suit by a benamidar in such circumstances to enforce a contract is not tenable. (*Chari, J.*) MAUNG SAN DA *v.* MAUNG CHAN THA. **7 Rang. 797=121 I.C. 806=A.I.R. 1930 Rang. 130.**

———*Beneficial owner can maintain a suit in name of benamidar.*

A beneficial owner is entitled to maintain an action in the name of benamidar but as the latter is a mere trustee for him and represents in fact the real owner as far as the legal position is concerned he is subject to all the rights and obligations of the real owner and all the equitable considerations which would bind him. (*Ross and Chatterji, JJ.*) KAMTA SINGH *v.* CHATURBHUJ SINGH. **8 Pat. 585=120 I. C. 17= A. I. R. 1929 Pat. 664 (674).**

———A benamidar has a right to maintain an action on behalf of the beneficiaries. (*Kulwant Sahay and Macpherson, JJ.*) HAZARIRAM *v.* KEDAR NATH MARWARI. **7 Pat. 726=9 P.L.T. 822= 113 I. C. 673=A. I. R. 1929 Pat. 1.**

———*Benamidar can maintain suit for possession against trespasser.*

An action can be maintained by a benamidar in respect of property although the beneficial owner is no party to it. He can maintain a suit for recovery of possession of property against trespasser. A.I.R. 1918 P.C. 140 Rel. on. (*Mitter, J.*) AFIRAM BIBI *v.* NARIMTULLA SAHA. **48 C.L J. 135= 112 I. C. 458=A.I.R. 1928 Cal. 666.**

——A benamidar cannot sue to set aside a sale under decree passed against the real owner, on the ground that the benamidar was not a party to that suit. (*Devadoss, J.*) PUTTA YARRAMMA *v.* KALA VENKAMMA.
101 I. C. 165 = A. I. R. 1927 Mad. 659.

——*Benamidar to sue on mortgage even in cases governed by Deccan Agriculturists' Relief Act—Deccan Agriculturists' Relief Act* (17 *of* 1879), *S.* 12.

The principle that a benamidar can maintain a suit on a mortgage when a mortgage is executed ostensibly in his favour and the real mortgagee will be bound by the decree passed in the mortgage suit, applies even to cases falling within the scope of the Deccan Agriculturists' Relief Act and the provisions of S. 12 have to be observed by the Court in a suit by a benamidar just as much as in a suit by the real creditor. 46 Cal. 566 (P.C.), Foll. (*Fawcett and Madgavkar, JJ.*) NARAYAN KESHAO *v.* KAJI GULAM. **49 Bom. 832 = 27 B.L.R. 1240 = 91 I. C. 353 = A. I.R. 1926 Bom. 115.**

——*Suit by benamidar is maintainable except against the beneficial owner.*

A true benamidar, *i.e.*, a person who has merely lent his name to the transaction and is therefore a trustee holding a legal title without any beneficial interest in the property, can maintain a suit in his own name against, at any rate, all persons except the person beneficially entitled. 46 Cal. 566 and 42 Mad. 348, Foll. (*Spencer, Og. C. J. and Srinivasa Aiyangar, J.*) RANGAPPA NAYAKAR *v.* RANGASAMI NAYAKAR.
1925 M.W.N. 232 = 88 I.C. 249 = A. I. R. 1925 Mad. 1005.

——*Benamidar has a right to sue in ejectment.*

A benamidar can sue for ejectment from property standing in his name. 18 All. 69 ; 21 All. 380 ; 46 C. 566 (P.C.), Foll. (*Stuart, J.*) SHAFFIUDDIN *v.* MT. HURMAT. **70 I. C. 849 = A.I.R. 1923 All. 10.**

——*Benamidar cannot sue for possession and title, the beneficial owner.*

A benamidar has no right to bring a suit claiming title and for possession when he is suing in effect the beneficial owner. 46 C 586 (P.C.) Dist. (*Sanderson, C.J. and B. B. Ghose, J.*) DAMODAR MANDAL *v.* KARAMAT ALI KHAN. **A. I. R. 1923 Cal. 536.**

——*Benamidar can sue for possession.*

A benamidar can maintain a suit for recovery of possession. (*Newbould, J.*) MAFIZUDDIN HOWLADAR *v.* MAHAMAD ISLAM CHOWDHURY.
67 I.C. 741 = A. I. R. 1923 Cal. 281.

——*Real owner can sue in presence of benami owner.*

Where there are both a benami and real owner of a property, the real owner can maintain a suit in respect of the property, especially when the benami owner is added as a party defendant. (*Mookerjee and Buckland, JJ.*) KRISHNAJIBAN SANYAL *v.* MD. MASIUDDIN MANDAL. **33 C.L.J. 369 = 63 I .C. 244 = A.I.R. 1921 Cal. 653.**

——A benamidar in respect of a house is entitled to sue for the removal of obstruction to access of light and air to the house. (*Mookerjee and Panton, JJ.*) PANCHU GOPAL *v.* MATANGINI DEBI. **35 C.L.J. 43 = 64 I. C. 581 = A. I. R. 1921 Cal, 560.**

——*Benamidar can sue so long as law is not contravened.*

A benamidar can, so long as the transaction does not contravene the provisions of the law, maintain an action in respect of the property or debt standing in his name, even though the beneficial owner is no party to it. 46 Cal. 566 (P.C.), Foll. (*Scott-Smith and Martineau, JJ.*) BHANA MAL *v.* BELI RAM.
4 Lah.L.J. 378 = 62 I.C. 799 = A.I.R. 1921 Lah. 129.

Succession.

——A son succeeds to the trusteeship of his father who is a benamindar, A.I.R. 1918 P.C. 35, Foll. (*Adami and Chatterji, JJ.*) DEO LAL JHA *v.* BINDESHWARI NARAYAN. **10 P.L.T. 469 = 120 I. C. 776 = A.I.R. 1929 Pat. 440.**

Suit against.

——*Suit against* benamidar *binds real owner but plaintiff cannot defeat* benamidar *where real owner if made a party cannot be defeated.*

A suit against a *benamidar* binds the *benamidar* as much as the real purchaser even though the latter may not have been made a party to the suit. The plaintiff cannot be allowed by keeping the real purchaser out of the record to enforce a right against an ostensible vendee which he would not have been entitled to enforce against the real purchaser had he been brought on the record. Where the plaintiff was not entitled to any preference as against the real vendee in a matter of pre-emption,

Held, he could not claim pre emption by confining his action to the *benamidar* alone. 8 I. C. 527, Foll. (*Sulaiman and Kanhaiya Lal, JJ.*) MT. RAM SAKHI *v.* LACHMI NARAIN. **5 L.R.A. Civ. 616 = 80 I.C. 42 = A.I.R. 1924 All. 802.**

——*Revenue sale—Rights of purchaser—Joint possession.*

A suit for joint possession by the purchaser of a separate account in a sale deed under the Bengal Revenue Sale Law is maintainable even though the plaintiff is a benamidar, (*Walmsley and Greaves, JJ.*) MOHESH CHANDRA DE *v.* KALI KANTA SARMA.
(1921) 60 I.C. 708 (Cal.).

Suit by.

——*Suit for ejectment is maintainable whether the transfer was supported by consideration or not.*

Per *Phillips and Venkatasubba Rao, JJ.* (*In the Order of Reference*).—A benamidar can bring a suit for ejectment although he is not the real owner. The rule applies whether the transaction is supported by consideration or it is only a transfer by the owner to a benamidar which was not really intended to effect a transfer : 46 Cal. 566 (P. C.), Foll. (*Coutts-Trotter, C. J. Ramesam and Wallace, JJ.*) GOVINDA *v.* CHENGALROYA. **35 M.L.T. 29 = 1924 M.W.N. 733 = 83 I.C. 74 = 47 Mad. 896 = A.I.R. 1925 Mad, 22 = 47 M.L.J. 415 (F.B.).**

BENCH OF MAGISTRATES—*See* CR. P. CODE, 1898, SS. 15, 16, ETC.

BENEFICIAL—Interest.

See (1) CONTRACT—STRANGER.
(2) TRUST.
(3) TRUSTS ACT.

Owner.

See (1) CONTRACT—STRANGER.
(2) TRUSTS.
(3) TRUSTS ACT.

BENEFICIARY.

See (1) CONTRACT—STRANGER.
(2) TRUST.
(3) TRUSTS ACT.

BENEFIT OF DOUBT—*See* CRIMINAL TRIAL.

BENEFIT TO ESTATE.

See (1) GUARDIAN AND WARD, ETC.
(2) HINDU LAW—JOINT FAMILY—MANAGER.
(3) MINOR.

BENGAL, AGRA AND ASSAM CIVIL COURTS ACT (XII OF 1887)—*See* BENGAL N. W. P. AND ASSAM CIVIL COURTS ACT.

BENGAL ALLUVIAL LANDS ACT (V OF 1920).

Revision.

——*Order of Sub-Divisional Officer, ordering huts erected on disputed char to be sold is not revisable under Cr. P. Code., S.* 439.

Order passed by Collector as such under the Alluvial Lands Act cannot be revised by Criminal Bench of the High Court under S. 439.

Per Suhrawardy, J.—Order passed by a Sub-Divisional Officer under the Alluvial Lands Act directing that some huts which were erected on the disputed char were to be sold and the sale proceeds credited to the treasury, is not passed in judicial capacity but as an executive officer and as such cannot be revised by the High Court. (*Suhrawardy and Graham, JJ.*) OSMAN MUNSHI *v.* KADIR PRAMANICK. **33 C.W.N. 836 = 1929 Cr. C. 480 = A.I.R. 1929 Cal. 768.**

S. 10—Effect.

——*Effect of S.* 10 *is to stay earlier proceedings under S.* 145, *Cr. P. Code.,—Criminal P. C., S.* 145.

Some char lands became the subject-matter of proceedings under S. 145, Cr. P. Code., and at the time of the proceedings being initiated an attachment order was made against the lands. Various steps were taken in those proceedings and subsequently the Magistrate after reviewing the situation passed an order directing that the lands be released from attachment under S. 145 and decided to replace those proceedings with others under the Bengal Alluvial Lands Act, 1920. It was contended that S. 10 of that Act was intended to apply to proceedings under S. 145 so far as their institution or carrying on was concerned and not to the attachment order made under that section and that once an attachment was made, S. 10 conferred no right on the Collector to make a further attachment under that Act.

Held, that if the contention were sound it would result in nullifying the provisions of the Bengal Alluvial Lands Act of 1920. The provisions of S. 10 were wide enough to apply to all proceedings, including an attachment that may have been had under S. 145. The effect of S. 10, Bengal Alluvial Lands Act, would, therefore, be to stay the earlier proceedings under S. 145, Criminal Pro. Code. 13 C.W.N. 125, A.I.R. 1921 Cal. 631, Dist. (*Pearson and Mullick, JJ.*) DIGENDRA BEHARI ROY *v.* JANAKI NATH ROY. **33 C.W.N. 1115 = 1929 Cr. C. 326 = A. I. R. 1929 Cal. 646.**

——S. 10 negatives the implied repeal of S. 145 of the Crim. Pro. Code so far as recently formed alluvial lands are concerned. (*Greaves and Duval, JJ.*) ABDUL JABBAR MUNSHI *v.* MUFIZUDDI SARKAR. **28 C. W. N. 783 = 81 I.C. 931 = 25 Cr. L.J. 1107 = A.I.R. 1924 Cal. 980.**

BENGAL ALLUVIAL LAND SETTLEMENT ACT (XXXI OF 1858.)

S. 1—Estoppel.

——*Government adding assessment on accreted land to that on parent estate on previous occasions—They are not debarred from entering into separate engagement with the proprietor at a later survey—Evidence Act, S.* 115.

S. 1, Act XXXI of 1858 empowers the Government either to add the revenue assessed upon the alluvial increment to the jumma of the parent estate and enter into a new engagement with the proprietor for the payment by the latter of the aggregate amount or to make a separate settlement for the alluvial increment and to make this increment a separate estate accordingly. Although on previous occasions the Government chose to exercise their right in the manner first described, they are not under any obligation to exercise their discretion in the same way on a subsequent occasion when a fresh survey is made of all the accretions. (*Sir John Wallis.*) SECRETARY OF STATE *v.* PARBATI CHARAN SHAHA. **55 I.A. 289 = 55 Cal. 1037 = 110 I.C. 8 = 48 C.L.J. 163 = 32 C.W.N. 906 = A.I.R. 1928 P.C. 193.**

BENGAL ALLUVION AND DILUVION ACT (IX OF 1847).

Accretion.

——*Plaintiff a co-sharer and patnidar—Diarah proceedings taken as to accretions—Zemindar refusing to take settlement—Payment of malikana—Plaintiff recorded as tenant through sub-tenants—Plaintiff is entitled to claim accretions as appertaining to his patni tenures, but he cannot be compelled to take settlement of the accreted lands.*

Plaintiffs were co-sharers in a zamindari, and 16 annas patnidars under the zemindars. Certain lands had accreted to the zemindari and diarah proceedings were taken by the Government for the purpose of the resumption and settlement of the accreted lands. The zemindars refused to take settlement of the accreted lands, and were granted malikana in respect thereof.

Held, that no doubt the plaintiffs under the law were entitled to claim these accreted lands as appertaining to their patni tenure, and Government could not compel them to take settlement of the accreted lands even against their will. (*Page and Mallik, JJ.*) HARENDRA KUMAR RAI *v.* SECRETARY OF STATE. **33 C.W.N. 385 = 115 I. C. 45 = 55 Cal. 1355 = A. I. R. 1928 Cal. 808.**

Applicability.

——*Act does not apply to lands covered by Decennial and Permanent Settlement.*

It is now a settled law that Act IX of 1847 will only apply to lands which were not covered by the original Decennial and Permanent Settlements. 17 I. A. 40 : 17 Cal. 570, Foll. (*Jwala Prasad and Ross, JJ.*) RAMANANDHAN SAHAY *v.* JAIGOVIND PANDEY. **2 Pat. 839 = 75 I. C. 955 = A. I. R. 1924 Pat. 213 (224).**

Assessment.

——*Char formed in bed included in proprietor's land is assessable.*

Char formed in the bed of river proved to have existed at the time of the Decennial Settlement can be assessed with additional revenue, although the bed was included in the land of the proprietor at the time of the settlement. (A. I. R. 1922 P. C. 6, Foll.) Prior to the decision in A. I. R. 1922 P. C. 6 a distinction had been drawn between the assessibility of chars forming in a navigable river and those forming in a non-navigable river existing at the date of the Decennial Settlement, upon the ground that if such a river was non-navigable, the bed formed part of the settled estate and must be regarded as having been taken into account at the time of the settlement. That distinction was disapproved in A. I. R. 1922 P. C. 6, the basis of that ruling being that property is one thing and assessibility is another. (*Rankin and Page, JJ.*) SECRETARY OF STATE FOR INDIA *v.* SARAT SUNDRI DEBI. **29 C. W. N. 195 = 86 I. C. 110 = A. I. R. 1925 Cal. 447.**

——*Assessment under can be made if the lands are "added" lands.*

Jurisdiction may be assumed on behalf of the Crown under the Act, only if the lands which are sought to be assessed and resumed are " added" lands within the meaning of the statute. (*Mookerjee and Cuming, JJ.*) SECRETARY OF STATE *v.* UPENDRA NARAINROY.

36 C. L. J. 336 = 71 I. C. 849 = A. I. R. 1923 Cal. 247.

Ss. 1, 3, 5, 6—Object and Scope.

——*S.* 1 *modifies Regulation II of* 1819, *S.* 24—*Act provides simpler procedure than the Regulation—New survey in S.* 3 *is intended for changes by alluvion dereliction but not changes for possession—Any such new map in S.* 6 *refers to new map according to new survey —Without Revenue Survey Map Act could not be applied—S.* 31 *of the Regulation is not affected or repealed by Alluvion Act.*

The effect of the repealing clause, *viz.*, S.1 is to destroy the vitality of such provisions of Reg. II of 1819 as established tribunals and prescribed rules of procedure. *Prima facie* these provisions include S. 24 which hinges on S. 22 which in its turn is dependent on and inseparably associated with the rules embodied in Ss. 5 to 21. The expression " any such new map" plainly refers to the "new map" made according to "new survey" as contemplated in S. 3. That section provides for periodical surveys at intervals of not less than ten years, after,a revenue survey has been completed and approved. The object of the " new survey " is to ascertain the " changes" that may have taken place since the date of the last previous survey, that is changes by alluvion or dereliction (not changes by possession). S. 6 then imposes upon the revenue authorities the duty to assess what may be called added land whenever on inspection of the new map, it appears that land has been added to an estate paying revenue directly to Government. There must consequently be a comparison between two maps, made at an interval of not less than ten years and each showing the revenue paying estate concerned. That estate must accordingly be in existence as a revenue paying estate, if not before at least on the date of the first of the two maps taken as the basis for comparison.

" The object of the Act is to provide for the assessment of riparian estates from time to time in accordance with the changes which periodical surveys may show to have taken place in their area and boundaries. S. 3 of the Act refers to a revenue survey which is to be approved by Government as fixing the boundaries of estates and provides that at intervals of not less than ten years fresh surveys of such estates may be made. S. 5 then provides for reduction in the sudder jama when on a comparison of two successive surveys, it appears that the area of an estate has been diminished and S. 6 provides for an addition to the jama when on inspection and comparison of the new map land appears to have been added to the estate since the last survey. In every case the starting point is to be the revenue survey which it would appear is to be taken as representing the boundaries of the estate as they existed at the time of the Permanent Settlement, and it is apparently not open to the revenue authorities to go behind that survey and enquire whether in fact the boundaries at the time of settlement were not other than therein represented." S. 3 of Act IX of 1847 is all comprehensive in scope and Ss. 5 and 6 both refer to all estates paying revenue directly to Government no matter whether they were or were not in existence in **1793.** What is essential to attract the application of Act IX of 1847 is that there should have been in the case of the estate concerned, a revenue survey. This *prima facie* furnishes the boundaries as presumably though not conclusively accurate.

Per *Rankin, J.*—No measures for the assessment of the lands would be lawful unless taken under the provisions of the Act. The basis of Act IX of 1847 is that with the aid of two maps the proprietary rights will in general be ascertainable by mere inspection. The provisions of S. 31 of Regulation II of 1819 are in no way repealed or affected by Act IX of 1847. That section can stand intact though machinery clauses are repealed *quod* char lands. The only measures authorised by Act IX of 1847 relate to cases in which a revenue survey has previously been completed and approved; and in such cases after an interval of ten years a new survey map may be made and new maps prepared. If when that has been done it appears to the revenue authorities on inspection of such new map that land has been added, they are required without delay to assess the same with a revenue according to the rules in force in assessing alluvial increments and to report their proceedings to the Board of Revenue whose orders thereupon shall be final. The actual fixing of the assessment under Act IX of 1847 is based not on a judicial decision as to liability but on an executive or administrative order following upon an inspection of the map. There is no longer a trial and a preliminary decree, and provisions designed to prevent interruption of the proceedings by compelling appeals from the ' preliminary decree' to be brought promptly after notice of such decree have no longer any operation. If the very special trial contemplated by Regulation II of 1819 is never held the revenue authorities cannot claim for their decision imposing an assessment the detailed legal incidents annexed or attributed by the Regulation to the result of such a trial on the question of liability. (*Mookerjee and Rankin, JJ.*) PEARY LAL RAY CHAUDHURI *v.* SECRETARY OF STATE.

39 C.L.J. 454 = 83 I.C. 446 = A.I.R. 1924 Cal. 913(c).

Ss. 1, 3 & 6—Object and Scope.

——*Enquiry under—Suit to impeach assessment—Which evidence admissible—Right to malikana.*

Act IX of 1847 was framed for the assessment of lands gained from the sea or from rivers by alluvion or dereliction. The expression "any such new map" in S. 6 plainly refers to " the new map " made according to "new survey" as contemplated in S. 3. The object of the Act is to provide for the assessment of riparian estates from time to time, in accordance with the changes which periodical surveys may show to have taken place in their area and boundaries. In every case the starting point is to be revenue survey which is to be taken as representing the boundaries of the estate as they existed at the time of the Permanent Settlement, and it is apparently not open to the revenue authorities to go behind that survey and enquire whether in fact the boundaries at the time of settlement were not other than therein represented. What is essential to attract the application of Act IX of 1847 is that there should have been, in the case of the estate concerned, a revenue survey. This *prima facie* furnishes the boundaries as presumably, though not conclusively, accurate. The true position is that the revenue survey map is taken as the basis of comparison ; but the comparison of the map is not conclusive. The comparison sets the revenue authorities in motion, and they may, then, on the best materials they can procure, proceed to assess what land they deem to be assessable. When the proceedings have been commenced in accordance with the statutory requirements, there are no restrictions prescribed as to the evidence to be used for the solution of the problem in controversy. That problem is whether land has been "added" to a revenue paying estate and has not been assessed with revenue. What is liable to be assessed with revenue is land not previously assessed ; not land which has been formed since the revenue survey map. In the determination of the question, whether the land sought to be assessed is added land the Court has to determine the land included in the estate at the time of its creation as a permanently settled estate. For this purpose, the revenue survey map is valuable but not conclusive evidence. S. 1 leaves no room tor controversy that when alluvial land has been settled as a separate estate with a separate jama, it shall thenceforward be regarded and treated as in all respects separate from and independent of the original estate. Consequently, where in 1848, a separate estate was created and settled with the predecessors of the plaintiffs, by reason of the refusal of the predecessors of the defendants, the new estate became a separate estate independent of the original estate in all respects. The fact that the proprietors of the original estate had a right to receive malikana does not affect the question. Because malikana is a right to receive a portion of the profits of the estate for which the Government have made a settlement with another person, the real proprietor having neglected to come in and make a settlement. No doubt, malikana has sometime been described as an "unalienable right of proprietorship". But this does not justify the inference that a person in receipt of malikana allowance under S. 5 of Reg. VII of 1822, even though he be regarded as the holder of a "distinct proprietary right constituting an interest in land" can be deemed to be a person to whose land or estate alluvial accretion has been annexed, within the meaning of S. 4 of Reg. XI of 1822. The malikana holder is entitled to receive periodically a specific amount from the income of land, this right may have the qualities of a rent charge, but this is not sufficient to show that the land or estate is still held by him as zemindar immediately from Government, and unless this is established he cannot maintain his title to the accretion. (*Mookerjee and Rankin, JJ.*) SAUDAMINI DASSYA *v.* SECRETARY OF STATE FOR INDIA. **77 I. C. 707 = 38 C. L. J. 47 = 50 Cal. 822 = A. I. R. 1924 Cal. 197 (198, 199, 201, 203).**

S. 3—Assessment.

———*Land accreted to permanently settled estate—Owner agreeing to duly pay assessment—Same rate as that of other accreted land and not of permanently settled estate is contemplated.*

The proprietors of a permanently settled estate executed in respect of the estate a kabuliyat which contained, among others, the following clause : "If in future any chur be newly accreted and the quantity of taluq land be increased (thereby), we shall duly (*riti mata*) pay revenue for the said increased land."

Held, that the clause meant that the rates of assessment in respect of the accreted land were to be determined in the same way, and according to the same rules as Government adopt with regard to all newly formed *churs* and not that the rates mentioned in respect of the permanently settled estate are to be accepted. (*Sir John Wallis.*) SECRETARY OF STATE *v.* PARBATI CHARAN SHAHA. **55 Cal. 1037 = 55 I. A. 289 = 110 I. C. 8 = 48 C. L. J. 163 = 32 C. W. N. 906 = A. I. R. 1928 P. C. 193.**

Ss. 3 to 6—Assessment.

———*Creation of Zamindari in* 1861 *and* 1871—*No survey made—Government cannot assess the lands.*

A Zamindari was created in 1861 and a taluq created in 1871 by Government but it was not shown that there

was a revenue survey contemporaneous or subsequent in date or that there was a new survey after the lapse of not less than 10 years from the date of such revenue survey. The Government nevertheless purported to assess the lands.

Held, that the assessment was illegal. S. 6 imposes upon the Revenue authorities the duty to assess what may be called added land whenever on inspection of the new map it appears that land has been added to an estate paying revenue to Government. There must be therefore a comparison between two maps made at an interval of not less than 10 years and each showing the revenue paying estate concerned. That estate must accordingly be in existence as a revenue paying estate on the date of the first of the two maps. What is essential to attract the application of Act IX of 1847 is that there should have been in the case of the estate concerned a revenue survey. Further, it is only when on inspection of the new map it appears that land has been added that there is Legislative authority for assessment of additional revenue. (*Mookerjee and Chotzner, JJ.*) SREENATH ROY *v.* SECRETARY OF STATE. **50 Cal. 276 = 70 I. C. 510 = 36 C. L. J. 345 = A. I. R. 1923 Cal. 233.**

S. 3—Changes.

———*"Changes", meaning of—Change caused by annexation of another's land by a proprietor is not contemplated.*

The word "changes" in S. 3 of Bengal Act 9 of 1847 means changes brought about by the action of the river or the sea, and not changes by the act of one proprietor in annexing to his estate the property belonging to another proprietor. A map prepared under Act 9 of 1847, unlike a Revenue Survey Map or a map prepared under the Bengal Survey Act, can never be said to be a map according to possession of the parties. (*Das and Adami, JJ.*) BIBI WAKILAN *v.* DEONANDAN PRASAD. **2 P. L. T. 81 = 59 I. C. 298 = A. I. R. 1921 Pat. 268.**

S. 6—Assessment.

———*Order under S. 6 is final only for purposes of assessment—Diara proceedings are not binding as between under-tenure-holders claiming adversely to each other under different proprietors.*

An order under S. 6 is not final for all purposes, but it is final for the purpose of the assessment imposed on the land. The diara proceedings are binding on the proprietor with regard to the assessment of revenue, but are not binding as between under-tenure-holders in questions where the parties are not proprietors, but under-tenure-holders claiming the land adversely to each other under different proprietors. (*Greaves and Mukerji, JJ.*) RADHA NATH DUTTA *v.* CHANDRA KUMAR. **43 C.L.J. 152 = 91 I.C. 718 = A. I. R. 1926 Cal. 523.**

———*Bengal Permanent Settlement Regulation* (*I of* 1793)—*Permanently settled estate*—Churs *formed subsequent to settlement—Non-navigable river are liable to assessment though river-bed belongs to Zamindar.*

Churs within the limits of the *Zamindari* formed after the decennial settlement are to be treated as unsettled under Bengal Regulation II of 1890 notwithstanding the fact, that the river-bed from which the *churs* have been thrown up belong to the *Zamindar* at the time of the settlement and the Jama was assessed on the Zamindari as a whole. Therefore under Bengal Act IX of 1847 the Government can assess to public revenue *churs* formed in a non-navigable river both where it flows through a permanently settled *Zamindari* and within the middle line of the river where it is the boundary of the *Zamindari*. The right of the Government to assess the *churs* in question is not affected by the fact that the whole or half of the river-bed was part of the *Zamindar's* permanently settled estate. Bengal Regulation I of 1793 exempts from further assessment all lands included in a permanently settled estate whether they were cultivated or waste at the time of settlement. 17 Cal. 590 ; 17 I. A. 40; distinguished; 46 Cal. 390, Reversed. (*Viscount Cave.*) SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* MAHARAJA OF BURDWAN. **48 I. A. 565 = 265 C. W. N. 619 = 35 Cal. L. J. 92 = 67 I. C. 835 = 49 Cal. 103 = A. I. R. 1922 P. C. 6 = 42 M. L. J. 61.**

S. 6—Irregularity.

——*Irregular procedure should be objected to before Board of Revenue—Fundamental irregularity is a good ground in a Court of Law—Burden of proving irregularity is on objector—Superimposing maps to detect accretion is not irregularity.*

Proceedings of the assessing authorities are subject to being quashed in the ordinary Courts of law if they have been tainted by fundamental irregularity. It is a convenient and proper procedure that in an eminently practical matter, affecting measurements, surveys and maps of localities, with which the assessing officials on the one hand and owners on the other have presumably intimate local knowledge, such objection should be tabled to, and considered and reported upon by the Board of Revenue. The words of this statute imposing finality upon the orders of the Board of Revenue in such a situation are not only imperative but most salutary. Two conditions, however, must be noted ; the first is that fundamental irregularity, that is to say, a defiance of or non-compliance with the essential of the procedure would still give ground for questioning the proceedings in a Court of law. But the burden of establishing such essential and fundamental violation of statutory requirements rests upon the person alleging it. It is not sufficient to submit in a Court of law that upon the documents before the Board of Revenue, doubts arise as to whether this, that, or the other details of investigation should have been set to rest more clearly in the course of the administrative procedure. If such doubts arise upon points of fact, the Board of Revenue is competent to deal with them and is, further, the proper Court before which they should be stated. In order that the doubts should be promptly set at rest, it may have to be on the ground itself. The practice of finding an excess area by superimposition of maps is not to be condemned though a separate map showing the accretions is not prepared. 44 I. A. 104, Expl. (*Lord Shaw.*) SECRETARY OF STATE *v.* ROY JATINDRA CHAUDHRY. **51 I. A. 241 = 80 I. C. 1023 = 1924 M.W.N. 588 = 35 M. L. T. 146 = 51 Cal. 802 = 29 C.W. N. 1 = A. I. R. 1924 P. C. 175 = 47 M. L. J. 48.**

S. 6—Notice.

Notice served for the purposes of assessment under S. 7 of Act IX of 1847 can be amended. (*Mookerjee, A. J. C. and Fletcher, J.*) SOUDAMINI DASYA CHOUDHURANY *v.* SECRETARY OF STATE. **65 I. C. 76 (Cal.).**

S. 6—Scope.

——*Suit to contest the order of the Board of Revenue is not covered by S. 24, Bengal Regulation (2 of 1819).*

A suit to contest an order of the Board of Revenue under S. 6 of Act 9 of 1847, declaring the liability of the lands claimed as part of a permanently settled estate, to assessment of revenue, is not barred by the one year's rule of limitation laid down in S. 24 of Reg. 2 of 1819.

A.I.R. 1924 Cal. 913, Foll. (*Sanderson, C.J. Chatterjea, Rankin, Suhrawardy and Panton, JJ.*) SECRETARY OF STATE *v.* RAI RADHAKANT AICH. **53 Cal. 952 = 43 C.L.J. 542 = 30 C.W.N. 774 = 98 I. C. 728 = A. I. R. 1926 Cal. 924 (F. B.).**

BENGAL ALLUVION AND DILUVION REGULATION (XI OF 1825).

Accretions.

——*Land gained by accession from recess of river or sea becomes increment to tenure of person to whose land or estate it is annexed.*

S. 4 of Regulation XI of 1825 shows that when land is gained by gradual accession, whether from the recess of a river or of the sea, it forthwith becomes an increment to the tenure of the person to whose land or estate it is annexed ; and if it is annexed to a subordinate tenure held under a superior landholder, the under-tenant becomes liable for the payment of any increase of rent to which he may be justly liable. Consequently, as soon as the lands accreted and became attached to the holdings of the under-tenants, their title accrued, and it was not necessary for them to make an assertion of such statutory title by assertion. The remedy of the landlords was to assess rent on the accreted lands. Consequently the superior landlord is not competent to create a valid title in another by granting him a lease. (*Mookerjee, A. C. J. and Fletcher, J.*) KARIM SHEIKH *v.* AFAJUDHI SHEIKH. **33 C. L. J. 531 = 64 I. C. 805 = A.I.R. 1921 Cal. 330.**

Applicability.

Regulation XI of 1825 is not applicable in Madras. 36 Mad. 57, Foll.; 41 Mad. 840, Expl. (*Kumaraswamy Sastri and Walsh, JJ.*) NAGANNA *v.* SATYA NARAYANA. **53 Mad. 202 = 123 I. C. 131 = A. I. R. 1930 Mad. 181.**

Presumption.

Where owner of a diluviated estate has paid revenue for the site which was under water and which subsequently reformed, he is entitled to claim the land as belonging to his estate and such land cannot be dealt with under the provisions of Regulation XI of 1825. (*Walmsley and M. N. Mookerjee, JJ.*) CHANDRA KUMAR AICH *v.* JIBAN KRISHNA NATH MOHAJAN. **29 C.W.N. 290 = 80 I. C. 702 = A. I. R. 1925 Cal. 249.**

S. 1—Applicability.

——*Bed of small and shallow river belonging to private individual—first part of S. 1 does not apply.*

The first part of S. 1 of the Regulation does not apply to land forming the bed of a small and shallow river where the bed is recognized as the property of a private individual. (*Cuming and Panton, JJ.*) ANDORU AKANDA *v.* NASIR AKANDA. **90 I. C. 1010 = A. I. R. 1926 Cal. 368.**

S. 2—Dhardhura.

——*Custom of "dhardhura" pleaded—Incidents of custom must also be pleaded and proved—Custom—Evidence of.*

A mere statement that a custom of "dhardhura" (which means that a stream shall be the boundary) exists, will not be enough, where such a custom is pleaded, but all the incidents of the custom must be pleaded and proved. A. I. R. 1928 All. 399 (F.B.) and A. I. R. 1927 All. 221, Cons. (*Mukerji and Niamatullah, JJ.*) BADRUDDIN *v.* TEJ RAM. **1929 A. L. J. 380 = 116 I. C. 300 = A. I. R. 1929 All. 233.**

S. 4—Accretion.

The principle of acquisition of title by accretion is subject to the doctrine of reformation in suit. Therefore, though ordinarily an accretion thrown up along the frontage of a raiyati-holding is an accretion to the holding, this principle will not be applicable when there is reformation *in situ* and the land is identifiable and recognizable as land belonging to the owner of the side: A. I. R. 1922 Pat. 588 (F.B.); A. I. R. 1921 Pat. 234, Foll. (*Adami and Chatterji, JJ.*) ALIMUDDIN *v.* SALIM. **10 P. L. T. 207 = 117 I. C. 318.**

——*Land washed away by a river and reformed in same place is not "gained" within S. 4, though land on opposite side of the river is owned by different owners—Riparian owners.*

Lands washed away and afterwards re-formed upon the old site, which can be clearly recognized, are not lands "gained" within the meaning of S. 4, Regulation XI of 1825; they do not become the property of the adjoining owner, but they remain the property of the original owner. This principle also applies when the question is between two riparian owners, who own property on either side of the river, and when the land is washed away from one side of the river and re-formed on the other side and is re-formed on the old ascertained site. 1 Marshall's Reports 136 and 13 M. I. A. 467 (P.C.), Foll.; 6 I. A. 211 (P.C.), Expl. and Dist. (*Sir Lancelot Sanderson.*) MAHARAJA OF DUMRAON *v.* SECRETARY OF STATE. **54 I. A. 156 = 6 Pat. 481 = 1927 M. W. N. 393 = 101 I. C. 1 = 31 C. W. N. 717 = 45 C.L.J. 520 = 8 P.L.T. 497 = 25 A.L.J. 905 = 26 M.L.W. 754 = A.I.R. 1927 P. C. 89 = 53 M. L. J. 576.**

——*Land taken away gradually and restored suddenly—Accretion belongs to original owner on being clearly recognised.*

The general principle is that land which gradually accedes to another estate becomes annexed to it. An exception is made in the case where a river by a sudden change of its course breaks through and intersects an estate without any gradual encroachment and joins with another estate without destroying its identity. In such cases the land on being clearly recognized shall remain the property of its original owner. The same rule applies even where land is taken away by the river gradually and restored suddenly. (*Dalal and Pullan, JJ.*) SRI THAKURJI *v.* JAIKALI KUNWAR. **49 All. 328 = 25 A.L.J. 222 = 100 I.C. 9 = A.I.R. 1927 All. 243.**

——*Portion not settled—Right to accretion is not affected.*

The true view of the law of alluvion is that physically land is added to land; in point of right, the right to the land is *accretio* to the right to the old.

The fact that no settlement of revenue is made of a portion cannot affect this *accretio* to the right, unless any question of limitation or adverse possession arises. A. I. R. 1924 Cal. 197 Ref. (*Cuming and Mukerji, JJ.*) LATIFA KHATUN *v.* ZOFER ALI. **55 Cal 201 = 104 I. C. 655 = A. I. R. 1927 Cal. 902.**

——"*Gain*"—*Land washed away and re-formed on old site is not gained—Tenure holder cannot claim such land as an accretion on payment of rent.*

Land washed away and afterwards re-formed on the old ascertained site, is not land gained by increment within the meaning of S. 4. Therefore, where land is re-formed upon the old site, which can be identified, such land remains the property of the original owner and in the absence of a contract to the contrary the tenure-holder is not entitled to claim it as an accretion to his land and hold it on payment of rent. A. I. R. 1922 Pat. 588 (F. B.), Dist and not Foll.; 13 M. I. A. 467 (P.C.), Rel. on and Case-law cited. (*Graham and Mitter, JJ.*) RAHIMADDI MATABAR *v.* NAIMADDI HOWLADAR. **31 C. W. N. 750 = 104 I.C. 547 = A. I. R. 1927 Cal. 565.**

On account of a change in the course of the Ganges, lands lying on one bank became diluviated and gradually re-formed on the other bank. They were sold for arrears of revenue and in default of purchasers the Government purchased it and brought a suit for declaration of title and possession against the Zemindar, who claimed it as accretion and revenue free. *Held,* even as an accretion, it is liable for revenue assessment, and the zemindar cannot claim to hold it as part of his permanently settled estate. If a case of abandonment by the prior proprietors is set up and proved and then there is an accretion it must be reassessed before revenue can be demanded. (*Miller, C.J. and Foster, J.*) MAHARAJA KESHAV PRASAD SINGH *v.* SECRETARY OF STATE FOR INDIA. **(1923) 74 I. C. 881 (Pat.).**

——*Accretion need not be by imperceptible process.*

What is a gradual accretion must depend upon the circumstances of each case, the nature of the river, the manner of the accretion, and the quantity of the land thrown out each year. But the process of accretion need not be imperceptible. 42 Cal. 489 (P. C.) and 4 P.L.J. 1 Foll. (*Jwala Prasad, A. C. J. and Das, J.*) KHUBI MAHTON *v.* LACHMI DAS. **63 I. C. 704 = 2 Pat L. T. 599.**

S. 4—Applicability.

——*Lands re-formed identifiable as land belonging to original owner—Regulation does not apply.*

The case is taken out of the Regulation when it is shown that the land washed away, and re-formed on its old site is identifiable and recognisable as land belonging to the owner of the site. (*Das and Adami, JJ.*) GAJADHAR PRASAD *v.* DULHIN GULAB KUER. **2 P. L. T. 59 = 5 Pat. L. J. 632 = 57 I. C. 744 = A. I. R. 1921 Pat. 234.**

S. 4—Assessment.

——*U.P. Land Revenue Act (3 of 1901), S. 99—Land added to one of the two permanently assessed villages on either side of a river is liable for assessment.*

Where land from one permanently settled village is cut off from that village and added by alluvion to another permanently settled village such land is liable to assessment. The test in such a case is whether the land in dispute ever before formed part of the estate permanently settled to which it is added. 18 B. W. R. 113, Ref.; 17 Cal. 509 and A. I. R. 1922 P. C. 6, Dist. (*Mears, C. J. and Kendall, J.*) RAMA NAND *v.* SECRETARY OF STATE. **50 All. 440 = 107 I. C. 566 = 9 L. R. A. Rev. 3 = 26 A. L. J. 134 = A. I. R. 1928 All. 199.**

S. 4 (1)—Accretion.

——*Alluvial land—Sand bank or waste land rendered cultivable in one year by sudden action of river is not gained by alluvion.*

In order to entitle a holder to the land in dispute as alluvial land, outside the area of but contiguous to his holding, under S. 4 (1) of the Regulation, it must be shown that the land is alluvial and has been gained by gradual accession. It must be shown that the deposit of silt amounted to formation of land by a process of gradual alluvion. If on the contrary the land appears to be a sand bank or waste rendered culturable in one year by the deposit of silt by action of the river on the surface of the tract so existing, it cannot be said to be gained by alluvion and the tenant can have no claim to it. Agra High Court Reports F, B. Rulings June to December 1866, at p. 78, Rel. on. (*Wort and James, JJ.*) PARKALO KOERI *v.* BHAGWAT SAHAI.

A. I. R. 1929 Pat. 545.

S. 4 (1)—Applicability.

———The clause is limited to accretions from the lands of the person under whom the person to whose land the alluviated land has been attached, holds and is not applicable to the case of the land of another tenant. A.I.R. 1922 Pat. 588 (F.B.) Foll. (*Adami and Chatterji, JJ.*) ALIMUDDIN *v.* SALIM. **117 I. C. 318= 10 P. L. T. 207.**

———*Accretion to holding out of river-bed which is the property of landlord—S.* 4 (1) *applies—Section not confined to lands which are the property of the state.*

The first clause of the fourth section of the Regulation applies clearly both to the case of a superior landlord who holds from the Crown and to the case of the holder of a subordinate estate or tenure holding from a landlord intermediate between himself and the Crown and to be limited in each case to accretions from the lands of the person from whom he holds and to whom revenue in the one case and rent in the other is payable. In the case of a superior landlord the person from whom he holds is the Crown and none else. In such a case it is only where the Crown is the proprietor of the accreted lands that the section comes into operation. To hold otherwise and permit a landlord to acquire in this manner a proprietary right in the land of his neighbour with whom he has no relationship such as that of a tenant to his landlord would be going outside the scope of the section and permitting what in effect would be confiscation of another man's land. This consideration however does not apply where the claim is by a tenant against land of his landlord, a claim which by the proviso to the first clause of the section is limited to a right of property similar to that possessed by the tenant in the tenure to which the land may become annexed and which by the same proviso carries with it the liability to pay an increase of rent. The section applies in all cases where the tenant claims as an increment to his tenure, land gained by gradual acquisition from the bed of the river which is the property of his landlord and, except in the case of a claim by the superior landlord, the section is not confined to lands which are the property of the State. 1 P. L. J. 536, 1 P. L. T. 229, 13 M. I. A. 467, Ref.

Per *Mullick, J.*—The Regulation does not provide for islands in a large and navigable river, the bed of which is the property of an individual or those in a small and shallow river, the bed of which is not the property of an individual. While Cls. 3 and 4 determine the right of proprietorship they are subject to the provisions of clause (1) in respect of the assessment of revenue and the rights of tenants. With regard to the rights of tenure holders and raiyats, Clause (1) deals with rivers of all classes and is subject to no words of limitation or restriction. The Regulation is not exhaustive. It is subject to the rules of equity and justice. Therefore land gained from the river-bed by reformation *in situ* or otherwise will, if it can be identified, belong to the owner of the bed except when otherwise expressly prescribed by the Regulation. This rule will preclude a tenant from acquiring a right of tenancy in an accretion from a river-bed which was not the property of his landlord before emergence. (*Dawson Miller, C. J., Mullick and Jwala Prasad, JJ.*) KHUBI MAHTON *v.* LACHMI DAS. **3 Pat. L. T. 513= 67 I C. 642=1922 P. H. C. C. 258= 2 Pat. 18=A. I. R. 1922 Pat. 588 (F. B.).**

S. 4 (2)—Presumption.

———*Riparian rights—Sudden change in course of river—Defendants' land separated and added to plaintiffs—Land identifiable—Title continues in defendant.*

Where the identity of the defendants' lands is not lost by the change in the course of the river in spite of the fact that those lands lie on the north side of the river instead of on the south where they had formed part of the defendants' villages the title to the lands in suit would not vest in the plaintiff although the river had suddenly changed its course and the lands were cut off from the defendants' villages and were joined by the fluvial action to those of the plaintiff's. 27 Cal. 768 (772); 13 M. I. A. 468 (472). (*Simpson and Wazir Hasan, A. J. Cs.*) BALBHADDAR PRASAD *v.* HAR NARAYAN DAS.

9 O.L.J. 518=73 I. C. 727=A. I. R. 1923 Oudh 102.

S. 4 (3)—Chur land.

———*Title vests in Government only when the bed of river is not the property of any individual—Rights of the parties should be determined with reference to conditions at time when* chur *first formed.*

Unless it is established that the bed of the river is not the property of an individual, title cannot vest in Government; in other words, title vests in Government if the bed of the large navigable river is public domain. The rights of the parties must be determined with reference to the conditions of things at the time when the *chur* first formed. 14 W.R. (F. B.) 25, Foll. (*Mookerjee, A.C.J. and Fletcher, J.*) SURENDRA NATH *v.* SECRETARY OF STATE. **35 C. L. J. 196= 60 I. C. 395=A. I. R. 1921 Cal. 779.**

BENGAL CESS ACT (IX OF 1880).

Appeal.

———*Suit for recovery of arrears of cesses with penalty in respect of revenue free tenures—If value above Rs.* 100, *second appeal lies.*

There is a second appeal in a suit for recovery of arrears of cesses in respect of revenue free tenures with penalty for non-payment under S. 58, treated as a suit for rent provided the value of the suit is over Rs. 100. 16 Cal. 638; 20 Cal. 254 and A.I.R. 1923 Cal. 673, Foll. (*Mukerji and Mallik, JJ.*) JYOTI PRASAD SINGHA DEO BAHADUR *v.* GOPAL ACHARYA GOSWAMI. **33 C. W. N 1000=A.I.R. 1930 Cal. 145.**

Res judicata.

———*C. P. Code, S.* 11—*Decision as to cess cannot be* res judicata *unless years to be compared fall in same re-valuation.*

In the Bengal Cess Act in almost every important section stress is laid upon the fact that the cess is for the year that is current. So there cannot be *res judicata* in regard to the amount of cess, unless it is first proved that the two years, which are to be compared one with the other fall under the same re-valuation. (*Foster, J.*) RAJA DHAKESHAR *v.* RAMDARNARAYAN.

A.I.R. 1927 Pat. 58.

S. 4—"Annual value."

———*"Annual value" includes damages for use and occupation—Payment under kabuliyat for use and occupation is "annual value."*

The expression "annual value" is so wide as even to include damages which the court would allow to the owner of the land against third persons for actual use and occupation of the land. Therefore, the payment of jama on the basis of a kabuliyat by a farmer of a hat on account of his occupation of the land on which the hats were to be held, and from which he was entitled to exclude other persons, is the "annual value" which is payable for use and occupation of the land. (*B.B. Ghose and Cammiade, JJ.*) SECRETARY OF STATE *v.* SATI PRASAD. **55 Cal. 1328 = 115 I. C. 185 = A.I.R. 1929 Cal. 197.**

S. 4—Definition.

——*"Tenure-holder" defined.*

A cultivating raiyat who pays more than Rs. 100 as rent is a tenure-holder within the meaning of S. 4 and is liable to pay cess under S. 41 (2) as fixed by the Collector. A.I.R. 1927 Pat. 270 and A.I.R. 1928 Cal. 508, Foll. (*Jwala Prasad and Dhavle, JJ.*) RAMA MAHTON *v.* MOHAN MAHTON. **11 P.L.T. 212 = A.I.R. 1930 Pat. 322.**

——*Essentials constituting cultivating raiyat laid down.*

To come under the definition of cultivating raiyat in the Cess Act, there must be actual personal cultivation, that is, by the tenant himself or through his family or hired servants or at most in part by persons who would be mere under-raiyats. It is not sufficient that the tenancy should be a mixture of personal cultivation and of rent collecting. A.I.R. 1927 Pat. 270, Ref. (*Macpherson, J.*) KESHAV PRASAD SINGH *v.* BANSIDHAR LAL. **A.I.R. 1930 Pat. 305.**

——*Cultivating raiyat.*

The rent of Rs. 100 must be taken as applied to the whole of the land which is cultivated by the person in question. (*Rankin, C.J. and Ghosh, J.*) SARAT CHANDRA DEB *v.* DARANI MOHAN. **55 Cal. 1305 = 113 I.C. 240 = 47 C.L.J. 545 = 32 C.W.N. 610 = A.I.R. 1928 Cal. 508.**

Ss. 4, 5, 6.

——*Hats—Jama or license fees realised from—Liability to assessment—Lease and license—Distinction between.*

A kabuliyat for a fixed term executed in favour of the landlord by which an aggregate rent was payable in respect of the land and the ijardar had virtually complete control of the land over which *hats* were held, amounts to a demise and the sum payable to the lessor is 'rent' liable to assessment within the meaning of S. 6 by whatever name it may be called by the parties, rent or license fees. The distinction between a license and a demise is a question of substance, not of words. (*Graham and Mitter, JJ.*) SECRETARY OF STATE FOR INDIA *v.* BHUPALCHANDRA RAY. **57 Cal. 655.**

Ss. 5, 52 and 64—Liability.

——*Rent free tenure of—Liability to pay Road cess to Government is a personal liability—Encumbrance cannot be annulled—Previous decree for cess is not* res judicata—*C. P. Code, S. 11.*

The provisions of Ch. IV of the Act must be complied with to make cess payable with respect to rent free lands. The liability to pay cess to the superior landlord arises in case of a rent free tenure only after the publication of extracts from the valuation roll. Only then is the superior landlord entitled to realise the cess with the same penalty and in the same manner as if it were an arrear of rent. The payment of road cess is a liability to the Government, but this liability enforceable under S. 5 does not in itself create any charge on the tenure or estate. The liability to the Government is a personal one enforceable under Public Demands Recovery Act. Only the right, title and interest of the judgment-debt pass in realizing this liability. The holding itself therefore does not pass in execution of a decree to the purchaser at the execution sale so as to entitle him to hold it free from encumbrance created upon it by the tenant previous to the sale. The purchaser therefore cannot have the encumbrance annulled nor recover the possession of the holding from a purchaser of it in execution of a decree based on the encumbrance . . . . . . A previous decree for cess does not operate as *res judicata* as a cess is a recurring charge. (*Jwala Prasad and Ross, JJ.*) PITAMBER CHOWDHRY *v.* SHAIKH RAHMAT ALI. **3 Pat. L. T. 282 = 65 I.C. 138 = 1922 P. H. C. C. 167 = A.I.R. 1922 Pat. 303.**

S. 5—Rent.

——*Lease hundreds of years old—Rent cannot include cess.*

Where a mokarrari lease is several hundred years old it is obvious that as the cess would be imposed by S. 5 of the Cess Act, from and after the commencement of that Act and not before, the mokarrari rent cannot include cess. (*Foster, J.*) RAJA DHAKESHAR PRASAD NARAYAN SINGH *v.* RAMDARNARAYAN SINGH. **A.I.R. 1927 Pat. 58.**

S. 6—Cess.

——*Lessee of mining rights need not pay cess to lessor.*

A case of rent or royalty payable under a mining lease does not come within Chap. II which relates to assessment of cess on the annual value of lands and not to assessment on the annual net profits from mines, etc. A holder of mining rights in a mouza is liable to pay cess to the Government under Chap. V of the Act but not to the lessor. (*Dass and Adami, JJ.*) KUSUNDER NAYADI COLLIERIES *v.* BHOLANATH SARKAR. **1926 P.H.C.C. 265 = 8 P.L.T. 410 = 97 I.C. 476 = A.I.R. 1926 Pat. 430.**

S. 6—Interpretation.

——*Rule of* ejusdem generis *is not applicable to words "other immovable property" in S. 6.*

Per *Cammiade, J.*—The rule of *ejusdem generis* cannot apply to the words "and other immovable property" in S. 6, because the classes of business previously enumerated are exhaustive and there is no room for the application of the rule. (*B. B. Ghose and Cammiade, JJ.*) SECRETARY OF STATE *v.* SATI PRASAD. **55 Cal. 1328 = 115 I. C. 185 = A.I.R. 1929 Cal. 197**

——*Net annual profits include royalty.*

Royalty is included within the term "net annual profits" as defined in S. 6. (*Das and James, JJ.*) BURNETT *v.* BURTON. **10 P.L.T. 544 = 116 I.C. 523 = A.I.R, 1929 Pat. 110.**

S. 20 (b)—Rent.

——*Rent fixed in paddy—Sum mentioned in cess-return as price of paddy—Suit to recover arrears of paddy is not suit for rent and S. 20 does not apply.*

Where the real rent is a fixed quantity of paddy, the sum of money entered in cess-return is not the rent itself but what is considered the fair value of the paddy deliverable as rent. A suit, therefore, to recover certain arrears of paddy or its value at a particular rate is not a suit for rent and the entry of the sum in the return is not a bar and S. 20 has no application. 2 P. L. J. 617, Rel. on ; 2 P. L. J. 653, Ref. (*Mukerji, J.*) TASER MONDAL *v.* PROKASH CHANDRA. **111 I. C. 142 = A. I. R. 1929 Cal. 31.**

S. 20—Rent.

——*Bhaoli land not mentioned—Rent if can be recovered.*

The fact that bhaoli is not mentioned with respect to any land in the Road Cess Return would not debar the landlord from claiming produce rent for the same. (*Jwala Prasad, J.*) NAND LAL SINGH *v.* RAMPHAL SINGH. **59 I. C. 875 (Pat.).**

S. 26—Jurisdiction.

——*Civil Court has no jurisdiction to entertain suit fo variation or annulment of valuation made by Collector.*

A Revenue Court alone can decide whether a Collector has properly used his discretion in exercise of the jurisdiction conferred upon him by Chap. 2 of the Cess Act. The Civil Court has no jurisdiction to entertain a suit for variation or annulment of the valuation made by the Collector under Cess Act. (*Das and James, JJ.*) KHARAG NARAYAN *v.* SECRETARY OF STATE.
10 P.L.T. 785 = 118 I. C. 325 = A.I.R. 1929 Pat. 743.

——*Collector deciding that a person is tenure-holder—Suit for declaration that he is otherwise barred.*

Where there is a subsisting judgment of the Collector that a particular person is a tenure-holder, the person cannot be allowed to file a civil suit for declaration in the Civil Court that his status is that of a cultivating raiyat and not a tenure-holder. (*Das and James, JJ.*) KHARAG NARAYAN *v.* SECRETARY OF STATE.
10 P.L.T. 785 = 118 I.C. 325 = A. I. R. 1929 Pat. 743.

S. 40—Application.

——*S.* 40 *applies only where cess is levied in the district as a whole—S.* 40 *is imperative wherever it applies.*

S. 40 is applicable only where there is any cess to be levied in the district as a whole, that is, if there is a district re-valuation; and where there is a re-valuation only of an estate or a tenure in any district it is not imperative that notice should be served on the holder of that estate or tenure according to the provisions of the last paragraph of S. 40. Where the matter falls within the provisions of S. 40 the procedure laid down in that section is imperative and unless it is followed the taxing authority cannot impose any burden of taxation on any person. (*B B. Ghose and Cammiade, JJ.*) ABINI NATH MUKERJI *v.* SECRETARY OF STATE. **54 Cal. 119 = 31 C. W. N. 329 = 100 I. C. 887 = A. I. R. 1927 Cal. 322.**

S. 41 (2)—Cess.

——*Liability to pay cess can be varied by contract.*

The liability to pay cess as fixed under the Act is liable to be varied by a contract between the parties: 3 C.L.J. 337; 4 Cal. 576 and 22 C.L.J. 571, **Foll.** (*Jwala Prasad and Dhavle, JJ.*) RAMA MAHTON *v.* MOHAN MAHTON. **11 P. L. T. 212 = A.I.R. 1930 Pat. 322.**

S. 41 (3)—Cess.

——*A cultivating raiyat only can be assessed in a less onerous manner as regards rate than a holder of a tenure.*

A person who is cultivating raiyat only can be assessed in a less onerous manner as regards rate than if he were a holder of a tenure as defined by S. 41 (3). (*Rankin, C.J. and C. C. Ghosh, J.*) SARAT CHANDRA DEB *v.* DHARANI MOHAN. **55 Cal. 1305 = 113 I. C. 240 = 47 C.L.J. 545 = 32 C.W.N. 610 = A.I.R. 1928 Cal. 508.**

S. 41—Cess.

——*Valuation roll is a factor in determining the amount of cess.*

The rate as laid down in the Cess Act is not the only factor in determining the amount of cess. There is another factor in determining it and that factor is the valuation roll. (*Mallick, J.*) KHAGENDRA PRASANNA SEN *v.* SASI MOHAN. **47 C.L.J. 464 = 110 I.C. 340 = A.I.R. 1928 Cal. 406.**

S. 41 (3)—Cess.

——*Cultivator paying less than Rs.* 100 *as rent should pay rate half that of tenure holder.*

Where a person cultivates land and pays rent not exceeding Rs. 100 per annum, such a person is liable to pay at the rate of half the rate paid by a tenure-holder, whatever may be the character of his holding under the Bengal Tenancy Act. The denomination "cultivating raiyat" has nothing to do with the Bengal Tenancy Act, nor has the Bengal Tenancy Act anything to do with the realization of the cess. (*Das and Adami, JJ.*) ABDUL HASAN *v.* ASGHAR ALI. **6 Pat. 13 = 102 I.C. 365 = 8 P.L.T. 643 = A.I.R. 1927 Pat. 270.**

S. 41—Cess.

——*Raiyat must pay cess to landlord.*

Under the provision of S. 41 of the Cess Act every cultivating raiyat is to pay to the person, to whom his rent is payable one half of the road cess. (*Das and Ross, JJ.*) KESHEO PRASAD SINGH *v.* RAMDEAL KUER. **6 P.L.T. 214 = 87 I.C. 439 = A.I.R. 1925 Pat. 473 (1).**

——*Lands held on payment of rent in kind—Liability to pay cess.*

Irrespective of whether rent is payable in cash or in kind, cess is payable in respect of all lands held by a cultivating raiyat. (*Brett, J.*) JOGESH CHANDRA ROY *v.* ANNADA CHARAN CHOWDHURY.
68 I. C. 662 = 26 C.W.N. 368.

——*Contract to pay cess is not illegal.*

A contract to pay cess is not at all illegal, nor is it prohibited under the provisions of S. 41 or any other provisions of the Cess Act. (*Jwala Prasad and Ross, JJ.*) PITAMBER CHOWDHRY *v.* SHAIKH RAHMAT ALI. **1 P. 218 = 3 Pat. L. T. 282 = 65 I. C. 138 = 1922 Pat. (Sup.) 167 = A. I. R. 1922 Pat. 303.**

Ss. 41, 47 and 58—Penalty.

——*Penalty under S.* 58 *is not payable but is recoverable—Limitation of money claim will apply to suit under S.* 58.

The plaintiff brought a suit under S. 58 for cesses unpaid for four years.

Held, that his suit was barred with respect to one year as the penalty under S. 58 is not payable but is only recoverable and so not within S. 41. The plaintiff had the choice to bring a suit either for four years' arrears of cess with interest, claimed as if it was an arrear of rent under S. 47 or for the penal amount provided by S. 58 as an ordinary money claim in which case the three years, limitation will apply. (*Das and Ross, JJ.*) BHUNESHWARI KUER *v.* GOPAL SARAN.
8 Pat. 358 = 118 I.C. 733 = A.I.R. 1929 Pat. 331.

S. 41—Scope.

——In order to get an exemption from the statutory liability imposed under S. 41 there should be a clear provision in the contract between the parties. (*Jwala Prasad and Dhavle, JJ.*) RAMA MAHTON *v.* MOHAN MAHTON. **11 P.L.T. 212 = A.I.R. 1930 Pat. 322.**

Ss. 41 and 107—Status of Tenant.

——*Valuation statement prepared under the Act—Status of tenant under Bengal Tenancy Act is not affected—Civil Courts cannot question the statements.*

According to S. 107 what is done under the Cess Act is done only for the purposes of that Act and has no other effect on the rights of persons. It does not in any way modify the conclusive effect given by S. 93 to the cess valuation. In determining the amount of cess payable the fact that the tenants are recorded in the record of rights as tenants at fixed rates is strictly irrelevant. The question is not as to the status of the defendants under the Bengal Tenancy Act, but is as to their status and liability for the purposes of the Cess Act which under S. 41 must be determined according to the entries in the cess valuation statement. The status of the defendants under the Bengal Tenancy Act is in no way affected by this valuation which stands by itself and the civil courts have no jurisdiction to interfere with it. (*Ross, J.*) KESHO PRASAD SINGH *v.* RAM SWARUP AHIR. **90 I. C. 621 = A.I.R. 1926 Pat. 175.**

Ss. 50, 52, 54, 56, 58 and 62—Application.

———*Return by revenue free holder under S.14—Valuation—Provisions of Ss. 50, 52, 54, 56, 58 and 62 apply.*

Where the holder of revenue free tenure submits a return in pursuance of proclamation issued under S. 14, and there has been a valuation unless the lands come within the category of lands mentioned in S. 33 of the Act, or comprise an estate borne on the general register of revenue free lands, S. 50 of the Act must necessarily apply. Further publication of notices under S. 51 and in certain cases also of notices under S. 54 is necessary. The liability of the holder of the rent free lands will arise only under S. 56 and his liability to penalty only under S.58 and his liability to pay statutory interest under S. 62. (*Mukerji and Mallick, JJ.*) JYOTI PRASAD SINGHA *v.* GOPAL ACHARYA GOSWAMI. **33 C.W.N.1000 = A.I.R. 1930 Cal. 145.**

Ss. 52 and 52-A (inserted by Act IV of 1910)—Notice.

———*Notice under S. 52— Notice published before the Amendment Act can be certified subsequently—Publication of notice should be strictly proved before liability for cess can arise.*

The publication of the notice under S. 52 should be strictly proved before the liability of the defendants can arise. Under S. 52-A the Collector may sign a certificate at any time after the publication of the certification under S. 52 of the Cess Act. The Amending Act only provides the method of proving the publication made; it creates no new right nor does it affect any existing right. There is nothing in S. 52-A which prevents the Collector from signing a certificate at any time after the publication has been made. When such a certificate is given according to S. 52-A it will prove conclusively that the publication was made. That the certificate refers to a duplication before the passing of Act IV of 1910 is immaterial. (*Chakravarti, J.*) RISHI KESH *v.* SONS AND HEIRS OF SHAMSHER KHAN. **92 I.C. 48 = A.I.R. 1926 Cal. 736.**

S. 54—Notice.

———*Notice is condition precedent.*

A notice under S. 54 is a condition precedent to liability to pay cess. 13 C. 197, Foll. (*Ross, J.*) MURLI MANOHAR *v.* RAJA NAND SINGH. **72 I.C. 1 = A.I.R. 1924 Pat. 205.**

S. 64-A—Limitation.

———*Limitation for suit under S. 64-A is governed by Rules under Bengal Tenancy Act, Sch. 3.*

The same rules of limitation are to be applied to a case under S. 64-A as would apply in rent suits to recover rent of a transferable tenure or holding, that is, limitation will be governed by rules under Schedule 3, Bengal Tenancy Act. 24 Cal. 27, Dist. (*Greaves and Panton, JJ.*) SATYA NIRANJAN *v.* EBRAHIM MANDAL. **95 I. C. 843 = A. I. R. 1926 Cal. 1069.**

S. 95—Cess return.

———Per *Cuming, J.*—A cess return can be used in evidence by or against a third party who is no party to the preparation of the return: 15 C. L. J. 7, Foll.; A. I. R. 1923 Cal. 611, Expl.

Per *Page, J.*—Provided that such a return does not offend against S. 95 it may be adduced in evidence if otherwise it is admissible under the Evidence Act. (*Cuming and Page, JJ.*) SHEIKH INTAZ *v.* DINA NATH. **53 Cal. 615 = 43 C. L. J. 425 = 30 C. W. N. 803 = 96 I.C. 72 = A.I.R. 1926 Cal. 856.**

———*Road cess return is inadmissible in favour of person on whose behalf it is filed, whether it may have been filed directly to prove admission or indirectly.*

S. 95 is absolute in its terms in declaring that a road cess return shall not be admissible in favour of the person on whose behalf it was filed, and it is immaterial whether it was put in evidence, directly to prove an admission or indirectly for some other purpose. (*Newbould and Graham, JJ.*) RAMKUMAR DAS *v.* HARNARAIN DAS. **92 I. C. 104 = A. I. R. 1926 Cal. 727.**

———*Return cannot be used in favour of person making statements therein—Evidence Act, S. 21.*

S. 95 of the Cess Act restricts the provisions of S. 21 of the Evidence Act and makes the exception to that section inapplicable to the case of these returns. A return cannot be used under any circumstances in favour of the person making it but it can be used by others for a purpose not directly connected with the statements made in the return. (*Suhrawardy and Chotzner, JJ.*) CHANDRA MOHAN MAITI *v.* KINARAM MAITI. **79 I. C. 412 = A. I. R. 1925 Cal. 408.**

———*Statement in return that land is in* khas *possession of landlord is not always accurate—Evidence Act, S. 32.*

The genesis of S. 95 of the Cess Act is traceable to a tendency on the part of landlords to describe lands though in the occupation of tenants, as in their *khas* possession for some possible ulterior purpose. A statement, therefore, that certain land is in the *khas* possession of the landlord is of doubtful accuracy and ought not to be used in his favour when made in a return by invoking the aid of S. 32 of the Evidence Act or some other adjective law. (*Suhrawardy and Chotzner, JJ.*) CHANDRA MOHAN MAITI *v.* KINARAM MAITI. **79 I. C. 412 = A. I. R. 1925 Cal. 408.**

S. 98—Prerogative.

———The effect of S. 171 is not to restrict any of the rights to recover debts due to the Crown which the Crown may possess in virtue of its prerogative. (*Page, J.*) WEST LAIKDIH COAL CO., LTD., *In re.* **53 Cal. 328 = 96 I.C. 37 = A.I.R. 1926 Cal. 781 (782).**

S. 182 (1)—Ultra vires.

———*R. 30 is not* ultra vires.

R. 30 is not *ultra vires* as cl. (1) of S. 182 is quite general. (*B. B. Ghose and Cammiade, JJ.*) ABANI NATH MUKERJI *v.* SECRETARY OF STATE. **54 Cal. 119 = 31 C. W. N. 329 = 100 I. C. 887 = A. I. R. 1927 Cal. 322.**

S. 182—Ultra vires.

———*R. 57 is* ultra vires *even if made under S. 182.*

There is nothing to show that R. 57, Bengal Cess Manual, was made under S. 182 of the Cess Act. Even if it does purport to be made under S. 182 of the Cess Act it is clearly *ultra vires.* (*Cuming and Page, JJ.*) SHEIKH INTAZ *v.* DINA NATH DE SARKAR. **53 Cal. 615 = 96 I. C. 72 = 43 C. L. J. 425 = 30 C. W. N. 803 = A. I. R. 1926 Cal. 856 (857).**

BENGAL CHILDREN ACT (II OF 1922).

Application.

———*Calcutta Suppression of Immoral Traffic Act (Bengal Act XIII of 1923), S. 4—Act applies to females under S. 16, whether married or not.*

BENGAL CIVIL COURTS ACT (1871), S. 24.

Acts apply whether the female in question is unmarried or married and the whole matter turns not on the status of the female from the point of view of marriage or no marriage but on the question of age. If the word "girl" were limited to mean a young unmarried female, it would be easy for a person who desired to live on the immoral earning of young girls to marry them solely for the purpose of enabling him to put himself outside the provisions of the statutes and to set the whole law at defiance. (*Costello and Lort Williams, JJ.*) PANCHU GOPAL SHAW *v.* EMPEROR.
48 C. L. J. 586 = 115 I. C. 266 = 33 C. W. N. 198 = 30 Cr. L. J. 440 = 56 Cal, 750 = 12 A. I. Cr. R. 304 = A. I. R. 1929 Cal. 99.

BENGAL CIVIL COURTS ACT (VI OF 1871).

S. 24—Pre-emption.

———*Bengal Regulation.* (*VII of* 1832), *S.* 9—*Pre-emption Mahomedan Law does not apply when vendor and pre-emptor are Mahomedans but vendee is Hindu.*

Where no local custom exists with regard to pre-emption amongst Hindus, the Mahomedan Law of Pre-emption does not apply when the person claiming the right of pre-emption and the vendor are Mahomedans and the purchaser is a Hindu. 4 B. L. R. 134 (F. B.), Foll. and the subsequent repeal of S. 9 of Reg. 7 of 1832 by S. 24 of Act 6 of 1871 does not make. 4 B.L.R. 134 (F. B.) inapplicable to such cases. (*Greaves and Panton, JJ.*) AJIMTULLA SAHA *v.* JADAVNATH CHAKRAVARTI. **30 C. W. N. 272 = 93 I. C. 18 = A. I. R. 1926 Cal. 685.**

———**(XII OF 1887)**—*See* BENGAL, N.- W. P. AND ASSAM CIVIL COURTS ACT.

BENGAL COURT FEES AMENDMENT ACT (IV OF 1922).

Ultra vires.

Bengal Act IV of 1922 is not *ultra vires* of the local Legislature. (*Greaves, J.*) G. T. WILLIAMS (DECEASED), *In re.* **27 C. W. N. 812 = 75 I. C. 466 = 50 Cal. 597 = A. I. R. 1924 Cal. 115.**

S. 17—Enhancement of fees.

———*Enhancement of fees does not apply to application for probate, etc., on which fees prescribed by the law in force at the time have been paid before the commencement of this Act though the probate, etc., may not have been issued.*

S. 17. Act does not apply to an application for probate on which the Court-fees prescribed by the then prevailing law was paid before the commencement of the Act, though the probate was issued afterwards. (*Mookerjee and Chotzner, JJ.*) THADDENS S. NAHAPIET *v.* SECRETARY OF STATE. **39 C. L. J. 209 = 81 I. C. 751 = A. I. R. 1924 Cal. 987.**

BENGAL COURT OF WARDS ACT (IX OF 1879).

Guardian—Powers of.

———*Guardian appointed under, can compromise proceedings without leave of Court—C. P. Code* (1882), *S.* 462.

A guardian appointed by the Court of Wards on behalf of infants under the Bengal Court of Wards Act (1879) has power to compromise proceedings in the Civil Court without obtaining the leave of the Court under S. 462 of the C. P. Code (1882). (*Lord Buckmaster.*) NAKIMO DEWANI *v.* MT. PEMBA DICHEN.
48 I. A. 27 = 48 Cal. 469 = 19 A. L. J. 171 = 23 Bom. L. R. 698 = 33 C. L. J. 211 = 25 C. W. N. 797 = 14 M. L. W. 253 = 1921 M. W. N. 115 = 59 I. C. 911 =

BENGAL COURT OF WARDS ACT (1879), S. 6 (e).

29 M. L. T. 202 = A. I. R. 1921 P. C. 22 = 40 M. L. J. 201.

———*Lease granted with sanction of Commissioner—Lease is void as against wards, in so far as it exceeds the Commissioner's sanction.*

Where a lease of land belonging to wards of the Court of Wards was granted to defendants with the previous sanction of the Commissioner and a patta was issued to the defendants.

Held, that the patta must be construed consistently with the terms of the Commissioner's sanction and in so far as it was in excess thereof it was void as against the wards or voidable at their instance. (*Richardson and Shamsul Huda, JJ.*) MUKBUSOR, RAHMAN *v.* RAJ LAKHI DEBYA. **39 C. L. J. 102 = 81 I. C. 744 = A. I. R. 1921 Cal. 789.**

Manager of Estate.

The manager of an estate under the Court of Wards can make an agreement to grant a prospecting license and mining lease. 4 Pat.L.J. 580, Dist. (*Jwala Prasad and Kulwant Sahay, JJ.*) RUDRADAS *v.* KAMAKHYA NARAYAN. **3 Pat. 968 = 84 I. C. 178 = A. I. R. 1925 Pat. 259 (272).**

Minor.

———*Even in presence of Board of Revenue's refusal to order minor's manager to execute lease, minor can be sued for specific performance of agreement to lease.*

A minor represented by a Court of Wards can be sued for specific performance of an agreement to grant lease even though the Board of Revenue has refused to order the Manager to execute the lease. (*Jwala Prasad and Kulwant Sahay, JJ.*) RUDRA DASS CHAKRAVARTI *v.* KAMAKAHYA NARAYANSINGH.
3 Pat. 968 = 84 I.C. 178 = A.I.R. 1925 Pat. 259 (279).

Scope.

———*Act is limited to British subjects—Disqualified Ruling Chief—Charge of his person and property, whether in State or in British India, is a matter for Political Department and not for Court of Wards.*

Jurisdiction of the Act is limited to persons who are subject to the jurisdiction of the British Civil and Revenue Courts. The position of a Ruling Chief holding property in British India is anomalous; and he cannot ordinarily hold landed property without the permission of the Government of India. And hence the charge of the personal property of a disqualified Ruling Chief is a matter for the Political Department, whether the property be contained within the Ruling Chief's State or outside it in British India, and Bengal Court of Wards ordinarily have no concern with it. (*Courtney-Terrell, C.J. and James, J.*) SANKAR PRASAD MISRA *v.* BRAJAMOHAN DEB. **125 I. C. 145 = A. I. R. 1930 Pat. 357 (365).**

Ss. 6 (e), 7 and 35—Management.

———*After declaration under S. 6 (e) any property coming to the proprietor either by inheritance or by otherwise is property which the proprietor is disqualified to manage—Its management automatically vests in the Court of Wards—An order under S. 35 is an order once for all—Possession by Court of Wards completes charge of the Court of Wards.*

The Court of Wards is empowered under S. 6 of the Court of Wards Act to take over charge of the property of a disqualified proprietor within the Court's jurisdiction. The disqualification attaches to the person and after a proprietor is declared disqualified under S. 6 (*e*) he is disqualified to manage his own property.

Any property therefore that comes to him by inheritance or otherwise after he has once been declared disqualified and the Court of Wards has taken over his property under S. 35 of the Act must be property which he is disqualified from managing and the management whereof must automatically vest in the Court of Wards. The order for possession does not take effect until possession of property is actually taken, until such pessession is taken the Court of Wards is not in charge of the property and the ward may be free to deal with it as he likes. An order under S. 35 is an order made once for all and after the order has once been made all that is required to complete the charge of the Court of Wards is the taking of possession. (*Ross and Sen, JJ.*) LACHMI NARAIN *v.* MD. ABRAHIM HUSSAIN. **4 Pat. 172 = 84 I. C. 620 = 6 P. L. T. 400 = 1924 P. H. C. C. 310 = A. I. R. 1925 Pat. 179.**

Ss. 35, 6 (e) and 7—Management.

——*After declaration under S. 6 (e) any property coming to the proprietor either by inheritance or by otherwise is property which the proprietor is disqualified to manage—Its management automatically vests in the Court of Wards—An order under S. 35 is an order once for all—Possession by Court of Wards completes charge of the Court of Wards.*

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Ss. 40 and 41—Accounts.

——*Adjustment of accounts between Court of Ward's estate and other estates is within the powers of Courts of Wards.*

Where there are mutual accounts between Court of Wards estate and other estate it is within the power of the Court of Wards to adjust the accounts and admit liability on the part of Ward's estate. 26 Mad. 330; A. I. R. 1922 Nag. 98, Foll.; 11 Bom. 551 (P.C.), Dist. (*Das and Allanson, JJ.*) BANDRI NATH *v.* NARESH MOHON. **8 Pat. 86 = 119 I. C. 903 = A. I. R. 1929 Pat. 369.**

S. 51—Procedure.

——*Suit against ward as represented by the manager for money advanced on bahikhata account—Suit is properly framed.*

A suit was brought against the defendant, as a ward of the Court of Wards, represented by the manager for recovery of money advanced to him on bahikhata account. The suit was decreed but the decree stated that the decree-holder was not entitled to proceed against the properties of the defendant. The defendant as a ward appealed contending that suit not having been instituted against him personally was not properly framed and that he had no opportunity of defending the suit.

Held, that there was no prejudice to the defendant on account of his being represented by the manager: 8 Cal. 620, Expl.; 5 All. 487; 5 P. L. W. 92; and A.I.R. 1925 Pat. 179; Dist.; 17 C. L. J. 691, Rel. on.

(*Obiter*)—*Held*, further that the appeal by the Raja personally was incompetent. (*Kulwant Sahay and Macpherson, JJ.*) BRAJA SUNDER DEB *v.* BHABAN SAHU. **6 Pat. 373 = 103 I.C. 717 = A. I. R. 1928 Pat. 177.**

——*C. P. Code, O. 32, R. 3—Guardian* ad litem *does not continue in his office after decree.*

The guardian *ad litem* appointed in the suit does not continue as such without a fresh appointment during the execution proceeding when the Court of Wards manager appeared and asked to be appointed as guardian *ad litem* in execution proceedings.

Held, he should have at once been so appointed under the provisions of S. 51 of the Court of Wards Act. (*Newbould and B. B. Ghose, JJ.*) KHAJEH SALULUDDIN *v.* AFZEL BEGUM. **28 C. W. N. 963 = 84 I. C. 68 = 39 C. L. J. 590 = A. I. R. 1925 Cal. 23**

S. 60—Interpretation.

——*A Court of Wards appointed common manager under Ben. Ten. Act—All co-sharers do not become wards of Court so as to prevent them from incurring debts or selling their interest, or their creditors from selling property in execution—Bengal Tenancy Act (VIII of* 1885), *Ss.* 95 *and* 97.

Appointment of Court of Wards as common manager by the District Judge under the provisions of the Bengal Tenancy Act, does not render all the co-sharers of the property wards of Court so as to disqualify them from incurring debts or selling their interest in the property in question or to bar the creditor of such co sharer from selling his interest in execution of his decree against him. (*B.B. Ghose and Panton, JJ.*) PRASANNA KUMAR *v.* DHIRENDRAPAL. **33 C. W. N. 847 = A. I. R. 1929 Cal. 790.**

S. 60—Widow.

——*Surrender of estate in return for a fixed monthly allowance—Widow, a ward of court—Court's permission not obtained—Estate in Court's possession—Surrender is void.*

Where two co-widows who were wards of Court under Bengal Court of Wards Act (1879) and whose property was in Court's possession, surrendered their interest in their husband's estate without the sanction of Court of Wards to the nearest reversioners who in return agreed to pay a fixed monthly allowance to the widows for their lives,

Held, that the surrender was void under Hindu Law as well as in contravention of S. 60 of the Bengal Court of Wards Act. 46 Ind. App. 72 and 47 Ind. App. 233, Ref. (*Sir Jhon Edge.*) MANSINGH *v.* MAHARANI NAWLAKHBATI. **5 Pat. 290 = 53 I. A. 11 = 24 A.L.J. 250 = 43 C.L.J. 259 = 1926 M.W.N. 332 = 7 P. L. T. 223 = 28 Bom. L. R. 841 = 94 I. C. 830 = 31 C.W.N. 49 = A. I. R. 1926 P.C. 2 = 50 M.L.J. 332.**

S. 60—Widow—Surrender.

——*Widow can relinquish without sanction if it is really surrender, but cannot if it is really an alienation which is valid by analogy of surrender.*

A Hindu widow may, under certain circumstances, effectively divest herself of her interest in her husband's estate without coming within the prohibition of section 60 of the Court of Wards Act; but it is not correct to say that under no circumstances would section 60 operate to prevent a Hindu widow from relinquishing her estate in favour of her husband's next reversioners; just as the Court of Wards Act cannot prevent the widow from dying, so it has no operation if the widow desires to turn *byragi* or renounce the world. In a case of disclaimer by the widow at the time of the death of her husband or of relinquishment, properly so called, afterwards, the title of the heir would undoubtedly arise by operation of law, and section 60 of the Court of Wards Act would not operate to the prejudice of the heir. Where the widow sells the estate for valuable consideration to the heir or to a stranger with the consent of the heir, in other words whenever the transaction is one, not of relinquishment, the title of the heir arises, not by operation of law, but by the act of transfer on the part of the widow, and the transaction would come within the prohibition of section 60. Where the deed of surrender by a widow recited that the grandsons who were the next heirs who had undertaken to pay them or the survivor of them the monthly sum of rupees two thousand out of the income and profits of the estate and also to defray the expenses of the daily and periodical worship of the family deities, and the document then asserted that the grandsons had agreed to all the terms aforesaid, and the grandsons executed another deed whereby they agreed to pay 2,000 per month to the widows and to spend Rs. 100 per month for the worship and agreed to be liable to pay 2,000 with interest at 12 per cent. per mensem from date of default and to make the amount a charge on the property.

Held, The act of the widows is not an act of the renunciation of the world or an act which in the eye of law would justify the inference in that they were civilly dead. The transaction operated as a conveyance and fell within the prohibition of section 60 of the Court of Wards Act. (*Das and Kulwant Sahay, JJ.*) MAN SINGH *v.* NAWALAKHBATI. **2 Pat. 607= 4 P. L. T. 335=73 I. C. 822= A.I.R. 1923 Pat. 492 (499, 504).**

S. 70, R. 15—Procedure.

——*Commissioner cannot be compelled to sanction lease where he insists on sanction from Board of Revenue.*

Even though Rule 15 of the rules framed under section 70 of the Court of Wards Act empowers the Commissioner to sanction a lease so as to make the lease valid yet he cannot be compelled to exercise his power under that rule where he insists on the sanction of the Board of Revenue being obtained. (*Jwala Prasad and Kulwant Sahay, JJ.*) RUDRA DAS *v.* KAMAKHYA NARAYAN. **3 Pat. 968=84 I. C. 178= A. I. R. 1925 Pat. 259 (269).**

BENGAL CRIMINAL LAW AMENDMENT ACT (1925).

Ultra Vires.

——*Bengal Criminal Law Amendment Act of* 1925 *is not* ultra vires.

The Bengal Criminal Law Amendment Act of 1925 does not affect Acts of Parliament and is not *ultra vires*

of the local Government that passed it. (*Rankin, C. J. and Majumdar, J.*) GIRINDRA NATH BANERJI *v.* BIRENDRA NATH PAL. **54 Cal. 727= 31 C.W.N. 593=102 I. C. 647=8 A. I. Cr. R. 121= A. I. R. 1927 Cal. 496.**

S. 11—Scope.

——*Whether a person is legally detained has to be dealt with under Cr. P. Code.*

Bengal Criminal Law Amendment Act is an Act which was intended to supplement the ordinary criminal law in Bengal and the question whether or not a particular person is legally detained under it has to be dealt with, if at all, under the Code of Criminal Procedure (*Rankin, CJ. and Majumdar, J.*) GIRENDRA NATH *v* BIRENDRA NATH. **54 Cal. 727=31 C. W. N. 593= 102 I. C. 647=8 A. I. Cr. R. 121= A. I. R. 1927 Cal. 496.**

BENGAL DISORDERLY HOUSES ACT (III OF 1906).

S. 2—Scope.

If a prostitute lives with a man *en famille* she does not necessarily come within the category of disorderly persons. (*Macpherson, J.*) MUNSHI MIAN *v.* EMPEROR. **30 Cr. L. J. 517=10 P. L. T. 523= 12 A.I.Cr. R. 325=1929 Cr. C. 199=115 I.C. 690= A. I. R. 1929 Pat. 406.**

S. 2 (2)—Scope.

——*S. 2 (2) creates offence under S. 4 (o), Cr. P. Code, and so must be tried in accordance with provision of Cr. P. Code, S. 244.*

Section 2 (2), Bengal Disorderly Houses Act creates an offence within the definition of S. 4 (*o*). Cr. P. Code and under S. 5 of that Code the offence is triable according to the provisions of that Code since there is nothing in the Act itstelf which regulates the manner of trying the offence. The trial must, therefore, be held in accordance with S. 244 of the Code. (*Macpherson, J.*) MUNSHI MIAN *v.* EMPEROR. **30 Cr. L. J. 517= 115 I.C. 690=10 P. L.T. 523=12 A. I. Cr. R. 325= 1929 Cr. C. 199=A. I. R. 1929 Pat. 406.**

BENGAL DRAINAGE ACT (VI OF 1880).

S. 37—Notice.

——*Absence of notice vitiates certificate proceedings.*

Service of notice in accordance with the provisions of S. 37, is not optional and the failure to serve the notice vitiates certificate proceedings taken under the Public Demands Recovery Act of 1895. (*Greaves and Chakravarty, JJ.*) ARUN CHANDRA *v.* SECRETARY OF STATE. **87 I. C. 339=A. I. R. 1926 Cal. 367.**

BENGAL ELECTORAL. RULES.

R. 29—Interpretation.

——*Doubt as to the rule is to be resolved by Governor.*

The power conferred on the Local Government by Rule 29, of the Bengal Electoral Rules is a discretionary one and if there be a doubt as to the true intention of that rule that doubt is to be resolved by the Governor. (*Sanderson, C. J. and Richardson, J.*) MANINDRA CHANDRA NANDI *v.* PROVAS CHANDRA MITTER. **51 Cal. 279=79 I. C. 1042=39 C. L. J. 58= A.I.R. 1924 Cal. 761 (768).**

BENGAL EMBANKMENT ACT (II OF 1882).

S. 68—Wrong order.

——The Civil Courts cannot replace the actual order of the Collector by an order which should have been made by him. (*Mookerjee and Chotzner, JJ.*) ARUN

BENGAL EMBANKMENT ACT (1882), S. 74.

CHANDRA SINHA BAHADUR *v.* MANMOHAN SINHA ROY. **37 C. L. J. 585 = 70 I. C. 784 = A. I. R. 1924 Cal. 154.**

S. 74—"Defaulter."

———*Patnidar never called on to pay is not a defaulter—"Person holding from defaulter" means person holding an interest subordinate to the defaulter.*

The former patnidar who was never called on to pay cannot be styled a defaulter merely because he owned the patni when the order of apportionment was made. The words ' a person holding from the defaulter" refer to persons holding interest subordinate to the defaulter and not to one who has stepped into the place of the former owner by buying the whole of his interest. (*Walmsley and Chakravarti, JJ.*) DINONATH GHOSE *v.* OFFICIAL TRUSTEE OF BENGAL. **96 I. C. 574 = A. I. R. 1926 Cal. 1158.**

Ss. 76 (a) and 91--Scope.

———Section 76, Embankment Act, has no application in the case of river coming under the operation of the Canal Act. (*C. C. Ghose and Jack, JJ.*) HEMCHANDRA *v.* EMPEROR. **33 C. W. N. 88 = 118 I.C. 355 = 30 Cr. L. J. 914.**

S. 78—Mala fides.

———*Act of accused need not be* mala fide.

In order to support a conviction under S. 78 on the ground that the accused by any wilful act destroyed or diminished the efficiency of an embankment, it is not necessary that there should be a finding that the accused acted *mala fide*. (*Newbould and B. B. Ghose, JJ.*) EXECUTIVE ENGINEER, NADIA RIVER DIVISION *v.* ASHUTOSH SAHA. **52 Cal. 573 = 89 I. C. 719 = 26 Cr.L.J. 1407 = A. I. R. 1925 Cal. 921.**

S. 87—Proof.

———*Claimant for abandoned embankment must prove that the site was originally taken from his estate or tenure—It is not enough to prove that it lies within the limits of his estate.*

Under Section 87 the burden lies upon the person who claims the abandoned embankment to establish that the site was originally taken from his estate or tenure. If the embankment was erected after the permanent settlement it may be possible to raise a presumption in favour of the claimant that the site was taken out of his estate. But where nothing is known as to the time of erection of the embankment no presumption arises that the embankment stands on a site which was included within the estate of the defendants at the time of the Permanent Settlement. If the embankment was in existence at the date of the Decennial Settlement, or the Permanent Settlement, it is improbable in the highest degree that the site should have been included in an estate settled with a private individual. It is not enough for the claimant to show that the site lies within the limits of his estate; he has to establish that the land was originally, that is, at the time of the first erection of the embankment, taken from his estate. (*Mookerjee and Panton, JJ.*) BHUBAN MOHAN *v.* DHANGOPAL GHOSE. **39 C. L. J. 577 = 84 I. C. 22 = A. I. R. 1921 Cal. 761 (2).**

Ss. 87 and 4—Scope.

———*S. 4 does not control S. 87.*

Section 87 applies to all public embankments inclusive of the embankments enumerated in Sch. D to Bengal Embankment Act VI of 1873. 17 Cal. 505, Ref. (*Mookerjee and Panton, JJ.*) BHUBAN MOHAN *v.* DHANGOPAL GHOSE. **39 C. L. J. 577 = 84 I.C. 22 = A. I. R. 1921 Cal. 761 (2).**

BENGAL ESTATES PARTITION ACT (1897).

BENGAL ENCUMBERED ESTATES ACT (VI OF 1876.)

———*See*—CHOTA NAGPUR ENCUMBERED ESTATES ACT.

BENGAL ESTATES PARTITION ACT (VIII OF 1876).

S. 77—Batwara.

———*Batwara prepared under provisions of Ch. 7 is a public document, and being made in presence of proprietor, is evidence against him—Evidence Act, Ss.* 35, 18 *and* 13.

A Batwara signed by the partition Deputy Collector and containing entries required by the provisions of Ch. 7, is a record made in the course of official duty within the purview of S. 35, Evidence Act. It would also be evidence against the proprietors under Ss. 18 and 13, Evidence Act because they were made in their presence: 38 I. C. 205 Ref. (*Mullick, Ag. C. J. and Jwala Prasad, J*). RAMSARUP RAUT *v.* RAMNARAIN TEWARY. **7 Pat. 85 = 10 P. L. T. 399 = 114 I. C. 479 = A. I. R. 1929 Pat. 32.**

S. 119—Partition.

———*Partition proceedings are not binding on tenure-holder even though he is one of the proprietors.*

If, in the course of a partition proceeding any question arises as to the extent or otherwise of the tenure, as the tenure-holder is not in general a party to the proceedings, he is not affected in any manner by the decision which may be arrived at by the revenue authorities for the purposes of partition between the proprietors. Even if therefore the tenure is set up by a person who is also a proprietor and is a party to the proceedings, it would be unreasonable to hold that a party who has appeared before the revenue authorities in his character as a proprietor should be finally concluded by a decision upon a question of title, which would not have been binding upon him if he had been a stranger to the proceedings. 37 Cal. 662, Foll: and 16 C. W. N. 639, Ref. (*Das and Ross, JJ.*) SUBEDAR RAI *v.* RAMBILAS RAI. **5 Pat. 8 = 7 P.L. T. 257 = 90 I. C. 817 = A. I. R. 1926 Pat. 162.**

S. 149—Partition.

———*The revenue officer who carries out the partition should not concern himself with the disputed question of title to the land under partition—Only a Civil Court has right to decide that question—Object of legislature.*

The revenue officer who carries out the partition should not concern himself with or affect to decide disputed questions of title to the land under partition. Though S. 149 prohibits attempts that may be made by way of litigation to re-agitate such vexed questions as whether the partition as made or the proportionate revenue impose upon any separate estate is fair or correct, it does not provide that a person who claims an interest in the land which is the subject of a partition should be deprived of the right to have the validity of his claim decided by a Court of law, although no doubt in certain circumstances the final decree in the title suit may be subject to the partition that was or will be made and must be framed in such manner as to give effect to the partition 36 Cal. 726; 37 Cal. 662; 16 C. W. N. 639 and A.I.R. 1924 Cal. 245, Ref. (*Page and Graham, JJ.*) MT. MATANGINI GHOSE *v.* MT. MONMOHINI GHOSE. **55 Cal. 392 = 33 C .W. N 1219 = 105 I. C. 149 = A. I. R. 1928 Cal. 41.**

———(V OF 1897.)

Scheme of Act.

———The scheme of the Act is to provide a specila machinery under the revenue authorities for effecting partitions and that machinery is quite separate and apart from that of the Civil Courts. It provides a system of tribunals from the Deputy Collector to the Board of Revenue with exclusive jurisdiction subject to the express provisions of the Act which alone permit the interference of the Civil Court. (*Courtney Terrell C. J. and Ross, J.*) RAMBAHADUR SINGH *v.* KESHAVA PRASAD SINGH. **11 P. L. T. 494 = 8 Pat. 830 = 121 I. C. 456 = A.I.R. 1930 Pat. 130.**

Scope.

——*Civil Courts cannot issue instructions to revenue Courts.*

The Civil Courts have no control either judicial or administrative over the revenue Courts and it is wrong in principle and indefensible in practice for Civil Courts to issue instruction to revenue Courts (*Das, J.*) JANATH SINGH *v.* RAMADHIN SINGH. **10 P. L. T. 584 = 120 I. C. 754 = A. I. R. 1930 Pat. 13.**

S. 3 (xi) " Parent estate".

——An estate does not cease to be " parent estate" even though there is a previous private partition. (*Das and Ross, JJ.*) BEAS SINGH *v.* BALDEO PATHAK. **7 Pat. 510 = 9 P. L. T. 267 = 109 I. C. 609 = A. I. R. 1928 Pat. 343.**

S. 4 (2)—Limitation.

——*No time limit for application to form separate estate to be jointly held.*

The terms of S. 4 (2) of the Act clearly show that it is open to one or more co-sharers to ask that their interest shall be formed into one separate estate to be held as a joint undivided estate. There is no limitation as regards the stage at which such an application can be made and therefore there is no irregularity in the Court entertaining an application even after he has made the general arrangement and given each of the co-sharers a separate block. (*Mullick and Ross, JJ.*) RADHA KANTO PARHI *v.* MATHURA MOHAN PARHI. **2 Pat. 403 = 87 I. C. 274 = A. I. R. 1924 Pat. 187.**

S. 5 (3) and (5)—Applicability.

——*Cl.* (3) *applies to proprietors having interest in some villages—Proceeding under sub-clause* (5) *instead of sub-clause* (3) *is not a basis for civil suit—Bengal Estate's Partition Act, S.* 119.

Sub-clause (3) of S.5 applies only to cases where a proprietor has an undivided share held in common tenancy in specific mauzas forming part of the parent estate, but where he has no interest which extends over the whole estate in other words it applies only to proprietors who have an interest in some out of the total number of villages constituting the estatate. If he has a share in the remainder also then he has a fractional interest in the entire estate as well as a fractional interest in a part, the latter fractional interest being the difference between the larger and the smaller interest. A proprietor of a mahal which is composed of two mauzas and who is in possession of a fractional interest in each is not entitled to claim an allotment in each mauza representing his asset in that mauza; such a construction would defeat the entire principle of compactness where there are many villages and when the proprietor holds a different fractional interest in each. Jurisdiction means the power or authority to judge and a Court is said to exercise jurisdiction when it exercises its power to adjust any jural relationship between the parties before it. Jurisdiction in its wider sense is sometimes understood to mean the power to do certain specific things which are ordained by statute. Where a Revenue Court has assumed jurisdiction correctly, that is to say, if by reason

of its local situation or pecuniary authority or by reason of the subject-matter of the position of the parties, the Court had power under the statute to entertain a partition proceeding, then every error made in carrying out the partition in accordance with the terms of the law, would not necessarily invalidate the proceeding and render it null and void. A Court has jurisdiction to decide wrongly as well as rightly and if for example in making the partition, it disobeys the provisions of sub-clause (3) of S. 5 of the Estate's Partition Act and instead of making an allotment under that sub-clause, proceeds under sub-clause (5) then that error cannot be remedied in a Civil Court. S. 119 of the Estate's Partition Act would be a clear bar. (*Mullick and Ross, JJ.*) RADHAKANTO PARHI *v.* MATHURA MOHAN PARHI. **2 Pat. 403 = 87 I. C. 274 = A. I. R. 1924 Pat. 187.**

Ss. 6 and 84—Applicability.

——*Where application for separation and partition is made and estates are declared to be under separation and partition, S.* 6 *applies and not S.* 84 *and costs are to be levied on all proprietors.*

Where an application is made to the Collector for separation and partition of an estate and proceedings are drawn by which the estates are declared to be under separation and also to be under partition, the case comes under S. 6 of the Act and not under S. 84, and costs under Ss. 37 and 38 are to be levied proportionately on all proprietors concerned of the estates. (*C. C. Ghose and Mallick, JJ.*) HEM CHANDRA *v.* SARABALA DATTA. **56 Cal. 1079 = 121 I. C. 747 = A. I. R. 1930 Cal. 265.**

Ss. 7 and 99—Applicability.

——*Test is holding land in severalty under private arrangement.*

The main test of applicability of Section 99 is holding the land in severalty under a private arrangement. This arrangement need not be so complete or so formally made as to exclude partition on the application of some of the proprietors under Section 7. (*Newbould and Panton, JJ.*) PROSANNA KUMAR BEDANTA THIRTHA BHATTA CHARJYA *v.* MADHU BADHYA. **A. I. R. 1923 Cal. 279 = 68 I. C. 500.**

S. 7—Jurisdiction.

——*Objection as to the existence of previous private partition—Collector has jurisdiction to decide the objection.*

The Collector has full jurisdiction to make a partition and to decide all objections to his making it, including the objection as to the existence of a previous private partition. The Collector has a larger, and in some respects an exclusive jurisdiction in the matter of partition: 36 Cal. 726, Diss. from A. I. R. 1924 Pat. 209; A.I.R. 1924 Pat. 211 and 3 Pat. L.J. 188 ; Dist. (*Das and Ross, JJ.*) BEAS SINGH *v.* BALDEO PATHAK. **7 Pat. 510 = 9 Pat. L. T. 267 = 109 I. C. 609 = A. I. R. 1928 Pat. 343.**

Ss. 7 and 99—Proof.

——*Ejectment suit brought by proprietor after partiton—Defendant must prove existence of tenure—Plaintiff must prove estate before partition was held in common tenancy and that tenure was not created by himself—Private arrangement under S.* 7 *does not necessarily prevent application of S.* 99.

There is no presumption in law that because an estate has been partitioned under the Estates Partition Act, it must necessarily have been held by the proprietors in common tenancy and not in severalty. In a suit for ejectment brought by a proprietor after a partition under the Estates Partition Act, the fact that the estate was held in common tenancy has to be proved by the plaintiff. The existence of the tenure, lease or encumbrance has to be proved by the defendant. The plaintiff has to prove that it was not created by him. If the defendant can prove that it was created by any proprietor of the estate, it will hold good as regards the lands finally allotted to the share of such proprietor. Hence in such a suit for ejectment where defendant pleads and proves the existence of a tenure, the plaintiff must prove that the estate that has been partitioned was held in common tenancy that the tenure was not created by him. Then he will get a decree for khas possession or joint possession with the defendants to the extent of his share according as he is the sole owner or only a co-sharer in the estate from which he seeks to eject the defendant. The private arrangement described in S. 7 of the Act is not necessarily the same private arrangement that would prevent the application of S. 99 and if it is found that the estate was held not in common tenancy but in severalty in pursuance of some private arrangement amongst the parties S. 99 will not have any application. 20 Cal. 285 and 15 C. W. N. 426, Foll. Unless the plaintiffs who are suing in ejectment can bring their case within S. 99 of the Act they must take their estates subject to the tenures of the defendants. 43 Cal. 103, Foll. (*Greaves and Mukerji, JJ.*) BAMA CHARAN *v.* PYARI MOHAN. **87 I. C. 581 = A. I. R. 1926 Cal. 433.**

S. 7—Proof.

———*Formal document is not necessary to prove partition.*

The production of a formal document showing partition is not necessary to establish a previous partition. Such a partition may well be assumed from the facts proved. (*Miller, C. J. and Mullick, J.*) NARASINGH THAKUR *v.* BISHUNPERGASH SINGH.

4 P. L. T. 629 = 75 I. C. 1036 = 1924 P. H. C. C. 21 = A. I. R. 1924 Pat. 209 (211).

S. 7—Scope.

———This section is no bar to a Collectorate partition. The Civil Court will not interfere with the decision of the Revenue Authorities except on the clearest proof that that decision was wrong. S. 7 contemplates a complete partition. 5 I. C. 776, Foll. (*Das and Ross, JJ.*) SHEIK AMAR HASAN *v.* SAIJID ABAS ALI.

3 Pat. 614 = 78 I. C. 653 = 3 Pat. L. R. Civ. 62 = A. I. R. 1924 Pat. 594

S. 25—Applicability.

———*Declaratory suit that private partition has taken place—Section does not apply.*

Section 25 of the Act has no application to a suit for a declaration that there was such a partition as is contemplated by S. 7 of the Act and that the Collector be restricted from taking further action to make the partition. (*Jwala Prasad, J.*) NARSINGH THAKUR *v.* BISHUN PARGASH SINGH. **1 Pat L. R. 258 = 74 I. C. 642 = A. I. R. 1923 Pat. 441.**

S. 25—Bar to suit.

———*Suit to stop Collector's partition proceedings, if not affecting right or extent of interest is not barred.*

The suit that would be barred by limitation under S. 25 is one raising a question of title or extent of interest. S. 25 does not bar a suit of objection which is based on the ground of a previous partition under S. 7. (*Das and Kulwant Sahay, JJ.*) KULDIP SAHAY *v.* RAIKUMAR SINGH. **4 P. L. T. 633 = 75 I. C. 1046 = 1 Pat. L. R. 386 = A. I. R. 1924 Pat. 211.**

———*Its effect is not to stay proceedings in civil Court but that the latter shall not stay proceedings before Collector—It applies only to persons claiming title or right in or to parent estate.*

S. 25 is not a bar to a suit in a Civil Court. Its only effect would be to protect the proceedings before the Collector from being stopped by the Civil suit. There is a great deal to be said for the view that S. 25 has no application to suits by persons objecting to any partition at all but applies only to suits by persons claiming right or title in or to a parent estate. (6 Cal. 726, *Foll.* (*Miller, C. J. and Mullick, J.*) NARASINGH THAKUR *v.* BISHUNPERGASH SINGH.

4 P. L. T. 629 = 75 I. C. 1036 = 1924 P. H. C. C. 21 = A I. R. 1924 Pat. 209.

Ss. 29 and 119—Jurisdiction.

———*Question whether estate was previously partitioned is cognizable by the civil Court.*

The civil Court has jurisdiction to decide the question whether an estate had been previously partitioned or not even where an order had been passed by the Collector directing a partition of the estate. 3 P.L.J. 188; A.I.R. 1924 Pat. 209, Rel. on.; A. I. R. 1928 Pat. 343, Dist. (*Adami and Chatterji, JJ.*) MAHAMAD SAIYEED *v.* GURSAHAY MAHTO. **10 P. L. T. 167 = 8 Pat. 763 = 119 I. C. 911 = A. I. R. 1929 Pat. 332.**

S. 29—Limitation.

———*Time runs from Collector's order and not from order of Board confirming Collector's order.*

The words after 'the Collector has recorded a proceeding under S. 29 do not refer to the ultimate order of the Board confirming the order of the Collector. (*Das and Adami, JJ.*) BADRI NARAIN SINGH *v.* SUBHKARAN MISSER. **6 P. L. J. 41 = 61 I. C. 90 = 2 P. L. T. 130 = A. I. R. 1921 Pat. 39 (1).**

Ss. 37, 38 and 111—Jurisdiction.

———*Order by Collector setting aside order passed by Deputy Collector under Ss. 37 and 38, is without jurisdiction.*

Section 111 enumerates the orders passed by a Deputy Collector which can be interfered with by the Collector on appeal. But an order under Ss. 37 and 38 of the Act finds no place in the list under S. 111 and the Collector, therefore, has no jurisdiction to pass an order setting aside the order passed by the Deputy Collector under Ss. 37 and 38. (*C. C. Ghose and Mullick, JJ.*) HEM CHANDRA *v.* SARABALA DATTA. **56 Cal. 1079 = 121 I. C. 747 = A. I. R. 1930 Cal. 265.**

Ss. 37, 38 and 119—Jurisdiction.

———*When order of Collector only interferes with order passed under Chap. 5 and therefore is not one under Chap. 5, jurisdiction of Civil Court is not barred.*

An order by a Collector on appeal setting aside the order passed by the Deputy Collector under Ss. 37 and 38 is not an order passed under S. 37, but is an order whereby an order passed under those sections is interfered with. It is not an order under Chap. 5, so as to bar the jurisdiction of a civil Court under Cl. (2), S. 119. A Civil Court has the jurisdiction to question the correctness of the order. (*C. C. Ghose and Mallick, JJ.*) HEM CHANDRA *v.* SARABALA DATTA.

56 Cal. 1079 = 121 I. C. 747 = A. I. R. 1930 Cal. 265.

S. 46—Rent.

———*Decision as to rent is not binding.*

Certain figure as to rent taken by the Deputy Collector as the basis of partition is not binding upon the tenants and they might challenge it in defence if sued

(*Dawson Miller, C. J. and Ross, J.*) RAMPHAL SINGH *v.* LALJI SINGH. **9 P. L. T. 480 = 110 I. C. 363 = A. I. R. 1928 Pat. 409.**

Ss. 48, 49 and 50—Presumption.

———A batwara entry under the new Partition Act does not carry with it a presumption of the same character as is attached to an entry in the cadastral or revisional survey; the presumption conveyed by the survey entries arises out of the statutory provision in S. 103-B, Ben. Ten. Act. There is nothing in the Batwara Act to show that an entry therein will carry any such presumption. 63 I.C. 194, Dist. (*Courtney Terrell, C. J. and Chatterji, J.*) LACHHANDHARI *v.* RAJPAL MAHTON.

A. I. R. 1930 Pat. 376.

Ss. 49 and 119—Bar to suit.

———'Kasht' *and* 'bakasht' *are terms of art denoting possession of proprietors and tenants—Record-of-Rights and* Batwara Khatian *showing plaintiff's possession—Dispossession—Suit for possession is not barred by S.* 119.

Where the Record-of-Rights showed the plaintiffs to be in possession of the purchased holding under S. 22 (2) of the B. T. Act, and the '*Batwara Khatian*', based upon it under S. 49 of the Estates Partition Act also showed the same but the possession of the lands had been delivered over to the defendants, and an order under S. 144, Criminal Procedure Code had been passed against the plaintiffs who therefore, brought this suit for possession.

Held: Section 119 of the Estates Partition Act did not bar the suit. The terms *kasht*' or '*bakasht*' are words of art. introduced to facilitate understanding the possession of land by the proprietors and the tenants. (*Jwala Prasad, A. C. J. and Das, J.*) NANDKISHORE SINGH *v.* MATHURA SAHA. **3 Pat. L. T. 13 = 65 I. C. 586 = A. I. R. 1922 Pat. 193.**

S. 57—Proof.

———*Evidence of partition—Enjoyment of separate shares from time immemorial is sufficient to establish partition.*

Where it is shown that the parties have acquiesced in the result of a partition it must be presumed that they or their predecessors-in-interest were parties to the partition. Where the parties have been holding their estates in separate shares from time immemorial, the fact that the original partition proceedings were lost in antiquity is no reason for disturbing divisions which existed for a long period. Although no deed of partition can be produced and from lapse of time no direct evidence of partition could be given, yet very long possession and acquiescence in the separate holding of the lands in the estate are sufficient to prove that there was a complete partition. 3 P.L.J. 188 Foll. (*Jwala Prasad, J.*) NARSINGH THAKUR *v.* BISHUN PARGASH SINGH. **1 Pat. L. R. 258 = 74 I. C. 642 = A. I. R. 1923 Pat. 441.**

S. 61—Decision—Finality of.

———*For practical purposes decision of Collector is final decision.*

Although a collectorate partition is not final until it is confirmed by the Commissioner, for all practical purposes, the decision of the Collector is the final decision of the case. (*Das and Rowland, JJ.*) PARMESHARI PRASAD SINGH *v.* RAMGATIA. **11 P. L. T. 99 = 120 I. C. 44 = A. I. R. 1930 Pat. 149. (2).**

S. 81—Decision—Finality of.

———(*Obiter*) *Decision as to rate not based on actual facts of the case—Decision is not a nullity.*

(*Obiter*)—Partition proceedings under S. 81 cannot be treated as nullity even though the decision there come to as to the rent payable was not based upon the actual facts of the case and the tenants when sued for rent cannot in defence challenge the findings of the Deputy Collector in the absence of all the other parties to the partition. A.I.R. 1925 Cal. 437, Foll. (*Dawson Miller, C. J. and Ross, J.*) RAMPHAL SINGH *v.* LALJI SINGH. **9 P. L. T. 480 = 110 I. C. 363 = A. I. R. 1928 Pat. 409.**

S. 81—Eviction.

———*A co-sharer landlord after partition of an estate under the Act can evict a transferee prior to partition of a non-transferable holding.*

Plaintiffs were co-sharer landlords with some other persons in respect of a holding within more than one estate. The original tenants transferred to the defendants a portion of a holding in one of the estates and the defendants were in possession of that portion. Subsequently there was a partition of that estate under the Estates Partition Act among the co-sharer landlords of the holding. The transferred plots fell to the saham of the plaintiffs alone. They therefore claimed ejectment of the defendants on the ground that they were trespassers being the transferees of a non-transferable holding.

Held, that, as against the plaintiffs, defendants have acquired no title or interest although the plaintiffs for the time being had no right to evict them, as under the law they had no right to re enter unless the entire holding had been transferred by the original tenant. But so soon as the plaintiffs acquired, instead of a share of the rent to which they were entitled, a specified portion of the lands comprised in the holding, they obtained the right to enter on it if they found it to be in the occupation of a trespasser. (*Suhrawardy and Graham, JJ.*) HARANCHANDRA *v.* BEHARI LAL. **47 C. L. J. 618 = 112 I. C. 202 = A. I. R 1928 Cal. 560.**

Ss. 81 and 119—Setting aside.

———*Order under S. 81 can be set aside in a suit—It is not a nullity unless so set aside.*

A suit does lie to set aside an order made under S. 81 if it turns out that by that order a tenure or holding has not been split up but an amalgamation of tenures and holdings has been divided contrary to the meaning of section. In such a suit it would be no answer at all to say that the Deputy Collector had jurisdiction to enquire into the facts and that if he has found the facts wrongly his order cannot be interfered with. For the purposes of such a suit it seems reasonable to say that the Deputy Collector could not give himself jurisdiction under S. 81 by coming to a wrong finding of fact. On ordinary principles a suit in the Civil Court to set aside such an order would be necessary because it is an order which as between the proprietors certainly has some value and which ought only to be set aside in the presence of all the proprietors, every one of whom is vitally interested in the matter. It is going too far to say that that order is to be regarded as a mere nullity, so that, although the tenants have had notice and although the landlords have had to act upon the order for a substantial time it can be ignored or set aside as against a single landlord in answer to a suit for rent.

Per *Page, J.—Quaere.*—Whether a tenant or other person aggrieved by an order under S. 81, is entitled to challenge that decision otherwise than by the methods provided in the Estates Partition Act. (*Rankin and Page, JJ.*) SATISH CHANDRA CHATTERJEE *v.* KALI CHARAN CHOUDHURY. **29 C. W. N. 221 = 86 I. C. 14 = A. I. R. 1925 Cal. 437 (439).**

S. 81—Split up.

———*Power of the Collector to split up a tenure should be exercised only where necessary for equitable partition.*

Under S. 81, the right to split up, for the purposes of partition, any tenure or holding is given to the Collector under which he can divide any tenure or holding into separate parts apportioning the rent to be attached to each such part and giving an opportunity to the tenants to raise any objection to such division. But the right should be exercised only where it is reasonably necessary to do so in order to effect an equitable partition. (*Suhrawardy and Graham, JJ.*) HARANCHANDRA *v.* BEHARI LAL. **47 C. L. J. 618 = 112 I. C. 202 = A. I. R. 1928 Cal. 560.**

———*"Split up" means completely sever in parcels.*

The word "split" in S. 81 means to cause to part as under or to divide by a quick or sharp cut. The addition of the word "up" intensifies the meaning of "split" and means severing completely in several parcels the holding, which before the partition was held under several persons. 10 C. W. N 818, Foll. (*Suhrawardy and Graham, JJ.*) HARAN CHANDRA *v.* BEHARI LAL. **47 C. L. J. 618 = 112 I. C. 202 = A. I. R. 1928 Cal. 560.**

Ss. 82 and 119—Bar to Suit.

——— *Order under S. 82 by Revenue Court refusing partition on ground of land being rent free does not preclude suit for partition in Civil Court.*

Where a Revenue Court has passed an order under S. 82 refusing to partition a land on the ground that it is rent free land, the order is no bar to a suit for partition in the Civil Court. (*Jwala Prasad, A. C. J. and Ross, J.*) JITABANDHAN SINGH *v.* SUKHA KOER. **6 P. L. J. 689 = 63 I. C. 861 = 1921 P. H. C. C. 342 = A. I. R. 1921 Pat. 259.**

Ss. 94 and 95--Accounts.

——— *Separate accounts are destroyed by partition.*

The Estates Partition Act, 1897, does not support the proposition that partition does not destroy separate accounts. Ss. 94 and 95 of the Estates Partition Act would seem to imply that the separate accounts can have no futher existence after a partition because S. 94 provides for the separate liability of the separate estate for the amount of land revenue specified in the notice to be issued under that section and requires the proprietor to enter into separate engagement for the payment of such land revenue ; and S. 95 enacts that from the date of the notice each separate estate shall be separately liable for the amount of land-revenue assessed upon it under the Act. If any further protection is required by way of separate account it would seem that a separate account must be freshly opened. (*Das and Ross, JJ.*) BANARSI PRASHAD *v.* MOHIUDDIN AHMAD. **3 Pat. 581 = 78 I. C. 723 = A. I. R 1924 Pat. 586.**

S. 99—Applicability.

———Grants of a share in specified mouzas which are themselves only portions of an estate held in common tenancy, come under S. 99. (*Lord Phillimore.*) BASURAM SAHA ROY *v.* RAM RATAN ROY. **54 Cal. 586 = 54 I. A. 196 = 8 P. L. T. 255 = 101 I. C. 359 = 1927 M. W. N. 437 = 31 C. W. N. 885 = 39 M L. T. 170 = 26 M. L. W. 642 = A. I. R. 1927 P. C. 117 = 53 M. L. J. 117.**

———*Lands held by porprietors in different parcels—S. 99 does not apply.*

S. 99 only applies where the estate is held in common tenancy and has no application where the lands are held in different parcels by the proprietors. (*Cuming and B. B. Ghose, JJ.*) AKSHYAKUMAR GOPE *v.* SASANKA MOHAN. **97 I. C. 372 = A. I. R. 1927 Cal. 62.**

S. 99—Construction.

———The Act does not apparently contemplate any *tertium quid* between common tenancy and several holding. (*Lord Phillimore.*) BASU RAM SAHA ROY *v.* RAM RATAN ROY. **54 Cal. 586 = 54 I. A. 196 = 8 P. L. T 255 = 101 I. C. 359 = 1927 M. W. N. 437 = 31 C. W. N. 885 = 39 M. L. T 170 = 26 M. L. W. 642 = A. I. R. 1927 P. C. 117 = 53 M. L. J. 117.**

Ss. 99, 76, 77 and 78—Co-sharer.

———*One co-owner holding specific piece of land as a joint owner—Rights of other co-sharers are not affected—He cannot create a tenure on such lands to the prejudice of other co-sharers—Position is different when he holds such lands in severalty under an agreement from other co-sharers.*

A co-sharer may be in possession of a particular piece of land within the joint estate by virtue of his right as a joint owner but, by such possession the rights of the other co-owners in that piece of land are not necessarily affected. All co-owners continue as tenants-in-common with regard to the land, unless the co-owner in possession acquires a separate right. Any person accepting an interest in that land from the co-sharer in possession of it must take it subject to the right of the others to enforce a partition and such encumbrancer cannot complain if the land is allotted to a co-sharer other than his grantor, and he is thereby deprived of his right to it. But the position is different if a co-owner holds a particular piece of land in severalty. A person is said to hold land in severalty if he holds it in his own right only, without any other person being joined or connected with him in point of interest With regard to co-owners in a joint estate, interest in severalty in a portion of the land within the joint estate in favour of one of the co-owners can only be created by a formal agreement referred to in Ss. 76, 77 and 78, by all the co-owners by which possession is given to one of them. (*B. B. Ghose and Graham, JJ.*) ASHUTOSH ROY *v.* MONOMOHAN ROY. **97 I. C. 539 = A. I. R. 1927 Cal. 65.**

S. 99—Co-sharer.

———*T. P. Act, S. 68 (c)—Mortgagee if dispossessed by third persons can sue mortgagors for mortgage money personally although the third persons are co-sharers of mortgagors—S. 99, Estates Partition Act does not apply.*

The appellants were granted a Zarpeshgi in 1883 over certain lands by the defendants in the suit. The mortgagors were share-holding proprietors of village Siadhi bearing Tauzi numbers 3911 and 3912 and the mortgage granted by them was not a mortgage of their shares in those tauzi numbers but of certain specific bakasht lands of which they had by an arrangement between themselves and their co-sharers, possession at that time. The zarpeshgidars were to be given possession of the mortgaged land and to satisfy themselves by the profits for the interest payable on the zarpeshgi money. In the year 1893 the share of the mortgagors in tauzi No. 3911 was sold for arrears of Government revenue. The auction purchasers who acquired the interest of the mortgagors subsequently about the year 1913, effected a partition between themselves and their co-sharers and the zarpeshgi lands in so far as they were within tauzi No.3911 fell into the takhta of other co-sharers who dispossessed the plaintiffs. In the year 1917 there was also a batwara partition of tauzi No. 3912 and the mortgaged property in so far as it remained in the possession of the plaintiffs, the mortgagees, fell into the takhta of other share holders than the mortgagors, the result being that the mortgagors were then dispossessed entirely of the remaining interest they had in the mortgaged lands. The plaintiffs then brought the present suit on 18th May, 1919, to recover from the defendants who represent the mortgagors the balance of the zarpeshgi money due together with interest since the date of their dispossession.

Held, that S. 99, Estates Partition Act does not apply to the case, that S. 68 (*c*), T. P. Act applies and the mortgagors are entitled to sue for the mortgage money. 11 C. L. J. 136, Foll. (*Dawson Miller, C. J. and Kulwant Sahay, J.*) RAMNANDAN PARBAT *v.* DENI SAHI. **5 P. L. T. 26 = 74 I. C. 877 = 1 Pat. L. R. 366 = A. I. R. 1924 Pat. 91.**

S. 99—Interpretation.

——*'Portion of estate' includes a specific portion.*

The principle enunciated in the section merely follows the well-recognised principle, namely, that an encumbrance of an undivided share of an estate is transferred to the lands allotted to the share of the person who created the encumbrance on a partition with his co-sharers. The words 'portion of an estate' in the section are wide enough to include cases where a specific portion of the estate is let out in *putni*, a co-sharer's share in any definite plots of land included in a joint estate being as much "a portion of share" as an aliquot part of a share is, though the illustrations to the section lend support to the opposite view. (*N. R. Chatterjee and Graham, JJ.*) DINA NATH SAHA ROY *v.* JADU NATH BISWAS. **86 I. C. 130 = 29 C. W. N. 202 = A. I. R. 1925 Cal. 456.**

S. 119—Interference by Collector.

——*Order of Deputy Collector under Ss. 37 and 38—Appeal—Interference by Collector—Legality.*

Held, that an order of the Deputy Collector under Ss. 37 and 38 of the Estates Partition Act cannot be interfered with by the District Collector on appeal. (*C. C. Ghose and Mallik, JJ.*) HEM CHANDRA CHAKRAVARTHI *v.* SARABALA DATTA. **56 Cal. 1079 = 121 I. C. 747 = A. I. R. 1930 Cal. 265.**

S. 119—Jurisdiction.

——*Action of Collector in allotting separate estates on final order from Commissioner cannot be challenged in Civil Court—Behar and Orissa Act (I of 1913), S. 1.*

When a final order of the Commissioner of Board of Revenue passed in first instance or on review has been received by the Collector, it is his duty to give the several proprietors possession of the separate estate allotted to them under S. 94 (1) and his action in so doing cannot be challenged in civil Court. (*Courtney-Terrell, C. J. and Ross, J.*) RAMBAHADUR SINGH *v.* KESHAVA PRASAD SINGH. **8 Pat. 830 = 121 I. C. 456 = 11 P. L. T. 494 = A. I. R. 1930 Pat. 130.**

——*Civil Court cannot interfere with acts of Collector except as in S. 119.*

Apart from S. 119, the Civil Court has no jurisdiction to interfere with the acts of the Collector duly performed in the exercise of his statutory powers. The civil Court has no jurisdiction over the Collector and where the legislature has given full jurisdiction to the Collector in the matter of partition, it is the duty of the Civil Court to respect that jurisdicion. 5 I. C. 454, Rel. on.

(*Das and Ross, JJ.*) BEAS SINGH *v.* BALDEO PATHAK. **7 Pat. 510 = 9 P. L. T. 267 = 109 I. C. 609 = A. I. R. 1928 Pat. 343.**

——*Lessees from co-sharer claiming relief that their tenure should not be reduced by the act of partition authorities and they should be declared to be tenants under the co-sharers holding their tenancy under the partition is cognizable by Civil Court.*

Where the case of the plaintiffs was that they did not desire to alter the boundary of the separated estate nor did they want that the allotment of the defendants should be reduced or that the acts of the partition authorities should be interfered with in any way, but all they wanted was that their tenure should not be held to be reduced by the action of the partition authorities, and that they should hold the disputed lands under the defendants as tenants.

Held, Civil Court's jurisdiction was not ousted. (*B. B. Ghose and Graham, JJ.*) ASHUTOSH ROY *v.* MONOMOHON. **97 I. C. 539 = A. I. R. 1927 Cal. 65.**

——*Civil Court should be slow to interfere with Revenue Court's jurisdiction.*

The Civil Court should be very slow to interfere with the jurisdiction which is exercised by a Revenue Court upon powers conferred upon it by the Estates Partition Act. (*Das and Allanson, JJ.*) RAJKESHWAR SINGH *v.* SHYAM BICKARI SINGH. **8 P. L. T. 477 = 103 I. C. 313 = A. I. R. 1927 Pat. 286.**

——*Objection, as to certain plots not belonging to the estate under partition, raised—No adjudication given on the question, but the plots allotted in the final partition award—Civil suit by objector is not barred.*

If there has been any adjudication upon the question, whether certain plots belonged to the estate which was being partitioned, raised by a party during the course of the batwara proceedings, S.119 would undoubtedly affect adversely his position. But where there has been no adjudication upon such a claim, the mere fact that there has been in the final partition award an allocation of the land which the objection had contended was not properly capable of inclusion in the estate which was being partitioned, cannot operate to prevent the claimant from bringing a suit for a declaration of his title and, if necessary recovery of possession. 37 Cal. 662, Rel. on. (*Adami and Bucknill, JJ.*) AJODHYA PRASAD *v.* RAMKHELAWAN SINGH. **6 Pat. 73 = 7 P. L. T. 779 = 1926 P. H. C. C. 236 = 96 I. C. 632 = A. I. R. 1926 Pat. 421.**

Ss. 119 and 94—Jurisdiction.

——*Collector refusing to put party to partition in possession of land allotted to him—Suit in Civil Court to recover the land can be brought.*

Where a party to a partition applies to the Collector to give effect to the partition and give him (the applicant) possession of certain land and the Collector refuses the application, the applicant can bring a suit in the Civil Court for recovering what was allotted to him at the partition. (*Suhrawardy and Duval, JJ.*) SIR WASIF ALI MIRSA *v.* SARDINDU NARAIN RAI. **29 C. W. N. 839 = 89 I. C. 193 = A. I. R. 1925 Cal. 953.**

S. 119—Jurisdiction.

——*Suit for declaration that certain land included a partition in defendant's estate belongs to plaintiff is not triable by Civil Court.*

The allotment paper referred to as extract from partition paper gives to the owner of each separate estate the lands allotted to him as forming his separate estate.

The map is only to delineate the allotments and must necessarily follow the papers. The title to the lands allotted to each must therefore depend upon the partition papers and the allotments are based upon the assets of the lands given to each which cannot be disturbed without disturbing the partition. Where the Plaintiff sought a declaration of his title to the lands as being included within the separate estate allotted to him and for a further declaration that the lands were not included in the separate estate allotted to the defendants.

Held, that although the suit may not, in form be one for contesting the correctness of any order in the partition proceedings in substance it was. The partition paper is the title deed of each proprietor in respect of the lands allotted to him under the partition, and in case of a discrepancy between such papers and the map, the partition paper should prevail. (*Chatterjee and Cuming, JJ.*) ANIL KUMAR BISWAS *v.* RASH MOHAN SAHA. **81 I. C. 29 = 28 C. W. N. 46 = A. I. R. 1924 Cal. 245.**

Ss. 119 and 5 (3) and (5)—Jurisdiction.

———*Applies to proprietors having interest in some villages—Proceeding under sub-clause* (5) *instead of sub-clause* (3) *is not a basis for Civil Suit.*

Sub-clause (3) of S. 5 applies only to cases where a proprietor has an undivided share held in common tenancy in specific mauzas forming part of the parent estate, but where he has no interest which extends over the whole estate; in other words, it applies only to proprietors who have an interest in some out of the total number of villages constituting the estate. If he has a share in the remainder also then he has a fractional interest in the entire estate as well as a fractional interest in a part, the latter fractional interest being the difference between the larger and the smaller interest. A proprietor of a mahal which is composed of two mauzas and who is in posssession of a fractional interest in each is not entitled to claim an allotment in each mauza representing his asset in that mauza; such a construction would defeat the entire principle of compactness where there are many villages and when the proprietor holds a different fractional interest in each. Jurisdiction means the power or authority to Judge and a Court is said to exercise jurisdiction when it exercises its power to adjust any jural relationship between the parties before it. Jurisdiction in its wider sense is sometimes understood to mean the power to do certain specific things which are ordained by statute. Where a Revenue Court has assumed jurisdiction correctly, that is to say, if by reason of its local situation or pecuniary authority or by reason of the subject matter or the position of the parties, the Court had power under the statute to entertain a partition proceeding, then every error made in carrying out the partition in accordance with the terms of the law, would not necessarily invalidate the proceeding and render it null and void. A Court has jurisdiction to decide wrongly as well as rightly and if for example in making the partition, it disobeys the provisions of sub-clause (3) of S. 5 of the Estates Partition Act and instead of making an allotment under that sub-clause proceeds under sub-clause (5) then that error cannot be remedied in a Civil Court. S. 119 of the Estates Partition Act would be a clear bar. (*Mullick and Ross, JJ.*) RADHAKANTO PARHI *v.* MATHURA MOHAN PARHI. **2 Pat. 403 = 87 I. C. 274 = A. I. R. 1924 Pat. 187.**

S. 119—Partition.

———*Bengal Tenancy Act* (8 *B. C. of* 1885), *S.* 22 (2)*—Collectorate partition after purchase of raiyati holding by a co-sharer—Allotment as bakasht land to takhta of another co sharer—Partition does not take away privilege of purchasing co-sharer—S.* 119 *is no bar.*

The fact that revenue authorities allotted certain lands as bakasht lands does not estop the co-sharer holding direct possession of the said lands under S. 22 (2) from continuing to hold them in his khas occupation on payment of rent to the co-sharer to whose takhta it has been allotted. Such a defence is not barred by S. 119 of the Bengal Estates Partition Act since the allotment made by the revenue officers is not contested. S. 22 (2) confers a privilege on the purchasing co-sharer which is in derogation of the common law right of the other co-sharers as stated in the judgment of the Judicial Committee in A. I. R. 1924 P. C. 144. Partition only removes the necessity for the limitation on the effect of the purchase and would set free the holding to be operated upon by the ordinary provisions of the law. In other words, S. 22 (2) imposes a limitation on the rights of the co-sharers, for the benefit of the purchasing co-sharer and there is no reason why this limitation should be removed by reason only of a partition taking place. A. I. R. 1925 Pat 547, Appr. (*Das and Ross, JJ.*) JHAPSI SAO *v.* BIBI ALIMAN. **5 Pat. 281 = 7 P.L.T. 170 = 93 I. C. 1001 = A.I. R. 1926 Pat. 263.**

S. 119—Scope.

Object of the Estates Partition Act is that all matters arising out of batwara proceedings should be dealt with by the revenue authorities and not by the Civil Courts, and where a partition has been effected by the revenue authorities the Civil Courts have no jurisdiction to disturb the same. 1 Pat. L. T. 507, Foll. 16 C. L. J. 19, Dist (*Das, J.*) JAINATH SINGH *v.* RAMADHIN SINGH. **10 P. L. T. 584 = 120 I. C. 754 = A. I. R 1930 Pat. 13.**

BENGAL EXCISE ACT (V OF 1909).

Applicability.

———*Cr. P. Code., Ss.* 102 *and* 103.

Ss. 102 and 103, Cr. P. Code. do not apply to the search made under the Bengal Excise Act. (*Suhrawardy and Mitter, JJ.*) HARBHAJJAN SAO *v.* EMPEROR. **54 Cal. 601 = 102 I.C. 547 = 31 C. W. N. 667 = 28 Cr. L. J. 579 = 8 A. I. Cr. R. 114 = A. I. R. 1927 Cal. 527.**

S. 2—Diluted mixture.

———Opium diluted in water cannot be held to be an admixture for the purpose of smoking. 41 Cal. 694, Ref. (*C. C. Ghose and Duval, JJ.*) DWARIKA NATH MISRA *v.* EMPEROR. **44 C. L. J. 111 = 30 C. W. N. 984 = 27 Cr. L. J. 1133 = 97 I. C. 653 = A. I. R. 1926 Cal. 1120.**

S. 74 (4)—Report.

———*Cr. P. Code., S.* 250*—Report of an Excise Sub-Inspector is not police report for S.* 250*—Cr. P. Code, S.* 190.

The report of a Sub-Inspector of Excise to a Magistrate is a police report only for the purposes of S. 190, Cr. P. Code. The report is not a police report for other purposes. (*Cuming and Gregory, JJ.*) RADHIKA MOHAN DAS *v.* HAMID ALI. **54 Cal. 371 = 100 I. C. 540 = 28 Cr. L. J. 316 = A. I. R. 1927 Cal. 405.**

BENGAL FERRIES ACT (I OF 1885).

S. 5—' Ferry'.

———*Two points on two sides of the river for conveying persons and property are necessary.*

In order to constitute a ferry such as is contemplated by the Act; it is necessary that there should be two points on both sides of the river so that people and property may be conveyed from one side of the river to the other. It must be connected on both side with land on the bank of the river. (*Jwala Prasad, J.*) JEOBARAN SINGH *v.* RAMKISHUN LAL. **4 Pat. 503 = 92 I. C. 871 = 7 P. L. T. 734 = 27 Cr. L. J. 359 = A. I. R. 1925 Pat. 623.**

S. 9—Jurisdiction of Commissioner.

The approval of the Commissioner is limited to the term of the lease and not to the whole lease. (*Mullick and Ross, JJ.*) SHEODHAR PRASAD SINGH *v.* RAMSAROOP SINGH. **7 P. L. T. 337 = 96 I. C. 623 = A. I. R. 1926 Pat. 318**

Ss. 16 and 18—'Distance.'

——"*Distance*" *meaning—How measured.*

The land "distance" in S. 16 means distance by river. The distance must be measured by reference to the water frontage and not by land. *Blissett* v. *Hart*, (1744) 125 E. R. 1923; *Huzzey and Field*, 150 E. R. 186 and *Anderson* v. *Jellet*, (1883) 9 S. C. R. 10, Ref. (*C. C. Ghose and Pearson, JJ.*) CHAIRMAN, SERAJGANJI LOCAL BOARD *v.* BUDHISWAR PATNI. **51 C. L. J. 199 = 34 C. W. N. 422 = 1930 Cr. C. 361 = A. I. R. 1930 Cal. 281.**

S. 16—Ferry.

——*Limits of the ferry should be known.*

For the purposes of a prosecution under S. 16 read with S. 28, it is important that the limits of each ferry should be known. (*Adami, J.*) JEOBARAN SINGH *v.* RAMKISHUN LAL. **27 Cr. L. J. 970 = 96 I. C. 522 = A. I. R. 1926 Pat. 520.**

Ss. 16 and 6—Ferry.

——*Public ferry—What is declared to be so under S. 6 or Regulation VI of* 1819, *or Bengal Act I of* 1866.

No ferry is a public ferry unless there has been a notification to that effect under S. 6 with regard to it, or unless the ferry has previous to 1885 been determined or declared to be a public ferry under Regulation VI of 1819 or Bengal Act I of 1866. (*Adami, J.*) JEOBARAN SINGH *v.* RAMKISHUN LAL. **27 Cr. L. J. 970 = 96 I. C. 522 = A. I. R. 1926 Pat. 520.**

Ss. 16 and 28—Ferry.

——*Only maintenance of ferry is not criminally punishable—Conveying persons and property in addition is an offence—Each trip is separate offence.*

The maintenance of a private ferry is in contravention of S. 16 of the Act for which the person maintaining it may be liable for damages and also an injunction may issue against him. If, in addition, to maintaining such a prohibited private ferry he carries passengers and property for hire he is liable criminally under S. 28 of the Act and each trip is a separate offence. (*Jwala Prasad, J.*) JEOBARAN SINGH *v.* RAMKISHUN LAL. **4 Pat. 503 = 92 I. C. 871 = 7 P. L. T. 734 = 27 Cr. L. J. 359 = A. I. R. 1925 Pat. 623.**

Ss. 18 and 16—Plying.

——*Plying along one bank if offence.*

The plying of a boat for hire along the one bank of the river would be no offence. (*Adami, J.*) JEOBARAN SINGH *v.* RAMKISHUN LAL. **27 Cr. L. J. 970 = 96 I. C. 522 = A. I. R. 1926 Pat. 520.**

Ss. 28 and 16—Ferry.

——*Person maintaining ferry and carrying persons for hire is guilty and not his servants.*

The person intended to be punished by the section primarily is the person who maintains a ferry in contravention of S. 16 and who, in working such ferry, conveys for hire any passengers, animal, vehicle or other thing. His servants or other persons helping him cannot be said to be doing so for hire because the hire does not belong to them, nor can they be said to contravene the provisions of S. 16, the ferry not being maintained by them but only by the former. (*Adami, J.*) JEOBARAN SINGH *v.* RAMKISHUN LAL. **27 Cr. L. J. 970 = 96 I. C. 522 = A. I. R. 1926 Pat. 520.**

BENGAL FOOD ADULTERATION ACT (VI OF 1919).

Ss. 5, 6 and 7—Adulteration.

——*It is no defence for accused to say that he had advertised that he was not selling pure foods and that purchaser knew the fact.*

The Food Adulteration Act is intended to protect the public from using adulterated articles and therefore it has made it penal to sell these adulterated articles irrespective of the fact whether the purchaser knew the article to be adulterated or otherwise. Articles mentioned in S. 6 are ordinarily articles of food and it is no defence to say that these articles can be adulterated and sold in market with the publication of the fact that they are adulterated. (*Suhrawardy, J.*) RAKHAL CHANDRA *v.* PURNA CHANDRA. **34 C. W. N. 281 = 51 C. L. J. 227 = 1930 Cr. C. 353 = A. I. R. 1930 Cal. 273.**

S. 6 (1)—Adulteration.

——*Both owner and servant selling come under S.* 6 (1).

S. 6 (1) applies, not only to master of owner of the adulterated article sold, but also the servant or agent who sells such article. *Brown* v. *Foot*, (1892) 66 L. J. 649 and *Hotchin* v. *Hindmarsh*, (1899) 2 Q. B. 181, Ref. (*Rankin, C. J. and Pearson, J.*) PEARY MOHAN *v.* HARENDRA NATH. **34 C. W. N. 114 = 1930 Cr. C. 383 = A. I. R. 1930 Cal. 295.**

Ss. 6 and 15—Adulteration.

——*Bengal Municipal Act* (1884), *S.* 44—*Municipal Chairman cannot grant leave to prosecute under S.* 15 *of the Act of* 1919.

S. 44 of the Bengal Municipal Act (1884) would not empower the Chairman to sanction prosecution under S. 6 of the Act VI of 1919. (*Newbould and Suhrawardy, JJ.*) RAGHUNATH MODY *v.* KURSEONG MUNICIPALITY. **25 Cr. L. J. 170 = 76 I.C. 394 = A. I. R. 1923 Cal. 561.**

S. 14 (2)—Evidence.

——*S.* 14 (2)—*Certificate of Public Analyst not in the prescribed form is not admissible.*

Under S. 14 (2) the Public analyst should submit his certificates in the form prescribed in the schedule to this Act. Where no such certificate was submitted, but the Public analyst reported on the case by a letter in the ordinary official form,

Held, his letter was not admissible in evidence without proof of the truth of its contents. (*Newbould and Suhrawardy, JJ.*) RAGHUNATH MODY *v.* KURSEONG MUNICIPALITY. **25 Cr. L. J. 170 = 76 I. C. 394 = A. I. R. 1923 Cal. 561.**

Ss. 21 and 15—Procedure.

——*Prosecution under S.* 21 *without sanction under S.* 15 *does not bar subsequent trial under Cr. P. Code, S.* 403.

Prosecution of an accused under S. 21 of Bengal Food Adulteration Act without any order or consent in writing of the Municipal Commissioners within the meaning of S. 15 of the Act, and his subsequent acquittal under S. 245, Cr. P. Code, is no bar to his subsequent trial on the same facts for the same offence. (*C. C. Ghose and Duval, JJ.*) P. BANERJEE *v.* BEPIN BEHARY.

43 C. L. J. 110 = 30 C. W.N. 382 = 27 Cr. L. J. 751 = 95 I. C. 79 = A. I. R. 1926 Cal. 691.

BENGAL GENERAL CLAUSES ACT (I OF 1899),

S. 8. Effect of.

———*Calcutta Municipal Act (III of 1923, B. C.) Ss.* 363, 364—*Calcutta Municipal Act (III of* 1899, *B. C.), S.* 449—*Effect of saving—Demolition order for building built without sanction before the new Calcutta Municipal Act*, 1923—*Sanction by General Committee to proceed under S.* 449 *of the old Municipal Act, re-affirmed by the new Corporation—Demolition order is not valid.*

A prosecution had been sanctioned by the General Committee under S. 449 of the old Act (III B. C. of 1899), but the case was actually started under the new Act (III B. C. of 1923) by the new Corporation and notice upon the party was issued and an order of demolition was passed.

Held, that whether the proceedings were under S. 363 or 364 of Act III, B. C of 1923, they were irregular and the order of the Municipal Magistrate was not justified as the party had not been heard by the Corporation before sanction for prosecution was given.

Held, further that the proceedings under S. 449 of the Calcutta Municipal Act (III B. C. of 1899) could only be started by the General Committee and, therefore, in respect of unauthorized structures which existed before 1st April, 1924, when the Calcutta Municipal Act of 1923 came into force, there was, after the passing of the latter Act, nobody competent to take proceedings under S. 449 of the Act of 1899. (*Sanderson, C. J. and Panton, J.*) RAM GOPAL GOENKA *v.* CORPORATION OF CALCUTTA. **52 Cal. 962 = 90 I. C. 317 = 26 Cr. L. J. 1533 = 29 C. W. N. 898 = A. I. R. 1925 Cal. 1251.**

S. 22—Postponement.

———*Power to make rules—Power to fix date includes power to postpone the same.*

Under S. 22, the power to fix a date for election must be taken to include the power to postpone any date so fixed. (*Mukerji and Graham, JJ.*) BHUBAN MOHAN *v.* CHAIRMAN, DACCA MUNICIPALITY.

31 C. W. N. 926 = 103 I. C. 890 = A. I. R. 1927 Cal. 704.

S. 25—Interpretation.

———*Prosecution of a person within the Howrah Municipal area under Ss.*466 *and* 574, *Calcutta Municipal Act of* 1899, *which had been extended to Howrah under a Government notification—Acquittal on the ground that the Act was repealed and no notification had been issued extending any part of the new Act to Howrah—Acquittal opposed on the ground that prosecution was competent under S.* 25, *General Clauses Act—Acquittal was held to be proper as any prosecution founded upon the notification must be under the new Act.*

A person, who was charged in respect of an offence under Ss. 466 (*d*) and 574, Calcutta Municipal Act (Act III of 1899), was acquitted on a preliminary objection that the prosecution did not lie, inasmuch as, though the provisions of Ss. 466 and 574 of the Act in question had been extended to Howrah by a notification under Act III of 1899, that Act had been repealed and re-enacted by the Calcutta Municipal Act (Act III of 1923), and no fresh notification had been issued extending any part of the new Act to Howrah. It was contended on

behalf of the opposite party that though the Act of 1899 had been repealed, a prosecution under it was competent by virtue of provisions of S. 25. Bengal General Clauses Act (I of 1899). *Held*, that the provisions of S. 25, Bengal General Clauses Act indicated that the notification is attracted to the provisions so re-enacted, and that any prosecution founded upon it must be under the new Act. Therefore prosecution under the old Act was not competent. (*Chotzner and Gregory, JJ.*) S. MUKHERJEE *v.* HARUN TAR MAHAMED & CO.

55 Cal. 1206 = 114 I. C. 406 = 32 C. W. N. 476 = 30 Cr. L. J. 298 = 12 A. I. Cr. R. 134 = A. I. R. 1928 Cal. 484.

BENGAL GHATWALI LANDS (BIRBHUM) ACT (V OF 1859).

———*Scope.*

This Act applies only to Ghatwalis within the meaning of Bengal Ghatwali Lands Regulations (XXIX of 1814) and even with regard to them it does not confer the mineral rights but merely proceeds on the assumption (which may be erroneous) that they have those rights. (*Das and Ross, JJ.*) SATYA NIRANJAN *v.* SUSHILA BALA DASI. **4 Pat. 799 = 90 I. C. 513 = A. I. R. 1926 Pat. 103.**

BENGAL GHATWALI LAND REGULATION (XXIX OF 1814).

———*See* BIRBHUM GHATWALI LAND REGULATION.

BENGAL GOONDAS ACT (I OF 1923).

S. 4.—Duties of officer.

———*Warrant of arrest—Arresting officer cannot enquire whether person under arrest is good for the amount of security or other sureties shall be able to control him.*

Refusal of bail on the ground that the person arrested is not good for the amount of security required or that the other sureties would not be able to keep control over the person would be an illegal abuse of law, on general principles as well as on the face of Goondas Act and the warrant issued under it. On such a warrant the business of the officer who fixes the sum of money is to see that he fixes a reasonable sum of money having regard to all the circumstances and that it is not an excessive one and it is sufficient, so far as the person under arrest is concerned, that he is willing to execute a bond in that amount. (*Rankin and Duval, JJ.*) BISSESWAR ROY *v.* EMPEROR. **53 Cal. 962 = 30 C. W. N. 791 = 28 Cr. L. J. 10 = 99 I. C. 42 = A. I. R. 1926 Cal. 961.**

S. 4—Powers of High Court.

———*Warrant—Secretary to Local Government issuing warrant is not Court subordinate to High Court—High Court can interfere only if case falls under Cr. P. Code, S.* 491.

The Commissioner of Police acting under warrant issued by Secretary to Local Government under S. 4, Goondas Act, is not acting under the Cr. P. Code. The Secretary to the Government in such cases is not in the position of a subordinate or inferior Court to the High Court (A. I. R. 1924 Cal. 698, Rel on) and, therefore, the High Court will look at the question only from the point of view that the proceedings of the executive are armed with certain special powers and will interfere only if the case falls under S. 491, Cr. P. Code. (*Rankin and Duval, JJ.*) BISSESWAR ROY *v.* EMPEROR. **53 Cal. 962 = 99 I.C. 42 = 30 C. W. N. 791 = 28 Cr. L. J. 10 = A. I. R. 1926 Cal. 961.**

BENGAL LANDLORD AND TENANT PROCEDURE ACT (VIII OF 1869).

Occupancy holding.

——*Decree obtained by 16 annas landlords for arrears of rent thereof—Holding can be sold in execution.*

The general principle that in Bengal, occupancy holdings might be sold in execution of decrees for money, provided that the sale was at the instance of or with the consent of the landlord, was not affected or modified either by Act X of 1859 or Act VIII of 1869. An occupancy holding in Sylhet where Act VIII of 1869 is still in force, can therefore be sold in execution of a decree obtained by the 16 annas landlords for arrears of rent due from that holding. (*Teunon and Newbould, JJ.*) NRIPENDRA KUMAR *v.* NADIR KHAN. **25 C. W. N. 554 = 66 I. C. 46 = A. I. R. 1921 Cal. 124.**

Procedure.

——*Sales under—C. P. Code, O. 21, R. 89—Applicability.*

There is nothing in Act VIII of 1869 which makes the provisions of the C. P. Code applicable to sales under that Act. (*Suhrawardy and Mallik, JJ.*) BANESWAR SINGH *v.* ABDUL HASSAN. **31 C. W. N. 1016 = 104 I. C. 180 = A. I. R. 1927 Cal. 752.**

S. 27—Applicability.

——S. 27 does not apply where plaintiff claims possession on basis of title which is denied by defendant. (Case-law discussed.) (*Greaves and Mukerji, JJ.*) GOBINDCHANDRA *v.* PRAKASH NATH. **91 I. C. 677 = A. I. R. 1926 Cal. 555.**

S. 52—Who can deposit.

——*Mortgagee.*

A mortgagee of a non-transferable occupancy holding is not entitled to make deposit under S. 52, as the deposit must be made by the tenant or on his behalf. (Case-law discussed.) (*Suhrawardy and Jack, JJ.*) RAJ CHANDRA DATTA *v.* HABIB MOHAMMAD. **34 C. W.N. 31 = A. I. R. 1929 Cal. 572.**

——*Transferee.*

A transferee from a tenant is entitled to make a deposit of the decretal amount for the non-payment of which the tenant is liable to be ejected. (Case-law discussed.) (*Mitter, J.*) SAILAJA SUNDARI *v.* SURJA KANTA. **32 C. W. N. 1166 = 117 I. C. 697 = A. I. R. 1929 Cal. 133.**

——A transferee of a non-transferable occupancy holding is not entitled to make the deposit under S. 66 (2), Bengal Tenancy Act or a similar provision in other enactment, namely S. 52 of Act VIII of 1869, to defeat the landlord's decree for ejectment. (*Suhrawardy and Mallik, JJ.*) BANESWAR SINGH *v.* ABDUL HASAN. **31 C. W. N. 1016 = 104 I. C. 180 = A. I. R. 1927 Cal. 752.**

BENGAL LAND REDEMPTION AND FORECLOSURE REGULATION (BENG. REG. XVII OF 1806).

Defective proceedings.

——*Possession by mortgagee.*

Where a mortgagee in spite of his proceedings under the Regulation, being defective, enters into possession he holds as a trespasser and if he holds for 12 years, the mortgagor's right to redemption is barred. (1882) A. W. N. 84, Foll. (*Lindsay and Iqbal Ahmed, JJ.*)

BENGAL LAND REDEMPTION AND FORECLOSURE REGULATION (BENG. REG. XVII OF 1806).

LUCHI RAI *v.* JAGARNATH SAHU. **26 A. L. J. 149 = 114 I. C. 187 = A. I. R. 1928 All. 197.**

——*Rights of mortgagor and mortgagee.*

If the foreclosure proceedings are defective, they do not affect the relations between the mortgagor and the mortgagee, and the mortgagee having been in possession as such continues in possession as mortgagee. 65 P. R. 1908, Foll. (*Addison, J.*) KARMAT ULLAH KHAN *v.* GHULAM NABI. **95 I. C. 863 (Lah.).**

Foreclosure—Suit, necessary for.

——Under the Regulations the mortgagee is bound to institute proceedings for foreclosure within 12 years. The mortgagee's title must be held to be incomplete until it is confirmed by a regular suit. It is doubtful whether the Regulation of 1806 applied to a usufructuary mortgage. Mere failure of the mortgagor to make the deposit as required by the Regulation, within the year of grace, does not of itself make the mortgagee an absolute owner of the mortgaged property. 10 M. I. A. 340, Foll. (*Prideaux, A.J.C.*) RUPABAI *v.* RODBA. **72 I. C. 121 = 6 N. L. J. 130 = A. I. R. 1923 Nag. 274.**

Mortgage by conditional sale.

——*T.P. Act—Introduction of—Effect on mortgage prior to.*

The introduction of the Transfer of Property Act did not affect the right or liability of a mortgagee under a mortgage by conditional sale under Bengal Regulation XVII of 1806, or the relief in respect of such right or liability to which the mortgagee was entitled, but it affected the procedure for enforcing that right or liability or obtaining that relief. 6 All. 262 (F. B.); 16 All. 259 (F.B.) and 30 M.L.J. 338, Rel. on. (*Kanhaiya Lal, J.*) KHARAG SINGH *v.* KIDDHA. **96 I. C. 93 = A. I. R. 1926 All. 667.**

Purchaser from mortgagee.

——A purchaser from a mortgagee by conditional sale who does not enquire as to whether the mortgagee had acquired full proprietary rights by proceeding under the Regulation is not a *bona fide* purchaser. (*Jai Lal, J.*) ZAMAN ALI *v.* RURA. **96 I. C. 886 = A. I. R. 1926 Lah. 676.**

Redemption suit after foreclosure.

——Where a mortgagee obtains a decree for proprietary possession after obtaining an order for foreclosure under Bengal Regulation XVII of 1806 against the mortgagors, in a subsequent redemption suit by the mortgagors, the decree becomes conclusive as to the mortgagee's proprietary title and as to whether the mortgagee complied with the provisions of the Regulation. 10 M. I. A. 340 and (1892) A. W. N. 51, Appl.; 17 A. L. J. 691; 4 A.L.J. 717 and 40 All. 387, Dist. (*Daniels and King, JJ.*) BANS BAHADUR RAI *v.* CHAITRA KUT RAI. **48 All. 643 = 24 A.L.J. 1053 = 97 I.C. 157 = A.I.R. 1926 All. 755.**

Revision.

——An order by the District Judge in a proceeding under Regulation XVII of 1806 rejecting the plea that the Regulation was not in force is revisable. (*Moti

Sagar, J.) NAND KISHORE *v.* NARAIN SINGH. **78 I. C. 350 = 6 L. L. J. 137 = A. I. R. 1924 Lah. 471.**

Surrender by mortgagor—Effect of.

———A mortgage-deed contained a covenant that if the money due was not paid within two years, the mortgage would operate as a sale. After the expiry of this period, on application of the son and legal representative of the mortgagee, for foreclosure under Bengal Regulation XVII of 1806, a notice was issued under S. 82 of Act X of 1877 then in force. After the expiry of the period of one year's grace, the case was consigned to records. The mortgagor subsequently voluntarily delivered possession to the mortgagee, who thereafter remained in continuous possession and enjoyment of the disputed property for nearly 40 years. *Held*, the surrender of the property in dispute to the mortgagee and the mutation of names in his favour operated as a surrender by the mortgagor of his equity of redemption in recognition of the validity of the previous foreclosure proceedings, and extinguished the right of redemption. (*Kanhaiya Lal, J.C.*) BASHIR HUSAIN *v.* CHANDRAPAL SINGH. **68 I. C. 223 = 25 O. C. 83 = 10 O. L. J. 1 = A. I. R. 1922 Oudh 133.**

S. 7—Amount due.

———It is immaterial whether mistakes are made or not in the amount, provided the claim is made quite clear and it is for the mortgagor to deposit or to tender the amount which he himself believes to be due on the foot of the mortgage. 91 P. R. 1913, Foll. (*Harrison and Agha Haidar, JJ.*) GOBIND MAL *v.* RAM CHAND. **100 I. C. 329 = 9 L. L. J. 14 = 28 P. L. R. 153 = A. I. R. 1927 Lah. 141.**

S. 8—Applicability.

———From the time the Transfer of Property Act was passed Regn. XVII of 1806 has not been in force in the Santal Parganas except in cases in which the amount of the mortgage money in respect of which the procedure prescribed by the Regulation was to be followed has been less than Rs. 1,000. (*James, J., on difference between Das and Fazl Ali, JJ.*) BAIJNATH *v.* CHIRANJI LAL. **10 P. L. T. 787 = A. I. R. 1929 Pat. 537.**

S. 8—Interpretation—" Himself ".

———The word "himself' in S. 8 of the Regulation is merely another way of stating " in person" and under O. 3, R. 1, C. P. Code, an act which can be done in person can also be done by an attorney. (*Harrison and Agha Haidar, JJ.*) GOBIND MAL *v.* RAM CHAND. **100 I. C. 329 = 9 L. L. J. 14 = 28 P. L. R. 153 = A. I. R. 1927 Lah. 141.**

S. 8—Nature of proceedings.

———An application under S. 8 of the Regulation is a suit within the meaning of Act XXXVII of 1855 and Regn. III of 1872. 9 W. R. 402, Rel. on. 10 M. I. A. 340 (P. C.) and 3 Cal. 397 (P. C.), Ref. (*James, J., on difference between Das and Fazl Ali, JJ.*) BAIJNATH *v.* CHIRANJI LAL. **10 P. L. T. 787 = A. I. R. 1929 Pat. 537.**

S. 8—Notice—Burden of proof.

———The making of a demand for repayment of the mortgage-money previous to the filing of an application for foreclosure is an act to be performed by the mortgagees. There can be no presumption from the fact of the application having been made and the consequent proceedings taken thereon that such a demand was made by the mortgagee. But where a mortgage was executed in 1868, and foreclosure proceedings taken in 1879, direct evidence as to the demand cannot be reasonably expected so late as in 1924. But from the fact that a copy of the application made by the mortgagee together with the parwana issued by the Deputy Commissioner, was handed over to the mortgagor personally, and that he did personally appear before the Deputy Commissioner and accepted delivery of papers relating to the foreclosure proceedings without protest, it was held that the necessary demand had been proved. 3 All. 408 ; 5 All. 9 ; 3 Cal. 397 (P. C.) and 11 Cal. 111 (P. C.), Rel. on. (*Wazir Hasan and Gokaran Nath Misra, JJ.*) KHANNA SINGH *v.* GULZAR SINGH. **105 I. C. 861 = 1 L. C. 502 = A. I. R. 1927 Oudh 502.**

———There can be no presumption in law that a foreclosure notice under the Regulation is regular and that the party who relies upon foreclosure proceedings, having effected forfeiture of the estate of a mortgagor, has to prove affirmatively the due performance of every condition necessary to be established under the Regulation. Unless the party who sets up due service of a notice under Regulation XVII proves affirmatively that actual demand of payment was made from the mortgagor before application was made for the foreclosure, the notice must be held to be a nullity. 46 P. R. 1907, Rel. on. (*Campbell, J.*) BEHARI LAL *v.* BALMOKAND. **89 I. C. 475 = A. I. R. 1926 Lah. 112.**

———*Notice, issue of—Formalities, observance of—Presumption.*

A Court will not presume that all formalities have been duly observed in issuing notice under the Regulation. A District Judge acting under the Regulation does so not in a judicial, but in a ministerial capacity, and it is for the mortgagee to prove affirmatively the due performance of every condition necessary to be established before the foreclosure can attach upon the estate. 16 P. R. 1888 ; 106 P. R. 1889 and 46 P. R. 1907, Foll. (*Addison, J.*) KARMAT ULLAH KHAN *v.* GHULAM NABI. **95 I. C. 863 (Lah.).**

———The Court will not presume that all the formalities required by Regulation XVII of 1806 in proceedings for foreclosure have been observed, but the mortgagee must prove affirmatively the due performance of every necessary condition. The mere fact of mortgagor's raising no objection to the validity of the notice does not warrant the presumption that the notice fulfilled all the necessary conditions. The non-existence of the notice does not relieve the mortgagee of the burden of proving that the notice satisfied the requirements of the Regulation. On the other hand, the non-existence of the notice is fatal to the validity of the foreclosure proceedings. 46 P. R. 1907, Foll. (*Martineau and Brasher, JJ.*) MUNSHI RAM *v.* NAURANGA. **72 I. C. 575 = A. I. R. 1924 Lah. 176.**

Ss. 8 and 7—Notice—Contents of.

———The mortgagee has the option either of giving the actual contents of S. 8 and specifying the three methods in which foreclosure may be avoided, or of quoting the actual section and referring the mortgagor to its contents. A notice is not invalid if the sacrosanct

BENGAL LAND REDEMPTION AND FORECLOSURE REGULATION (BENG. REG. XVII OF 1806).

words " S. 7 " do not occur therein provided always that the contents of that section are embodied in the notice. 123 P.R. 1894 ; 34 P.R. 1895 and 57 P.R. 1914, Rel. on. (*Harrison and Agha Haidar, JJ.*) GOBIND MAL *v.* RAMCHAND. **9 L. L. J. 14 = 100 I. C. 329 = 28 P. L. R. 153 = A.I.R. 1927 Lah. 141.**

———The omission in the notice to mention S. 7 is not fatal provided the purport of the section is given in the notice. (*Broadway and Fforde, JJ.*) JAGGI MAL *v.* ARYA RAM. **7 Lah. 471 = 27 P. L. R. 788 = 94 I. C. 991 = A. I. R. 1926 Lah. 483.**

———Under S. 8 the mortgagor is to be notified that if he does not redeem the property mortgaged in the manner provided for by S. 7 within one year from the date of the notification the mortgage will be finally foreclosed. The requirements of S. 8 are fulfilled if the notice to the mortgagor gives full purport of S. 7, even though S. 7 is not expressly mentioned in the notice. 21 P. R. 1903 ; 28 P. R. 1908 and 57 P. R. 1914, Dist. (*Martineau, J.*) DIWAN SINGH *v.* JIRAM. **26 P. L. R. 743 = 91 I. C. 8 = A. I. R. 1926 Lah. 215.**

———S. 7 provides either for payment or tender to the mortgagee or for deposit in Court, and a notice which simply informs the mortgagor that he must pay the money within the year and says nothing of the alternatives of tender and deposit in Court is misleading. The defect is not cured merely by the addition of words " in the manner provided for in S. 7 of the Regulation." (*Chevis, J.*) ZORA *v.* CHANDU. **68 I.C. 883 = A. I. R. 1923 Lah. 71.**

S. 8—Notice—Validity of.

———Demand for a larger sum than was actually payable at the time of issuing notice cannot be regarded as a fatal defect in the notice. 91 P. R. 1913, Foll. (*Broadway and Fforde, JJ.*) JAGGI MAL *v.* ARYA RAM. **7 Lah. 471 = 27 P.L.R. 788 = 94 I. C. 991 = A. I. R. 1926 Lah. 483.**

S. 8—Power of attorney.

———Where the power of attorney provided : "They are authorized to make mutual settlement to effect compromise, to conduct case jointly and severally, to appoint any vakil to conduct the case, to nominate any arbitrator or umpire for purposes of the decision of the case, to get witnesses summoned, to put questions to the parties and their witnesses, to produce evidence of all sorts and to realize from Court money due to me after filing their receipt in Court. In short all the steps taken by them in this case shall be accepted, as done by me." *Held*, that the power also included the power to file an application under S. 8. (*Harrison and Agha Haidar, JJ.*) GOBIND MAL *v.* RAMCHAND. **9 L. L. J. 14 = 100 I. C. 329 = 28 P. L. R. 153 = A. I. R. 1927 Lah. 141.**

BENGAL LAND REGISTRATION ACT (VII OF 1876).

Non-registration.

———*Effect on title.*

Where a person has purchased a share in the zamindari it is wrong to say that because his name is not registered under the Land Registration Act he should be considered as no proprietor till his name is registered. (*B. B. Ghose, J.*) SURENDRA NATH *v.* JABED ALI. **85 I. C. 747 = A. I. R. 1926 Cal. 420.**

BENGAL LAND REGISTRATION ACT (VII OF 1876).

———*Owner not registered—Lessee or assignee of rent can sue.*

Section 78 is no bar to a person recovering rent although the person who should have been registered as the proprietor and through whom he claims has not been so registered. S. 78 is inapplicable to the case of an assignee of rent, though the name of the assignor has not been registered under the Act. (*Greaves and Chakravarti, JJ.*) PRASANNA KUMAR DE MAHAJAN *v.* NANIGOPAL DE. **42 C. L. J. 134 = 90 I. C. 561 = A. I. R. 1925 Cal. 1175.**

———*Scheme of the Act.*

The scheme of the Bengal Land Registration Act shows that nobody's name can get on the register until and unless due notice to all parties affected is given and is found to be served. (*Rankin, C. J. and C. C. Ghose, J.*) TARAKESWAR PAL CHOWDHURY *v.* KUNWAR SATISH KANTA ROY. **51 C. L. J. 297 = A. I. R. 1930 Cal. 411.**

S. 4—Effect of entries.

———*Entries in general register ambiguous.*

Where in a case the entries in the general register or of revenue-paying estates maintained according to Bengal Act VII of 1876 on material matters were very ambiguous and if reference were to be made to them alone, it was not possible to say with any certainty what was sold at the revenue sale. *Held*, that in this case the entries in the general register by themselves could not be considered to be conclusive on the above-mentioned question and that reference to documents other than the general register was necessary. (*Sir Lancelot Sanderson.*) JAIGOBIND PANDE *v.* RAMANANDAN SAHAI. **32 C. W. N. 650 = 48 C. L. J. 1 = 109 I. C. 392 = 30 Bom. L. R. 1343 = 28 M. L. W. 807 = A. I. R. 1928 P. C. 130 = 55 M. L. J. 56 (P. C.).**

S. 10 (g) (ii)—Scope.

———*Failure to mention name of mouza does not invalidate registration.*

By S. 10 (*g*) (*ii*) it is expressly stated that the name of each mouza containing the land must be stated in the register. Disobedience to the Act, however, does not appear to invalidate the registration. (*Lord Buckmaster.*) AMIRUDDIN GAZI *v.* MUKHAN LAL CHATTERJI. **34 C. W. N. 285 = 121 I. C. 514 = 32 Bom. L. R. 520 = 31 M. L. W. 561 = 51 C. L. J. 162 = A. I. R. 1930 P. C. 83 = 58 M. L. J. 218 (P. C.).**

Ss. 42, 52 and 55—Scope of.

———*Rival claimants—Jurisdiction of Collector.*

It is necessary for an applicant for registration of his name in the Land Registration Record to establish not only that the succession or transfer has taken place but that he has acquired possession in accordance with such succession or transfer, where he claims to have succeeded to any proprietary right whether by purchase, inheritance, gift or otherwise. But if his claim is that he assumed charge of the estate or property either as joint proprietor or as manager, it is sufficient for him to establish that his possession exists. Where each of the two applicants claims to have assumed charge of an endowment, the Collector has simply to see with whom possession exists. If he finds that possession exists with one of the applicants, he has no jurisdiction to refer the matter to the Civil Court, but should order the name of the persons in possession to be recorded in the Land Registration Record. The jurisdiction either to determine summarily the question of the right to possession or to refer the matter to the Civil Court arises where there is no proof to the satisfaction of the Collector that any person is in possession of the interest in dispute. (*Das and Bucknill, JJ.*) S. A. ZAMIN *v.* S. M. A. ALI. **1 Pat. 68 = 65 I. C. 135 = 3 Pat. L. T. 406 = A. I. R. 1922 Pat. 315.**

Ss. 60 and 78—Liabilities of tenant.

——*Tenant is not bound to pay rent to unregistered owner, but he cannot refuse payment to registered owner.*

When a person has been registered as owner of certain land under the Land Registration Act, the tenant holding that land is precluded under the provisions of S. 60 from pleading that the registered owner is not the true owner. According to S. 78 of the same Act, a tenant is not bound to pay rent to a person whose name has not been registered under the Act. These two sections are complementary to each other. (*Greaves and Chakravarty, JJ.*) DEBENDRA LAL PANJA *v.* NILMONEY PRODHAN. **86 I. C. 865 = A. I. R. 1925 Cal. 1173.**

S. 62—Effect.

Obiter.—S. 62 of the Land Registration Act means that there is no right of appeal or review under any enactment whatsoever, against the order of the Civil Court. (*Mullick and Bucknill, JJ.*) KAPILESHWAR JHA *v.* RAGHUNATH PRASAD **4 P. L. T. 718 = 74 I. C. 474 = 1 Pat. L. R. Civ. 370 = A. I. R. 1924 Pat. 134.**

S. 70—Objection.

——*Objection must be made before Collector.*

An objection must be made before the Collector to enable the objector to raise any question in regard to the separate account. (*Das and Allanson, JJ.*) DOMA BHAGAT *v.* RAJA RAM SINGH. **8 Pat. 95 = 9 P. L. T. 661 = 115 I. C. 225 = A. I. R. 1929 Pat. 22.**

S. 70—Separate account.

——*Opening of separate account does not affect liability of all proprietors for entire Government revenue payable for mahal.*

For the convenience of the parties, the Collector has the right to open separate account, but that does not affect the position that all the proprietors are in effect liable for the entire Government revenue payable in respect of the Mahal. (*Das and Allanson, JJ.*) DOMA BHAGAT *v.* RAJA RAM SINGH. **8 Pat. 95 = 9 P. L. T. 661 = 115 I. C. 225 = A. I. R. 1929 Pat. 22.**

——The question as to separate account does not in fact raise any question of title. (*Das and Allanson, JJ.*) DOMA BHAGAT *v.* RAJA RAM SINGH. **8 Pat. 95 = 9 P. L. T 661 = 115 I. C. 225 = A. I. R. 1929 Pat 22.**

S. 72—Applicability.

——*S. 72 does not apply where proprietor does not appear on notice under S. 70.*

Section 72 does not apply to a case where a proprietor being served with notice under S. 70 does not appear to contest the application under that section. (*Das and Allanson, JJ.*) DOMA BHAGAT *v.* RAJA RAM SINGH. **8 Pat. 95 = 9 P. L. T. 661 = 115 I. C. 225 = A. I. R. 1929 Pat. 22.**

Ss. 72 and 74-A—Applicability.

——Section 74-A gives the same power to the Collector which S. 72 gives to a party and these sections apply only when the shares in respect of which a separate account has been opened no longer correspond with the character and extent of interest held in the estate by any one proprietor or manager. (*Das and Allanson, JJ.*) DOMA BHAGAT *v.* RAJA RAM SINGH. **8 Pat. 95 = 9 P. L. T. 661 = 115 I. C. 225 = A. I. R. 1929 Pat. 22.**

S. 74—Reference.

——The Collector cannot refer the question at issue to the Civil Court unless an objection has been preferred to the application for a separate account under S. 70, Land Registration Act. (*Das and Allanson, JJ.*) DOMA BHAGAT *v.* RAJA RAM SINGH. **8 Pat. 95 = 9 P. L. T. 661 = 115 I. C. 225 = A. I. R. 1929 Pat. 22.**

S. 78—Applicability.

——*Rent—Suit for—Land in possession of tenants comprised in a number of estates—Co-sharer proprietor's interest in respect of one estate partially registered in the Collectorate—Rent proportionate to his entire estate realized by him for over 30 years without any objection—Inference.*

Section 78 has no application to cases where the land in possession of the tenant is comprised in more than one estate. The proprietor mentioned in the section is the proprietor of one estate within the ambit of which the lands in possession of the tenants are comprised. 15 C. L. J. 308, Foll. The section is enacted to compel people or to give them an adequate notice to obey the provisions which require registration to be made of these interests in land. It is a section in aid of S. 38. It gives a certain sanction inducing people to make sure to register their interests. Where a tenancy extended to entire land of four touzis in which the plaintiffs had 4 annas 12 gandas share and the defendants held all the lands of the said four touzis at a consolidated rent of Rs. 179-2-8 gandas and had been paying Rs. 49 odd to the plaintiffs as their share of rent and with reference to the last touzis the plaintiff's name was registered only with reference to 19¼ gandas,

Held, that the plaintiff would not be debarred by S. 78 from realizing rent at the rate claimed by them. The inference in such a case would be that the rent which the defendants have been in the habit of paying for many years is really due as between the plaintiff on the one hand and the defendants on the other. (*Rankin, C. J. and Mitter, J.*) NRIPENDRA NATH *v.* DHARENDRA NATH. **46 C. L. J. 584 = 107 I. C. 91 = A. I. R. 1928 Cal. 115.**

——*Assignees from unregistered proprietors.*

S. 78 has no application to the case of a person to whom rent has been assigned by a proprietor whose name has not been registered under the Act. 1 C.W.N.

BENGAL LAND REGISTRATION ACT (1876), S. 78.

141, Foll. (*Chatterjea and Suhrawardy, JJ.*) PROBOTH CHANDRA MITTER *v.* HARISH CHANDRA NASKER. **27 C.W.N. 888 = 78 I.C. 7 = A.I.R. 1924 Cal. 124.**

Ss. 78 and 81—Co-sharers.

——*Bengal Tenancy Act, S. 60—Lease by one co-sharer alone—Ijardar can sue for entire rent.*

One of the co-sharers alone let out by written contract a portion of the land of the estate without reference to

BENGAL LAND REVENUE SALES ACT (1859).

The disqualification in bringing suits for rent is one which attaches only to revenue free estates already entered in the General Register if the proprietor or manager or mortgagee fails to register his name. (*Kulwant Sahay, J.*) BIBI SALEHA *v.* HULAS MAHTON. **6 P.L.T. 780 = 86 I.C. 559 = A. I. R. 1925 Pat. 564.**

S. 78—Scope.

——*Assignee from registered proprietor need not get his name registered under the Act*

BENGAL LAND REVENUE ASSESSMENT (RESUMED LANDS) REGULATION (BENG. REG. II OF 1819).

—Burden of proof.

——Neither in 1838, when the summary settlement was made nor in 1839, when the three *mauzas* in suit were amalgamated was any claim to hold free of rent on account of *Malikanadari* right put forward by the predecessors of the defendants. The claim on behalf of the defendants-respondents was for the first time put forward in 1877, but it was resisted and disallowed on the ground, that no such *mauza* existed. The claim was again put forward, when the matter came for the purpose of cadastral survey.

Held, it lies upon those who claim to hold the lands free of the obligation to pay rent to show by satisfactory evidence that they have been relieved of this obligation, either by contract or by some old grant recognised by Government. 12 Moo. I. A. 286, Foll. (*Mr Ameer Ali.*) JAGDEO NARAIN SINGH *v.* BALDEO SINGH. **71 I. C. 984 = 1923 M. W. N. 361 = 27 C. W. N. 925 = 3 P. L. T. 605 = 49 I. A. 399 = 36 C. L. J. 499 = 32 M. L. T. 1 = 2 Pat. 38 = A. I. R. 1922 P. C 272 = 45 M. L. J. 460 (P.C.)**

—Nature of proceedings.

——Application by Government under Regulation II of 1819 is not a suit so as to make Art. 149 of the Limitation Act applicable. (*Newbould and Graham, JJ.*) MAHABUNNESSA BIBI *v.* SECRETARY OF STATE. **98 I. C. 334 = 53 Cal. 561 = A. I. R. 1926 Cal. 1064.**

—S. 24—Applicability.

——A suit to contest an order of the Board of Revenue under S. 6 of Act IX of 1847, declaring the liability of the lands, claimed as part of a permanently settled estate, to assessment of revenue, is not barred by the one year's rule of limitation laid down in S. 24 of Reg. II of 1819. A. I. R. 1924 Cal. 913, Foll. (*Sanderson, C. J., Chatterjee, Rankin, Suhrawardy and Panton, JJ.*) SECRETARY OF STATE *v.* RAI RADHA KANTA. **98 I. C. 728 = 53 Cal. 952 = 43 C. L. J. 542 = 30 C. W. N. 774 = A. I. R. 1926 Cal, 924 (F.B.).**

——S. 24 does not apply to a suit to declare that *chur* lands are not added lands within S. 6 of the Bengal Alluvion Act and Art. 14, Lim. Act, does not apply to such a suit. (*Mukerjee and Rankin, JJ.*) PEARY LAL RAY *v.* SECRETARY OF STATE. **83 I. C. 446 = 39 C. L. J. 454 = A. I. R. 1924 Cal. 913.**

BENGAL LAND REVENUE SALES REGULATION (BENG. REG. V OF 1812).

—S. 3—Permanent tenure before Act.

——*Rent recoverable.*

In the case of a permanent tenure which had come into existence before the passing of the Bengal Tenancy Act the actual rent within the meaning of S. 74 of the Act would be the amount recoverable as rent under cl. 3, Reg. V of 1812, that is to say, the whole specific sum which the permanent tenureholder agreed to pay when his tenure was created, whether it contained abwab or not. 18 C. L. J. 83, Foll.; 15 Cal. 828, not overruled by 17 Cal. 131 (P. C.). Case-law discussed. (*Das and James, JJ.*) GOPAL SARAN NARAYAN SINGH *v* MAHESWARI PRASAD SINGH. **119 I. C. 65 = 10 P. L. T. 329 = 8 Pat. 655 = A. I. R. 1929 Pat. 307.**

—S. 3—Service in lieu of rent.

——A contract to do gratuitous service for a certain number of days in a year in lieu of rent for the land occupied is not illegal as being against public policy, nor is it illegal for being indefinite and arbitrary under S. 3 of the Regulation. (*Mitter, J.*) RADHU HARI *v.* NARENDRA NATH. **115 I. C. 34 = 49 C. L. J. 189 = 56 Cal. 862 = A. I. R. 1929 Cal. 224.**

Macpherson, J.) An unregistered mortgagee whose suit for rent has been rightly dismissed in appeal under S. 78 can secure a decree, for the rent sued for, from the Court of second appeal, if he has, during the pendency of the second appeal, been registered under Bengal Land Registration Act, even though the rent of any year became barred by limitation at the date when the name was actually registered under the Act, provided it was not barred at the time of the suit. (Case-law discussed.) (*Mullick, J.*) *On difference between* (*Kulwant Sahay and Macpherson, JJ.*) UMESHWARDHARI SINGH *v.* NARMAN SINGH. **7 Pat. 690 = 9 P.L.T. 357 = 110 I.C. 469 = A.I.R. 1928 Pat. 410 (419).**

S. 78—Revenue-free estates.

——*Disqualification in bringing rent suits only applies to estates already entered in General Register.*

PAL CHOWDHURY *v.* KUNWAR SATISH KANTA ROY. **51 C. L. J. 297 = A.I.R. 1930 Cal. 411.**

BENGAL LAND REVENUE SALES ACT (XI OF 1859.)

Appropriation.

——*Payment of land revenue—Appropriation—General law of appropriation will apply only in the absence of specific provision in the Act on the point—Contract Act, Ss. 59 to 61.*

The general principles of appropriation as contained in the Contract Act can only be resorted to in the case of the matter of payment of land revenue, where there is no provision in the Bengal Land Revenue Sales Act (XI of 1859) itself which may be applicable to the case and nothing which would militate against their application.

(*Cuming and Mukerji, JJ.*) DASHARATHI GHOSH *v.* KHONDKAR ABDUL HANNAN. **55 Cal. 624 = 47 C.L.J. 12 = 105 I.C. 15 = 32 C.W.N. 359 = A.I.R. 1928 Cal. 68 (a) (71).**

Interpretation.

———*Act VII of* 1868—*Language does not refer to a small holding.*

The language of Act XI of 1859 and Act VII of 1868 hardly refers to a small holding, like a homestead or a residential site, in the occupation of the proprietor. (*Walmsley and M. N. Mukerjee, JJ.*) JATINDRA NATH ROY CHOWDHURY *v.* NARAIN DAS KHETRY. **52 Cal. 862 = 90 I.C. 901 = A.I.R. 1926 Cal. 97.**

Jurisdiction.

———*C. P. Code, S. 9—Proceedings before Collector without jurisdiction—Civil Court can determine rights of parties—Question of title can be decided by Civil Court only and not by revenue Court—Suit raising question of title—Jurisdiction of Civil Court is not barred by the Act*

Where the proceedings before the Collector are without jurisdiction, the Civil Court undoubtedly has the right to determine the rights of the parties. A question of title is a matter for the Civil Court and not for the Revenue Court to decide, and the Civil Court has the right to entertain any suit of a civil nature unless barred by any express enactment. There is nothing in Act XI of 1859 to bar the right of the Civil Court to entertain a suit actually raising a question of title as to definite share: 13 W.R. 67; 15 W.R. 112; and 23 W.R. 104, Dist. (*Das and Allanson, JJ.*) DOMA BHAGAT *v.* RAJA RAM SINGH. **8 Pat. 95 = 115 I. C. 225 = 9 P.L.T. 661 = A.I.R. 1929 Pat. 22.**

Notice.

———No notice is required to be served on the proprietors before sale, where the arrears are for the current or next preceding year. (*Miller, C. J. and Foster, J.*) MAHARAJA KESHO PRASAD SINGH *v.* SECRETARY OF STATE FOR INDIA. **74 I.C. 881.**

Practice.

———*Kabuliyat showing a particular date as due date for payment of rent—Rent paid a year later under prevailing practice—Due date was held to be one recognised in practice.*

The stipulation in the kabuliyat taken by itself, meant that the rent for 1320 B. S. would be payable by the tenant on the 28th June, 1913. But the plaintiff produced a jamawasilbaki kept in the Collector's office containing entries of no less than six years and from that the Court came to the conclusion that it was the practice of the Collector to receive the rent of each Bengal year in May or June of the following year.

Held, that in view of this practice, the rent for 1320 was not due to be paid before the 28th June, 1914. (*Walmsley and B. B. Ghose, JJ.*) (HAFEZ) AHMAD YAR KHAN *v.* DINA NATH SADHUKHAN. **42 C.L.J. 69 = 90 I.C. 40 = A. I. R. 1925 Cal. 1148.**

Resumption.

———*When Government resumes* Howla *from* Howladar *there is no effect on* karsha *and it cannot be sold for arrears of rent.*

A *Howladar* holding a *Howla* under Government Khas Mahal regretted his bargain and asked Government to manage the *Howla* during the unexpired term. In the *Howla* there was a *karsha* which fell into arrears and to realize the arrears, a sale was held under Act XI of 1859 at the instance of the Government.

Held : that the arrangement which the *Howladar* entered into with the Government had not the effect of changing the rent into revenue and thereby rendering the *karsha* liable to sale under the provisions of Act XI of 1859. Therefore the case purporting to be held under Act XI of 1859 was without jurisdiction. (*Walmsley and B. B. Ghose, JJ*) UKILUDDI AKAN *v.* ASMAT ALI MUNSHI. **27 C. W. N. 723 = 77 I. C. 29 = A. I. R. 1923 Cal. 714.**

Revenue Sale.

———*What is sold is the interest of the Crown—Person in adverse possession must surrender possession to purchaser.*

On the failure of an owner to pay the Government assessment, his estate or interest in the land is forfeited or rather determined, and under a sale for arrears of revenue what is sold is not the interest of the defaulting owner but the interest of the Crown, subject to the payment of the Government assessment. A person in adverse possession who occupies the disputed land without payment of rent to the defaulting proprietor, is bound to surrender possession of that land to the revenue sale purchaser when the sale is confirmed, and if the land is not so surrendered, he renders himself liable for mesne profits, as he unlawfully keeps the purchaser out of possession. A person is not a defaulting proprietor whose title was not perfected by adverse possession before the revenue sale : (*Mookerjee and Chotzner, JJ.*) JOBEDA KHATUN *v.* TULSI CHARAN DAS. **36 C. L. J. 472 = 77 I. C. 564 = A. I. R. 1923 Cal. 82.**

Sale under.

———*Register D kept by Collector erroneous—Full description of the estate not given—Notification describing estate correctly—Sale cannot be set aside.*

There is no direction either in the Act or in the rules framed by the Board of Revenue that the description of the estate in the sale notification should be on reference to the registers A, C or D which the Collector has to keep under the provisions of the Land Registration Act, and if the register D and the other registers kept by the Collector be erroneous, and do not give a full description of the estate, that is no ground for setting aside the sale of an estate if the notification of sale contains a correct description of the estate. (*Adami and Kulwant Sahay, JJ.*) SHAMA KANT LAL *v.* KASHI NATH SINGH. **7 P. L. T. 747 = 1626 P. H. C. C. 362 = 96 I. C. 807 = A. I. R. 1926 P. 549 (557).**

———*All proprietors need not be mentioned in the proclamation*

There is nothing in the law or in the rules framed under the Revenue Sales Law prescribing that when there are a large number of proprietors the names of all of them should be given in the notification. (*Adami and Kulwant Sahay, JJ.*) SHAMA KANT LAL *v.* KASHI NATH SINGH. **7 P. L. T. 747 = 1926 P. H. C. C. 362 = 96 I. C. 807 = A. I. R. 1926 Pat. 549 (558).**

———*What is sold is not interest of defaulting owner but interest of owner subject to payment of Government assessment—Adverse possession against purchaser commences from sale—Limitation Act, Art.* 144.

In a sale held under Act XI of 1859, what is sold is not the interest of the defaulting owner which is determined on the failure to pay the Government assessment but the interest of the Crown subject to the payment of the Government assessment, and, therefore, the period of limitation for adverse possession against the purchaser at such a sale only commences to run from the date of the sale. 20 C. L. J. 563 (P. C.) and 15 C. L. J. 436, Ref. (*Mookerjee and Buckland, JJ.*) SECRETARY OF STATE *v.* WAZED ALI KHAN. **34 C. L.J. 147= 65 I.C. 866=A. I. R. 1921 Cal. 687.**

Scope.

——*Purchaser at revenue sale buying off taluqdar intending to deposit revenue and to prevent sale—Purchase is not fraudulent.*

There is nothing wrong in a third person who wants to purchase an estate at a revenue sale to buy off taluqdar who wanted to deposit the revenue in order to prevent the sale. If such person then purchases the property himself at the revenue sale this does not amount to any fraud or underhand dealing. (*B. B. Ghose and Panton JJ.*) MONMOHAN CHOWDHURY *v.* TURNER MORRISON & CO. **57 Cal. 434=33 C.W.N. 930=51 C. L. J. 320= A. I. R. 1930 Cal. 69 (77).**

The Act is a stringent enactment for the realization of arrears of revenue and, therefore, there is no obligation to comply exactly with its requirements. (*Suhrawardy and Graham, JJ.*) LAL BEHARY *v.* RAJENDRA NATH **53 Cal. 886=43 C. L. J. 468=30 C.W.N. 618= 95 I. C. 353=A. I. R. 1926 Cal. 866.**

——*Auction-purchaser at revenue sale is entitled to mesne profits from tenants.*

An auction purchaser at a revenue sale under the Act is entitled to recover mesne profits from tenants when their tenancies are not annulled till the institution of the suit for mesne profits as mesne profits are limited to the amount payable by the tenants as rent: 37 Cal. 559, Foll. (*Newbould and Graham, JJ.*) AHMAD ALI *v.* MALHIUL ALAM CHOUDHARY. **91 I.C. 474 (Cal.)**

Ss. 2, 3 and 33—Jurisdiction.

——*Arrears and continuance of default give jurisdiction—Party impugning revenue sale as contrary to law must give dates of revenue kists according to original settlement and kistbandi—Misdescription of estate sold does not make sale void for want of jurisdiction.*

If the Government revenue is payable in June according to the original settlement and kistbandi of the mahal it does not under sec. 2 of Act XI of 1859, become an arrear of revenue until the 1st of July. A perusal of Secs. 2 and 3 of the Act makes it perfectly clear that the Collector should not put up an estate for sale unless there is an arrear of revenue in respect of that estate and unless the latest date of payment fixed by the Board has expired and the default has not been made good. It is quite impossible that the 7th June which is the latest date fixed for payment by the Board of Revenue under Sec. 3 of the Act is also the date upon which the kist or instalment is payable for June according to the original settlement and kistbandi of the mahal. Whenever a person seeks to have a revenue sale set aside on the ground that there was no authority in the Collector to sell the estate, having regard to the fact that the latest date fixed for payment by the Board of Revenue had not expired at the date when the property was put up for sale, he should, in order to enable the Court to decide the point give the dates of the revenue kists according to the original settlement and kistbandi, 7th June is not the date when the revenue kist is falling due but it is the latest date for payment of previous arrears. The Collector therefore has complete jurisdiction to sell property on the 24th September following June. In every case where a sale for arrears of revenue is impeached as being contrary to the provisions of Act XI of 1859, having regard to the scheme of the Act and the express direction contained in Sec. 33 of the Act, no grounds of objection

are open to plaintiff which had not been declared and specified in an appeal to the Commissioner. 2 P. L. J. 402 (F. B.) Diss. but Foll. (*Das and Macpherson, JJ.*) JAGDISWAR NARAYAN *v.* MD. HAZIQ HUSSAIN. **5 P. L. T. 473=77 I.C. 851=1924 P. H. C. C. 142= A. I. R. 1924 Pat. 537 (a) (540, 542).**

Ss. 2 and 3—Material dates.

——*Liability of estate to sale depends on three dates.*

The liability of an estate to sale under the Act depends on three dates. The first is the date on which the instalment of revenue is payable under the terms of the Settlement. If it is not paid on this date under S. 2 of the Act it does not become an arrear of revenue until the first of the following month which is the second date and though the unpaid sum has become an arrear of revenue, the estate is not liable to sale under the Act unless this arrear of revenue remains unpaid on the latest day of payment as fixed by the Board of Revenue under S. 3 of the Act. This is the third date: 22 C.W.N. 769, Foll. (*Adami and Kulwant Sahay, JJ.*) SHAMA KANT LAL *v.* KASHI NATH SINGH. **7 P. L. T. 747= 1926 P. H. C. C. 362=96 I. C. 807= A. I. R. 1926 Pat. 549.**

——*Original kistbandi unknown—Dates fixed under S. 3 are the kist dates.*

Where original kistbandi under S. 2 of the Revenue Sales Act is unknown and forgotten, the latest dates fixed under S. 3 are popularly known as the kist dates. They are not the kistbandi dates as provided for by S. 2, but the latest dates of payment fixed by the Board of Revenue under S. 3 of the Act. (*Adami and Kulwant Sahay, JJ.*) SHAMA KANT LAL *v.* KASHI NATH SINGH. **7 P. L. T. 747=1926 P. H C. C. 362= 96 I.C. 807=A. I. R. 1926 Pat. 549.**

Ss. 2 and 3—Powers of Collector.

——*Collector cannot sell before the expiry of period fixed.*

According to Ss. 2 and 3 Government Revenue is not in arrear until the first of the following month when the Government revenue should be paid according to the original kistbandi; and the Collector has no power to put up the estate for sale until the expiry of the latest date fixed for the payment after the estate is in arrear. (*Das and Adami, JJ.*) SURAJ NARAYAN CHAUDHARY *v.* SARASWATI BAHURIA. **6 P. L.T. 738= 88 I. C. 485=3 Pat. L. R. 237= A. I. R. 1925 Pat. 750.**

S. 3—Date of sale.

——*Act VII of 1868—Board's Notification of 6th October, 1871 issued under Section 3 of Act XI of 1859—Effect of—Holding when saleable for arrears—Premature sale is invalid.*

The effect of the two Acts, *viz.*, the Bengal Land Revenue Sales Act (XI of 1859) and Act VII of 1868, and of the Board's Notification of 6th October, 1871, issued under Section 3 of the Act of 1859, is that no holding can be sold till after the 28th June next after the first day of the month in which the revenue or rent should have been paid. The date on which the amount of rent or revenue is payable, depends primarily, not on general or administrative considerations, such as the course of business in the Collectorate or the mode in which the accounts are kept, but on the contract between the parties. A premature sale is invalid and *ultra vires* and confers no right on the purchaser. (*Richardson and Greaves, JJ.*) BIRENDRA CHANDRA *v.* MAHOMED SOLEMAN. **26 C. W. N. 140=68 I. C. 491= A. I. R. 1921 Cal. 449.**

S. 3—Revenue payable.

———*Tenant taking over existing tenancy but executing* Kabuliat *afterwards—Revenue is payable according to the tenancy taken over.*

Where *A* took over a tenancy in September 1862, but executed a *Kabuliat* on the 10th November 1862, and it appeared from the accounts in Collector's register that the tenancy was for the Bengali year.

Held, that the tenancy continued as before and that the revenue was payable at such time as was fixed by that tenancy and not on the 10th of November. (*Sir John Edge.*) MAHOMED SULAIMAN *v.* KUMAR BIRENDRA CHANDRA SINGH. **74 I. C. 906 = 32 M. L. T. 115 = 50 Cal. 243 = 27 C. W. N. 749 = 37 C.L.J. 561 = 50 I.A. 247 = A.I.R. 1922 P.C. 405 = 44 M. L. J. 388.**

S. 3—Sale under.

———*Land entered in the register passes to auction purchaser but not the buildings standing thereon.*

On the failure of an owner to pay the Government assessment, his estate or interest in the land is forfeited or rather determined. By a sale held under Act XI of 1859 what is sold is not the interest of the defaulting owner, but the interest of the Crown, subject to the payment of the Government assessment. 18 C. W. N. 1281 P. C., Applied.

The word "estate" within the Act must be taken to have a more limited meaning than it would have in English law and the Government's power of sale for arrears of revenue *prima facie* is limited to the land, which is subject to the payment to the Government of the annual revenue and in respect of which the proprietor is entered in General Register of Revenue-paying Estates.

Where land is sold under Act XI of 1859 it is the land so entered in the register which passes under the sale to the auction purchaser but not the buildings on the land. A. I. R. 1926 Cal. 97, Affirmed.

It seems that in order to make a house erected upon the land as well as the land itself subject to the Government power of sale for arrears of revenue special words indicating the intention of the Legislature to make the building subject to sale would be necessary. (*Sir Lancelot Sanderson.*) NARAYAN DAS *v.* JATINDRA NATH. **54 Cal. 669 = 1927 M. W. N. 459 = 102 I.C. 198 = 54 I. A. 218 = 29 Bom. L. R. 1143 = 46 C. L. J. 1 = 31 C. W. N. 965 = 8 P.L. T. 663 = 26 A. L J. 1 = 26 M. L. W 848 = A. I. R. 1927 P.C. 135 = 53 M. L. J. 158.**

S. 5—Notice.

———*Notice under, is expedient when mortgage has been found to be a good one by judicial decision, but non-service of notice is not an illegality.*

It may be expedient to serve notice under S. 5 when a mortgage has been found to be a good one by judicial decision, but if such notices are not issued where there is no order of attachment by any judicial authority, the law cannot be said to be contravened. (*B. B. Ghose and Basu, JJ.*) KRISHNA CHANDRA *v.* PABNA DHANA BHANDAR CO., LTD. **117 I. C. 552 = A. I. R. 1928 Cal. 722.**

Ss. 5 and 6—Notice.

———*Combined notice under Ss.* 5 *and* 6 *is not a proper notice.*

Notice under S. 5 apparently is to be issued for the purpose of giving warning to the people concerned of the liability of the mahal being sold in the event of the payment not being made within the time fixed therein. It must, therefore, issue *before* the mahal has become liable to sale; whereas the notification under S. 6 has to be

issued *after* the property has become liable to sale—a date for sale having been fixed. A combined notification, therefore, under Ss. 5 and 6 cannot be legally issued. The effect of the issue of such notice must be that there was no service of a proper notification issued under S. 6 of the Act. (*Suhrawardy and Graham, JJ.*) LAL BEHARY *v.* RAJENDRA NATH. **53 Cal. 886 = 43 C. L. J. 468 = 30 C. W. N. 618 = 95 I. C. 353 = A. I. R. 1926 Cal. 866.**

S. 6—Notice.

———*Sufficiency of specification depends on facts of each case—Sale will not be set aside for omission of certain particulars.*

There is no authority for the proposition that there are certain specifications to be given in the notice and that if by any chance one of these details is not given the notification is not sufficient. No hard and fast rule can be laid down with regard to sufficiency of the notice, for it must vary according to the facts of each particular case. (*Cuming and Chakravarti, JJ.*) KUSUM KAMINI *v.* HAR SUNDER MAJUMDAR. **30 C.W.N. 1004 = 97 I. C. 885 = A. I. R. 1926 Cal. 1195.**

———*Arrears need not be mentioned.*

Section 6 does not require the Collector to mention the arrears for which the property is put up for sale. (*Das and Adami, JJ.*) SURAJ NARAYAN CHAUDHARY *v.* SARASWATI BAHURIA. **6 P. L. T. 738 = 88 I. C. 485 = 3 Pat. L. R. 237 = A. I. R. 1925 Pat. 750.**

S. 7—Notice.

———*It is not a question between the defaulting proprietor and the Collector as to whether notice under S.* 7 *was served or not—Non-service of notice under S.* 7 *is neither illegality nor irregularity vitiating sale.*

Notices under S. 7 are only for the purpose of forbidding the tenants from paying their rent to the defaulting proprietor. If such notice is not served and the tenants pay the rent due to the defaulting proprietor, then it would be a question whether the auction-purchaser would again be entitled to recover that rent. It is not a question between the defaulting proprietor and the Collector as to whether notice under S. 7 was served or not. It is neither an irregularity nor an illegality which can vitiate a sale if notices under S. 7 are not served. (*B. B. Ghose and Basu, JJ.*) KRISHNA CHANDRA *v.* PABNA DHANA BHANDAR CO., LTD., **117 I.C. 552 = A. I. R. 1928 Cal. 722.**

———*Day of payment according to settlement need not be mentioned.*

It is necessary for the Collector to mention in the notice under S. 7 the last day fixed for payment of Government revenue under S. 3 of Act XI of 1859. It is not necessary for him to state the day on which the Government revenue should have been paid according to the settlement and kistbandi of the mahal. Care should be had in avoiding confusion between the month for which the instalments are due according to the original settlement and kistbandi of mahal and the month in which the latest dates of payment are fixed. (*Das and Adami, JJ.*) SURAJ NARAYAN CHAUDHARY *v.* SARASWATI BAHURIA. **6 P. L. T. 738 = 88 I. C. 485 = 3 Pat. L. R. 237 = A. I. R. 1925 Pat. 750.**

S. 8—Validity of Sale.

———*Bengal Towzi Manual, Rr.* 102, 110, 114 *and* 115 *—Non-compliance with rules makes sale for arrears invalid.*

Where the proprietor of an estate sent the revenue payable by him by money order and the same was received by the Collectorate before the due date, but due to mistake in towzi number and name of the thana, it was not credited in the register and a note was made in the money order acknowledgment that due to discrepancy in the particulars of the estate the money was not credited and was kept in deposit, but the proprietor did not care to look at the acknowledgment and the estate was sold for arrears of revenue.

Held, that the question whether an estate is in arrears is not a mere matter of form but of substance—a legal position to be inferred from all the circumstances rather than a fact to be determined by a mere reference to the entries in the register as relating to the particular estate.

Held, further, that if the clerks of the Collectorate did not make a reasonable effort after kist day had expired to find out what the remittance was meant for, they failed in their duty. There is no duty cast upon a remitter to be on the look out for the return of the acknowledgment or for any endorsement that may happen to be made therein, unless he is warned to do so, and non-compliance of the rules providing for a notice to the proprietor of the fact that the revenue was not credited, by the revenue authorities, would make the sale contrary to the provisions of the Act and must be annulled. (*Cuming and Mukerji, JJ.*) DASHARUTHI GHOSH *v.* KHODKAR ABDUL HUNNAN. **55 Cal. 624= 47 C. L. J. 12=105 I. C. 15=32 C. W. N. 359= A. I. R. 1928 Cal. 68.**

S. 9 (3) and (4)—Mortgagee.

——*Mortgagee is entitled to make deposit.*

A mortgagee of a revenue paying estate is interested in making the deposit of revenue and can save the property from being sold. (*B. B. Ghose and Panton, JJ.*) HAZARIMALL *v.* MANOHAR DAS. **33 C.W.N. 1163= 57 Cal. 298=A. I. R. 1930 Cal. 151.**

S. 9—Mortgagee.

——*Remedy of mortgagee making deposit under S. 9 is same as under Transfer of Property Act, S. 72.*

Mortgagee making deposit to prevent the properties from being sold is entitled to a charge on the property as against all the persons interested therein for the amount of money so paid and his remedy to realize it is the same as under S. 72, Transfer of Property Act: 11 M. I. A. 241, Ref. (*B. B. Ghose and Panton, JJ.*) HAZARIMULL *v.* MANOHAR DAS. **57 Cal. 298= 33 C. W. N. 1163=A. I. R. 1930 Cal. 151.**

——*Mortgagee making deposit--He must tack amount deposited to mortgage debt and cannot bring separate suit—Transfer of Property Act, S. 72.*

The mortgagee making deposit to prevent property from sale cannot bring one suit for his mortgage money and another for the amount deposited. The amount deposited cannot be claimed as a separate debt. He must treat the whole sum as one entire debt by tacking the amount of the revenue he paid to the mortgage amount. (*B. B. Ghose and Panton, JJ.*) HAZRIMULL *v.* MANOHAR DAS. **33 C. W. N 1163= 57 Cal. 298=A.I.R. 1930 Cal. 151.**

Ss. 10 and 11—Separate account.

——*Statute does not authorise apportionment of arrears of revenue when separate account is opened—But such apportionment so far as it is a matter of accounts, cannot affect Collector's jurisdiction to sell share in arrears.*

There is no authority in the statute for apportioning, when a separate account is opened, the arrears of

revenue, whether after taking an account or merely according to the ratio between the Government revenue assessed on the separate account and that remaining to be assessed on the residuary share. But so far as such an apportionment is a matter of accounts, it would be merely an irregularity which at the most might give ground for impugning a sale under S. 33 of the Act. But the defect in the method of dealing with the arrears cannot affect the jurisdiction of the Collector to sell a share which admittedly was in arrears and was liable to sale. (*Das and Ross, JJ.*) MADAN MOHAN LAL *v.* ABDUL RAZAQUE. **4 Pat. 1=88 I. C. 465= 3 Pat. L. R. 66=6 P.L. T. 713= A. I. R. 1925 Pat. 681.**

——*Share whether pokta or kham—Proportion between total jama sadr and jama sadr assigned to the share in application for separate account determines question.*

When an application for opening a separate account is made, the relation between the total jama sadr and jama sadr assigned in the application to the share in respect of which the application is made is the determining factor as to whether the share is pokta or kham and the Collector, in opening the separate account, ought to interpret the share according to this proportion. (*Das and Ross, JJ.*) MADAN MOHAN LAL *v.* ABDUL RAZAQUE. **4 Pat 1=88 I. C. 465= 3 Pat. L. R. 66=6 P. L. T. 713= A. I. R. 1925 Pat. 681.**

S. 12—Estoppel.

——*Non-raising of objection on the ground of existence of arrears does not prevent party from subsequently objecting on that ground.*

The three kinds of objections specified in S. 12 are the only objections that could be made to the only statements that the application is to contain. It would seem to follow from this that if no such objection is made, the Collector is bound to open a separate account whether the share from which the separate account is to be opened is in arrears or not at the time. No inference, therefore, unfavourable to the party attacking the opening of separate accounts on the ground of the existence of arrears can be drawn from the fact that when the separate accounts were opened no objection was raised on the ground of the existence of arrears. (*Das and Ross, JJ.*) MADAN MOHAN LAL *v.* ABDUL RAZAQUE. **4 Pat. 1=88 I. C. 465= 3 Pat. L. R. 66=6 P. L. T. 713= A. I. R. 1925 Pat. 681.**

S. 13—Separate accounts.

——*Collector cannot sell any share from which separate accounts do not show any arrears as due—Date when estate is in general arrear determines extent of residuary share liable to be sold.*

All that the Collector has to do is to look at the separate accounts as they stand and if he finds that any separate account is not in arrear, he is not entitled to sell that share; he can only sell the share from which according to the separate accounts an arrear of revenue is due. The Collector is not permitted to sell a share merely because that share is in arrears; but he can only sell if the estate is in general arrear. It must be shown therefore that the estate as a whole is in arrears and liable to sale: and that date on which this liability to sale arose must be the date which will fix the extent of the residuary share of the estate to be put up for sale, if it is that share which is in arrears. It may be that the arrears shown at that date as due by the residuary share had in fact come down from an earlier period when the residuary share was larger in extent, that is a matter which may give rise to a claim for contribution but the Collector is bound by what his accounts show as they stand. (*Das and Ross, JJ.*) MADAN MOHAN LAL *v.* ABDUL RAZAQUE. **4 Pat. 1=88 I. C. 465=3 Pat. L. R. 66=6 P. L. T. 713=A. I. R. 1925 Pat. 681.**

——*Residuary share sold after opening of separate accounts—Onus of showing that at date of opening of separate accounts latter also were liable to sale is on party alleging so.*

The sale law contemplates that an estate in arrears should be sold as soon as possible after the liability to sale has arisen by failure to pay the arrears on the latest day of payment. Therefore where, after opening of separate accounts the balance of the residuary share is sold for arrears of revenue, the *onus* of showing that the entire estate (*i.e.*, including the separated accounts) was liable to sale at the date of the opening of the separate accounts is on the party alleging the same. (*Das and Ross, JJ.*) MADAN MOHAN LAL *v.* ABDUL RAZAQUE **4 Pat. 1=88 I. C. 465=3 Pat. L. R. 66=6 P. L. T. 713=A. I. R. 1925 Pat. 681.**

——*Suit contesting sale of residuary share as covering separate accounts—Some old accounts shown—Their continued existence should be proved by plaintiff.*

In a suit impugning a sale of a residuary share for arrears, where plaintiff alleges that the sale covers also some separate accounts and where some old separate accounts are shown, it is not for the defendants or the Collector to show what became of the separate accounts. The burden is on those who challenged the sale to show that the separate accounts still exist. (*Das and Ross, JJ.*) MADAN MOHAN LAL *v.* ABDUL RAZAQUE. **4 Pat. 1=88 I. C. 465=3 Pat. L. R. 66=6 P. L. T. 713=A. I. R. 1925 Pat. 681.**

S. 13—Separate share.

——*Estate in arrear—Particular separate share in arrear should be sold but not the share not in arrear at the kist in question though in arrear in previous kist.*

When an estate is in arrear the Collector should look to his books to find which of the separate shares or which number of them was in arrear for that kist. If no separate share is in arrear for that kist, the entire estate is liable to be sold, but no separate share can be sold for an arrear of a previous kist. (*B. B. Ghose and Basu, JJ.*) KRISHNA CHANDRA *v.* PABNA DHAN BHANDAR CO., LTD. **117 I.C. 552=A. I. R. 1928 Cal. 722.**

S. 13—Validity of sale.

——*No arrears due for the kist for which an estate is sold—Sale is not valid.*

If no arrear is due for the kist for which an estate is sold, the sale is without jurisdiction. 38 Cal. 537 (P.C.), Rel. on. (*B. B. Ghose and Basu, JJ.*) KRISHNA CHANDRA *v.* PABNA DHANA BHANDAR CO., LTD. **117 I. C. 552=A. I. R. 1928 Cal. 722.**

S. 33—Date of payment.

——*Payment by revenue money order is made on the date on which the treasury voucher is filled by the post master—Withoutarrears a sale is not governed by S. 33.*

According to the rules in the Bengal Tauzy Manual of 1918 the question whether a remittance of land revenue sent by Revenue Money Order reaches the Collector in time depends not upon the receipt of the money or even of the money order form at the Treasury, but on the date when the Treasury voucher is filled in by

the Post Master. Under rule 61 of the Manual read along with S. 50 of the Contract Act payment to the Post Office of land revenue by a revenue money order is in time if it is made before the last day of payment. S. 33 does not come into operation unless there is a sale for arrears of revenue. In absence of arrears of revenue if an estate is sold S. 33 will not apply. (*Newbould and B. B. Ghose, JJ.*) BILAS CHANDRA ROY *v.* RAJENDRA CHANDRA DAS ROY. **51 Cal. 776=78 I. C. 661=A. I. R. 1924 Cal. 839.**

S. 33—Separate suit.

——*Sale held under inaccurate description—Point not raised in appeal to Commissioner—Separate suit to set aside sale does not lie.*

In order that a sale may be annulled by the Court, a plaintiff must prove (1) that the sale was made contrary to the provisions of the Act; (2) that he had sustained substantial injury by reason of the irregularity complained of; and (3) that he specified the irregularity in question in his appeal to the Commissioner. Where therefore a sale was held under an inaccurate description, but the plaintiffs proved no substantial injury by reason of the mis-description, and not raise the point before the Commissioner as a ground in appeal, a separate suit to set the sale aside is barred. 2 Pat. L. J. 402 (F. B.), Overruled.

It would be regrettable if the title of a purchaser under the Act of 1859 was liable to be impeached by suit in respect of a trifling error which is not proved to have substantially affected the price given for the property. The first persons to suffer by such an interpretation of the Act would be the defaulting proprietors, for the effect would be to deter purchasers from bidding freely at a revenue sale. 42 Cal. 897 (P. C.) and 21 Cal. 70 (P. C.), Ref (*The Lord Chancellor.*) JAGDISHWAR NARAYAN *v.* MUHAMMAD HAZIQ HUSSAIN. **6 Pat. 200=53 I. A. 246=44 C. L. J. 515=31 C. W. N. 107=38 M. L. T. 5=8 P. L. T. 1=98 I. C. 930=26 M. L. W. 837=A. I. R. 1926 P. C. 126=51 M. L. J. 815.**

S. 33—Setting aside sale.

——*Non-compliance with provisions of Act—Substantial injury must be proved.*

Whether the non-compliance with the provisions of the Act amounts to an illegality or an irregularity, it can only be a ground for setting aside a sale if the party complaining succeeds in proving that substantial injury has resulted from such non-compliance. (*Suhrawardy and Graham, JJ.*) LAL BEHARY *v.* RAJENDRA NATH. **53 Cal. 886=43 C. L. J. 468=30 C. W. N. 618=95 I. C. 353=A. I. R. 1926 Cal. 866.**

S. 33—Validity of sale.

——*Cesses cannot be recovered under the Act—Amount of arrears claimed different from amount due—Sale is not vitiated.*

The amount of cesses cannot be included in the amount recoverable under the Revenue Sales Act, but the fact that the amount of arrears claimed was different from what is found really due does not take away that jurisdiction of the Collector to hold the sale. (*Suhrawardy and Graham, JJ.*) LAL BEHARY *v.* RAJENDRA NATH. **53 Cal. 886=43 C.L.J. 468=30 C.W.N. 618=95 I.C. 353=A. I. R. 1926 Cal. 866.**

S. 33—Void sale.

——*Lim. Act, Art. 12—Neither provision applies to void sale.*

When the sale under the Sales Act, is a nullity, there is no need to set it aside, and S. 33 of the Sales Act, and Art. 12 of the Limitation Act, are not applicable to such a sale. (*Walmsley and B.B. Ghose, JJ.*) HAFEZ AHMED YAR KHAN *v.* DINA NATH SADHU KHAN.
42 C.L.J. 69 = 90 I.C. 40 = A.I.R. 1925 Cal. 1148.

S. 34—Applicability.

———*Does not apply to a sale held to be void for want of arrears—It applies only where sale is annulled under S. 33.*

A Collector cannot put up the estate for sale where the estate is not in arrears. A Civil Court can authoritatively recognise that the Collector had no power to put up the property to sale in fact that there was no valid sale at all. A sale which is annulled is quite distinct from a sale which the Court holds authoritatively to be no sale at all and which the Court consequently disregards in a suit for possession of the sold property. S.34 applies only when a sale is annulled by a final decree of a Civil Court under S. 33 on one of the grounds mentioned in S. 33. (*Das and Ross, JJ.*) HAKIM MOHAMMAD IDRIS *v.* LACHMAN DAS.
5 P.L.T. 368 = 78 I.C. 303 = 1924 P.H.C.C. 25 = A.I.R. 1924 Pat. 504.

S. 36—Applicability.

———*No applicability to person claiming through certified purchaser.*

The section ought to be construed strictly and it does not apply when a person is not a certified purchaser himself but a person claiming through a certified purchaser. (*N. R. Chatterjee and Panton, JJ.*) SRISH CHANDRA BANERJEE *v.* PROTAP CHANDRA DAS.
62 I.C. 662 (Cal.).

S. 37—Avoidance of encumbrance.

———*It is not necessary for purchaser at auction-sale to serve notice on encumbrancer to avoid encumbrance—Expression of intention to do so by word or deed is sufficient.*

The position of a purchaser at a revenue sale is analogous to that of a landlord whose tenant has incurred forfeiture. And so it is not necessary for the auction-purchaser under Revenue Sale Law to serve any notice on an incumbrancer for the exercise of his right to avoid incumbrance. It is sufficient if he brings a suit in ejectment which it must be held is an unequivocal expression of the intention of the auction-purchaser to take possession of the property by annulling incumbrances. The only thing necessary for him to do is to express his intention by word or deed to avoid the incumbrance. Consequently to enable the auction-purchaser at a revenue sale to take possession of a property on which there is an encumbrance which he is entitled to annul, it is sufficient for him to bring a suit against the person in actual possession, by which act he expresses his unequivocal intention to avoid all subsisting rights which he can annul, as he seeks to take direct possession of the property sued for. It is simply a feasible means of seeking direct possession. It is not necessary for him to find out if there is any other person, under whom the person in actual possession claims to hold. The person in actual possession can, however, resist by showing that he holds under a third person whose interest the purchaser must annul. But the suit cannot be defeated merely on the ground that the person in actual possession claims under a party who has not been made a party to the suit or on whom the purchaser did not serve any notice; 14 C.W.N. 352, Dist. 42 Cal. 638 and Commr. of Works *v.* Hull, 1 K.B. 205, Ref. (*B. B. Ghose and Panton, JJ.*) MANMOHAN CHOWDHURY *v.* TURNER MORRISON & CO. **57 Cal. 434 = 33 C.W.N. 930 = 51 C.L.J. 320 = A.I.R. 1930 Cal. 69.**

———*Creation of* Patni *by an auction-purchaser cannot show that option to annul under-tenure is exercised.*

The mere creation of the *patni*, by an auction-purchaser would not by itself be an indication to the under-tenure holders that the option to annul the under-tenure, had in fact been exercised. (*Greaves and Ghose, JJ.*) KULA MIAH *v.* NAZU MIAH. **68 I.C. 449 = A.I.R. 1923 Cal. 195.**

S. 37 (4)—Buildings.

———*Masonry rivetments are not buildings.*

Masonry rivetments cannot be considered to be buildings within the meaning of the words under S. 37, Cl. 4. (*B. B. Ghose and Panton, JJ.*) MANMOHAN CHOWDHURY *v.* TURNER MORRISON & CO.
33 C.W.N. 930 = 51 C.L.J. 320 = 57 Cal. 434 = A.I.R. 1930 Cal. 69.

S. 37—Burden of proof.

———*Purchaser at sale for arrears suing for recovery of land—Defendant claiming land as lakhiraj—Onus is on the plaintiff to show that at Permanent Settlement the land was entered as* mal *and was included in the estate as such.*

A purchaser of an entire estate sold for arrears of revenue suing to recover land claimed by the defendant as lakhiraj must make out a *prima facie* case that at the time of the Permanent Settlement the land in dispute was *mal* land and was included in the estate as such, and that the revenue assessed upon the estate was fixed on consideration of the assets of the land in dispute; in other words, that the assets of the land were taken into account in settling the revenue at the time of the Permanent Settlement. The fact that the lands are within the ambit of the estate is not sufficient to meet this burden. 14 M.I.A. 152 (P.C.); 20 C.W.N. 1028; and 27 C.L.J. 133, Foll. (*Ross and Kulwant Sahay, JJ.*) CHANDRA MOULESHWAR PRASAD SINGH *v.* HEMNALINI DEBI. **5 Pat. 726 = 1926 P.H. C.C. 228 = 96 I.C. 575 = A.I.R. 1926 Pat. 416.**

S. 37—Encumbrances.

———*Structures are not encumbrances.*

Structures or buildings are not encumbrances within the meaning of the section. (*Walmsley and M. N. Mukerji, JJ.*) JATINDRANATH ROY CHOWDHURY *v.* NARAYAN DAS KHETRY. **52 Cal. 862 = 90 I.C. 901 = A.I.R. 1926 Cal. 97.**

———*Revenue sale does not* ipso facto *annul an encumbrance—Steps have to be taken by purchaser to annul it—Denial of purchaser's title by tenants before encumbrance is annulled does not create forfeiture.*

An encumbrance is not annulled *ipso facto* by the revenue sale. The purchaser at the revenue sale has to take steps to annul the tenure alleged to be an encumbrance and if before the rent suits are instituted the purchaser has taken no steps to annul the encumbrance, the denial of the purchaser's title by the tenants on the land creates no forfeiture. (*Ross and Kulwant Sahay, JJ.*) CHANDRA MOULESHWAR PRASAD SINGH *v.* HEMNALINI DEBI. **5 Pat. 726 = 1926 P.H.C.C. 228 = 96 I.C. 575 = A.I.R. 1926 Pat. 416.**

S. 37, Exception 4—Meaning of.

———*Exception does not mean that lease must be one for excavating a tank thereon.*

In order to bring a case within Exception 4 it is not necessary that the lease must be a lease for the purpose of excavating a tank thereon. (*Ross and Kulwant Sahay, JJ.*) CHANDRA MOULESHWAR PRASAD SINGH *v.* HEMNALINI DEBI. **5 Pat. 726 = 1926 P.H.C.C. 228 = 96 I.C. 575 = A.I.R. 1926 Pat. 416.**

S. 37—Raiyat.

———*"Raiyat" means one who cultivates land or has acquired it for cultivation.*

"Raiyat" means a person who actually cultivates the land or has acquired it for the purpose of cultivation. (*B. B. Ghose and Panton, JJ.*) MANMOHAN CHOWDHURY *v.* TURNER MORRISON & CO. **57 Cal. 434 = 33 C.W.N. 930 = 51 C.L.J. 320 = A.I.R. 1930 Cal. 69.**

S. 37—Settlement.

———*"Settlement" means not permanent settlement of 1793 but contract with Government.*

The expression "After the time of settlement" does not mean "After the time of permanent settlement of 1793". The term settlement means the contract with Government whenever that may have been made. 24 W. R. 476; 24 Cal. 887, Foll. 4 C.W.N. 513 and 10 C.W.N. 503, Ref. (*Mookerjee and Panton, JJ.*) MOKBUL ALI *v.* BASARAT ALI. **34 C.L.J. 485 = 66 I.C. 911 = A.I.R. 1921 Cal. 192.**

S. 37—What can be sold.

———*Owner of portion of estate omitting to get it separately assessed—The portion is liable for whole revenue and can be sold under S. 37.*

Where a person becomes owner of a portion of an estate by adverse possession, he can get it separately assessed to land revenue, but if he omits to do so, the portion continues to form part of the security for the whole land revenue of the estate and to be liable to be sold under S. 37. 18 C.W.N. 1281, Rel. on. (*Sir John Wallis.*) KRISHNA PRAMADA DASI *v.* DHIRENDRA NATH GHOSH. **56 Cal. 813 = 56 I.A. 74 = 113 I.C. 465 = 33 C.W.N. 289 = 49 C.L.J. 112 = A.I.R. 1929 P.C. 50.**

S. 53—Chaukidari chakran land.

———*Resumption puts an end to rights created by chaukidar—Sale—Purchase by defaulting proprietor—He takes subject to all incumbrances.*

If *chaukidari chakran* lands are resumed by Government and are settled with a *zemindar*, all rights created in such lands by the *chaukidar* in favour of third parties come to an end, although if a transfer has been made by the *zamindar* before the resumption, the transferee becomes entitled to the benefits of the settlement with the *zamindar*. A defaulting proprietor purchasing at a sale acquires under S. 53 the estate subject to all its encumbrances which exist at the time of sale and does not acquire any rights, in respect of under-tenants or *raiyats*, not possessed by the previous proprietor at the time of the sale. (*Mookerjee, Ag. C.J. and Fletcher, J.*) SATYENDRA NATH BANNERJEE *v.* KRISHNA SAKHA KAR. **35 C.L.J. 185 = 69 I.C. 7 = A.I.R. 1922 Cal. 193.**

S. 53—Encumbrances.

———*Non-defaulting proprietor purchasing estate sold for arrears of revenue—He repurchases subject to encumbrances existing at time of sale, though created by defaulting co-proprietor.*

Any co-proprietor purchasing an estate sold for arrears of Government revenue re-purchases it subject to all its encumbrances existing at the time of sale, even if the purchaser is a non-defaulting proprietor and the encumbrances were made by defaulting proprietors: 16 W. R. 136, Foll. (*Das and Adami, JJ.*) KASHI LAL *v.* NURUL HUQ. **8 Pat. 569 = A.I.R. 1929 Pat. 209.**

———*Encumbrance created by defaulting proprietor is binding on benamidar purchaser for him.*

The purchaser who is the benamidar for the defaulting proprietor is only entitled to take the property subject to the encumbrance created by the defaulting proprietors. 16 W. R. 130; 16 W. R. 138; and 22 C.W.N. 505 (P.C.), Foll. (*Suhrawardy and Mukerji, JJ.*) ASIUR RAHMAN *v.* ASGAR ALI. **96 I.C. 404 (Cal.).**

S. 54—Burden of Proof.

———*Purchaser suing for* Khas *possession must prove assessment.*

In a suit by a purchaser for *Khas* possession, on behalf of the landllord purchaser mere proof of geographical situation is not enough; the landlord has also to show that the land had been assessed, and it is only after he has done so that the burden passes to the defendants (49 I.A. 399 = 27 C.W.N. 925, Dist.) (*Walmsley and Suhrawardy, JJ.*) SASHI BHUSAN HAZRA *v.* KAZI ABDULLA. **28 C.W.N. 143 = A.I.R. 1924 Cal. 328.**

S. 54—Encumbrance.

———*Allowance granted for number of years—Grant is presumed—Allowance is encumbrance within S. 54.*

The fact that an allowance has been received out of certain lands for a long period from the owner thereof is proof of a grant of a perpetual allowance charged on such lands. (30 Mad. 203, Foll.) A charge of this character is an encumbrance on the land. The purchasers at the revenue sale purchase the property burdened with this encumbrance. 37 Cal. 322, Foll. (*Cuming and Chakravarty, JJ.*) MANOHAR DAS *v.* BROJENDRA LAL. **91 I.C. 411 = A.I.R. 1926 Cal. 552 (a) (553).**

———*Tenure created intermediate between the proprietor and the mukarraridar is an 'incumbrance'.*

The existence of a *mukarrari* created by grant by the proprietor, does not bar the proprietor from creating an intermediate tenure between himself and the *mukararidar*. Where the proprietor therefore, granted to his wife, the right of collecting rent in lieu of dower from the *mukarraridar*.

Held, the grant was an incumbrance within the meaning of S. 54. (*Coutts and Macpherson, JJ.*) MT. SHAHZADI BEGAM *v.* MT. KOKILA. **1 Pat. 38 = 63 I.C. 183 = 3 P.L.T 816 = A.I.R. 1922 Pat. 389 (390).**

S. 54—Notice.

———In a sale under S. 54 of Act XI of 1859 no question of notice arises. (*Cuming and Chakravarti, JJ.*) MANOHAR DAS *v.* BROJENDRA LAL. **91 I.C. 411 = A.I.R. 1926 Cal. 552 (c) (554).**

S. 54—What is sold.

———*Separate share of estate subject to mortgage sold in Government sale—Only equity of redemption passes to purchaser.*

Where a separate share of an estate is sold for arrears of revenue, and the share is subject to a mortgage all that passes to the purchaser is the equity of redemption. (*Das and Adami, JJ.*) KASHILALL *v.* NARUL HUQ. **8 Pat. 569 = A.I.R. 1929 Pat 209 (b) (210).**

BENGAL LAND REVENUE SETTLEMENT REGULATION (VII OF 1822).

———*Diara Deputy Collector—Power to assessment.*

A Diara Deputy Collector acting under Regulation VII of 1822 has no power to assess rents of the tenants but can only record rents that are being paid by the tenants. (*Cuming and Page, JJ.*) SRISH CHANDRA RAY *v.* GAHARALI TALUKDAR. **97 I.C. 603= A.I.R. 1927 Cal. 148.**

Object.

———*Entries in Khatians—Legal Effect.*

The intention of a settlement under Reg. VII of 1822 is not to touch or disturb the possession of the lands but rather to respect such possession and the entries in the Khatians prepared for the purposes of a settlement under the Regulation do not confer a title on the person in whose favour such entries are made but only record the fact of their possession to serve as a basis for calculation of the revenue. (*Mukerji and Mitter, JJ.*) KADER BUX PATWARI *v.* SALIMUDDI HAZI. **50 C.L.J. 543=A.I.R. 1930 Cal. 267.**

———*Rubkar—Evidentiary value of.*

The recording of the rate of rent in the rubkars being a duty imposed by the Regulation itself, the matters so recorded are evidence which the Court may take into consideration in settling the question of rent. (*Dawson Miller, C. J. and Mullick, J.*) DEO NARAYAN SINGH *v.* DWARKA PRASAD. **109 I. C. 136= 9 P. L. T. 679=A. I. R. 1928 Pat. 429.**

———A rubkar is not a judicial decision which can have the force of *res judicata*. Though entitled to great weight as being made by a settlement officer, it is in the last resort only a piece of evidence, however strong. (*Daniels J.*) JAGANNATH PRASAD *v.* MAHESH PRASAD. **99 I. C. 726=A. I. R. 1927 All. 245.**

S. 9—Enhancement of Rent.

———*Chur lands—Temporary settlement.*

In the case of temporary settled estates such as chur land, the revenue authorities may reassess the revenue and resettle the estate with effect from the expiry of a previous term of settlement. To enhance the rents, proceedings under Part II of Ch. X of S. 52 of the B. T. Act should be taken. (*Richardson and Suhrawardy, JJ.*) ASHUTOSH CHAKRABARTY *v.* DWARIKA NATH MOTA. **36 C. L. J. 192=70 I. C. 119= 27 C. W. N. 121=A. I. R. 1923 Cal. 207.**

S. 9—Power of Collector.

———The Collector is not empowered to determine any rent so as to fix the under-tenant with liability to pay it to the landlord, but, he can only record existing rights. (*Walmsley and Ghose, JJ.* DHIRENDRA CHANDRA *v.* HABIBULLAH. **29 C. W. N. 505= 87 I. C. 442=A. I. R. 1925 Cal. 758.**

BENGAL LICENSED WAREHOUSE AND FIRE BRIGADE ACT (I of 1893).

S. 7.—Application.

———*Application for license not disposed of—Effect.*

If an application for license under the Act is not disposed of within thirty days from the date of receipt by the Chairman, the applicant is under S. 7 exempted from liability so long as there is no final refusal (*Newbould and Suhrawardy, JJ.*) LEGAL REMEMBRANCER, BENGAL, *v.* MULL. **25 C. W. N. 960=66 I. C. 428= 34 C. L. J. 203= A. I. R 1921 Cal. 469.**

S. 15—Refusal of license.

———*Order by Vice Chairman—Legality.*

Refusal of an application for license to use any building as a warehouse must be in writing and signed by the Chairman of the Commissioners and an order by the Vice-Chairman is no refusal under S. 15 of the Act. (*Newbould and Suhrawardy, JJ.*) LEGAL REMEMBRANCER, BENGAL *v.* MULL. **25 C.W.N. 960=66 I. C. 428= 34 C. L. J. 203=A. I. R. 1921 Cal. 469.**

BENGAL LOCAL SELF-GOVERNMENT ACT (III OF 1885).

Jurisdiction.

———*Election Rules 1 and 42—Civil Court has jurisdiction to set aside an election.*

Where a person is elected as a member of the Local Board, a civil Court has jurisdiction to entertain a suit to set aside the election as the decision by the presiding officer under R. 42 is not final. (*Mitter and Mullick, JJ.*) SIBESH CHANDRA *v.* BIBI BHUSAN ROY. **56 Cal. 52=116 I. C. 372= A. I. R. 1928 Cal 750.**

Ss. 139. 140 and 78—Encroachments.

———*Bye-law prohibiting encroachment—Imposition of penalty—Validity.*

The District Board has impliedly, if not expressly, power to provide for, by its by-laws, the punishment for encroachments over its roads in order to carry out the provisions of S. 78 of the Act, namely, to provide for the repair and maintenance of its road. 11 C. W. N. 175 (notes) Diss. (*Jwala Prasad and Adami, JJ.*) MAHESH SHAH *v.* DARBARI HUSSAIN. **1 Pat. 251=65 I. C. 571=3 Pat. L. T. 464= 23 Cr. L. J. 139=A. I. R. 1922 Pat 545.**

BENGAL MUNICIPAL ACT (III OF 1884).

Presence of Candidate.

———*Candidate for election has no right to be present at the recording of votes.*

A candidate for election as Municipal Commissioner is not entitled to be present in that part of the polling station where votes are actually recorded. Rights of candidates or electors which are rights expressly given by statute do not carry with them any rights under natural law not given by statutory law. (1875) L. R. 10 C. P. 209 Dist. (*Newbould and B. B. Ghose JJ*). HOWRAH MUNICIPALITY *v.* HARIPADA ROY CHOWDHURY. **82 I. C. 345=28 C. W. N. 892= A. I. R. 1924 Cal. 1070.**

Prosecution.

———*Sanction to prosecute for one offence—Conviction for another offence is illegal.*

A Magistrate cannot convict persons of an alternative or disjunctive offence mentioned in bye-law No. 80 when sanction was by the Municipal authorities to prosecute the accused in connection with another offence. Where sanction was given to prosecute for the offence of "singing with a high sounding instrument" a conviction for the offence of "playing on a drum" was held illegal. (*Bucknill, J.*) RAHIM *v.* EMPEROR. **72 I. C. 894=1 Pat. L. R. Cr. 45= 24 Cr. L. J. 478=A. I. R. 1924 Pat. 377.**

S. 6 (3)—Basis.

———*Occupation is the basis.*

A holding means land held by an occupier under one title and one set of boundaries, that is to say, it is on the basis of occupation and not on the basis of ownership, the question as to whether certain premises form the holding or not is to be determined: 12 C. L. J. 410 Ref. (*Mukerji and Graham, JJ.*) CHAIRMAN, MUNICIPAL CORPORATION, FARIDPUR *v.* GOUR GOPAL. **101 I. C. 755= A. I. R. 1927 Cal. 592.**

S. 6 (3)—Meaning of.

———*Expression "surrounded by one set of boundaries" illustrated.*

There were two plots of land belonging to plaintiff with a building on each of them. One of these buildings was divided into three compartments and the other into two, and these five compartments were in the occupation of five different tenants. On the north as well as on the south of the buildings there were two plots of land which formed open spaces which were not divided and they were common to all the compartments in the buildings.

Held, that it cannot be said that the premises are surrounded by one set of boundaries within S. 6 (3). (*Mukerji and Graham, JJ.*) CHAIRMAN, MUNICIPAL CORPORATION, FARIDPUR *v.* GOUR GOPAL.
101 I. C. 755 = A. I. R. 1927 Cal. 592.

Ss. 6 (3) and 85 A—Separate Assessment.

———*Adjacent plots held by same person as owner, one by survivorship and the other by purchase constitute one holding—Separate assessments are not legal.*

Where two adjacent plots of land are held by the same person as owner, they must be deemed to be held by him under one title and constitute one holding within the meaning of S. 6 (3). It makes no difference that one plot was acquired by survivorship and the other by purchase. In such a case the owner of the plots is liable only to an assessment in respect of the plots under S. 85-A of the Act and not to separate assessments in respect of each plot. (*Mullick and Ross, JJ.*) TULSHI PRASAD RAM *v.* CHAIRMAN, DUMRAON MUNICIPALITY. **7 P. L. T. 35 = 90 I. C. 74 = A. I. R. 1926 Pat. 181.**

S. 15 (2)—Joint Hindu family.

———*Father and son, members of Hindu joint family, jointly assessed are both qualified voters.*

Where the income of the son along with that of his father is assessed for purposes of income-tax, both are qualified to vote under Section 15 (2). The fact that the son and the father were members of a Hindu joint family and the income of both were jointly assessed does not take away the son's right. 38 Cal. 501 Dist. (*Shamsul Huda, J*). CHARU CHANDRA *v.* CHAIRMAN, MUNICIPALITY, FARIDPUR.
26 C. W. N. 412 = 70 I. C. 154 = A. I. R. 1921 Cal. 782.

S. 15—List of Voters.

———*Rules under Municipal Act—Name must appear in voter's list to entitle a person to be elected as commissioner.*

Unless the name of the candidate is entered in the list of voters he is not entitled to vote for election nor is he qualified to be elected. 22 Cal. 717 Dist. A. I. R. 1923 Cal. 467. Foll. (*Suhrawardy and Mukerji, JJ.*) NISHI KANTA CHAUDHURY *v.* GOPESHWAR CHATTERJEE.
53 Cal. 570 = 44 C. L. J. 31 = 30 C. W. N. 977 = 96 I. C. 620 = A. I. R. 1926 Cal. 1070.

S. 15 (3)—Occupation.

———*Son living in father's house as son and not being in exclusive occupation is not qualified to vote under S.* 15 (3).

Son living in a house belonging to his father as the son of his father and not as an owner cannot be regarded as being in occupation within the meaning of Section 15 of the Act. *Macdonell* v. *Dickson,* 16 R. 143 ; 2 C. W. N. 586 and 15 C.L.J. 689, Foll. (*Shamsul Huda, J*). CHARU CHANDRA *v.* CHAIRMAN, MUNICIPALITY, FARIDPUR. **26 C. W. N. 412 = 70 I. C. 154 = A. I. R. 1921 Cal. 782.**

S. 15—Persons.

———*Members of Hindu joint family are "persons."*

There being no provision in the Bengal Municipal Act that a person otherwise qualified to vote is not entitled to vote merely because he is a member of a joint Hindu family, the members of a Hindu joint family are "persons" within the meaning of Section 15 of the Municipal Act. (*Chatterjea and Suhrawardy, JJ.*) MUNICIPAL COMMISSIONERS, DACCA *v.* KRISHNA DAS NAG. **36 C. L. J. 189 = 64 I. C. 168 = A. I. R. 1921 Cal. 473.**

S. 15—Scope.

———*S.* 15 *is concerned with electoral franchise and not with taxation.*

Sections 85 and 15 do not relate to the same subject-matter. S. 15 is not concerned with the incidence of taxation but with qualifications for the electoral franchise. (*Page and Mallik, JJ.*) AGHORE NATH *v.* DWIJUPADA CHATTERJEE. **55 Cal. 1266 = 32 C. W. N. 940 = 115 I. C. 90 = A. I. R. 1928 Cal. 832.**

S. 15 and Rr. 6 and 11—Validity.

———*Rr.* 6 *and* 11 *are* intra vires—*Proviso to R.* 11 *applies to General Elections.*

S. 15 authorises the Local Government to frame rules in all matters necessary to the proper conduct of elections. In view of the explanation to S. 15 it might possibly be said that it is open to the Local Government subject to the provisions of S. 14 to provide by rule that entry in the register of voters shall by itself be a sufficient qualification. But in the case of persons possessing the qualification required by the proviso to S. 15 or by the rules framed under such section entry in the register is to be regarded not so much as in itself a qualification but as the evidenee upon which the polling officer must proceed. For this purpose the register is conclusive and if the result is that a duly qualified person finds himself debarred from voting, the conclusion to be drawn is not that Government by rule has improperly deprived him of his rights, but that he himself has failed to furnish the necessary evidence of his title. The proviso to R. 11 applies not only to the rectification of the register for the purposes of bye-elections but also to general elections. Subject to this interpretation of the proviso to R. 11 both rules 6 and 11 are *intra vires.* (*Teunon and Newbould, JJ.*). ATANI HAQ *v.* MANICKTALA MUNICIPALITY.
48 Cal. 378 = A. I. R. 1921 Cal. 85.

S. 30 (as amended) and S. 34—Effect of.

———*Amendment of S.* 30 *in* 1894 *empowered Commissioners to dispose of roads—They have however no such power over bridges, tanks, ghats, etc., even now, since the soil under them is not their property.*

Before the Amendment of 1894 the Commissioners had no power to dispose of the roads but since the amendment they have obtained a proprietary right over the roads, by becoming owners of the soil and can now dispose of the roads. But they cannot even now dispose of bridges, tanks, ghats, etc., because they have no proprietary right over the soil beneath them. (*Suhrawardy and Cammiade, JJ.*) NUDDEA MILLS CO., LTD. *v.* SIDHESWAR CHATTERJEE.
56 Cal. 280 = 115 I. C. 515 = 32 C. W. N. 1055 = A. I. R. 1929 Cal. 33.

Ss. 30, 234 and 235—Scope.

———*Municipality has no right to levy rent, etc., from the persons exposing goods for sale on the Municipal road—Preventing lessee of such rents from realising it is no offence—Penal Code, S.* 143.

S. 234 of the Municipal Act is a section of emergency referring to deposit of moveable property on the roadside. The right of the Municipality as to the road is governed by S. 30 by which the property in roads is vested in the Commissioners for the purposes given in the Act. Under S. 30 Municipality has no right to lease out its rights for the purpose of carrying on shops or exposing goods for sale. There is no right to collect rent, toll or any tax, unless there is a contract creating the relationship of landlord and tenant between the parties. If the provisions of S. 335 of the Municipal Act do not apply to any place like Lohardagga, accused who prevented the lessee of the Municipality of Lohardagga from realising rent from the shop-keepers or persons exposing their goods for sale along the road, not on a Municipal market nor on a market to which the provisions of Part X applied were not guilty of an offence under S. 143, Penal Code. (*Jwala, Prasad, J.*) DHUNMUN CHOWDHURY *v.* EMPEROR.

3 Pat. L. T. 339 = 25 Cr. L. J. 114 = 76 I. C. 178 = A. I. R. 1922 Pat. 286.

S. 34—Effect of.

———*Amendment of S. 30 in 1894 empowered Commissioners to dispose of roads —They have however no such power over bridges, tanks, ghats etc., even now, since the soil under them is not their property.*

Before the amendment of 1894, the Commissioners had no power to dispose of the roads but since the amendment they have obtained a proprietary right over the roads, by becoming owners of the soil and can now dispose of the roads. But they cannot even now dispose of bridges, tanks, ghats, etc., because they have no proprietary right over the soil beneath them. (*Suhrawardy and Cammiade, JJ.*) NUDDEA MILLS CO., LTD. *v.* SIDHESWAR CHATTERJEE. **56 Cal. 280 = 32 C.W.N. 1055 = 115 I.C. 515 = A.I.R. 1929 Cal. 33.**

S. 34—'Land'.

———*'Land' includes roads.*

There is no sufficient reason why the ordinary significance of the word "land" should be abridged by excluding roads only. (*Suhrawardy and Cammiade, JJ.*) NUDDEA MILLS CO., LTD. *v.* SIDHESWAR CHATTERJEE. **56 Cal. 280 = 32 C. W. N. 1055 = 115 I. C. 515 = A. I. R. 1929 Cal. 33.**

S. 34—Powers of Commissioners.

———*Greater portion of road in question being closed and becoming useless to general public—Remaining small portion useful only to plaintiff—Municipality selling this portion of the road no longer required—Validity.*

The road in question as a road had become useless to the general public. The greater portion of it had been closed and was of no use, only a small portion still remained. It could only be used by the plaintiff and votaries of the temple to which it led.

Held, that in these circumstances Municipal Commissioners cannot be said to have acted beyond the power vested in them by the law in regarding this portion of the road as no longer required for the purposes of the Act and selling it. They did not certainly do something prohibited by law or inconsistent with the Act. (*Suhrawardy and Cammiade, JJ.*) NUDDEA MILLS CO., LTD. *v.* SIDDESHWAR CHATTERJEE.

56 Cal. 280 = 32 C. W. N. 1055 = 115 I. C. 515 = A. I. R. 1929 Cal. 33.

———*Commissioners can stop or divert or dispose of road for purposes of Act.*

There is nothing in the Act which prohibits the Commissioners to stop or divert a road or to dispose of a road. The only limitation to their power given by the Act is that they must exercise such power only for the purposes of the Act. 1 All. 557, Foll. 2 Cal. 425, not *Foll.* (*Suhrawardy and Cammiade, JJ.*) NUDDEA MILLS CO., LTD. *v.* SIDHESWAR CHATTERJEE.

56 Cal. 280 = 32 C. W. N. 1055 = 115 I. C. 515 = A. I. R. 1929 Cal. 33.

S. 34—Scope.

The power of the Commissioners to transfer lands including roads &c., must be exercised for the purposes of the Act, namely, the improvement of the Municipality. (*Suhrawardy and Cammiade, JJ.*) NUDDEA MILLS CO., LTD. *v.* SIDHESWAR CHATTERJEE.

56 Cal. 280 = 32 C. W. N. 1055 = 115 I. C. 515 = A. I. R. 1929 Cal. 33.

S. 37—Contracts.

———*Contract signed by Chairman and Vice-Chairman—Rule is satisfied—But Contract is subject to provisions of T. P. and Registration Acts.*

S. 37 requires that every contract of value exceeding Rs. 500 must fulfil four requirements namely, it must be (1) sanctioned by the Commissioners at a meeting, (2) put in writing, (3) signed by the Chairman or Vice-Chairman and at least one Commissioner and (4) sealed with the common seal. Where at the time of execution of the indenture, the Vice-Chairman who was aware of the contents of the deed affixed his signature thereto, in his capacity as a Commissioner qualified to be an executant, in addition to the Chairman and in fulfilment of the requirement of S. 37, *Held* the indenture was executed in conformity with S. 37; but this does not necessarily show that the deed became forthwith operative against the Commissioners; for the contract may be such as is subject to the operation of other statutory provisions, for instance, those of the Transfer of Property Act and in the Indian Registration Act. (*Mookerjee and Chotzner, JJ.*) J AND D EZEKEIL CO. *v.* ANNODA CHARANSEN. **50 Cal. 180 = 70 I. C. 794 = 36 Cal. L. J. 109 = A. I. R. 1923 Cal. 35.**

Ss. 37 and 44—Lease.

———*Lease by Chairman alone is* ultra vires *and could not be certified by acceptance of rent.*

A lease by the Chairman would be void, unless the lease had been sanctioned by the Commissioners at a meeting, and such a transaction being *ultra vires* could not be validated by ratification such as by acceptance of rent. The burden clearly lies upon the lessee to establish that the requirements of the Statute were fulfilled. (*Mookerjee and Chotzner, JJ.*) AKSHAY KUMAR CHAND *v.* COMMISSIONERS OF BOGRA MUNICIPALITY. **37 C. L. J. 589 = 75 I. C. 506 = A. I. R. 1923 Cal. 675.**

S. 44—Meaning.

———*Powers of Commissioners and of Commissioners at a meeting.*

A distinction is drawn between acts done by "the Commissioners" and acts done by "the Commissioners at a meeting". (*Suhrawardy and Graham, JJ.*) HOWRAH MUNICIPALITY *v.* RAMSAROOP SEROUGEE. **95 I. C. 726 = A. I. R 1926 Cal. 1073.**

S. 45—Delegation of power.

———*Rules under the Act—Chairman has power to delegate his power even under the rules.*

The Chairman has power to delegate his powers, not only under the Act, but under the rules as well; the rules forming an integral part of the Act. (*Mukerji and Graham, JJ.*) BHUBAN MOHAN *v.* CHAIRMAN, DACCA MUNICIPALITY. **31 C. W. N. 926 = 103 I. C. 890 = A. I. R 1927 Cal. 704.**

——*Powers that can be delegated are only those under the Municipal Act.*

Although under Section 45 of the Bengal Municipal Act, (III B.C. of 1884), the Chairman may delegate his duties or powers to the Vice-Chairman, the powers he can so delegate are the powers as defined by that Act. He cannot by virtue of that section delegate to the Vice-Chairman his powers under the Licensed Warehouse and Fire-Brigade Act. That Act provides in Section 9 for the delegation of the powers of the Chairman to a special committee but makes no provision for delegation to the Vice-Chairman. (*Newbould and Suhrawardy, JJ.*) SUPDT. AND REMEMBRANCER OF LEGAL AFFAIRS *v.* J. S. MULL. **34 C. L. J. 203 = 25 C. W. N. 960 = 66 I. C. 428 = A. I. R. 1921 Cal. 469.**

Ss. 45 and 204—Delegation of power.

——*Delegation of Chairman's power to institute "proceeding" to Vice-Chairman includes power to apply under S. 204 and issue a notice.*

The word "prosecution" must be taken as being used in a general sense and as covering all matters incidental to, or connected with, prosecutions, and therefore when the delegation order by the Chairman to Vice Chairman speaks of powers in regard to suits and prosecutions, it clearly means not only the actual institution of suits and prosecutions but matters relating thereto including an application and a notice under S. 204. (*Suhrawardy and Graham, JJ.*) CHAIRMAN, HOWRAH MUNICIPALITY *v.* RAMSARUP SEROUGEE. **95 I. C. 726 = A. I. R. 1926 Cal. 1073.**

S. 60 —Appeal.

——*Municipal servant—Conviction—Appeal—District Magistrate—When debarred from hearing.*

A District Magistrate who has merely received proceedings of a Municipality, is not debarred from hearing an appeal against the conviction of a Municipal servant unless he is in any way concerned with the Municipality. (*Jwala Prasad, J.*) TEJ NARAIN SINGH *v.* EMPEROR. **3 U.P.L.R. (Pat.) 54 = 61 I.C. 515 = 22 Cr. L. J. 387.**

Ss. 85 and 87—Assessable income.

——*Income earned outside but spent within Municipality is assessable.*

The words "within the Municipality" govern both "circumstances" and "property." The word "circumstances" must be interpreted to be in substance the equivalent of "means." Income though earned outside Municipality is liable to assessment if spent and enjoyed within the Municipality. 27 Cal. 849, Dist. (*Teunon and Newbould, JJ.*) CHAIRMAN, JAYNAGAR MUNICIPALITY *v.* SAILABULA DUTT. **48 Cal. 443 = 25 C. W. N 47 = 61 I. C. 511 = A. I. R. 1921 Cal. 485.**

Ss. 85 (b) and 101—Assessment.

——*Commissioners' accepting valuation made by guess and in entire disregard of S.* 101 *is* ultra vires *and such assessment cannot be sustained.*

If no attempt is made to ascertain the value of the holding and Commissioners accept the valuation officer's method of valuation knowing full well that it was based on the estimated cost of the building in entire disregard of principles which the valuation officers were bound by law to adopt, the Commissioners must be deemed to have acted *ultra vires* and the assessment cannot be sustained. 11 Cal 275 at p. 281 and 37 Cal. 374, Foll.

A holding in suit was debuttar property held by the plaintiff as shebait. It was occupied by temples and some buildings which were not let. Holdings of

similar nature in the vicinity had been let and some of them changed hands. At the time of the valuation of the holding for the purpose of S. 85 (*b*) all that the valuation officer did was to estimate by guess what he conceived to be the cost of erecting the buildings that he found on the holding and settled the valuation on the estimate so made. Commissioner accepted the valuation officer's basis of valuation.

Held that the Commissioners were not justified in departing from rule of assessment land down in S. 101 and the holding ought to have been assessed according to the provision of the Act on the gross annual rent at which the holding may be reasonably expected to let. (*Page and Patterson, JJ.*). NARAYAN CHANDRA DUTT *v.* CHAIRMAN, MUNICIPAL COMMRS. PANIHATI. **57 Cal. 162 = 50 C. L J. 537 = 34 C.W.N. 155 = 124 I. C. 483 = A. I. R. 1930 Cal. 38.**

S. 85—Circumstances.

——*Word "circumstances" is not intended to restrict but to widen scope of section— Although it is not easy to define circumstances, still amounts passing through municipal limits and available at any moment to persons taxed, and their being wealthy zamindars cannot be altogether ignored—Words.*

The introduction of the word "circumstances" in the section is not intended to restrict the term "property" but to widen the scope of the section. And although it is not easy to define what the "circumstances" are, still the amounts which pass through the limits of the Municipality and are available to the persons taxed at any moment and the fact that the persons are wealthy zamindars, cannot be altogether ignored while estimating the "circumstances and property"; 35 Cal. 859, Rel. on.; Other cases referred. (*Mukerji and Mallick, JJ.*) TARAK GOVINDA CHOWDURY *v.* INDU JYOTI MAJUMDAR. **49 C. L. J. 383 = 33 C. W. N. 684 = A. I. R. 1929 Cal. 452.**

Ss. 85 (a) and 87 (d)—Companies.

——*Assessment on tea companies—Head Office situated within Municipality—Income from tea gardens outside—Companies can be assessed by Municipality on basis of such income—Several companies jointly occupying one holding assessed separately — Assessment is not* ultra vires—*Assessment list under S. 87, cl. (d) defective—Defect is one of form and does not vitiate assessment.*

What constitutes the circumstances and property of a person within the Municipality must in a large measure depend upon the facts of the particular case. It is immaterial that the tea is grown in the interior of the district, beyond the Municipal limits and is sold in a far distant market. The fundamental fact remains that though the original source of the income may be outside the local limits of the Municipality, the entire income is brought to be spent and enjoyed within the municipality. The term "circumstances' in S. 85 is equivalent to "means". There can be no room for doubt that the sale proceeds of the tea, when they are brought within the Municipal limits and are placed in the Bank to the credit of the companies, may without undue strain in the language, be described as their "circumstances and property" that is, "their means and property" within the Municipality, and may consequently be taken to furnish a just measure of their liability to assessment under S. 85 (*a*) (1911) 39 Cal. 141 approved.

The tax imposed is the tax upon the persons contemplated by S. 85 (*a*) and not the tax upon a holding prescribed by S. 85 (*b*). S. 85 (*a*) cannot plainly be limited in its application to a case where only one person occupies an entire holding. The language does not justify such a restricted interpretation ; and there is no good reason why in places where the personal tax is in operation, several persons occupying the same holding should not each be subject to assessment, according to their respective circumstances and property within the Municipality 2 C.W.N. 689, and 15 C.L.J. 689 referred to. If the tax is assessed on a person as occupier, it is plain that he does not cease to be occupier, because other persons are jointly in occupation with him.

Held ; further, that though the assessment list is defective inasmuch as it is not prepared in accordance with the provisions of S. 85 (*d*) this defect is only one of form and does not invalidate the assessment.

Per *Buckland, J.*—The companies undoubtedly are persons. They admittedly occupy holdings. There is nothing in the section which saves from liability because the occupation is joint. The tax is in the nature of a poll tax, leviable on persons. Not, however, merely as persons, but according to their circumstances and property within the Municipality. (*Mukerjee and Buckland, JJ.*) The Chairman, Jalpaiguri Municipality *v.* The Jalpaiguri Tea Co., Ltd, **64 I. C. 649 = 34 C. L. J. 283 = 26 C. W. N. 311 = A. I. R. 1922 Cal. 46.**

S. 85 (a)—Holding.

——"*Holding" does not mean a part of a holding.*

The term "holding" in S. 85 (*a*) bears the meaning attributed to it in S. (6) (3) of the Act, *viz*, "land held under due title or agreement and surrounded by one set of boundaries." It does not and cannot reasonably be construed to mean or include a part of a holding. 17 C.W.N. 812, Ref. (*Page and Mallik, JJ.*) Aghore Nath *v.* Dwijapada Chatterjee.
55 Cal. 1266 = 32 C. W. N. 940 = 115 I. C. 90 = A. I. R. 1928 Cal. 832.

S. 85 (a)—Liability to assessment.

——*Test for making a person liable to assessment for an occupation of "a holding" is the mode of user and not the length of occupation—Occupation by a servant must be ancillary to his duties.*

Occupation of a holding in order to render a person amenable to a personal tax imposed upon "persons occupying holdings" under S. 85 (*a*) connotes actual possession by the person liable to be assessed or by his servant or agent in furtherance of the duties which such servant or agent was engaged to perform for the assessee. Such possession must be beneficial to the assessee, it must be intended that the possession should be continuous and not merely casual or intermittent, and the assessee or joint assessees of the holding must be entitled to the exclusive use and enjoyment of the holding as of right and not on sufferance free from interference from outsiders and without the user and enjoyment being subject to a paramount right of regulation or control by the party who put them in possession or any other person : per *Denman, C. J.* in *In re Chelsea Waterworks*, 5 B. & D. Ad. 156 and per *Lord Hatherley* in *Cory* v. *Bristow*, (1871) 2 A.C. 272, Foll. It is the mode of user and not the length of the term that determines whether or not the occupation is such that the person occupying the holding is liable to assessment. In order to constitute an occupation as a servant it must be an occupation ancillary to the performance of the duties which the occupier was engaged to perform. Where a Headmaster of a High School resided for some time in the attached hostel with the permission of the School Committee and lived as an ordinary boarder under the Superintendent subject to the usual terms of boarding and lodging, but was not entitled to the use of any particular seat or bed

and was also liable to have his seat changed at any time as the Superintendent might direct.

Held, that the Headmaster did not occupy a holding within the meaning of S. 85 (*a*) and was not liable to be assessed and that his occupation was not occupation as a servant. (*Page and Mallick, JJ.*) Aghore Nath *v.* Dwijapada Chatterjee. **55 Cal. 1266 = 32 C. W. N. 940 = 115 I. C. 90 = A. I. R. 1928 Cal. 832.**

Ss. 85 (b) and 101—Meaning and effect.

——Meaning and the effect of Ss. 85 (*b*) and 101 is that in every case the rate is to be imposed on the annual value of the holding which is deemed to be the gross annual rent at which the holding may be reasonably expected to let, and the proviso is inserted in aid of the assessee, to lay down a maximum to prevent excessive assessments being made. *West Derby Union* v. *Metropolitan Life Assurance Society*, (1897) A. C. 647, Ref. (*Page and Patterson, JJ.*) Narayan Chandra Dutt *v.* Chairman, Municipal Commissioners, Panihati. **57 Cal. 162 = 50 C. L. J. 537 = 34 C. W. N. 155 = A. I. R. 1930 Cal. 38.**

S. 85 (a)—Occupiers.

——*Defendants holding ijara of a market place within Municipality and issuing licenses to others to sell wares on the land—Ijaradars are the persons who really occupy holding within Municipality.*

The petitioners were ijaradars of a certain place described as a cattle market, within the Municipality and they made their collection of rent and carried on their business on the holding in respect of which the assessment had been made although they resided elsewhere. On that holding a cattle market was held on hat days and the holding remained vacant on other days. The persons who sold their wares in the market were sort of licensees under petitioners. Municipality brought a suit against the petitioners to recover tax under S. 85 (*a*). It was contended that this personal tax could not be levied as they were not occupiers of the holding.

Held, that the ijaradars were the persons who really occupied the holding within the Municipality. (*Mitter, J.*) Prodip Singh Jamadar *v.* Ramani Mohan Sen. **114 I. C. 94 = 32 C. W. N. 1170 = A. I. R. 1928 Cal. 591.**

S. 85—Plea under.

——*C. P. C., S.* 100.

The question of the validity of the imposition of the personal tax under S. 85, Municipal Act, cannot be raised for the first time in the argument in the High Court. (*Rankin, C. J. and Page, J.*) Faridpur Loan Office, Ltd. *v.* Nirode Krishna Roy.
56 Cal. 462 = 118 I. C. 864 = A. I. R. 1929 Cal. 452.

S. 85 (a)—Property.

——*Amount deposited in Post Office Savings Bank and other savings banks in municipal area is "property within Municipality."*

Amount deposited in the Post Office Savings Bank and in other savings banks in the Municipal area is "property within the Municipality" within the meaning of the words as used in S. 85 (*a*). (*Mukerji and Mallik, JJ.*) Tarak Govinda Chowdhury *v.* Indu Jyoti Majumdur. **49 C. L. J. 383 = 33 C. W. N. 684 = A. I. R. 1929 Cal. 452.**

S. 85 (a)—Scope.

——*Holding claimed jointly—Tax is to be assessed on each separately according to circumstances and property of each within Municipality.*

Whether the holding is claimed jointly by two or more persons Cl. (*a*) suggests that a tax is to be assessed on each separately according to the circumstances and property of each within the Municipality. A. I. R. 1922 Cal. 46, Foll. (*Mitter, J.*) PRODIP SINGH *v.* RAMANI MOHAN. **32 C. W. N. 1170 = 114 I. C. 94 = A. I. R. 1928 Cal. 591.**

S. 85—Separate assessment.

——*Separate occupiers of separate parts of one holding cannot be assessed for portions in their occupation.*

There cannot be separate occupiers of separate parts of one and the same holding assessable to tax in respect of portions that they respectively occupy. (*Page and Mallik, JJ.*) AGHORE NATH *v.* DWIJAPADA CHATTERJEE. **55 Cal. 1266 = 115 I. C. 90 = 32 C. W. N. 940 = A. I. R. 1928 Cal. 832.**

S. 85 (a)—Tests.

——*Assessee's means and circumstances within the Municipality only should be considered—Test is not what is spent but what is earned.*

For the purpose of assessment the Municipality cannot take into account the "circumstances and property" of the assessee outside the Municipality, but must restrict itself to the "circumstances and property," that is, the "means and property" within the Municipality and, further, to measure the means and property within the Municipality, the test is not what is spent, but what is earned within the Muncipality. (*Mookerjee, A. C. J. and Fletcher, J.*) DEBENDRA NATH RAI *v.* CHAIRMAN, TAKI MUNICIPALITY. **25 C. W. N. 45 = 60 I. C. 284 = A. I. R. 1921 Cal. 567.**

S. 101, Proviso 3—Machinery.

——*Raised reservoir for storing water is not a machinery.*

The steel tank with its supporting structure for storage of water is not 'machinery' within the meaning of proviso 3, S 101 of the Bengal Municipal Act. In assessing the plot on which it stands, the value of the tank and its supporting structure cannot be excluded from consideration. The determination in any given case of what is or is not machinery must to a large extent depend upon the special facts of that case. Generally the word "machinery" when used in ordinary language, *prima facie* means some mechanical contrivances, which by themselves or in combination with one or more other mechanical contrivances, by the combined movement and inter-dependent operation of their respective parts generate power or evoke, modify, apply or direct natural force with the object in each case of effecting a definite and specific result. (70 L. T. 217, 218; (37 New Zealand Law Report 1028) Distinguished. (1921, A. C. 521) Referred to (*Lord Atkinson*). CORPORATION OF CALCUTTA *v.* CHAIRMAN OF THE COSSIPORE AND CHITPORE MUNICIPALITY. **49 Cal. 190 = 48 I. A. 435 = 67 I.C. 926 = 15 M. L. W. 253 = 26 C. W. N. 761 = A. I. R. 1922 P. C. 27 (P. C.).**

S. 101—Measure of rateable value.

——Measure of rateable value is defined by statute as the rent which may reasonably be expected; interests on costs or on capital value cannot be substituted for the statutory measure but can be looked at as *prima facie* evidence in order to answer the question of fact, what rent a tenant may reasonably be expected to pay. And where the hereditament is incapable of being compared with other hereditaments which form the subject of letting the amount of capital expended is admissible in evidence as a criterion by which to estimate the rent. *The Queen* v. *School Board for London* 55 L. J. M. C. 55 and on appeal 17 Q. B. D. 738; *Liverpool Corporation* v. *Llanfyllin Assessment Committee*, (1899) 8 Q. B. 14; *Liverpool Corporation* v. *Chorley Assessment Committee and Whitnell Overseers* (1912) K. B. 270, on appeal 1913 A. C. 197 and *Metropolitan Water Board* v. *Chertsay Union*, (1916) 1 A. C. 337, Ref. (*Page and Patterson, JJ.*) NARAYAN CHANDRA DUTT *v.* CHAIRMAN, MUNICIPAL COMMISSIONERS, PANIHATI. **57 Cal. 162 = 50 C.L.J. 537 = 34 C.W.N. 155 = A.I.R. 1930 Cal. 38.**

S. 102—New valuation.

——*Old percentage remains in force unless it is rescinded by the Commissioners and some other percentage fixed.*

Under S. 102 a percentage once fixed remains in force in spite of new valuation until the order of the commissioners determining such percentage is rescinded and until the commissioners at a meeting determine some other percentage on the valuation of the holdings at which the rate will be levied from the beginning of the next year. (*Lord Carson.*) BHUBAN MOHAN BASALL *v.* CHAIRMAN OF THE MUNICIPALITY, DACCA. **119 I. C. 622 = 50 C.L. J. 149 = 33 C. W. N. 1039 = A. I. R. 1929 P. C. 272 (P. C.).**

Ss. 102 and 103—New Valuation.

——*Re-valuation of holdings without determining percentage rate afresh is not* ultra vires.

The rate fixed continues unchanged and is to be considered as the rate for the year until altered. There is no provision in the Act which provides that every time there is a fresh valuation there must be a formal meeting to fix the percentage even though the Commissioners intended the same percentage to continue. (*Cuming and B. B. Ghose, JJ.*) BHUBAN MOHAN *v.* DACCA MUNICIPALITY. **53 Cal. 453 = 30 C. W. N. 405 = 44 C. L. J. 275 = 94 I.C. 231 = A.I.R. 1926 Cal. 607.**

Ss. 114 & 113—Reference.

——*Objection to assessment disposed of without reference under S. 114—Disposal is* ultra vires—*Subsequent proceedings regarding assessment and collection are also* ultra vires.

Where an application objecting to the assessment is not referred to Commissioners as provided by S. 114, all the subsequent proceedings with regard to assessment and realization of taxes are *ultra vires* and the applicant is entitled to relief in respect thereof. The Municipal authority after acting *ultra vires* in not disposing of the objection to the original assessment under S. 113, cannot protect themselves by making a fresh assessment leaving the original objection to the assessability of the holding undisposed of. The two assessments cannot be treated independently. (*Ross and Kulwant Sahay, JJ.*) CHAIRMAN OF THE TIKARI MUNICIPALITY *v.* ALAM ARA BEGUM. **7 P. L. T. 804 = 96 I. C. 444 = A. I. R. 1926 Pat. 547.**

S. 202—Applicability.

——*Dispute as to title—High Court can interfere in revision.*

S. 202 of the Act cannot be applied where there is a dispute between any person and the Municipality with regard to the title to any land. Such a dispute must be decided in the ordinary way by a Civil Court. An order by a Magistrate under S. 202 of the Act is a judicial proceeding and the High Court has power to revise such an order. (*N.R. Chatterjea and Cuming, JJ.*) ALOKE MOHAN SAHA *v.* NARAYANAGANJ MUNICIPALITY. **59 I C. 137 = 22 Cr. L. J. 25 (Cal.).**

S. 202—Nature of Proceedings.

———*Proceeding under the section is a judicial proceeding which can be revised by High Court.*

An order made by a Magistrate under S. 202 of the Bengal Municipal Act, 1884, is a judicial proceeding and the High Court has power to revise the order. (*Newbould and B. B. Ghose, JJ.*) NABADWIP MUNICIPALITY *v.* PURNA CHANDRA MUKERJI. **88 I.C. 862 = 52 Cal 670 = 41 C. L. J. 611 = 29 C. W. N. 817 = 26 Cr. L.J. 1246 = A. I. R. 1925 Cal. 934.**

———*Proceedings under the section are not criminal—No procedure is given by the section—Application of C. P. Code, is not wrong.*

A Magistrate exercising his power under S. 202 is not engaged in a criminal proceeding. No procedure is prescribed by the section. He would not be wrong in following, so far as they seem applicable, the provisions of the Code of Civil Procedure. (*Newbould and B. B. Ghose, JJ.*) NABADWIP MUNICIPALITY *v.* PURNA CHANDRA MUKERJI. **88 I. C. 862 = 52 Cal. 670 = 41 C.L.J. 611 = 29 C. W. N. 817 = 26 Cr.L.J 1246 = A. I. R. 1925 Cal. 934.**

S. 202—Procedure.

———*Orders under the section without hearing parties—Orders are illegal and must be set aside.*

The legislature do not intend to enable a Magistrate to deprive a person of his right to a civil action for acts done by the Commissioners in excess of their powers except by a judicial order passed after hearing the parties concerned. Where a Magistrate passed orders under S. 202 of the B. M. Act without giving the parties concerned an opportunity of being heard,

Held, that the orders were illegal since the Magistrate did not act judicially and that they must be set aside. (*Newbould and B. B. Ghose, JJ.*) NABADWIP MUNICIPALITY *z.* PURNA CHANDRA MUKERJI. **88 I. C. 862 = 52 Cal. 670 = 41 C. L. J. 611 = 29 C. W. N. 817 = 26 Cr.L. J. 1246 = A. I. R. 1925 Cal. 934.**

S. 209—Requisition.

———*Municipality accepting gift of land on condition of erecting fencing at their own cost—Donor is not guilty of breach of requisition.*

The accused was served with a requisition under S. 209 of the Municipal Act requiring him to cause a fence to be erected for the protection of passengers and pedestrians over the bank of a tank belonging to the accused. The accused disobeyed this requisition, his grounds being that in 1898 certain land on the side of the tank was made over by him to the municipality and conditions were imposed by him on the municipality at the time to the effect that if in future any fencing had to be erected or was required on the side of the tank the municipality would erect such a fencing at their own cost. In 1914, the municipality caused certain departmental estimates to be prepared for fencing and for acquiring the extra strip of land on the side of the tank but that inasmuch as the funds did not permit of this work being done at once the work was left in abeyance and in September, 1922, the requisition, referred to above, was served on the accused under S. 209 of the Bengal Municipal Act.

Held, that there is nothing in the Municipal Act itself which can remotely suggest that the municipality is incompetent to enter into a binding engagement of this description and therefore the Municipality is not in the circumstances of the particular case, competent to require the accused to cause a fencing to be erected at his own cost. (*C.C. Ghosh and Cuming, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* NARAYAN CHANDRA BANERJI. **38 C.L.J. 13 = 24 Cr.L.J. 680 = 73 I.C. 776 = A.I.R. 1924 Cal. 101.**

Ss. 237 & 241—Erections.

———*Building of a Chhapari is an erection requiring sanction—Sanction with reservation in the absence of rules under S. 241 is* ultra vires.

The building of the verandah is an erection or re-erection within the meaning of S. 237 of the Bengal Municipal Act, and, therefore, sanction is necessary. But unless rules are made under S. 241, the Municipality must either grant or refuse sanction without reservation; where no such rules are framed, a sanction with reservation is *ultra vires* and can be disregarded. (*Coutts and Macpherson, JJ.*) BRIJ BEHARI LAL *v.* CHAIRMAN, DALTONGANJ MUNICIPALITY. **1 Pat. 26 = 63 I.C. 355 = 3 Pat. L.T. 226 = 1921 P.H.C.C. 347 = A. I. R. 1922 Pat. 118.**

S. 238—Limitation.

———*"Within 15 days"—Time runs from commencement of building.*

There is absolutely nothing in the section to suggest that the period should run from the date on which the Commissioners have knowledge of the building and the words of the section are open to no other construction than that the period should run from the date of the commencement of the erection of the building. (*Coutts and Macpherson, JJ.*) RAMDHARI LAL *v.* CHAIRMAN OF THE PATNA MUNICIPALITY. **1 Pat. 42 = 69 I. C. 183 = 3 P. L. T. 779 = A. I. R. 1922 Pat. 484.**

Ss. 241 and 237—Erection of boundary wall.

———*Bye-law prohibiting erection of boundary wall is* ultra vires.

Erection of a wall apart from its erection as part of a scheme for the erection of the house itself, does not fall within S. 241 and a bye-law prohibiting the erection of a compound wall, is therefore *ultra vires* of the Municipality. (*Dass and Ross, JJ.*) BASANT KUMAR BOSE *v.* CHAIRMAN OF GIRIDIA MUNICIPALITY. **1 Pat. 44 = 63 I. C. 290 = 3 Pat. L. T. 143 = 1921 P. H. C. C. 349 = A. I. R. 1922 Pat. 56.**

S. 245—Scope.

———*Pucca building existing in a* bustee—*Block of huts in the* Bustee *can be dealt with.*

The Municipality is competent to deal with collections of blocks of huts in a *bustee* under S. 245 even though within the area of the *bustee* there may be pucca buildings. (*Suhrawardy and Duval, JJ.*) NARAYAN MUNJARI DASSI *v.* CHAIRMAN, HOWRAH MUNICIPALITY. **29 C. W.N. 445 = 86 I.C. 618 = A. I. R. 1925 Cal. 676.**

S. 261—Permanent structure.

———*'Kiln' points to a structure of permanent nature—Word not to be strained against defendant.*

The word 'kiln' points to a structure which is of a permanent nature. The words of the section ought not to be strained unduly against the defendant. If it had been intended to prohibit the manufacture of bricks not only by means of a kiln but also by means of the older system of clamp, it would have been sufficient for the Legislature to provide that no place shall be used without a license from the Commissioners for the purpose of making bricks, the words "no place shall be used as a kiln for making bricks" were advisedly used by the Legislature having regard to the ordinary meaning of the word "kiln" as distinguished from "clamps". (*Sanderson, C.J. and Panton, J.*) THE SUPERINTENDENT

AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* TRAILOKYA NATH CHATTERJEE.
49 Cal. 1014 = 72 I.C. 356 = 26 C.W.N. 926 = 36 C. L. J. 168 = 24 Cr. L. J. 356 = A.I.R. 1922 Cal. 194.

S. 261—Unwholesome smells.

———*Business not* per se *offensive but from which unwholesome smells arise—Section applies.*

Section 261, Bengal Municipal Act applies not only to a manufactory or business or trade *per se* offensive or unwholesome but it also covers the case of a manufactory or place of business from which offensive or unwholesome smells may arise. There is a clear distinction between the English and the Indian statutes, as the former apply only to manufactory or business *per se* offensive. *Withington Local Board of Health* v. *Corporation of Manchester* (1893) 2 Ch. 19; *Wanstead Local Board of Health* v. *William Hill.* 13 C. B. (N. S.) 479 Dist. (*Chatterjee and Panton, JJ.*) GOBINDA CHANDRA MULLICK *v.* THE CHAIRMAN OF THE HOOGHLI AND CHINSURA MUNICIPALITY.
26 C.W.N. 994 = 65 I.C. 518 = A.I.R. 1922 Cal. 99.

Ss. 261 and 273—"Wood".

———*"Wood" includes timber.*

Timber is clearly included in the term "wood" within the meaning of S. 261. (*Dawson Miller, C. J. and Coutts, J*). EMPEROR *v.* TAR MAHOMED JAN.
2 P.L.T. 722 = 63 I.C. 327 = 6 P.L.J. 363 = 22 Cr. L.J. 631 = A.I.R. 1921 Pat. 178.

Ss. 271 & 178—Prosecution under.

———*Objection filed to notice not properly disposed of—Prosecution under S. 271 is not justified.*

A prosecution under S. 271 of the Act is not justified unless the objection is disposed of according to terms of the law laid down under S. 178. A person need not comply with the orders mentioned in the notice under S. 178 if he has filed an objection. If the objection is decided in his favour then the notice is cancelled. If it is decided against him, then the decision cannot have the retrospective effect of punishing him for the default committed by him with respect to the first notice. (*Jwala Prasad, J.*) RAMPURTAP LAL *v.* BARH MUNICIPALITY.
3 P. L. T. 301 = 66 I. C. 417 = 23 Cr. L.J. 273 = A.I.R. 1922 Pat. 183.

Ss. 279 & 310—Liability of owner.

The Bengal Municipal Act provides that where there is more than one tenant the owner shall be liable for the Municipal rates for water and lighting, unless the tenants jointly hold the holding. The status of the tenants and their relationship, to each other and the extent of their holding are facts peculiarly within the knowledge of the landlord and it is for him to prove that the tenants are in joint occupation of the whole holding. (*Cuming, J.*) BISHNUPADA DEY *v.* CHAIRMAN OF THE MANIKTOLA MUNICIPALITY.
64 I. C 351 (Cal.)

Ss. 279 (3), 322 (1), 85 (d) & (f), 103 & 85 (b)—'Occupier.'

———*"Occupier" meaning of—Bare ownership is not enough.*

Bare ownership does not constitute rateable occupation; in order to constitute rateable occupation, there must be a use and enjoyment which is or is capable of being beneficial. (Case-law Referred). (*Mookerjee and Fletcher, JJ.*) SHAMSUDDIN *v.* CHAIRMAN, DACCA MUNICIPALITY.
40 C.L.J. 295 = 25 C.W.N. 282 = 60 I.C. 498 = A.I.R. 1921 Cal. 161.

S. 282—Civil Court.

———*Wrongly charged owner must apply under S. 113 and cannot go to civil courts at once.*

The Municipality may, owing to ignorance of the facts, assess the owner where they ought to assess the occupier and *vice versa.* The aggrieved person has his remedy under S. 113. which provides that a person who disputes his liability to be assessed may apply to the Commissioners under S. 113. Until the aggrieved person has exhausted the remedies which the Act provides he cannot invoke the assistance of the civil courts. (*Cuming and B. B. Ghose, JJ.*) BHUBAN MOHAN *v.* DACCA MUNICIPALITY.
53 Cal. 453 = 30 C.W.N. 405 = 44 C.L.J. 275 = 94 I.C. 231 = A.I.R. 1926 Cal. 607.

Ss. 290 to 293, 295 and 297—Rules under.

———*Rules framed by Local Government under S. 290 are not* ultra vires *and water supply can be cut off for non-payment of costs.*

Rules 4, 9 and 24 (*e*) framed by the Local Government for the Chittagong Municipality under S. 290 of the Bengal Municipal Act are *intra vires* and do not conflict with Ss. 295 and 297 of the same Act. The Municipality is, therefore, entitled to compel the occupier or owner of a house to pay for cost of water-meter to measure the amount of water consumed in the house or to cut off water supply for non-payment of the same. (*Chaudhuri and Cuming, JJ.*) NAGENDRA LAL DAS *v.* THE CHAIRMAN OF THE CHITTAGONG MUNICIPALITY. **47 Cal. 426 = 59 I. C. 340 = 27 C. W. N. 240.**

S. 339 and Chap. X—License.

———*A part proprietor is entitled to apply for a license.*

A part proprietor of a market is entitled to apply for a license under Chapter X of the Act. (*Suhrawardy and Chotzner, JJ.*) NIRPENDRA KUMAR DUTTA *v.* CHAIRMAN, HABIGANJ MUNICIPALITY. **85 I. C. 533 = A. I. R. 1926 Cal. 261.**

S. 340—Owner.

———*Owner does not mean entire body but any person entitled to any rent.*

The word "owner" as used in S. 340 does not mean the entire body of owners, but any person who is entitled to any rent or any portion of the rent or any kind of rent. 38 Cal. 501, Appr. (*Suhrawardy and Chotzner, JJ.*) NRIPENDRA KUMAR DUTTA *v.* CHAIRMAN, HABIGANJ MUNICIPALITY. **85 I. C. 533 = A. I. R. 1926 Cal. 261.**

S. 350—Bye-laws under.

———*Bye-law No.* 80—Tabla *is not a high sounding instrument.*

Under no circumstances can the playing of the *Tabla* be regarded as "singing with a high sounding instrument" within the Bye-law No. 80. (*Bucknill, J.*) RAHIM *v.* EMPEROR. **1 Pat. L. R. Cr. 45 = 24 Cr. L. J. 478 = 72 I.C. 894 = A. I. R. 1924 Pat. 377.**

S. 356—Service of.

———*Warrant—Brother of owner in possession and paying taxes on behalf of owner—Service of warrant on brother of owner is sufficient.*

Where the house was not in the occupation of the recorded owner but his brother and, although the Municipal taxes were levied on the owner, they were collected from his brother.

Held, the service of the distress warrant on the brother of the owner was a proper service. (*Dawson*

BENGAL MUNICIPAL ACT (1884), S. 358.

Miller, C. J. and Ross, J.) Govt. Advocate, Bihar and Orissa *v.* Ganga Prasad.
1 Pat. 423=3 Pat. L. T. 559=25 Cr. L. J. 31= 75 I. C. 719=A. I. R. 1922 Pat. 532.

S. 358—Alternative resolutions.

——*Resolutions put as alternative and not separately as required by bye-law—Action taken on resolution is not void.*

At a meeting of the commissioners two resolutions were moved and seconded. The first resolution was "that the question of a general revision of assessment be postponed for a year in view of the economic distress prevailing in the country." The second resolution was "that the general revision of assessment of holdings be undertaken without delay as it was overdue." The resolutions were not put separately as they ought to have been according to the bye-law of the Municipality but were put as alternative resolutions and the numbers in favour of each were ascertained.

Held, that although the procedure adopted was irregular, the irregularity was not sufficient to render null and void all actions taken on the basis of the resolution passed. (*Lord Carson.*) Bhuban Mohan Basak *v.* Chairman of the Municipality, Dacca.
50 C. L. J. 149=33 C. W. N. 1039=119 I. C. 622= A. I. R. 1929 P. C. 272.

S. 363—Applicability.

——*Claim for damages for wrongful act of Municipal Officers—S. 363 applies.*

S. 363 is applicable only to those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners or their officers in the exercise or honestly supposed exercise of their statutory powers. 6 Cal. 3 ; 3 C L.J. 376 ; 3 C.L.J. 36 n.; and 12 C. L. J. 410, Foll. (*Mukerji and Graham, JJ.*) Chairman, Municipal Corporation, Faridpur *v.* Gour Gopal. **101 I. C. 755= A. I. R. 1927 Cal. 592.**

——*Illegal distress warrant—Suit for damages—S. 363 applies.*

S. 363 applies to a suit against the Vice-Chairman of a Municipality for damages due on account of an unauthorised distress warrant. (English and Indian law fully discussed.) S. 363 requires the service of notice upon the Commissioners in every instance and also upon the person concerned, if the suit is intended to be brought against an officer of the Commissioners or any person acting under their direction. (*Mookerjee and Fletcher, JJ.*) Sasanka Sekhar *v.* Sudhangsu Mohan. **48 Cal. 45=59 I. C. 572= A. I. R. 1921 Cal. 91.**

S. 363—Limitation.

——*Assessment paid under protest, proceedings being* ultra vires—*Suit for recovery need not be filed within three months.*

Where demand is made from a tax-payer and he pays the taxes under protest, that is to say, on an understanding that he would be entitled to a refund if his contention that the demand was *ultra vires* was correct, a suit for the recovery of such taxes need not be filed within three months. 2 C. W. N. 689, Foll. (*Ross and Kulwant Sahay, JJ.*) Chairman of the Tikari Municipality *v.* Alam Ara Begum.
7 P. L. T. 804=96 I. C. 444= A. I. R. 1926 Pat. 547.

——*Suit by municipal servant against chairman for salary—Limitation.*

BENGAL MUNICIPAL ELECTION RULES OF 1896.

A suit by a municipal servant for recovery of money due to him under a contract with the muncipality is one for breach of contract and is not governed by S. 363 of the Bengal Municipal Act. It is only in cases where plaintiff claims damages or compensation for a wrongful act committed by commissioners or their servants in the exercise of their statutory powers that S. 363 applies. 6 C. 8, Foll. ; 3 C.L.J. 376, Ref. (*Richardson, J.*) Panchanan Chatterjee *v.* Santosh Kumar Bose. **65 I. C. 105 (Cal.).**

Sch. IV—Warrant.

——*Date of return is not necessary to be mentioned.*

A distress warrant issued in the form provided in Schedule IV does not require that the date of return of warrant should be mentioned. (*Dawson Miller, C. J. and Ross, J.*) Govt. Advocate, Bihar and Orissa *v.* Ganga Prasad. **1 Pat. 423= 75 I. C. 719=3 Pat. L. T. 559=25 Cr. L. J. 31= A. I. R. 1922 Pat. 532.**

BENGAL MUNICIPAL ELECTION RULES.

R. 15—Provisions mandatory.

——*Held*, that the provisions of R. 15 of the Bengal Election Rules are mandatory and not merely directory. (*Suhrawardy and Costello, JJ.*) Rathis Chandra Munshi *v.* Amulya Charan Ghatak.
34 C. W. N. 741.

Rr. 15 and 16—Jurisdiction of Magistrate.

——Per *Costello, J.*—Rr. 15 and 16 would seem to suggest that the Magistrate should summarily and finally settle certain disputes in connection with municipal elections. The proviso to R. 15, however, would seem to throw a doubt on such a view. (*Suhrawardy and Costello, JJ.*) Rathis Chandra Munshi *v.* Amulya Charan Ghatak. **34 C. W. N. 741.**

——R. 16—*Decision as to nomination paper being in time under R. 15—Finality—Jurisdiction of Civil Court.*

Held, that the order of the Magistrate holding that the nomination paper sent in by a person was in time within R. 15 is not final under R. 16 and that the same can be questioned in a civil suit. (*Suhrawardy and Costello, JJ.*) Rathis Chandra Munshi *v.* Amulya Charan Ghatak. **34 C. W. N. 741.**

R. 32—Applicability—Meeting Rules.

——*Election postponed and new polling officers appointed in place of old ones—R. 32 does not apply.*

Where an election is postponed and consequently fresh polling officers appointed and a new date and place are fixed for polling in supersession of the old polling officers and date and place of polling, R. 32 does not apply. (*Mukerji and Graham, JJ.*) Bhuban Mohan *v.* Chairman, Dacca Municipality.
31 C. W. N. 926=103 I. C. 890= A. I. R. 1927 Cal. 704.

BENGAL MUNICIPAL ELECTION RULES OF 1896.

Withdrawal.

——*Candidate can withdraw before closing of poll.*

At a municipal election candidates are under the rules entitled to withdraw at any time before the closing of the poll. A. I. R. 1924 All. 134 Appr. (*Suhrawardy and Duval, JJ.*) Nagendranath Addi *v.* Commissioner, Presidency Division.
30 C. W. N. 670=91 I. C. 722= A. I. R. 1926 Cal. 1016.

Rr. 4 to 11—Postponement of election.

———*Election postponed to allow 15 days' time under R. 5—Fresh compliance with Rr. 4 to 11 is not necessary.*

Where an election is postponed merely for the purpose of allowing the necessary interval of 15 days, required by R. 5, there would be no necessity for fresh compliance with Rr. 4 to 11 of the Election Rules. The register, as already prepared and amended, would be a valid register for the purpose of the postponed election. (*Mukerji and Graham, JJ.*) BHUBAN MOHAN *v.* CHAIRMAN, DACCA MUNICIPALITY.

31 C. W. N. 926 = 103 I. C. 890 = A. I. R. 1927 Cal. 704.

Rr. 6, 7 and 10—Election.

———*Eight days' time not allowed to apply under R. 10—No application rejected wrongly and no prejudice caused—Election cannot be set aside.*

Per *Graham, J.*—A Court would not be justified in setting aside an election on the ground that time allowed by R. 10 to apply to Magistrate was not made available in consequence of publication of the revised register before the time allowed under R. 10 had elapsed after the applications were rejected, where it has not been shown that the omission to comply with the rules affected the result of the election, or that any of the applications was wrongly rejected.

Per *Mukerji, J.*—The rights which the successful candidates acquire in the elections cannot be interfered with unless, at least, it is reasonably clear that the irregularity contributed directly or indirectly to the acquisition of those rights, or that it has really operated to the prejudice of the rate-payers who intended to take part in the elections. (*Mukerji and Graham, JJ.*) BHUBAN MOHAN *v.* CHAIRMAN, DACCA MUNICIPALITY.

31 C. W. N. 926 = 103 I. C. 890 = A. I. R. 1927 Cal. 704 (711).

Rr. 29, 10 and 6—Jurisdiction.

———*Dispute as to whether a person's name should be on the voters' list, Magistrate can decide point.*

Even where a case does not come under Rule 6 or Rule 10, where there is a dispute as to whether the name of the defendant should or should not be on the register and the Chairman decides the question in a particular way, the Magistrate has power to decide the point under Rule 29. (*Chatterjee and Newbould, JJ.*) SHYAM CHAND *v.* NABENDRA NATH. **26 C. W. N. 147 = A. I. R 1921 Cal. 808.**

BENGAL, N. W. P. AND ASSAM CIVIL COURTS ACT (XII OF 1887).

S. 10—Jurisdiction.

———*District Judge absent from place of his office—He has no jurisdiction to hear appeals—Another Judge acting for him should hear them.*

Where the District Judge leaves the place where his Court is held, the only person who has any right to deal with an appeal lying to the District Judge would be the Subordinate Judge who is then discharging the office of the District Judge. Assumption of jurisdiction by the District Judge in respect of such an appeal would be wholly irregular. There is no intention on the part of the Legislature to have a duplication of characters or to give people a choice to go before one officer or another. (*Rankin, C. J. and Majumdar, J.*) MAWAZZAN ALI KHAN *v.* SHEBASH CHANDRA PAKRASHI.

31 C. W. N. 814 = 105 I. C. 348 = A. I. R. 1927 Cal. 598 (a) (599).

S. 13 (2)—Jurisdiction.

———*Allotment of sub-division by District Judge does not limit jurisdiction.*

Where the ordinary civil business of a district is such that it is necessary to appoint more than one officer to do the work of a particular Judge, and the District Judge acting under S. 13 (2) makes an arrangement for distribution of business by posting several officers to exercise jurisdiction over a particular sub-division or local area of the district, the allotment has not the effect of limiting the general jurisdiction over the particular sub-division or local area. And so where a Munsif is posted to exercise jurisdiction over a particular area or subdivision of the District, the jurisdiction is never limited to an area less than the Munsiff to which he is posted. A. I. R. 1930 Pat. 227, Referred. (*James, J.*) SUBAN RAI *v.* KESHO PRASAD SINGH. **10 P. L. T. 848 = 120 I. C. 783 = A. I. R. 1930 Pat. 230.**

S. 13 (1) & (2)—Jurisdiction.

———*Under S. 13 (2) District Judge cannot divest a Subordinate Judge of the jurisdiction conferred on him by S. 13 (1).*

By assigning some particular civil business to a particular Judge and thus arranging for the administration under S. 13 (2) the District Judge cannot divest that Judge of the jurisdiction which has been conferred on him by the Local Government under the provisions of sub-S. (1) of S. 13 and therefore, where a petition under O. 21, R. 90 has been filed before the Subordinate Judge of the second Court and is dismissed for default by him and subsequently he is put in charge of the business attaching to the Court of the first Subordinate Judge, he does not become incompetent to hear an application for review of the order dismissing the application for default. 27 Cal. 272; A. I. R. 1922 Cal. 41; and 6 P. L. J. 304, Rel. on. (*Mukerji and Graham, JJ.*) KASISWAR RAY *v.* SATYA BRAHMA DAS. **54 Cal. 374 = 45 C. L. J. 142 = 31 C. W. N. 332 = 101 I. C. 133 = A. I. R. 1927 Cal. 312.**

S. 13 (2)—Jurisdiction.

———*C. P. Code, Ss. 37 and 38—Execution of decree—Decree not transferred—Immoveable property within another Court's jurisdiction as assigned by District Judge—Jurisdiction of Court passing decree, as conferred by Local Government, extending to the property—Letter Court can attach same.*

The District Judge cannot by any order under S.13 (2) take away the jurisdiction of a Court to execute a decree passed by it, when (the execution case not having been transferred by it to any other Court) it is the only Court which can execute it under the provisions of S. 38 read with S. 37 of the C.P. Code. A decree was passed by a certain Munsiff's Court. The Court's territorial jurisdiction conferred by the Local Government under S. 13 (1) extended over the immovable property sought to be attached. But the property was situate within the jurisdiction of another Munsiff's Court as assigned by the District Judge, under S. 13 (2) of the Civil Courts Act. The execution case was not transferred to any Court.

Held, that the Court which passed the decree had jurisdiction to attach the property. (*Chatterjee and Chotzner, JJ.*) ASIRUDDIN MANDAL *v.* RAM SHAKHI DEBYA. **41 C. L. J. 166 = 86 I. C. 775 = A. I. R. 1925 Cal. 679.**

———*C. P. Code, S. 37 (b)—Redistribution of civil work by District Judge in the District under S. 13 (2) of Civil Courts Act does not disturb the territorial jurisdiction of a Subordinate Judge in the District.*

Subordinate Judge has jurisdiction throughout the district. The territorial jurisdiction thus conferred upon him can only be removed by a proper order and notification by the local Government under S. 13, clause (1) of the Civil Courts Act. An order of the District Judge under clause (2) of S. 13 of the Act simply making arrangements for the distribution of the civil work in the district cannot at all disturb or in any way curtail the territorial jurisdiction of the Subordinate Judge. Where a mortgage decree was passed by a Subordinate Judge, first class, but subsequently the civil work of the area in which the mortgaged property was situated was transferred to third Subordinate Judge by an order, under S. 13 (2) of the Bengal, N. W. P. and Assam Civil Courts Act of the District Judge.

Held, that the first Subordinate Judge did not cease to have jurisdiction to execute the decree passed by him. (*Jwala Prasad and Adami, JJ.*) RAJA JAGANNATH PRASAD SINGH *v.* SHEONANDAN SAHAY. **2 P. L. T. 374 = 6 P. L. J. 304 = 1921 P. H. C. C. 186 = 62 I. C. 487 = A. I. R. 1921 Pat. 152.**

S. 17—Jurisdiction.

——*C. P. Code, S. 150—Scope.*

When the Court which has passed a decree is abolished, it is the Court to which its business is transferred which is competent to execute the decree. (*Sulaiman and Pullan, JJ.*) MAQBUL AHMAD *v.* PATESHRI PARTAP NARAIN SINGH. **118 I. C. 670 = 1929 A. L. J. 976 = A. I. R. 1929 All. 677.**

S. 19—Jurisdiction.

——*Court's jurisdiction is not ousted where mesne profits allowable under O. 20, R. 12 (2), C. P. Code, exceed its jurisdiction—Application for final decree is not a plaint and neither this application nor original plaint can be returned for want of jurisdiction — C. P. Code, S. 6—C. P. Code, O. 20, R. 12 (2).*

Per *Full Bench* (*Walmsley, J., dissenting*).—Where a Judge has in the proper exercise of his jurisdiction passed a decree for possession and also a preliminary decree for mesne profits, he must be held to have jurisdiction to make a final decree in accordance with his decision. This jurisdiction is not limited, if, as a result of the inquiry directed by him, the mesne profits are found to exceed the amount of his pecuniary jurisdiction as regards the value of the suit. If a suit is rightly entertained as within the jurisdiction of the Judge and a decree passed, his power to grant the proper and adequate relief is not affected by any event which increases the value of the relief during the pendency of the suit. To hold that jurisdiction should depend on the amount for which the final decree should be passed would have this effect, that after the Judge passes a preliminary decree and it is found after accounts taken that the final decree must be for an amount exceeding the pecuniary limit of his jurisdiction, the entire proceedings before him including the decree passed should be considered as being without jurisdiction. The forum of appeal is determined with reference to the value of the suit, and not the amount decreed. The plaintiff is neither required nor bound to state any amount in his application. The application is not a plaint, and the admission of both parties that the plaint should be returned for presentation to a higher Court cannot be accepted for the reason that a preliminary decree has already been passed in the case by the Munsif on the original plaint, and the only thing that remains to be done is to give effect to the preliminary decree by a final decree. There is no provision in the law for the return of a plaint after a preliminary decree has been passed.

Per *Walmsley, J.*—Mesne profits *pendente lite* are not to be considered in determining the value of the suit for purposes of jurisdiction. A plaintiff forsakes his right to ask for an enquiry under R. 12 (1) (*c*) of O. 20 and the final decree under R. 12 (2), if the amount claimed by him makes a resort to a Court of superior jurisdiction necessary, in which case he must institute a fresh suit subject to the ordinary law of limitation. (*Walmsley, C. C. Ghose, Suhrawardy, B. B. Ghose and Duval, JJ.*) BIDYADHAR BACHAS *v.* MANINDRA NATH DAS. **42 C.L.J. 49 = 29 C. W. N. 869 = 53 Cal. 14 = 89 I. C. 726 = A.I.R. 1925 Cal. 1076 (F. B.).**

S. 19—Scope.

——*S. 19 does not refer to proceedings for ascertainment of mesne profits* pendente lite—*C. P. Code, O. 20, R. 12 (1) (c) permits passing of decree beyond pecuniary jurisdiction of the Court—C. P. Code, O. 20, R. 12 (c).*

The Court that has jurisdiction to direct an enquiry for ascertainment of mesne profits *pendente lite* under O. 20. R. 12 (*c*), C. P. Code, and pass a final decree under the second paragraph of the rule, is the court that passes the decree for possession even where the total value exceeds Court's jurisdiction. There is no justification for the view that the Court having seisin of the case may pass a decree for possession of the property, and then, if the claim for mesne profits exceeds its pecuniary jurisdiction, solemnly hand over the case to another court having pecuniary jurisdiction over the subject-matter of the suit. S. 19 of Bengal and Assam Civil Courts Act does not refer to proceedings for the ascertainment of mesne profits *pendente lite*.

O. 20, R. 12 confers special jurisdiction on the court to take cognizance of a cause of action that has arisen subsequent to the institution of the suit, and cannot be read as a subject to the provision of S. 19 of Act XII of 1887. 43 Cal. 650, Dist.

The appeal lies to the Court of the District Judge, and not to the High Court, if such Court is Munsif's Court. (*Das and Adami, JJ.*) DINANATH SAHAI *v.* MAYAWATI KUER. **2 P. L. T. 143 = 6 P. L. J. 54 = 1921 P. H. C. C. 69 = 60 I. C. 346 = A. I. R. 1921 Pat. 118.**

S. 20—Scope.

——*The section deals with* forum *of appeal only.*

The section does not give right of appeal from every order of a District Judge to the High Court. It merely deals with the forum of appeal. (*Dawson Miller, C.J. and Foster, J.*) BIBI WASHIHAN *v.* MIR NAWAB ALI. **3 Pat. 1018 = 7 P.L.T. 424 = 92 I.C. 133 = A. I. R. 1925 Pat. 138.**

S. 21—Appeal.

——*Appeal to Sub-Judge—C. P. Code, S. 24—U. P. Honorary Munsiffs Act* (II *of* 1896).

Appeal lies from Honorary Munsif appointed under S. 9, U.P. Honorary Munsiffs Act, to Sub-Judge, though the case may have been transferred to the Munsif from a Court of Small Causes. (*Boys, J.*) MEGI MAL *v.* HIRA LAL. **22 A.L.J. 880 = 5 L.R.A. Civ. 725 = 82 I. C. 292 = A. I. R. 1924 All. 761.**

S. 21 (2)—Forum of appeal.

——*Value of land below Rs.* 5,000 —*Value with decreed mesne profits exceeding Rs.* 5,000—*Appeal lies to High Court.*

Appeal against decree for mesne profits in a suit for possession of land, where value of the land with mesne profits up to the date of the suit was below Rs. 5,000, but such value with mesne profits decreed exceeded

Rs. 5,000, lies to the High Court. A.I.R. 1925 Cal. 1076 (F.B.). Dist.; 34 Cal. 954 (F.B.), Ref. (*B. B. Ghose and Panton, JJ.*) MANMATHA NATH DUTT *v.* MATI LAL MITRA. **33 C.W.N. 614 = A.I.R. 1929 Cal. 719.**

S. 21—Forum of appeal.

———*Suits Valuation Act, S. 8—Suit for accounts decreed by Subordinate Judge valued at Rs.* 1,500 *for Court-fees—Value for jurisdiction is the same—Defendant cannot by putting any valuation alter forum of appeal—Appeal lies to District Judge and not to High Court.*

Where a suit for rendition of accounts was valued at Rs. 1,500 for Court-fees and at Rs. 5,500 for jurisdiction and preliminary decree for accounts was made by a Subordinate Judge, *held*, that the valuation for purposes of jurisdiction ought to have been Rs. 1,500, *i.e.*, the same as that for Court-fees. The defendant cannot by putting any valuation he pleases change the forum of appeal. Under the Bengal, U. P. and Assam Civil Courts Act, S. 21, the appeal would lie to the District Judge and not to the High Court. (*Kulwant Sahay and Macpherson, JJ.*) RAJA BABU *v.* GAURI LAL.
9 P.L.T. 726 = 109 I. C. 895 = A. I. R. 1928 Pat. 535.

———*Suit for declaration that certain praperty is not liable to attachment in execution—Property exceeding Rs.* 5,000 *in value —Suit valued at less than Rs.* 5,000 *—Suit dismissed—Appeal lies to High Court—Suits Valuation Act, S.* 8*—Court-fees Act, Sch.* 2*, Art.* 17.

A suit for declaration that a certain property was not liable to be attached in execution of a decree against the plaintiff was valued at less than Rs. 5,000. It was dismissed. An appeal was presented to the High Court by the plaintiff himself, valuing the subject-matter at more than Rs. 5,000 it being found that property was worth more than Rs. 5,000; *held*, that the suit being one on which Court-fee is payable, as under Court-fees Act, Sch. 2, Art. 17, S. 8 of the Suits Valuation Act did not apply, that the plaintiff was not debarred from showing that the property was worth more than Rs. 5,000 and that the appeal lay to the High Court. 5 Pat. L.J. 397, A.I.R. 1926 Pat. 351, and Pat. S.A. 1204 of 1922, Ref. (*Kulwant Sahay and Allanson, JJ.*) AMIR NAWAB *v.* MT. NAJEDA BEGAM. **6 Pat. 420 = 103 I C. 819 = A. I. R. 1927 Pat. 289.**

———*Decree in suit valued at more than Rs.* 5,000*—Order in execution—Appeal lies only to High Court.*

An appeal lies directly to the High Court against an order in execution of a decree passed in a suit valued at more than Rs. 5,000. If it be presented to the District Court and decided by it the High Court will, in second appeal, set aside the order as being made without jurisdiction and substitute in its place an order that the memorandum of appeal presented to the District Judge be returned to the appellant for presentation to the High Court. (*Mookerjee and Panton, JJ.*) KUMUDINI RAY *v.* KAMALA KANT SEN. **35 C.L.J. 106 = 68 I. C. 575 = A. I. R. 1922 Cal. 247.**

———The term "value" means the amount or value of the subject-matter of the suit, and, ordinarily the value of the subject-matter determines the Court of Appeal. A plaintiff cannot, however, by grossly exaggerating the value of the property in dispute choose his own forum. (*Tudball and Sulaiman, JJ.*) BABAR SHAW *v.* MUHAMMAD RAFIQ. **62 I. C. 35 (All.)**

S. 21—Valuation of appeal.

———*Valuation of suit for purposes of appeal is valuation in plaint as amended by order of trial Court, if any.*

When S. 21 of the Bengal Civil Courts Act refers to the value of the original suit, the reference is to the valuation as made by the plaintiff subject to such amendments as may have been made under the orders of the trial Court. The Legislature did not intend that the expression 'the value of the original suit' in S. 21 means the real value of the subject-matter of the original suit, regardless of what may have happened in the trial Court Before the appellate stage is reached, the suit must already have been tried and the value of the suit fixed either by agreement of parties or on adjudication by the Court. (*Mookerjee and Rankin, JJ.*) HARIHAR DAS CHOWDHURI *v.* RAJ KUMAR MUKERJEE.
71 I. C. 1014 = A. I. R. 1923 Cal. 405.

S. 22—Transfer.

———The District Judge is competent to transfer an appeal from an order under S. 476 to a Subordinate Judge. A.I.R. 1927 All. 555, Foll. (*Mukerji, J.*) KARIMULLAH *v.* RAMESHWAR PRASAD.
51 All. 344 = 111 I.C. 595 = 1929 A.L.J. 55 = 10 L.R. A. Cr. 121 = 12 A.I. Cr. R. 199 = A. I. R. 1929 All. 774.

S. 37.

———S. 37 of Act XII of 1887 is not repugnant to Reg. III of 1872 in order that it might prevail over the former in the matter of interest. (*Jwala Prasad and Ross, JJ.*) DEBI PRASAD DHUNDHANIA *v.* KUSUM KUMARI. **A. I. R. 1930 Pat. 442.**

S. 37—Equity.

———*Positive enactment of law cannot be overridden by rule of equity.*

Under S. 37, the Courts in the United Provinces are to adjudicate according to justice, equity and good conscience, where there is no law governing the case. A positive enactment of law such as is contained in S. 123, T. P. Act, cannot be ignored or overridden by a rule of equity. (*Sen and Weir, JJ.*) HIRA MANI SINGH *v.* ANMOL SINGH. **26 A.L.J. 944 = 117 I. C. 351 = A. I. R. 1928 All. 699.**

S. 37 (2)—Equity.

———*Landlord and tenant—Incidents of tenure—No specific contract—No legal possession—Rule of equity should be applied.*

In the absence of any proof of a specific contract or necessary incident of the tenure to the contrary or of any law regulating the relations between the parties, Courts have to fall back under S. 37, clause (2) of Act XII of 1887 on the rule of justice, equity and good conscience and enforce such equity as the circumstances of the case might justify. (*Lindsay and Kanhaiya Lal, JJ.*) NATHA *v.* GOBIND RAM. **19 A.L.J. 681 = 64 I. C. 153 = A. I. R. 1921 All. 28.**

S. 37 (2)—Highway.

———*English principles should be applied to cases of highways.*

It is sometimes dangerous to attempt to ascertain the law in India by the discussion of English cases. But in a matter where legislation, like the Municipalities Act, following closely upon English Local Government legislation, has left the matter at large, without following it up by modifying the general law on a topic such as public ways and highways, the Courts in India are really enjoined to apply the English principles. (*Walsh, Ag. C.J. and Ryves, J.*) MD. RAZA KHAN *v.* MD. ASKARI KHAN. **46 All. 470 = 85 I. C. 304 = 22 A.L.J. 729 = 6 L.R.A. Civ. 67 = A.I.R. 1924 All. 599.**

S. 37—Legitimacy.

———*S. 112 of Evidence Act applies to determine legitimacy of Muhammadan children.*

Where a Muhammadan child was born during the continuance of a valid marriage between its parents, but its birth was within six months of the date of its parents' marriage,

Held, that S. 112 of Evidence Act applied and the child was legitimate. 10 All. 289, Ref.; A.I.R. 1923 All. 570, Approved. (*Daniels and King, JJ.*) SIBT MOHAMMED *v.* MOHAMMED HAMEED. **48 All. 625 = 24 A.L.J. 723 = 96 I.C. 582 = A.I.R. 1926 All. 589.**

S. 37—Personal law.

———*Mahomedan law—Gift by Mahomedan to Hindu —Rules of Mahomedan law shall apply—Transfer of Property Act, S. 123.*

A, a Mahomedan, made a gift of his property to *B* a Hindu and completed the transaction by making delivery of possession to him. *A* subsequently sold the property to *C* another Mahomedan who afterwards made a gift of that property to his daughter but left the transaction incomplete as no delivery of possession was given. In a suit brought by *C's* daughter in conjunction with *C* against *A* and *B* to whom *A* had gifted away his property, the plaintiffs contended that the rules of Mahomedan law were not applicable to the gift made to *B* and that the provisions of S. 123, T. P. Act, applied to such a gift.

Held, that since under the rules of Mahomedan law a person governed by that law may make a valid gift to a Hindu by an oral transaction which is perfected by delivery of possession, to apply the provisions of S. 123 to render invalid a gift made in this manner would have the effect of making the section abrogate a rule of Mahomedan law, in spite of the express provisions of S. 129 and that the gift by *A* to the Hindu donee should be treated as valid. Plaintiff's claim was accordingly dismissed as the title of *C's* vendor *A* had ceased before *C* purchased the property from him. 21 Cal. 121 (P.C.), 6 M.H.C.R. 455, Dist. (*Wort and James, JJ.*) MT. TABERA *v.* AJODHYA PRASAD. **A.I.R. 1929 Pat. 417.**

S. 38—Appellate Court.

———Where an Additional Subordinate Judge who decided the appeal was Munsif when the suit was filed charge of the suit up to the point of the framing of and had issues,

Held, that he was not disqualified from hearing the appeal under S. 38 as no decree or order had been passed by him in the capacity of Munsif. (*Dalal, J.*) GAINDA *v.* HAZARI LAL. **25 A. L. J. 1024 = 108 I. C. 704 = A. I. R. 1928 All. 96.**

BENGAL PATNI REGULATION (VIII OF 1819).—*See* PATNI REGULATION.

BENGAL PERMANENT SETTLEMENT REGULATION (I OF 1793)—*See* PERMANENT SETTLEMENT REGULATION.

BENGAL PUBLIC DEMANDS RECOVERY ACT (I OF 1895).

S. 10—Notice.

———*Non-service of notice renders the sale a nullity.*

When notice has not been served under S. 10 the sale must be deemed to be a nullity, a sale wholly without authority. In such circumstances the plaintiff need not ask that the sale be set aside; he is entitled to recover possession upon the footing that the sale has not affected his title. (*Maokerjee and Chotzner, JJ.*) LALIT MOHAN SEN *v.* MONORANJAN GHOSE CHOWDHURY. **36 C. L. J. 208 = 72 I. C. 698 = A.I.R. 1923 Cal. 13.**

———*Person absent from home—Service by affixture is sufficient—One co-sharer not served—Sale is void only in respect of his share.*

Where the person was temporarily away from home and service of notice could not be effected on any adult male member,

Held, that service by fixing a copy on the outer door of the house in which he ordinarily resided was sufficient service. 1 C. L. J. 550, distinguished. Where a notice is issued regarding sale of property in which there are more than one co-sharer and it is not served on one of the co sharers by reason of his death, the sale even if void is void only in respect of the share of the deceased co-sharer. (*Coutts and Ross, JJ.*) BENI RAY *v.* BABUI BACHA KUER. **1 Pat. 273 = 69 I. C. 700 = 1 Pat. L. R. 196 = A. I. R. 1922 Pat. 546.**

S. 31—Application.

———*"And in some conspicuous part of the land"—Applies only to service by affixture in Certificate Officer's office.*

The words "and also in some conspicuous part of the land" in S. 31, refer only to cases in which the service is effected by fixing a copy in some conspicuous place in the office of the Certificate Officer and not to a case in which the notice is served by fixing a copy on the outer door of the house in which the judgment-debtor ordinarily dwells or carries on business. (*Coutts and Ross, JJ.*) BENI RAY *v.* BABUI BACHA KUER. **1 Pat. 273 = 69 I.C. 700 = 1 Pat. L. R. 196 = A. I. R. 1922 Pat. 546.**

———(III OF 1913).

Peshkosh.

———*Permanently settled holders—Sum is recoverable only if liability is statutory or contractual.*

Where the plaintiffs are the holders of a permanently settled estate under the Government and the demand of Peshkosh made upon them is in addition to the revenue payable by them in respect of their estate,

Held, such an additional demand can be recoverable only if there is a special liability either statutory or contractual. (*Mookerjee and Chotzner, JJ.*) NABA DWIP CHANDRA NANDI *v.* SECRETARY OF STATE FOR INDIA. **50 Cal. 208 = 79 I. C. 218 = A. I. R. 1923 Cal. 609.**

Ss. 4 and 6—Certificate.

———*Columns in the tabular form properly filled in—Omission to mention names and figures in the blanks in the certificate portion does not invalidate the certificate.*

Where in the certificate the columns in the tabular form are properly filled in, namely, the name and address of the certificate-holder, the name and address of the certificate-debtors and the amount of public demand for which the certificate was signed are mentioned, the omission to mention these names and the figures in the blanks in the certificate portion of the form cannot be taken to be material omission which would go to the length of invalidating the certificates. The idea underlying the filling in of the form is that the debtor should have information of the specific sum claimed from him and the particulars thereof. 19 C. W. N. 1159, Dist. (*Suhrawardy and Graham, JJ.*) HARA PRASAD GAIN *v.* GOPAL CHANDRA GAIN. **45 C. L. J. 73 = 31 C. W. N. 299 = 100 I. C. 997 = A.I.R. 1927 Cal. 315.**

S. 4—Certificate.

———*Certificate issued for a particular period—Supplementary certificate cannot be issued for same period —C. P. Code, O. 2, R. 2—Principle applies to proceedings in Revenue Courts.*

S. 4 of the Act should not be interpreted so as to authorise the issue of more than one certificate with regard to a single demand broken up into fragments. Such an interpretation would violate the cardinal rule which has also been accepted in C. P. Code, O. 2. R. 2 for the avoidance of multiplicity of proceedings. (*Mukerjee and Cuming, JJ.*) PRATAP CHANDRA JANA *v.* THE SECRETARY OF STATE. **49 Cal. 1026 = 35 C.L.J. 304 = 67 I. C. 375 = A.I.R. 1922 Cal. 101.**

S. 4—"Manager."

———Manager is not a person from whom a public demand is due. (*Suhrawardy and Jack, JJ.*) KALIPADA ROY *v.* MUKUNDA LAL. **34 C.W.N. 131 = A.I.R. 1929 Cal, 679.**

S. 4—Scope.

———*Strict compliance with form of certificate is essential.*

A certificate which contains no entry in that part of it which is really the certificate in the prescribed form giving any of the particulars in the handwriting of the officer having jurisdiction to issue such a certificate is invalid, because the form of a certificate under S. 4 of the Bengal Public Demands Recovery Act should be strictly complied with. (*Greaves and Chakravarti, JJ.*) ALI MIYAN *v.* WAJIDDIN SIKDAR. **82 I.C. 1013 = A.I.R. 1925 Cal. 383.**

S. 7—Signature.

———*Appendix form 3—Lithographic signature of certificate officer is sufficient.*

It is not incumbent on the certificate officer to sign the notice with his own hand. Lithographic signature is sufficient. (*Suhrawardy and Graham, JJ.*) HARO PRASAD *v.* GOPAL CHANDRA. **45 C. L. J. 73 = 31 C. W. N. 299 = 100 I. C. 997 = A. I. R. 1927 Cal. 315.**

S. 9—Certificate.

———*Certificate must be made against and served on proper persons from whom debt is due.*

S. 9 gives a valuable right to the certificate debtor and therefore it is necessary that the certificate should be made against and served on proper person from whom the amount of debt is due. (*Suhrawardy and Jack, JJ.*) KALIPADA ROY *v.* MUKUNDA LAL. **34 C. W. N. 131 = A. I. R. 1929 Cal. 679.**

S. 10—Retrospective effect.

———The provisions of the new statute (Public Demands Act) have no retrospective operation so as to extinguish or modify causes of action which might have already accrued by reason of failure to serve the notice issued under S. 10 of the Public Demands Recovery Act, for S. 36 must be read along with S. 3 (1). The plaintiff is entitled to relief on the footing that the sale which was held without service of the notice on the plaintiff under S. 10 has not affected his title. *Colonial Sugar Refining Co.* v. *Irvine*, (1905) App. Cas. 369; 40 I. A. 74, Ref. (*Mookerjee and Chotzner, JJ.*) LALIT MOHAN SEN *v.* MONORANJAN GHOSE CHOUDHURY. **36 C. L. J. 208 = 72 I. C. 698 = A. I. R. 1923 Cal. 13.**

S. 20—Sale of Patni Taluq.

———*Sale of Patni taluq not confirmed—Patni taluq sold under Regulation* (*VIII of* 1917), *S.* 14—*Latter sale is not bad—Bengal Regulation* (*VIII of* 1919), *S.* 14.

If on the date of sale of Patni taluq under S. 14 of the Regulation (VIII of 1919) there is another order existing for the sale of the same property under Public Demands Recovery Act, unless this latter sale is confirmed thereby vesting the title in the purchaser under S. 20 of the Public Remands Recovery Act, the sale under S. 14 of the Regulation is not bad, and passes good title to the purchaser. A. I. R. 1918 P. C. 159 and 15 Cal. 546, Ref.; 12 Cal. 597, Dist. (*Graham and Mitter, JJ.*) KHYARENNESSA CHOUDHURANI *v.* SATYA BHANU GHOSAL. **A. I. R. 1930 Cal. 599 (a) (601).**

S. 20—Certificate.

———*To ensure indefeasible title certificate must be made against proper person.*

Under S. 20 what purchaser gets in a sale under the Act is the right, title and interest of the certificate debtor. Therefore in order that the sale may pass title to the purchaser it is necessary to make the certificate against proper person. (*Suhrawardy and Jack, JJ.*) KALIPADA ROY *v.* MUKUNDA LAL. **34 C. W. N. 131 = A. I. R. 1929 Cal. 679.**

S. 23—Sale.

———*Sale by certificate officer authorized to sell—Security of purchaser should not be impaired though there was irregularity in sale.*

A certificate sale is a sale held by the certificate officer authorized to hold sales under the Act, although it may be contrary to the provisions of the Act by reason of some irregularity in publishing or conducting the sale the security of purchasers at sales for public demands should not be impaired. 21 Cal. 70 (P. C.), Appl. (*C. C. Ghose and Suhrawardy, JJ.*) ANANDA CHANDRA *v.* JHULON SINGH. **33 C. W. N. 305 = 56 Cal. 902 = 120 I. C. 151 = A. I. R. 1929 Cal. 409.**

———*C. P. Code, O. 21, R. 66—Misdescription of property which can be identified does not prevent passing of title to purchaser.*

A misdescription in the sale proclamation cannot be a ground for holding that a property did not pass under it to the purchaser if it can be gathered from the surrounding facts and circumstances that there could not be any doubt as to what was actually sold. (*C. C. Ghose and Suhrawardy, JJ.*) ANANDA CHANDRA NANDY *v.* JHULON SINGH. **56 Cal. 902 = 33 C. W. N. 305 = 120 I. C. 151 = A. I. R. 1929 Cal. 409.**

S. 34—Separate suit.

———*Certificate debtor cannot challenge sale by way of defence in suit for possession.*

It is not open to a certificate debtor to challenge a certificate sale by way of defence in a suit for possession brought by the purchaser, his remedy being limited to the procedure indicated in the Act itself. A. I. R. 1925 Cal. 81, Rel. on. (*C. C. Ghose and Suhrawardy, JJ.*) ANANDA CHANDRA *v.* JHULON SINGH. **56 Cal. 902 = 33 C. W. N. 305 = 120 I. C. 151 = A. I. R. 1929 Cal. 409.**

Ss. 35 and 37—Jurisdiction.

———*Limitation to jurisdiction of Civil Courts.*

The right of interference by the Civil Court in a certificate sale is limited to cases where there were no arrears due or non-service of notice under S. 7 or the whole proceedings were vitiated by fraud. A. I. R. 1922 Cal. 101, Dist. (*C. C. Ghose and Suhrawardy, JJ.*) ANANDA CHANDRA *v.* JHULON SINGH. **56 Cal. 902 = 33 C. W. N. 305 = 120 I. C. 151 = A. I. R. 1929 Cal. 409.**

S. 36—Void sale.

———*Suit to set aside sale held for imaginary arrears.*

Where a sale by the Revenue Authorities was without jurisdiction, it is not necessary for the proprietor to

take recourse to the procedure prescribed in Revenue Sale Law as an essential preliminary to the institution of a regular suit for cancellation of sale held under that statute. If the Revenue authorities sell the property for an imaginary arrears, there is usurpation of jurisdiction on their part and the sale is a nullity. (*Mookerjee and Chotzner, JJ.*) DHIRENDRA KRISHNA MUKHERJEE *v.* MOHENDRA NATH MUKHERJEE.
27 C. W. N. 386 = 70 I. C. 869 = A. I. R. 1923 Cal. 428.

S. 37—Representative.

———Mortgagee from certificate debtors is their representative. (*Suhrawardy and Graham, JJ.*) HARA PRASAD *v.* GOPAL CHANDRA. **45 C. L. J. 73 = 31 C. W. N. 299 = 100 I. C. 997 = A. I. R. 1927 Cal. 315.**

S. 37—Scope.

———*Section pre-supposes existence of valid certificate against proper person.*

S. 37 pre-supposes the existence of a valid certificate for it is the existence of a valid certificate against the proper person that gives jurisdiction to the certificate officer to sell the property of that person. (*Suhrawardy and Jack, JJ.*) KALIPADA ROY *v.* MUKUNDA LAL.
34 C. W. N. 131 = A. I. R. 1929 Cal. 679.

———*No public demand due—The certificate is* ultra vires—*Proceedings founded on it are null and void.*

It is a condition precedent to the issue of a valid certificate that the " public demand " should be due and payable by the certificate debtor, and if at the time when the certificate is signed by the certificate officer, there is no public demand due from the certificate debtor, the certificate is *ultra vires*, and all the proceedings founded upon it are null and void. 25 Cal. 833 (P. C.). Rel. on. (*Page and Mallik, JJ.*) HARENDRA KUMAR RAI *v.* SECRETARY OF STATE. **55 Cal. 1355 = 33 C.W. N. 385 = 115 I. C. 45 = A.I. R. 1928 Cal. 808.**

———A suit in the Civil Court to set aside sale will only lie on the ground of fraud and not on the ground of irregularities in the conduct of the sale. (*Suhrawardy and Graham, JJ.*) HARA PRASAD *v.* GOPAL CHANDRA.
45 C. L. J. 73 = 31 C. W. N. 299 = 100 I. C. 997 = A. I. R. 1927 Cal. 315.

S. 37—Separate suit.

———*Suit to set aside sale alleging fraud—Plea of fraud failing—Suit fails—Section applies though auction-purchaser is interested in the result.*

Where a question arises between the certificate-holder and the certificate-debtors or their representatives, the procedure laid down by S. 37 must be adopted, notwithstanding that the purchasers under the auction sale may be impleaded as being interested parties in the suit. 19 Cal. 683 (P. C.), Foll. Where plaintiffs after taking steps to have the sale set aside by making application to the certificate officer pursuant to S. 22 or S. 23 of the Act seek to re-open the same question in a suit and in addition claim the same relief upon an allegation of fraud which proves to be groundless, the suit cannot be held as maintainable unless plaintiffs satisfy the Court that they are entitled to a decree based upon some ground other than those to which S. 37 is made applicable. (*Walmsley and Page, JJ.*) BASANTA KUMAR *v.* HARENDRA NATH. **30 C. W. N. 36 = 91 I. C. 796 = A. I. R. 1926 Cal. 107.**

Ss. 37 and 35—Separate suit.

———*Issue of certificate* ultra vires—*Suit for declaration is not barred.*

S. 37 read with S. 35 does not bar a suit for a declaration that the issue of a certificate was *ultra vires*.

A.I.R. 1914 P. C. 30, Referred to. (*Mukerjee and Cuming, JJ.*) PRATAP CHANDRA JANA *v.* THE SECRETARY OF STATE. **49 Cal. 1026 = 35 C. L. J. 304 = 67 I. C. 375 = A. I. R. 1922 Cal. 101.**

S. 37—Separate suit.

———*Sale of holding without notifying date, time or place—Declaration that sale is a nullity—Suit if maintainable.*

A sale held under the Public Demands Recovery Act by order of a Certificate Officer, without notifying the date, time and place of the sale is a nullity. S. 37 of that Act is no bar to a suit to obtain a declaration that the sale is null and void. (*Mookerjee, A. C. J. and Fletcher, J.*) REAJ-UD-DIN DALAL *v.* SHAHAMUTULLA MIA. **60 I. C. 759 (Cal.).**

Ss. 37 and 23—Setting aside sale.

———*Sale cannot be set aside by suit unless substantial injury is caused.*

A sale cannot be set aside for material irregularity by a separate suit unless substantial injury is caused. (*Suhrawardy and Graham, JJ.*) HARA PRASAD *v.* GOPAL CHANDRA. **45 C. L. J. 73 = 31 C. W. N. 299 = 100 I. C. 997 = A. I. R. 1927 Cal. 315.**

S. 41—Certificate.

———*Certificate has same effect as decree of Civil Court—Decree against person as representing minors is inoperative against minors unless person is entered as such in Collectorate Register.*

A certificate under the Act is considered as equivalent to a decree of a Civil Court. Therefore a decree against a person as representing minors without any mention about the same in Collectorate Register must undoubtedly be held not binding on the minors. (*Suhrawardy and Jack, JJ.*) KALIPADA ROY *v.* MUKUNDA LAL.
34 C. W. N. 131 = A. I. R. 1929 Cal. 679.

S. 57—Certificate officer.

———*Certificate Officer is not Court with special jurisdiction—His decision cannot operate as* res judicata *in a Civil Court— C. P. Code, S.* 11.

A certificate officer, who is a mere agent for speedy and summary recovery of rents due to an estate under the management of the Court of Wards and on whom certain powers of a Civil Court have been conferred, is not a Court exercising special jurisdiction. And so any decision arrived at by a certificate officer cannot operate as *res judicata* on any question raised in the Civil Court. A. I. R. 1927 Cal. 421, Ref. (*B. B. Ghose and Bose, JJ.*) DWARKANATH *v.* SRIGOBINDA.
112 I. C. 71 = A. I. R. 1929 Cal. 130.

Rules by Local Government, R. 46 (2)—Notice.

———*Omission to serve notice does not vitiate sale.*

Omission to serve notice under R. 46 (2), not causing injury to any party does not vitiate sale. (*Suhrawardy and Graham, JJ.*) HARAPRASAD *v.* GOPAL CHANDRA.
45 C. L. J. 73 = 31 C. W. N. 299 = 100 I. C. 997 = A. I. R. 1927 Cal. 315.

Rules under R. 46 (4)—Statement.

———*Omission of statement under—Only purchaser can raise an objection, if any.*

An objection on the ground of omission of the statement required by R. 46 (4) is available to the purchaser; but it does not lie in the mouth of the debtor or his representative to take exception to the validity of the sale on this ground. (*Suhrawardy and Graham, JJ.*) HARAPRASAD *v.* GOPAL CHANDRA. **45 C. L. J. 73 = 31 C. W. N. 299 = 100 I.C. 997 = A. I. R. 1927 Cal. 315.**

BENGAL PUBLIC DEMANDS RECOVERY ACT (1913), R. 47.

Rules under R. 47 (3)—Proclamation.

———*Omission to publish proclamation at Thana is not fatal.*

An omission to publish sale proclamation at the local Thana is not fatal to the sale if no injury is caused to the debtor. (*Suhrawardy and Graham, JJ.*) HARAPRASAD *v.* GOPAL CHANDRA. **45 C. L. J. 73 = 31 C. W. N. 299 = 100 I. C. 997 = A. I. R. 1927 Cal. 315.**

BENGAL PUBLIC GAMBLING ACT (II OF 1867).

S. 2. (as amended by Act IV of 1913)—Gaming.

———*Definition of gaming is only descriptive—To bring case under "gaming" it must be established that game was for money staked on result of game.*

The definition in the Act does not really define gaming but merely indicates what it is like and excludes wagering or betting on some particular occasion and in some particular circumstances and also excludes "lottery." To bring the case within the meaning of "gaming" all that has to be seen is whether the game that was going on was for money which was staked on the result of the game which was to be lost or won according to the success or failure of the person who has staked provided of course that it was not a lottery. 31 Cal. 542; 39 Cal. 968; 40 Mad. 556, Ref. (*Mukerji, J.*) ARJOON SINGH *v.* EMPEROR. **1929 Cr. C. 513 = 33 C. W. N. 910 = A. I. R. 1929 Cal. 769.**

———*Question whether game is of pure chance or one in which skill proponderates is no longer pertinent.*

The question as to whether a game is one of pure chance or one in which the element of skill preponderates are no longer pertinent under the Act as it stands now. What is to be seen is whether the game is covered by what is meant by " gaming"; if it is, it is hit by the Act unless it is a game of mere skill. 6 C. L.J. 708, Expl. (*Mukerji, J.*) ARJOON SINGH *v.* EMPEROR. **1929 Cr. C. 513 = 33 C. W. N. 910 = A. I. R. 1929 Cal. 769.**

Ss. 3, 4, 5 and 6—Applicability.

———*Presumption under S. 6 arises only under peculiar circumstances mentioned by statute itself—Magistrate not satisfied that premises are used as common gaming house—No presumption under S. 6 arises.*

The presumption of law under S. 6 arises only in the peculiar circumstances mentioned by the statute itself, *i.e.*, if the warrant authorises a search on the footing of the premises being a common gaming house and when the search results in a find of instruments of gaming. When the requirements of S. 5 are not strictly complied with inasmuch as the Magistrate does not say anywhere in the proceedings that the premises were used for a common gaming house, the presumption under S. 6 does not arise, and if there is no evidence showing that the premises had been kept for the profit or gain of the accused, they cannot be convicted under S. 3 or S. 4. (*Mukerji, J.*) GANGADAS BANERJI *v.* EMPEROR. **51 C. L. J. 224 = 51 C. L. J. 396 = 1930 Cr. C. 541 = A. I. R. 1930 Cal. 365.**

Ss. 11, 11 (a)—Finding of fact.

———A finding whether the "ring game" is a game of skill or chance is a finding of fact and unless there is a grave error, the High Court will not interfere. (*Jwala Prasad, J.*) DAMRI MIAN *v.* EMPEROR. **3 U. P. L. R. (Pat.) 55 = 61 I C. 518 = 22 Cr. L. J. 390.**

—(Amendment) Act (IV of 1913)—Scope.

———*Racing in partnership—Validity.*

It cannot be held that persons who enter into partnership for the purpose of making agreements not forbidden but recognised by Law, though unenforceable at Law, are persons who conduct a business, the very nature of which disentitles them to have recourse to Courts of law to recover the claims otherwise sustainable. (*Buckland, J.*) LEICESTER CO *v.* S. P. MALIK. **27 C. W. N. 442 = 80 I. C. 498 = A. I. R. 1923 Cal. 445.**

BENGAL REGULATION.

———**(I of 1793).**

See PERMANENT SETTLEMENT REGULATION.

———**(VIII of 1793).**

See DECENNIAL SETTLEMENT REGULATION.

———**(II of 1793).**

See INHERITANCE REGULATION.

———**(XIX of 1793).**

See REVENUE FREE LANDS (NON-BADSHAHI GRANTS) REGULATION.

———**(XXXVII of 1793).**

See REVENUE FREE LANDS (BADSHAHI GRANTS) REGULATION.

———**(XLIV of 1793).**

See GRANT OF LEASES REGULATION.

———**(XLVIII of 1793).**

See QUINQUENNIAL REGISTER REGULATION.

—(I of 1801), S. 14—Effect of.

———*Failure to get taluq separated does not make the taluqdar a lease-holder.*

The penalty and the only penalty imposed by the regulation on the talookdar who omitted to apply for the separation of his talook within the period of limitation was that such talukdar forfeited all title to separation under Reg. VIII of 1793, but in other respects the rights of the talookdars are not meant to be in any degree affected by this regulation. He would be considered a dependent taluqdar in the sense that this taluk shall not be entitled to be separated from the zamindaris to which it may be attached. *Jugodish case* (A. I. R. 1926 Pat. 369), Diss. from. (*Das and Adami, JJ.*) KAMAKHYA NARAIN SINGH *v.* BHUVANESHWAR LAL SINGH. **7 Pat 594 = 115 I. C. 204 = A.I.R. 1928 Pat. 516 (528, 529).**

—(XLII of 1803), S. 2 (2)—Mahalwari.

———*"Mahal" signifies property held under one title—"Mahalwari" is used in contradistinction to " mauzawari".*

The word "mahal" which is used in the Bengal Regulations as the equivalent of the English word "estate", signifies, not the property of person, and the property held under one title, whether by one person or by many. The word "mahalwari" is used in contradistinction to "mauzawari" which defines every separate mauza or village in the revenue records. (*Rankin, C. J. and Ghose, JJ.*) TARAKESWAR *v.* SATISH KANTA. **51 C. L. J. 297 = A. I. R. 1930 Cal. 411.**

———**(II of 1805).**

See LIMITATION REGULATION.

———**(XII of 1805).**

See CUTTACK LAND REVENUE REGULATION.

———**(XI of 1806).**

See TROOPS TRANSPORTS AND TRAVELLERS ASSISTANCE REGULATION.

———**(XVII of 1806).**

See LAND REDEMPTION AND FORECLOSURE REGULATION.

———**(V of 1812).**

See LAND REVENUE SALES REGULATION.

BENGAL REGULATION.

———**(XXIX of 1814).**

See BIRBHUM GHATWALI LAND REGULATION.

———**(III of 1818).**

See STATE PRISONERS REGULATION.

———**(II of 1819).**

See LAND REVENUE ASSESSMENT (RESUMED LANDS) REGULATION.

———**(VIII of 1819).**

See PATNI REGULATION.

———**(VII of 1822).**

See BENGAL LAND REVENUE SETTLEMENT REGULATION.

———**(XI of 1825).**

See BENGAL ALLUVION AND DILUVION REGULATION.

———**(X of 1829).**

See STAMPS REGULATION.

(VII of 1832) (Modifying Bengal Reg. V of 1831).

———*Applicability to Oudh—Conversion before date of annexation—Caste Disabilities Removal Act (XXI of* 1850) *—Acts do not apply .*

Regulation VII of 1832 or Act XXI of 1850 can be held to be applicable to the Province of Oudh from the date of annexation at the earliest, *i.e.*, on 13th February, 1856 and therefore the Regulation and the Act do not apply to the case of convert who renounced his religion before that date. (*Stuart, C. J. and Wazir Hasan, J.*) MITAR SEN SINGH *v.* MAQBUL HASAN.

4 O. W. N. 1243 = 3 Luck. 154 = 107 I. C. 890 = A. I. R. 1928 Oudh 138.

S. 9 and Bengal Civil Courts Act (VI of 1817).

———S. 24—*Applicability—Pre-emption—Mahomedan Law does not apply when vendor and pre-emptor are Mahomedans but vendee is Hindu.*

Where no local custom exists with regard to pre-emption amongst Hindus, the Mahomedan Law of Pre-emption does not apply when the person claiming the right of pre-emption and the vendor are Mahomedans and the purchaser is a Hindu. [4 B. L. R. 134 (F. B.), Foll.] and the subsequent repeal of S. 9 of Reg. VII of 1832 by S. 24 of Act VI of 1871 does not make. 4 B. L. R. 134 (F. B.) inapplicable to such cases. (*Greaves and Panton, JJ.*) AJIMTULLA SAHA *v.* JADAVNATH CHAKRAVARTI.

30 C. W. N. 272 = 93 I. C. 18 = A. I. R. 1926 Cal. 685.

(XIX of 1840), S. 19—Scope.

———*Collector allots public jama to enable revenue authorities to distribute equitably Government revenue between two revenue paying units and there is no decision in those proceedings as to Government revenue payable by each mauza.*

S. 19, Regulation of XIX of 1840, gives power to the Collector to draw out a paper of partition, specifying the allotment of the public jama upon each. But the Collector allots the public jama upon each of the mauzahs to enable the revenue authorities to find whether the division of the property, and the allotment of the jama on each estate into which it may have been divided have been made agreeably to the Regulation, and there is no decision in those proceedings as to the Government revenue payable by each of the mauzahs constituting the mahal. (*Das and Allanson, JJ.*) DOMA BHAGAT *v.* RAJA RAM SINGH.

9 P. L. T. 661 = 8 Pat. 95 = 115 I. C. 225 = A. I. R. 1929 Pat. 22.

———**(III of 1872).**

See SONTHAL PARGANAS SETTLEMENT REGULATION.

BENGAL RENT RECOVERY ACT (1865).

———**(V of 1893).**

See SONTHAL PARGANAS JUSTICE REGULATION.

———**(IV of 1910).**

See SONTHAL PARGANAS RURAL POLICE REGULATION.

BENGAL RENT ACT (X OF 1859).

———*Occupancy right under, was not transferable—Thekadar cannot acquire right.*

A right of occupancy under Bengal Act X of 1859 was a personal right. 22 W. R. 22 (F. B.), Foll. The raiyat could not transfer or make use of the right of occupancy as subject of property. A person in possession as thekadar cannot acquire a right of occupancy. (*Das and Ross, JJ.*) C. H. EDGELL *v.* BISWANATH PRASAD SINGH.

2 P. L. T. 654 = 62 I. C. 59 = A.I.R. 1921 Pat. 428.

S. 6—Lease-holders.

———*Rule as to occupancy does not apply to yearly lease-holders.*

The general rule under S. 6 of Act X of 1859 is undoubtedly to the effect that every raiyat who has cultivated or held land for a period of 12 years has a right of occupancy in the land so cultivated or held by him whether he held under patta or not, so long as he pays the rent payable on account of the same, but this rule shall not apply to khamar nijjot or *sir* land belonging to the proprietor of the estate or tenure and let by him on lease for a term of years or year by year. (*Das and Foster, JJ.*) GOPINATH SARANJI *v.* AJHARRUL HAQUE.

8 P. L. T. 578 = 101 I. C. 119 = A. I. R. 1927 Pat. 225.

S. 6—Tenancy.

———*Construction—Occupancy was held not to be created—Deed—Construction.*

A suit in 1864 by a Zemindar against his tenant claiming possession of certain chur land was compromised and fresh patta and kabuliyat fixing a yearly rent for a term of 8 years, were executed. After the expiry of the term a fresh patta and kabuliyat were to be given at a fair rate to be then settled. The kabuliyat continued " if after the fair rent is settled according to the proper rate prevailing in the villages I refuse to pay that rent, then you will bring the lands under your *khas* possession by evicting me therefrom; and I shall not be able to make any objection to the same." Until a fresh rent was settled the tenancy was to continue at the fixed rate. *Held*, upon the construction of the lease there was no right of occupancy. (*Lord Dunedin.*) MIDNAPORE ZAMINDARI CO. *v.* NARESH NARAYAN ROY.

48 I. A. 49 = 48 Cal. 460 = 14 M. L. W. 265 = 64 I. C. 231 = 30 M. L. T. (P. C.) 279 = A. I. R. 1922 P. C. 241.

BENGAL RENT RECOVERY ACT (VIII OF 1865).

Scope.

———*S. 208, Chota Nagpur Tenancy Act with Rent Recovery Act forms a complete Code for actual process of selling and effect of sale but operation of sections dealing with institution of execution proceedings is not prevented—C. P. Code, O. 21, R. 22.*

No doubt S. 208 with the Rent Recovery Act forms a complete Code for the actual process of selling and the effect of the sale of a tenure of holding, but this does not prevent the operation of sections dealing with the institution of the execution proceedings themselves; and if a decree is more than one year old, there is no reason why it should be executed, without notice, against a tenure or holding. (*Ross and Fazl Ali, JJ.*) BALDEO DAS BIRLA *v.* LAL NILMANI NATH SAHI DEO.

8 Pat. 122 = 9 P. L. T. 627 = 113 I. C 681 = A. I. R. 1928 Pat. 615.

S. 16—Applicability.

———*S.* 16 *applies to sale of tenure for arrears of Cess—Chota Nagpur Tenancy Act* (1908), *S.* 208.

Section 16 of the Bengal Rent Recovery Act of 1865 does apply to the sale of a tenure or holding for arrears of cess by virtue of S. 208 of the Chota Nagpur Tenancy Act. It follows, therefore, that the purchaser acquires the property free from all incumbrances unless the case comes within the proviso to S. 16. (*Das and Adami, JJ.*) Srimati Tulshi Mahatam *v.* Gajadher Marawari. **6 Pat. 317 = 103 I. C. 464 = A. I. R. 1927 Pat. 266.**

BENGAL REVENUE RECOVERY ACT (I OF 1890).

S. 5—Invalid Sale.

———*Sale of estate not in arrears is without jurisdiction and the title of real owner is not affected thereby.*

A Collector acts without jurisdiction in selling estates which are not in arrears under the Revenue Sale Law as his power is restricted to a sale of estates in arrears only. The real owner's title is not affected by the sale by the Collector of an estate not in arrears. (*Coutts and Adami, JJ.*) Mohammad Waheed *v.* Mt. Sunder Basi Kuer. **70 I.C. 714 = A. I. R. 1922 Pat. 445.**

BENGAL REVENUE SALES LAW. *See* Bengal Land Revenue Sales Act.

BENGAL SANITARY DRAINAGE ACT (VIII OF 1895).

S. 16—Applicability.

———*S.* 16 *applies to lands within and outside the Municipality.*

Section 16 applies in the case of lands acquired within or outside the Municipality. (*B. B. Ghose and Panton, JJ.*) Secretary of State *v.* Fakir Md. Mandal. **45 C. L. J. 185 = 101 I. C. 349 = A.I.R. 1927 Cal. 415**

BENGAL SURVEY ACT (V OF 1875).

S. 40 (1)—Scope.

———*Order under, bears analogy to order under S.* 34 *of Bengal Regulation VII of* 1822.

A possessory order under S. 40 (1) bears an analogy to a decision under S. 34 of Bengal Regulation VII of 1822. (*Mookerjee and Panton, JJ.*) Maharaja of Cooch Behar *v.* Mohendra Ranjan Rai. **34 C. L. J. 465 = 66 I. C. 923 = A. I. R. 1921 Cal. 277.**

S. 41—Assistant Settlement Officer.

———*Decision of, will have the force of a Civil Court decree.*

Revenue Officer appointed with the additional designation of Settlement Officer is vested with the powers of a Superintendent of Survey under the Bengal Survey Act and he has the powers of a Collector under Section 41 of the Act. He has power to delegate his function under this section to an Assistant Settlement Officer and the latter's decision as to possession has the force of a decree of a Civil Court. (*Coutts and Ross, JJ.*) Balgobind Kumar *v.* Rai Beharilal Mitter. **66 I. C. 471 = 1922 P. H. C. C. 114 = 3 P. L. T. 617 = A. I. R. 1923 Pat. 96.**

Ss. 41 and 62—Civil Court.

———*In spite of order under S.* 41 *Civil Court can adjudicate question of title.*

The question of title may be determined by a Civil Court and S. 41 of the Act does not preclude it from finding as to who was in possession of the disputed and anterior to the order passed by the survey authorities, 13 Cal. 280 and 19 C. W. N. 1038, Foll. (*Suhrawardy and Duval, JJ.*) Sujjad Ahammad Chowdhry *v.* Sachindranath Roy. **85 I. C. 1012 = A. I. R. 1925 Cal. 1052.**

S. 41—Dispossession.

———*Limitation Act, Art.* 142—*Adverse decision under, is dispossession.*

An adverse decision under S. 41 of the Bengal Survey Act amounts to dispossession within the meaning of Art. 142. (*Das and Adami, JJ.*) Bahadur Ali Khan *v.* Secretary of State. **61 I. C. 78 = 2 P. L. T. 133 = A. I. R. 1921 Pat. 277.**

S. 41—Effect of Order.

———*Survey officer unable to decide fact of possession from the evidence collected by him—His order that the boundary should be plotted as it stood in the revenue survey map was held to be not an order determining the fact of possession.*

A Survey Officer being unable to decide the fact of possession from the evidence collected by him refused to decide who was in actual possession and directed that the boundary should be plotted as it stood in the revenue survey map.

Held, that his order was not an order determining the fact of possession though S. 47 of the Bengal Survey Act directs that the Survey Officer in deciding a dispute as to boundaries between two mauzas must determine the boundary with reference to actual possession. (*Suhrawardy and Cammiade, JJ.*) Hemangini Debi *v.* Mundir Mridha. **112 I. C. 823 = A. I. R. 1928 Cal. 576.**

S. 41—Limitation.

———*Order under—Suit instituted more than* 3 *years after order, is not barred by Limitation Act, Art.* 46.

The order under S. 41 of the Bengal Survey Act has, until reversed or modified by competent authority, the force of an order of a Civil Court declaring the parties to be in possession of the land in accordance with the boundary as determined by the Collector. A suit instituted 3 years after the date of the order is not barred by Art. 46 of the Limitation Act. (*Mookerjee and Panton, JJ.*) Maharaja of Cooch Behar *v.* Mahendra Ranjan Rai. **34 C. L. J. 465 = 66 I. C. 923 = A. I. R. 1921 Cal. 277.**

———*Order of Collector—Limitation Act, Art.* 142 *applies to suit to modify or reverse Collector's order—Limitation Act, Art.* 142.

The order of the Collector under S. 41 operates as a decree of a Civil Court and it cannot be reversed or modified without any limitation of time. Art. 142 of the Limitation Act must apply, when it is sought to reverse or modify the order of the Collector, the date of dispossession being the date of the order of the Collector. (*Das and Adami, JJ.*) Parbhu Charan Bharthi *v.* Secretary of State. **61 I.C. 46 = 6 P.L.J. 51 = 2 P.L. T. 118 = A. I. R. 1921 Pat. 31.**

———*Settlement of boundary dispute—Effect of order—Suit for possession by landlord.*

An order under S. 41 of the Bengal Survey Act has the force of a decree of a Civil Court and the party in whose favour the order is passed should be considered to be in actual possession at the date of the order, and a person wishing to upset the order must bring a suit within 12 years from the date of the order.

An order settling a boundary dispute under S. 41 of the Bengal Survey Act is not void if, after the decision is come to, boundary pillars are not set up. The placing of boundary pillars is a part of the procedure which is performed by the officers of the Survey Department after a boundary dispute is decided. It is to be presumed that the boundaries were duly laid down and the burden of proving the contrary lies on the party alleging it. (*Das and Adami, JJ.*) RAFIQ-UN-NISSA *v.* KESHWAR NARAIN SINGH. **59 I. C. 840 (Pat.).**

Ss. 62 and 41—Scope.

———Judgments of the survey officers in disputes as to boundaries are no evidence of title : 8 C. W. N. 876, Foll. (*Ross and Kulwantsahay, JJ.*) PILCHER AND CO. *v.* SATISH CHANDRA. **115 I. C. 217= A.I.R. 1928 Pat. 399.**

BENGAL TENANCY ACT (VIII OF 1885).

Abatement of rent.

———Abatement of rent can be claimed in a case under the Bengal Tenancy Act. (*Pearson and Graham, JJ.*) GOSTA BEHARI PRAMANICK *v.* HEM CHANDRA DAS. **51 Cal. 1022=82 I. C. 315=29 C. W. N. 124= A. I. R. 1925 Cal. 356.**

Applicability.

———*Notification No. 964, T.R., dated 5th November, 1898 extending Bengal Tenancy Act to Western Duars—A darchukanidar can establish that he is an occupancy tenant.*

The plaintiffs were the holders of a jote, a chukani tenancy held by one *C* under whom the defendants alleged they were darchukanidars. The chukani was sold for arrears of rent and was purchased by the plaintiffs who served a notice on the defendant under S. 167, Ben. Ten. Act for annulling the encumbrance and thereafter instituted a suit for khas possession. The defence was that the defendants had occupancy rights in the lands and so were protected from eviction.

Held, that though a darchukani tenancy created by a chukanidar who had no right to create the same would not be recognized by law and would not be binding on the jotedar, yet considering the true meaning and effect of Notification T. R. dated 5th November, 1898. Cl. (4), by which the Bengal Tenancy Act was extended to the Western Duars from 1st January, 1899, the defendant should have a chance of establishing that he was a tenant whose tenancy was fit to be recognized in law and that as such tenant he had acquired a right of occupancy which protects him from eviction. (*Mukerji and Mitter, JJ.*) SANJUA URAO *v.* MATADIN AGARWALLA. **55 Cal. 428=111 I. C. 276=A. I. R. 1928 Cal. 322.**

———*Lease of homestead within Municipal area—Bengal Tenancy Act does not apply.*

Per *Mitter, J.*—Lease of homestead land within the Municipality cannot be governed by the Bengal Tenancy Act.

Per *Duval, J.*—The mere fact that the land lies within the Municipality is not necessarily sufficient to bring the case under the Transfer of Property Act. (*Duval and Mitter, JJ.*) SAFOR ALI *v.* ABDUL MAZID. **31 C. W. N. 282=100 I. C. 614=47 C. L. J. 27= A. I. R. 1927 Cal. 279.**

———*Lease for residential purposes and not for agricultural purposes is not governed by Bengal Tenancy Act, even though right to fruit trees on the land is given to the lessee—In such cases conduct of parties should not be considered.*

Where on the land in suit at the time of the lease there were only a certain number of fruit-trees and by the lease the lessees were to enjoy the land by erecting houses on it and planting, if they so liked, other fruit trees, and the provision was that thel ease should continue to the lessee's heirs, but there was a further provision that if at

any time the lessor should require the land he would give notice to the lessees who would. therefore, give up the land on receipt of the value of the fruit-trees, etc.

Held, that the land was not let out for purposes of cultivation but for residential purposes with the right to take fruits from the trees on the land and to plant other fruit trees and take their fruits. The mere fact that there is a right to plant trees or pluck the fruits of trees would not by itself convert a potta granted for a residentials purpose into a horticultural lease carrying the same rights as an agricultural lease and so bring it under the Bengal Tenancy Act, but it is governed by the Transfer of Property Act, and that the rights as between the parties must be determined on a construction of the lease, and the conduct of the parties after the lease has once been entered into cannot be considered. (*Suhrawardy and Duval, JJ.*) GOPAL CHANDRA BANERJEE *v.* BHUTNATH SASMAL. **42 C, L. J. 520=92 I C. 411= A.. I. R. 1926 Cal. 312.**

———*Whether B. T. Act or Transfer of Property Act applies depends on nature of the original tenancy and not on character of parcels included in the sub-tenancy.*

Whether a case is governed by B. T. Act or Transfer of Property Act depends upon the nature of the original tenancy and not on the character of the parcels included in the sub-tenancy. Actual origin of the tenancy need not be investigated. When tenancy was sub-let, if it was an agricultural holding, B. T. Act applies. (*Mookerjee and Rankin, JJ.*) RAMPADO SARKAR *v.* ATORE DOME. **84 I. C. 740= 40 C. L. J. 307=A.I.R. 1925 Cal. 202.**

———*Under tenure—Jama including agricultural land as well as homestead—Bengal Tenancy Act and Transfer of Property Act applies.*

Where the jama of an under-tenancy contained at the time of its creation agricultural land as well as homestead the Beng. Ten. Act applies and T.P. Act does not apply. (*Newbould, J.*) ABHAIPADA SIRCAR *v.* ATORE DOME. **67 I. C. 66=A. I. R. 1923 Cal. 294 (2).**

Homestead.

———*Homestead portion is on the same footing as cultivated area.*

Homestead portion of an agricultural holding is on the same footing as a portion under actual cultivation in the absence of local custom or usage. (*Mookerji and Rankin, JJ.*) RAMPADO SARKAR *v.* ATORE DOME **84 I.C. 743=40 C. L. J. 307=A. I. R. 1925 Cal. 202.**

———*Homestead sold by tenant for non-agricultural purposes—Transfer recognised by Landlord, on receipt of* Salami *and the rent quadrupled—Settlement must be taken as new one—T. P. Act (IV of* 1882)—*S.* 111 (*L*) *applies.*

A *Raiyat* sold his homestead, which formed a part of his non-transferable occupancy holding within municipal limits, to a pleader for residential and professional purposes. The landlord received *Salami* and recognised the transfer. Rent receipts were granted in the form prescribed by the Tenancy Act, in most of them the tenancy being described as *Karsa*. In a suit by the landlord for ejectment after 6 months' notice to quit.

Held, that the Defendants' tenancy was not a continuation of the old tenancy but one originated in a new settlement with the landlord. The lease since taken by the Defendant was not taken for purpose of agriculture or horticulture but for residential purposes, and in order to the practice of the Defendant's profession as a pleader in the local Courts. The tenancy, was therefore governed by the provisions of the T. P. Act and had been terminated by the notice to quit duly served. (1889) 16 Cal. 652 and (1892) 19 Cal. 489 Followed. (*Teunon*

and Abdul Majid, JJ.) HARENDRA KUMAR ROY CHOWDHURY *v.* HAR KISHORE PAUL.
70 I.C. 166 = 26 C.W.N. 389 = A.I.R. 1922 Cal. 201.

Interpretation.

———*Rights reserved by legislature to tenants can be claimed by suit as well by defence.*

The mere declaration by the legislature that a tenant has certain rights which he might enforce by suit cannot by itself suggest that the right cannot be claimed by way of defence. If the right is there, it can be enforced by a suit as well as claimed by way of defence. (*Fazl Ali and Chatterji, JJ.*) RAMESHWAR MANDAR *v.* BADRI SAHU. **11 P. L. T. 470 = A. I. R. 1930 Pat. 105.**

Landlord and Tenant.

———*Holding over on expiry of lease does not necessarily create tenancy of any kind—Each case depends upon facts and intention of parties—English law principles are not wholly applicable to cases under Bengal Tenancy Act.*

The act of holding after the expiration of the term does not necessarily create a tenancy of any kind, it being in each case a question of fact, what the intention of parties was. At the common law, if the tenant continues in possession by consent of his landlord, he is deemed *prima facie* a mere tenant at will. In England in the absence of rebutting evidence the inference arising from payment and acceptance of rent is that the tenancy is tenancy from year to year and *prima facie* the renewed tenancy is subject to all the terms of the expired tenancy which can be applied to a tenancy from year to year. But these doctrines of English law are not applicable to the whole extent under the Bengal Tenancy Act. (*Rankin, C. J. and C. C. Ghose, J.*) GOPAL CHANDRA RUDRA *v.* KHATER KARIKAR. **33 C. W. N. 1207 = A. I. R. 1930 Cal. 262.**

———To a tenancy having its origin 80 or 85 years ago provisions of T.P. Act or Bengal Tenancy Act are not applicable. (*Rankin, C. J. and Mukerji, J.*) HEMANGINI DASSI *v.* ASUTOSH DAS. **113 I. C. 568 = A. I. R. 1929 Cal. 330.**

———*Tenancies of homestead land and of the nature of village service tenure are not governed by Bengal Tenancy or T.P. Act and are not transferable—Surrender by tenant—Former tenant absconding—Landlord can take direct possession.*

Tenancies of homestead land created for the purpose of habitation and purely of the nature of village service-tenure are not governed by the Bengal Tenancy Act or by the T.P.Act and are not transferable except by custom or usage and where there has been an implied surrender of the land and the former tenants have abandoned the land the landlord is entitled to take direct possession of it. 7 C. L. J. 309 and 20 C. W. N. 322, Foll. (*Duval and Mitter, JJ.*) ADHAR CHANDRA DEY *v.* BIPIN CHANDRA DEY. **100 I. C. 167 = A. I. R. 1927 Cal. 373.**

———*Bengal Patni Regulation, S.* 11—*Landlord can realise rent after one year under ordinary law,* i.e., *Bengal Tenancy Act.*

Even if a landlord allows his rent to fall into arrear for a period exceeding one year, he is not debarred from realizing it under ordinary law. The Patni Regulation gives to the zamindar the right to realize the rent by a summary procedure and that summary procedure is restricted only to periodical rents. But the zamindar is not bound to realize his rent every six months. He can wait for a longer period, and if he does wait for a longer period he can proceed under the general law for the realization of his rent. (*Jwala Prasad and Bucknill, JJ.*) SHAIKH ABDUL GAFFAR *v.* F. B. DOWNING.
5 Pat. 415 = 8 P. L. T. 343 = 98 I. C. 893 = A.I.R. 1926 Pat. 465 (471).

———A landlord is entitled to consideration for recognising the purchase of a non-transferable occupancy holding. (*Chakravarty, J.*) SASI KANTA ACHARJEE BAHADUR *v.* GENDA SHEIKH. **82 I. C. 970 = A. I. R. 1925 Cal. 389.**

Land revenue.

———*Even in case of possession by trespasser land* asli *at Permanent Settlement cannot on re-emergence be resumed and assessed with revenue.*

Upon re-emergence after submergence subsequent to the Permanent Settlement, of lands which were *asli* at the Permanent Settlement and assessed as such, revenue cannot be assessed by the Government on the lands. If the person in possession is not the rightful owner, the Government is not on that account authorised to resume and assess the land with revenue upon such re-emergence. (*Newbould and B. B. Ghose, JJ.*) SECRETARY OF STATE *v.* KALI NARAYAN ROY CHOUDHURY.
85 I. C. 211 = 29 C. W. N. 119 = A. I. R. 1925 Cal. 273.

Land Tenure.

———Jote is a general term with respect to a holding and it is not necessarily equivalent to a " Raiyati jote ": A.I.R. 1922 P. C. 241; 21 C. W. N. 188; and 8 C.W.N. 117, Foll. (*Suhrawardy and Graham, JJ.*) TARINI CHARAN *v.* SRISH CHANDRA. **56 Cal. 173 = 115 I. C. 81 = 48 C. L. J. 97 = 32 C. W. N. 587 = A. I. R. 1928 Cal. 880.**

———*Incidents are governed by custom.*

The term " Chukani" is used with regard to a particular sort of tenancy and its incidents are governed by custom. (*Walmsley and Ghose, JJ.*) BHAJAN SHEIKH *v.* BALAI SARKAR. **A.I.R. 1923 Cal. 375.**

Merger.

———*Purchase of raiyati holding by fractional proprietor—Holding does not merge in larger interest even before or after the Act—Interest acquired passes to purchaser of such proprietor's interest.*

Both before and after the passing of the Bengal Tenancy Act in 1885, even if the occupancy right ceased to exist on a purchase of the raiyati holding by a fractional proprietor, the holding did not merge in the larger interest. The interest acquired does not cease to exist because the co-sharer transfers his interest to another proprietor, but it would pass to the transferee of the proprietary interest. (*Dawson Miller, C. J. and Foster J.*) GOPI SINGH *v.* JAGDEO SINGH.
8 P. L. T. 69 = 102 I. C. 386 = A. I. R. 1927 Pat. 172.

Mokarary land.

———The mere fact that a certain rate is mentioned with respect to excess land that may be found in possession of the tenants does not create a presumption as to the mokarari nature of the holding. (*Suhrawardy and Duval, JJ.*) RAMIJUDDIN *v.* RAI RADHA KANTA AICH BAHADUR. **80 I. C. 987 = A. I. R. 1925 Cal. 245.**

Occupancy holding.

———*The* raiyat *has property in the holding distinct and apart from the parent estate.*

Per *Das, J.*—An occupancy holding forms a property by itself and is capable of being held and is in fact held distinct and apart from the estate, within the ambit of

which it may happen to lie. An occupancy holding is heritable; it is transferable with the consent of the landlord. The *raiyat* is entitled to cut down trees provided there is no local custom to the contrary. S. 65 protects the tenant from ejectment for non-payment of rent, but allows the landlord to bring the holding to sale with the result that the surplus sale proceeds are available to the tenant. This is a clear recognition of property in the *raiyat* distinct and apart from the parent estate. (*Dawson Miller, C.J., Das and Adami, JJ.*) BHONU LAL CHOWDHURY *v.* W. A. VINCENT.
3 Pat. L. T. 653 = 65 I.C. 882 = A. I. R. 1922 Pat. 619 (635).

——*Non-transferable occupancy holding—Sale of the holding in execution of the money-decree against the holder is valid.*

A decree-holder, not being the landlord of the holding, can, against the will of the judgment-debtor and without the express consent of the landlord of which there is no evidence, cause a portion of the judgment-debtor's occupancy holding to be sold in execution of a money-decree. Further a landlord who has obtained against his tenant a money-decree can, in execution thereof sell the non-transferable occupancy holding without the tenant's consent. (*Dawson Miller, C. J., Das and Adami, JJ.*) JUGESHWAR MISRA *v.* NATH KOERI.
1 Pat. 317 = 3 Pat. L. T. 205 = A.I.R. 1922 Pat. 114.

Occupancy right.

——A right of occupancy under the Bengal Tenancy Act, 1885, appears to be a statutory right, and is not conferred by a gift from a proprietor. (*Sir John Edge, J.*) BINDESHWARI PRASAD SINGH *v.* MAHARAJA KESHO PRASAD SINGH BAHADUR. **5 Pat. 634 = 53 I. A. 164 = 7 P. L. T. 553 = 95 I.C. 1025 = 31 C. W. N. 74 = 44 C. L. J. 86 = A. I. R. 1926 P. C. 79 = 51 M. L. J. 587 (P. C.).**

——*Older theories do not continue along side Act.*

In addition to the methods to be found prescribed in the Bengal Tenancy Act there do not still survive running *pari passu* with them the old method of acquisition of occupancy right. It was not intended by the Bengal Tenancy Act to keep these older doctrines alive. (*Rankin and B. B. Ghose, JJ.*) JANABALI MOLLA *v.* PORT CANNING. **84 I. C. 735 = 40 C. L. J. 167 = A. I. R. 1925 Cal. 336.**

Recorded tenant.

——*Rent decree—Landlord is not bound to sue legal representatives whose names are not registered.*

The landlord is entitled to sue his recorded tenants. The death of some of the defendants previous to the decree does not in any way affect the liability of the tenure, where the landlord had no notice. (*Mullick and Bucknill, JJ.*) JAGDEO NATH *v.* PRATAP UDHAINATH.
75 I. C. 321 = 1923 P. H. C. C. 374 = A. I. R. 1924 Pat. 339.

——*Sale of Tenure—Only one tenant recorded—Representation by such recording, on behalf of all explained.*

So far tenures are concerned the Bengal Tenancy Act makes it obligatory upon the tenants to have their names recorded, in the landlord's *sherista* whenever they become entitled to them by succession. In the case of a tenure, therefore, where only one tenant takes the trouble to have his name recorded in the landlord's *sherista*, and the others, either through design or negligence fail to do so, it may be presumed that the tenants who failed to have their names recorded in the landlord's *sherista* consented to the tenant who had his name recorded representing them both in transactions and in suits affecting the landlord and the tenants. But other principles arise where the Court has to deal with the case of the sale of a holding, as to which there is nothing in the Bengal Tenancy Act compelling raiyats to have their names recorded in the landlord's *sherista*. It is a question of fact in each case whether the recorded tenant does in fact represent the holding in dispute and the fact that only one tenant is registered is an item in the evidence upon the question whether he is or is not the representative tenant *qua* the landlord. It is impossible to say that it follows as a matter of law that a co-tenant does represent the holding *qua* the landlord when all that is shown is that he is he only recorded tenant and is the head of the family. If the recorded tenant went and applied for a settlement and the landlord settled the land with him then whatever the position may be as between him and his brother, *qua* the landlord he is the only tenant. But if on the other hand he along with his brother became entitled to the holding by succession, question will have to be considered whether he did in fact represent the holding *qua* the landlord. (*Das and Adami, JJ.*) JAIDEB THAKUR *v.* JAMAHIR MISSER. **69 I. C. 565 = 1923 P. H. C. C. 57 = 1 Pat. L. R. 47 = A. I. R. 1923 Pat. 206.**

Retrospective effect.

——Under the Bengal Tenancy Act any right of occupancy acquired previous to the passing of the Act is maintained. (*Walmsley and Ghose, JJ.*) BHAJAN SHEIKH *v.* BALAI SARKAR. **A.I.R. 1923 Cal. 375.**

Scope.

——*Act is enacted for the protection of tenants, so the mere fact that a tenant declines to pay high rate of rent which he is not bound to pay under the Act, does not disentitle him from obtaining a renewal* (per *Greaves, J.*)

The mere fact that a tenant has declined to pay rent at a rate which he is not bound to pay by virtue of the provisions of the Tenancy Act does not disentitle him from obtaining the renewal. The Tenancy Act is enacted amongst other things for the protection of the tenant and it would be a dangerous principle if the landlord by indirect means of such a nature were in a position to exact a higher rate of rent from the tenant than the law allows and it would be a great inducement to a tenant to pay a higher rate of rent than he is bound to pay under the law if he is sure that by so doing at the end of his term he will secure a renewal of his tenancy for another period and he cannot otherwise obtain a renewal. (*Greaves and Cuming, JJ.*) ASHRAF ALI *v.* ARMAN KHAN. **90 I. C. 893 = A. I. R. 1926 Cal. 162.**

——*Several rent receivers can co-exist but not tenants—Under-raiyat has no tangible interests nor is it transferable or heritable.*

The scheme and policy of the land laws of Bengal is to originally divide persons having interest in agricultural land into two classes *viz.*, those in actual occupation or cultivating tenants and those entitled to rent from such tenants. There may be several degrees of rent-receivers but there is one class of cultivating tenants who are called raiyats. The under-raiyat does not stand on a much higher footing than hired labourers and the raiyat is supposed to be cultivating land through his under-raiyat. The Bengal Tenancy Act has taken away his right of acquiring a right of occupancy under any condition except by local usage or custom. He is no better than a tenant-at-will with no tangible interest in the land except that of holding it till the end of the agricultural year. The right of an under-raiyat is not transferable; the interest of an under-raiyat is not heritable. Though the right of an under-raiyat is not transferable without the landlord's consent it does not necessarily or logically follow that it is transferable with his consent. Even though it is transferable with the landlord's consent a consent given long after, the transfer cannot be said to have been made with the landlord's consent. One of the ordinary incidents of a transferable interest is its heritability but the interest of an under-raiyat is not heritable. (*Suhrawardy and Graham, JJ.*) JNANENDRA NATH MUSTAPHI *v.* DUKHIRAM SANTRA. **40 C. L. J. 90 = 82 I.C. 386 = 28 C.W.N. 865 = A. I. R. 1924 Cal. 850.**

———*Subsequent lessee cannot sue to collect dues by previous lessee—No privity of contract or estate exists between them.*

Under the Bengal Tenancy Act the question of the status of the tenant is not without importance. It would introduce confusion into the administration of the Act to say that if a holding be leased by the landlord for the purposes of cultivation first to one raiyat and then to another, the second raiyat would be entitled to collect the rent payable by the first. The law as to concurrent leases in England appears to be curious and technical and in some respects unsettled. (*Richardson and Suhrawardy, JJ.*) (SHAIKH) SANGSAR ALI *v.* JAGANNATH PAL. **76 I. C. 252 = 37 C. L. J. 263 = A. I. R. 1923 Cal. 368.**

S. 3 (3)—Non-payment of rent.

———*Non-payment of rent does not necessarily connote proprietorship of land.*

It is possible for a raiyat to hold lands without paying rent to the landlord, but he does not thereby become the proprietor of the soil. He may be a tenant in accordance with the definition of "tenant" as given in S. 3 (3) B.T. Act, and still under a special contract does not pay rent to the landlord. (*Suhrawardy and Cuming, JJ.*) ASWINI KUMAR *v.* KAMINI KUMAR. **87 I.C. 798 = A.I.R. 1926 Cal. 337 (2).**

S. 3—Tenancy of tank.

———*Mere fact that tenancy is of tank does not take it out of operation of Bengal Tenancy Act.*

The mere fact that the tenancy is of a tank does not take it out of the operation of Bengal Tenancy Act, when the lease has been subject of Record-of-Rights under Bengal Tenancy Act and is on the face of it a raiyati lease. (*Cuming and S. K. Ghose, JJ.*) BHABANI CHARAN BANIKYA *v.* SUCHITRA BAISNABI. **51 C.L.J. 25 = A. I. R. 1930 Cal. 270.**

S. 3 (3)—Tenancy of waste land.

———*Payment of rent is not necessary to create tenancy of waste land.*

The immediate payment of rent is not an essential factor in the creation of a tenancy. It is by no means unusual for waste lands to be granted to a tenant by his landlord with a stipulation that no rent shall be payable until they are brought under cultivation. There is nothing in the Bengal Tenancy Act which prevents such an arrangement. (*Dawson Miller, C. J. and Mullick, J.*) CHATTER KUMARI DEBI *v.* PRATABHUJ SINGH. **67 I.C. 859 = A. I. R. 1923 Pat. 176.**

S. 3 (3) and (9)—Index of tenancy.

———*Certain rent payable for one entire khata and for a share in another khata—First khata alone cannot form tenancy and so cannot be holding.*

It is the rent which gives the index of a particular tenancy and so where a certain rent is to be paid for one entire khata and for particular share in another khata, it cannot be said that the first khata alone forms the tenancy and therefore that alone cannot be a holding. 2 P. L. J. 563, Expl. (*Adami and Chatterji, JJ.*) INDRASAN PANDA *v.* KABUTRA KUER. **119 I.C. 556 = A.I.R. 1929 Pat. 237.**

S. 3 (5)—'Mal.'

———*Mal does not define actual rent.*

If malguzari is not to be regarded as necessarily a definition of actual rent, still less can the term 'mal' be so regarded. (*Das and James, JJ.*) GOPAL SARAN *v.* MAHESHWARI PRASAD. **8 Pat. 655 = 10 P.L.T. 329 = 119 I.C. 65 = A.I.R. 1929 Pat. 307 (313).**

S. 3 (8)—Mourasi tenure.

———*Mourasi tenure comes within the definition of "permanent tenure."*

Mourasi tenures come within the definition of "permanent tenure" as stated in S. 3 (8) because the word "mourasi," which implies according to its literal meaning, "a succession from generation to generation" in the interest held by the mourasidar conveys the idea of permanency, as it can be predicated of such a tenure that it is held for an indefinite time: A. I. R. 1925 P. C. 97, Expl. (*Mitter, J.*) GIRI BALA DASI *v.* KEDAR NATH. **56 Cal. 180 = 117 I. C. 534 = A.I.R. 1929 Cal. 454.**

S. 3 (9)—Homestead belagan land.

———*Homestead belagan land is not only part of holding but is inseparable from the rest of lands in that holding*

All that is required for a holding is that it should consist of a parcel or parcels of land whether rent free or rent paying held by a raiyat and forming the subject of a separate tenancy; and a homestead belagan land included in the holding is held by the tenant for the purpose of cultivating the rest of the lands in that holding, and such a land is not only a part of the holding but is inseparable from the rest of the lands in that holding. There is, therefore, no presumption that belagan homestead lands are not part of a raiyati holding: 43 I. C. 377 = (1917) P. H. C. C. 360 = 3 Pat. L. W. 299, Overruled. (*Jwala Prasad, Ross and Wort, JJ.*) TILAKDHARI SINGH *v.* KUMAN DAS. **11 P. L. T. 141 = 123 I.C. 403 = A.I.R. 1930 Pat. 201 (F.B.).**

———*Whether belagan homestead land is or is not part of raiyat's holding is a question of fact.*

It is a question of fact and not of law as to whether a particular homestead land is or is not part of the raiyat's holding and this is to be determined upon the facts and evidence in each case. (*Jwala Prasad, Ross and Wort, JJ.*) TILAKHDARI SINGH *v.* KUMAN DAS. **11 P.L.T. 141 = 123 I.C. 403 = A.I.R. 1930 Pat. 201 (F.B.).**

———*Tenant transferring belagan homestead and abandoning his holding—Transferee cannot resist ejectment from landlord—Ejectment.*

Where a tenant is not in possession of any portion of the holding and he has been held to have abandoned it entirely, a transferee of such tenant of belagan homestead in that holding cannot resist the suit brought by the landlord to eject him from the homestead plot. (*Jwala Prasad, Ross, and Wort, JJ.*) TILAKHDARI SINGH *v.* KUMAN DAS. **123 I.C. 403 = 11 P.L.T. 141 = A. I.R. 1930 Pat. 201 (F.B.).**

S. 3 (9)—Retrospective operation as amended by Act IV of 1928—

———*Definition is not retrospective in operation.*

Definition of "holding" as amended by Act IV of 1928 is not retrospective in operation and Court cannot disturb a decision between parties correctly arrived at

between them according to law on the date of decision. (*Rankin, C.J. and Mukerji, J.*) BIR BIKRAM KISHORE MANIKYA BAHADUR *v.* RAJJAB ALI.
33 C.W.N. 1156 = A.I.R. 1930 Cal. 238.

S. 3 (9)—Undivided share.

———*Parcel of land comprising undivided share is not holding.*

Where the parcel of land let to a tenant comprises an undivided share in certain land, the letting is not letting of a holding within the meaning of the definition. (*Rankin, C.J. and Mukerji, J.*) BIR BIKRAM KISHORE MANIKYA BAHADUR *v.* RAJJAB ALI.
33 C.W.N. 1156 = A.I.R. 1930 Cal. 238.

———*Parcel of land including undivided share is not "holding."*

Where a portion of a tenancy includes an undivided fractional share in a parcel of land, it cannot be regarded as a holding. (*Mitter, J.*) BIR BIKRAM *v.* RAJJAH.
116 I.C. 637 = A.I.R. 1929 Cal. 201 (a) (202).

———*"Parcel" cannot mean an undivided share.*

The word "parcel" in the definition of the word "holding" implies land within a defined set of boundaries, and cannot be taken as meaning an undivided share. 25 Cal. 917 *n.* and 2 P. L. J. 553, Foll. (*Adami and Chatterji, JJ.*) INDRASAN PANDE *v.* KABUTRA KUER. **119 I. C. 556 = A. I. R. 1929 Pat. 237.**

———*Undivided portions of land cannot constitute a holding.*

Where undivided portions of land have been included within the leasehold, the tenancy cannot be said to comprise a holding as defined in the Bengal Tenancy Act. 25 Cal. 917, Foll, (*Cuming and B. B. Ghose, JJ.*) BAHADUR AHMAD MOULAVI *v.* HEMANTA KUMAR ROY. **94 I. C. 338 = 30 C.W.N. 613.**

Ss. 3 (9), 30 and 182—Undivided share.

———*"Holding" does not include undivided share.*

An undivided share of land is not a 'holding' within S. 3 (9) of the Act and the word 'parcel' in that clause means entire parcel. Therefore S. 30 has no application when the tenancy of a raiyat is an undivided share of land. (*Newbould and Panton, JJ.*) BINAYAK DAS *v.* SAMINUDDI. **59 I. C. 209 = 24 C.W.N. 1022.**

S 3 sub-Sec. (17).

———*Amendment whether retrospective.*

Held, that sub-Sec. (17) of S. 3 of the Bengal Tenancy Act as amended in 1928 is not retrospective in its effect. (*Graham and Mitter, JJ.*) SURESH CHANDRA DUTTA *v.* MOHENDRA CHANDRA DE.
34 C.W.N. 845.

S. 4—Nature of tenancy.

———*Question whether tenant is tenure-holder or* raiyat *under B. T. Act ultimately depends on question of fact.*

Though a substantial question of law may, and generally does arise in determining whether a tenant is a *raiyat* or a tenure holder, the point depends ultimately on questions of fact. 46 Cal. 90 (P.C.), Foll. (*Miller C. J. and Macpherson, J.*) TARNI SINGH *v.* SATNARAIN MAHARAJ. **1925 P.H.C.C. 281 = 6 P.L.T. 787 = 90 I.C. 895 = A. I. R. 1926 Pat. 9.**

S. 4—Under-ryot.

———The expression "ryot" in the Act does not include under-ryot. The terms are not interchangeable. (*Cuming and B. B. Ghose, JJ.*) KINU SHAIKH *v.* RAJKUMAR GHOSE. **96 I.C. 588 = A. I. R. 1926 Cal. 1160.**

S. 4—Zerait land.

———*Zerait land is wholly outside the scope of the Act.*

Proprietor's private lands are wholly outside the scope of the Act and settlement of these lands is governed by

the codified law in the Transfer of Property Act. Tenants holding Zerait otherwise than under a lease for a term of years or from year to year do not acquire occupancy or non-occupancy rights therein. (*Jwala Prasad, A.C.J. and Kulwant Sahay, J.*) RAMJI RAM *v.* BANSI RAUT.
4 Pat. 89 = 84 I. C. 305 = 6 P.L.T. 240 = 1924 P.H.C.C. 337 = A. I. R. 1925 Pat. 241.

———A lessee of zerait land is a tenant of a class outside Section 4. (*Jwala Prasad, A.C.J. and Kulwant Sahay, J.*) RAMJI RAM *v.* BANSI RAUT. **4 Pat. 89 = 84 I. C. 305 = 1924 P.H.C.C. 337 = 6 P.L.T. 240 = A. I. R. 1925 Pat. 241 (249).**

S. 5—Area held by a tenant, meaning.

———*Area held by a tenant means holding or letting, in controversy.*

The term 'area' held by a tenant means the holding or letting, over which a certain controversy has arisen, and not the whole land in tenant's possession. (*Rankin, C. J. and C. C. Ghose, J.*) HARI MOHAN *v.* GOUR MOHAN SARKAR. **120 I.C. 453 = 56 Cal. 1164 = 33 C.W.N. 564 = A. I. R. 1930 Cal. 253.**

S. 5, Cl. 5—Burden of Proof.

———*Presumption of tenure-holder applies only when the land exceeds 100 bighas—Challenging party should prove the contrary.*

The presumption of tenure-holder applies only when the land exceeds 100 bighas and it is not right, for the purpose of ascertaining whether the presumption applies, to institute an enquiry as to whether the person who holds the land in question also holds other lands from the same landlord or otherwise in other parts of the province or in the same neighbourhood. That may perhaps be useful for other purposes, *e.g.*, when considering whether the presumption is rebutted, or in a case in which there is no presumption. When once the presumption arises the challenging party should prove the contrary. (*Rankin, C.J. and C. C. Ghose, J.*) HARI MOHAN *v.* GOUR MOHAN. **56 Cal. 1164 = 120 I. C. 453 = 33 C.W.N. 564 = A. I. R. 1930 Cal. 253.**

S. 5—Construction of lease deed.

———*Lease of bagat land for a limited period—No indication in it that lease was meant for agricultural or horticultural purposes—Lessee is not raiyat and can be ejected after termination of lease—Lease—Construction.*

Where the kabuliyat showed that the lease was for a piece of bagat land and it contained no indication that the tenant was to be treated as a raiyat or that the purpose of the tenancy was agricultural or horticultural, and the limitation as to the rights of the tenant indicated in the kabuliyat showed clearly that the lease was neither intended to be an agricultural lease nor a horticultural lease.

Held, that the tenant was bound by the contract he made, that is, to give up possession of the land after the expiry of the prescribed period. (*Pearson and Chakravarti, JJ.*) RAIKRISTO *v.* BATA KRISTO.
90 I.C. 114 = A. I. R. 1926 Cal. 354

Ss. 5 and 103-B—Exception to the presumption.

———*Tenancy exceeding* 100 *bighas and recorded in Record-of rights as tenure—Kabuliyat expressly stating tenancy to be raiyati and all its incidents as given in kabuliyat also being those of raiyati holding—Presumption under Ss.* 5 *and* 103-*B being rebutted by kabuliyat, tenancy was held only raiyati one.*

A tenancy exceeded 100 bighas in area and was recorded in Record-of-Rights as a tenure. The lease was a confirmatory lease. But the kabuliyat expressly stated that the tenancy was a raiyati tenancy. Further all the incidents of the tenancy as mentioned in the kabuliyat. such as prohibition of sale, of erection of permanent structures, of digging tanks, etc., were those of a raiyati holding.

Held, that the presumption under Ss. 5 and 103-B was rebutted by the kabuliyat, and so the tenancy was only a raiyati one. (*Cammiade and S. K. Ghose, JJ.*) JITENDRA NATH *v.* RAICHARAN BISWAS.

33 C.W.N. 356 = 119 I.C. 816 = A. I. R. 1929 Cal. 514.

S. 5—Flower garden.

———Land taken for the purpose of a flower garden is taken for an agricultural purpose. (*Cuming and Mallik, JJ.*) SHIBA KALI KUMAR *v.* CHUNI LAL.

31 C.W.N. 1007 = 103 I.C. 674 = A.I.R. 1927 Cal. 748.

S. 5, Cl. (3) and S. 48—Kabuliyat to mortgagee.

———*Mortgagor raiyat by executing kabuliyat in favour of mortgagee does not hold under a raiyat as mortgagee is not a raiyat.*

Where the sum advanced was not paid by the Zarpeshgidar as rent payable in advance for a certain period at the end of which the land was to be delivered up to the lessor and profits were to be taken as interest and the Zarpeshgidar was to remain in possession on the same conditions until the amount was repaid and the property was hypothecated for repayment of the loan in the event of the Zarpeshgidar being dispossessed.

Held, that the raiyat who executed the lease did not by executing kabuliyat become tenant holding immediately or mediately under a raiyat within S. 5 (3) and S. 48 did not apply. Whether Zarpeshgi and the kabuliyat constituted one transaction or two transactions is immaterial. (*Dawson Miller, C. J. and Mullick, J.*) TILAKDHARI SINGH *v.* CHATURGUN BIND.

3 Pat. 266 = 78 I.C. 923 = 1924 P.H.C.C. 4 = A.I.R. 1925 Pat. 118.

Ss. 5. 5 (5), 120 and 120 (2)—Nature of tenancy.

———*Lessee holding less than* 100 bighas—*S.* 5 (5) *does not apply—Land let out expressly for cultivation —Lessee is not a tenure-holder.*

Section 5 (5) has no application to the case of a person who does not hold more than one hundred standard *bighas* of land, and there will be no presumption as to his being a tenure-holder. The true scope and meaning of S. 5 are that, where the purpose for which the tenancy was originally created is known and clearly proved, no other presumption as to the tenancy being otherwise than what the original purpose is, is admissible. If land is expressly leased out to a person for the purpose of cultivation and he was prohibited from making settlement of it with any other person, or granting *shikmapatta* in respect thereof, or using the land in any way which would interfere with the cultivable nature thereof, the lessee is only a *Shikamidar* and not a tenure-holder under S. 5. (*Jwala Prasad and Bucknill, JJ.*) BENI CHAUDHARI *v.* TRILOKENATH TIWARI.

A. I. R. 1922 Pat. 425.

S. 5—Permanent Mokarrari tenancy.

———*No statutory presumption from area of tenant being raiyat—Acquisition of tenancy for letting it out—Tenant is tenure-holder and not raiyat.*

Where a tenancy was called permanent mukarrari and the transferee was never alluded to as raiyat but as mukararidar and there was no statutory presumption from the area that the transferee was a raiyat and there was no indication in settlement deed that the person acquiring the right to hold the land had done so for the purpose of cultivating it himself or by member of his family or by hired servants or with the aid of partners but on the contrary the indications were all against any acquisition for such a purpose as the transferee was a pardanshin lady living in a different village who promptly let out the whole area for seven years: the transferee must be held to be a tenure holder and not a raiyat within the purview of S. 48. (*Macpherson and Dhavle, JJ.*) FAKIR MOHAMMAD *v.* SAKINA.

10 P. L. T. 369 = A. I. R. 1929 Pat. 372.

S. 5 (5)—Presumption.

———*There is presumption in favour of a tenant holding land exceeding hundred bighas.*

There would undoubtedly be a presumption in favour of the interest of the tenant being that of a tenure-holder if the land exceeds 100 standard bighas. But there is no presumption in favour of the raiyati land, because the area held by the tenant is less than 100 bighas. (*Das and Kulwant Sahay, JJ.* SATYENDRA NARAYAN *v.* SHYAMSUNDAR SINGH.

7 Pat. 212 = 109 I. C. 526 = 9 P. L. T. 696 = A. I. R. 1928 Pat. 267.

———*Tenant holding more than* 100 *bighas—Presumption is that he is tenure-holder.*

Where the area held by a tenant exceeds one hundred standard bighas, the tenant shall be presumed to be a tenure holder until the contrary has been shown. Reference to the mode of user of the land is legitimate when the terms of the original grant are ambiguous or cannot be proved by direct evidence. When the transferee of the original tenants objected to be recorded as a tenure-holder he was peremptorily informed that if he insisted upon the status of an occupancy ryot he must forthwith vacate the land, with the result that the transferee withdrew his objection and was recorded as a tenure-holder. *Held* that there can be no reasonable doubt that the original tenants were tenure-holders under the Government. (*Mookerjee and Cuming, JJ.*) HEMANTA KUMARI DEVI *v.* MIDNAPORE ZAMINDARY CO., LTD.

77 I. C. 261 = 35 C. L. J. 493 = A. I. R. 1923 Cal. 25.

S. 5 (2)—Raiyats.

——— Where the defendants were proved to have lands which they themselves cultivated they must be considered to be raiyats under the Bengal Tenancy Act and therefore S. 182 applies to them. (*Rankin, C. J. and C. C. Ghose and B. B. Ghose, JJ.*) JITENDRA MOHAN DUTT *v.* ABDUL OJHA. **118 I. C. 358 = 32 C.W.N. 1221.**

———Where the tenant was given the right to bring the land under cultivation.

Held, that he was a raiyat within the meaning of S. 5 (2). (*Dawson-Miller, C.J. and Mullick, J.*) HIRA LAL *v.* MUTUK DHARI SINGH.

7 Pat. 275 = 9 P.L.T. 589 = 109 I. C. 461 = A.I.R. 1928 Pat. 316.

S. 5 (5)—Rebuttal of presumption.

———*Presumption under S.* 5 (5) *applies only where area held by tenant under single grant is in excess of hundred bighas—This presumption is rebutted by showing that tenant was holding land not in excess of hundred bighas but smaller area and that tenancy along with other land constitute* 100 *bighas in tenant's possession.*

The presumption under S. 5 (5) only applies where the area held by the tenant under a single grant is in excess of 100 bighas. But this presumption is rebutted by showing that in respect of the tenancy in question the tenant is holding the land not in excess of 100 bighas but a smaller area and the tenancy in question along with other lands constitute the 100 bighas in possession of the tenant. A. I. R. 1927 Pat. 209, Rel. on. (*Mitter, J.*) GOUR MOHAN SARKAR *v.* HARI MOHAN MONDAL. **A. I. R. 1930 Cal. 161.**

S. 5—Rebuttal of presumption.

———*Test is the purpose of tenancy and the attendant circumstances.*

In order to determine whether the presumption under S. 5 is rebutted the real and the true test is to see for what purpose the tenancy was created, and where the lease is equivocal, the attendant circumstances have to be looked to, to judge of the purpose for which the tenancy was created. (*Duval and Mitter, JJ.*) KARUNA CHANDRA DAS *v.* SECRETARY OF STATE.
100 I. C. 466 = A. I. R. 1927 Cal. 413.

S. 5 (5)—Reclamation and cultivation by tenant.

———*Tenant whether tenure-holder or* raiyat—*Reclamation and cultivation by tenant by his own plough is inconsistent with tenant being tenure-holder only.*

Though reclamation of the whole *jot* by the settlement-holders and cultivation by their own ploughs may not be absolutely inconsistent with a tenure, it is entirely contrary to experience in Bengal in cases where the tenancy is a tenure or the tenant proposes to settle *raiyats* upon the land and become a rent-receiver, more especially where the settlement-holder belongs to an agricultural caste or tribe. (*Miller, C. J. and Macpherson, J.*) TARNI SINGH *v.* SAT NARAIN.
6 P. L. T. 787 = 1925 P. H. C. C. 281 =
90 I. C. 895 = A. I. R. 1926 Pat. 9.

S. 5—Sub-letting by raiyat.

———Mere sub-letting of his holding by a raiyat however persistent would hardly transform him into a tenure-holder. (*Kulwant Sahay and Macpherson, JJ.*) MITA DUSADH *v.* ANU MAHTO. **7 Pat. 566 =**
109 I. C. 287 = A. I. R. 1928 Pat. 603.

S. 5 (5)—Tests.

———*Tenant whether tenure-holder or raiyat—Test is purpose and extent of tenancy.*

In determining whether the status of tenant under the B. T. Act is that of a tenure-holder or a *raiyat* what has to be considered is (1) the purpose for which the land was acquired and (2) the extent of the tenancy. 45 Cal. 805, Foll. Where the area exceeds 100 bighas there is under S. 5 (5) of the Act a presumption until the contrary is proved, that the tenancy is a tenure. But if the first criterion is established the second does not arise, while if the first is not established the second is conclusive. (*Miller, C. J. and Macpherson, J.*) TARNI SINGH *v.* SAT NARAIN.
6 P. L. T. 787 = 1925 P. H. C. C. 281 =
90 I. C. 895 = A. I. R. 1926 Pat. 9.

———*Terms being unambiguous, presumption is of little importance—Subsequent conduct is admissible if terms are equivocal—Whether tenancy or tenure is created depends upon acts and circumstances.*

The presumption arising under S. 5 (5) though of considerable importance in a case where the origin of he tenancy is not known, is of little consequence where the terms of grant are known and are not ambiguous. In cases where the terms of the grant are equivocal, the Court must rely upon the attendant circumstances and evidence of subsequent conduct is also admissible. What has got to be determined, if possible, is whether the right acquired was the right to hold the land for purpose of collecting rent or bringing it under cultivation by establishing tenants on it or the right to hold the land for purposes of cultivating it by oneself or by members of one's family or by hired servants or with the aid of partners. Where the outstanding features of a kabuliyat were that there was nothing stated as to the granting of sub-leases or collecting of rent from subtenants, nor was there anything as to establishment of tenants on the land, and the grantee was described as a raiyat enjoying right of occupancy and was required to make the land fit for cultivation by cutting jungle and erecting embankments, and where he was recorded as a settled ryot in the finally published record-of-rights. *Held*, that the conditions and circumstances were more consistent with an intention to confer on the grantee the right to hold the land for cultivation by himself or by members of his family or by hired servants or with the aid of partners than that he should be permitted to establish tenants on the land for purposes of cultivation and thus be a tenure-holder. (*Walmsley and Mukerji, JJ.*) JOGESH CHANDRA ROY *v.* TAZAR ALI.
85 I. C. 757 = A. I. R. 1925 Cal. 1238.

Ss. 5, 18 and 48—Under-raiyat.

———*Tenant holding whole or part of settled land for cultivation is under-raiyat—Consideration whether rent is fixed or variable is generally immaterial.*

S. 48 is not controlled by S. 18. If the landlord is a raiyat, and the tenant holds under him the whole or a part of the holding of the landlord settled with the tenant for the purpose of cultivating it, then under the definition tenant is an under-raiyat and the raiyat is his landlord within the meaning of S. 48, the point whether tenant holds at a fixed rent being entirely immaterial save in exceptional circumstances. A. I. R. 1927 Cal. 878, Ref. (*Macpherson and Dhavle, JJ.*) FAKIR MAHOMED *v.* SAKINA. **10 P. L. T. 369 =**
A. I. R. 1929 Pat. 372.

S. 6—Applicability.

———*Section applies to tenures held long before the permanent settlement.*

Tenures which have been held from long before the Permanent Settlement fall within the scope of S. 6 of the Bengal Tenancy Act. (*Newbould and B. B. Ghose, JJ.*) BIRENDRA KISHORE MANIKYA BAHADUR *v.* ALI AHMAD. **39 C. L. J. 605 = 84 I. C. 86 =**
A. I. R. 1924 Cal. 1015.

S. 6 (a)—Presumption.

———*Presumption under, was held unrebutted.*

In a question relating to permanency of rent it was found that the tenures existed before the Permanent Settlement and though fresh assessments were made twice they could have been due to an enhancement of area. *Held*, that these two assessments did not give rise to an inference in law that the zemindar had proved the conditions enabling him to enhance the rent. A. I. R. 1928 Cal. 286, Affirmed. (*Sir Binod Mitter.*) BIR BIKRAM *v.* ALI AHMAD. **34 C. W. N. 793 =**
A. I. R. 1930 P. C. 221.

S. 7 (2)—Customary rate not proved.

———*Landlord asserting existence of customary rate but failing cannot ask for settlement of fair and equitable rent.*

The landlord, in order to claim the benefit of S. 7 (2), must prove that there is no customary rate ; and if he asserts that there is such a customary rate but fails to prove it, he is not entitled to ask the Court, to determine a fair and equitable rent. (*Suhrawardy and Cuming, JJ.*) SATINDRA MOHAN *v.* BAMA SUNDARI.
88 I. C. 512 = A. I. R. 1926 Cal. 432.

S. 7 (1) and (2)—Customary rate not proved.

———*Plaintiff's failure to prove customary rate does not give jurisdiction to settle fair rent.*

Before a Court can take action under sub-S. (2) it must be definitely found that no customary rate exists. The finding that the plaintiff has failed to prove the customary rate is not sufficient to give jurisdiction to the Court to proceed to determine to what extent the rent should be enhanced under Cl. (2). A. I. R. 1925 Cal. 454, Foll. (*Suhrawardy and Cuming, JJ.*) RAM SUNDAR DAS *v.* SATINDRA MOHAN TAGORE.

89 I. C. 190 = A. I. R. 1926 Cal. 85.

S. 7 (2)—Enhancement.

———*Enhancement up to fair rent cannot be made until it is found that no customary rate exists.*

Where the landlord seeks to have the rent of a tenure-holder enhanced under S. 7, the first point for investigation is whether the rent is liable to enhancement. When this has been made out, the next point for determination is whether there is "a customary rate" payable by persons holding similar tenures in the vicinity. It is only when this has been answered in the negative, that the rent can be enhanced up to such limit as the Court thinks "fair and equitable." A. I. R. 1922 Cal. 152, Foll. (*Suhrawardy and Cuming, JJ.*) JOGESH CHANDRA ROY *v.* IZZAT ALI. **40 C. L. J. 585 = 85 I. C. 97 = A. I. R. 1925 Cal. 454.**

Ss. 7, 52 and 105—Enhancement when allowed.

———*Claim for excess rent for excess area—Decree for enhancement of rent cannot be given.*

A landlord applied for excess rent for excess area and also for enhancement of rent, but gave up his claim to the latter and a decree for excess rent was passed. The special Judge on appeal however gave a decree for enhancement of rent. *Held*, the Special Judge should not have considered the question of enhancement but should have confined himself to the question of fair and equitable rent having regard to the provisions of S. 52 of the Act. (*Chatterjee and Pearson, JJ.*) RAM RENU ROY *v.* MIDNAPORE ZEMINDARY COMPANY, LIMITED. **67 I. C. 1001 = A. I. R. 1923 Cal. 111.**

S. 7—Etmam tenure.

———*Etmam tenure in Chittagong, not being from the time of permanent settlement—Rent can be enhanced.*

The etmam tenure in Chittagong which has not been proved to have existed from the time of the permanent settlement is excluded from the operation of S. 6, Bengal Tenancy Act and the rent is enhancible under S. 7. (*Cuming and Mukerji, JJ.*) UPENDRA LAL *v.* JOGESH CHANDRA. **47 C. L. J. 112 = 107 I. C. 730 = 32 C. W. N. 1233 = A. I. R. 1928 Cal. 186.**

S. 7—Liability to enhanced rent.

———A stipulation that the tenure-holder is to pay rent for lands besides those mentioned in the *kabuliyat* which may be under his cultivation or which may be found in excess upon measurement indicates that rent is not fixed in perpetuity and hence the same can be enhanced. (*Rampini and Sharfuddin, JJ.*) SURJA PROSAD SUKUL *v.* MIDNAPORE ZEMINDARY CO., LTD. **77 I. C. 954 = 38 C. L. J. 369.**

S. 7—Rate of rent.

———*Absolutely accurate rate is not possible.*

It is impossible for a Court acting under S. 7 to arrive with absolute accuracy at a rate of rent. The best that the Court can do is to make an approximation to what the rent of a tenure should justly be. (*Panton and Mallik, JJ.*) RADHARANI SANTA *v.* RAMESHCHANDRA. **117 I. C. 678 = A. I. R. 1928 Cal. 218.**

S. 9—Dismissal of suit.

———*C. P. Code, O. 9, Rr. 8 and 9—Previous suit for enhancement of rent dismissed for default—Second suit for the same relief is not barred under O. 9 or Bengal Tenancy Act, S. 9.*

The dismissal of a suit for enhancement of rent under O. 9, R. 8 would not debar the plaintiff from maintaining a second suit for enhancement of rent of the same tenure either under O. 9, R. 9, C. P. C. or S. 9, Bengal Tenancy Act, inasmuch as the cause of action in each suit is different. (*Kulwant Sahay and James, JJ.*) GOPAL LAL RAY *v.* TAJ MAHOMED.

7 Pat. 28 = 8 P. L. T. 789 = 103 I. C. 615 = A. I. R. 1927 Pat. 375.

Ss. 11 and 18—Applicability.

———*Holding not proved to be one with fixed rate—Sections do not apply.*

Where the holding has not been proved to be one with a fixed rate, Ss. 11 and 18 of the B. T. Act cannot apply. (*Mukerji, J.*) SATISH CHANDRA GHOSE *v.* DEBENDRA NATH DEY.

85 I. C. 636 = A. I. R. 1925 Cal. 761.

S. 11—Restriction about alienation.

———*Lease containing covenant restricting alienation by lessee—Covenant must be strictly construed against lessors.*

A covenant in a lease which involves a forfeiture must be construed strictly as against the lessor. Where a lease provided: "If there is necessity for you and your heirs to sell the said lands and jamas, then you and your heirs shall sell or transfer the same at proper value to us and our representatives.

Held, there was no absolute covenant against sale or transfer. The lessees were not absolutely debarred from alienation, but merely restricted as to the persons in whose favour they were to alienate and they were protected by the fact that the sale was to be made at a proper value.

Held further, upon the true construction of the covenant taken as a whole, the right of re-entry was intended to extend to the representatives of the lessors if and when any sale took place by the lessees of the lands and jamas. (*Greaves, and B.B. Ghose, JJ.*) ARPIN KHAN *v.* CHANDICHARAN. **95 I. C. 252 = A. I. R 1926 Cal. 950.**

S. 11—T. P. Act, S. 10.

———*S. 10 of T. P. Act is not inconsistent with S. 11.*

S. 10 of the Transfer of Property Act saving conditions restraining alienation in leases where the conditions are for the benefit of the lessor, is not inconsistent with the provisions of S. 11 of the Bengal Tenancy Act. 12 C. L. J. 126, Ref. (*Walmsley and Mukerji, JJ.*) KANAI LAL GHOSH *v.* BASANTA BEHARI SEN.

42 C. L. J. 490 = 29 C. W. N. 1020 = 90 I. C. 451 = A. I. R. 1926 Cal. 451.

S. 12—Auction Sale.

———*Transferee of permanent tenure getting transfer registered and giving notice of transfer under S. 12—Tenure sold under Public Demands Recovery Act in pursuance of certificate in which transferee not named—Sale is nullity.*

The transfer of a permanent tenure becomes complete as soon as the transfer document is registered. And so where, after such a transferee has given the necessary notice of his transfer under S. 12, and the transfer document is registered, the tenure is sold under the Public Demands Recovery Act in pursuance of a certificate in which the transferee is not named, such a sale is nullity. A. I. R. 1923 P. C. 88; A. I. R. 1923 Cal. 13; 32 Cal. 296, Rel. on. (*Mitter, J.*) GIRIBALA DASI *v.* KEDAR NATH. **56 Cal. 180 = 117 I. C. 534 = A. I. R. 1929 Cal. 454.**

S. 12—Liability of lessee after transfer.

——*Lessee undertaking to perform all obligations under lease and hypothecating his property as security—Lease transferred—Though obligation to pay rent passes to transferee, lessee's liability to stand as security does not cease.*

Darpatni is a permanent tenure governed by the provisions of the Bengal Tenancy Act. S. 12 of the Act provides a limit as to the mode in which the transfer is to be made. As soon as the document by which the transfer is made is registered the transfer is complete. When the estate is transferred and the vendor ceases to have any estate then if the vendor's liability is a liability consequent on privity of estate, that liability ceases. The same principle has been held to apply in the case of transfer by the original lessee. But the fact that by transfer the transferor ceases to be a tenant does not imply that he is absolved from liability under the terms of the contract between him and the lessor and it is conceivable that a person may cease to be a tenant and yet continue liable to the landlord under his personal covenant. The lessee under his kabuliyat hypothecated certain other properties to secure the due payment for all time of the rent reserved and the performance of the other obligations arising under the lease. There was nothing in the kabuliyat to indicate that the security would be extinguished on the lessee's liability to pay the rent ceasing on the transfer of the lease.

Held, that the security created by the kabuliyat was not extinguished in consequence of the transfer and the recognition of that transfer by the lessor. (*Walmsley and Mukerji, JJ.*) KANAI LAL GHOSE *v.* BASANTA BEHARI. **42 C. L. J. 490=29 C. W. N. 1020=90 I. C. 451=A. I. R. 1925 Cal. 451.**

S. 12—Liability of usufructuary mortgagee.

——*Landlord—Right to sue for rent—Usufructuary mortgagee from tenant.*

The landlord of a tenure can sue for rent the usufructuary mortgagee of his tenant, if the said mortgagee having taken possession of the mortgaged property. 12 C. 185, 10 C. 443, Rel. (*Teunon and Newbould, JJ.*) NITYANANDA SARKAR *v.* HARI MOHAN SARKAR. **64 I.C. 750 (Cal.).**

S. 12—Release.

——*Release if amounts to transfer.*

It is doubtful if a release is a transfer of a permanent tenure by sale, gift or mortgage within the meaning of S. 12 which the landlord would have been bound to recognize. 33 Cal. 967 and 43 Cal. 790, Ref. (*Suhrawardy and Jack, JJ.*) BISTUPADA BERA *v.* SRINATH CHANDRA. **49 C. L. J. 132=33 C. W. N. 629=116 I. C. 165=A. I. R. 1929 Cal. 258.**

S. 12—Suit against transferee.

——*Landlord knowing of other person's interest in tenure but suing transferee for rent—Suit is a rent suit.*

Suit for rent brought against the person who is a transferee and of whose purchase the landlord has received notice under S. 12 is a suit for rent properly framed and is binding on the tenure though the landlord may have, subsequently to the transfer, known of the interest of other persons therein. (*Suhrawardy and Jack, JJ.*) BISTUPADA BERA *v.* SRINATH CHANDRA. **49 C. L. J.132=33 C. W. N. 629=116 I. C. 165=A. I. R. 1929 Cal. 258.**

S. 12—Transfer of permanent tenure.

——A transfer of a permanent tenure, by a registered document is complete under S. 12 of the Bengal Tenancy Act as soon as the document is registered. (*Mr. Amir Ali.*) SURAPATI RAY *v.* RAM NARAYAN. **50 I. A. 155=50 Cal. 680=73 I. C. 193=39 C. L. J. 26=28 C. W N. 517=33 M. L. T. 314=18 M. L. W. 681=4 L. R. P. C. 159=A. I. R. 1923 P. C. 88=45 M. L. J. 219 (P. C.).**

Ss. 12 and 13—Transfer of tenure.

——*Transfer of tenure voluntary or in execution—Landlord is presumed to have notice—He cannot ignore transferee and rely upon decrees against original tenure-holders.*

Under the Act of 1885 instead of the transferee being bound to go to the landlord to get his name recorded it is provided that a voluntary transfer must be by a registered instrument and before registration a fee is to be paid by the transferee and notice given by the registration office through the Collector to the landlord or in the case of an execution sale by the executing Court.

Therefore, the landlord cannot ignore transfers of the tenure and rely upon a decree, obtained by him against persons whom he chooses for his own purposes still to record as his tenants though he knows or must be taken to know that their interest in the tenure has ceased. A.I.R. 1923 P.C. 88 and 19 Cal. 17, Ref. (*Sir George Lowndes.*) JITENDRA NATH GHOSE *v.* MONMOHAN GHOSE. **A. I. R. 1930 P. C. 193.**

S. 12—Transferee.

——There is nothing in law to make it obligatory upon the landlord to treat as tenant any person of whose interest he may have had notice but who is not a transferee under S. 12. (*Suhrawardy and Jack, JJ.*) BISTUPADA BERA *v.* SRINATH CHANDRA. **49 C. L. J. 132=33 C. W. N. 629=116 I. C. 165=A. I. R. 1929 Cal. 258.**

——It cannot be laid down as a universal proposition of law, that whenever the landlord gets notice of interest of any other, than the transferee, even if it is admitted by the transferee, he is bound to recognise such person as his tenant. (*Suhrawardy and Jack, JJ.*) BISTUPADA BERA *v.* SRINATH CHANDRA. **49 C. L. J. 132=33 C. W.N. 629=116 I. C. 165=A. I. R. 1929 Cal. 258.**

S. 13—Auction Sale.

——*Failure to serve notice and pay landlord's fee—Sale is not invalid.*

The mere failure to serve the notice to pay the landlord's fee does not invalidate the auction sale. (*Greaves and Duval, JJ.*) BARADA PROSAD *v.* TARAK NATH **94 I. C. 147=A. I. R. 1926 Cal. 844.**

S. 13—Saramoiyan holding.

——*Money-decree by plaintiff against defendant—Purchase of saramoiyan holding of defendant by plaintiff describing it in the sale proclamation as an occupancy holding—Landlord's bringing suit for rent—Holding sold in execution of rent decree—Purchaser in the rent decree dispossessing plaintiff—Plaintiff suing to recover possession—Plaintiff was held not entitled to recover possession as what he purchased at the sale was a share in the ordinary occupancy holding and not the saramoiyan right.*

Plaintiffs, in execution of a money-decree obtained by them against the defendants' third party, put up for sale a fractional portion of the saramoiyan holding describing it in the sale proclamation as an occupancy holding and themselves purchased it. Afterwards, the landlords of the village, in whose sherista the names of the defendants' third party were still registered as tenants, sued those defendants for arrears of rent, obtained a decree and put up the holding to sale. The defendant second party was the purchaser and he subsequently obtained delivery of possession by dispossessing the plaintiffs. The sale proclamation in that execution properly described the property as a saramoiyan interest. The plaintiffs then sued to recover possession from the defendants' second party.

Held, that plaintiffs never purchased a share in a saramoiyan interest in execution of their decrees. What they purported to purchase at those sales was a share in an ordinary occupancy holding, and the saramoiyan right was not transferred to them. It followed therefore that the defendants' third party were not divested of that right at that time and legally remained tenants holding at a fixed rate of rent, and the rent suit against them was properly constituted and the sale in execution of the rent decree passed the interest to the defendant second party, and formed a first charge upon the property. A.I.R. 1923 P.C. 88; 12 Cal. 642; and 16 C.W.N. 478, Dist. (*Dawson Miller, C. J. and Adami, J.*) SARASWATI CHARAN PRASAD *v.* SURAJ DEO NARAIN SINGH. **7 Pat. 167 = 117 I. C. 650 = A. I. R. 1928 Pat. 367.**

S. 15 —Heirs not shown in Sherista.

——*Heirs of tenure-holder—Non-registration in the sherista does not affect their rights.*

The mere failure of the heirs of the recorded tenure-holder to cause their names to be registered in the landlord's sherista does not entitle the landlord to affect their interest by sale in execution issued in a suit against a person, who, to the knowledge of the landlord had no interest in the property. The sale must be one in justice and equity and should operate as a sale of the tenure. 10 Cal. 996, Rel. on. (*Walmsley and Buckland, JJ.*) PROVAS CHANDRA CHATTERJEE *v.* JAHARUDDIN MONDAL. **59 I. C. 49 = 32 C. L. J. 77.**

S. 15—No notice of succession.

——*No notice of succession by heirs—Decree in rent suit against some heirs—Decree is not rent decree.*

Even where no notice is given of succession of an heir to the tenure, to the landlord under S. 15, Bengal Tenancy Act, the decree in the rent suit against one of the heirs of the tenant cannot be regarded as a rent decree. A. I. R. 1921 Cal. 434, Foll. (*Panton and Mitter, JJ.*) AMBICA CHARAN *v.* HARKISHORE. **103 I C. 707 = A. I. R. 1927 Cal. 825.**

Ss. 15 and 16—No notice of succession.

——*Omission to notify succession to a tenure makes the successor unable to recover rent payable by sub-tenants' but his interest is not affected in any other way—Landlord must either proceed against the recorded tenants or real tenants in occupation.*

The omission to notify succession to a permanent tenure has only the result that the person succeeding to the tenure shall not be entitled to recover by a suit or any other proceeding any rent payable to him by the subordinate tenants, but it does not affect his interest in the tenure in any other way. The landlord, however, is entitled to sell the tenure in execution of a rent decree against his recorded tenants ; but if one of the recorded tenants is dead, he cannot by omitting his name in a suit brought for the rent of the tenure affect the interest of the heirs of the deceased tenant. The landlord must do one of two things. He must proceed either against the recorded tenants or against the real tenants who are in actual occupation of the tenure. 3 C. W. N. 371, Dist. (*B. B. Ghosh and Graham, JJ.*) MT. SUSHILASUNDARY *v.* TARAKCHANDRA IDURALI SARDAR. **97 I.C. 489 = A. I. R. 1927 Cal. 81.**

S. 15—Notice of succession.

——*Failure by tenant's heirs to give notice—Landlord is not entitled to treat one of them as representative of other heirs.*

Failure on the part of heirs of a tenant-holder to comply with the requirements of S. 15 does not necessarily entitle the landlord to treat one of the several heirs as representative of the tenancy. 3 C.W.N. 371, Dist. (*Mookerjee, A.C.J. and Fletcher, J.*) FAIZANNESSA *v.* GAGANESWARI. **26 C.W.N. 138 = 63 I. C. 706 = A. I. R. 1921 Cal. 434.**

——*Omission by tenure-holder's heirs to notify succession to landlord—Decree for rent against recorded tenants is rent decree.*

The representatives of the original holders of a tenure did not give notice of succession to the landlord and did not deposit the fee prescribed by the B. T. Act. Two of them abandoned the tenure while the others remained in possession and had their names recorded in the books of the landlord as tenants in actual occupation. Default was thereafter made in the payment of rent in respect of the tenure and the landlord sued the recorded tenants and obtained a decree against them. *Held*, that the tenure was fully represented in the suit and the decree which wss obtained against the recorded tenants operated as a rent decree. (*Mookerjee, A.C.J. and Fletcher, J.*) ABHOY CHARAN DUTTA *v.* MONORANJAN RAI CHOUDHURY. **60 I. C. 510 (Cal.).**

Ss. 15 and 16—Scope.

——A suit for his share of rent is maintainable by a co-sharer landlord in presence of other co-sharers who are incompetent to realise their rent on account of the provision of Ss. 15 and 16 of the B. T. Act, though there has been no separate collection before. 31 Cal. 707, Dist. (*Greaves and Chakravarti, JJ.*) NIBARAN CHANDRA ROY *v.* NABIN CHANDRA ROY. **40 C.L.J. 504 = 85 I. C. 127 = A. I. R. 1925 Cal. 297.**

Ss. 15 and 16—Transfer of tenure.

——*Heirs transferring patni tenures without complying with S. 15—Transferee not debarred from recovering rent from tenants.*

Although the vendors who had succeeded to the tenure have not complied with S. 15 before transferring the tenure to the plaintiff the latter is not debarred by S. 16 from recovering the rent from the defendant tenants ; in order to attract the bar created by S. 16, two conditions must co-exist; the plaintiff must have succeeded to the tenure and the rent sued for must be payable to him as the holder of the tenure. (*Walmsley and Suhrawardy, JJ.*) JAGADAMBA DEBI *v.* UMA SANKAR DE. **A. I. R. 1928 Cal. 220.**

S. 16—Suit for rent by purchaser.

——*Person claiming rent not as holder of tenure but as purchaser from person to whom rent accrued due—S. 16 does not apply.*

S. 16 being a penal provision it should be strictly construed. It applies only to a person who claims the rent a as a holder of the tenure, and not to a person who claims it by virtue of purchase from the person to whom the rent accrued due. 27 Cal. 535, Foll. (*Chatterjea and Panton, JJ.*) MESBAHUDDIN *v.* ABDUL BORKAT. **34 C.L.J. 119 = 65 I.C. 839 = A. I. R. 1921 Cal. 308.**

S. 17—Extent of purchaser's right.

——*Sale of Patni tenure for arrears of rent passes tenure only subject to conditions in which it was created—Lands registered as Lakhiraj—Onus is on purchaser to show that the origin was subsequent to purchase.*

Where the purchaser at court auction of a *putni taluk* which was created in 1807 and sold for arrears of rent, sought to evict under provisions of Bengal Tenancy Act the persons in possession of certain lands situate in the taluq claiming that the lands were *Mal* lands, but which the defendants claimed to be *Lakhiraj*, being so registered. *Held*, in absence of any indication that the holdings as revenue-free tenures originated by sufferance or grant subsequent to 1807, the presumption is that they ran back to a period prior to the creation of the *Taluk* and that it lay upon the plaintiff to show an origin subsequent to the creation of the Putni, *i.e.*, 180. *Held* further, that the purchaser of the putni taluk at a court sale for arrears of rent due, took the *taluk* subject to the condition in which it was created originally. (*Lord Phillimore.*) BIPRADAS PAL CHAUDHARY *v.* KAMINI KUMAR LAHIRI. **48 I. A. 499 = 49 Cal. 27 = 66 I.C. 674 = 15 M.L.W. 180 = 30 M.L.T. 138 = 26 C.W.N. 465 = A.I.R. 1922 P.C. 48 = 41 M. L.J. 638.**

S. 18—Lease.

——*Transfer* (Per *Cuming, J., Cammiade, J., dissenting*).

The word "transfer" includes "lease". 19 C. W. N. 1127, Foll. (*Cuming and Cammiade, JJ.*) RAJ KUMAR DUTTA GUPTA *v.* RAMANI MOHAN KUNDA. **104 I. C. 150 = A. I. R. 1927 Cal. 878.**

Ss. 18, cl. (a) and 85—Lease.

——*"Transfer" in S. 18, cl. (a), includes a lease—S. 18 controls S. 85—Bengal Tenancy Act, S. 85.*

The term "transfer" in clause (*a*). S. 18 includes a lease. S. 85 is controlled by S. 18. 19 C. W. N. 1110, Diss. from. (*Mookerjee, A. C. J. and Fletcher, J.*) AMAR CHAND *v.* PRASANNA DASI. **25 C.W.N. 9 = 61 I.C. 529 = A.I.R. 1921 Cal. 603.**

Ss. 18 and 48—Scope.

——*S. 48 is controlled by S. 18* (Per *Cuming, J., Cammiade, J. dissenting*).

The restriction imposed by S. 48 on the amount of rent that a raiyat can recover from an under-raiyat has no application in the case of a raiyat at a fixed rate of rent, the section being governed by S. 18. In other words, S. 18 controls S. 48 as it does S. 85. A.I.R. 1921 Cal. 603, Appl. (*Cuming and Cammiade, JJ.*) RAJ KUMAR DUTTA GUPTA *v.* RAMANI MOHAN KUNDA. **104 I.C. 150 = A.I.R. 1927 Cal. 878.**

Ss. 18 and 48—'Under-raiyat'.

——*Tenant holding whole or part of settled land for cultivation is under-raiyat—Consideration whether rent is fixed or variable is generally immaterial—Bengal Tenancy Act, S. 5.*

S. 48 is not controlled by S. 18. If the landlord is a raiyat, and the tenant holds under him the whole or a part of the holding of the landlord settled with the tenant for the purpose of cultivating it, then under the definition tenant is an under-raiyat and the raiyat is his landlord within the meaning of S. 48, the point whether tenant holds at a fixed rent being entirely immaterial save in exceptional circumstances. A.I.R. 1927 Cal. 878, Ref. (*Macpherson and Dhavle, JJ.*) FAKIR MOHAMMAD *v.* SAKINA. **10 P. L. T. 369 = A. I. R. 1929 Pat. 372.**

S. 18-B—Acceptance of fee.

——*Transfer of tenancy—Acceptance of landlord's fee by landlord is not admission of permanency of the tenancy of the transferee.*

Acceptance of landlord's fee by landlord at the time of transfer of tenancy would not operate as an admission as to its permanence under the provisions of S. 18-B of the B.T. Act, though it would amount to a recognition of the transferee as a tenant. (*Mukerji, J.*) SATISH CHANDRA GHOSE *v.* DEBENDRA NATH DEY. **85 I. C. 636 = A. I. R. 1925 Cal. 761.**

Ss. 19, 20 and 21—Occupancy rights.

——*Occupancy rights are inherent and not the right of landlord to grant.*

There is nothing in either S. 20 or S. 21 or in any other section in the Bengal Tenancy Act which provides that a right of occupancy can be acquired either by grant or by contract. An occupancy right is inherent in the status of the raiyat and is not the landlord's right to grant. (*Das and Kulvant Sahay, JJ.*) KESHO PRASAD SINGH *v.* PERMESHRI PRASAD SINGH. **2 Pat. 414 = 71 I. C. 902 = 4 P. L. T. 135 = 1923 P. H. C. C. 65 = 1 Pat.L.R. 111 = A. I. R. 1923 Pat. 276 (284).**

S. 19 (as amended by Act I of 1907)—Scope.

——*Non-occupancy tenant is not affected.*

The status of a non-occupancy raiyat was not affected by the passing of the Bengal Tenancy Amendment Act (I of 1907). 20 C.W.N. 258, Appr. (*Cuming and Mallik, JJ.*) SHEBAKALI KUMAR *v.* CHUNI LAL. **31 C. W. N. 1007 = 103 I. C. 674 = A. I. R. 1927 Cal. 748.**

——Occupancy rights acquired prior to 1885 are protected by the provisions of S. 19. (*Greaves and Panton, JJ.*) KHETRA MOHUN GHOSE *v.* LAKHI KANTA. **44 C. L. J. 271 = 98 I.C. 862 = A. I. R. 1927 Cal. 46.**

Ss. 20 (5), 44 (c) and 182—Effect of Sale.

——*Sale of occupancy holding for arrears of rent—Raiyat having no other land in village except homestead—One year after sale landlord settling land with same raiyat for fixed period—Tenant can be ejected on expiry of period even from homestead.*

Under S. 20 (5), Bengal Tenancy Act, an occupancy raiyat whose agricultural holding in the village is sold up for arrears of rent, leaving no other land for him, except his homestead land in the village, the raiyat ceases to be a settled raiyat of the village one year after the sale of the holding. If after such expiry of one year, the landlord again settles the land on the raiyat by a kabuliyat for a term of years, the raiyat is liable to be ejected from the land in question on the expiry of the term of the lease under S. 44 (*c*). Such is the incident of the land then held by him and the same incident would apply to his homestead land by virtue of S. 182. 21 C. L.J. 475, Ref. (*Jwala Prasad and Dhavle, JJ.*) BISHNATH SINGH *v.* MT. BIBI AYESHA. **11 P.L.T. 107 = 120 I. C. 477 = A. I. R. 1930 Pat. 224.**

S. 20 (1-A)—Scope.

——A person in possession for a considerable number of years would be considered to have held the land in the village for a continuous period of 12 years, although the area was declared to be a village subsequent to the commencement of the period of 12 years. (*B. B. Ghose and Bose, JJ.*) MANIRUDDIN MANDAL *v.* CHARU SILA DASSI. **48 C. L. J. 386 = 114 I. C. 150.**

S. 20—'Settled raiyat.'

——*Settled raiyat must have held continuously as raiyat at least as homestead some land for 12 years.*

To prove that a person is a settled raiyat it must be proved that he continuously held as a raiyat land situated in the village although the land need not be identical throughout the period of 12 years. The holding of land is to be continuous and further the holding is to be in the character of a raiyati. Though the land must be held as a raiyati this does not necessarily mean that the land should have been actually cultivated, because land may be held by a raiyat as his homestead under S. 182. It is not sufficient for a raiyat that the character of land such as would justify its use as a homestead. It must be established that the land is used by the raiyat as his homestead. (*Mookerjee and Rankin, JJ.*) PRODYOT KUMAR TAGORE *v.* UMESH CHANDRA SAHA.

72 I. C. 640 = A. I. R. 1924 Cal. 367.

S. 20—'Village'.

———*"Village" must be taken in the sense defined in S.* 3 (10).

The statutory meaning of the word "village" in the first clause of S. 20 does not give rise to any impossible construction or to any repugnance. In order that occupancy right may be acquired the land must be held in a village for a period of 12 years and if the land has not been comprised in any village in the statutory sense the condition of acquisition of the occupancy right has not been complied with. (Mis. Appeal No. 18 of 1919 Foll.) (*Rankin and B. B. Ghose, JJ.*) JANABALI MOLLA *v.* PORT CANNING. **40 C. L. J. 167 = 84 I. C. 735 = A. I. R. 1925 Cal. 336.**

S. 20—Zerait land.

———*Zerait land leased out—Lessee inducting a tenant on the land—Tenant's possession for* 12 *years completes occupancy right.*

Where the lessee of Zerait land has title and a tenant is duly inducted by him upon the land, the tenant holds the land as a raiyat, within the meaning of S. 20 and if he holds the same for a period of more than twelve years his occupancy right is complete and the suits for ejectment must fail. (*Mullick and Bucknill, JJ.*) SHEO GOBIND RAM SAHU *v.* MAHIPAT DUSADH.

2 Pat. 913 = 81 I.C. 321 = 1924 P.H.C.C. 191 = 5 P.L.T. 653 = A.I.R. 1924 Pat. 207.

S. 22 (2) (as amended by Act I of 1908)—Amendment not retrospective.

———Where a co-sharer landlord purchases a raiyati holding before amendment of S. 22 (2) by the East Bengal and Assam Act, his position under the Act as amended is not affected since the amending Act is not retrospective in its operation. (*Suhrawardy and Jack, JJ.*) ABHOY CHARAN MODAK *v.* RAMA SUNDER SHAHA. **33 C.W.N. 1081 = A.I.R. 1930 Cal. 109.**

S. 22 (as amended by Act I of 1907) Amendment not retrospective.

———The amending Act (I of 1907) has no retrospective effect. Where a tenure holder brought the subordinate raiyati interest before the amendment of S. 22 of the B. T. Act in 1907, the subordinate right does not lose its separate existence and merge in the superior right after the amending Act of 1907 came into force. 15 I.C. 705; 38 I.C. 534 Ref. (*Suhrawardy and Cumming, JJ.*) ABDUL REKIB KHAN *v.* JALAL AHMED.

65 I. C. 584 (Cal.).

S. 22 (2)—Effect of acquisition.

———*Occupancy right only and not tenancy right ceases to exist.*

When the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure holder, it is merely the occupancy right that ceases to exist and not the tenancy holding. 32 Cal. 386 (F.B.); 24 Cal. 143; A.I.R. 1921 Cal. 429; 27 C.W.N. 760*n* and 37 Cal. 709, Foll.; A.I.R. 1923 Cal. 701 and A.I.R. 1924 P. C. 144, Dist. (*Rankin, C. J. and Suhrawardy, J.*) GORAI MOLLAH *v.* PANCHU HALDAR. **34 C.W.N. 51 = 51 C.L.J. 193 = A.I.R. 1930 Cal. 111.**

———*What ceases to exist is not holding but occupancy right in it.*

Where a putnidar purchases a holding under the putni what is extinguished under S. 22 (2) is occupancy right in the holding and not the holding itself. 24 Cal. 143, Foll. (*Suhrawardy and Jack, JJ.*) ABHOY CHARAN MODAK *v.* RAMA SUNDER SHAHA.

33 C.W.N. 1081 = A.I.R. 1930 Cal. 109.

S. 22 (2)—Effect of Collectorate Partition.

———*Collectorate partition after purchase of raiyati holding by a co-sharer—Allotment as bakasht land to takhta of another co-sharer—Partition does not take away privilege of purchasing co-sharer—Bengal Estates Partition Act,* 5 (*B.C. of* 1897), *S.* 119 *is no bar.*

The fact that revenue authorities allotted certain lands as bakasht lands does not estop the co-sharer holding direct possession of the said lands under S. 22 (2) from continuing to hold them in his khas occupation on payment of rent to the co-sharer to whose takhta it has been allotted. Such a defence is not barred by S. 119 of the Bengal Estates Partition Act since the allotment made by the Revenue Officers is not contested. S. 22 (2) confers a privilege on the purchasing co-sharer which is in derogation of the common law right of the other co-sharers as stated in the judgment of the Judicial Committee in A.I.R. 1924 P.C. 144. Partition only removes the necessity for the limitation on the effect of the purchase and would set free the holding to be operated upon by the ordinary provisions of the law. In other words, S. 22 (2) imposes a limitation on the rights of the co-sharers for the benefit of the purchasing co-sharer and there is no reason why this limitation should be removed by reason only of a partition taking place. A.I.R. 1925 Pat. 547, Appr. (*Das and Ross, JJ.*) JHAPSI SAO *v.* BIBI ALIMAN. **5 Pat. 281 = 7 P.L.T. 170 = 93 I. C. 1001 = A.I.R. 1926 Pat. 263.**

———*Collectorate partition—Land falling into particular* takhta—*Landlords cannot dispute it except where there is an arrangement to the contrary at time of Batwara.*

In all cases where you have a Collectorate partition between co-proprietors, if the lands are merely the *bakasht* lands of the landlords before the partition, then in the absence of any special arrangement come to between the landlords themselves at the time of the *batwara*, none of them has the right to dispute the possession of those into whose *takhta* the particular lands in question fall. The only exceptions seem to be those which are created by law either under the Bengal Tenancy Act or under some other provision of law whereby a tenancy interest or possibly some other interest in land is acquired. (*Dawson Miller, C.J. and Adami, J.*) QYAMUDDIN KHAN *v.* RAMYAD SINGH. **1 Pat. 600 = 67 I.C. 530 = 3 P. L. T. 419 = A. I. R. 1922 Pat. 354.**

———*Occupancy holding—Purchase by a co-sharer landlord—Collectorate partition—Holding allotted to* takhta *of another co-sharer—Purchaser cannot be ejected.*

A co-sharer landlord, who by purchase of an occupancy holding becomes liable to pay proportionate rent to the other co-sharers under Section 22 (2) of the B. T. Act is not liable to be ejected from the holding purchased by him when, upon a subsequent Collectorate partition it is allotted to the *takhta* of another co-proprietor. (*Jwala Prasad, A.C.J. and Das, J.*) NANDKISHORE SINGH *v.* MATHURA SAHU. **3 P. L. T. 13 = 65 I. C. 586 = A. I. R. 1922 Pat. 193.**

———*Occupancy holding—Purchased by a co-sharer landlord—Collectorate partition—Holding allotted to another co-sharer—Holding does not cease to exist.*

BENGAL TENANCY ACT (1885), S. 22.

Where the holding of an occupancy tenant was purchased by a co-sharer landlord and the same was allotted to another co-sharer on Collectorate partition,

Held, tenancy right does not cease to exist. There is no foundation in the Tenancy Act for his argument. 24 Cal. 143 and 32 Cal. 38, Followed. (*Das and Adami, JJ.*) BASUDEO NARAIN *v.* RADHA KISAN AND DABINDRA MISSIR. **3 P. L. T. 22 = 1922 Pat. (Sup.) 55 = 65 I. C. 281 = A. I. R. 1922 Pat. 62.**

S. 22—Effect of purchase by landlord.

——*Purchase of occupancy interest by landlord—Holding is not extinguished.*

The purchase of raiyat's interest by the landlord does not extinguish the holding but divests it of the right of occupancy, if any, attached to it. 24 Cal. 521 and 24 Cal. 143, Rel. on. (*Chatterjee and Panton, JJ.*) PROFULLA NATH *v.* SECRETARY OF STATE.

26 C.W.N. 100 = 63 I.C. 892 = A.I.R. 1921 Cal. 429.

S. 22—Effect of the section.

——*Section merely declared law as it had been.*

S. 22 did not create any new law, it stated the law as it then stood and as it had been enunciated in a series of decisions. (*Coutts and Macpherson, JJ.*) MULLICK MUKTEAR AHMAD *v.* KALI CHARAN.

1921 P. H. C. C. 357 = 2 P. L. T. 525 = A. I. R. 1921 Pat. 373.

Ss. 22 (3) and 49—Ejectment of tenants inducted.

——*Tenants inducted by ijaradars—Ejectment suit by landlord after expiry of* ijara—*Notice was necessary.*

The ijara lease authorized the ijaradar to buy holdings at sale in execution for arrears of rent and also provided that during the term of the *ijara* he was at liberty to sub-let the same. A certain holding was thus purchased in execution for arrears of rent by ijaradar who sub-let the holding to the old tenant himself. After the latter's death, the ijaradar inducted upon the holding, the tenant's heirs (defendants). After the *ijara* lease had expired, the landlords sought to eject the defendants.

Held, that having regard to S.29 (3) and the terms of the *ijara* it must be held that the holding continued and that the defendants were plaintiff's under-raiyats, and that the sub-letting not having been by a written lease. S. 49 (*b*) applied and that the defendants could not be ejected otherwise than after notice. (*Teunon and Newbould, JJ.*) MT. NAYANJAN BIBI *v.* DURGADAS BANDOPADHYA. **33 C. L. J. 575 = 60 I. C. 449 = A. I. R. 1921 Cal. 327.**

S. 22 (2)—Loss of share after purchase.

——*Co-sharer purchasing occupancy holding and subsequently ceasing to be a co-sharer—He cannot retain possession of the holding afterwards.*

The status of a co-sharer landlord purchasing an occupancy holding is not the status of a raiyat but a peculiar status created by S. 22 (2). His right is that of a proprietor entitled to retain possession of the land subject to payment to his co-proprietors their shares of the rent. It is not the status of a raiyat inasmuch as if he sub-lets to a third person, such third person is deemed to be a raiyat in respect of the land and ordinarily a raiyat sub-letting to a third person does not confer a raiyati but an under-raiyati interest. If he ceases to be co-sharer and his proprietary interest is lost he has no right to retain possession of the land and it would pass on to the person who would acquire the interest of that co-sharer. 2 P. L. T. 163 and A. I. R. 1922 Patna 193, Ref. to. (*Ross and Kulwant Sahay, JJ.*) LALA RAMBAHADUR LAL *v.* MT. GUNGA KUER.

89 I. C. 232 = 7 P.L.T. 87 = 3 P.L.R. (Civ.) 138 = A. I. R. 1925 Pat. 547.

BENGAL TENANCY ACT (1885), S. 22.

S. 22 (1) and (2)—Merger.

——*Transfer of Property Act, S.* 111 (*d*)—*Lease—Purchase of proprietary interest and lessee's rights by the same person—Inferior interest merges in the superior interest.*

A lease of immoveable property determines in case the interest of the lessee and the lessor in the whole of the property becomes vested at the same time in one person in the same right and so where a person purchases proprietary interest and also the inferior rights of the lessee the inferior interest shall merge in that of the superior interest. A I. R. 1922 P. C. 94, Ref. to. (*Dawson Miller, C. J. and Mullick, J.*) HRIDAY NARAIN SINGH *v.* KALICHARAN SINGH.

107 I. C. 819 = A. I. R. 1928 Pat. 273.

S. 22 (2)—Merger.

——*Purchase of holding by proprietor makes the raiyati interest merge in the taluki interest.*

On the purchase of the occupancy holding by the proprietor the raiyati interest is merged in the taluqi interest and the previous lessees are by such change raised to the position of raiyats and the lease granted to the subsequent lessees by the proprietor is a raiyati lease of the land of the same denomination as the previous lessees. 30 All. 369, Dist. (*Greaves and Cuming, JJ.*) HOCHANUDDIC *v.* ABDUL HAKIM. **90 I. C. 816 = A. I. R. 1926 Cal. 158.**

S. 22—Merger.

——*Landlord and tenant—Occupancy tenant being also landlord acquiring landlord's interest at partition—Doctrine of merger applies.*

In the case of an occupancy tenant who is also a landlord, acquiring by partition a landlord's interest, the doctrine of merger applies. 2 P. L. J. 225, Dist. (*Coutts and Macpherson, JJ.*) MULLICK MUKHTEAR AHMAD *v.* KALICHARAN. **2 P. L. T. 525 = 1921 P. H. C. C. 357 = A. I. R. 1921 Pat. 373.**

——*Third parties' rights not affected—Merger occurs.*

Where there is no question of affecting the rights of any third person, merger takes place. (*Coutts and Macpherson, JJ.*) MULLIK MUKTEAR AHMAD *v.* KALICHARAN. **1921 P. H. C. C. 357 = 2 P. L. T. 525 = A. I. R. 1921 Pat. 373.**

S. 22—Permanent lease to occupancy raiyat.

——*Occupancy raiyat taking permanent lease—No merger takes place.*

The disputed lands were comprised in a revenue-paying estate which was purchased by the plaintiffs on the 6th March, 1916, at a sale for arrears of revenue. On the 11th February, 1918, the plaintiffs commenced this action to eject the defendant as a trespasser. The defendant was a cultivator who had acquired a right-of-occupancy raiyat in the record of rights finally published in 1895. On the 16th July, 1901, he took from the then proprietors a permanent lease under what was described as a taluki Pottah. The plaintiffs contended that the effect of the permanent lease granted to him by the proprietors on the 11th July 1901 was to extinguish the rights of occupancy which he then possessed and that thereafter he must be deemed to have held as a tenure-holder. *Held*, that the occupancy right has not been affected by the subsequent acquisition of the tenure. 26 C. W. N. 565, P.C., Foll. (*Mookerjee and Chotzner, JJ.*) JOGENDRE KRISHNA ROY *v.* SHAFER ALI.

76 I. C. 382 = A. I. R. 1923 Cal. 373.

S. 22—Purchase before amendment.

——*Raiyati holding—Purchase by co-sharer landlord prior to amendment of the section—Status of landlord.*

Under S. 22 of the B. T. Act prior to its amendment by Act I of 1908 (E. B. and A.) the status of a co-sharer landlord purchasing a raiyati holding was that of a raiyat, and as such he could grant an under-raiyati lease. (*Newbould and Buckland, JJ.*) INU MANDAL *v.* BIMALENDU ROY. **59 I. C. 337 (Cal.).**

S. 22 (2)—Purchase by co-proprietor.

———*Co-proprietor purchasing occupancy holding need not give it up on partition and allotment of the holding to another co-proprietor.*

A co-proprietor acquiring an occupancy holding by purchase is entitled to retain possession of the same on payment of rent to his co-sharers and need not give it up the moment the estate, in which the land is situate, is partitioned among the proprietors and is allotted to some other co-proprietor. 1 P. L. T. 374 and 4 P. L.W. 428, Dist. (*Jwala Prasad, J.*) BABU RAM PRASAD *v.* GOPAL CHAND. **2 P. L. T. 163 = A. I. R. 1921 Pat. 341.**

———*Occupancy holding—Purchase by co-proprietor—Position of partition—Effect.*

An occupancy holding purchased by a co-proprietor becomes the *bakhast* land of the co-sharers which the purchaser is allowed under S. 22 (2) of the Act to keep apart for himself on condition of paying rent to his co-sharers. It is liable to be allotted on a partition as *bakhast* to the co-sharer in whose *patti* it is situate and the purchasing co-sharer is not entitled to continue in possession of it. (*Adami, J.*) MATHURA SAHU *v.* CHANDRADIP SINGH. **59 I. C. 87 (Pat.).**

S. 22 (2)—Purchase by a co-sharer.

———*Co-sharer purchasing raiyati jote—He selling—Agreement allowing him to remain in possession is a sub-lease within S.* 22 (2).

Where a co-sharer purchased a raiyat jote of a tenant and subsequently sold it to a third person by an agreement by which he was allowed to remain in possession, *held*, that the transaction was tantamount to a sub-lease within the meaning of S. 22 (2). (*Dawson Miller, C. J. and Foster, J.*) GOPI SINGH *v.* JAGDEO SINGH. **8 P. L. T. 69 = 102 I.C. 386 = A. I. R. 1927 Pat. 172.**

S. 22 (2)—Purchase by a co-sharer and part proprietor.

———*Co-sharers—Part of proprietary right of a part of holding falling to a co-sharer purchasing the entire holding at rent sale—His status is not affected.*

The fact that the proprietary right of part of a holding after partition has fallen to the co-sharer who purchased the entire holding in sale in execution of a rent decree, will not affect the question of his status with regard to that portion of the holding which falls in the takhta of another landlord. If for the purposes of the partition, the name of a tenant who had long ceased to have any interest in the holding was recorded, that cannot affect the real rights of the parties, nor does the fact that the purchaser has settled the lands with a tenant make him a landlord. The peculiar status enforced in him by S. 22 (2) continues notwithstanding the settlement. A. I. R. 1925 Pat. 547, Appl. (*Das and Ross, JJ.*) KIRTYA NAND SINHA *v.* RAM LAL DUBE. **8 P. L. T. 20 = 97 I. C. 68 = A. I. R. 1926 Pat. 580.**

S. 22 (2) (as amended by Act I of 1908)—Purchase by part proprietor.

———*Occupancy holding—Purchase by part proprietor—Purchaser holds land as joint proprietor.*

The effect of S. 22, B. T. Act, as amended by the Eastern Bengal and Assam Council Act, is that when a co-sharer landlord purchases an occupancy holding, the occupancy holding disappears and the purchaser enjoys the land in his character of proprietor or tenure-holder and not as a raiyat. But, as, upon the disappearance of the tenant right all the holders of the superior interest would *prima facie* be entitled to possession that one amongst them who is allowed to keep exclusive possession of the land is made to pay his co-sharers a fair and equitable sum for such use and occupation. The co-sharers, who are deprived of the rent they had previously realised from the occupancy raiyat are in this manner compensated for their loss. (*Mookerjee and Chotzner, JJ.*) PURNA CHANDRA ROY *v.* MATHURA MOHAN SAHA. **36 C. L. J. 89 = 70 I.C. 68 = A. I. R. 1923 Cal. 210.**

S. 22—Purchase of a part.

———Where a part of another's raiyati holding was acquired by purchase, *held*, that the purchaser did not become a raiyat. (*Ross and Sen, JJ.*) HARI MOHAN PRASAD CHAUDHURY *v.* MD. BASIDUL HAQUE. **1924 P. H. C. C. 268 = 84 I. C. 130 = 5 P. L. T. 616 = A. I. R. 1924 Pat. 780.**

Ss. 22 and 49—Re-settling of non-transferable holding.

———*Purchaser of non-transferable occupancy holding—Co-proprietor—His tenant is a* raiyat *and not liable to be evicted by notice under S.* 49.

The plaintiff was co-sharer landlord with regard to a certain occupancy holding which had been found to be non-transferable. He purchased the occupancy holding and then let it out to the defendants under a *kabuliyat* for a term of one year only which expired in *Pous* 1318 B. S. The defendants continued in possession after the expiry of the term of that *kabuliyat* and the present suit was brought in May 1919 which corresponds with sometime in *Asar* 1326 B. S. *Held*, that the plaintiff was not a *raiyat* with regard to the land after his purchase of the occupancy right, but was holding in his right as a co-proprietor and the defendant would be a *raiyat* or a tenure-holder and hence not liable to be ejected by service of notice under S. 49 of the Bengal Tenancy Act. (*Walmsley and B. B. Ghose, JJ.*) ROSHANALI *v.* CHANDRA MOHAN. **50 Cal. 749 = 27 C. W. N. 759 = 75 I. C. 447 = A. I. R. 1923 Cal. 701.**

S. 22 (2)—Scope.

———S. 22 (2) has application only to transferable holding and not to non-transferable holdings. 19 C. L. J. 400 ; 43 I. C. 467, Appr. ; A. I. R. 1928 Pat. 234, Dist. (*Ross and Chatterji, JJ.*) LACHMI NARAIN *v.* RAMSARAN. **10 P. L. T. 204 = 8 Pat. 650 = 118 I. C. 129 = A. I. R. 1929 Pat. 185.**

S. 22 (2) (as amended by Act I of 1908)—Scope.

———*Sub-S.* (2) *applies to all-cases of sub-leases effected after passing of the amending Act whether occupancy right was acquired before or after* 1907 *or* 1885.

The second sub-section of S. 22, in so far as it refers to the rights of a sub-lessee which come into operation after the Act, must apply to all cases where such a sub-lease is effected after the passing of the amending Act whether the occupancy right was acquired before or after the passing of that Act, or the Act of 1885. (*Dawson Miller, C. J. and Foster, J.*) GOPI SINGH *v.* JAGDEO SINGH. **8 P. L. T. 69 = 102 I. C. 386 = A. I. R. 1927 Pat. 172.**

———*Applicability.*

S. 22 (2) is not concerned with **the raiyat-kasht** of a proprietor or permanent tenure-holder which he held before he became proprietor or permanent tenure-holder but with land the occupancy right in which was transferred to him after he became jointly interested as proprietor or permanent tenure-holder. (*Jwala Prasad and Macpherson, JJ.*) LALJI SINGH *v.* LAKSMI NARAYAN SINGH. **10 P. L. T. 91 = 97 I. C. 708 = A. I. R. 1927 Pat. 32.**

S. 22 (2)—Suit for rent.

———*Right to sue for entire rent.*

A co-sharer's right to sue for the entire rent is not affected though one co-sharer purchases a portion of the holding. (*Jwala Prasad, J.*) RAM RATTAN PRASAD *v.* JANG BAHADUR SINGH. **62 I. C. 47 (P).**

S. 22 (2)—Tenant claiming as raiyat.

———*Suit for ejectment—Defence that parties are not under-raiyats but raiyats—They must prove it.*

In a suit for ejectment if the defence to the suit is that the defendants are not under-raiyats but raiyats it is for the defendants to make that defence good, particularly if they have to begin by admitting that their tenancy in origin was an under-raiyati. (*Rankin, C. J. and Suhrawardy, J.*) GORAI MOLLAH *v.* PANCHU HALDAR. **34 C. W. N. 51 = 51 C. L. J. 193 = A. I. R. 1930 Cal. 111.**

S. 22 (2) (as amended by I of 1908)—Transferable holding.

———*Transferable occupancy holding purchased by co-sharer landlord—He holds it not as raiyat, but as tenure-holder subject to payment of fair rent to other co-sharers.*

If a co-sharer landlord purchases a transferable occupancy holding, he is entitled to hold it not as a raiyat, but as a tenure-holder in the right which he has in the tenure, subject to payment of a fair and equitable rent to the other co-sharer. A. I. R. 1923 Cal. 210, Rel. on. (*Suhrawardy and Garlick, JJ.*) GOLHAR BIBI *v.* ASWINI KUMAR. **33 C W. N. 161 = 117 I. C. 536 = A. I. R 1929 Cal. 253.**

Ss. 22, 86 and 87—Transfer in lieu of Takkavi.

———*Transfer of occupancy rights in lieu of takkavi loan is sale.*

Takkavi loans were made, by an izardar to certain occupancy tenants who being unable to pay the loans gave up their holdings to the izardar.

Held, that the transactions were neither surrenders nor abandonments of the holdings but sales of the occupancy rights of the tenants in favour of the izardar. The word "acquire" in S. 22 before its amendment by the Act of 1907, implied the accrual to a raiyati tenancy of rights conferred by statute rather than the transfers of right by another tenant. 4 C. L. J. 200; A.I.R. 1920 Pat. 168, Foll. 13 C. L. J. 568, Diss. (*Dawson Miller, C.J. and Foster, J.*) RAM DHEYAN SINGH *v.* BHULOTAN SINGH. **72 I. C. 705 = A. I. R. 1924 Pat 392**

Ss. 23 and 178—Contracts about particular crop and enhancement.

———*Contract after* 1885 *to grow indigo crop only for benefit of landlord is void—Agreement to pay enhanced rent for non-existent obligation is also void.*

Under Section 23 of the Act the tenants are entitled to use the land for any purpose they choose, provided it is consistent with the provisions of that section and the agreement to pay enhanced rent in consideration for the release of a non-existing obligation is void under the provisions of Section 178 (3) (*b*). A contract to grow a particular crop like indigo on a portion of the holding for the benefit of the landlord when such an obligation was not fastened to the tenancy before 1885 is void after the

passing of the Act (1885). (*Dawson Miller, C. J. and Adami, J.*) W. M. GRANT *v.* EKLAL JHA. **67 I. C. 49 = 3 Pat. L. T. 386 = 1922 P. H. C. C. 177 = A. I. R. 1922 Pat. 171.**

S. 23—Excavations.

———*Excavations not injuriously affecting landlord are not prohibited.*

Tenants are entitled to make excavations and the provisions of S. 23 do not apply. There is nothing in the law which prevents tenants having permanent heritable rights at a fixed rent from using the land in any manner they think fit so long as there is no risk to the right of the landlord to recover the rent payable, and it is now settled that unless there are any reservations, the landlord has no right in the case of such tenures other than the right to receive the stipulated rent. Without actual damage or act affecting landlord's rights to obtain rent no damages or injunction could be granted. (1904) 9 C. W. N. 255 Dist. (*Walmsley and B. B. Ghosh, JJ.*) BARADA PRASAD BANERJEE *v.* BHUPENDRA NATH MUKERJEE. **75 I. C. 55 = 50 Cal. 694 = A. I. R. 1924 Cal. 56.**

S. 23—Fishery rights.

———*Raiyat is entitled to fishery right on the land leased.*

The Bengal Tenancy Act secures the *raiyats* a limited ownership in the soil and unless landlord expressly reserves his rights to appropriate the water and the fish which come upon his land during the periods of inundation the *raiyat's* right to appropriate the same cannot be restricted. (13 M. I. A. 467) applied. (*Mullick and Ross, JJ.*) HENRY HILL AND CO. *v.* SHEORAJ RAI. **3 Pat. L.T. 53 = 1922 P. H. C. C. 195 = 64 I. C. 346 = A. I. R. 1922 Pat. 9.**

S. 23—Occupancy holding.

———*Occupancy holding is presumed to be non-transferable.*

Non-transferability is an ordinary incident of an occupancy holding and it will be presumed under the law to be so until the contrary is shown. No specific issue on the point is necessary. 24 Cal. 355, Rel. on. (*Courtney. Terrell. C. J. and Jwala Prasad, J.*) SOURENDRA *v.* KUNJBIHARI. **10 P. L. T. 129 = 8 Pat 439 = 116 I. C. 518 = A. I. R. 1929 Pat. 222.**

S. 23 Trees.

———*Landlord and Tenant—Trees—Tenant has right to enjoyment and benefit of growing timber during occupancy—Landlord is not entitled to enter upon and cut down trees without tenant's consent.*

A tenant has a right to enjoy all the benefits of the growing timber on the land during his occupancy and in the absence of a custom or of a contract to the contrary the landlord has no right to interfere with the enjoyment of his tenant of the trees upon his holding as long as the relation of landlord and tenant subsists. If thus the landlord desires to have the privilege during tenancy of entering upon the tenant's holding and cutting down and removing timber he must procure the consent of the tenant in that behalf. (1864) W. R. Gap. 367 and 30 All. 134, Ref. 22 Cal. 742 and 11 M. I. A. 295 (P. C.), Dist. (*Rankin, C. J., and C. C. Ghose, J.*) KAMAL KRISHNA SANYAL *v.* MADHUSUDAN CHOUDHURY. **33 C. W. N. 839 = 123 I. C. 316 = 57 Cal. 344 = A. I. R. 1930 Cal. 240.**

Ss. 23 and 178 (3) (b)—Trees.

———*Cutting trees is using land within S. 23—Occupancy raiyat stipulating not to cut trees—Stipulation is not binding—Tenant covenanting not to appropriate* *trees is bound by the covenant irrespective of any custom—Bengal Tenancy Act, Ss.* 178 (3) (*b*) and 23.

One of the uses of the land under S. 23 is to cut down trees. If an occupancy raiyat covenants that he will not be entitled to cut down trees, where there is no custom to the contrary, that contract will not take away his right to cut down trees. It is otherwise with regard to the right of appropriating trees. If any tenant has covenanted not to appropriate any trees, he would be bound by that covenant even if there be a custom that the tenants on the locality are entitled to appropriate trees. (*B. B. Ghose and Cammiade, JJ.*) LAKHI NATH BERA *v.* NABADWIP CHANDRA. **31 C. W. N 192 = 100 I. C. 7 = A. I. R. 1927 Cal. 268.**

S. 24—Kabil legan lands.

———*Fair rent assessed—Decree for damages for use and occupation in lieu of back rent can be passed.*

With regard to the kabil legan lands, a decree can be passed for back rents as damages for use and occupation when a fair and equitable rent is assessed on the kabil lagan lands. A. I.R. 1921 Pat. 435, Expl.; A. I. R. 1925 Pat. 559, not Foll.; A.I. R. 1929 Pat. 233, Foll. (*Ross, J.*) PAHWARI RAI *v.* JANKI KUER. **10 P. L. T. 281 = 117 I. C. 206 = A. I. R. 1929 Pat. 347.**

Ss. 24 and 27—Rate of rent.

———*Plaintiff alleging that there was existing rent failing to prove it—He can only be given decree at the rate admitted by defendant.*

When the plaintiff comes to Court with the allegation that there is an existing rent or rate of rent and fails to prove it, he can only be given a decree at the rate admitted by the defendant, although the Court may not be satisfied that that is the real or the proper rate. (*Kulwant Sahay and Macpherson, JJ.*) BISHESHAR SINGH *v.* PATAN MOHAN. **123 I. C. 615 = A. I. R. 1930 Pat. 485.**

S. 24—Utbandi tenants.

———*Suit for rent at rate fixed by all utbandi tenants—Plaintiff cannot in appeal claim fair rent on the ground that tenants acquired occupancy rights.*

Where the suit as originally framed is not one for recovery of rent under S. 24 but is a suit for recovery of rent at rates agreed upon by all utbandi tenants, plaintiffs cannot in appeal claim a decree for fair and equitable rent on the ground that the defendants by holding the lands for a continuous period of 12 years had acquired a right of occupancy therein and that they were consequently liable to pay a fair and equitable rent under S. 24, Ben. Ten. Act. (*Rankin, C.J. and Mukerji, J.*) NAFUR CHANDRA PAL *v.* JATINDRA NATH DAS. **50 C. L. J. 294 = 34 C. W. N. 127 = A. I. R. 1929 Cal. 614.**

Ss. 25, 86 and 87—Eviction of tenants.

———*Landlord can obtain possession of occupancy raiyat's holding in three ways as in S. 25, 86 (5) and S. 87.*

There are three methods by which a landlord subject to the Bengal Tenancy Act, can obtain possession of an occupancy raiyat's holding: (*a*) on a decree as mentioned in S. 25 ; (*b*) on relinquishment or surrender in the manner described in S. 86 (5) and (*c*) on abandonment as in S. 87 of the same Act. (*Bucknill and Foster, JJ.*) FIRANJI RAI *v.* CHHEDDI PANDEY. **97 I. C. 302 (Pat.).**

S. 25—Nature of decree.

———*Decree under—Execution is of the order for ejectment.*

Where a decree is passed in a suit under Section 25, the decree to be executed is a decree for ejectment and not a decree for compensation, because ejectment is to follow in the event of non-compliance with the order of the Court directing payment of compensation and remedying of the misuse. (*Chatterjea and Suhrawardy, JJ.*) KORIM *v.* ASWINI KUMAR. **25 C. W. N. 658 = 63 I.C. 236 = A. I. R. 1921 Cal. 492.**

S. 25—Patni regulations.

———*Bengal Patni Taluks Regulation (VIII of* 1819,) *S.* 11—*Purchaser of patni cannot evict occupancy tenants.*

The policy of the law at the time of the enactment of the patni regulations seems to have been to protect from eviction those cultivating the land ; at the time of the enactment of the patni regulations, occupancy rights did not exist, those cultivating the lands were either khud khast ryots, that is ryots of the village cultivating the lands, or paikast ryots who were cultivators who came from outside the village. Consequently, S. 11 of the Patni Regulations extends protection to the only cultivating ryots of the village then known namely khudkhast ryots or resident and hereditary cultivators. It has been the policy of the law throughout to protect those actually on the land and cultivating it. Therefore, these occupancy tenants also must be deemed to be protected. (*Greaves and Chakravarti, JJ.*) JNANENDRA MOHAN BHADURI *v.* HARENDRA KRISHNA DE. **87 I. C. 32 = A. I. R. 1925 Cal. 1169.**

S. 25 (f) (2)—Rights of Landlord.

———*Transferee paying into Court on footing that he has taken transfer of occupancy holding—Rights of landlord still arise under S.* 25 (*f*) (2) *and transferee spends on holding at his risk.*

Even where a transferee pays money into Court on the footing that he has taken transfer of an occupancy holding, the rights of the landlord under S. 25 (f) (2) arise and if the transferee in the meantime incurs expenditure by putting masonry buildings on the property, he does so at his own risk. (*Rankin, C. J.*) MIR BELAYET ALI *v.* RADHIKALAL DAS. **A. I. R. 1930 Cal. 547.**

S. 26—No heir.

———*Escheat—Last male-holder leaving no male heir—Tenure escheats to landlord.*

Where the last male-holder of an occupancy holding has left no heirs at all, the holding becomes a holding without a tenant and must revert to the landlord. A.I.R. 1925 Pat. 597, Foll. (*Das and James, JJ.*) PRASAD NATH JOGI *v.* AMBIKA PRASAD SINGH. **10 P. L. T. 823 = 117 I. C. 630 = 9 Pat. 515 = A. I.R. 1930 Pat. 407.**

———*Tenant of transferable occupancy holding dying intestate without heirs—Occupancy right is extinguished—Holding reverts to landlord subject to encumbrance created by tenant.*

S. 26 seems to mean that although the other property of an occupancy *raiyat* dying intestate and without leaving any heirs, escheates to the Crown, his occupancy right does not escheat to the Crown but is extinguished. This does not mean that the holding ceases to exist but only that the occupancy right is terminated as in the case of transfer of an occupancy right to a person jointly interested in the land as proprietor. 32 Cal. 386 (F.B.) Foll. The holding is then a holding without a tenant and must revert to the landlord. 1 Cal. 391 ; A.I.R. 1925 Patna 57 Foll., 13 C. W. N. 12 Diss.

Where a tenant can legally alienate or encumber his holding, and that holding reverts to the landlord on the death of the tenant intestate without heirs, what reverts is the estate that was in the tenant as encumbered by him, diminished by virtue of S. 26 by the loss of the occupancy right. 8 M. I. A. 500 and 11 M. I.A. 619 Foll. (*Mullick and Ross, JJ.*) GARBHU *v.* BIBI KHUDAI JATUNNISSA. **4 Pat. 774 = 89 I. C. 170 = 7 P. L. T. 75 = 1925 P. H. C. C. 206 = A. I. R. 1925 Pat. 597.**

S. 26—Suit for khas possession.

——*Death of occupancy raiyat leaving heir—Suit for khas possession under S. 26 fails—Court need not decide who is the preferential heir.*

A suit for khas possession based on the provisions of S. 26 should fail as soon as it is found that the occupancy raiyat died leaving an heir and it is not necessary for the Court to decide who is preferential heir and base its decision upon the same. (*Cuming and B. B. Ghose, JJ.*) HARENDRA KUMAR BOSE *v.* KHEMADAKINKA. **44 C. L. J. 282 = 98 I. C. 835 = A. I. R. 1927 Cal. 86.**

S. 26—Under-raiyat.

——*Occupancy right of under-raiyat is not heritable where no custom to the contrary is proved.*

Per *Greaves, J.*—The right of occupancy acquired by an under-raiyat is a right acquired by custom or usage and not by statute and in order to determine whether heritability is an incident of the custom or usage it must be ascertained by evidence as to the nature and extent of the custom or usage. Apart from statute heritability is not an invariable incident of occupancy right.

Per *Cuming, J.*—An occupancy right is a personal right. Heritability of such right is a creature of the statute created by S. 26 and outside the statute there is no right of heritability in regard to such a right. As S. 26 or any other provision of the B. T. Act does not refer to the heritability of an occupancy right held by an under-raiyat, such right is not heritable under the law. But it is open to the under-raiyat to prove that by custom or usage the occupancy right is heritable. (*Greaves and Cuming, JJ.*) SUDHANYA KUMAR DASS *v.* SAIK ISMAIL. **90 I. C. 844 = 29 C. W. N. 733 = A. I. R. 1925 Cal. 956.**

——*Interest of an under-raiyat is not heritable—Landlord and tenant.*

The interest of an under-raiyat is not heritable. 31 Cal. 757 (F.B.) referred to. (*Newbould and Panton, JJ.*) SUTU BIBI *v.* JAMINI SUNDARI GUHA. **A. I. R. 1922 Cal. 85.**

——*Under-raiyat, cannot sub-let or transfer his rights.*

The Act does not give an under-raiyat a right to create a sub-lease so as to be valid against the *raiyat*. The rights of an under-raiyat are not transferable. (*Huda and Panton, JJ.*) GOPAL MOLLAH *v.* MAFIDENNESSA BIBI. **61 I. C. 200 (Cal.).**

S. 26—Usufructuary Mortgage.

——*Usufructuary mortgage of occupancy tenure by last limited owner—Provided there is custom of transferability and mortgage for necessity mortgagee is entitled to possession against landlord when, holding reverts.*

A usufructuary mortgagee under a mortgage created by the widow of the last male-holder of the occupancy holding is entitled to possession of the holding as against the landlord when the holding reverts to the landlord for want of heirs provided that the holding was transferable by custom and the alienation was for legal necessity. 8 M.I.A. 500 (P.C.) and 11 M.I.A. 619 (P.C.), Foll. (*Das and James, JJ.*) PRASAD NATH JOGI *v.* AMBIKA PRASAD SINGH. **10 P. L. T. 823 = 117 I. C. 630 = 9 Pat. 515 = A. I. R. 1930 Pat. 407.**

S. 29—Additional consideration.

——*Additional consideration passing from landlord—Original rent can be enhanced.*

The plaintiff had an old tenancy in his possession and there was another tenancy with regard to which there was a dispute between the plaintiff and the defendant. The plaintiff executed a kabuliyat which was made up of two parts—one relating to the tenancy originally held and the other regarding which there was a dispute. According to the kabuliyat the rental of the portion of the new tenancy was increased. The suit was brought on the ground that the enhancement of rent of even a portion of the new tenancy was the violation of the provision of S. 29.

Held, that it is sufficient that it should appear that some further consideration has proceeded from the landlord to justify an addition to the original rent. A new contract was entered into between the parties for the original consideration and for additional consideration, and the parties were free to enter into it on any terms they pleased. There is no violation of the provision of S. 29. (*Cuming and Cammiade, JJ.*) SALI BEWA *v.* AJIJUDDIN SHAIKH. **104 I. C. 763 = A. I. R. 1927 Cal. 911.**

——*Rent—Enhancement of—Augmentation of holding—Additional area—Increased rent.*

If a tenant takes a settlement of an additional area and a new arrangement is arrived at between the landlord and tenant and a new rental is fixed thereby, increasing the rent originally paid, the rent so increased is not an enhancement, and S. 29 of Bengal Tenancy Act does not apply. (*Walmsley and Greaves, JJ.*) TARAK NATH SARKAR *v.* SRISH CHANDRA RAI. **60 I. C. 412 (Cal.).**

S. 29, Proviso (3)—Applicability.

——*Enhancement of rent—Right of landlord.*

To entitle a landlord to enhance rent under S. 29, Proviso (3) he must prove three things :—(i) that the raiyat has held his land at a specially low rate of rent in consideration of cultivating a particular crop for the convenience of his landlord ; (ii) that he is released from the obligation of cultivating the crops : and (iii) that he deems the rent which he agreed to pay fair and equitable. S. 29, Proviso (3) of the B. T. Act applies where the purpose of the tenancy is the growing of a particular crop and, in consideration of that the rent is not merely a low rent but a rent specially low on that account. (*Ross, J.*) EKLAL JHA *v.* WILLIAM MELING GRANT. **64 I.C. 332 (Pat.).**

See ON APPEAL. **67 I. C. 49 = 3 Pat. L.T. 387 = A.I.R. 1922 Pat. 171.**

——*Evidence that rate of rent was specially low is necessary.*

The application of S. 29 would require evidence that the rate of rent in the lease was a specially low rate. (*Ross, J.*) HENRY HALL AND CO. *v.* BAWAN THAKUR. **2 P. L. T. 605 = A. I. R. 1921 Pat. 412.**

S. 29—Burden of proof.

——*Tenant must prove that he is an occupancy raiyat before invoking aid of S. 29.*

S. 29 only applies to the case of an occupancy raiyat, and before invoking the aid of S. 29 the tenant must prove that he is an occupancy raiyat in regard to the

rent claimed lands. (*Das and Adami, JJ.*) RAMDHANI SINGH *v.* KEWAL MANI SINGH.
7 P. L. T. 145 = 1926 P. H. C. C. 29 = 90 I. C. 929 = A. I. R. 1926 Pat. 156.

——*Proviso—Construction—Increased payment for 3 years immediately preceding the year of suit must be proved.*

To entitle the plaintiffs to the benefit of the provisions contained in the proviso, they must establish that the increased rent which they claim has been actually paid for a continuous period of not less than three years immediately preceding the years in suit. The proviso does not mean that if rent has been paid at the increased rate for three years or longer, the rent of the holding has become permanently increased, as if there had been an increase by writing registered. The true effect of S. 29 is that there is no permanent enhancement when there is an attempt to increase rent without writing registered. (*Mookerjee and Chotzner, JJ.*) JANAKI BALLAV ROY *v.* ENAT MONDAL. **72 I. C. 136 = 37 C. L. J. 489 = A. I. R. 1923 Cal. 600.**

S. 29 —Compromise Decree in Contravention.

——*A compromise decree passed in contravention of provisions of S. 29 is operative and binding until vacated by appropriate proceedings.*

A compromise decree passed in contravention of the provisions of S 29, cannot be treated in a subsequent suit between the parties as without jurisdiction and a nullity, but is operative and binding until vacated by appropriate proceedings. A.I.R. 1926 Cal. 1101 ; A.I.R. 1921 Cal. 34 (F. B.) ; and A. I. R. 1925 Cal. 907 (F.B.) ; Rel. on ; 17 C. W. N. 496, *held no longer good law.* (*Mitter and Mallik, JJ.*) MAHOMMED HOSSEIN *v.* KHANA KAZI. **113 I. C. 570 = A. I. R. 1928 Cal. 606.**

S. 29—Consolidation of holdings.

——*Consolidation of distinct holdings with separate rentals is not creation of new holding and rent can be enhanced only within the limits of S. 29.*

The Court must determine whether a new holding has been created, though it may include the land of the original holding or whether the parties had recourse to a colourable device to evade the provisions of S. 29.

Where the parties held two separate holdings with specific and definite rentals which were consolidated into one holding.

Held, that there was no new holding and that rent must not be enhanced beyond the limits fixed by S. 29. (*Dawson-Miller, C. J. and Mullick, J.*) W. H. MEYRICK *v.* DIPA PANDEY. **3 Pat. 825 = 84 I. C. 361 = 6 P. L. T. 537 = A. I. R. 1925 Pat. 185.**

S. 29, Proviso (1)—Continuous period.

——*Scope of—Continuous period of three years—Meaning of.*

The words "continuous period of not less than three years immediately preceding the period for which the rent is claimed" in S. 29 (1) of the Bengal Tenancy Act do not mean the period for which rents are claimed collectively in the suit, but mean the period in respect of which the rent is payable as a separate cause of action. (*Buckland and Cuming, JJ.*) JOGENDRA NATH MAITRA *v.* GOPAL CHUNDRA SAHA.
64 I. C. 188 (Cal.)

S. 29—Contracts.

——*Section does not save contracts.*

The words of S. 29 are imperative and it provides that rent must not be enhanced so as to exceed by more than two annas in the rupee the rent previously payable by the raiyat. This prohibition is not qualified by any provision calculated to save a contract or agreement between the parties.

A kabuliyat purported to amalgamate with the jama of a holding the *jama* of another piece of land which had no existence and the jama of which was entirely fictitious and then purported to enhance the rent within the limits permitted by S. 29 and thereby fraudulently enhanced the jama of the holding beyond the limits of S. 29. The jamas relating to certain other holdings were also enhanced and then the total of all the jamas including the fictitious jama was described. This total exceeded the amount to which the rent of the holdings could be enhanced under S. 29.

Held : that the landlord was entitled to recover the jamas of the holdings that were not amalgamated with the fictitious jama but that the suit with regard to the amalgamated jama was not maintainable. (*Suhrawardy and Cuming, JJ.*) JNANEDRA NATH ROY *v.* NALINI MOHAN GHOSE. **87 I. C. 565 = A. I. R. 1925 Cal. 1262.**

S. 29—Contract for avoiding ejectment.

——*Defendant agreeing to pay more rent to avoid ejectment is not protected.*

The defendant purchased a non-transferable occupancy holding which bore a rent of Rs. 12-12-0. The plaintiff landlord refused to recognise the defendant as a purchaser and in consequence the landlord would have been entitled to *khas* possession. In order to retain possession of this holding, the defendant agreed to pay a rent of Rs. 18-11-0 and upon these terms, the landlord allowed him to remain on the land.

Held : that it was not a question of enhancement of rent of the original tenant but the defendant whose position by virtue of his purchase was only that of a trespasser as against the landlord, took a new settlement after his purchase at the rate of rent sued for. (*Ghose, J.*) FERASAT ALI MULIK *v.* PRIAMBODA DEBI.
69 I. C. 414 = A. I. R. 1924 Cal. 544.

Ss. 29 and 50—Distinction.

Whereas S. 50 contemplates a case where a tenancy has been held at a certain rate, S. 29 applies only to a case where rent has been actually paid for a period of three years. A. I. R. 1922 Cal. 141, Ref. (*Mookerjee and Chotzner, JJ.*) JANAKI BALLAV ROY *v.* ENAT MANDAL. **72 I. C. 136 = 37 C. L. J. 489 = A. I. R. 1923 Cal. 600.**

S. 29—Enhancement beyond limit.

——*Enhancement beyond statutory limit—Onus is on landlord to justify it.*

Where the previous rent of the tenant has been proved, it is for the landlord to justify the enhancement of the rent claimed where it is in excess of the enhancement allowed by the statute. (*Mookerjee and Cuming, JJ.*). RAJINDRA NARAYAN MAZUMDAR *v.* SHEIKH KALIM. **67 I. C. 813 = 26 C. W.N. 758 = 49 Cal. 875 = A. I. R. 1922 Cal. 575.**

S. 29—Extent.

——*Enhancement by consent however small in excess of two-annas in a rupee cannot be allowed—There is no escape under maxim* deminimis non curat lex.

The statute enacts in the most explicit terms that there is to be no enhancement of more than two-annas in the rupee. *Ex concessis* if there is an enhancement however small over two-annas in the rupee it means violation of the statute and such enhancement cannot be allowed. The principle of *deminimis non curat lex* has no application to a prohibitary statute which says that excess can in no case be more than two annas. (***Mitter, J.***) GULMATINNESSA *v.* JAGO PALI.
A. I. R. 1929 Cal. 658.

——*Limit of two-annas for enhancement of rent cannot be exceeded even where the excess is very small and can for all practical purposes be disregarded.*

The principle embodied in the maxim *Deminimis non curat lex* cannot be applied to a case where the statute (such as S. 29, Ben. Ten. Act) has laid down a mandatory provision fixing the limit of the enhancement of rent. And so the limit of two annas laid down in S. 29 cannot be exceeded, although the excess might be a very small one and for all practical purposes might be disregarded. (*Mitter, J.*) BIDU BHUSAN DAS *v.* GHENU NASYA. **A. I. R. 1929 Cal. 531.**

S. 29—Obligation before act.

——*Obligation arising before Act—Agreement to pay enhanced rent for release thereof is valid.*

Where under *kabuliats* before 1885 the tenants bound themselves to grow a particular crop only for the benefit of the landlord in consequence of which a low rent was fixed and in 1902 the tenants promised to pay enhanced rent in consideration of the release of the obligation to grow the particular crop.

Held, that the restrictions imposed by Section 29 of the B. T. Act upon the freedom of contract had no operation before the B. T. Act (1885) came in force. The word "specially" in proviso (iii) of Section 29 of the B.T. Act has no reference to the *quantum* of reduction of rent allowed for the consideration there mentioned but merely requires that owing to special circumstances, *viz.*, the agreement to grow a particular crop, the rent is lower than it otherwise would have been. In order to bring an enhancement within proviso (iii) of Section 29 of the B. T. Act three factors must be present. (1) The *raiyat* must have held the land at a low rate of rent in consideration of cultivating a particular crop for the convenience of the landlord. (2) He must have been released from an existing obligation of cultivating this crop and (3). He must have deemed that the rent which he agreed to pay was fair and equitable.

Mere proof that the rent was a low rent would not be sufficient to comply with the section, unless it were also proved that the low rate was arrived at in consideration of cultivating a particular crop. But once it is proved that this is the case then the actual amount, whereby the rent is reduced below what it otherwise would have been if no such obligation had existed, is not a matter to be taken into consideration in deciding whether the proviso had been complied with. (*Dawson Miller, C.J. and Adami, J.*) W. M. GRANT *v.* EKLAL JHA. **67 I. C. 49 = 3 Pat. L. T. 386 = 1922 P. H. C. C. 177 = A. I R. 1922 Pat. 171.**

S. 29—Omission to raise plea.

——*Suit for rent—Defence under S. 29—When available.*

Where a tenant omitted to raise a defence under S. 29 of the B. T. Act in a prior suit for rent he is not estopped from taking it in a subsequent suit. (*Suhrawardy and Cuming, JJ.*) NAFAR CHANDRA PAL CHOWDHURY *v.* BHUSI MOLLA. **65 I. C. 581 (Cal.).**

S. 29—Order on Objections.

——*There is no presumption that an order was passed immediately after rejection of any objection.*

All objections by all persons would have to be disposed of before any order could be passed under S. 29. Therefore no presumption exists that an order was passed immediately after rejection of any particular objection. (*Miller, C.J. and Mullick, J.*) NARASINGH THAKUR *v.* BISHUNPERGASH SINGH. **4 P. L. T. 629 = 75 I. C. 1036 = 1924 P. H. C. C. 21 = A. I. R. 1924 Pat 209.**

Ss. 29 and 105.—Proceedings under S. 105.

——Section 29 refers to contracts between landlords and tenants and deals with cases of money rents of an occupancy raiyat which may be enhanced by contract in writing and registered, and which must not exceed by more than two annas in the rupee, the rent previously payable by the raiyat. Obviously, therefore, it has no application whatever to proceedings under S. 105. (*Cuming and Chakravarti, JJ.*) MATTA MAJHI *v.* GOPI NATH. **89 I. C. 951 = A. I. R. 1926 Cal. 353.**

S. 29—Recovery of enhanced rent.

——*Must be strictly followed—Recovery of enhanced rent for three years does not validate enhancement.*

The Thekadar of a patta in a certain estate sued for arrears of rent on the basis of the Theka. The proprietor of the estate gave different leases to a stranger who executed a kabuliyat in respect of all the leases in one deed. After the period of this kabuliyat a fresh lease was got from the proprietor at a rental in kind the value of which was estimated at Rs. 61.

Held, that the Thekadar was not entitled to get any rent other than the original cash rent as defendant had acquired occupancy rights. S. 29 is intended to be strictly followed and the Court should not allow it to be defeated or evaded. Thus even if the enhanced rent had been realised for three years, the enhancement could not be validated. (*Foster, J.*) M. H. MEYRICK *v.* DIP PANDEY. **75 I. C. 22 = A.I.R. 1924 Pat. 820.**

S. 29—'Rent' for previous period.

The section is no bar to a duly registered agreement complying with the other terms of the section taking effect for a period prior to the date of execution. 'Rent' in S. 29 may include rent for a previous period which was due but not paid. (*Newbould and Panton, JJ.*) HESENJAN CHAUDURI *v.* MAHAFEDJUDDIN. **62 I.C. 619 (Cal.).**

S. 29—Scope.

——*Original jama—No proof as to—Section does not apply.*

Where there is no evidence to prove the original jama, S. 29 will have no application. (*Suhrawardy, J.*) FAIJADDIN *v.* AGNI KUMAR SARMA. **71 I.C. 300 = A.I.R. 1924 Cal. 370.**

S. 29—Settlement to end litigation.

——*Settlement* bona fide *to end litigation—S. 29 has no application.*

When the settlement between the parties is a *bona fide* settlement to end the litigation between them, such an agreement does not come within the mischief of S. 29. (*Das, Kulwant Sahay and Dhavle, JJ.*) ASKARAN BAID *v.* DEOLAL SINGH. **10 P L.T. 717 = 118 I.C. 723 = A I.R. 1929 Pat. 568 (F.B.).**

Ss. 29 and 147-A—Suit between landlord and trespasser.

——*Compromise-agreement—Suit ending in the compromise, not between landlord and tenant as such—Neither S. 29 nor S. 147-A applies.*

Where the suit which ended in the compromise decree was not a suit between a landlord and a tenant as such but a suit between a landlord and a trespasser and although the compromise recognised the defendants as occupancy tenants from the date of the compromise, it did not say they were occupancy tenants before that.

Held, neither S. 147-A nor S. 29 applies. The defendant must pay the enhanced rent agreed upon. The sections apply only to a suit between tenants and landlord. (*Coutts and Adami, JJ.*) SHEOGOBIND SINGH *v.* MAHABIR MISSER. **1922 P. H. C. C. 319= 71 I.C. 143=4 P.L.T. 301=A.I.R. 1922 Pat. 654.**

S. 29—Tenancy by amalgamation.

———*Does not apply to tenancy created by amalgamating additional land.*

A tenancy created by amalgamating additional land with an existing occupancy holding is not governed by S. 29 of the Bengal Tenancy Act. (*Chakravarty, J.*) SASI KANTA ACHARJEE BAHADUR *v.* GENDA SHEIKH. **82 I.C. 970=A.I.R. 1925 Cal. 389.**

S. 30—Bhaoli and Naqdi lands.

———*Portions for which bhaoli and naqdi rents are paid forming one holding—S. 30 does not apply—Bhaoli and naqdi lands shown in separate khatas—Onus is on defendant to prove that they form one holding.*

If the same lands be held by a tenant on payment of rent, partly in cash and partly in kind, and there be no distinction as to the portions of the lands for which bhaoli or the naqdi rents are paid, the holding must be treated as a single holding, and S. 30 would not apply. From the fact that decrees for bhaoli and naqdi rents are usually executed as rent decrees, it does not necessarily follow that in each case a presumption will be raised that the naqdi and bhaoli lands formed a single holding. Where parties do not agree that each class of land forms a single holding, no presumption can be raised, and the court has to decide the question upon the acts and circumstances of each case. Where the survey khatian shows that the bhaoli and the naqdi lands are distinct and separate and each class of land is entered in a separate khata, a presumption is raised in favour of the view that the holdings are separate, and it would be for the defendant in each case to show that the bhaoli and the naqdi lands formed a single holding. (*Ross and Kulwant Sahay, JJ.*) MT. RAM KALI KUAR *v.* MADAN MOHAN LAL. **8 Pat.L.T. 224= 98 I.C. 995=A.I.R. 1927 Pat. 108.**

S. 30—Excess area.

———*Rent suit—Excess area in tenant's possession can be treated as separate holding.*

Owners of an undivided share of an estate can treat the excess land in the occupation of the tenant of the estate as a separate holding in a rent suit. 13 C.W.N. 635, Rel. on. (*Newbould and Graham, JJ.*) PECHA MANDAL *v.* BHAIRABENDRA NARAYAN. **91 I.C. 846=A.I.R. 1926 Cal. 541.**

S. 30 (b)—Extent when rise in prices.

———*Enhancement on the ground of rise in price of staple food crops—Land partly consisting of house—Enhancement limited to land only.*

Held, that no enhancement can be claimed on the ground that there is a rise in the price of staple food crops in respect of land which is used in such a way with the acquiescence of the landlord that food crops cannot be raised thereon. *Held also* that where there is a house on a portion of the land the enhancement should be limited to the land only. (*Ross, J.*) JEO NATH JHA *v.* BISHAMBAR DAS. **8 Pat. L.T. 495=106 I.C. 422.**

———It is the increase in the value of staple food crops which is taken into consideration, and not the increased value of the particular crops which the raiyat may have grown: 106 I C. 422, Dist. (*James and Chattagi JJ.*) SALOO JOLAHA *v.* SAMPAT KUMAR. **A. I. R. 1930Pat. 529 (c) at 530.**

Ss. 30 and 50—Fresh suit when allowed.

———C. P. Code, O. 23, R. 1.—Suit for enhancement of rent under Ss. 30 and 50—Landlord not proving case under S. 50—was allowed to withdraw with leave to sue again. (*Chatterjea and Panton, JJ.*) INDU BHUSAN SARKAR *v.* JATU MALLICK. **35 C. L. J. 161=62 I. C. 699= A.I.R. 1921 Cal. 611 (b).**

———**S. 30 (b)**—*Holding converted into orchard—Enhancement of rent—Claim for.*

The landlord is not precluded from claiming enhancement of rent on the ground of a rise in the price of staple food crops, merely by the fact that the tenant had converted the holding into an orchard and the landlord did not object to such conversion. (*Kulwant Sahay and Macpherson, JJ.*) JAGDISH PRASAD *v.* JAMNA PRASAD. **11 Pat. L.T. 557=9 Pat. 583.**

S. 30 (b)—Homestead lands.

———*Occupancy raiyat—Homestead—Rent is liable to enhancement.*

The rent of an occupancy raiyat of homestead lands is liable to enhancement under S. 30 (*b*) of the Act. (*Walmsley and Ghose, JJ.*) (RAJA) RESHI *v.* TRAILOKYA MOHATA. **76 I.C. 492= A. I. R. 1923 Cal. 370.**

Ss. 30 and 182—Homestead land.

———*Rent of homestead lands can be increased unless special custom to the contrary is proved.*

There seems nothing in S. 30 to restrict it to the land actually used for cultivation. To attract the operation of the section it would seem to be sufficient that the land in question is a holding held at a money rent by an occupancy raiyat. Neither would S. 182 remove homestead lands from the operation of S. 30. It would no doubt be open to the tenant to prove that the rent of homestead land by custom or local usage is not liable to be enhanced under S. 30 (*b*) but failing such proof homestead land would come within the operation of S. 30 (*b*). (*Cuming and Panton, JJ.*) RAJA RESHEE CASE LAW *v.* CHINTAMONI DALAI. **36 C.L.J. 305=70 I.C. 535=27 C.W.N. 962= A.I.R. 1922 Cal. 510.**

S. 30 (b)—Homesteads and Patit lands.

———*Enhancement can be claimed even for land yielding no crop.*

The fact that a certain holding consists of homesteads, or patit lands or lands which yield no crop is no ground for disallowing enhancement of the rent of the tenancy. A.I.R. 1922 Cal. 510, Foll. (*Suhrawardy and Chotzner, JJ.*) RESHEE CASE LAW *v.* AMBIKA DASSI. **79 I.C. 567=A.I.R. 1925 Cal. 396.**

S. 30 (a)—Intention of.

———*S. 30 (a) does not intend to raise or depress rents to common average level but lays down as to what should be proper standard.*

The object of S. 30 (*a*) was not to raise or depress rents to a common average level but where it could be found that in any particular area a tenant of the village could expect to get land similar to that in dispute in similar circumstances at some definite customary rate per bigha that rate should be taken as the proper standard. 9 W.R. 83 and 13 W. R. 346, Foll. 21 W.R. 157, Dist. 1 C. W. N. 310 and 21 Cal. 985, Ref. (*Courtney Terrel, C. J. and James, J.*) S. RADHA KISHANJI *v.* HARICHARAN. **11 Pat. L. T. 335= A. I. R. 1930 Pat. 332.**

Ss. 30 and 76—Irrigating Facilities.

———*Landlord is not bound to provide tenants with means to cultivate.*

The landlord being not bound in the absence of contract or custom to provide necessary irrigating facilities to the tenants, the tenants cannot claim suspension of the naqdi rent for want of facilities. (*Das and Ross, JJ.*) PARTAB NARAYAN SINGH *v.* NATHAN SINGH.

1924 P. H. C. C. 173 = 79 I. C. 858 = 5 Pat. L. T. 629 = A. I. R. 1924 Pat. 605.

S. 30—Kabuliat before B. T. Act.

——*Kabuliat executed before B. T. Act—Covenant that excess rent will be charged if at next survey excess area is found does not exclude application of S. 30, B.T. Act.*

Whether mention of one contingency excludes all other contingencies is a question to be determined with reference to particular circumstances of each case. A covenant in a kabuliat executed before passing of the B. T. Act that if at the time of any future survey any excess area is discovered the tenant should be liable to pay enhanced rent on the different kinds of land does not indicate that the only mode of enhancement was that fixed by contract and, therefore, the landlord is not entitled to claim enhancement under S. 30 for rise in the price of staple food crops. (*Suhrawardy and Cuming, JJ.*) BASANT KUMAR KAPALI *v.* SATINDRA MOHUN TAGORE. **88 I. C. 377 = A. I. R. 1925 Cal. 1209.**

S.30—Lease by settled raiyat.

——Settled raiyat taking lease of orchard for cultivation acquires rights and liabilities of occupancy raiyat. (*James and Chatterji, JJ.*) SALOO *v.* SAMPAT.

A. I. R.1930 Pat. 529.

S. 30 (a)—Lump rent.

——*Existence of lump rentals does not take any given area out of S. 30 (a)—Different classes of land in village and assessment of lump rent do not preclude application of S. 31 (f).*

Where soils of different class exist in the same village and facilities for irrigation vary, the existence of lump rentals may make it difficult to ascertain prevailing rents; but the existence of lump rental does not take any given area out of the operation of S. 30 (*a*), since even if there are different classes of land in the village and lump rent has been assessed the provisions of S. 31 (*f*) would apply. 2 P. L. J. 124, Ref. (*Das and James, JJ.*) KAMALA PRASAD *v.* BANKEY PRASAD.

10 Pat. L.T. 693 = A. I. R. 1929 Pat. 702.

S. 30 (b)—Naqdi and Bhaoli lands.

——*Holding consisting of Naqdi and Bhaoli lands—Rent is not enhanceable.*

Ordinarily where a holding consists of both naqdi and bhaoli lands the landlord cannot institute the suit under S. 30 (*b*) for enhancement of the naqdi rents. Where in the khatian no separate rent is shown for each of the plots given but the total cash rental is given for those plots which pay naqdi rent and the bhaoli rent has not been stated, the fact that the naqdi area is specially mentioned does not point to the naqdi lands forming a separate holding. (*Adami and Scroope, JJ.*) DIP NARAYAN SINGH *v.* BHIM MANDAL.

8 Pat. L. T. 564 = 101 I. C. 511 = A. I. R. 1927 Pat. 207.

Ss. 30 and 74—Neg and dak cess.

——*Realization of neg and dak cess from tenants attracts provisions of S.74—Payment of illegal amounts is no bar to suit for enhancement of rent under S. 30.*

Where it is established beyond doubt that a sum of nine pies in a rupee is realized from tenants as neg and dak cess and not as rent, the provisions of S. 74 are attracted, and the sum being illegal is irrecoverable from the tenants. The payment of such illegal amounts by the tenant is no bar to suit for the enhancement of rent and when such enhancement is claimed it is to be claimed upon the jama as recorded in the survey Record-of-Rights. A. I. R. 1929 Pat. 661, Rel. on. (*Wort, J.*) RAMESHWARDHARI SINGH *v.* MAHABIR SINGH.

10 Pat. L. T. 700 = A. I. R. 1930 Pat. 76.

Ss. 30 and 36—Power of Court.

——*Enhancement of rent.*

Court has power to pass order bearing less hard on tenants than would be the case otherwise where enhancement of rent is decided on. (*Dawson Miller, C.J. and Foster, J.*) RAMJI RAM *v.* RAMSRE ROUT.

1924 P. H. C. C. 217 = 83 I. C. 124 = A.I.R. 1924 Pat. 761.

Ss. 30, Cls. (a) and (b) and 31-B.—"Prevailing rate.'

——*Prevailing rate, meaning of—Determination of prevailing rate depends upon rents paid by occupancy raiyats in the whole village.*

By using the expression 'prevailing rate' in S. 31-B it was intended to refer to the table of rates prepared by the Revenue Officer under Part II of Chap. X. When a prevailing rate, whatever may be exact meaning of that expression in this section, has once been determined as stated in the section the rate so found shall be deemed to be the prevailing rate unless it can be shown that the actual prevailing rate has risen by an increase in the rents in the village generally owing to a rise in the price of staple food crops. Ss. 31 and 31-A as well as 31-B must be read together with S. 30 and the expression 'prevailing rate' as used in S. 31-B must have the same meaning as the same expression when used in S. 30, that is to say, it must be the prevailing rate paid by the occupancy-raiyats for land of a similar description and with similar advantages in the whole of the village or in neighbouring villages. It follows, therefore. that in ascertaining the prevailing rate regard must be had to the rents paid by occupancy raiyats holding similar lands in the whole of the village or in neighbouring villages and not to the rents paid by some of them only. The Court in ascertaining the prevailing rate should proceed according to the method laid down by Mullick, J., in 2 P. L. J. 124. (*Dawson Miller, C. J. and Kulwant Sahay, J.*) RAMJI RAM *v.* RAM KUMAR SINGH.

3 Pat. 49 = 5 Pat. L. T. 77 = 75 I.C. 411 = 1923 P. H. C. C. 345 = 2 Pat. L. R. 113 = A. I. R. 1924 Pat. 326.

Ss. 30 and 39—Price lists under S. 39.

——Claim for enhancement—Court must refer to price lists prepared under S. 39. 37 Cal. 742, Ref. (*Newbould and Graham, JJ.*) HARIHAR ROY *v.* SARATCHANDRA.

91 I. C. 734 = A. I. R. 1926 Cal. 661.

Ss. 30 and 54—Prolonged suit.

——It would be manifestly unfair in a case which has been prolonged to order any enhancement of back rents, that is to say rents from the commencement of the suit. The ordinary course is no doubt laid down in S. 154. (*Dawson Miller, C. J. and Foster, J.*) RAMJI RAM *v.* RAMASRE RAUT. **1924 P. H. C. C 217 = 83 I C 124 = A. I. R. 1924 Pat. 761.**

S. 30 (b)—Quality of land.

——Whether the land is good or bad has nothing whatever to do with the question of enhancement under S. 30 (*b*). A.I.R. 1922 Cal. 510, Foll. (*Das and Fazl Ali, JJ.*) NIRMAL KUMAR *v.* GAURI PRASAD.

10 Pat.L.T. 388 = A.I.R. 1929 Pat. 348

S. 30 (a)—Report of Revenue Officer.

——*Suit for enhancement of rent—Report of Revenue Officer insufficient—Further enquiry should be directed.*

If, in a suit for enhancement of rent under S. 30 (*a*) of the Bengal Tenancy Act, the Court is not satisfied with the report of the Revenue Officer it should direct a further enquiry setting out what further materials are wanted to come to a proper decision and the fact that the suit had been pending for a long time is no ground for not taking steps to bring it to a satisfactory termination and for declining an order for further enquiry. (*Mukerji, J.*) PRAMESH CHANDRA SEN *v.* BANWARILAL SHAHA. **86 I.C. 533 = A.I.R. 1925 Cal. 898.**

S. 30—Retrospective effect.

———It is doubtful how far Court has power to make enhancement of rent retrospectively. (*Dawson Miller, C.J. and Foster, J.*) RAMJI RAM *v.* RAMASRE RAUT. **1924 P.H.C.C. 217 = 83 I.C. 124 = A.I.R. 1924 Pat. 761.**

S. 30 (b)—Rise in Prices.

———*For enhancement, rise in prices of agricultural produce need not have benefited tenant.*

The principle underlying S. 30 (*b*) is not that for enhancement of rent there ought to be benefit to the tenant consequent upon rise in prices of agricultural produce. (*Das, J.*) MUHAMMAD ABDUL HASNAT *v.* RAMBILAS SINGH. **10 P.L.T. 869 = 122 I.C. 815 = A.I.R. 1930 Pat. 162.**

S. 30 (b)—Scope.

———Disallowing maximum enhancement on the ground that prices of necessaries having correspondingly risen the tenant is not better off is erroneous. A.I.R. 1929 Pat. 702, Foll. (*Wort, J.*) RAMESHWARDHARI SINGH *v.* MAHABIR SINGH. **10 Pat. L. T. 700 = A.I.R. 1930 Pat. 76**

S. 30—Stipulation for additional rent.

———*Potta containing stipulation that additional rent would be payable for additional area is not conclusive on the point of perpetuity of rent.*

A stipulation in the potta to the effect that if any additional area was discovered in future in the tenants' possession, rent would have to be paid therefor at the rate fixed in the potta, though forms an important factor in the determination of the question whether the rent was fixed in perpetuity, is not the sole determining factor. 38 C.L.J. 369 ; 9 C.W.N. 334 and A.I.R. 1924 Cal. 513, Rel. on. (*Mukerji, J.*) SURJA KUMAR TEWARI *v.* RATAN CHOURA. **31 C.W.N. 450 = 102 I.C. 323 = A.I.R. 1927 Cal. 406. (407).**

Ss. 30, 3 (9) and 182—Undivided share.

———"*Holding*" *does not include undivided share.*

An undivided share of land is not a 'holding' within S. 3 (9) of the Act and the word 'parcel' in that clause means entire parcel. Therefore S. 30 has no application when the tenancy of a raiyat is an undivided share of land. (*Newbould and Panton, JJ.*) BINAYAK DAS *v.* SAMINUDDI. **59 I.C. 209 = 24 C.W.N. 1022.**

S. 31—Sub lease.

———*Rent—Enhancement of—Sub-lease by occupancy raiyat not a ground for enhancing rent.*

The mere fact that an occupancy raiyat has sub-let part of his holding is not a sufficient reason for refusing his landlord an enhancement of rent under the provisions of the Act. (*Walmsley, J.*) BASIRUDDIN SARKAR *v.* JOGENDRA MOHAN DAS. **64 I. C. 182 (Cal.)**

S. 31-A—Applicability.

———*Principle of S. 31-A cannot be applied to districts to which that section is not made applicable by Local Government.*

The principle of S. 31-A cannot be applied to areas to which it has not been made applicable by the Local Government for in enacting S. 31-A the Legislature could not be held to have intended to alter the pre-existing law in districts to which that section was not applied.

45 Cal. 930 and 21 C. L. J. 483, Ref. on. (*Courtney Terrell, C. J. and James, J.*) RADHA KISHUNJI *v.* HARICHARAN. **11 Pat. L. T. 335 = A.I.R. 1930 Pat. 332.**

S. 31-A (1)—Applicability.

———*It is not obligatory to apply method of averaging set forth in S. 31-A (1) even in districts where that section is made applicable.*

Section 31-A (1) does in fact permit the process of averaging to be applied. But it will be noted that even in cases to which the section is made applicable by the Local Government it is not obligatory to apply the method set out in the section and in certain circumstances it would be clearly wrong to use that method. (*Courtney Terrell, C.J. and James, J.*) S RADHA KISHUNJI *v.* HARICHARAN. **11 Pat. L. T. 335 = A.I.R. 1930 Pat. 332.**

Ss. 32 and 35—Relation with S. 35.

———*Both the sections must be read together—S. 35 gives discretion in the Court as to the extent to which the enhancement should be allowed.*

The words used in S. 32 on the face of them appear to be of a mandatory character. But S. 32 should be read along with S. 35 which controls it. S. 32 only lays down the procedure by which the enhancement is to be calculated and S. 35 gives a discretion in the Court as to the extent to which the enhancement should be allowed. (*Duval and Mukerji, JJ.*) KUARMONY SINGH *v.* DASHRATHI PATI. **109 I.C. 305 = A.I.R. 1928 Cal. 570.**

S. 32 (b)—Right to share produce.

———*Landlord is entitled to certain share of produce—Except where raiyats hold at fixed rates landlord is entitled to periodical revision of rent under S. 30 (b).*

Section 32, as a whole, is based not on economic principles but on the legal and historical principle that the landlord is entitled to a certain share of the produce of the holding. Except where raiyats hold at fixed rates, the landlord is entitled to a periodical revision of rent under S. 30 (*b*) and not on general economic principles, but because he is entitled to a certain proportion of the produce of the land. (*Das and James, JJ.*) KAMALA PRASAD *v.* BANKEY PRASAD. **10 Pat. L. T. 693 = A.I.R. 1929 Pat. 702.**

S. 32—Scope.

———S. 32 does not prevent Court from comparing period immediately before suit with any other period during tenancy. (*Suhrawardy and Garlick, JJ.*) SOUDAMINI DASSYA *v.* BASIR MAMUD. **33 C. W. N. 498 = 115 I. C. 586 = A.I.R. 1928 Cal. 841.**

S. 35—Applicability.

———*Enhancement of rent should be with due regard to S. 35—Essentials to show that tenant is not liable to enhancement of rent under S. 32 indicated.*

In enhancing rent under Ch. 5, the provisions of S. 35 cannot be ignored ; but in order to show that a tenant is not liable to pay the enhancement which would be admissible under the rules laid down by S. 32, it is necessary to show that the rent payable by the raiyat is already unduly high, or that the productive capacity of the land has deteriorated through no fault of the raiyat since his rent was settled. (*Das and James, JJ.*) KAMALA PRASAD *v.* BANKEY PRASAD. **10 Pat. L. T. 693 = A.I.R. 1929 Pat. 702.**

———*Courts have no unrestricted discretion to deprive landlord of his dues.*

Section 35 does not give the Courts an unrestricted discretion to deprive the landlords of what is justly and properly due to them and although a Court may be generous to the tenant, it must at the same time be just to the landlords. (*Das and Fazl Ali, JJ.*) NIRMAL KUMAR *v.* GAURI PRASAD. **10 Pat. L. T. 388 = A.I.R. 1929 Pat. 348.**

——*Court has discretion to enhance rent.*

Court has discretion to enhance the rent if the circumstances are fair and reasonable to justify it. (*Suhrawardy and Garlick, JJ.*) SOUDAMINI DASSYA *v.* BASIR MAMUD. **33 C.W.N. 498 = 115 I.C. 586 = A.I.R. 1928 Cal. 841.**

——*Judge must take into account all the facts and all the relevant rules and must allow enhancement only if it is fair and equitable.*

S. 35 is a section of a general nature. The Judge has to take into consideration all the facts of the particular case and the rules which are set out in the Bengal Tenancy Act relating to the particular application, and then before he allows an enhancement he must be satisfied that under the circumstances of the case the enhancement is fair and equitable. The provision is inserted for the protection of the tenant. (*Sanderson, C. J. and Richardson, J.*) ISHAN CHANDRA *v.* RAMA PROSAD. **25 C.W.N. 897 = 65 I.C. 656 = A.I.R. 1921 Cal. 209.**

S. 35—'Circumstances'.

——*"Circumstances of the case" means circumstances of the particular case.*

Under S. 35 the circumstances referred to in the expression "which is under the circumstances of the case unfair or inequitable" are the circumstances of the particular case. (*Wort, J.*) RAMESHWARDHARI SINGH *v.* MAHABIR SINGH. **10 Pat· L. T. 700 = A. I. R. 1930 Pat. 76.**

S. 35—Deterioration.

——*Reduction of rent on ground of deterioration can form plea in defence in action for arrears of rent.*

Per *Fazl Ali, J.*—A claim for reduction of rent on the ground of permanent deterioration is available to a tenant by way of plea in defence in an action brought by landlord to recover arrears of rent. A. I. R. 1922 Pat. 169, Foll. (*Fazl Ali and Chatterji, JJ.*) RAMESHWAR MANDAL *v.* BADRI SAHU. **11 Pat. L. T. 470 = A. I. R. 1930 Pat. 105.**

S. 35—Enhancement refused.

——*Enhancement refused on facts found—High Court will not interfere.*

Where the Court has exercised its discretion in refusing to enhance the rent under S. 35, on the facts found, High Court will not interfere in second appeal. (*Das and Ross, JJ.*) SHAMDUTT SINGH *v.* GAJADHAR PRASAD. **98 I. C. 1049 = 7 Pat. L. T. 768.**

Ss. 35 and 27—Rise in Prices.

——*Rise in the prices established—Rent should be correspondingly increased—Landlord's neglecting gilandazi would not be a ground for refusal to enhance cash rent.*

When the rise in prices has been established there ought, in the absence of special circumstances to be a corresponding increase in the rent. That the landlord had neglected gilandazi would not be a ground for refusing an enhancement of cash rent. (*Ross and Kulwant Sahay, JJ.*) (MT. BIBI) SAYED ATULNISSA *v.* AMRIT MATHO. **8 Pat. 117 = 100 I. C. 754 = A. I.R. 1927 Pat. 144.**

S 36—Applicability.

——*Enhancement of rent—B. T. Act, S. 30.*

Court has power to pass order bearing less hard on tenants than would be the case otherwise where enhancement of rent is decided on. (*Dawson Miller, C. J. and Foster, J.*) RAMJI RAM *v.* RAMASRE RAUT. **83 I. C. 124 = 1924 P. H. C. C. 217 = A. I.R. 1924 Pat. 761.**

S. 37—Consolidation of rent and abwab.

——*Jama paid before Record-of-Rights same as that paid after and consisting of ground rent and abwab which was latterly disallowed—There is no change in legal rent payable and consolidation of legal rent with abwab does nat bar suit for enhancement.*

If a jama paid by the raiyat before the preparation of the Record-of-Rights consists of ground rent and abwab and the same jama was paid after the preparation of the Record-of-Rights even though the abwab was disallowed by the Revenue Officer, consolidation of the rent with the abwab does not operate as a bar to the institution of the suit for enhancement of rent. The abwab being illegal enhancement must be ignored, 4 P. L. J. 106, Foll, (*Das and James, JJ.*) SRI RAM CHANDRA NAIK *v.* RAMBRICH SINGH. **10 P. L. T. 696 = A. I. R. 1929 Pat. 661.**

S. 37—Non-fulfilment of condition for fresh suit.

——*Suit for enhancement of rent withdrawn with permission to bring fresh suit subject to condition—Condition not fulfilled—Dismissal does not amount to dismissal on merits.*

Where a plaintiff is allowed to withdraw a suit for enhancement of rent of a holding with permission to bring a fresh suit provided he pays the costs of the defendant within a particular limit, or otherwise the suit to stand dismissed, default in payment of costs amounts to dismissal for default and not dismissal on merits. (*James and Chatterji, JJ.*) DHORI AHIR *v.* PARMESHOR MISSIR. **A. I. R. 1930 Pat. 406.**

S. 38—Permanent deterioration.

——*"Permanent deterioration" must be construed with reference to existing condition and not by possibilities of improvement by application of capital and skill.*

A deterioration would not cease to be permanent if by the application of capital and skill the case of deterioration might be removed. The question of deterioration must be construed with reference to existing conditions: 20 Cal. 579, Foll. (*Fazl Ali and Chatterji, JJ.*) RAMESHWAR MANDAR *v.* BADRI SAHU. **11 P. L. T. 470 = A. I. R. 1930 Pat. 105.**

S. 40—Essentials.

——*Tenant must be occupancy raiyat—Amount fixed by contract as payable annually in case of tenant's failure to pay the rent in land—S. 40 does not apply as rent had been already commuted by contract.*

An order for commutation of rent can be made only under Section 40. The essence of Section 40 is that the rent should be in reality payable in kind either wholly or partially. It is further necessary that the tenant should have the status of an occupancy raiyat. Where although nominally the rent was payable in kind the parties had contracted that upon failure of the tenant to pay the rent in kind, the rent would be leviable at the rate of a certain sum annually,

Held, there was no room for commutation under Section 40 as the parties had already commuted the rent by their contract. (*Mookerjee, A. C. J. and Fletcher, J.*) MOHESHDUTT *v.* SHEIKH BASIR. **25 C.W.N. 714 = 67 I.C. 946 = A. I. R. 1921 Cal. 530.**

S. 40—Jurisdiction of Civil Court.

——*Proceedings are miscellaneous proceedings—No procedure is laid down in the Act—C. P. Code, O. 32, R. 3, does not apply—Civil Court cannot interfere with revenue officer except for illegality.*

Proceedings under S. 40 of the Bengal Tenancy Act are miscellaneous proceedings by a Revenue Officer in regard to which there are no provisions as to procedure either in the Act itself or in the rules framed under the Act. The provisions of R. 3, O. 32, C. P. Code, have also no application. Except on the ground of illegality there can be no interference by a Civil Court with the orders passed by a Revenue Officer. The only matter for a Court to consider in regard to the legality or otherwise of proceedings where a minor has been represented by a guardian who had not appeared is whether the minor was prejudiced by the non-appearance of his guardian. (*Cammiade, J.*) HARICHARAN SIL *v.* BEPIN BEHARI. **100 I.C. 146 = A. I. R. 1927 Cal. 374.**

———*Order under without notice to parties concerned is* ultra vires *and does not bind Civil Court—Jurisdiction—Civil and Revenue Court.*

Although the section does not state explicitly that no order for commutation is to be made till opportunity has been afforded to the party liable to be affected thereby, to appear and contest the application, it is obvious on first principles that no order should be made till notice of the application has been served. The object of the application for commutation is to secure an alteration of the most essential element of the tenancy, namely, the rent. It is of the utmost importance to the parties whether the rent is to be payable in kind or in cash; and if the rent is to be paid in cash what sum should be taken as the proper amount payable in lieu of rent previously paid in kind. An order of this description cannot justly be made without notice to the party affected. An order under Section 40 made by a Revenue Officer without jurisdiction does not bind the Civil Court. (*Mookerji and Chotzner, JJ.*) GORA CHAND HALDAR *v.* RAKHALCHANDRA GOPE.

37 C.L.J. 473 = 72 I.C. 37 = A.I.R. 1923 Cal. 364.

S. 40—Liability of lessee.

———*Lessor properly on record in S. 40 proceedings—Lessee is bound.*

In the proceeding under S. 40, if lessor has been properly on the record, the lessee would be bound by the decision. (*Macpherson and Fazal Ali, JJ.*) MOD ALI *v.* BHAGALPUR TANNERY.

A.I.R. 1930 Pat. 325.

S. 40—Presence of landlord.

———*Presence of landlord is necessary.*

No commutation under S. 40 is possible where the landlord is not before the Collector. (*Macpherson and Fazal Ali, JJ.*) MOD ALI *v.* BHAGALPUR TANNERY. **A.I.R. 1980 Pat. 325.**

S. 40—Report whether public document.

———*Evidence Act, Ss. 74 and 35—Crop cutting report of Deputy Collector under S. 40, Bengal Tenancy Act, is public document and admissible to prove quantity of crops cut.*

The crop cutting report of the Deputy Collector made under S. 40, Bengal Tenancy Act, should be considered a public document and is evidence of the amount of crops produced by the land. 4 Cal. 79, Rel. on. (*Adami, J.*) HARGOBIND SINGH *v.* KISHUNDEYAL GOPE. **7 P.L.T. 671 = 95 I.C. 966 = A.I.R. 1926 Pat. 436.**

S. 40 (5)—Retrospective effect.

———*Commutation Officer can make his order of commutation retrospective.*

Whether to make an order of commutation retrospective or not, being entirely in the discretion of the commutation officer, he has jurisdiction to make it retrospective. (*Doss and James, JJ.*) ENAYAT KHAN *v.* BEPIN BEHARI. **10 P.L.T. 107 = 115 I.C. 195 = A.I.R. 1929 Pat. 177.**

S. 44—Homestead land.

———*Homestead land, let for cultivation—Non-occupancy raiyat, cannot be ejected except on grounds in section.*

Where the land was formerly homestead land within the meaning of that expression as used in the Act, but ceased to be so and had been let for cultivation, *i.e.*, for an agricultural purpose, to the respondent and both cereals and vegetables had been grown on it for many years.

Held, the respondent who is a non-occupancy raiyat is not liable to be ejected except on one or other of the grounds specified in section 44 of the Bengal Tenancy Act. (*Chamier, C.J. and Sharfuddin, J.*) MT. WAJIHUNNISSA BEGUM *v.* FAKIRA MAHTON.

3 P. L. T. 621 = A.I.R. 1923 Pat. 94.

Ss. 44 and 47—Tenant holding over.

———*Second lease executed, continuing occupation—Tenant is not liable to ejectment under S. 44.*

Where after the expiry of the terms of the lease the tenant held over for about eleven months after which another lease was executed,

Held, the tenant was not admitted to occupation under the second lease but that he had been in occupation of the land and the second lease was executed with a view to the continuance of that occupation. He was therefore, not liable to ejectment. (*Mukerji, J.*) MUHAMMAD SULAIMAN *v.* UMA CHARAN SIL.

79 I.C. 648 = A. I. R. 1925 Cal. 181.

S. 46, Sub-S. 7—Commencement of enhancement.

———*Rent at enhanced rate is payable from the date of acceptance of agreement.*

The enhanced rent is payable by the tenant from the date when he agrees to pay the rent determined by the Court. Although Sub-S. (7) does not in terms say from what date the enhanced rent should be payable yet, as his liability to pay the enhanced rent only arises by reason of his agreement, it seems impossible to hold that he was under any liability to pay rent at the enhanced rate before that date. (*Dawson Miller, C. J. and Macpherson, J.*) MT. BIBI WAJIBUNNISSA BEGUM *v.* BABU LAL MAHTON. **5 Pat. 46 = 7 P.L.T. 355 = 1925 P.H.C.C. 298 = 90 I.C. 871 = A.I.R. 1926 Pat. 42.**

S. 46—Ejectment when disallowed.

———*Suit for ejectment—Court should first determine fair and equitable rent and decree for ejectment should not be passed if the tenant agrees to pay such rent.*

In a suit for ejectment of non-occupancy tenant, before passing a decree under S. 46, Cl. (6), the Court should determine the fair and equitable rent and fix a time within which the tenants are to appear and signify their election to pay the rent so determined. The Court may record an order in the order-sheet determining what the fair and equitable rent is. If the tenants do not appear within the time fixed by the Court and recorded in the order determining fair and equitable rent or appear and signify their unwillingness to accept the fair and equitable rent determined by the Court, then the Court should pass a decree in ejectment. But such a decree should not be passed where the tenants agree to pay the fair and equitable rent fixed by the Court before ejectment. (*Rankin, C. J. and Mitter, J.*) PORT CANNING & LAND IMPROVEMENT CO., LTD. *v.* JOGENDRA MANDAL. **55 Cal. 659 = 111 I. C. 222 = A. I. R. 1928 Cal. 533.**

S. 46—Nature of proceedings.

———*Proceedings under the section are really for assessing fair and equitable rent, and agreement in sub-S. 7 is not same as in previous sub-sections but his agreement, between landlord and tenant after Court's fixing rent.*

The proceedings under S. 46 are not merely proceedings for ejectment, but to have a fair and equitable rent assessed by the Court. If the tenant has refused to accept the agreement filed under the provisions of S. 46, it is then alone that a suit for ejectment under that section can be commenced. The " agreement " referred to in sub-Ss. 1 and 2 is not strictly an agreement, but it really is an offer made to the tenant which the tenant can refuse or reject as he likes. [22 *C. W. N.* 558, *Foll.*] The agreement mentioned in sub-S. 7 is the agreement arrived at between the parties when Court has fixed a fair and equitable rent and the raiyat has agreed to pay the same. (*Greaves and M. N. Mukerji, JJ.*) Port Canning and Land Improvement Co., Ltd *v.* Achhiruddi Molla.

43 C. L. J. 45 = 92 I. C. 37 = A. I. R. 1926 Cal. 693.

Ss. 46 and Sch. 3, Art. 2—Nature of proceedings.

———*Proceedings under S. 46, B. T. Act, are not on same cause of action as are those for rent against non-occupancy raiyat.*

A suit for recovery of rent against a non-occupancy raiyat is barred if not brought within three years from the last day of the agricultural year in which the arrear fell due, under the provision of Art. 2 (*b*) of Schedule III. The period cannot be extended under the provisions of S. 14 of the Lim. Act owing to pendency of proceedings under S. 46, B. T. Act, as the two suits are not founded on the same cause of action. 3 *Cal.* 6, *Dist.* (*Greaves and M. N. Mukerji, JJ.*) Port Canning and Land Improvement Co., Ltd. *v.* Achhiruddi Molla. **43 C. L. J. 45 = 92 I. C. 37 = A. I. R. 1926 Cal. 693.**

Ss. 46 and 111—Nature of proceedings.

———*Suit under S. 46 includes the question of determining the status of tenant and falls within S. 111.*

A suit under S. 46 is not merely a suit for ejectment in the sense of ejecting a trespasser but it involves a determination by the Court of the class of the tenant and also the fixing of a fair and equitable rent. Therefore a suit under S. 46 comes under the express words of S. 111. (*Greaves and Mukerji, JJ.*) Kanak Kanti Roy Chowdhury *v.* Srishtidar Mandal.

88 I. C. 670 = A. I. R. 1925 Cal. 1211.

S. 46, Cl. 7—Non-occupancy tenant.

———*Non-occupancy tenant's liability for enhanced payment begins from the time of his agreement so to pay.*

The liability of the non-occupancy tenant to pay enchanced rent is not dependent on the decree which merely stops short after determining what the fair and equitable rent is. The liability attaches from the time when the tenant agrees to pay the rent so determined. A. I. R. 1926 Pat. 42, Rel. on. (*Jack and Mitter, JJ.*) Port Canning & Land Improvement Co., Ltd. *v.* Achhiruddi Molla. **50 C. L. J. 8 = A. I. R. 1929 Cal. 334.**

S. 48—Essentials.

———*Defendant must be under-raiyat for applying the section.*

To attract the operation of S. 48 it must be established that the defendant is an under-raiyat, that is to say, that he is a tenant who holds immediately or mediately under a raiyat

A usufructuary mortgage was executed by an occupancy raiyat in favour of the plaintiff, stipulating that the mortgagee would pay the proprietor's rent and take dakhilas in the name of the raiyat. Afterwards he executed a kabuliyat in favour of the mortgagee stipulating to pay rent at Rs. 20 per year. In a suit by the mortgagee for recovery of rent,

Held, that the mortgagor holding from the mortgagee under the kabuliyat did not cease to be a raiyat holding under the proprietor and was not an under-raiyat and S. 48 was inapplicable to the case. *A. I. R.* 1925 *Patna*, 118. 3 *Pat.* 266, *Foll.* (*Suhrawardy and Mukerji, JJ.*) Ismail Pramanik *v.* Khedir Pramanik. **43 C.L.J. 242 = 93 I. C. 1015 = A. I. R. 1926 Cal. 986.**

S. 48—Scope.

———*Tenancies under settlement and kabuliat virtually co-extensive—S. 48 applies.*

The demise in favour of the landlord under the deed of settlement was *A* plus *X* and that in favour of tenant under the kabuliyat granted by the landlord was *A* plus *Y*, so that the tenancies could not be co-extensive. But though *X* and *Y* existed and were part of the consideration in each case each was entered for a purpose unrelated to the substantial contract between the parties and each was infinitesimal in value and its effect upon the financial arrangement was and was intended to be nil.

Held, that except nominally the tenancy under kabuliyat was co-extensive with the tenancy under the deed of settlement and if the tenant was an under-raiyat, S. 48 was not inapplicable and the maximum annual rent which landlord could recover from the tenant was one and at half times that fixed under the settlement. 39 Cal. 839, Disc. ; 42 I. C. 243, Rel. on. ; 24 I. C. 677, Ref. (*Macpherson and Dhavle, JJ.*) Fakir Mohammad *v.* Sakina. **10 P. L. T. 369 = A. I. R. 1929 Pat. 372.**

———*S. 48 applies even if the holding is not co-extensive—Under-raiyat of a part of holding agreeing to pay to raiyat higher than* 150 *per cent. of the rent of whole holding—Raiyat cannot recover more than* 150 *per cent. if under-raiyat offers to pay* 150 *per cent.*

Section 48 is not limited only to cases where the holdings are absolutely co-extensive, and if the under-raiyat of a part of a holding offers in Court to pay as much rent as would equal the amount of rent paid by the raiyat for the total holding plus fifty per cent. of that, the raiyat cannot recover more than that amount in spite of an agreement between the under-raiyat and himself to pay rent at a higher rate. (*Rankin, C. J. and Mukherji, J.*) Srijan Gazi *v.* Abdul Sattar. **56 Cal. 217 = 116 I. C. 731 = 32 C. W. N. 1050 = A. I. R. 1928 Cal. 885.**

———*S. 48 is controlled by S. 18.* (Per *Cuming, J., Cammiade, J. dissenting.*)

The restriction imposed by S. 48 on the amount of rent that a raiyat can recover from an under-raiyat has no application in the case of a raiyat at a fixed rate of rent, the section being governed by S. 18. In other words, S. 18 controls S. 48 as it does S. 85 ; A. I. R. 1921 Cal. 603. Appl. (*Cuming and Cammiade, JJ.*) Raj Kumar Dutta *v.* Ramani Mohan.

104 I. C. 150 = A. I. R. 1927 Cal. 878.

S. 48 (a)—Scope.

———*Under-*raiyat *—Rent-in-kind —Money value on default—S. 48-A does not apply.*

Where a *Kabuliat* executed by an under-*raiyat* provided for payment of certain quantity of paddy as rent and in default, a certain sum of money to be paid as the price, *Held*, the rent provided in the contract did not come under S. 48-A of the Bengal Tenancy Act as it was not a money rent. (*Chatterjee and Newbould, JJ.*) KRISHNA KUMAR SAHA *v.* PIRU FAKIR. **63 I. C. 502 = 35 C. L. J. 159 = A. I. R. 1922 Cal. 273.**

S. 48—Zarpeshgi lease.

———*Raiyat executing* zarpeshgi *lease and then taking land from* zarpeshgidar *under* kabuliat *is an under*-Raiyat—*Rent recoverable from him is governed by S.* 48.

Where defendant who had ceased to be a *raiyat* by the execution of *zarpeshgi* lease, executed a *kabuliyat* by which he was given a lease for a period of nine years by the *zarpeshgidar*,

Held, defendant cannot be deemed to be a *raiyat* because he does not hold the land either immediately under a proprietor or immediately under a tenure-holder, he is an under-*raiyat* and the rent recoverable by the plaintiff must, therefore, be regulated by section 48 of the Bengal Tenancy Act. The legal relation between the parties after the execution of the *kabuliat* was that of landlord and tenant and that the mere fact that the lands were let out to the mortgagor would not alter the relation between the parties. (*Ross, J.*) CHATEERGUN BIND *v.* TILAKDHARI SINGH. **71 I. C. 470 = A. I. R. 1923 Pat. 402.**

S. 49—Bargadar.

———*Bargadar is not presumed to be day labourer—If he is a tenant S. 49 applies.*

A bargadar may be a day labourer or he may be a tenant. The mere fact that he holds on produce rent will not give the landlord a right to eject him. He will still come within the provisions of S. 49 if he is a tenant. (*Cuming and Page, JJ.*) KSHETRA NATH DUTTA *v.* NITYANANDA MONDAL. **96 I. C. 667 = A. I. R. 1926 Cal. 1118.**

S. 49—Burden of proof.

———A plaintiff claimed to be a raiyat and he served notice of ejectment under S. 49, Beng. Ten. Act, upon the defendants as under-raiyats. The defendants claimed that they were raiyats and could not be ejected by notice under S. 49.

Held, that the onus lay on the plaintiff to prove that he was a raiyat and defendant an under-raiyat and the tenancy was determined by notice under S. 49; A. I. R. 1927 Cal. 966, Foll; 20 W. R. 374; 23 W. R. 291; A. I. R. 1920 P. C. 67 and A. I. R. 1924 P. C. 65, Dist. (*Suhrawardy and Jack, JJ.*) NAGENDRA NATH VASU *v.* KSHIRADAR RUIDAS. **113 I. C. 575.**

———*Suit for ejectment—Plaintiff alleging that defendant is under-ryot must prove that—Evidence Act, S.* 101.

Where the plaintiff, alleging that he is a ryot and the defendant is under-ryot, sues to eject the defendant on service of notice to quit in compliance with the provision of S. 49, Cl. (*b*), Bengal Tenancy Act, the burden of proving that he is a ryot and the defendant is under-ryot is on him; 57 I. C. 833, Foll; A. I. R. 1920 P. C. 67; A. I. R. 1924 P. C. 65, Dist. (*Mukerji and Mullick, JJ.*) BASIRUDIN SARKAR *v.* SAHEBULLA PRAMANIK. **32 C. W. N. 160 = 105 I. C. 857 = A. I. R. 1927 Cal. 966.**

S. 49—Consent decree.

———*Consent decree is no substitute for written lease required by S.* 49.

A consent decree cannot transform tenancy which at its inception was for an unlimited time into a tenancy for a term held under a written lease within the meaning of S. 49. (15 C. L. J. 122 and 672 and 28 C. L. J. 507, Dist.) The tenant could be ejected only after notice under S. 49 (*b*) and in execution of a decree. (*Mookerjee and Suhrawardy, JJ.*) GANESH CHANDRA PAL *v.* CHANDRA MOHAN DATT. **84 I. C. 730 = 28 C. W. N. 984 = A. I. R. 1925 Cal. 199.**

S. 49—Contents of Notice.

———*Notice should be in clear terms—No special form is necessary.*

There is no special form for notice under S. 49. All that is required for a valid notice under S. 49 is that its terms should be clear and not liable to be misunderstood. (*James, J.*) SINGHESHWAR CHOUDHARY *v.* PARBAL MANDAL. **103 I. C. 471 = A. I. R. 1927 Pat. 376.**

Ss. 49 and 85—Effect of—Conflicting Circumstances.

———*Record-of-Rights—Entry showing that under-raiyats had acquired occupancy rights—Entry based on kabuliyat which contained no clause entitling plaintiff to eject defendants, under-raiyats, but contained term that it was year to year tenancy—If kabuliyat be treated as permanent lease it offended against Bengal Tenancy Act, S.85—If treated as year to year lease, it could not protect defendant from ejectment—So entry based on it was void.*

There was an entry in the Record-of-Rights to the effect that under-raiyats defendants had acquired occupancy right. The kabuliyat did not contain any clause entitling the plaintiff to eject the defendants, but contained a term that it was a *san basen* kabuliyat, *i.e.*, it was a tenancy from year to year;

Held, that if the kabuliyat was treated as creating a permanent lease, it must be regarded as void since it would offend against S. 85. On the other hand if it was treated as a year to year lease it did not protect the defendants from ejectment upon notice under S 49. In either view of its terms, therefore, the kabuliyat could not create a right of occupancy in the under-raiyats; and hence the Record-of-Rights based on it was not correct: 27 C. L. J. 107 and 28 C. L. J. 91, Foll. (*Mitter, J.*) EAKUBALI PANDIT *v.* MUHAMMAD ALI. **49 C. L. J. 352 = A. I. R. 1929 Cal. 450.**

S. 49—Lease for indefinite period.

———*Ejectment.*

By a notice under S. 49 a landlord can eject a tenant holding under a lease for an indefinite period: 39 Cal. 278, Foll. (*Greaves and B. B. Ghose, JJ.*) BINGSHP BADAN HALDAR *v.* RATAN IJARDAR. **92 I. C. 961.**

S. 49—Non-heritable holding.

———*Heirs of tenant of non-heritable holding not recognized by landlord are not necessary parties.*

In a suit for ejectment the heirs of a tenant of a non-heritable holding are not necessary parties unless they are recognised by the landlord as tenants. (*Cuming and B. B. Ghose, JJ.*) JAGANNATH MONDAL *v.* BHAJAHARI NATH. **96 I. C. 360 = A. I. R. 1926 Cal. 1206.**

S. 49 (b)—Permanent lease.

———*Ejectment—Permanent lease by raiyat—Lessee if an under raiyat—Adverse possession.*

Where a raiyat grants a permanent lease without the consent of the tenure-holder and the lessee and his heirs remain in possession for more than 12 years their status is not that of under-raiyat and they cannot be ejected by the service of a notice to quit under S. 49 (*b*) of the

B.T. Act, 28 C. 205, 17 C.W.N. 860, Rel. on. (*Teunon, J.*) PURNA CHANDRA DAS *v.* JOY LAL PAYADA.
64 I. C. 756 (Cal.).

S. 49—Period of Notice.

——*Six months' notice is not necessary—Reasonable notice should be given.*

There is no necessity to import into the agricultural law of this country the six months' notice required in the case of an annual tenancy in England or as required in India in the Presidency towns. What is needed is a reasonable notice having regard to the nature of the tenancy and the date of the expiry of the agricultural year as indicated in S. 49. 17 C. W. N. 932, Ref. (*Greaves and Mukerji, JJ.*) BROJO NATH *v.* ABDUR RAHAMAN. **89 I. C. 113= A. I. R. 1926 Cal. 466.**

——*Substantial notice is necessary—Technicality is not to be insisted on.*

The technicalities of the English law relating to the form and contents of a notice to quit should not be introduced in connection with the provisions of S. 49, Bengal Tenancy Act. There is sufficient compliance with the requirements of S. 49 if what is served upon the tenant gives him notice to quit the land at the end of the agricultural year next following and the suit is instituted after the lapse thereof. (*Mookerjee and Chotzner, JJ.*) PURNA CHANDRA DAS *v.* ALI MAHAMMED. **70 I. C. 999=37 C. L. J. 548= A. I. R. 1924 Cal. 520.**

Ss. 49 and 182—Scope.

——*Settled raiyat of village and under-raiyat of homestead—Ejectment from latter—Rights defined.*

A settled raiyat of the village and an under-raiyat with respect to the homestead land cannot be ejected from the latter because the incidents thereof will be governed by the provisions of the Bengal Tenancy Act applicable to raiyats : A. I. R. 1927 Cal. 96 ; 20 I. C. 698 ; 28 I. C 839; 54 I. C. 906; 31 Cal. 757; A. I. R. 1924 Cal. 850; 50 I. C. 8 and A. I. R. 1928 Cal. 299, Ref.; A.I.R. 1930 Pat. 224, Dist. (*Jwala Prasad, J.*) KHAIRULLAH *v.* BEHARI MAJJAM. **123 I. C. 628= A. I. R. 1930 Pat. 411.**

S. 49—Scope.

——*Landlord can eject under-raiyat though he is settled raiyat under different landlord, on the expiry of his registered lease.*

A landlord under S. 49 can eject an under-raiyat, holding under a registered lease, of homestead and nal land and a tank, though he is a settled raiyat of the village of lands held under a different landlord on the expiry of his under-raiyati lease. : 21 C. L. J. 475, Dist. (*Cuming and Chakravarti, JJ.*) RAHIMUDDI MEAJI *v.* AMINA BIBI. **43 C. L. J. 132=94 I. C. 920= A. I. R 1926 Cal. 662.**

——*Denial of landlord's title—Under-raiyat cannot be ejected apart from S.* 49.

The denial of the landlord's title does not make an under-raiyat liable to be ejected. He can be ejected only in accordance with the provisions of S. 49. (*Greaves and B. B. Ghose, JJ.*) ABBAS SHEIKH *v.* NEYAMATUNNESSA. **91 I. C. 662= A.I.R. 1926 Cal. 540.**

——*Section does not apply to sub-lease by permanent heritable tenant of homestead land.*

The Bengal Tenancy Act has no application to the sub-lease of a homestead land of which the lessor is a permanent and heritable tenant. (*Cuming and Chakravarty, JJ.*) BIDHUMUKHI *v.* GOVINDA CHANDRA. **42 C. L. J. 78=90 I. C 104= A.I.R. 1926 Cal. 215.**

S. 49—Service of Notice.

——*C. P. Code, O.* 5, *R.* 17—*Strict compliance with O.* 5, *R.* 17 *is essential.*

The rules laid down in O. 5 of the Code of Civil Procedure relating to the service of summons will apply to notices served under S. 49 of the Bengal Tenancy Act. Perhaps R. 19 does not apply to notices issued under the Bengal Tenancy Act for the rule numbered 3 of the Government rules only says that the process shall be served in the manner provided in the Civil Procedure Code. Rule 19 relates to the proof of service by the affidavit of the serving officer or his examination on oath in Court and the decision of the Court that the service was duly made. But rule 17, relating to the mode of service, applies and if it is not complied with, the notice will be vitiated. A. I. R. 1924 Pat. 446, Dist. (*Jwala Prasad, Ag. C. J. and Kulwant Sahay, J.*) MAHADEO SINGH *v.* BASGIT SINGH. **4 Pat. 135= 7 P. L. T. 175=91 I.C. 184=1925 P.H. C. C. 106= A. I. R. 1925 Pat. 441.**

Ss. 49 (b) and 85—Solenama for indefinite period.

——*Suit for ejectment—Solenama in previous suit enhancing rent allowing defendants to continue generation after generation—Solenama created new lease and so was compulsorily registrable but registration was barred under S.* 85—*Embodying the lease in decree does not make difference in application of Registration Act, S.* 17 (1) (*d*).

The plaintiffs who were raiyats sued the defendants under-raiyats, in ejectment on service of a notice to quit under S. 49. The defendant pleaded that the plaintiffs were not entitled to evict him relying upon a decree passed on the basis of a solenama in a previous suit for rent which the plaintiffs had instituted against him. By the solenama, the plaintiffs in consideration of an enhancement of rent, consented to allow him to hold this land permanently.

Held, that as it was not a term of the solenama that the defendant had the right to hold from generation to generation or that any such existing right was being admitted by it, it was impossible to escape from the conclusion that the solenama created a new lease in respect of land which the defendant held from before. It would not be operative as a lease unless it was registered under S. 17, sub-S. (1), Cl. (*d*), Registration Act, but S. 85, Cl. (2), Ben. Ten. Act, bars its registration. The fact that this lease was embodied in a decree did not make it any the more operative as a lease because S. 17, sub-S. (2), Cl. (6) excepts documents falling within Cls. (*b*) and (*c*) and not Cl. (*d*) of sub-S. (1): A. I. R. 1927 Cal. 913 and A. I. R. 1921 Cal. 451 (F. B.), Rel. on; A. I. R. 1926 Cal. 666, Ref. (*Mukerji and Bose, JJ.*) NAZAR ALI *v.* INDRA KUMAR. **56 Cal. 427=118 I. C. 895= A. I. R. 1929 Cal. 462.**

S. 49-E, Sub.-S. 2—Permission of Collector.

——*Aboriginal Tenant—Permission of Collector cannot enlarge power of tenant to mortgage in any other way than by a complete usufructuary mortgage.*

The power of an aboriginal to effect a mortgage of his land is restricted by the provisions of section 49-E, sub-section (2) of the Act under which such a tenant is empowered only to make a complete usufructuary mortgage of his land and the permission of the Collector cannot enlarge the power of an aboriginal to effect a mortgage of his holding in any other way than by a complete usufructuary mortgage. (*Walmsley and Ghose, JJ.*) GANGARAM MAJHI *v.* BAMAPADA MAHAPATRA. **68 I. C. 301=A. I. R. 1923 Cal. 313.**

S. 49 K—Application to set aside sale.

———*Sale of aboriginal's tenure is void and need not be set aside.*

Under S. 49, K of the Bengal Tenancy Act, the sale of an aboriginal tenure in execution of a money decree is void and an application to set it aside is not governed by Art. 12 or Art. 166. (*Chatterjee and Panton, JJ.*) JOGESHWAR MAHATA *v.* JHAPAL SANTAL.

51 Cal. 224 = 82 I. C. 848 = 28 C. W. N. 556 = A. I. R. 1924 Cal. 638.

S. 50—Agreemeent above excess area.

———*Kabulyat, stating that if excess area is found to be in possession of tenant, he would pay higher rent, does not alter rate of rent.*

Where it is provided by a kabulyat that if the lands are measured and on measurement the tenant is found to be in possession of more land than what he is paying rent for, he will pay rent for that excess land at the higher rate paid by the neighbouring tenants, the kabulyat does not alter, nor does it propose to alter the rent or rate of rent within S. 50. (*Cuming and Page, JJ.*) UMESH CHANDRA *v.* BEPIN BEHARI.

97 I. C. 546 = A. I. R. 1927 Cal. 75.

S. 50—Applicability.

———*Suit under general law between landlord and tenant.*

The presumption under S. 50 of the B. T. Act can arise only where the suit is one brought under the provisions of that Act. Thus where the suit is for ejectment under the general law by the landlord for ejectment against the transferee of a non-transferable holding the Court may, but is not bound, to raise the presumption. (*Suhrawardy and Costello, JJ.*) CHITPORE GOLABARI CO., LTD. *v.* HARI MOHAN GHOSE. **34 C. W. N. 675.**

S. 50 (2)—Applicability.

———*S. 50 inapplicable—Court can draw inference of fixity of rent from evidence—Uniform rate for twenty years is not itself sufficient to establish fixity of rent.*

The Court is not precluded from drawing the appropriate inference from the facts proved by evidence on the record because S. 50 has no application. Payment of rent at an unvarying rate for more than 20 years is not in itself sufficient to establish that the tenancies are held at fixed rate. (*Mukerji and Graham, JJ.*) SHYAMA CHARAN GHOSE *v.* FAKIR CHANDRA.

101 I. C. 45 = A. I. R. 1927 Cal. 546.

———*S. 50 (2) does not apply to suit not under the Act—But presumption may arise in case of uniform rate of rent for more than 20 years.*

Sub-S. 2 of S. 50 has no application in suits, which are not suits under that Act but are suits under the general law for ejectment of an alleged trespasser. 44 Cal. 555, Foll. But though this special presumption does not apply, it may arise apart from the Act where there has been a uniform payment of rent for more than 20 years, when the original contract was a contract to hold at fixed rates coupled with the fact that other-co-sharer landlords by recognizing the transfer not only admitted the transferability of the holding but also the fixity of the rent. (*Newbould and Pearson, JJ.*) SANTOSH KUMAR ROY *v.* RAKHAL CHANDRA.

43 C.L. J. 104 = 94 I. C. 740 = A. I. R. 1927 Cal. 174.

S. 50 (1)—Applicability.

———*If rent has actually not been changed, Sub-S. (1) applies irrespective of any contract between parties.*

Sub-section (1) refers to the fact that whatever the contract might be, where the rent has not as a matter of fact, been changed from the time of the Permanent Settlement, the conditions laid down in it should prevail. (*Cuming and B. B. Ghose, JJ.*) JITENDRANATH ROY *v.* BANKU BEHARI SAHA. **96 I. C. 565 = A. I. R. 1926 Cal. 1177.**

S. 50 (2)—Applicability.

———*Cases of tenants not coming directly under Act—Principle applies—Tenancy held for several generations—Uniform rent for 55 years—Tenancy was held not proved to be permanent or one with fixed rate—Landlord and Tenant.*

Although the statutory presumption cannot be availed of directly, the principle involved in S. 50 is a useful guide to the Courts which may sometimes be relied upon. But the case must be one between a landlord and his admitted tenant. The two outstanding features of the tenancy were that the tenancy had been held by the defendants for several generations and that the rent had been uniform for over 55 years.

Held, that they may be sufficient for holding that the tenancy was heritable but they are not sufficient in law, in the absence of any other circumstance, to show that the rent was fixed for ever or that the tenancy was a permanent one. 35 C. 763; 47 C. 280; 32 C. 51; 44 C. 555 and 23 C.W.N. 201, Ref. (*Mukerji J.*) SATISH CHANDRA GHOSE *v.* DEBENDRA NATH DEY.

85 I.C. 636 = A. I. R. 1925 Cal. 761.

S. 50—Applicability.

———*Origin of tenancy known—Section does not apply.*

S. 50 cannot apply where the origin of tenancy is known. (*Woodroffe and Suhrawardy, JJ.*) SECRETARY OF STATE *v.* RAMCHARAN ACHARJEE.

40 C. L. J. 235 = 70 I. C. 207 = A. I. R. 1924 Cal. 464.

S. 50 (2)—Applicability.

———*Tenure held over 20 years at the same rent—Name not in the list of permanent tenants—S.* 50, *cl.* 2 *applies.*

The mere circumstance that the names by which the tenures are known at present cannot be traced in the list of tenants under Permanent Settlement does not show conclusively that the tenures are not included therein. The names of taluks are frequently changed as they pass from hand to hand, and very often a taluk is sub-divided whereupon new names are given to each of the fragments. Such sub-division does not affect the continuity of the tenure concerned or render inapplicable the provisions of Section 50 of the Bengal Tenancy Act.

A slight variation even though not explained does not deprive the tenant of the benefit of the presumption that they held under Permanent Settlement. (*Mookerjee and Chotzner, JJ.*) TARA KUMAR GHOSE *v.* KUMAR ARUN CHANDRA SINGH. **36 C. L. J. 389 = 74 I. C. 383 = A. I. R. 1923 Cal. 261.**

S. 50—Applicability.

———*Applicability—Principle of section applies to ejectment suits—Presumption applies whether rent is payable in cash or kind.*

Section 50 (2) is by its terms, limited in its application to suits or proceedings under the Bengal Tenancy Act. A suit for ejectment does not fall within that description. But even in cases where section 50 is not directly applicable, the Court may act on a presumption similar to the one arising under the section, if the facts justify the necessary inference. The presumption applies whether the rent is payable entirely in cash or partly in cash and partly in kind, or entirely in kind.

The same principle plainly applies to suits or proceedings where the rule embodied in section 50 is extended by analogy. (*Mookerjee and Rankin, JJ.*) MANMATHA NATH KAR *v.* PROBODH CHANDRA PATARHI.
37 C. L. J. 52=73 I. C. 416=
A. I. R. 1923 Cal. 102.

S. 50 (2)—Applicability to Haja Badi.

———*Does not apply to tenancies which are wholly or partly* Haja Badi.

Tenancies which are wholly or partly *Haja Badi* do not attract the presumption of permanency under S. 50, cl. (2). The tenants in years in which there is flood get according to custom an entire or proportionate remission of the rent according to the extent to which they are *Haja Badi.* (*Chatterjee and Panton, JJ.*) BIJOY CHAND MAHATAP *v.* AKHIL BHUIYA. **51 Cal. 314=**
28 C. W. N. 529=81 I. C. 564=
A.I.R. 1924 Cal. 648.

S. 50—Burden of proving liability—Enhancement.

———*Onus is upon the landlord to prove that the rent is liable to be enhanced—It may be shifted by proving origin of tenancy or any other mode—But production of Dakhilas mentioning area does not shift the onus.*

Under S. 50 the initial onus lies upon the landlord to prove that the rent of the tenancy is liable to be enhanced on the ground of additional area. This onus may be shifted by proving the origin of the tenancy or a contract or by other mode of proof showing the right of the landlord to enhance the rent on that ground. The onus is not shifted by merely producing dakhilas which mention the areas for which rent is paid, A. I. R. 1924 Cal. 374 and 20 Cal. 579, Foll. (*Suhrawardy and Duval, JJ.*) MD. MOYENUDDIN BASUNIA *v.* BAHARUDDIN CHOUDHURI. **90 I.C. 557=A.I.R. 1926 Cal. 113.**

S. 50 (2)—Burden of proving tenancy.

———*Fact of defendant being a tenant must be established before seeking aid of S.* 50 (2).

The presumption arising under S. 50, cl. (2) can only be availed of in a suit or proceeding under the B.T. Act. Where the plaintiff sues for recovery of possession alleging that the defendant was a trespasser, and the defendant claims to be a tenant, until the fact that the defendant is a tenant is made out, the suit can not be said to be one under the B. T. Act. The fact has to be made out independently of S. 50, that the suit is against a tenant, and until that is made out S. 50 has no application. 7 C.W.N. 132; 9 C.L.J. 467, 15 C. W.N. 752; 13 C.L.J. 415, Ref. (*Mukerji, J.*) SATISH CHANDRA GHOSE *v.* DEBENDRA NATH DEY.
85 I.C. 636=A.I.R. 1925 Cal. 761.

Ss. 50 and 30 (a)—Burden when shifted.

———*Enhancement of rent—Entries in Record-of-Rights not consistent with previous condition—Burden is shifted on the defendants.*

If the landlord succeeds in showing that holdings, as recorded in the record-of-rights, were not in existence in the condition in which they were so recorded, in the previous years, the onus is shifted on the defendants to prove that their present holdings are made up of other holdings which also have borne uniform rental. (*Das and Kulwant Sahay, JJ.*) NAND LAL CHAURE *v.* KESHO PRASAD SINGH. **1923 P. H. C. C. 339=**
78 I. C. 593=A. I. R. 1924 Pat. 245.

S. 50—Entry about fixity.

———*Record-of-rights showing fixity of rent—Tenant need not prove fixity till landlord rebuts the entry.*

Where the Record-of-Rights records the tenants as holding at fixed rates,

Held, that it may require very slender evidence to rebut the presumption raised by that record, but so long as the entry remains unrebutted there is no onus on the tenants to produce evidence of a uniform rate of rent. Until that entry is displaced by the landlord the tenant is entitled to rely on it, and he is not bound to produce any evidence in support of the fixity of rent so long as the entry itself remains unrebutted. (*Greaves and Panton, JJ.*) K. S. BONNERJI *v.* MAHOMED FOIZ.
96 I. C. 884=A. I. R. 1926 Cal. 1222.

Ss. 50, 115, 102 (b), 105 and 106—Essentials of presumption.

———The presumption under S. 50 cannot apply to a tenancy when the particulars mentioned in S. 102 (*b*) have been recorded under Ch. X, if an attempt is made to raise it in a regular suit and or in a proceeding under S. 105 or S. 106 of the Act; 26 C. W. N. 945, and A. I. R. 1922 Cal. 146, Foll. (*Newbould, J.*) PITAMBAR NATH *v.* BHAIRAB CHANDRA SINHA.
91 I. C. 878 (Cal.).

S. 50—Extent of enhancement.

———*Enhancement of rent need not be of a substantial amount.*

It cannot be laid down as a proposition of law that as a matter of law a change, unless it is of a substantial character, is not sufficient to stand in the way of presumption, and that even if the alteration is made with the object of making an enhancement, that variation is not to be taken into account if it is not a variation by substantial amount. All that is necessary to find is whether there has been a change in the rent or rate of rent. Of course the change must be a real one in the sense that it was intended to be a change, but that does not mean that it must be of a substantial amount. The relevant question is whether there has been really a change or variation and not whether the same was in respect of a substantial amount. In order to decide the question it will also have to be considered whether the tenant submitted to it. (*Cuming and Mukerji, JJ.*) DEARISH *v.* DWIJADAS CHAKRAVARTI.
44 C. L. J. 103=97 I. C. 1007=
A. I. R. 1926 Cal. 1214.

S. 50 (2)—If presumption inapplicable.

———*Presumption not applying—Court may look to other evidence and determine whether the rent was fixed.*

In cases to which the presumption under S. 50 (2) is not applicable the Court is entitled to consider the facts in view of all the circumstances and determine whether it was not a just inference that the holding bears a fixed rental: 44 Cal. 555, Dist.; 18 C. L. J. 193, Foll. (*Suhrawardy and Mukerji, JJ.*) RAJMOHINI DASI *v.* NAGENDRA KUMAR. **94 I. C. 310=**
A. I. R. 1926 Cal. 887.

S. 50 (1)—Kabuliyat.

———Where the kabuliyats only show that the tenants were in possession and they only attorned to the plaintiff on his purchase of the zamindari, and showed no new creation of tenancy,

Held, that it cannot be relied upon for showing that there was a change in rent since the date of Permanent Settlement: 22 C. W. N. 322, Dist: A. I. R. 1923 P. C. 86, Foll. (*Cuming and Roy, JJ.*) GOCOOL CHANDRA *v.* MOHENDRANATH. **109 I. C. 376 (Cal.).**

Ss. 50 and 102 (b)—'Kaimi settled raiyat'.

———*"Kaimi" added to " settled raiyats" in the entry —Entry is not bad.*

The addition of the word "kaimi" to "settled raiyats" has not the effect of making the entry a bad entry, so as to bar the operation of S. 50. (*Mukerji and Graham,* *JJ.*) SHYAMA CHARAN GHOSE *v.* FAKIR CHANDRA DUTTA. **101 I. C. 45 = A. I. R. 1927 Cal. 546.**

S. 50—'Permanent settlement.'

———*The words "at the time of the permanent Settlement" relate to the date of the Permanent Settlement of* 1793.

The reference in S. 50 to the time of the Permanent Settlement refers to the date on which the Permanent Settlement Regulation I of 1793 was passed. (*Dawson Miller, C. J. and Mullick, JJ.*) DEO NARAYAN SINGH *v.* DWARKA PRASAD. **9 P. L. T. 679 = 109 I. C. 136 = A. I. R. 1928 Pat. 429.**

S. 50 (2)—Presumption.

———*At the time of permanent settlement rent of holding not "fixed in perpetuity"—Presumption under S.* 50 (2) *by payment of same rent for number of years does not arise.*

Where at the time of the permanent settlement the rent of a holding is not "fixed in perpetuity," the tenants are not "raiyats holding at fixed rates" as defined in S. 4, Cl. (3) (*a*). There is therefore no room for raising a presumption under S. 50, Cl. (2) by payment of the same amount of rent for a number of years. (*Courtney-Terrel, C. J. and Jwala Prasad, J.*) MOHAMMAD YUNAS *v.* BANSI RAI. **11 P. L. T. 240 = A. I. R. 1930 Pat. 379.**

Ss. 50 and 109—Presumption.

———*Proceedings under S.* 105—*Revenue Court applying presumption under S.* 50—*Appellate Court holding that presumption was rebutted and remanding the case for settling fair rent—Appellate Court's order is decision under S.* 109 *and second appeal lies—Order of appellate Court is final and not interlocutory.*

Plaintiff commenced proceedings under S. 105 for settlement of fair and equitable rent in respect of certain lands. The defendants contested the case on the ground that they held the lands in dispute on a fixed rental as a permanent, heritable, transferable and mokarari tenure. The settlement officer held that the defendants were entitled to the presumption under S. 50 and evidence adduced by the plaintiff was not sufficient to rebut the presumption. Against this decision an appeal was preferred to the Special Judge and he came to the conclusion that the holding in suit was a non-mokarari tenure and liable to enhancement of rent, and after so holding he remanded the case to the lower Court for assessment of fair and equitable rent.

Held, that the issue whether the defendants were non-mokarari tenure-holders or they were permanent tenure-holders paying rent which is fixed in perpetuity, being the cardinal issue in the proceeding, the order of the Special Judge was a decision under S. 109-A and, therefore, second appeal was competent.

Held, further, that with regard to the question as to whether the tenure was liable to enhancement of rent or not, the decision of the Special Judge was a final decision and the order was final and not interlocutory and, therefore, right of appeal from this order would not cease with disposal of the suit: 7 C.W.N. 440, Dist. (*Panton and Mitter, JJ.*) NEW BEERBHOOM COAL CO., LTD. *v.* JYOTI PORSAD SING DEB. **31 C. W. N. 936 = 104 I. C. 828 = A. I. R. 1927 Cal. 686.**

S. 50 (2)—Presumption.

———*Uniform rate shown for twenty years—Old wasil baki papers in which these tenancies are not found does not rebut the presumption.*

Where the tenants have produced dakhilas of a uniform rate of rent for over twenty years which gives them the presumption that their rent is fixed, the presumption is not rebutted by producing jama wasil baki papers of over hundred years old, wherein the tenancies do not find a place. (*Duval and Mitter, JJ.*) KASIM ALI *v.* K. S. BONNERJI. **101 I. C. 347 = A. I. R. 1927 Cal. 493.**

S. 50 (3)—Presumption.

———*Addition or subtraction of land affects the presumption.*

The operation of S. 50 (3) is affected by the fact of the land having been separated from other land which formed with it a single holding, or amalgamated with other land into one holding. The addition of other parcels to the original holding as well as the increase in the rental, change the incidents of the original holding and admittedly a new holding is created: 22 C. L. J. 81, Ref. (*Duval and Mitter, JJ.*) KASIM ALI *v.* K. S. BONNERJI. **101 I. C. 347 = A. I. R. 1927 Cal. 493.**

S. 50 (2)—Presumption.

———*Non-payment of rent previous to suit does not affect presumption—Rate of rent remaining unchanged for* 20 *years is sufficient*

It is not necessary to prove payment of rent at the same rate for 20 years under S. 50. It is sufficient if the defendants could show that the rent or rate of rent remained unchanged for 20 years previous to the date of the suit even though a single year's rent is not paid. (*Cuming and Page, JJ.*) JIBAN NASKAR *v.* MURALIDHAR. **97 I. C. 513 = A. I. R. 1927 Cal. 48.**

———*Agreement to pay enhanced rent at future time is not by itself sufficient to rebut presumption under sub-S.* (2).

An agreement to pay enhanced rent at some future time does not constitute a change in the rate of rent under S. 50, and, therefore, does not by itself rebut the presumption under S. 50 (2). (*Cuming and B. B. Ghose, JJ.*) JITENDRANATH ROY *v.* MT. ABEJANNESSA BIBI. **30 C. W. N. 1038 = 97 I. C. 753 = A. I. R. 1926 Cal. 1207.**

S. 50 (4)—Presumption.

———*Existence of temporary kabuliyat rebuts the presumption*

Where there is a temporary kabuliyat for a term of years the presumption of a fixed tenure from the time of the Permanent Settlement goes. (*Greaves and Panton, JJ.*) BIRENDRA KISHORE *v.* JAHIRUDDIN. **94 I. C. 26 = A. I. R. 1926 Cal. 858.**

S. 50—Presumption.

———*Additional land with additional rent added to the old tenancy held for more than* 20 *years—Presumption as to old tenancy is not destroyed—No presumption as regards permanent lands arises.*

The tenants by holding additional lands for additional rent and paying the same along with the old rent and the old area do not lose the presumption as regards the old area and the old rent also, but the tenants are not entitled to the presumption for the added area although they are entitled to the presumption for the area which they held as was presumed before the Permanent Settlement. The onus of proving what the old area was and what the area is subsequently added, is upon the tenants, and if they show what the old rents were, then they are entitled to the presumption under S. 50 so far as the old tenancy is concerned. (*Cuming and Chakravarty, JJ.*) HEMCHANDRA *v.* GIRISH CHANDRA. **92 I. C. 107 = A. I. R. 1926 Cal. 710.**

———*Record-of-Rights becoming final—Tenant cannot claim the presumption under S.* 50—*Other circumstances may be considered.*

After a record-of-rights becomes final, a tenant is debarred by the provisions of S. 115 from claiming the presumption under S. 50. The expression "thereafter" in S. 115 means "after the particulars have been finally recorded after recourse to all the provisions contained in Chap. 10 of that Act for the attainment of finality in this respect" [A.I.R. 1922 Cal. 146, Foll.]. Although the tenants are not entitled to the benefit of the presumption under S. 50, Cl. (*b*) of the Act, the other circumstances of the case should be considered in order to enable the Court to come to a conclusion whether the rent payable by them is enhancible or not. (*M. N. Mukerji, J.*) SARAT CHANDRA PAL *v.* MUHAMMAD AKBAR.

86 I. C. 753 = A. I. R. 1926 Cal. 256.

——*Presumption under the section may arise apart from its provision.*

Apart from the presumption of Cl. (2) of S. 50 the natural presumption may arise, but no such presumption can arise merely from proof that tenants have been paying at fixed rate for the past few decades. 44 Cal. 555, Foll. (*Newbould, J.*) PITAMBAR NATH *v.* BHAIRAB CHANDRA SINHA. **91 I. C. 878.**

——*Though presumption of permanency may not arise in a particular case defendants can prove contract against enhancement of rent.*

Even if the tenure had been held for a long period at the same rate of rent, no presumption as to its permanency could arise, if the tenure was created after the permanent settlement. But it is open to the defendants who are sued for enhancement of rent to establish on the evidence that there was a contract that the rent of the tenure should not be enhanced. (*Greaves and Cuming, JJ.*) GOPI MOHAN MUZUMDAR *v.* NAWAB BAHADUR. **29 C. W. N. 723 = 88 I. C. 433 = A. I. R. 1925 Cal. 954.**

——*Presumption under S.* 50 *arises if entries in the record-of-rights do not comply with S.* 102 *and S.* 115 *does not apply.*

If entries in the record-of-rights do not record or wrongly record particulars under S. 102 (b) as it stood prior to amendment the presumption under S. 50 arises and S. 115 does not apply. (*Greaves and Graham, JJ.*) MOFIZUDDIN CHOWDHURY *v.* RAJENDRA NATH SANYAL. **29 C. W. N. 209 = 84 I. C. 989 = 40 C. L. J. 248 = A. I. R. 1925 Cal. 208.**

——*Suit for enhancement of rent not coming under Ch. X of the Act—Presumption under S.* 50 *does not apply.*

The expression 'thereafter' in S. 115 of the Act clearly signifies "after the particulars have been finally recorded after recourse to all the provisions contained in Ch. X for the attainment of finality in this respect." S. 115 does exclude the application of the presumption when the particulars had been recorded under Ch. X. A suit for enhancement of rent is not a suit instituted under Ch. X. of the Bengal Tenancy Act. Consequently in such a suit the tenant is not entitled to the benefit of the presumption under S. 50. 36 Cal. 617 and 12 C. W. N. 904, Dist. 37 Cal. 30 Foll. 26 Cal. 617, Dist. 64 I.C. 445, Foll. (*Mookerjee and Cuming. JJ*). PRASANNA KUMAR SEN *v.* DURGA CHARAN CHAKRABURTHY.

49 Cal. 919 = 70 I. C. 537 = 26 C. W. N. 947 = 36 C. L. J. 291 = A.I.R. 1922 Cal. 146.

——*Record-of-rights published under Ch. X—Tenant is thereafter precluded from relying on presumption under S.* 50.

After the publication of the Record-of-rights under Chapter X, the tenant is debarred by the provisions of S. 115 from claiming the presumption under S.. 50 of the same Act. (*Chatterjea and Panton, JJ.*) BAMANDAS BIDYASAGAR BHATTACHARYA *v.* SADHU MAJHI. **64 I. C. 445 = 26 C. W. N. 945 (Cal.).**

——*No presumption of fixity apart from the Section—Recording of mokarari under S.* 115 *makes S.* 50 *inapplicable even though limitation for filing suit to correct entry is not time-barred.*

It cannot be held in a case brought under the Bengal Tenancy Act that any presumption arises as to the fixity of rent from mere payment of the same rate of rent for a number of years apart from the presumption arising under S. 50 of the Act. To hold otherwise would be to require every landlord to enhance the rent of every tenant under him at certain intervals of time which he might not himself desire to do. The presumption of S. 50 cannot apply even when defending a suit brought by the landlord before the expiry of the period of limitation with regard to suit by tenant for declaration that the record of rights is erroneous. Where among the particulars it is mentioned that the tenancy is not a mokarari tenancy the presumption under S. 50 cannot apply. 37 Cal. 30 Expl. and Foll. 45 Cal. 930. Foll. (*Newbould and B. B. Ghose, JJ.*) BRAJA DAS ROY *v.* BANKIM CHANDRA BHUIA.

51 Cal. 454 = 83 I. C. 169 = A. I. R. 1924 Cal. 660.

——*Presumption under, applies to occupancy raiyats.*

There is no rule that an occupancy raiyat is not entitled to the benefit of S. 50. (*Mookerjee and Walmsley, JJ.*) NARENDRA LAL CHOWDHURY *v.* BENODE BEHARI SADHUKHAN. **27 C. W. N. 740 = 80 I. C. 577 = A I. R. 1924 Cal. 143.**

——*Presumption as to fixity of rent—Rebuttal—Additional sums paid by tenant.*

Where if it can be legitimately inferred that an additional sum paid by a tenant was lawfully a part of the rent by consent of the tenant, and not an illegal *abwab* this would not amount to a rebuttal of the presumption as to fixity of rent created by S. 50 of the Bengal Tenancy Act, (*Newbould, J.*) RAJESWAR PROSAD BHOKAT *v.* BAHADUR SINGH.

63 I. C. 317 (Cal.).

——*Presumption under, is not in tenant's favour when record-of-rights is against him.*

When the record-of-rights is against them, the tenants are not entitled to the benefit of the presumption afforded by S. 50 (2). Once the record-of-rights shows that the tenant is not a tenant at a fixed rate of rent it is for the tenant to establish by cogent evidence that his rent or rate of rent has not been changed from the time of the permanent settlement. (*Das and Adami, JJ*). MAHARAJA BAHADUR KESHO PRASAD *v.* ISER DUBEY. **1 Pat. L. R. 32 = 71 I. C. 15 = A. I. R. 1924 Pat. 373.**

——*Presumption under, was held to be not rebutted by a certain kabuliyat.*

On the construction of the kabuliyat in the case,

Held, that it proceeded upon the basis that there were pre-existing rights, and consequently it could not be relied upon for the purpose of showing that there had been a change in the rent since the date of the Permanent Settlement. (*Lord Buckmaster.*) K. PRASANNADEB *v.* UDDHABCHANDRA.

28 C. W. N. 752 = 18 M. L. W. 147 = 33 M.L.T. 432 = 1923 M. W. N. 718 = 75 I. C. 556 = A.I.R. 1923 P. C. 83 = 45 M. L. J. 779 (P.C.).

—— *Payment of fixed rate for even* 25 *to* 33 *years—No presumption of fixity from permanent settlement arises.*

The tenants are in view of section 115 not entitled to the benefit of the presumption under S. 50 (2) after the publication of record-of-rights; and in order to establish that they are tenants at fixed rent in perpetuity, they would have to establish by evidence that they have been holding at the rate of rent which has not been changed since the time of the permanent settlement. The fact that the tenants have proved that they have paid rent at a fixed rate for from 25 to 33 years does not entitle the Court to presume that they have been paying at fixed rate from the time of the permanent settlement. (*Coutts and Das, JJ.*) MAHARAJA BAHADUR KESHO PRASAD SINGH *v.* RAMJAS PANDE. **2 Pat. 92 = 79 I. C. 199 = A.I.R. 1923 Pat. 324.**

———*Rent continues at same rate until changed by consent or by Court proceedings—Refusal to receive rent at old rate does not affect presumptions under S.* 50 (2).

Per *Teunon, J.*—Mere demand on the part of the landlord for an enhanced rent and refusal to receive or acknowledge the old rent does not enable him to deprive the tenant of the benefit of the provisions of S.50. The rent at which a tenancy is held continues until a change has actually been effected. Such change can be effected only by consent or by proceedings in Court.

Per *Huda, J.*—The presumption under sub-S. 2 of S. 50 can only arise when the tenant proves affirmatively that he has held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding. These words place on the tenant the burden of proving either that he has actually paid rent at a uniform rate for twenty years or that if not actually paid there has been at any rate an agreement between him and his landlord that he should hold at the old rate. Where the holding of uniform rate since the time of the permanent settlement has not been proved, the landlord has a right to demand an increase and in any case to refuse to receive rent at the old rate in order to prevent the presumption under sub-S. 2 of S. 50 arising against him. (*Teunon and Huda, JJ.*) MOHINI KANTA SAHA CHOWDHURY *v.* PREONATH NIOGI. **A.I.R. 1922 Cal. 143.**

———*Sub division of tenure does not affect the presumption to be drawn under S.* 50 (2).

The sub-division of a tenure does not operate as a breach of the continuity of the tenure; if the different parts into which tenure is divided are held at proportionate rent and the aggregate rent equals the original rent, the tenure-holder is entitled to the benefit of the presumption under S. 50, cl. (2), Bengal Tenancy Act, A. I. R. 1923 Cal. 66, Foll. 86 Cal. 287, Diss. (*Suhrawardy and Chotzner, JJ.*) GOUR KRISHNA SARKAR *v* NIL MADHAB SAHA. **78 I. C. 744 = A. I. R. 1925 Cal. 498.**

———In an appeal before a special Judge arising out of a proceeding under S. 105 of the B. T. Act for settlement of rent, the landlord contended that the tenants were merely *raiyats* whose rent was liable to be enhanced, whereas the case of the tenants was that they were raiyats with a fixed rent which was not liable to be enhanced.

Held, the point was one which had to be decided by the special Judge before he could make up his mind whether he was to apply S. 105 of the Bengal Tenancy Act to the case in question. His judgment disposing of the appeal was not merely "a decision settling a rent" within the meaning of S. 109 (3) of the Act and consequently there was a right of appeal in respect of that matter to the High Court.

In deciding whether tenant is entitled to the benefit of the presumption as to fixity of rent under S. 50 (2) of the Bengal Tenancy Act, the question for the consideration of the Court is not whether the same rent has been paid for a period of 20 years before the institution of the suit, but the question is whether the tenant or his predecessors-in-interest have held at a rent or rate of rent which has not been changed during the 20 years immediately before the institution of the suit or the proceeding in which the question arises. (*Sanderson, C. J. and Richardson, J.*) GOBINDA CHANDRA GANGULI *v.* MANMATHA NATH PAL CHOUDHURY. **62 I. C. 677 (Cal.).**

———It was found that a tenant had for more than twenty years paid a certain rate of rent, and there was no proof of any variation in the rent at any prior period.

Held, the tenant acquired the status of a tenant holding at a fixed rent and was entitled to the benefit of the presumption as to the fixity of rent under S. 50 (2) of the Bengal Tenancy Act. (*Teunon and Newbould, JJ.*) KUMARI DASYA *v.* RANI HEMANTA KUMARI BIBI. **60 I. C. 402 (Cal.).**

———*Apart from applicability of S.* 50, *tenant is not entitled, by showing fixity of rent for* 20 *years immediately preceding, to ask Court to presume same rent was paid since Permanent Settlement.*

Where a tenant is not entitled to the benefit of the presumption under S. 50, he is not entitled, by showing that his rent has not been changed during the twenty years immediately before the institution of the suit or proceeding, to ask the Court to presume that he has held at that rent from the time of the Permanent Settlement. (*Das and Bucknill, JJ.*) GOBIND LAL SIJUAR *v.* RAM SARAN LAL. **2 P. L. T. 642 = 68 I. C. 433 = A. I. R. 1921 Pat. 435.**

S. 50 (2)—Purchaser from tenant,

———*Purchaser from tenant gets benefit where rent, tenant and land are same in* 1299, 1311 *and* 1323.

Where a tenant vendee produced three dakhilas for 1299, 1311 and 1323 to prove that the tenancy was *mokarari* and the tenant, rent and quantity of land mentioned in each of them were the same in all.

Held, that in the absence of proof that there was any change in the tenancy or that during the intervening periods there was any alteration in the rent, S. 50 applied to the case. (*Walmsley and M. N. Mukerji, JJ.*) PARAN CHANDRA SOW *v.* KANTA MOHAN MULLICK. **39 C. L. J. 437 = 83 I. C. 568 = A. I. R. 1924 Cal. 875.**

S. 50 (2)—Quinquennial Register.

———*Evidence Act, S.* 35—*Quinquennial Register of* 1795.

The Quinquennial Register of 1795 kept under the Bengal Regulation 48 of 1793 is admissible in evidence to rebut the presumption under the B. T. Act, S. 50 (2). (*Suhrawardy and Duval, JJ.*) HEM CHANDRA ROY *v.* BENAYAKDAS ACHARJI CHOUDHURY. **86 I. C. 538 = A. I. R. 1925 Cal. 1037**

———*Quinquennial Register of* 1795—*Want of entry of a taluq in the Register cannot rebut presumption under S.* 50 (2).

The mere fact that a certain taluq is not entered in the Quinquennial Register of 1795 is not sufficient to rebut the presumption under the B. T. Act, S. 50 (2). (*Suhrawardy and Duval, JJ.*) HEM CHANDRA ROY CHOUDHURY *v.* BENAYAKDAS ACHARJI CHOUDHURY. **86 I. C. 538 = A. I. R. 1925 Cal. 1037.**

S. 50 (2)—Rebuttal of presumption by Certified Copy.

——*Certified copy of a paper in Collectorate not strictly fulfilling the test of S.* 35, *Evidence Act, is not sufficient to rebut presumption.*

In a proceeding under S. 105 of the Bengal Tenancy Act, the zemindar filed a certified copy of an entry from a book in the Collectorate made on the footing of a return submitted by his predecessor-in-title in 1242 B. S. under Reg. VIII of 1793, S. 48 and Reg. VII of 1799, S. 158, to prove the fact that a certain taluk did not exist on that date.

Held, that the copy was of very slight weight as against the tenant, and that it was not sufficient to rebut the presumption arising under S. 50 (2) of the Bengal Tenancy Act from proof of payment of uniform rent for 20 years. (*Walmsley and Mukerji, JJ.*) TARAK CHANDRA CHUCKERBUTTY *v.* PRASANNA KUMAR SAHA. **78 I. C. 719 = 39 C. L. J. 389 = 28 C. W. N. 679 = A. I. R. 1924 Cal. 654.**

Ss. 50 and 115—Record-of-Rights and Presumption.

——*Record-of-rights published under Bengal Tenancy Act—Presumption under S.* 50 *does not apply.*

When Record-of-right has been finally published under the Bengal Tenancy Act the presumption under S. 50 does not apply by virtue of the provision laid down in S. 115: 37 Cal. 30 (F.B.); A.I.R. 1922 Cal. 146: A. I. R. 1921 Pat. 435; A. I. R. 1923 Pat. 324, Rel. on: 26 Cal. 617; 12 C. W. N. 904, held not good law. (*Adami and Scroope, JJ.*) ACHAIMBIT MAHATA *v.* RAJ CUMAR TEKAIT. **11 P. L. T. 251 = A. I. R. 1930 Pat. 392.**

——*After publication under S.* 115 *presumption under S.* 50 *will not apply.*

Where the record-of-rights has been finally published under section 115 the presumption under Section 50 is no longer available to the tenants whether they rely upon payment of rent at a uniform rate before or after the publication of the record-of-rights. (*Dawson-Miller, C. J. and Foster, J.*) RAM SARAN MAHTON *v.* SYED MD. ARADUT HUSSAIN. **6 P. L. T. 221 = 80 I.C. 926 = A. I. R. 1925 Pat. 181.**

S. 50—Rent in kind.

——*'Rent' includes rent in kind.*

Raiyats who pay their rent in kind partially or entirely are not disentitled to the benefit of the statutory presumption corresponding to the rule now embodied in section 50. In S. 50 the term 'rent' cannot be restricted to 'money rent' and it bears the meaning attributed to it in section 3, Cl.(5) 37 C. 626 Doubted. (*Mookerjee and Chotzner, JJ.*) DINA NATH PAL *v.* RAJA SATI PRASAD GARCA BAHADUR. **36 C. L. J. 220 = 27 C.W.N. 115 = 72 I. C. 663 = A. I. R. 1923 Cal. 74.**

S. 50—Resettlement.

——*Purchase of holding by landlord in rent sale and re-settlement with the same tenant breaks the continuity.*

Where the landlord purchases a holding at a rent sale and after the sale he resettles the land with the same tenant, there has been a break in the continuity of the tenancy and the presumption unber S. 50, does not apply. (*Cuming and Roy, JJ.*) RAMANATH BUTTACHARJEE *v.* JAGANNATH MONDAL. **106 I.C. 136 = A. I. R. 1928 Cal. 169.**

Ss. 50 and 160—Right of occupancy.

——***A raiyat holding at a fixed rent is entitled to the benefit of S.* 50.**

A raiyat holding land at a fixed rent can acquire a right of occupancy and claim protected interest under S. 160, Ben. Ten. Act. He is entitled to the benefit of S. 50 if he proves the particular state of facts laid down therein. A. I. R. 1922 Cal. 287, Foll. (*Suhrawardy and Graham, JJ.*) TARANI CHARAN SARDAR *v.* SRISH CHANDRA PAL. **115 I. C. 81 = 48 C. L. J. 97 = 32 C.W.N. 587 = 56 Cal. 173 = A. I. R. 1928 Cal. 880.**

S. 50—Series of tenancies

——*One or series of tenancies or the land held under one or different landlords is immaterial.*

Whether there is one or series of tenancies or whether the land is held under the same landlord or different landlords is immaterial. It is sufficient for the purpose of the section that the rent or rate of rent has been the same from the time of the Permanent Settlement. (*Cuming and Page, JJ*) UMESH CHANDRA *v.* BEPIN BEHARI. **97 I. C. 546 = A. I. R. 1927 Cal. 75**

S. 50 (1) (2)—Settlement.

——"*Settlement*" *means the permanent settlement of* 1793.

The word 'settlement' in S. 50 refers to permanent settlement of 1793 and not to any other settlement. To gain the advantage of S. 50, it is necessary to show that the rate of rent has not been changed from the time of the Permanent Settlement of 1793. (*Greaves and Panton, JJ.*) OSMAN MANDAL *v.* RADHIKA MOHAN ROY. **50 Cal. 135 = 67 I.C. 294 = 27 C. W. N. 647 = A. I. R. 1923 Cal 298.**

S. 50—Slight Variation in rent.

——*Slight variation is immaterial.*

A slight variation in the rent, even though not explained, does not deprive the tenant of the benefit of the presumption under S. 50 of B. T. Act. (*Suhrawardy and Cuming, JJ.*) ALIMUDDIN MOLLAH *v.* KARIM BUX. **29 C. W. N. 500 = 41 C. L. J. 135 = 86 I. C. 316 = A.I.R. 1925 Cal. 632.**

S. 50—Special Contract.

——*Special contract between landlord and tenant.*

Where the contract by the tenants was "after the term, I shall abide by whatever settlement you make after measurement according to the rate of rent payable for the land of the village and cultivable land,"

Held, that this is a contract which entitles the land lord to claim rent from the tenants after the expiry of the term of the lease at the rate of rent payable for the cultivable lands of the village. (*Mookerjee and Cuming, JJ.*) SARAT CHANDRA LE DAS *v.* TARAPRASANNA BHATTACHARYA. **36 C. L. J. 333 = 70 I. C. 437 = A. I. R. 1923 Cal. 141.**

S. 50 (1)—Stipulation to pay for excess.

——*Kabuliyat—Stipulation to pay enhanced rent if land found in excess does not rebut the presumption under S.* 50 (1).

Under Cl. (1) of S. 50 if the rent has not in fact been changed from the time of the Permanent Settlement then it shall not be liable to be increased. If an instrument is subsequently executed forty or fifty years later the mere fact that the rent is expressed to be variable will by itself make no difference. 22 C.W.N. 904 Foll. Where a tenant by the kabuliyat of 1868 covenanted that if after measurement, land is found to be in excess he will pay rent for the same according to the prevailing rate,

Held, that this stipulation is in perfect accord with S.50 (1) and can in no sense be said to rebut the presumption raised under S. 50. A kabuliyat containing a stipulation like agreeing to pay enhanced rent in future is only a piece of evidence which can be taken into consideration to show that the tenancy did not exist from the time of the Permanent Settlement or that it was not held at an invariable rent from that time. (*Suhrawardy and Cuming, JJ.*) SATINDRA MOHAN TAGORE *v.* KAMARADDI MIJI. **88 I.C. 584 = A.I.R. 1925 Cal. 1133.**

S. 50(3)—Sub-division of tenure.

———*Sub division of tenures—Operation of cl.* (1), *and* (2) *is not excluded.*

Cl. (3) of S. 50 was inserted for the benefit of raiyats and not with a design to prejudice tenure-holders. The operation of Cls. (1) and (2) is not excluded in the case of tenures merely by reason of sub-division or amalgamation. 36 C. 287 Diss. (*Mookerjee and Rankin, JJ.*) KRISHNA KAMINI DASSI *v.* NILMADHAB SAHA.

36 C L.J. 382 = 73 I.C. 312 = A.I.R. 1923 Cal. 66.

S. 50—Suit for correction of entry.

———*Record-of-rights—Suit by raiyats for correcting wrong entry as to their status—No proceedings in Revenue Court or under Bengal Tenancy Act taken—Suit is only ordinary civil suit.*

Where a suit was brought by certain raiyats for correcting an entry as to their status in the record of rights, without any proceedings being taken before the Revenue Court or the special Judge or under Chap. X, Bengal Tenancy Act,

Held: that the suit can only be treated as an ordinary civil suit and that no presumption under S. 50 can arise. (*Duval and Mallik, JJ.*) SATHIPRASAD GARGA BAHADUR *v.* BROJA GOPAL. **31 C.W.N. 499 = 102 I.C. 113 = A.I.R. 1927 Cal. 458.**

S. 50—Transfer of a part.

———*Tenant transferring part of holding—Landlord recognizing transferee—New tenancy is created.*

Where the original holder of a tenancy sells or transfers half of his tenancy, and the landlord recognizes the transferee as his tenant, a new tenancy is created and presumption under S. 50, does not apply. (*Cuming and Ray, JJ.*) RAMANATH BHATTACHARJEE *v.* JAGANNATH MONDAL. **106 I. C. 136 = A. I. R. 1928 Cal. 169.**

S. 50 (2)—Uniform rate.

———*To prove uniform rate of rent dakhilas for twenty years need not be produced.*

In order to prove that a tenant has been holding at a uniform rate of rent for twenty years, it is not necessary that he should prove payment of rent for all those years and produce dakhilas for every one of those twenty years. (1865) 2 W.R. 60; (1867) 7 W. R. 284 and A.I.R. 1923 Cal. 665; Foll. (*Walmsley and Mukerji, JJ.*) GHULAM HUSAIN *v.* K. S. BONNERJEE.

30 C. W. N. 520 = 95 I.C. 525 = A. I. R. 1926 Cal. 1169.

———*Finding as to uniform rate of rent for 20 years based on wrong conception of law—High Court can interfere—C. P. Code, S.* 100.

Where the lower Court evidently has misunderstood the principles laid down in coming to the conclusion that the tenants have failed to prove payment of rent at a uniform rate for twenty years, it is open to High Court to set aside the finding and come to a conclusion of its own on the admitted facts of the case. (*Walmsley and Mukerji, JJ.*) GHULAM HUSAIN *v.* K. S. BONNERJEE. **30 C. W. N. 520 = 95 I. C. 525 = A. I. R. 1926 Cal. 1169.**

———*C. P. Code, S.* 100—*Proof of uniform rent for 20 years is a question of fact.*

The question as to whether the tenant has held the land for more than 20 years at a uniform rent is a question of fact. (*Suhrawardy and Cuming, JJ.*) ALIMUDDIN MOLLAH *v.* KARIM BUX. **41 C. L. J. 135 = 86 I. C. 316 = 29 C. W. N. 500 = A. I. R. 1925 Cal. 632.**

S. 50 (2)—Uniform rent.

———*Uniform payment need not be proved, but holding at uniform rent is necessary.*

What has to be established is, not that rent has been actually paid at uniform rate during 20 years, but that the tenant has held at a rent or rate of rent which has not been changed during 20 years. Such holding may be established even if it is not proved that rent has actually been paid during a portion of the 20 years.

Where it was established that rent had been paid at the rate alleged by the tenants during the years 1891 to 1895 as also during the years 1904 to 1911.

Held it is theoretically possible that in the interval there may have been an enhancement of the rent followed by a reduction, so as to make the rent payable in 1904 identical with that paid in 1895. But, it is for the Court of fact to decide from all the circumstances of the case, whether the principle of continuity or the principle of discontinuity should be applied. A.I.R. 1922 Cal. 141, Foll. (*Mookerjee and Rankin, JJ.*) SATIS CHANDRA BISWAS *v.* NIL MADHAB SAHA. **37 C. L. J. 598 = 73 I. C. 77 = A. I. R. 1923 Cal. 665.**

S. 50 (2)—Variation in rent.

———*Variation in rent to rebut presumption under S.* 50 (2) *need not be substantial.*

There is nothing in the section which requires that any change in the rate of rent should be substantial in order to rebut the presumption raised under S. 50 (2). Where the landlords did not want to alter the rent to any substantial extent so as to cause hardship to the tenants, but they wanted for rebutting the presumption which the law raises in favour of the tenants, and in that view made a nominal alteration in the rent and this position was accepted by the tenant.

Held: that would amount to a change in the rate of rent which would destroy the presumption of the fixity of rent from the time of the permanent settlement. (*B. B. Ghose, J.*) DWIJADAS CHAKRAVARTI *v.* DEARISH. **86 I. C. 587 = A. I. R. 1925 Cal. 1025.**

S. 51—Patit lands.

———*Remission for patit lands—Condition of lands unchanged—Lessee is entitled to remission.*

Where it was not found that any portion of the land which was found to be patit at the time of the lease has been brought under cultivation since its execution, the lessees are entitled to the hajat remission granted on account of the lands being patit. (*Page and Mallik, JJ.*) RASHMONI BEWA *v.* DHIRENDRANATH ROY. **33 C. W. N. 311 = 120 I. C. 145 = A. I. R 1929 Cal. 397.**

S. 51—Remission under circumstances.

———*Lessee granted remission of rent under certain circumstances—Lessor can claim full rent on change of circumstances.*

Under a kabuliyat it was agreed that the lessee should have some remission of rent under the circumstances existing at the time the tenancy was created, and that this remission was not to continue for ever under all circumstances.

Held: that the landlord was entitled to claim rent including the amount of remission which he had the right to withdraw when the circumstances had changed. (*Page and Mallik, JJ.*) NIROD KUMAR ROY *v.* RAJ LAKSHMI. **33 C. W. N. 309 = 120 I C. 145 = A. I. R. 1929 Cal. 398.**

S. 51—Rent suit for a period.

——*C. P. Code, S. 11—Rent suit for a particular period—Decree will bar subsequent suit for rents of those years—It is not a bar as to rates of rent for subsequent years though it may raise presumption of same rate.*

So far as the rents of the years which were in contest in the previous suit were concerned, the decision no doubt is an absolute bar under the doctrine of *res judicata* to any suit for the rents of those years. But so far as the rents or rates of rent of subsequent years are concerned, that judgment cannot be held to be an absolute bar, so as to prevent the parties from raising the question in a subsequent suit. The prior decision may be taken to determine the rent claimed in that suit and to give rise under S. 51 of the Bengal Tenancy Act to the presumption that the rents for subsequent years remained the same. 3 P. L. J. 372 Dist. 6 C. W. N. 589, Followed. (*Ross, J.*) Mannoo Lal Choudhury *v.* Lalji Chaube. **77 I. C. 334 = A. I. R. 1922 Pat. 213.**

S. 52—Abatement when not allowed.

——*Tenant proving deficiency in area is entitled to abatement of rent unless landlord shows express stipulation or other circumstances precluding tenant from claiming relief.*

When the tenant has shown that there is a deficiency in area proved by measurement in respect of the tenures or holdings in his possession he is entitled to an abatement of rent even though the tenant has not shown what the area was, at the time of the inception of the tenancy or what the state of things was when the rent was assessed or adjusted, unless the landlord shows that either the tenant has no right to abatement by some express stipulation contained in any document governing the tenancy or that there are circumstances which would disentitle the tenant to obtain relief: 22 C L.J. 569, Rel. on. (*C. C. Ghose and Mallik, JJ.*) Biresvar Bandopadhya *v.* Jagendra Nath. **49 C. L. J. 270 = 120 I. C. 462 = A. I. R. 1929 Cal. 413.**

S. 52—Applicability.

——Section 52 does not apply to a tenancy composed of some definite plots and an undivided share in another plot. (*Suhrawardy and Costello, JJ.*) Benod Kumar Roy Chowdhury *v.* Ganga Charan Mestari. **A. I. R. 1930 Cal. 595 (c) (596.)**

——*Under contract of tenancy, tenant agreeing that rent fixed by contract shall not be more or less at any time or on any account—Land diluviating—Contract precludes tenant from claiming abatement of rent.*

Unless the terms of the contract of the tenancy are so clear that it is manifest that the parties intended to exclude the operation of S. 52, the tenant ought not to be excluded from the statutory right given him under the section. A contract of tenancy provided that the amount of rent shall not be more or less at any time or on any account. Some of the land became diluviated and the tenant claimed proportionate abatement of rent.

Held: that S. 52 could not protect the tenant. (*Page and Mallik, JJ.*) Jitendra Nath *v.* Provat Chandra. **33 C. W. N. 245 = 119 I. C. 299 = A. I. R. 1929 Cal. 303.**

——*Rents originally settled with reference to reputed areas less than areas at date of suit—Tenants are liable to increase of rent.*

Where rents are originally settled with reference to reputed areas which are less than the areas held at the time of suit the tenants are liable to increase of rent under S. 52 (1) (*a.*) (*Das and James, JJ.*) Sri Ram Chandra Naik *v.* Rambrich Singh. **10 P. L. T. 696 = A. I. R. 1929 Pat. 661.**

——*Reduction in the area of holding — No stipulation in the patta that tenant would not be entitled to any reduction of rent—Tenant is entitled to the proportionate reduction of jama.*

Section 52 gives a statutory right to the tenant to have his jama reduced when there is a reduction in the area of the holding in creating a permanent tenure. An agreement with a tenant to deprive him of the provisions of S. 52 is valid ; but that agreement must be stated in clearness. When there is no stipulation in the patta that the tenant would not be entitled to any reduction of rent even if there would be a reduction in the area of the holding then the tenant would be entitled to the proportionate reduction of the jama: A. I. R. 1924 Cal. 880 Ref. (*Mallik, J.*) Khagendra Prasanna *v.* Sasi Mohan. **47 C. L. J. 464 = 110 I. C. 340 = A. I. R. 1928 Cal. 406.**

——*Stipulation in kabuliyat as to measurement of land and as to rate of rent—Rent is not fixed but depends upon the survey, having regard to the class of land.*

Where there is a stipulation in the kabuliyat as to the standard of measurement and also the rate of rent to be paid per bigha with regard to each class of land *i.e.*, bastu, udbastu, palan land, paddy land, bagat land etc.

Held: that the land within the boundaries is not let out at a fixed rent, but it is in the contemplation of the parties that there should be a survey and rent should be assessed upon the survey of the lands within the boundaries having regard to the class of land to which each plot falls and its area. (*Cuming and B. B. Ghose, JJ.*) Hemanta Kumar Roy *v.* Belatali Munshi. **30 C.W.N. 643 = 95 I.C. 1055 = A.I.R. 1926 Cal. 848.**

——*Rent stipulated to be payable with regard to certain quality of land on measurement under a survey—Rent is not fixed but depends upon the assessment with regard to the class of land.*

Where in the kabuliyat it was stipulated that rent should be payable at certain rates with regard to a certain quality of land which would be found on measurement under a survey at which the tenant bound himself to be present,

Held: the lands as described within the boundaries were not let out at the fixed jama mentioned in the kabuliyat. But it was the intention of the parties that the rent should be assessed upon a survey of the lands within the boundaries having regard to the class of land and area of each plot. (*Greaves and B. B. Ghose, JJ.*) Hemanta Kumar Roy *v.* Meser Bibi. **30 C. W. N. 640 = 95 I. C. 984.**

——*Claim for additional rent for accretions—Proceedings under S. 52 or settlement of rent under Ch. 10 are essential.*

In order to make the tenant liable for additional rent for accretions to his tenure such rent must be settled under Chap. X of the Bengal Tenancy Act or the landlord must take proper proceedings so as to bring into operation S. 52 of the Act or any other appropriate provision of the law. (*Walmsley and B. B. Ghose, JJ.*) Dhirendra Chandra Rai *v.* Nawab Khaja Habi bullah. **29 C. W. N. 505 = 87 I. C. 442 = A. I. R. 1925 Cal. 758.**

——*Applies to cases where land is proved to be in excess of the area for which rent was previously paid.*

The tenant's liability to pay additional rent is not limited to cases where the area is in excess of that comprised in the settlement at its inception but merely to cases where the land is proved by measurement to be in excess of the area for which rent has been previously paid by him. The Zemindar must show that the lands were in excess of those for which rents were being paid and that to do this it is for him to show what those lands are and what were the terms of the original settlement and what was the process of the measurement, if any, adopted. If there has been an intermediate settlement, the landlord need not go back to the inception of the tenancy and prove what area was then settled. (*Dawson Miller, C.J. and Adami, J.*) BISHUN PRAGASH NARAYAN SINGH *v.* ACHAIB DUSADH.

1 Pat. 459 = 66 I. C. 82 = 3 Pat. L. T. 807 = A. I. R. 1922 Pat. 215.

——*Lease disentitling tenant from claiming reduction of rent due to flood or diluviation—S. 179 not applying, S. 52 (b) will apply.*

In a case where the lands are not within a permanently settled area, although the lease may say that the tenants are not entitled to reduction of rent on account of flood or diluviation, yet they can claim the benefit of S. 52 (*b*), S. 179 does not apply to the case. (*Lord Moulton.*) KHETRAMONI DASI *v.* JIBAN KRISHNA KUNDU. **48 Cal. 473 = 48 I.A. 39 = 33 C. L. J. 214 = 25 C. W. N. 361 = 14 M. L. W. 248 = 30 M.L.T. (P.C.) 196 = 60 I.C. 1 = A.I.R. 1921 P.C. 33 = 40 M.L.J. 232.**

S. 52—' Area '—Meaning.

——*Share in plot whether comes under—Claim for enhancement—When sustainable.*

The word 'area' in S. 52 of the B. T. Act indicates a definite quality of land. A share in a plot cannot be brought within the significance of the word; and the subsequent use of 'tenures' or 'holding' shows that the legislature had in contemplation an entire plot of land within definite boundaries and not an undivided share. The enhancement under S. 52 can accordingly be claimed only where it is found that the land in the possession of the tenant is in possession of a definite quality of land for which he was paying rent previously.

Semble. It cannot be said that a tenure within the meaning of S. 52 may not be composed of undivided shares though the word 'area' used in the section suggests the view. (*Suhrawardy and Costello, JJ.*) BENOD KUMAR ROY CHOWDHURY *v.* GANGA CHARAN MESTARI. **51 C.L.J. 485 = A.I.R. 1930 Cal. 595.**

S. 52 (3) and (4)—Assessment on additional area.

——*Assessment of rent on additional area is governed by Sub-S.* (3) *and not* (4).

The sub section which sets forth the rule to guide Court in determining the additional rent is Sub-S. (3) and not (4). The rule prescribed in sub-S. 4 does not apply to cases of assessment of rent on additional area. (*Cuming and Mallik, JJ.*) ABDUL GANI CHAUDHURI *v.* ANGRI BHIKU. **56 Cal. 919 = 122 I.C. 212 = A.I.R. 1930 Cal. 205.**

S. 52—Assessment on basis of area.

——*Last assessment on basis of area—Defendant enjoying excess area must pay excess rent.*

If the landlord can show that since the creation of the tenancy, rent had been assessed, and that when rent was last assessed, the assessment was on the basis of a certain area and that the defendants are in possession of land in which no rent was assessed at the time then the landlord is entitled to increase of rent. (*Newbould and Panton, JJ.*) RAJA JOGENDRA KISHORE ROY CHOUDHURY *v.* SH. AKTAR. **67 I.C. 998 = A.I.R. 1923 Cal. 278.**

S. 52—Basis of suspension.

——*The doctrine of suspension of rent depends solely upon the fact that the rent due is an entire sum in respect of the land demised—Landlord and tenant.*

The doctrine of suspension of rent depends solely upon this : that the rent due is an entire sum in respect of the land demised. If, therefore, the tenant is not given occupation of the whole of the land demised, the landlord has no right to the entire rent, and, unless he has a right or some equity to an apportionment he can recover nothing on the contract. But the whole basis of the doctrine is that the rent due is one entire sum. A.I.R. 1925 P.C. 97, Foll. (*Rankin, C. J. and Mitter, J.*) SAJJAD AHMAD *v.* TRILOKYA NATH. **55 Cal. 464 = 32 C. W. N. 472 = 116 I.C. 375 = A. I. R. 1928 Cal. 479.**

S. 52—Burden about additional area.

——*Landlord should show additional area in tenants' possession to claim additional rent—Onus then is on tenant to prove that the additional area belonged to him previously.*

For the purposes of S. 52 it is not always necessary to ascertain the area of the original grant and the rent thereby reserved. All that the landlord has to show is that the present area is greater than the area for which rent was last paid. The onus is then shifted on the tenant to show that the excess land used previously to belong to the holding and was lost by alluvion or otherwise. (*Mullick, A. C. J. and Kulwant Sahay, J.*) SIB SAHAI LAL *v.* BIJAI CHAND. **5 Pat. 157 = 7 P. L. T. 375 = 1926 P.H.C.C. 19 = 90 I C. 862 = A.I. R. 1926 Pat. 197.**

S. 52—Contract out of Statute.

——*Parties can contract out of statute but by express words.*

In cases of permanent tenure, the parties to a lease can make a contract so as to deprive the tenant of the benefit of S. 52 ; when parties by an agreement intend to make a contract which will override the provisions of a statute they must state this clearly. The tenant is not deprived of claiming abatement of rent on account of the diluvion of some of the lands leased to him by a clause in a kabuliyat "there" shall never be any decrease or increase of the rent fixed in the kabuliyat. (*Newbould and B. B. Ghose, JJ.*) UMESH CHANDRA CHAKRABARTY *v.* MATI LAL BASU ROY CHOUDHURY. **39 C. L. J. 431 = 83 I.C. 336 = A.I.R. 1924 Cal. 880.**

S. 52 (1) (b) and 38—Diluvion or deterioration.

——*Suit for rent—Diluvion or deterioration of land—Tenant can plead abatement of rent, in defence.*

According to the ordinary rules of law if a tenant agrees to pay a certain amount of rent, he is exempt from the payment of the whole rent if the whole of the land be washed away or of a portion of the rent if a portion be washed away. Under S. 38 of the Act the plea of abatement can be taken in a suit for recovery of rent and it is not essentially necessary that the tenant should himself institute a suit for the abatement of his rent. S. 18 of Act (X of 1859) referred to.(*Jwala Prasad, A. C. J. and Ross, J.*) SUKHRAJ RAI *v.* GANGA DAYAL. **1922 P. H. C. C. 132 = 63 I. C. 219 = 6 P. L. J. 665 = 2 P.L.T. 569 = A.I.R. 1922 Pat. 169**

Ss. 52 & 105—Enhancement of Rent.

——— *Enhancement or settlement of fair and equitable rent cannot be claimed if tenancy is composed of undivided share.*

The landlord may claim under S. 105 enhancement or settlement of fair and equitable rent under S. 52, but it seems that if the tenancy in respect of which additional rent is claimed under S. 52 is composed of an undivided share the claim will not be admitted under S. 105 also. (*Suhrawardy and Costello, JJ.*) BENOD KUMAR ROY CHOUDHURY *v.* GANGA CHARAN MISTARI.

A. I. R. 1930 Cal. 595 (d) (596).

S. 52—Enhancement by Revenue authorities.

——— *Enhancement of rent—Bengal Regulation (VII of 1822)—Revenue authorities can assess revenue but cannot enhance rents under the Regulation.*

It is always open to the Revenue authorities to reassess the revenue and re-settle the estate with effect from the expiry of a previous term of settlement. If it is desired to enhance the rents of the tenants, proceedings should be taken by the Revenue authorities under Part II of Chapter X of the Tenancy Act or by the plaintiffs themselves under S. 52 or some other appropriate provision of that Act but not under Regulation VII of 1822. (*Richardson and Suhrawardy, JJ.*) ASHUTOSH CHAKRABARTY *v.* DWARKI NATH MATA.

36 C. L. J. 192 = 27 C.W.N. 121 = 70 I. C. 119 = A.I.R. 1923 Cal. 207.

S. 52 (1) (b)—Essentials.

——— *Abatement of rent—Tenant must prove reduction in area.*

In order to claim abatement of rent tenant must prove the reduction in the area of the holding and abatement will be allowed only to the extent of reduction in area as proved by him. (*Suhrawardy and Chotzner, JJ.*) CHANDI CHURAN LAW *v.* HAMID ALI.

85 I.C. 692 = A.I.R. 1925 Cal. 1208.

——— *Tenant must prove reduction in previous area to claim reduction in rent.*

In order to bring the case within the scope of S. 52, Clause (*b*) of the Bengal Tenancy Act the tenant must prove that he is entitled to a reduction of rent on account of deficiency in area proved by measurement of the holding as compared with the area for which rent has been previously paid by him. (*Suhrawardy and Chotzner, JJ.*) ABDUL MAUNAF *v.* SHEIKH MUSLIM.

79 I.C. 978 = A.I.R. 1925 Cal. 426.

——— *The tenant must prove diminution of area from that for which rent had been previously paid by him.*

Where there was no proof of diminution of area and the tenants had not proved that at the time of the original settlement, the rent was fixed at a specified rate per unit of measurement or at different rates according to the quality of the land where they had not established that in fact and in substance, the agreement was that the tenants should pay at a specified rate or rates for all the land (of which they were put in possession) according to its true area and the circumstances justified the conclusion that the rent fixed was a consolidated rent.

Held, that the fact that the area of the tenancy was stated to be 1 kani 12 gandas in 1899 and was found to be 1 kani 1 ganda and 3 karas in 1918 did not, by itself, justify the conclusion that the tenants held at a fixed rate which had to be applied to area ascertained by measurement in order to determine the rent payable by them. (27 C. L. J. 563 ; A.I.R. 1924 Cal. 374, Appr.) (*Mukerji and Rankin, JJ.*) ALI NAWAZ *v.* KARIM BAKSH CHAUDHURY.

40 C. L. J. 62 = 84 I C. 403 = A. I. R. 1924 Cal. 1044.

S. 52—Excess how proved.

——— *Suit for enhancement of rent on account of excess area—Landlord should prove that by some standard of measurement as was used at inception of tenancy there has been excess area.*

If the case comes under S. 52, the landlord is bound to prove what the area of the land was at the inception of the tenancy, by what standard the area was found and that by the same standard of measurement there has been an excess. (*Chatterjee and Panton, JJ.*) INDU BHUSHAN SARKAR *v.* JATU MALLICK.

35 C. L. J. 161 = 62 I.C. 699 = A.I.R. 1921 Cal. 611.

S. 52 (1) (a)—Interpretations.

——— The words "The area for which rent has been previously paid by him" mean the area with reference to which rent was assessed or adjusted. A. I. R. 1922 Pat. 215, Foll. (*Rankin, C.J. and Mitter, J.*) GOCOOL CHANDER LAW *v.* JAMAL BISWAS. **55 Cal. 680 = 111 I. C. 107 = A. I.R. 1928 Cal. 553.**

S. 52 (6)—Interpretation.

——— *"Measurement, etc." refers to the measurement on which the area in excess or defect is found out before institution of suit.*

The expression " at the time the measurement on which the claim is based was made" in S. 52 (6) of the Bengal Tenancy Act refers to the measurement upon which the area in excess or defect, as the case may be, is found out before the institution of the suit. It does not refer to the measurement made at the time of the original settlement or the last preceding adjustment of rent. 47 Cal. 266 overruled. (*Mookerjee, A. C. J., Fletcher, Chatterjee, Richardson and Ghose, JJ.*) NILMANI KAR *v.* SATI PROSAD GARGA.

48 Cal. 556 = 25 C. W. N. 230 = 61 I. C. 82 = A. I. R. 1921 Cal. 397 (F. B.).

S. 52—Joint tenants.

——— *Joint tenants—Right to abatement of rent must be asserted jointly by all.*

If two or more co-sharer tenants have a joint right for abatement of rent, they can only assert that right in a suit to which all the tenants are parties. 27 Cal. 417 and A. I. R. 1923 Pat. 397 Foll., A. I. R. 1925 Cal. 783, Dist. (*Page and Graham, JJ.*) RISHEE CASE LAW *v.* GOLAM ALI. **55 Cal. 676 = 111 I. C. 111 = A. I. R. 1928 Cal. 548.**

S. 52—Manner and nature of assessment not known.

——— *Time of creation of tenancy uncertain—Manner of assessment of rent not known—Nature of rent not known—Nothing to show whether there was measurement at inception of tenancy—Landlord must base claim upon some measurement on the basis of which rent was assessed.*

Where there is nothing to show when the tenancy was created, how the rent was assessed, whether rent was a consolidated rent, or whether assessed at a certain rate per bigha and whether there was any measurement of the holding at the inception of the tenancy, it is necessary for the landlord to base his claim for additional rent upon some measurement on the basis of which rent was assessed or adjusted. (*Rankin, C. J. and Mitter, J.*) GOCOOL CHANDER LAW *v.* JAMAL BISWAS.

55 Cal. 680 = 111 I. C. 107 = A. I. R. 1928 Cal. 553.

S. 52—Measurement at partition.

——— *Measurement at partition under Estates Partition Act is no occasion upon which rent is assessed.*

The measurement of land at partition of superior holding under the Estates Partition Act is no occasion upon which rent of land held by tenant is assessed or adjusted. (*Rankin, C. J. and Mitter, J.*) GOCOOL CHANDER *v.* JAMAL BISWAS. **55 Cal. 680 = 111 I. C. 107 = A. I. R. 1928 Cal. 553.**

S. 52 (1) (b)—Parties to suit.

——*Abatement, claim for—All landlords not parties—Suit will not fail by reason thereof.*

In a suit for rent by a co-sharer landlord, who, under an arrangement between himself, his co-sharer landlord and the tenants, is entitled to make separate collection of his share of rent, the defendants can claim an abatement of rent under section 52 (1) (*b*) of the Act, although all the landlords are not parties to the suit. (*Coutts and Das, JJ.*) MAHARAJA KESHO PRASAD SINGH *v.* RAMDEVI SINGH. **2 Pat. 183 = 74 I. C. 454 = 4 P. L. T. 689 = A. I. R. 1923 Pat. 397**

S. 52 (1) (b)—Possession of all property not delivered.

——*Suit for rent—Defendant claiming reduction not being put in possession of all property—Court can enter into enquiry as to what reduction should be made.*

Where in a suit for rent the defendants claimed reduction of rent on the plea that they were not put in possession of all the lands and contended that they could not be made liable for the rent until an enquiry had been made as to what reduction should be made upon a proper apportionment,

Held, that S. 52 (1) (*b*) was applicable and it was open to the Court to enter upon an enquiry as to what deduction of rent should be made in respect of the deficiency in the area. (*Sanderson, C. J. and Chotzner, J.*) BENI MADHAB *v.* KRISHNA KAMINI. **36 C. L. J. 121 = 70 I. C. 177 = A. I. R. 1921 Cal. 395.**

S. 52—Rate of deduction.

——*Additional area—Measurement—In all cases 10 per cent deduction should not be made—If measurement is not accurate, reasonable deduction may be made.*

There is no reason to allow any deduction from a scientific measurement or any other measurements unless it is shown that either of those two measurements was inaccurate. Ordinarily the measurements made by the Settlement Officers are accepted as scientifically made and correct, but the measurements made by the landlord are not scientifically made and it may be that such measurements may be challenged, but unless such measurements are challenged as inaccurate *prima facie* they ought to be accepted as correct. When any such plea is taken and the Court finds from the circumstances, that there are reasons to believe that previous measurements were inaccurate, in such a case the Court ought, upon the circumstances and evidence in each case, to find whether the previous measurement was or was not accurate. If it is found to be inaccurate, then the Court would make certain deductions as would, in the circumstances of that case, give an approximate and accurate result. (*Cuming and Chakravarti, JJ.*) CHANDY CHARAN *v.* BALARAM GOPE. **91 I. C. 763 = A. I. R. 1926 Cal. 616.**

S. 52—Rent when claimed back.

——*Landlord can claim back rent for additional area.*

There is nothing to prevent a landlord from claiming back rent for any additional area under S. 52. 29 Cal. 247, Foll. (*Ross, J.*) PAHWARI RAI *v.* JANKI KUER. **10 P. L. T. 281 = 117 I. C. 206 = A. I. R. 1929 Pat. 347.**

S. 52—Scope.

——Section 52 speaks of additional rent or of reduction of rent in respect of a particular area for which rent has been previously paid and it says that additional rent is to be paid if it is proved that such excess is due to the addition to the tenure or holding for which rent was not

being previously paid. (*Suhrawardy and Costello, JJ.*) BENOD KUMAR ROY CHOWDHURY *v.* GANGA CHARAN MESTARI. **A. I. R. 1930 Cal. 595 (a).**

S. 52—What is excess and how proved.

——*"The area with reference to which the rent previously paid has been assessed or adjusted"—Means area of the tenure as originally created—Suit for enhanced rent for excess of area—Landlord must prove excess—Entries in* dakhilas, *etc., are not enough for proof—But no presumption exists in tenant's favour that rent was consolidated for land within certain boundaries.*

In a suit for enhancement of rent for excess of area the landlord has to prove that there is an excess. He cannot prove this unless he proves what area of land was originally let. This involves proof of the terms of the original settlement and whether it was by any and if so by what process of measurement. The statement of area in a *dakhila* does not prove measurement. *Prima facie* section 52 would seem to be concerned with cases of alteration of area, not miscalculation of area; nor is it easy to suppose that it intended to provide an exceptional form of relief against mutual mistake. On the mere proof that a tenant's rent has been calculated at some date in the past upon the supposition that his holding is of a certain size a contract cannot be inferred that he is liable at any time to reassessment upon the actual area. This is to read the Act into the contract; and not to apply the Act to the contract. There is no reason whatever forbidding a landlord from proving if he can, a contract of this nature but entries of area and rate in *dakhilas or jamabandis* do not suffice to prove this by themselves in the absence of further material throwing light upon the original conditions of a holding whose origin is beyond the reach of direct evidence. 20 Cal. 579, 24 Cal. 251 and 6 C.W.N. 318, Foll. Even if it is proved that original rent was settled with reference to a quantity of land let out as distinct from the case of a consolidated rent for land within specified boundaries, the landlord must first prove what the original area was and with reference to what standard that area was determined. For this purpose a statement of areas in zemindari papers and rent receipts is insufficient. 5 C.L.J. 538 Foll. But where the area and the standard of measurement are specified but the boundaries are not, the onus is on the tenant to show that the rent is a consolidated rent for an area within specified boundaries; otherwise excess area is completely proved. But there is no presumption against the rent being a consolidated rent apart from the circumstances proved in each case. There is no initial presumption either way. "The area with reference to which the rent previously paid has been assessed or adjusted" means the area of the tenure as originally created as distinct from the area of any intermediate year in which the size of the holding may have been lessened by fluvial action. 6 C. W. N. 318 Foll. (*Rankin and Buckland, JJ.*) MANINDER CHANDRA NANDI *v.* KAULAT SHAIK. **50 Cal. 957 = 79 I C. 852 = 28 C. W. N. 264 = A.I.R. 1924 Cal. 374.**

S 52—When applicable.

——*Diminution of area alone will justify diminution in rent.*

Without diminution of area since the previous assessment of rent there can no abatement of rent, the standard of measurement remaining unchanged. (*Dawson Miller, C. J and Mullick, J.*) KESHEO PRASAD SINGH *v.* BHAGWAT SARAN PANDE. **5 P. L. T. 98 = 75 I. C. 670 = 1924 P. H. C. C. 18 = A. I. R. 1924 Pat. 511.**

S. 53—Additional area.

———*Contract not made with reference to boundaries but a specific block not specifiable except by area—Area is the essence—Additional area found with tenant—Tenant is liable to pay enhanced rent.*

When the contract of tenancy is made not with reference to any boundaries or a specific block otherwise identifiable but for a certain area at a certain rental, the area is of the essence of the contract and by subsequent excess found upon measurement renders the raiyat liable to pay additional rent. (*Mullick, A.C.J. and Kulwant Sahay, J.*) SIB SAHAI LAL *v.* BIJAI CHAND.
5 Pat. 157 = 7 P. L. T. 375 = 1926 P. H. C. C. 19 = 90 I. C. 862 = A. I. R. 1926 Pat. 197.

S. 53—Scope.

———*Contract to pay annual rent in monthly instalments is operative.*

The patni lease fixed the annual rent at Rs. 1,200, payable in twelve monthly instalments. The lease contain a covenant that on default of payment of the instalments, the lessee would pay interest according to law.

Held, that the agreement for payment of rent in monthly instalments would consequently, be operative even if S. 53 had been in force when the lease was granted. (*Mookerjee and Rankin, JJ.*) BIHARILAL BISWAS *v.* NASIMANNESSA BIBI. **37 C.L.J. 222 = 73 I. C. 482 = A. I. R. 1923 Cal. 527.**

S. 55—Scope.

———S. 55 appears to refer not to the right of a debtor to make a part-payment, but to the appropriation of a payment when accepted by the landlord in other words, it treats not of tender but of appropriation. (*Mookerjee and Rankin, JJ.*) BIHARILAL BISWAS *v.* NASIMANNESSA BIBI. **37 C L.J. 222 = 73 I.C. 482 = A. I. R. 1923 Cal. 527.**

S. 60—Applicability.

———*Does not apply to* ijardars *and part proprietors—Tenant claiming discharge on paying to part proprietor—Section applies.*

S. 60 does not apply to the case of an *ijardar* who could not get his name registered under the Land Registration Act. No doubt "proprietor" is defined in S. 3, Cl. (2) as a person owning an estate or part of an estate. But S. 60 merely speaks of proprietor of that estate which indicates an entire estate. The case, where rent is payable to two or more proprietors, the extent of whose interest is required to be registered under the Land Registration Act, and which is dealt with in the second part of S. 78 of that Act, is not dealt with by S. 60 of the Bengal Tenancy Act. S. 60 of the Bengal Tenancy Act is not concerned with questions of title, but where the tenant claims a discharge for the rent by reason of his payment to the heirs of a part-proprietor, he must bring his case strictly within the terms of the section, when he wants to defeat the suit for rent based upon a lease which he obtained from another part-proprietor alone, without reference to the other although the latter at that time had become co-owner of the estate to the extent of 8 annas. (*Chatterjea and Suhrawardy, JJ.*) PROBOTH CHANDRA MITTER *v.* HARISH CHANDRA NASKAR. **27 C. W. N 888 = 78 I.C. 7 = A.I.R. 1924 Cal. 124.**

S. 60—Ijardar.

———*Lease by one co-sharer alone—Ijardar can sue for entire rent—Bengal Land Registration Act,* (1876), *Ss.* 78 *and* 81.

One of the co-sharers alone let out by written contract a portion of the land of the estate without reference to the other registered co-sharer.

Held, that an ijardar from the lessor was entitled to sue for the entire rent. 38 Cal. 512, Dist. 24 I. C. 866, Foll. 27 C.L. J. 474, Ref. (*Chatterjea and Suhrawardy, JJ.*) PROBODH CHANDRA *v.* HARISH CHANDRA.
48 Cal. 1078 = 64 I.C. 58 = A. I. R. 1921 Cal. 145.

Ss. 60, 148 and 159—Landlords.

———*Landlords who are not necessarily proprietors, managers or mortgagees, are entitled to obtain rent decree against tenants though their name is not registered in Collector's Register—Bengal Land Registration Act* (1876), *S.* 78.

A landlord is not necessarily a "proprietor, manager or mortgagee." Ss. 148 and 159 refer to landlords and do not confine themselves to "proprietors, managers or mortgagees" who alone are referred to in S. 60, Ben. Ten. Act and S. 78, Land Registration Act. Hence a landlord is entitled to obtain a decree for rent against his tenant although his name may not have been recorded in the Collector's Land Register. (*Jwala Prasad and Wort, JJ.*) BALIRAM PRASAD *v.* HARNANDAN RAI.
8 Pat. 375 = 118 I. C. 733 = A. I. R. 1929 Pat. 357.

S. 60—Mortgagee.

———*Inability of mortgagee etc. to obtain rent decree by reason of his name not having been registered, does not affect his title as landlord—Bengal Land Registration Act* (1876), *S.* 78.

"A proprietor, manager or mortgagee," by his inability to obtain a rent decree by reason of his name not having been entered in the Collector's Register, does not lose his title as landlord to the lands of which rent is due; for although he may not himself be able to obtain a rent decree, his right as co proprietor, manager or mortgagee is not affected. (*Jwala Prasad and Wort, JJ.*) BALIRAM PRASAD *v.* HARNANDAN. **8 Pat. 375 = 118 I. C. 733 = A. I. R. 1929 Pat. 357.**

Ss. 60 and 70—Order under.

———*Disobedience—Collector can proceed under Cr. P. Code, S.* 95 *or S.* 476 *and direct prosecution under S.* 188, *I. P. C.—Cr. P. Code. Ss.* 195 *and* 476.

In cases of disobedience of orders under Ss. 69 and 70 of the Bengal Tenancy Act, it is competent to the Collector to act under the provisions of S. 195 or S. 476 of the Cr. P. Code, and to direct a prosecution under S. 188 of the Indian Penal Code. (*Teunon and Ghose, JJ.*) LAKSHAN BOR *v.* NARANARAIN HAZRA.
48 Cal. 1086 = 25 C. W. N. 617 = 66 I.C. 71 = A. I. R. 1921 Cal. 260.

S. 60—Payment to third person.

———*Suit for apportionment of rent by registered proprietor—Plea of tenants that they paid rent for over 12 years to proprietor of adjoining estate is not tenable.*

Under S. 60 a tenant cannot plead that the registered proprietor should not get the rent apportioned on the ground that the proprietor of adjoining mahal had realized rent for over 12 years in open assertion that the lands belonged to his mahal. Nor is such a proprietor a necessary party to the suit. (*Das and Ross, JJ.*) KESHEO PRASAD SINGH *v.* RAMDEAL KUER.
6 P. L. T. 214 = 87 I. C. 439 = A. I.R. 1925 Pat. 473 (1).

———*Rent suit—Registered proprietor—Defendant cannot plead payment to third party though he is transferee from proprietor.*

Although the plaintiff was the registered proprietor, her rights had been transferred to one *M* and the defendant executed a *kabuliyat* in favour of transferee and had since then been paying rent to him.

Held by Section 60 where rent is due to the proprietor, the receipt of the person registered under the Land Registration Act shall be a sufficient discharge for the rent, and the person liable for the rent shall not be entitled to plead in defence to a claim by the person so registered, that the rent is due to any third person. Section 72 applies to a case in which a transferee claims rent and it protects the tenant to whom the transferee has given notice of the transfer and has nothing to do with a case like the present. (*Coutts and Das, JJ.*) MT. ADAYABATI *v.* JANARDAN THAKUR.
1 P. L. R. 24 = 68 I. C. 288 = 3 P. L. T. 756 = A. I. R. 1922 Pat. 607.

———*Rent sent by registered proprietor—Tenant cannot plead that rent is due to third person.*

If the registered proprietor brings a suit for rent, it is not open to the tenant to plead in defence that the rent is due to a third person. The only thing that he can do is to deposit the rent under S. 149 of the Act and ask that there may be an adjudication as to the claim of the person whose title he sets up. 4 C. W. N. 606 Diss. from, 12 C. W. N. 622 Dist. (*Mullick and Bucknill, JJ.*) NAND KUER *v.* JODHAN MAHTON.
6 P. L. J. 658 = 61 I. C. 386 = 2 P. L. T. 337 = 1921 P. H. C C. 201 = A. I. R. 1921 Pat. 363.

S. 60 Plea under

———*Court is not bound to consider objection under S. 60 if not raised in written statement.*

Where objection under S. 60 as to the registration of the landlord's name is not raised in the written statement, the Court is not bound to consider it although a question or two might have been put to the landlord or his witnesses as to whether his name was registered. (*Mukerji and Mallik. JJ.*) ISAB *v.* GURU CHARAN SHAHA. **49 C. L. J. 372 = A. I. R. 1929 Cal. 431.**

S. 60—Thekadars.

———*Registered and unregistered Thekadars—Claim by registered Thekadar—Tenant cannot plead payment to unregistered Thekadar.*

Where the question arises between two sets of Thekadars one of whom is registered and the other is not registered, it is not open to the tenant to plead payment to the unregistered Thekadar in defence to a claim by the registered Thekadar .6 P. L. J. 658, Rel. on. (*Kulwant Sahay, J.*) JUNG SINGH *v.* DULARCHAND MAHTO. **96 I. C. 495 = A. I. R. 1926 Pat. 532.**

S. 61—Deposit.

———*Deposit by tenant less than the amount due is valid if due to* bona fide *dispute as to amount.*

When the difference between the deposit under S. 61 and the amount due is small and this is due to a *bona-fide* dispute as to the amount of the cess, then the deposit is valid under S. 61 and operates as an acquittance not for the whole amount due but for the amount of rent payable by the tenant and deposited in the same manner and to the same extent as if the amount of rent has been received by the landlord. 15 Cal. 166; 19 C.W.N. 1143, Foll; 18 C.W.N. 84, Dist. (*Mookerji and Mitter, JJ.*) GNANA DAYINI *v.* GUNAMONI DASI. **105 I. C. 52 = A. I. R. 1927 Cal. 914.**

———Bona fide *deposit of whole amount is valid though in fact less than due.*

Where there has been a *bona fide* deposit in respect of the whole amount due at the date of the deposit and not merely in respect of a portion thereof, the deposit is validly made under the section, even though it should turn out that the whole amount due had not been deposited. 20 C.L.J. 153 Foll. (*Dawson Miller, C.J.*

and Macpherson, J.) MT. BIBI WAJIBUNNISSA *v.* BABULAL MAHTON. **5 Pat. 46 = 7 P.L.T. 355 = 1925 P. H. C. C. 298 = 90 I. C. 871 = A.I.R. 1926 P. 42.**

———*Three deposits made on the allegation that tenant holds three distinct tenancies—Tenant really holding one tenancy—Deposits accepted by Court—Landlord is entitled to question their validity.*

If a tenant holds in fact one tenancy under his landlord but makes three deposits in Court on the allegation that he holds three distinct tenancies, it cannot be maintained that this is a deposit within the meaning of section 61. Though such a deposit has been made and has been accepted by the Court under section 62, it is still open to the landlord to question its validity. 20 C.L.J. 153 Dist. (*Mookerjee and Panton, JJ.*) SATIS CHANDRA DAS *v.* UMES NARAIN. **34 C.L.J. 501 = 64 I.C. 696 = A.I.R. 1921 Cal. 143.**

S. 62—Deposit.

———*Receipt granted to tenant—Presumption is that the tenant was entitled to make deposit.*

S. 62 provides in effect that the money tendered by the tenant shall only be received by the Court if it appears to the Court that the applicant was entitled under S. 61 to make the deposit and if the Court is so satisfied it shall receive the rent and give a receipt for it under the seal of the Court. Once the receipt is given under this section it is provided that it shall operate as an acquittance for the amount of rent paid by the tenant and deposited, in the same manner and to the same extent as if the amount of rent had been received by the person entitled thereto. Therefore if such receipt is produced by a tenant in a suit for arrears against him it must be presumed that the Court was satisfied at the time the receipt was given that the applicant was entitled under S. 61 to deposit the rent. (*Dawson Miller, C. J. and Foster, J.*) TOFA LAL DAS *v.* T.N. PARTRIDGE. **4 Pat. 285 = 86 I.C. 543 = 6 P.L.T. 562 = 1925 P.H.C.C. 41 = A. I.R. 1925 Pat. 387.**

S. 65—Charge.

———*Suit for arrears of rent—Holding transferred—Purchaser is bound to pay arrears of rent—Rent is first charge on the holding—Original tenant is not a necessary party.*

The rent due in respect of a property is a first charge on the property, and the person who purchases the property must be taken to have purchased the property charged with the rent due at the time of his purchase. It is, therefore not necessary that the tenant who was in possession during the period for which rent is claimed should be made a party to the suit. (*Greaves and Cuming, JJ.*) AMIYA PAL CHOWDHARY *v.* SHARBA MANGALA DEBI. **91 I. C. 657 = A.I.R. 1926 Cal. 737.**

———*Decree for rent obtained after sale of tenure —Whether falls under Chap.* VIII—*Charge on surplus sale proceeds.*

A decree for rent obtained by the landlord after the sale of the tenure in execution of another decree can only create a charge upon the holding or on the sale proceeds thereof representing the holding if it can be asserted that such a decree is a decree under Chap. VIII, B. T. Act. A decree obtained after the tenure is sold is not such a decree and there is no charge on the surplus sale proceeds. (*Suhrawardy and Costello, JJ.*) OFFICIAL TRUSTEE OF BENGAL *v.* PURNA CHANDRA. **34 C.W.N. 702.**

S. 65—Eviction.

———*Eviction under rent decree by landlord—No suspension of rent takes place.*

Where the landlord in execution of a decree obtained by his predecessor-in-interest caused a portion of the jotes ot the tenant to be sold and purchased them himself and got possession thereof through Court, *held*, that this was not a wrongful eviction of the tenant from any portion of the holding and therefore there cannot be a complete suspension of rent. (*C.C. Ghose and Chotzner, JJ.*) DEBI PRASAD BHAKAT *v.* OFFICIAL TRUSTEE OF BENGAL. **37 C.L.J. 314 = 72 I.C. 1013 = A. I. R. 1923 Cal. 333.**

S. 65—Landlord and tenant.

———*Decree for rent—Holding can be sold only so long as relationship of landlord and tenant exists.*

The right to proceed to sale under S. 65 is dependent on the existence of the relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced. To acquire the right which the section gives, not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure must have the landlord's interest "vested" in him. 41 Cal. 926 (P.C.), Foll. (*Ross and Kulwant Sahay, JJ.*) MT. RAM KALI KUAR *v.* MADAN MOHAN LAL. **8 P.L.T. 224 = 98 I.C. 995 = A. I. R. 1927 Pat. 108.**

S. 65—Priority.

———*Purchaser at rent-sale is not entitled to—Rent charge could be enforced only by sale free of incumbrances.*

The purchaser at the rent sale is not entitled to priority as rent is a first charge on the tenure or holding under S. 65 of the Bengal Tenancy Act. The charge should be enforced by sale of the tenure or holding free of incumbrances, and if in any case the decree for rent either has not been or cannot be enforced by the sale of the tenure or holding, the charge created by S. 65 cannot be enforced in any other way. 22 Cal. 364; 15 Cal. 492; 33 Cal. 985; 42 Mad. 114, Followed. (*Mukerjee and Panton, JJ.*) SITAL CHANDRA MAJHI *v.* PARBATI CHARAN CHAKRABARTI. **35 C. L. J. 1 = 69 I. C. 841 = A.I. R. 1922 Cal. 32.**

S. 65—Setting aside sale.

———*Sale under rent decree—Statement in sale proclamation that sale is subject to liability to pay arrears of rent for previous years—Consequent inadequate price realised—Judgment-debtor can apply to have sale set aside—O. 21, R. 90.*

The law does not hold the auction-purchaser of a holding at a sale under a rent decree liable to pay off antecedent arrears of rent and therefore, any statement in the sale proclamation implying such a liability is wrong. The judgment-debtor is entitled to have the sale set aside, if he can prove that the price fetched at the sale was an inadequate price taking into account the charges notified in the proclamation. The tenant judgment-debtor alone is liable to pay the arrears of rent accrued due prior to the institution of the suit or between the institution of the suit and the auction-sale. 21 Cal. 169, Foll.; 6 C.W.N. 877, Ref.

Per *Bucknill, J.*—It is doubtful if it is illegal to introduce into the condition of a sale of this character an instruction that the sale takes place in execution of the decree, but subject to other encumbrances, whether relative to arrears of rent or otherwise. Such a statement may be irregular under certain circumstances when the other charges specified relate to arrears of rent, but it is doubtful whether it is of such a character that the whole must be regarded as voidable or that it *ipso facto* vitiates the sale. Where the effect of the introduction of the statement of the existence of prior encumbrances is such as to affect adversely the proper position of the judgment-debtor it may be proper and open for him to apply to the Court in order that the sale may be set aside. (*Mullick and Bucknill, JJ.*) SAIYAD MAHOMED JOWAD HUSSAIN *v.* GOPAL NARAIN SINGH. **2 P.L.T. 248 = 80 I.C. 223 = A.I.R. 1921 Pat. 479.**

Ss. 65 and 212 (2)—Transferee.

———*Transferee of a non-transferable occupancy holding cannot force himself upon the landlord as a tenant without the latter's consent.*

The transferee of a non-transferable occupancy holding, whether he takes by kobala from the original tenant or whether he acquires the property by purchase under a mortgage decree, has a very precarious right for he cannot force himself upon the landlord as a tenant without the latter's consent. 4 P. L. J. 362, Foll. (*Dawson Miller, C.J. and Adami, J.*) BADLU PATHAK *v.* SIBRAN SINGH. **7 Pat. 155 = 107 I. C. 310 = 9 P. L. T. 241 = A. I. R. 1928 Pat. 234.**

S. 66—Agricultural lease.

———*T. P. Act, S. 117—T. P. Act, S. 117 should be liberally interpreted — Intermediate tenant—Direct cultivation of some lands—Other factors—Lease was held agricultural.*

In construing the T. P. Act and B. T. Act it must be remembered that although the Bengal Tenancy Act is later in time, there were somewhat similar provisions in the Bengal Rent Act, of 1859 and 1869 and it was probably the intention of the Legislature in exempting leases for agricultural purposes from the operations of Chap. V of the Transfer of Property Act to retain in force the special provisions relating to the class of leases dealt with in those Acts, which may be compendiously described as leases for agricultural purposes. Therefore a liberal interpretation should be given to the words of S. 117. (*Dawson Miller, C. J. and Foster, J.*) W. W. BROWCKE *v.* SRI PANCH RANI CHHATAR KUMARI. **4 Pat. 404 = 86 I. C. 597 = 6 P. L. T. 331 = 1925 P. H. C. C. 89 = A. I. R. 1925 Pat. 421 (431).**

S. 66 (3)—Appeal.

———*Decree directing to pay within specified time—Extension of time is not one under S. 66 (3), Ben. Ten. Act—No appeal lies from such order—Only revision can set it right—C. P. Code, Ss. 47 and 115.*

When a decree is drawn up directing the judgment-debtor to pay the decretal amount within a specified time, the extension of time would not be an order under S. 66 (3), Ben. Ten. Act. It is an order varying the terms of the decree which the Court has no jurisdiction to vary. Where the Court varies the terms of a decree by extending time which he has no jurisdiction to do, there is no appeal from that order but it can only be set right by an application for revision. 26 Cal. 639, Dist. (*B. B. Ghose and Bose, JJ.*) DALILUDDI *v.* BAKSHI BEPURI. **112 I. C. 124 = A. I. R. 1929 Cal. 140.**

S. 66 (2)—Deposit.

———*Transferee of non-transferable occupancy holding cannot make deposit—Bengal Landlord and Tenant Procedure Act (VIII of 1869), S. 52.*

A transferee of a non-transferable occupancy holding is not entitled to make the deposit under S. 66 (2), Bengal Tenancy Act or a similar provision in other enactment, namely S, 52 of Act VIII of 1869, to defeat the landlord's decree for ejectment. (*Suhrawardy and Mallik, JJ.*) BANESWAR SINGH *v.* ABDUL HASAN. **31 C. W. N. 1016 = 104 I. C. 180 = A. I. R. 1927 Cal. 752.**

S. 66—Scope.

——*Sub-lease of agricultural lands is governed by Act.*

A sub-lease of agricultural lands under which the sub-lessee is held to hold possession of the property and by making cultivation and proper management to pay the fixed amount of rent regularly is one governed by Bengal Tenancy Act. (*Das and Kulwant Sahay, JJ.*) DAMODAR PRASAD *v* MASOODAN SINGH.

8 P. L. T. 829 = 105 I. C. 172 = A. I. R. 1928 Pat. 89.

S. 67—Application.

——Section 67 has no application to produce rent. It applies only to rent paid in cash. (*Jwala Prasad and Rowland, JJ.*) PARMESHWAR SINGH *v.* LEKH NARAYAN SINGH. **11 P. L. T. 228 = 120 I. C. 46 = A. I. R. 1930 Pat. 157.**

S. 67—Interest.

——Where in a suit for thika rent the landlord relies upon a deed to prove contract of interest, it is necessary for him to produce it to substantiate his case. But even failing to prove the contract to pay interest the landlord is still entitled under S. 67 not to the rate which the landlord claims but to the interest at the rate of 12½ per cent. per annum. (*Wort and James, JJ.*) SITARAM *v.* MOHANLAL. **117 I. C. 180 = 10 P. L. T. 805.**

——Bhaoli *holdings—No evidence as to rent being payable quarterly—No interest can be charged.*

Where the holdings are *bhaoli* and there is no evidence that rent is payable quarterly, interest under S. 67 of the B. T. Act is not chargeable. (*Mullick and Ross, JJ.*) GONDA SINGH *v.* JITAN MAHTON.

6 P. L. T. 801 = 88 I. C. 395 = 3 P. L. R 109 = A. I. R. 1925 Pat. 795.

——*Tenancy purchased at Rent Sale—Kabuliyat executed before the Act—Interest exorbitant—Stipulation will not attach to the tenancy after sale.*

The plaintiff landlord asked for interest on overdue instalments at the rate of 75 per cent. per annum.

Held, the *kabuliyat* having been executed prior to the passing of the Bengal Tenancy Act, the provisions of Sec. 67 are not applicable to the case; but the Defendant purchased the holding at a sale for arrears of rent held at the instance of the landlord, the plaintiff. As a purchaser at the rent sale, the defendant purchased it with the ordinary incidents of a tenancy. A stipulation for the payment of interest at an unusual and exorbitant rate cannot be supposed to be an incident of a tenancy which would attach to it even after a sale for arrears of rent. 26 Cal. 315, Foll. (*Chatterjee and Cuming, JJ.*) ANANDA MOYEE DEBI *v.* SAUDAMANI DEBYA.

27 C. W. N. 502 = 72 I. C. 719 = 37 C. L. J. 333 = A. I. R. 1923 Cal. 559.

Ss. 67 and 78—Interest.

——*Holding over of tenancy created before Act—New contract is created and interest in arrears in excess of* 12 1/2 *per cent. is not recoverable—S. 67 applies both to money and rent and rent-in-kind.*

Where under a *kabuliyat* before the B. T. Act, the tenant was to pay interest at 6 pies per rupee per mensem on the cash rent and on *cotta* per rupee on the rent-in-kind if the rent falls into arrears, and the tenant held over on the expiry of the lease.

Held, that S. 67 applies both to money rent as well as rent-in-kind, that the holding over would create a new contract which would make S. 178 applicable and that interest at 12 1/2 per cent. on the arrears is not recoverable. (*Newbould and Panton, JJ.*) BRAHMAMOJI DEBYA *v.* SOMARALI SHEIKH.

68 I. C. 109 = A. I. R. 1922 Cal. 77.

S. 67—Nature of tenancy.

——*Lease granted in* 1874—*No term fixed—Transfer by tenant prohibited—After B. T. Act the tenancy is from year to year and rent can be claimed according to B. T. Act.*

A tenancy was created in 1874 and was headed as a raiyoti kabuliyat and was not for any term. The tenant and his heirs were not given any right to transfer the holding by gift, sale or will, and the holding was not subject to attachment in execution of decree against the tenant or his heirs. There was a condition that if the rent was not paid according to the instalments fixed in the document every month, interest would be charged at the rate of 2 annas in the rupee per month.

Held, that the tenant had not acquired the right of occupancy, that when the B. T. Act came into operation namely in 1885, the lease must be considered to be a lease from year to year. That in 1885 when the B. T. Act came in force the tenant had the status of a raiyat holding the land from year to year and that if rent were claimed for any period after the termination of the lease the claim must be governed by the provisions of the Bengal Tenancy Act. 64 I. C. 118. Foll. (*Suhrawardy and Cuming, JJ.*) RAJ KUMAR BASU *v.* GIRINDRA KUMAR BANDOPADHYA.

41 C. L. J. 453 = 87 I. C. 178 = A. I. R. 1925 Cal. 722.

S. 67—Scope.

——*Lease expiring before Act—Tenant holding over—Rent need not be paid as in* Kabuliat *but within limits of S.* 67.

In a case where the lease had expired before the passing of the Tenancy Act and where the tenant had been holding over, he is not necessarily liable to pay interest as stipulated in the *kabuliat*, but only within the limits allowed by S. 67. 2 C. W. N. 303, Dissented from; 28 Cal. 227: Foll. Interest on arrears of rent at 150 per anuum is too high. (*Chatterjea and Suhrawardy, JJ.*) CHANDRA NATH *v.* INAMDI.

34 C. L. J. 369 = 64 I. C. 118 = A. I. R. 1921. Cal. 300.

S. 69 (1)—Civil suit.

——*Report of the officer—Its accuracy is to be questioned by taking objections before Collector and not by a civil suit.*

The question of the accuracy of the report of the officer appointed under S. 69 (1) is a matter which could be questioned by objections taken before the Collector, and if the parties or either of them, after due notice of the proceeding, do not raise any objections to the report at the proper time, they are not entitled to do so by a civil suit. (*Dawson Miller, C. J. and Ross, J.*) AJAH LAL *v.* NARESH MOHAN. **9 P. L. T. 753 = 7 Pat. 667 = 110 I. C. 514 = A. I. R. 1928 Pat. 627.**

S. 69—Jurisdiction.

——*Both parties admitting that* Bhaoli *rent is payable—Dispute as to system of payment being* batai *or* danabandi *does not exclude Collector's jurisdiction.*

Where it is admitted by both the parties that *bhaoli* rent is payable, the existence of a dispute as to whether the system of payment is *batai* (by division of crops) or *danabandi* (appraisement) does not exclude the Collector's jurisdiction. (*Jwala Prasad and Kulwant Sahay, JJ.*) BHUNESHWARI KUER *v.* SUKHDEO SINGH.

6 P. L T. 419 = 85 I. C. 566 = A. I. R. 1925 Pat. 505.

Ss. 69 and 70—Scope of.

——*Final order—Its absence does not entitle landlord to sue for rent—Landlord is to apply to Collector for* *such order—Remedy in a civil Court is barred unless tenant is a defaulter.*

The fact that no final order has been made does not in itself entitle the landlord, where proceedings have been taken under S. 69, to sue for rent ignoring the proceedings which have been taken. In absence of any such order the proper course for a party is to apply to the Collector to pass a final order and until this is done or until he can show that he has attempted and failed to get his share, he cannot invoke the assistance of a civil Court, and the civil Court has no power to ignore the whole proceedings and try the case afresh as rent suit. In a suit for rent by the landlord it must be shown that the tenant was in default, A. I. R. 1924 Pat. 604 and A.I.R. 1925 Pat. 505, Rel. on ; 4 P.L.J 325, Diss. from. (*Dawson Miller, C. J. and Ross, J.*) AJAH LAL *v.* NARESH MOHAN. **7 Pat. 667 = 110 I. C. 514 = 9 P. L. T. 753 = A. I. R. 1928 Pat. 627.**

S. 70—Civil Court.

———*Civil Court cannot override final order by Rev. Court under S. 70—Final order is enforceable as a decree.*

What is a final order must be determined on the reading of the order as a whole. Where the Thakmina papers were considered by the Settlement Officer and the crop was divided between the landlord and the tenant and it was ordered that on the refusal by the landlord to accept the share, the money realised by sale thereof was to be deposited in the treasury.

Held, that the money belonged to the landlord without any further action on his part as that was a final order and therefore the civil Court had no jurisdiction to award anything on a claim for rent for certain years where the matter was decided under S. 70. (*Das and Ross, JJ.*) BINODE BEHARI BOSE *v.* TOKHI SINGH. **1924 P. H. C. C. 211 = 78 I. C. 465 = A. I. R. 1924 Pat. 604.**

S. 70 (5)—Decree.

———*Separate decree apart from order is unnecessary.*

Cl. 5 of S. 70, does not require that a separate decree, apart from the order, should be prepared by the competent Revenue Authority. It simply requires that the order shall be final and shall, on the application by the landlord or the tenants, to the Civil Court, be enforceable as a decree. In a case of appraisement the Collector does not take possession of the crops nor does he make it over to the landlord. He simply prepares an estimate of the crops under S. 69 and then reduces it into money value and declares how much is due to the landlord and how much to the tenant. In such a case the Collector's order must clearly specify the amount due from one party to the other so that the former may in execution of the order in the civil Court receive his dues from the latter. Again in a case of division of crops, where the tenant has made himself liable to the landlord by removal of the crop or otherwise such as is provided by S. 71, the Collector's order must clearly state the amount payable to the landlord by tenant, so that the former may receive the same in execution of the order in civil Court. But where there is a simple division of crops on the spot, each party is entitled to receive from the Collector who takes possession of the crops, his share therein. The party taking his share from the Collector will not be liable to the opposite party and there can be no order to pay anything to the other party. If a party does not choose to take his share, his share will remain in deposit with the Collector. The only order that the Collector can pass is to deposit the share to the credit of that party. The order is capable of execution against the Collector if he does not give to the party his share. The sale proceeds in the treasury to the credit of the party can be withdrawn any moment he likes. There will not be any necessity of execution. (*Jwala Prasad and Kulwant Sahay, JJ.*) BHUNESHWARI KOER *v.* SUKHDEO SINGH. **6 P. L. T. 419 = 85 I. C. 566 = A. I. R. 1925 Pat. 505**

S. 70 (4)—Notice.

———*Cl. 4 does not require any notice to be served.*

Sub S. (4), S. 70 does not require that notice shall be served on the parties to appear and take objections. The only notice required under the section is that prescribed in sub-S. (2). (*Dawson Miller, C. J. and Ross, J.*) AJAH LAL *v.* NARESH MOHAN. **7 Pat. 667 = 110 I. C. 514 = 9 P. L. T. 753 = A. I. R. 1928 Pat. 627.**

———*No fresh notice need be given under sub-S. (4).*

If sufficient time is given after service of notice and before the Collector passes his final orders, to enable tenants to come forward and make their objections, that is a proper compliance with the provisions of sub-S. (4) and no further notice is required upon the tenants to enable them to come and make their objections. (*Dawson Miller, C. J. and Foster, J.*) DINDAYAL SINGH *v.* RAJ KESHWAR NARAYAN. **1926 P. H. C. C. 258 = 8 P. L. T. 221 = 98 I. C. 991 = A. I. R. 1926 Pat. 495.**

———*Notice served by Amin—Person alleging absence of notice must prove it.*

If the Amin comes to the village and gives notice to all and sundry either by informing them personally or by leaving notices at their houses, then that is *prima facie* compliance with the section. If that is done, then it lies upon those who are complaining that the section is not complied with to come forward and give evidence that they in fact had no notice. (*Dawson Miller, C. J. and Foster, J.*) DINDAYAL SINGH *v.* RAJ KESHWAR NARAYAN. **1926 P. H. C. C. 258 = 8 P. L. T. 221 = 98 I. C. 991 = A. I. R. 1926 Pat. 495.**

S. 71—Bhaoli rent.

———*Suit for Rent—Bhaoli rent—Tenants removing crops before appraisement—Landlord is entitled to claim rent on the basis of best crops in the neighbourhood on similar lands.*

It is true that, where a plaintiff claims a certain amount of rent in cash and the defendant admits a lesser amount, unless the plaintiff can give good proof of the larger amount being payable, the suit will be decreed on the defendant's admission. But a different situation arises in the case of a claim for Bhaoli rent. If tenants cut and take away crop before it can be appraised or do not attend at the appraisement under S. 71 (4), Bengal Tenancy Act, presumption arises against them and the landlord is entitled to the full measure of the crop as of the best crop in the neighbourhood of a similar character to that harvest. 52 I. C. 267, Rel. on. (*Adami, J.*) HAR GOBIND SINGH *v.* KISHUN DAYAL GOPE. **7 P. L. T. 671 = 95 I. C. 966 = A. I. R. 1926 Pat. 436.**

S. 71 (4)—Burden of proof.

———*Claim for rent based on produce—Tenant preventing landlord from estimating crops—Onus is on tenant to prove actual produce—Evidence Act, S. 106.*

Where rent is claimed on the basis of the produce of the land and where the landlord has opportunity of appraising the crops and falsifies accounts in order to obtain a higher amount of rent, he is not entitled to get any decree except on proof of the produce of the land, and if he fails to prove that, he must be content with the admissions made by the defendants. But where the landlord could not make an estimate of the crops or was prevented from doing so by the tenants, his claim cannot be thrown out simply because he has not been able to prove the actual produce of the lands in the direct possession of the tenants. (*Jwala Prasad and Kulwant Sahay, JJ.*) BHUNESHWARI KUER *v.* SUKHDEO SINGH. **6 P. L. T. 419 = 85 I. C. 566 = A. I. R. 1925 Pat. 505.**

S. 71 (4)—Evidence.

——*Crop-cutting report of Collector for the year succeeding the years in suit is valuable evidence.*

A crop cutting report by Collector under S. 40, Bengal Tenancy Act, for the year immediately succeeding the years in suit and pertaining to the land in the immediate neighbourhood of the land in suit is a valuable piece of evidence in determining the produce of the land in suit for the years in suit, in the absence of any evidence to show that the year to which the report belongs was an exceptionally good year or evidence that the years immediately preceding it were exceptionally bad years or indeed any evidence at all to show that they in any way differed. (*Dawson Miller, C. J. and Foster, J.*) KISHUN DAYAL GOPE *v.* ISHWARNATH SINGH. **8 P. L. T. 74 = 102 I. C 391 = A. I. R. 1927 Pat. 167.**

S. 71 (4)—Jurisdiction.

——*The Collector has jurisdiction to make division of the crops under S. 71.*

S. 71 (4) is applicable to proceedings before the Collector and the Collector has jurisdiction to make a division of the crops. The division would ordinarily be made by dividing the crops ; but if the tenant has removed any portion of the crop so as to prevent the due division thereof, then an artificial rule is stated to meet this case. The object of Ss. 69 and 70 would be to a great extent defeated if S 71 (4) was not available to the Collector in cases which must frequently arise. (*Ross and Wort, JJ.*) BHUNESHWARI KUER *v.* SUKHDEO SINGH. **7 Pat. 281 = 9 P. L. T. 106 = 110 I. C. 93 = A. I. R. 1928 Pat. 282.**

S. 72—Scope.

——*Tenant must have paid rent to transferrer landlord and payment must be without notice of transfer.*

Before the tenant can be excused from payment to the transferee under S.72, two conditions are necessary. The first is that he must pay rent to the landlord whose interest has been transferred ; and secondly, he must have done so without notice of the transfer. (*Newbould and Graham, JJ.*) BROJO DHABAL *v.* PREM CHAND. **91 I. C. 726 = A. I. R. 1926 Cal. 515.**

S. 74—Abwab.

——*Whether stipulation in lease amount to part of rent or abwab is question of fact.*

Whether a stipulation in the lease or kabuliat to pay a sum, goats, molasses or any other thing over and above rent mentioned in the lease is an abwab or forms part of the lease rent is a question of fact to be decided in each particular case. In each case it has to be ascertained whether the sum claimed is really part of the rent agreed upon to be paid as consideration for the lease. A. I. R. 1927 P. C. 250, Rel. on. (*Cuming and Mallik, JJ.*) ABDUL GANI CHAUDHARI *v.* ANGRI BHIKU. **56 Cal. 919 = 122 I. C. 212 = A. I. R. 1930 Cal. 205.**

——*Kabuliyat agreeing that instead of* batai *system* nakdi *rent be paid—Then in separate clause it being*

stated that straw, etc., which according to custom used to be given to landlord will be given along with rent—Landlord failing to prove that straw, etc., used to be paid as part of rent—Agreement to deliver straw, etc., was independent of commuted cash rent and was illegal abwab.

In the kabuliyat it was agreed that instead of *batai* system, an annual *nakdi* rent should be paid according to a certain rate per bigha and by certain instalments every year. The lease then in a different clause went on; " Be it known that at the time of *batai* declarant used to give paddy, straw, husks and poal to the malick according to the custom of the village and so that same will be given continually along with the rent." The trial Court, however, found that the landlord failed to prove that straw, etc., used to be realized as part of the rent.

Held, that the agreement to deliver straw, etc., was independent of the commuted cash rent and it was an illegal *abwab*. 31 Cal. 834 and 25 I. C. 547, Rel. on ; A. I. R. 1927 P. C. 250, Dist. (*Ross, J.*) NAUNIT PRAYAJI *v.* BANDHU MAHTON. **A. I. R. 1930 Pat. 414.**

——*Stipulation to pay embankment cess, costs of acquittance, etc. is void though items have been totalled into annual jama.*

All impositions upon the tenants under the denominations of *abwab*, *mathat* or other like appellations in addition to the actual rent are illegal and all stipulations and reservations for the payment of such are void. They cannot legally be exacted nor can the tenant legally bind himself by contract to pay them. Where, along with the rent (malguzari) and road cess, a lessee bound himself to pay :—Embankment cess, Costs of acquittance *Dashora*, *Chait nawami farmaish*, *Tika betti guru bheti*, *Batchha pi jangala isimnavisi*, *Kathiari*, *Dewani dastur* and *Mahal Uprohili*.

Held, that though all the items were totalled up into an annual jama, the items other than rent and road cess were illegal *abwabs* and not recoverable by a landlord from his tenants, and stiputations for their payment were by S. 74 of the Bengal Tenancy Act, void. (Case-law discussed.) (*Dawson-Miller, C. J. and Foster, J.*) W. W. BROUCKE *v.* SRI PANCH RANI CHHATAR KUMARI. **4 Pat. 404 = 86 I.C 597 = 6 P.L.T.331 = 1925 P. H. C. C. 89 = A. I. R. 1925 Pat. 421 (429).**

——Dak *and* Bhet *expenses were held as no* abwabs.

Where the rent of land was fixed at a certain rate, *per Kani* but over and above that the tenant had to pay a certain amount for improvement of *Dak* and *Bhet* expenses in respect of the land and the total amount payable by the tenant according to the calculation mentioned in the *kabuliat* was distributed over certain instalments and the whole sum mentioned in the *kabuliat* as rent.

Held, that the *Dak* and *Bhet* expenses were not *abwabs* within S. 74, especially when the *kabuliat* further provided that on occasions of marriage and other auspicious ceremonies the tenant shall pay *rajdhuti* and *selami* according to the practice prevailing in the mouza. (*Suhrawardy and Page, JJ.*) NALINI BHUSAN GUPTA *v.* ALI MIA. **51 Cal. 643 = 79 I. C. 346 = A. I. R. 1924 Cal. 877.**

——*Illegal abwabs—No distinction lies between raiyats and intermediate tenants.*

As regards the imposition of illegal abwabs over and above the rent for the lands, no distinction is made in the Act between a raiyat and any intermediate tenant except in the case of a permanent *mukarrari* lease as provided in Cl. 3 of S. 74 and in S. 179 of the Act.

(*Dawson-Miller, C. J. and Foster, J.*) W. W. BROUCKE *v.* SRI PANCH RANI CHHATAR KUMARI.

4 Pat. 404 = 86 I. C. 597 = 6 P. L. T. 331 = 1925 P. H. C. C. 89 = A. I. R. 1925 Pat. 421 (429).

S. 74—"Actual rent."

———*Tenancy before Act—Rent under S. 74 is that recoverable under Regulation V of* 1812, *Cl.* 3.

In the case of a permanent tenure which had come into existence before the passing of the Bengal Tenancy Act the actual rent within the meaning of S. 74 of the Act would be the amount recoverable as rent under Cl. 3, Regn. V of 1812, that is to say, the whole specific sum which the permanent tenure-holder agreed to pay when his tenure was created, whether it contained *abwab* or not. 18 C. L. J. 83, Foll.; 15 Cal. 828, not Overruled by 17 Cal. 131 (P. C.). Case-law discussed. (*Das and James, JJ.*) GOPAL SARAN *v.* MAHESHWARI PRASAD. **10 P. L. T. 329 = 8 Pat. 655 = 119 I. C. 65 = A. I. R. 1929 Pat. 307.**

———The words "actual rent" in S. 74, cannot be taken to mean either a fair and equitable rent or rent at customary or pergana rates. (*Lord Sinha.*) RANI CHATTAR KUMARI DEVI *v.* W. W. BROUCKE.

54 I. A. 432 = 26 A. L. J. 19 = 8 P. L. T. 813 = 32 C. W. N. 260 = 47 C. L. J. 90 = 106 I. C. 571 = A. I. R. 1927 P. C. 250 = 54 M. L. J. 293.

S. 74—Illegal cesses.

———In all cases about illegal cesses, the question will primarily turn about the meaning of the words "actual rent" used in S. 74. (*Mukerji and Cammiade, JJ.*) JOGESH CHANDRA *v.* SHARAFUDDIN.

54 Cal. 799 = 46 C. L. J. 297 = 32 C. W. N. 81 = 105 I. C. 279 = A. I. R. 1927 Cal. 857.

S. 74—Kabuliyat.

———*Annual rental agreed to be paid in* kabuliyat *must be paid.*

A lessee is bound to pay the rent mentioned in his *kabuliyat* as the annual rental comprising road cess, embankment cess, etc., and cannot evade this liability because the raiyats may not or do not pay him what they used to pay to the lessor. 16 I. A. 152, Dist. (*Lord Sinha.*) RANI CHATTRA KUMARI DEVI *v.* W. W. BROUCKE. **54 I. A. 432 = 26 A. L. J. 19 = 8 P. L. T. 813 = 32 C. W N. 260 = 47 C. L. J. 90 = 106 I. C. 571 = A. I. R. 1927 P. C. 250 = 54 M. L. J. 293.**

S. 74—"Malguzari."

———The word 'Malguzari' or the words 'Malguzari Bakaya' cannot be limited to the actual rent but must be understood as meaning that the landlord was crediting the payment to whatever was due to him without making any distinction between rent or otherwise. A. I. R. 1927 P. C. 250, Rel. on. (*Das and Ross, JJ.*) HASAN IMAM *v.* BRAHMDEO SINGH.

A. I. R. 1930 Pat. 301.

——*Malguzari means revenue.*

The word "malguzari" ordinarily means revenue, and not rent, much less actual rent. A. I. R. 1925 Pat. 421, Reversed. (*Lord Sinha.*) RANI CHATTRA KUMARI DEVI *v.* W. W. BROUCKE. **54 I. A. 432 = 106 I. C. 571 = 26 A. L. J. 19 = 8 P. L. T. 813 = 32 C. W. N. 260 = 47 C. L. J. 90 = A. I. R. 1927 P. C. 250 = 54 M. L. J. 293.**

S. 74—Scope.

———*Realization of* neg *and* dak *cess from tenants attracts provisions of S.* 74*—Payment of illegal amounts is no bar to suit for enhancement of rent under S.* 30.

Where it is established beyond doubt that a sum of nine pies in a rupee is realized from tenants as *neg* and *dak* cess and not as rent, the provisions of S. 74 are attracted, and the sum being illegal is irrecoverable from tenants. The payment of such illegal amounts by the tenant is no bar to suit for the enhancement of rent and when such enhancement is claimed it is to be claimed upon the jama as recorded in the survey Record-of-Rights. A. I. R. 1929 Pat. 661, Rel. on. (*Wort, J.*) RAMESHWARDHARI SINGH *v.* MAHABIR SINGH.

10 P. L. T. 700 = A. I. R. 1930 Pat. 76.

———*Contracts of service in lieu of rent.*

Contracts to do gratuitous service in lieu of rent are governed not by Bengal Tenancy Act but by Transfer of Property Act. (*Mitter, J.*) RADHU HARI *v.* NARENDRANATH. **49 C. L. J. 189 = 115 I. C. 34 = 56 Cal. 862 = A. I. R 1929 Cal. 224.**

S. 75—Scope.

———*Purchase of land and arrears of rent—Purchaser is not mere assignee of arrears and can sue as landlord and take benefit of S.* 75.

Where the plaintiff purchases the landlord's title along with the arrears of rent and becomes the landlord, he is entitled to sue for rent and to obtain a rent-decree as a landlord and is also entitled to the benefit of S. 75. He is not a mere assignee of the arrears of rent; 3 P. L. W. 179 and 63 I. C. 424, Dist.; 41 Cal. 926, Foll. (*Das and Ross, JJ.*) HIRDAY NARAIN SINGH *v.* JUGAL PRASAD SINGH. **8 P. L. T. 201 = 97 I. C. 373 = A. I. R. 1927 Pat. 2.**

Ss. 76 and 182—Homestead land.

———*Building of permanent house by raiyat is permissible.*

It is competent to an occupancy tenant to erect a pucca house on homestead land not held as part of the occupancy holding in the absence of a local custom or usage to the contrary. S. 76 of the B. T. Act does not prohibit the tenant from so building. (*Mookerjea, A. C. J. and Fletcher, J.*) SURENDRA NATH SAHU *v.* NAKOOR CHANDRA CHAKRAVARTHI.

64 I. C. 716 (Cal.).

Ss. 76 and 30—Landlord and Tenant.

———*Landlord is not bound to provide tenants with means to cultivate.*

The landlord being not bound in the absence of contract or custom to provide necessary irrigating facilities to the tenants, the tenants cannot claim suspension of the nagdi rent for want of facilities. (*Das and Ross, JJ.*) PARTAB NARAIN SINGH *v.* NATHAN SINGH.

1924 P. H. C. C. 173 = 79 I. C. 858 = 5 P. L. T. 629 = A.I.R. 1924 Pat. 605.

S. 80 (a) and (b)—Land Tenure.

———Utbandi *character of tenures continues until order under S.* 80 (*a*) *is passed, notwithstanding acquisition of occupancy right before such order.*

Irrespective of the question whether occupancy rights have or have not been acquired, the *utbandi* character of tenures continues until order under S. 180 (*a*) determining the annual rental with respect to those tenures, has been passed. (*Mitter, J.*) NAFUR CHANDRA *v.* JATINDRA NATH. **118 I. C. 881 = A. I. R. 1929 Cal. 206.**

S. 85—Application.

———Section 85 does not apply to homestead lands. (*Cuming and Roy, JJ.*) JOGENDRA CHANDRA *v.* MONMOHINI DEBI. **105 I. C. 290 = A. I. R. 1928 Cal. 156.**

S. 85—Occupancy right.

———No kabuliyat can grant an occupancy right. (*Rankin, C. J. and Mukerji, J.*) ABDUL HAMID *v.* YAKUB ALI. **33 C. W. N. 1193 = 123 I. C. 266 = A.I. R. 1930 Cal. 315.**

S. 85—Permanent lease.

——*Permanent lease granted on the face of the deed by raiyat not being a fixed rate raiyat—Lease registered—Lease is inoperative as a permanent lease but liable to be terminated as provided by S.* 49 (b).

Where the lease purporting to be of a permanent character is granted, on the face of the document, by a raiyat (not being a raiyat holding at a fixed rate) to an under-raiyat, the lease is not operative as a permanent lease between the raiyat and the under-raiyat. Registration of such a document is null and void. But as the tenancy of an under-raiyat may be created without a written lease, the grantee in such a case is an under raiyat who holds otherwise than under a written lease, and his tenancy is liable to be terminated in the manner provided by S. 49 (*b*); till the tenancy has been thus terminated, the grantor cannot treat him as a trespasser. Where the lease, purporting to be of a permanent character, is granted by a person who, on the face of the document, professes to have a higher status than that of a raiyat (for example, that of a tenure-holder or a raiyat holding at a fixed rate), the grantee, when his title as permanent lessee is challenged by his grantor may invoke the aid of the doctrine of estoppel and plead that the grantor cannot be permitted to prove the falsity of the recitals in the document (on the faith of which he took the lease) so as to enable him to derogate from his grant. It is doubtful whether such plea may be defeated by the grantor on proof that they had conspired by false recitals to evade the provisions of the statute. (*Mookerjee, A. C. J. Fletcher, Chatterjea, Teunon and Richardson, JJ.*) CHANDRA KANTA NATH *v.* AMJAD ALI. **48 Cal. 783 = 25 C. W. N. 4 = 61 I. C. 466 = A. I. R. 1921 Cal. 451.**

Ss. 85 and 49—Record-of-Rights.

——*Entry showing that under-raiyats had acquired occupancy rights—Entry based on* kabuliyat *which contained no clause entitling plaintiff to eject defendants, under-raiyats, but contained term that it was year to year tenancy—If* kabuliyat *be treated as permanent lease it offended against Bengal Tenancy Act, S. 85—If treated as year to year lease, it could not protect defendant from ejectment—So entry based on it was void.*

There was an entry in the Record-of-Rights to the effect that under-raiyats defendants had acquired occupancy right. The *kabuliyat* did not contain any clause entitling the plaintiff to eject the defendants, but contained a term that it was a *san basen kabuliyat, i. e.*, it was a tenancy from year to year.

Held, that if the *kabuliyat* was treated as creating a permanent lease, it must be regarded as void since it would offend against S. 85. On the other hand, if it was treated as a year to year lease, it did not protect the defendants from ejectment upon notice under S. 49. In either view of its terms, therefore, the *kabuliyat* could not create a right of occupancy in the under-raiyats; and hence the Record-of-Rights based on it was not correct. 27 C. L. J. 107 and 28 C. L. J. 91, Foll. (*Mitter, J.*) EAKUBALI PANDIT *v.* MUHAMMAD ALI. **49 C.L.J. 352 = A. I. R. 1929 Cal. 450.**

S. 85 (2)—Registered lease.

——*Lease registered contrary to S.* 85 (2) *through misapprehension of registering officer—No collusion between lessor and lessee to evade the provisions—Lease is inoperative beyond nine years.*

Where there is no evidence that lessor and lessee conspired by false or equivocal recitals to evade the provisions of S. 85 (2) the lease that was admitted to registration contrary to the provisions of S. 85 (2) through a misconception of the registering officer does not affect the property demised, at any rate beyond the period of nine years. (*Miller, C. J. and Macpherson, J.*) TARINS SINGH *v.* SAT NARAIN. **6 P. L. T. 787 = 1925 P. H. C. C. 281 = 90 I. C. 895 = A. I. R. 1926 Pat. 9.**

S. 85 (2)—Registered Sub-lease.

——*Registered sub-lease in perpetuity is admissible in evidence.*

A sub-lease by a raiyat granted and registered in contravention of the provisions of S. 85 (2) of the B. T. Act is inadmissible in evidence. A raiyat is not precluded from questioning the validity of a sub-lease purporting to be a lease in perpetuity where there was no misrepresentation by him as to the extent of his interest or as to his status as raiyat. In such a case the doctrine of estoppel has no application. (*Teunon and Newbould, JJ.*) RAJ KUMAR DAS *v.* PANCHKORI TALUQDAR. **60 I. C. 507 (Cal.).**

——*Sub lease for period exceeding nine years—Evidence of—Tenancy—Sub-lessee having subsisting tenancy.*

A sub-lease granted by a raiyat after the passing of the B. T. Act for a term exceeding nine years and registered in contravention of the terms of S. 85 (2) of the Act is inadmissible in evidence to prove the tenancy of an under-raiyat. Where, however, the sub-lessee has a subsisting tenancy he can defend his possession or recover possession on being dispossessed on the strength of such subsisting tenancy even though the lease cannot be produced to prove the tenancy. (*N. R. Chatterjee, and Panton, JJ.*) NANDA KUMAR *v.* DINBANDU NANDI. **59 I. C. 748 (Cal.).**

S. 85—Scope.

——*Landlord purchasing occupancy holding under execution sale—Under-tenant holding over—Suit for ejectment—Holding over amounted to sub-letting otherwise than by registered instrument and was rendered invalid against landlord if not consented to.*

A landlord after the purchase of an occupancy holding at a sale held in execution of his rent decree sued for the ejectment of an under-raiyat who was holding over after the expiry of the registered under-raiyat lease for a period of nine years.

Held, that the under-raiyat after the expiry of original terms was holding under a new sub-letting otherwise than by registered instrument, and as such the tenancy was invalid as against the landlord in the absence of the proof of landlord's consent, bringing the case within the purview of S. 85. (*Rankin, C. J. and C. C. Ghose, J.*) GOPAL CHANDRA *v.* KHATAR KARIKAR. **33 C.W.N. 1207 = A. I. R. 1930 Cal. 262.**

——*A raiyat agreeing not to evict an under-raiyat except under certain contingencies contravenes the provisions of the section.*

An agreement by a raiyat not to evict his under-raiyat except on a certain contingency has the effect of making him a permanent tenant and as such contravenes the provisions of S. 85. (*Mitter, J.*) BRINDABAN CHANDRA *v.* MT. GIRIBALA DUTTA. **114 I. C. 83 = A. I. R. 1928 Cal. 478.**

——*Lease in contravention of provisions of S. 85—Tenant in possession on the basis of the* kabuliyat*—Dispossession by subsequent lessees—Tenant is entitled to recover land.*

Although an under-raiyat's lease is in excess of what a raiyat is entitled to grant to an under-raiyat under the provisions of S. 85, yet, if the under-raiyat was in possession of the property on the basis of the *kabuliyat*, he has sufficient interest in the property to recover the land if dispossessed by the subsequent lessees from the raiyat.

24 C. L. J. 539; 29 C. L. J. 479; and 22 C. W. N. 61, Foll.; 17 C. W. N. 468 and 17 C. W. N. 59, Dist. (*Mallik, J.*) RAI CHARAN PAL *v.* JADU NATH PAL.
116 I.C. 155 = A. I. R. 1928 Cal. 376.

———*Under-raiyati lease—Mere fact of impleading the alleged under-raiyat as defendant in rent suit does not imply landlord's consent to under-raiyat's lease.*

In a suit for rent against a raiyat the landlord also impleaded as *pro forma* defendant another person alleging to be an under-raiyat.

Held, that the mere fact that the person was made a defendant to the suit does not imply a consent by the landlord to the under-raiyati lease in his favour. (*Greaves and B.B. Ghose, JJ.*) MANIRADDI MOLLA *v.* AMBICA CHARAN. **91 I.C. 668 = A.I.R. 1926 Cal. 734.**

———*Stipulation for renewing an under-ryoti lease is valid.*

In spite of the provisions of S. 85, Bengal Tenancy Act, a stipulation contained in a lease granted by a raiyat to an under-raiyat that after the expiry of the term for which the lease was granted the raiyat would grant the under-raiyat a fresh lease is valid. Where a stipulation for a lease for a fresh term upon the expiry of the term already settled is contained in a lease, the heirs of the lessee are competent to execute a fresh kabuliyat of the covenant. In such a case the question involved is not one of heritability but of simple contract. 20 C.W.N. 948; 28 C.L.J. 507, Foll. (*Suhrawardy and Chotzner, JJ.*) SHULACHANA MAZUMDAR *v.* KALI BIBI. **41 C.L.J. 604 = 79 I.C. 317 = A.I.R. 1925 Cal. 516.**

———*Raiyat at fixed rate can give permanent tenure to under-raiyat.*

S. 85 does not bar a raiyat at fixed rates from making a permanent settlement with the under-raiyats or giving them a transferable heritable interest in the land. 9 C.W.N. 144, Ref. (*Newbould and Panton, JJ.*) PROBODH CHANDRA DAS *v.* BIRSINHA BAGANI.
71 I.C. 319 = A.I.R. 1924 Cal. 350.

———*Agreement to transform tenancy of under-raiyat into heritable one is valid.*

An agreement to transform the tenancy of the under-raiyat into a heritable tenancy is not in contravention of the terms of S. 85. (*Mookerjee, A.C.J. and Fletcher, J.*) AMINULLA CHOUDHURY *v.* MOHABAT ALI.
25 C.W.N. 715 = 60 I.C. 457 = A.I.R. 1921 Cal. 519.

Ss. 85 and 18, cl. (a)—" Transfer".

———*"Transfer" in S. 18, cl. (a) includes a lease—S. 18 controls S. 85.*

The term "transfer" in cl. (*a*) of S. 18 includes a lease. S. 85 is controlled by S. 18. 19 C.W.N. 1110, Diss. from. (*Mookerjee, A. C. J. and Fletcher, J.*) AMAR CHAND ROY *v.* PRASANNA DASI.
25 C.W.N. 9 = 61I.C. 529 = A.I.R. 1921 Cal. 603.

S. 86, cls. (6) and (7)—Surrender.

———*Surrender is operative against transferee of portion of non-transferable occupancy—Sale of whole or part creates no incumbrance.*

The raiyat has an absolute right of surrender subject to cl. 6 of S. 86. By that clause, where there is an incumbrance secured by a registered instrument, either the landlord or the incumbrancer can defeat the raiyat's right to surrender, but in other cases it would seem clear that neither the landlord nor the incumbrancer can object to the surrender, and the only ground upon which either of them could object is the ground mentioned in cl. 6. Nor will it avail the landlord that the raiyat had expressly agreed with him in writing, not to exercise his right of surrender. Under cl. 7 the landlord and the raiyat might enter into a valid arrangement for surrender as between themselves, but this would not affect the rights of a registered incumbrancer whose interest the landlord would be bound to recognise. Under cl. 7 the consent of the landlord is necessary and he would, therefore, be in no better position than an assignee of the tenancy who could claim no greater rights than those of his assignor. In all cases, however, not governed by cl. 6 the landlord would be bound to accept the surrender. No provision is made in the Act protecting the interest of the transferee of a part or the whole of a non-transferable holding in cases either of surrender or abandonment. The transfer of a non-transferable holding is not binding upon the landlord in the sense that it imposes upon him any obligation to recognise the transferee as his tenant. The transfer of a portion of the holding does not confer upon the landlord any right of re-entry as long as the tenant continues in possession of the remainder and pays the rent. Where there has been a transfer of a portion of the holding and a subsequent relinquishment by the raiyat, the landlord is entitled to enter and this appears to be in accordance with the provisions of the B. T. Act. Unless the case falls within cl. 6 the landlord is bound to accept the surrender and cannot object on the ground that the raiyat has created incumbrances or otherwise dealt with the land in a manner not contemplated by cl. 6. But if the landlord is bound by the surrender his rights under cl. 5 come into operation and entitle him to enter on the land and eject any one not protected under cl. 6. A purchaser from a raiyat of a portion of a non-transferable occupancy holding without landlord's consent is not an incumbrancer. A sale of the whole or a portion of an occupancy raiyati interest creates no incumbrance upon that interest. The interest remains unimpaired; the ownership alone changes. No sub-tenancy is created between the vendor and vendee, both the part transferred and the part retained remain whole and unincumbered. The word "incumbrance" implies a subsidiary interest charged upon or carved out of a parent estate such as a lease, mortgage, charge, easement or other interest limiting the full rights of ownership in the estate to which it appertains. It is something which affects the quality of the parent estate making it something less than it was before the incumbrance was created. A division of the estate between two or more owners does not impair its quality or incumber it in any way. Case-law reviewed. (*Dawson Miller, C.J., Mullick, Jwala Prasad, Foster and Macpherson, JJ.*) MT. SHEORAJI KUAR *v.* DHANI MIAN. **3 Pat. 1 = 75 I.C. 794 = 4 P.L.T. 581 = 1 Pat. L.R. 402 = 1923 P.H.C.C. 305 = A.I.R. 1924 Pat. 1 (F.B.).**

———*Occupancy tenant—Mortgage of holding by—Subsequent surrender will not affect rights of mortgagee.*

A person who has parted with his interest in property cannot deal with that interest by surrendering it in favour of the landlord, and he cannot confer upon the landlord any higher right than he could have passed to any other person by assignment. The interest of the defendant in the disputed property as mortgagee, therefore, cannot be affected by the surrender in favour of the landlord. That is laid down in cl. (*b*) of S. 86 of the Bengal Tenancy Act. (*Chatterjee and Pearson, JJ.*) AMIRUDDIN MAHMAD *v.* SHANKAR BORMAN.
67 I.C. 91 = A.I.R. 1922 Cal. 56.

———*Occupancy raiyat having transferred portion of non-transferable holding cannot surrender to landlord either such portion or whole holding.*

An occupancy raiyat who has transferred part of his non-transferable holding, is not competent to surrender to his landlord the portion so transferred either by surrender of that portion alone or by surrender of the whole inclusive of such portion. Case-law fully discussed. (*Mukerjee, C. J., Fletcher, Chatterjea, Teunon and Richardson, JJ.*) MOHSENUDDIN *v.* BAIKUNTHA CHANDRA. **48 Cal. 605 = 25 C. W. N. 29 = 61 I. C. 443 = A. I. R. 1921 Cal. 444.**

———*Non-transferable holding mortgaged by tenant—Mortgagee's rights are preserved on surrender.*

Where a tenant returns a non-transferable holding to the landlord, the transaction is a surrender whether it is with or without consideration. When there is a surrender to the landlord by the tenant, the right of the tenant's mortgagee or incumbrancer is preserved. 21 C.L.J. 185; 19 C.W.N. 268, Relied upon ; 42 C. 172 ; 12 C. W. N. 878, Ref. (*Ross, J.*) BISHESWAR CHAUDHRI *v.* ALI KARIM. **63 I. C. 500 (Pat.).**

S. 87—Abandonment.

———*Abandonment is established by cessation of cultivation and absence of arrangement for payment of rent—Leaving the village is not necessary.*

All that is necessary, in order to establish an abandonment by a raiyat, is to show that he has ceased to cultivate his holding either by himself or by some other person and that he has made no arrangement for the payment of his rent. The tenant need not have left the village in which the holding is situate in order to constitute abandonment under S. 87. (*Mitter, J.*) AMINADDIN *v.* CHANDRA NATH. **48 C. L. J. 390 = 114 I. C. 153 = A. I. R. 1929 Cal. 120.**

———*C. P. Code, S.* 100.

Abandonment is a question of fact. (*Mitter, J.*) AMINADDIN *v.* CHANDRA NATH. **48 C. L. J. 390 = 114 I. C. 153 = A. I. R. 1929 Cal. 120.**

———*Tenant of a non-transferable occupancy holding leaving the village in Falgun* 1324—*Landlord giving a settlement of the holding in Baisakh* 1325—*Sub-lease by the tenant in Ashar* 1325 *and two days later sale of a portion of the holding—Period was too short for abandonment and the lease and sale did not amount to a transfer.*

D was a tenant of a non-transferable occupancy holding. He died in 1320, leaving *R* and *K* as his heirs. *R* and *K* left the village in Falgun 1324. The landlord in Baisakh 1325 gave a settlement of the tenant's holding to the plaintiff. In Ashar 1325 *R* and *K* granted a sub-lease to defendant 1 and delivered possession to him. Two days afterwards they sold a 15-anna share of it to defendant 2. Plaintiff brought a suit for ejectment against *R* and the defendants on the ground of abandonment.

Held, that the period from Falgun to Baisakh was too short for an abandonment. Besides the granting of the sub-lease and of the sale of 15 annas did not amount to transfer. There was, therefore, no abandonment. 42 Cal. 172 (F.B.), Rel. on. (*B.B. Bhose and Garlick, JJ.*) ASWAMI KUMAR *v.* HURKUMAR. **32 C. W. N. 1111 = 114 I. C. 482 = A. I. R. 1928 Cal. 891.**

———*Mortgage of a non-transferable occupancy holding—Mortgagee subsequently foreclosing and getting possession—This amounts to abandonment.*

There can be no distinction between a sale of a whole holding and a mortgage of the whole holding where the mortgagee has foreclosed and been given possession by the Court. In the case of a non-transferable occupancy

holding, such a transfer amounts to abandonment such as entitles the landlord to re-enter. Anything short of showing that the interest of the tenant has ceased will not entitle landlord to re-enter. The mere fact that the tenant is allowed to live in the house after delivery of possession does not affect the principle. 42 Cal. 172, Expl. and Rel. on. (*Rankin, C. J. and Mukherji, J.*) JOGESH CHANDRA *v.* RADHA GOBINDA. **32 C. W. N. 1027 = 115 I. C. 265 = A. I. R. 1928 Cal. 848.**

———*Transfer of a part only or not by way of sale—Landlord cannot recover possession in the absence of abandonment.*

Where the transfer is of a part only or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding unless there has been (*inter alia*) an abandonment within the meaning of this section. 42 Cal. 172, Foll. (*Rankin, C. J. and Mukherji, J.*) JOGESH CHANDRA *v.* RATHA GOBINDA. **32 C. W. N. 1027 = 115 I. C. 265 = A. I. R. 1928 Cal. 848.**

———*Sale of non-transferable holding—Part of it in tenants' possession—There is no abandonment and landlord has no right of re-entry.*

A landlord can question the sale of a non-transferable occupancy holding only, if it has been followed by complete abandonment of the lands by the tenant. Where a tenant remains in possession of some of the lands, it follows that there has been no abandonment which entitles the landlord to re-enter on the lands in possession of the purchaser, as he has not taken possession of all the lands in the holding. (*Cammiade and S. K. Ghose, JJ.*) BENOD BEHARI *v.* JITENDRAPROSAD. **48 C.L.J. 546 = 117 I. C. 847 = A.I.R. 1928 Cal. 748.**

———*Holding put to sale and purchased cannot be said to be abandoned.*

To constitute an abandonment there must be voluntary abandonment of residence by the tenant without notice to the landlord and without arranging for payment of the rent as it falls due and cessation of cultivation of the holding either by himself or by some other persons. The mere fact that the plaintiff's holding was put to sale and purchased and that the holding was non-transferable does not go far enough to constitute proof of abandonment. The sale of a part of the holding, though invalid in the presence of the landlord who has not given his consent, is not an abandonment. (*Bucknill and Foster, JJ.*) FIRANGI RAI *v.* CHHEDDY PANDAY. **97 I. C. 302 (Pat.).**

———*No abandonment where tenant usufructuarily mortgages his holding but still resides in the village.*

Where the transfer is by way of usufructuary mortgage, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (*a*) an abandonment within S. 87, or (*b*) relinquishment of the holding, or (*c*) a repudiation of the tenancy.

In order to make out a case of abandonment under S. 87, the landlord must establish, *first* that the raiyat has voluntarily abandoned his residence without notice to him; *secondly*, that he has not arranged for payment of his rent as it falls due; and, *thirdly*, that he has ceased to cultivate his holding either by himself or by some other person. Where therefore the tenant executed a usufructuary mortgage, but he still resided in the village and the equity of redemption still vested in him.

Held, that there was no abandonment within S. 87. (*Das and Adami, JJ.*) SADHU SAO *v.* AWODH BIHAR SARAN SINGH. **7 P. L. T. 1 = 89 I. C. 802 = A.I.R. 1926 Pat. 71.**

——*Transferee of non-transferable holding is only trespasser, as against landlord.*

When the interest of a tenant is inalienable but notwithstanding this, he transfers his interest and puts the transferee in possession the original tenancy may be treated as abandoned and when the transferee takes possession of the land his position is no better than that of a trespasser as against the landlord. (*Greaves, J.*) SREERAM CHUNDER BASU *v.* NAGENDRA NATH BANERJEE. **82 I. C. 958 = A. I. R. 1925 Cal. 417.**

——*Non-transferable holding held by several tenants —One tenant transferring his share—Transfer is not abandonment entitling landlord to re-enter.*

Where there are several tenants in a holding transfer of undivided share by one of the tenants does not amount to abandonment which would entitle the landlord to re-enter. (*Chatterjea and Suhrawardy, JJ*) KARIM CHAKLADAR *v.* SAPARANNESSA BIBI. **25 C.W.N. 717 = 64 I.C. 330 = A.I.R. 1921 Cal. 523.**

S. 87—Burden of proof.

——*Suit for ejectment on the ground of abandonment —Mortgagee obtaining possession by foreclosure—Mortgagee must prove that inference of abandonment should not be drawn.*

Where in a suit for ejectment on the ground of abandonment by the original tenant, it is shown that the defendant is mortgagee who had foreclosed and taken possession of the holding, the burden or proof is on the mortgagee to show why the inference of abandonment should not be drawn. (*Rankin, C.J. and Mukherji, J.*) JOGESHCHANDRA *v.* RADHA GOBINDA. **32 C.W.N. 1027 = 115 I.C. 265 = A.I.R. 1928 Cal. 848.**

S. 87—Ejectment.

——*Part of holding sold in* 1908*—Subsequent partition in* 1919 *between co-sharers of taluk—Portion sold falling to share of plaintiff—Plaintiff suing in* 1922 *to eject purchaser—Purchaser cannot be ejected as he is not trespasser—Suit is also barred as adverse possession began in* 1908 *and not at the date of partition.*

A holding consisting of six plots belonged to *A*. Out of these six plots, three were sold in 1908 to *C*. Subsequently in 1919 there was a partition between the co-sharers of the taluk and the three plots purchased by *C* were allotted to plaintiffs. In 1922 plaintiffs brought a suit to eject *C*, alleging that he was a trespasser on the land.

Held, that the landlords had no right to eject *C* because *A* had not abandoned the holding which would give the landlords the right to khas possession. The act of partition among the landlords without concurrence of the tenant had surely the effect of dividing the holding so as to give the plaintiffs right to recover their share of the rent which had been fixed on the portion allotted to their shares, but that did not confer a new right upon the plaintiffs to bring ejectment against *C* who was not liable to be ejected previous to partition. 2 Pat. L. J. 225, Foll.

Held, further, that the act of the landlords effecting the partition cannot be held to be a trespass by the defendants. Trespass must be considered to have commenced when *A* sold three plots, that is in 1908. (*B. B. Ghose and Garlick, JJ.*) ADAMALI *v.* CHANDU MOLLA. **48 C. L. J. 347 = 32 C. W. N. 1077 = 117 I. C. 696 = A. I. R. 1928 Cal. 876.**

S. 87—Right of—Re-entry.

——*Transfer of occupancy holding—Tenant pleading right of transfer amounts to repudiation of tenancy—Landlord can re-enter.*

Even though there has been no abandonment, repudiation by the original tenant is sufficient to justify the andlord in evicting him. A. I. R. 1924 Cal. 900, Foll.

Where a tenant or occupancy tenant transfers his holding and in a suit for ejectment by the landlord pleads that the tenancy was transferable and he had a right to transfer, he must be deemed to have repudiated the tenancy and the landlord has a right of re-entry. 13 C.W.N. 220, Foll. (*Cuming and B. B. Ghose JJ.*) KINU SHAIKH v. RAJKUMAR GHOSE. **96 I. C. 588 = A. I. R. 1926 Cal. 1160.**

S. 87—Scope

——The provisions of S. 87 are not exhaustive as to abandonment. 4 C. W. N. 493; 19 C. W. N. 1319; 18 C.L.J. 193 and 37 I. C. 942, Foll. (*Mukerji and Mallik, JJ.*) BAIKUNTHA CHANDRA ROY *v.* CHANDRA NATH BANDOPATHYA. **33 C.W.N. 1023 = 123 I. C. 649 = A. I. R. 1930 Cal. 190.**

——*Principles with regard to abandonment govern both raiyats and under-raiyats.*

The principles which govern the case of a raiyat also govern the case of an under-raiyat with regard to the circumstances under which the landlord can re-enter in case of an abandonment. 42 Cal. 751 and 29 C. L. J. 1, Foll. (*Mitter, J.*) AMINUDDIN *v.* CHANDRANATH. **48 C. L. J. 390 = 114 I. C. 153 = A.I.R. 1929 Cal. 120.**

——*Execution sale of a non-transferable occupancy holding after which the tenant takes up a tenancy under the transferee, continues to reside on the homestead lands and cultivates some plots of land on the holding, does not entitle the landlord to sue for* khas *possession either against the tenant or the transferee.*

Where in execution of a decree against the tenant the occupancy holding is sold and afterwards the tenant takes up a tenancy under the transferee, but continues to live on his homestead land and to cultivate some plots of the land on the holding, and there is no proof of his refusal to pay rent to the landlord.

Held, that the landlord cannot sue him or the transferee for *khas* possession. (*Rankin and M. N. Mukerji. JJ.*) ROMESH CHANDRA MITTRA *v.* DAIBA CHARAN DAS. **28 C. W. N. 602 = 78 I. C. 497 = 39 C. L. J. 356 = A.I.R. 1924 Cal. 900.**

——*Abandonment requires complete cessation of interest—There can be abandonment apart from S.* 87.

Where the tenant has granted a usufructuary mortgage but he has not parted with his entire interest in the property, there is abundant authority for saying that the mere fact that he has granted a usufructuary mortgage over the whole property does not in itself entitle the landlord to re-enter especially when he has not left the village or abandoned his residence. Apart from S. 87 of the Bengal Tenancy Act there may be an abandonment of a holding but in such a case it must be proved either that the tenant has transferred his whole interest in the property and ceased to take any further interest therein, as for example by a sale of the whole property, or that he has abandoned the right to re-take possession in future or has either left the village without any intention of returning or done some other act which would clearly indicate that he no longer retained the *spes recuperandi* (1899-1900) 4 C. W. N. 493 ; (1912-13) C. W. N. 802 Dist. (*Dawson Miller, C.J. and Mullick, J.*) RAM LAL MANDAR *v.* KULDIP NARAYAN TEWARI. **3 Pat. 126 = 75 I.C. 841 = 5 P. L. T. 407 = A.I.R. 1924 Pat. 440.**

——*In order to succeed under S.* 87, *plaintiff must prove raiyat's voluntary abandonment without arranging for payment of rent and his ceasing to cultivate the land.*

In order to succeed under S. 87, the plaintiff must establish, *first*, that the raiyat voluntarily abandoned his residence without notice to his landlord. *Secondly*, that he did so abandon his land without arranging for payment of his rent as it fell due, and *thirdly*, that he ceased to cultivate his holding either by himself or by some other person. (*Das and Adami, JJ.*) RAMJANUM SINGH *v.* KHUB LAL SINGH.

2 P.L.T. 219 = 59 I.C. 908 = 1921 P. H. C. C. 151 = A. I. R. 1921 Pat. 142.

S. 87—Surrender.

——*Widow can surrender—Raiyati holding.*

A Hindu widow can abandon a raiyati holding. A surrender is an act of transfer which has to be justified by legal necessity. (*Ross, J.*) DEO NARAYAN SAHU *v.* RAMANAND SAHU. **63 I. C. 211 (Pat.).**

S. 88—Landlord and Tenant.

——*Receipt of rent by the agent—Landlord is not bound by every statement therein.*

It cannot be affirmed as a general proposition of law that a landlord is always bound by every statement given in the receipts of rent by the gomastha. When an agent of the landlord has accepted from the various tenants in the occupation of a holding at one rental, proportionate parts of the rents, it does not bind the landlord to recognize a separation of the tenancy in absence of evidence to connect the landlord with the receipt of any proportionate rate of rent by the agent. 6 C.W.N. 823; 10 C.W.N. 216 and 16 W.R. 97, Ref.; 25 Cal. 531, Dist. (*Rankin, C. J. and Mitter, J.*) MONMOTHA NATH *v.* RAJESWAR RAI.

55 Cal. 355 = 32 C.W.N. 184 = 107 I.C. 81 = A. I. R. 1928 Cal. 315.

S. 88—Necessary parties.

——*Suit by landlord—All co-tenants must be made parties.*

If a landlord desires to obtain a decree good against the land under the Bengal Tenancy Act, he must ordinarily (apart from any question of representation) implead all the co-tenants including the heirs or legal representatives of a deceased co-tenant. Whether one of several tenants can be regarded as a representative of the rest must depend on the circumstances of each case. (*Allanson and Sen, JJ.*) SHYAM SUNDER *v.* GOBARDHAN KAMTI. **7 Pat. 129 = 109 I. C. 519 = 9 P. L. T. 735 = A.I.R. 1928 Pat. 218.**

S. 88—Plea under.

——*Whether division is recognized under S. 88 is question of law and appellate Court has to see the facts justifying inference of sub-division.*

Whether there has been a division of the tenancy such as is recognized by S. 88 or not is a question not of fact but of law and the Court of second appeal has got to see what are the facts that have been found as justifying an inference of law to the effect that there has been a sub-division within the meaning of S. 88. (*Mukerji, J.*) HARI PROSANNA *v.* NISHAPATI SAI.

49 C. L. J. 289 = 120 I. C. 149 = A. I. R. 1929 Cal. 366.

S. 88—Scope.

——*Inference of sub-division cannot be drawn merely from separate realization of rent.*

Merely because there has been separate realization of rent no inference can be drawn to the effect that there was a sub-division which would come within the purview of S. 88. 22 W. R. 295; 22 W. R. 336; 31 Cal. 1026 and 6 C. W. N. 823, Rel. on. (*Mukerji, J.*) HARI PROSANNA *v.* NISHAPATI SAI. **49 C. L. J. 289 = 120 I.C. 149 = A. I. R. 1929 Cal. 366.**

S. 88—Test.

——*Test to determine whether tenure is sub-divided is to see whether parties have come to fresh agreement—Mere receiving rent separately is not sufficient.*

Whether a tenure has been divided or not is a question mainly of fact in each case. Separate shareholders in the landlord family may collect a separate share of the rent without either party intending to divide the tenure; and similarly the landlord may collect separate share of the rent from separate shareholders in the tenant family without the legal position being altered. The question whether a sub-division has been made is really the question whether the parties have come to a fresh agreement, and must be determined by the familiar considerations which attach to such a problem. (*Lord Atkin.*) PRAFULLA NATH *v.* SATYA BHUSAN.

56 I. A. 238 = 119 I. C. 618 = 33 C.W.N. 822 = 30 M. L. W. 310 = 10 P. L. T. 829 = A. I. R. 1929 P. C. 171 = 57 M. L. J. 132 (P.C.).

S. 88—Thiccadar.

——*Thiccadar is not "agent"—Thiccadar splitting up holding* bona fide *for benefit of estate—Landlord is bound by the arrangement.*

A thiccadar is not the agent of the landlord. Consent by a thiccadar given in good faith for the benefit of the estate to an alteration of the area of the holding under him and the apportionment of rent upon the new holdings is binding upon the landlord. 2 P. L. J. 151, Foll. (*Adami and Kulwant Sahay, JJ.*) KESHEO PRASAD *v.* LAKHNATH ROY. **7 P. L. T. 73 = 89 I. C. 21 = A. I. R. 1925 Pat. 796.**

S. 89—Scope.

——*Receiving rent after transfer of non-transferable holding—Lessee cannot be ejected.*

Where after transfer of non-transferable holding, dakhilas were received by transferees from plaintiffs who were then ijardars and after plaintiffs had become landlords by purchase of the proprietary right, and the act of the agent of plaintiffs in receiving the rent from the transferee was not repudiated by the plaintiffs.

Held, the transferee could not be ejected. (*Walmsley and B. B. Ghose, JJ.*) MAHAMMAD KASIRUDDIN PRODHAN *v.* BANI KANTA DAS.

A. I. R. 1923 Cal. 520.

S. 93—Common manager.

——*Appointment of—Objection by co-sharer with separate account — Objection should be taken into account.*

When a co-sharer, however small his interest may be, begins to quarrel with another co-sharer holding an equally small share, then according to the provisions of S. 93 a common manager may be appointed to take charge not only of the shares of the disputants but also of the shares of other co-sharers however large their interest may be. Not only that, if a co-sharer has opened a separate account and is in peaceful possession of his estate, he is also liable to lose possession of his separate estate although the owner of that separate account is totally unconnected with the quarrel between the other co-sharers. In cases where such a consequence is likely to follow the appointment of a common manager on the application of the small shareholders should not ordinarily be made and the objection of the owner of the separate estate to the appointment of a common manager should be taken into account in exercising the discretion given by S. 93 of the Act. (*Greaves and Chakravarthy, JJ.*) PROMATHA NATH MITRA *v.* MANMATHA NATH MITRA. **52 Cal. 231 = 86 I. C. 610 = A. I. R. 1925 Cal. 686.**

——*Expediency of partition suit and appointment of Receiver—Common manager should not be appointed.*

Whenever a dispute between the co-sharers is likely to cause injury only to themselves it may be well avoided by a partition suit and by the appointment of a Receiver by a Civil Court in the course of that suit. The appointment of such a Receiver does not usually involve the consequences which the appointment of a common manager under S. 93 does, and if the co-sharer can easily avoid the necessity of an application under S. 93 by bringing a partition suit, the Court should not ordinarily give relief on an application under S. 93. (*Greaves and Chakravarthy, JJ.*) PROMATHA NATH MITRA *v.* MANMATHA NATH MITRA. **52 Cal. 231 = 86 I. C. 610 = A. I. R. 1925 Cal. 686.**

——*Common manager cannot be appointed to a part of an estate—Previous appointment does not validate a later one.*

The appointment of a common manager must be to the entire estate and not to a portion thereof and former appointment of a common manager to a part only will not validate a later such appointment. (*Newbould and Suhrawardy, JJ.*) BASANTA KUMAR CHAKRAVARTY *v.* ASHUTOSH CHAKRAVARTY. **27 C. W. N. 1040 = 80 I.C. 654 = A. I. R. 1924 Cal. 214.**

S. 93 (6)—Injury.

——*Dispute between co-sharers—Loss of income is "injury".*

The loss of income to the co-sharers on account of a dispute between themselves amounts to "injury to private rights". 21 C. W. N. 240, Foll. (*Greaves and Chakravarthy, JJ.*) PROMATHA NATH MITRA *v.* MANMATHA NATH MITRA. **52 Cal. 231 = 86 I. C. 610 = A. I. R. 1925 Cal. 686.**

Ss. 95 and 97—Common manager.

——*Bengal Court of Wards Act (IX of* 1879), *S.* 60 *—A Court of Wards appointed common manager under Bengal Tenancy Act—All co-sharers do not become wards of Court so as to prevent them from incurring debts or selling their interest, or their creditors from selling property in execution.*

Appointment of Court of Wards as common manager by the District Judge under the provisions of the Bengal Tenancy Act does not render all the co-sharers of the property wards of the Court so as to disqualify them from incurring debts or selling their interest in the property in question or to bar the creditor of such co-sharer from selling his interest in execution of his decree against him. (*B. B. Ghose and Panton, JJ.*) PRASANNA KUMAR SAHA *v.* DHIRENDRA LAL GUPTA. **33 C. W. N. 847 = A. I. R. 1929 Cal. 790.**

——*Mortgage of six annas share—Common manager appointed before sale in execution of the mortgage decree —Manager impleaded in execution—Purchaser cannot separately realize rents of the six annas share.*

Where at the time of the sale of six annas share in an estate under a mortgage decree the estate was under the management of a common manager appointed under S. 95, and all that the purchaser purchased was a six-annas share subject still to the authority of the common manager.

Held, the fact that the common manager had heen made a party to the execution case will not make him liable under the decree. His authority as common manager still existed and the purchaser has no power to collect rents separately so long as the common manager continued to be the common manager. (*Adami and Scroope, JJ.*) ABDUL GAFFUR *v.* DURGA PRASAD. **8 P. L. T. 611 = 104 I. C. 672 = A. I. R. 1927 Pat. 334.**

——*District Judge's sanction is unnecessary for suit against common manager.*

The B. T. Act contains no provision requiring the District Judge's previous sanction for bringing a suit for rent against a common manager or for executing a decree passed in such suit. (*Pearson and Graham, JJ.*) SARAT CHANDRA GHOSE *v.* RAJ KUMAR CHAKRAVARTI. **82 I. C. 327 = A. I. R. 1925 Cal. 334.**

——*Common manager removed or resigning or dead —District Judge has inherent power to appoint successor.*

Where the Common Manager has been removed or has resigned or has died, the District Judge has inherent power to make a proper order for the appointment of a successor for the benefit of the estate.

There is no presumption that when a Common Manager has been removed or has resigned or has died, the contingency contempleted in S. 99 has happened. 10 C. W. N. 437, Ref. (*Mukerjee and Panton, JJ.*) BRINDABAN CHANDRA *v.* JNANENDRA NATH. **35 C. L. J. 75 = 64 I. C. 819 = A. I. R. 1921 Cal. 564.**

Ss. 95 (a) and 97—Court of Wards.

——*Estate brought under Court of Wards through mechanism of B. T. Act—Court of Wards has same powers as in the case of other estates.*

When the Bengal Tenancy Act gives the District Judge the power to direct that an estate be managed by the Court of Wards in such case that body has the same powers as it has in regard to other estates coming within the provisions of the Court of Wards Act including the power of suit. (*Woodroffe and Cuming, JJ.*) SECRETARY OF STATE *v.* ANANDA MOHAN. **34 C L.J. 205 = 66 I. C. 287 = A. I. R. 1921 Cal. 661.**

S. 95 (a)—Estate.

——*Estate to be managed includes accretions and reformations.*

The word "estate" under S. 95 (*a*) means all that the holder is entitled to by way of reformation or accretion. (*Woodroffe and Cuming, JJ.*) SECRETARY OF STATE *v.* ANANDA MOHAN. **34 C. L. J. 205 = 66 I. C. 287 = A. I. R. 1921 Cal. 661.**

S. 98—Common manager.

——*Execution proceedings against common manager appointed under S. 95—Dt. Judge's sanction is essential.*

The sanction of the District Judge should be obtained before proceedings are taken against the common manager appointed under S. 95 for realization of rents. (*Ross and Kulwant Sahay, JJ.*) DURGA PRASAD *v.* A. H. FORBES. **6 P. L. T. 127 = 86 I. C. 787 = 1925 P. H. C. C. 109 = A. I. R. 1925 Pat. 374.**

S. 99—Common manager.

——In an application by the co-owners under S. 99 of the B.T. Act for restoration of the management of their share, the common manager is not and cannot be made a party to the proceeding. (*Chatterjee and Panton, JJ.*) BHEGABATI DEBYA CHAUDHURANI *v.* NILKANTHA CHATTERJEE. **59 I. C. 191 = 24 C. W. N. 927.**

S. 99—Restoration.

——*Dispute between co-owners effectively settled— Restoration must be ordered.*

When the question arises for restoration of the estate under S. 99 of the Act, and it is alleged that the dispute is no longer existing, what the Judge has to consider is whether it has been really or effectively settled in such a way that the management will be conducted by the co-owners without inconvenience to the public or injury to private rights. If he is satisfied that the dispute has been settled, he cannot refuse to pass a restoration order, merely because there is apprehension that the co-owners

will oppress the tenants or that a breach of the peace may result. (*Greaves and Mukerji, JJ.*) ABDUL AZAHAR CHOWDHURY *v.* COLLECTOR OF BACKERGUNJ.
44 C. L. J. 569 = 87 I. C. 815 = A. I. R. 1925 Cal. 1168.

Ss. 101-115-A—Applicability.

——*Situation of land in municipal area is not sufficient to make Chap.* 10 *inapplicable.*

In the absence of any notification, as is contemplated by S. 1, the mere fact that the land is situate within municipal area is not sufficient for holding that Chap. 10 does not apply to it. (*Greaves and Mukerji, JJ.*) ISWAR CHANDRA *v.* JOGENDRA LAL.
98 I. C. 137 = A. I. R. 1927 Cal. 126.

Ss. 101-115-A—Scope.

——*Chap.* 10 *is not limited to suits between landlord and tenant only.*

The provisions of Chap. 10 are of wider application than merely to questions between landlord and tenant and cannot be limited to suits between landlord and tenant only. (*B. B. Ghose and Graham, JJ.*) FAZALAR RAHAMAN BISWAS *v.* GOLAM KADER MIA.
30 C. W. N. 689 = 96 I. C. 959 = A. I. R. 1926 Cal. 862

——*Entry in record-of-rights as to amount of rent of agricultural land is admissible as corroborative evidence in suit for recovery of rent.*

Non-agricultural lands are not subject to the provisions of Chap. 10 of the B.T. Act. But in a suit for the recovery of rent an entry in the record-of-rights with respect to the amount of rent is admissible in evidence as corroborative of other evidence in the suit although the weight to be attached to such entry would depend on the circumstances of each case. (*Suhrawardy and Page, JJ.*) SEN RAKIMJAN *v.* AMAR KRISHNA CHOUDHURY.
78 I. C. 169 = A. I. R. 1925 Cal. 404.

Ss. 101 and 111—Entertaining.

——*Entertaining means considering.*

To entertain a suit or application within S. 111 merely means the consideration of a suit or application and it equally applies to a suit instituted before the declaration under S. 101 is made and to suits instituted after such a declaration has been made. (*Greaves and Mukerji, JJ.*) KANAK KANTI ROY CHOUDHURY *v.* SRISHTIDAR MONDAL.
88 I. C. 670 = A. I. R. 1925 Cal. 1211.

Ss. 102 (b) and 50—Applicability.

——"*Kaimi*" *added to* "*settled raiyats*" *in the entry—Entry is not bad—Bengal Tenancy Act, S.* 50.

The addition of the word "kaimi" to "settled raiyats" has not the effect of making the entry a bad entry, so as to bar the operation of S. 50. (*Mukerji and Graham, JJ.*) SHYAMA CHARAN GHOSE *v.* FAKIR CHANDRA.
101 I. C. 45 = A. I. R. 1927 Cal. 546.

S. 102 (c)—Scope.

——*Revenue officer is to determine existing rent and not to settle a fair rent.*

The Revenue Officer is required under S. 102 (*c*) to determine the existing rent and not to settle a fair rent. 21 Cal. 38, Foll. (*Mukerjee and Rankin, JJ.*) RAMA NATH SANT *v.* OFFICIAL TRUSTEE OF BENGAL.
29 C.W.N. 517 = 87 I. C. 1014 = A. I. R. 1925 Cal. 799.

——*Section is not mandatory—Entries in compliance with the section do not attract presumption under S.* 50.

Provisions of S. 102 are not mandatory. The section provides that certain matters may be included without or in addition to other particulars stated in the section. An entry of a person as a settled ryot can be made in the record-of-rights under S. 102 (*b*) as it is a compliance with the section and consequently the presumption under S. 50 does not arise. (*Greaves and Graham, JJ.*) MOFIZUDDIN CHOWDHURY *v.* RAJENDRA NATH SANYAL. **29 C. W. N. 209 = 84 I.C. 989 = 40 C. L. J. 248 = A. I. R. 1925 Cal. 208.**

S. 102 (h)—Settlement officer.

——*Settlement Officer is bound to record grounds of remission of rent.*

The Settlement Officer is bound to record the conditions on which remission of rent may be claimed by tenant under S. 102 (*h*); A. I. R. 1925 Cal. 564, Foll. (*B. B. Ghose and Graham, JJ.*) OFFICIAL TRUSTEE OF BENGAL *v.* AKSHOY KAR. **97 I. C. 590.**

S. 102—Sub-letting.

——*Prohibition to sub-let at a rate higher than that fixed by settlement—Contract to pay a higher rent cannot be enforced.*

Where in temporarily settled estates Government has prohibited sub-letting lands at a rate higher than that fixed by temporary settlement, contract to sub-let at a higher rent cannot be enforced. 32 Cal. 463 and 37 Cal. 449, Dist. (*Suhrawardy and Garlick, JJ.*) BANSIDHAR DOBEY *v.* BUDANGAL DAS.
49 C. L. J. 65 = 117 I. C. 604 = 33 C. W. N. 362 = A. I. R. 1928 Cal. 763.

S. 103—Jurisdiction.

——*Boundaries between adjacent estates about which dispute exists—Executive officer cannot determine.*

An executive officer, acting under the provisions of S. 103 as it stood in 1896 has no power to determine the boundaries between conterminous estates as to which a *bona fide* controversy exists between the owners of such estates. 19 Cal. 643, Foll. (*Suhrawardy and Duval, JJ.*) BEJOY CHAND MAHATAB *v.* SARAT KUMAR ROY. **86 I. C. 767 = A. I. R. 1925 Cal. 1253.**

S. 103—Presumption.

——*The entry in the Record-of-Rights raises some presumption.*

An entry in the Record-of-Rights about non-agricultural land raises some presumption with regard to the correctness of the facts recorded in it. (*Allanson and Sen, JJ.*) BRINDRABAN PRASAD *v.* GOPAL SARAN.
8 P. L. T. 817 = 104 I. C. 514 = A. I. R. 1928 Pat. 36.

——*Occupancy rights obtained by under-raiyat by custom—Possession of such right by under-raiyat must be recorded as an incident of tenancy under S.* 102 *and presumption under S.* 103 *does apply to such an entry.*

It cannot be laid down as a general rule that no incident of a tenancy, how vitally it may affect the status of a tenant, can be properly recorded under S. 102 (*h*) if the right or the liability recorded is based on the existence of a local custom. Where occupancy rights may be obtained by a tenant as a result of local usage or by any other means, the revenue officers whose duty it is to frame the record-of-rights must record, as an incident of the tenancy, the fact that the tenant possesses such rights and the presumption under S. 103 will apply to such an entry. If the under-tenant enjoys occupancy rights, that is to say, if he is free from liability to eviction under S.49, and if he enjoys special privileges under S. 113 of the Act with regard to the period during which a settled rent cannot be enhanced, a record-of-rights which omits to mention this special incident of the tenancy, that the under-raiyat enjoys occupancy rights, would be certainly defective in most important particulars. Where there was nothing to indicate that the record was based on a finding regarding custom, and it appeared that the under-raiyat had been in occupation of the holding long before the date of the survey and settlement operations and that he had laid out capital on his holding.

Held, that the provisions of S. 103-B would govern this particular entry. 57 I. C. 126 and A. I. R. 1926 Pat. 68, Dist. (*James, J.*) SINGHESHWAR CHOUDHARY *v.* PARBAT MANDAL. **103 I. C. 471 = A. I. R. 1927 Pat. 376.**

S. 103—Presumption.

——*Presumption does not apply to decision of A. S. O.*

Under S. 103-B of the Act the presumption applies only to the actual entries in the record-of-rights as finally published and not to the decision of the Assistant Settlement Officer as if it formed part of the record. (*Dawson Miller, C.J. and Mullick, J.*) KAMALUDDIN AHMAD *v.* RAMANAND SINGH. **3 Pat. 120 = 78 I. C. 605 = 1924 P. H. C. C. 1 = A. I. R. 1924 Pat. 443.**

S. 103—Settlement entry.

——*Contrary user overrides settlement entry.*

Presumption of the correctness of the entry under S. 103, B. T. Act, can be sufficiently rebutted by evidence of contrary user. (*Suhrawardy and Chotzner, JJ.*) CHATTRA NATH CHOWDHURY *v.* BABAR ALI. **29 C. W. N. 333 = 86 I. C. 835 = A. I. R. 1925 Cal. 635.**

S. 103-A—Presumption.

——*Inference under, can only be drawn from final Record-of-Rights.*

The inference under S. 103-A of the Tenancy Act can only be drawn from the finally published Record-of-Rights, and not from the material upon which the finally settled Record-of-Rights is founded. (*Greaves and Panton, JJ.*) ALTAP ALI CHOUDHURY *v.* JARINA BIBI. **67 I. C. 871 = A. I. R. 1923 Cal. 194.**

Ss. 103-A and 103-B—Scope.

——*Record-of-rights finally published—Presumption under S. 103-B arises—But order under S. 103-A directing the name of a particular person to be entered is a valuable evidence as to possession by such person.*

The presumption under S. 103, cl. (*b*), no doubt attaches to the record-of-rights when it is finally published, but an order passed by a revenue officer on a dispute in proceeding under S. 103-A directing the name of a particular person to be entered in respect of a certain property is a very valuable piece of evidence on the question of possession so far as that party is concerned. (*Duval and Mukerji, JJ.*) NISI KANTA DAS *v.* BROJENDRA NATH. **47 C. L. J. 347 = 109 I. C. 241 = A. I. R. 1928 Cal. 298.**

S. 103-B—Applicability.

——*Applies to some extent to non-agricultural land also.*

Though the presumption under S. 103-B does not apply to non-agricultural land to the extent to which it applies to agricultural lands still an entry regarding non-agricultural land raises a presumption with regard to the facts recorded in the entry. (*Newbould and B. B. Ghosh, JJ.*) CHAND MIA MUNSHI *v.* TUKAMIA. **28 C. W. N. 516 = 80 I. C. 805 = A. I. R. 1924 Cal. 667.**

S. 103-B—Burden of proof.

——*Zamindar is not presumed to be in possession of raiyati holding—Record-of-rights recording land to be occupancy holding—Onus is on zamindar to prove that the land is his malik zerait.*

The right of the zamindar to rent is so universal as to be a presumptive right, but the zamindar has no right generally to possession of the raiyati holdings. Where zamindar plaintiff claims certain land to be malik's zarait while the defendant claims as his occupancy holding and the record-of-rights is in favour of the defendant, burden of proof lies on the plaintiff zamindar and the fact that the land in dispute fell in the zamindari of the plaintiff is not sufficient to rebut the presumption arising from the record-of-rights. 2 Pat. 38 and A. I. R. 1922 P. C. 272 (P. C.), Dist. (*Das and Foster, JJ.*) RAM LOCHAN DAS *v.* NANDIJHA. **5 Pat. 393 = 7 P. L. T. 784 = 96 I. C. 937 = A. I. R. 1926 Pat. 485.**

S. 103-B (5)—Burden of proof.

——*Bengal Regulation II of 1819—Resumption proceedings under rent—Claim to hold free of rent—Onus is on claimant to establish his right by proving a contract to that effect or a grant recognised by Government.*

Neither in 1838, when the summary settlement was made nor in 1839, when the three *mauzas* in suit were amalgamated was any claim to hold free of rent on account of *Malikanadari* right put forward by the predecessors of the defendants. The claim on behalf of the defendants-respondents was for the first time put forward in 1877 but it was resisted and disallowed on the ground that no such *mauza* existed. The claim was again put forward, when the matter came for the purpose of cadastral survey.

Held, it lies upon those who claim to hold the lands free of the obligation to pay rent to show by satisfactory evidence that they have been relieved of this obligation, either by contract or by some old grant recognised by Government. 12 Moo. I.A. 286, Foll. (*Mr. Ameer Ali.*) JAGDEO NARAIN SINGH *v.* BALDEO SINGH. **49 I. A. 399 = 1923 M. W. N. 361 = 71 I. C. 984 = 27 C. W. N. 925 = 3 P. L. T. 605 = 36 C. L. J. 499 = 32 M. L. T. 1 = 2 Pat. 38 = A. I. R. 1922 P. C. 272 = 45 M. L. J. 460 (P.C.).**

S. 103-B—Duty of Court.

——*Court's finding on one-sided evidence is not legal.*

If in a suit for correcting the entry in the Survey Record-of-Rights, the plaintiff has in his favour the presumption of the Record-of-Rights prepared under the Estates Partition Act and the defendant has the presumption under S. 103 (*b*), the Court must look to the evidence of both parties and a finding of possession based on evidence adduced by defendant alone, is illegal. (*Jwala Prasad, J.*) DEBILAL SAH *v.* RAM BIBEKI SINGH. **63 I. C. 194 (Pat.).**

——*Presumption under—Rebuttal—Onus on landlord in case of occupancy holding.*

In the case of an occupancy holding where the record-of-rights is in favour of the tenant it is for the landlord to show that the presumption under S. 103-B is inapplicable. (*Das and Kulwant Sahay, JJ.*) STONEWIGG *v.* KAMESHWAR NARAYAN. **11 P. L. T. 444.**

S. 103-B—Presumption.

——*Presumption of correctness arises with respect to each entry and not whole Record-of-Rights.*

What is presumed to be correct by the words " Every entry in the Record-of-Rights so published shall be evidence of the matter referred to in such entry and shall be presumed to be correct," is each entry and not the whole Record-of-Rights. (*Cuming and Pearson, JJ.*) BRINDABAN *v.* DHRUBACHARAN. **49 C. L. J. 540 = 121 I. C. 404 = A. I. R. 1929 Cal. 606.**

——*Presumption under S. 103-B may be rebutted by reference to proceedings before revenue authorities making entry.*

It is quite open to a party who seeks to rebut a presumption arising out of an entry in the settlement records to show by a reference to the proceedings that had been taken by the revenue authorities that the entry itself is wrong or is one which should not be taken at its face value. 27 C. L. J. 107, Foll.; A. I. R. 1927 Cal. 268, not Foll. (*Rankin, C.J. and Mukerji, J.*) ADU MANDAL *v.* HIRA LAL. **33 C. W. N. 196 = 117 I. C. 539 = A. I. R. 1929 Cal. 255.**

——*Entry in Record-of-Rights is presumed to be correct.*

Where an entry in Record-of-Rights is in favour of the tenant, it is not necessary for the tenants to establish by clear evidence that the entry in the Record-of-Rights is correct. A. I. R. 1922 P. C. 272, Dist.; A. I. R. 1923 Pat. 340. (*Courtney Terrell, C. J. and Chatterji, J.*) JODHI SAHU *v.* TIRBENA SAHU. **A. I. R. 1929 Pat. 748.**

——*Two entries in Record-of-Rights at different periods—Mere production of earlier entry contrary to subsequent does not rebut presumption arising out of subsequent entry—Record-of-Rights.*

Mere production of contrary entries in an earlier Record-of-Rights which is practically the only evidence of the proprietor of land will not in law rebut the presumption arising out of the subsequent entry in Record-of-Rights. A. I. R. 1927 Pat. 164, Foll. (*Kulwant Sahay, Macpherson and Dhavle, JJ.*) TENGAROO SUKHUL *v.* CHATTHU. **10 P. L T. 569 = 118 I. C. 316 = A. I. R. 1929 Pat. 460.**

——*Record-of-Rights—Entry is presumed to be correct.*

Every entry in a Record-of-Rights shall be presumed to be correct until it is proved by evidence to be incorrect. (*Cuming and Mukherji, JJ*) MADHAB CHANDRA *v.* TILOTTAMA DASI. **110 I. C. 445 = A. I. R. 1928 Cal. 751.**

——*Two Records-of-Rights prepared at different times—Entry in the second is not presumed to be rebutted by that in the first—Objection by both parties to an entry will not destroy the presumption.*

S. 103-B of the Bengal Tenancy Act gives a statutory presumption of correctness to the entries in the record of rights. When there are two records of rights prepared at different times, entries in both of them will be presumed to be correct entries of facts existing at the time the entries were made. There is nothing in the law which would entitle a party to say that the entry in the subsequent record is rebutted by the entry in the previous record. A. I. R. 1922 Patna 548, Diss. from. The presumption raised by the entry in the record of rights is a statutory presumption and the fact that both parties alleged that the entry was incorrect in certain respects, will not take away the statutory presumption attached to it. (*Kulwant Sahay and Macpherson, JJ.*) ABHIRAM BEDANTA *v.* CHINTAMANI BEDANTA. **8 P. L. T. 121 = 100 I. C. 701 = 6 Pat. 342 = A. I. R. 1927 Pat. 164.**

S. 103-B (3)—Presumption.

——*Presumption mentioned in section may be rebutted by external or internal evidence.*

The evidence for rebutting the presumption mentioned in S. 103, sub-sec. (3) may be external to the settlement proceedings or may be apparent on the face of these proceedings. Where the statement of his reasons by the Revenue Officer in his order showed that he did not determine the existing rent.

Held, the presumption of its correctness was rebutted. (*Mukerjee and Rankin, JJ.*) RAMA NATH SANT *v.* OFFICIAL TRUSTEE OF BENGAL. **29 C. W. N 517 = 87 I. C. 1014 = A. I. R. 1925 Cal. 799.**

——*Reduction of rent in case of inundation, recorded in Record-of-Rights—Presumption as to correctness applies to entry.*

An entry in the Record-of-Rights that if inundation takes place the raiyats are to get a rateable proportionate deduction of rent from the landlord is an entry of a local custom, and is not outside the purview of Chapter X. The presumption of correctness laid down in S. 103-B (3) applies to such an entry, and therefore the burden of proving that the custom recited in the entry does not exist, is upon the landlord. (*Rankin and Mukerjee, JJ.*) PROHLAD CHANDRA CHATTERJEE *v.* MAHENDRA NATH GOPAIT. **78 I. C. 836 = A. I. R. 1925 Cal. 564.**

——*Entry in quinquennial register cannot by itself rebut.*

The entry in quinquennial register prepared under Reg. 48 of 1793 is not by itself sufficient to negative the presumption under S. 103-B of the B. T. Act. (*C. C. Ghose and Chotzner, JJ.*) PROMODE CHANDRA ROY *v.* BINAYAKDAS ACHARYA CHOUDHURY. **27 C. W. N. 548 = 75 I. C. 201 = A. I. R. 1923 Cal. 611 (612).**

——*Record-of-Rights is to be presumed to be correct until the contrary is shown.*

The burden of proof lies *prima facie* upon the party attacking the correctness of the entry made in the finally published Record-of-Rights which must be presumed to be correct until proved by evidence to be incorrect under sub-section (3) of S. 103-B. But for this circumstance, it could not be presumed that because the defendants hold a patni taluq under the plaintiff, a particular tract in dispute is comprised within the tenure. (*Mookerjee and Buckland, JJ.*) JOGENDRA NATH *v.* JAGDINDRA NATH. **34 C. L. J. 133 = 67 I. C. 170 = A. I. R. 1921 Cal. 577.**

——*Land as regards which Revenue Officer had no jurisdiction to make the entry—Presumption as to correctness is not so great as in case of matters over which he has jurisdiction.*

If an entry has been made in the Record-of-Rights with regard to land which does not come within the scope of the B. T. Act and with regard to which the Revenue Officer had no jurisdiction to make the entry, the presumption under S. 103-B (3) cannot be of such great weight as would be the case if the entry were with regard to matters which are rightly and properly included in the Record-of-Rights. (*Sanderson, C. J. and Chotzner, J.*) SASI KANTA *v.* SANDHYAMONI DASYA **34 C. L. J. 504 = 26 C. W. N. 483 = 65 I. C. 4 = A. I. R. 1921 Cal. 236.**

S. 103-B (5)—Rebuttal.

——*Rent not paid—Period of tenants' possession indefinite—Evidence is not sufficient to prove, the entry in Record-of-Rights that rent is assessable, is incorrect.*

When the period, during which the tenants have been in possession is left in an indefinite and nebulous state, that is not sufficient, even when taken with the fact that no rent has been paid, to show that the entry in the record-of-rights, *viz.*, " Rent assessable but not taken and realised," is incorrect. (*Sanderson, C. J. Panton and Graham, JJ.*) BROJENDRA KISHORE *v.* MOHIM CHANDRA. **31 C. W. N. 32 = 99 I. C. 189 = A. I. R. 1927 Cal. 1 (10).**

S. 103 B—Trees.

——*Entry in the Record-of-Rights as to the tenant's right to trees does not carry the presumption of correctness.*

The entry in the Record-of-Rights as regards the fruits and timber of the trees which shows that the tenants are entitled to appropriate all the fruits and timber of the trees and that the landlords are not entitled to anything, does not carry a presumption of correctness under S. 103 (*b*). 57 I. C. 126, Foll. (*Kulwant Sahay, J.*) DEBI DAYAL SINGH *v.* MT. GANGO KUER. **89 I. C. 1020 = A. I. R. 1926 Pat. 68.**

Ss. 104, 104 J. and 192—Accretion.

——A new estate was constituted by the Revenue authorities of lands formed by accretion, and a new tenure rent was recorded in the Record-of-Rights as actually fixed and settled under the provisions of the B.T. Act. No proceedings were taken to obtain a reversal or modification of the decision of the Revenue Authorities. *Held*, the tenants were bound under S. 192 read with S. 104 of that Act, to pay the rent so fixed. (*Teunon and Chaudhuri, JJ.*) KUMAR ARUN CHANDRA SINHA *v.* JOGENDRA LAL ROY. **60 I. C. 391 (Cal.)**

S. 104—Fair rent.

——*Tenant's holding over—Settlement Officer can determine fair rent on basis of tenant's status.*

Where the tenants hold over, it is open to the Settlement Officer to determine fair rent after determining the true status of the tenants irrespective of the stipulation in the time-expired kabuliyats. (*Duval and Mitter, JJ.*) KARUNA CHANDRA DAS *v.* SECRETARY OF STATE. **100 I. C. 466 = A. I. R. 1927 Cal. 413.**

S. 104-H—Scope.

——*Person must be aggrieved of an entry of rent.*

S. 104-H of the Tenancy Act only contemplates a case where a person has been aggrieved so far as an entry of rent is concerned. Therefore if a person is not really affected by an entry of rent in the Record-of Rights, he would not be entitled to claim a revision of rent under Cl. (4) of that section even if he can bring his case under any of the sub-clauses of Cl. 3 of S. 104-H. (*Woodroffe and Suhrawardy, JJ.*) SECRETARY OF STATE *v.* RAMCHARAN ACHARJEE. **40 C. L. J. 235 = 70 I. C. 207 = A. I. R. 1924 Cal. 464.**

S. 104 (as amended by Act I of 1907) and S. 30 (b)—Subsequent suit.

——*C. P. Code. S. 11—Decision of Settlement Officer under S. 104, Ben. Ten. Act—No question about undivided portion of land—Subsequent suit for recovery of rent with claim for enhancement under S. 30 (b) is not barred.*

Decision of the Settlement Officer under S. 104, Ben-Ten. Act (VIII of 1885), enhancing rent under S.30 (*b*), when no question was raised as to portion of land being an undivided share, is not *res judicata* in a subsequent suit for recovery of rent with a claim for enhancement under S. 30 (*b*). 29 Cal. 707 (P. C.) and 30 Cal. 339, Ref. (*Rankin, C. J. and Mukerji, J.*) BIR BIKRAM KISHORE MANIKYA BAHADUR *v.* RAJJAB ALI. **33 C. W. N. 1156 = A. I. R. 1930 Cal. 238.**

S. 104-H. (3), Cls. (d) & (e) & sub-S. 4—Fair rent.

——*Rent payable by tenure-holders not fixed—Rent fixed on basis of rent payable by raiyats—Suit for fair rent lies by tenure-holders.*

Where the rent payable by the tenure-holders is not settled, but the settlement of the rent has proceeded on the basis of the rent payable by the raiyats to the proprietors, the tenure-holders are entitled to maintain a suit under Cls. (*d*) & (*e*) of S. 104-H (3) and the Court has power under sub-S. (4) to settle a fair rent. (*Chatterjea and Panton, JJ.*) PROFULLA NATH *v.* SECRETARY OF STATE. **26 C. W. N. 100 = 63 I. C. 892 = A. I R. 1921 Cal. 429.**

S. 104-H. (2)—Limitation.

——*Rent settled under Record-of-rights published—Cannot be amended after the periods mentioned in the section.*

The entry in the Record of-rights is conclusive unless altered by means of a suit instituted under S. 104-H (2) within six months from the date of the Certificate of final publication of the Record-of-Rights, or, if an appeal has been presented to a revenue authority under S. 104-G. then within six months from the date of the disposal of appeal. 13 C. W. N. 210; 17 C. W. N. 153; 23 C.W.N. 516; 46 Cal. 90, Referred to. (*Mukerjee and Cuming, JJ.*) PRATAP CHANDRA JANA *v.* THE SECRETARY OF STATE. **35 C. L. J. 304 = 67 I. C. 375 = 49 Cal. 1026 = A. I. R. 1922 Cal. 101.**

Ss. 104-H and 111-A—Limitation.

——A suit under S. 111-A can be maintained although the claim under S. 104-H may be barred by limitation. 45 C. 645 (651) Foll. (*Chatterjee and Panton, JJ.*) PALAN MEAH *v.* THE SECRETARY OF STATE FOR INDIA. **65 I. C. 669 (Cal.).**

S. 104-H—Scope.

——*Rent settled in Record-of-Rights is final.*

The section confers finality on the rent settled in the Record-of-Rights. A deft. in a rent suit cannot urge a plea of title contrary to the entry in the Record-of-Rights. (*Newbould and Panton, JJ.*) MANMATHA NATH *v.* NIROD GOBINDA CHOWDHURY. **60 I. C. 501 (Cal.**

Ss. 104-J and 103-B—Area.

——*Entry in Record-of Rights as to area is not conclusive under S. 104J—It is only conclusive under S. 103-B—Suit for ejectment—Tenant can give evidence as to area.*

An entry as to area in the Record-of-Rights is not conclusive under S. 104-J. Such entry can only be presumed to be correct under S. 103-B until the contrary is proved by evidence and, therefore, an under-raiyat can, in defence to a suit for ejectment, give evidence to prove that the holding from which he is being ejected forms part of a larger holding. A. I. R. 1924 Cal. 341, Foll. (*Cuming and Page, JJ.*) UMACHARAN *v.* LAXMI NARAYAN. **98 I. C. 498 = A. I. R. 1927 Cal. 214.**

S. 104-J—Area.

——*Entry as to area in Record-of-rights not conclusive when rent question is not in controversy.*

It is settled that an entry as to the rent settled is conclusive under S. 104-J. It may also be considered that other entries in the record-of-rights upon which the rent is settled cannot be challenged *so as to affect the rent settled, i.e.*, in so far as they bear upon the rent settled and for that purpose only. The fact that the suit under S. 104-H is to be instituted on the grounds mentioned in that section by a person aggrieved by an entry of a rent settled indicates that the other entries in the record-of-rights can be challenged under that section only for the purpose of showing the incorrectness of the entry as to the rent settled. But where, the question in controversy is not as to the rent payable but the quantity of land included in the tenure, the determination of which is necessary not for deciding the amount of rent payable for the tenure, but for deciding the question whether the rent should be suspended because the defendants had been dispossessed from a portion of the tenure, the entry as to the area is not conclusive under S. 104-J. If the contention, that as the rent of a tenancy is settled with reference to the area comprised in the tenancy, the entry as to the area as well as the rent should be held to be conclusive even in cases where the rent is not in dispute, were accepted, it must be held that other entries in the record-of-rights, such as an entry as to the status of the tenant (with reference to which also the rent is to be settled) is also conclusive even where the rent is not in dispute. Having regard to the express terms of S. 104-J which refers only to the rent settled, it follows that the entry as to the area is not conclusive for the purpose of deciding the question whether the rent should be suspended because the defendants had been dispossessed from a portion of the tenure. Such an entry only raises a presumption of correctness under S. 103-B. (*Chatterjee and Cuming, JJ.*) PRIYA NATH BASU *v.* TARACHAND MORAL. **27 C. W. N. 982 = 80 I. C. 1034 = A. I. R. 1924 Cal. 341.**

S. 104 J—Presumption.

———*Record-of-rights, entry in—Presumption does not apply where entry is without jurisdiction.*

S. 104-J of the B. T. Act no doubt, raises an irrebuttable presumption in favour of the entry in the Record-of-Rights, but no conclusive effect can be attributed to an entry made as a result of a proceeding carried on without jurisdiction. (*Mookerjee and Chotzner, JJ.*) JYOTISH PROKAS CHATTORAJI *v.* BAGLA KANTA CHOUDARI. **36 C. L. J. 124 = 70 I. C. 822 = A. I. R. 1922 Cal. 274.**

Ss. 104 J and 111-A—Scope.

———*Entry as to rent is conclusive—Entry as to being a tenant raises only a presumption.*

Although the entry relating to the rent settled is conslusive, any other entry, *e. g.*, a person is tenant in possession through his tenants, is not irrebuttable but shall be presumed to be correct until it is proved by evidence to be incorrect. (*Page and Mallik, JJ.*) HARENDRA KUMAR RAI *v.* SECRETARY OF STATE. **33 C. W. N. 385 = 115 I. C. 45 = 55 Cal. 1355 = A. I. R. 1928 Cal. 808.**

Ss. 105 and 187—Am-mukhtear.

———*Am-mukhtear duly empowered can represent a landlord under S.* 105.

S. 187 governs all cases of application by landlords whether as individuals or as a joint body and under S. 187 an Am-mukhtear duly empowered can represent a landlord for the purposes of the application. (*Suhrawardy and Duval, JJ.*) JOGENDRA NARAYAN SINGHA *v.* MOHAMED ISMAIL CHOUDHURY. **52 Cal. 139 = 86 I. C. 1035 = A. I. R. 1925 Cal. 637.**

S. 105—Applicability.

———*S. 29 of the Act does not apply to proceeding under S.* 105.

S. 29 refers to contracts between landlords and tenants and deals with cases of money rents of an occupancy raiyat which may be enhanced by contract in writing and registered, and which must not exceed by more than two annas in the rupee, the rent previously payable by the raiyat. Obviously, therefore, it has no application whatever to proceedings under S. 105. (*Cuming and Chakravarthi, JJ.*) MATTA MAJHI *v.* GOPI NATH KARMAKAR. **89 I. C. 951 = A. I. R. 1926 Cal. 353.**

———*Tank leased for agricultural purposes—S.* 105 *applies.*

When a tank is leased for agricultural purposes it can be assessed to rent under S. 105. (*Suhrawardy and Cuming, JJ.*) SATINDRA MOHUN *v.* RAMSUNDAR DAS. **88 I. C. 534 = A. I. R. 1926 Cal. 239.**

S. 105—Area.

———*Settlement officer may constructively decide the area of the holding.*

The question of the area of the holding is constructively a matter for the determination in proceedings for assessment of fair rent. S. 105 A empowers the Settlement Officer to raise an issue about the area of the holding but he need not frame a direct issue on the point. (*Dawson Miller, C.J. and Mullick, J.*) KESHO PRASAD SINGH *v.* BHAGWAT SARAN PANDE. **5 P. L. T. 98 = 75 I. C. 670 = 1924 P. H. C. C. 18 = A.I.R. 1924 Pat. 511.**

S. 105—Civil suit.

———*Settlement of rent under, bars a civil suit except as under S.* 113.

Where a fair and equitable rent has once been settled in a proceeding under S. 105, it is a bar to any subsequent proceeding for the enhancement of rent before the expiry of the period specified in S. 113 of the Act except on the grounds mentioned in that section. (*Bucknill, J.*) SHEO PRATAP DUBEY *v.* SHEO-GULAM LAL. **72 I. C. 781 = A. I. R. 1924 Pat. 193.**

Ss. 105 (3) and 105-A—Court fee.

———*Application under S.* 105 *raising question regarding non-mokarari character of tenancy—Government notification under S.* 105 (3) *requiring* ad valorem *Court-fee stamp to be paid under Art.* 1, *Sch.* 1, *Court Fees Act, if question under S.* 105-*A be raised—Issue regarding non-mokarari right of tenancy is one under S.* 105-*A and* ad valorem *Court-fee is chargeable—S.* 7 (4) *of Court-Fees Act is not applicable—Notification increasing Court-fee is not* ultra vires *as it incorporates only Art.* 1, *Sch.* 1, *Court-Fees Act, and no other provision.*

An application was made under S. 105 for settlement of fair and equitable rent and for a declaration that the rents of the assessed lands were liable to be enhanced and that the tenants were not mokararidars as recorded in the finally published record-of-rights. The application was treated as a plaint and the petitioners valued the claim for declaration at Rs 5. Government notification under S. 105 (3), provided that if during the time of the hearing of application an issue is raised under S. 105-A, an additional stamp to the amount of an *ad valorem* fee chargeable under Art. 1, Sch. I, Court fees Act would be payable.

Held, that the issue with regard to the declaration of the non-mokarari character of the tenancy was raised under S. 105-A and according to the notification a stamp to the amount of an *ad valorem* fee chargeable under Art. 1. Sch. 1, Court-fees Act, was payable. S. 7 (4) C of the Court-Fees Act would not be applicable to this case.

Held further, that the Government notification, although its effect is to increase the Court-fees, is not *ultra vires* because it incorporates by reference only Art. 1, Sch. 1, Court-fees Act and no other provision of it. (*Mitter, J.*) GOPAL CHANDRA *v.* GURU CHARAN KIRTANIA. **32 C W. N. 1136 = 117 I. C. 701 = A. I. R. 1929 Cal. 141.**

S. 105 (3)—Court fee.

———*One tenancy held by more than one tenant—Eight anna stamp is sufficient.*

Where the application relates to a single tenancy, though held by a number of joint tenants, a stamp of eight annas only is sufficient. A stamp of eight annas is to be levied in respect of each tenancy and not in respect of each tenant who may be one of the group of tenants holding a particular tenancy. 23 Cal. 723, Foll. (*Mukerjee, J.*) SACHIDANANDA THAKUR *v.* MAHES CHANDRA DAS. **50 Cal. 903=79 I. C. 312=28 C. W. N. 116=A. I. R. 1924 Cal. 345.**

——**S. 105**—"*Decree*" *should not direct different co-sharer-tenants to hold at different rates.*

In a suit under S. 105, a decree which results in different co-sharer tenants holding the same at different rates of rent is not a correct decree. (*Page, J.*) FAREY HOSSEIN MIR *v.* NAGENDRA KISHORE ROY.

34 C. W. N. 730=A. I. R. 1930 Cal. 533.

S. 105—Effect of Decree.

——*Decree of a Revenue Officer in a proceeding under S.* 105 *has the force of a decree of a Civil Court.*

The decree of Revenue Officer under S. 105 has the force of the decree of a Civil Court. Where the record of rights contained a decision by the Settlement Officer that a certain amount was fair and equitable rent,

Held, that so long as the decree subsisted it was not open to a defendant in a suit for rent to have the question whether the land was liable to rent tried again. (*Mookerjee and Rankin, JJ.*) DHARANI MOHAN ROY *v.* ASHUTOSH MOOKERJEE. **40 C. L. J. 34=82 I. C. 396=A. I. R. 1924 Cal. 907.**

Ss. 105 and 52—Enhancement of Rent.

——*Enhancement or settlement of fair and equitable rent cannot be claimed if tenancy is composed of undivided share.*

The landlord may claim under S. 105 enhancement or settlement of fair and equitable rent under S. 52, but it seems that if the tenancy in respect of which additional rent is claimed under S. 52 is composed of an undivided share the claim will not be admitted under S. 105 also. (*Suhrawardy and Costello, JJ.*) BENDO KUMAR ROY CHOUDHURY *v.* GANGA CHARAN MISTARI.

51 C. L. J. 485=A. I. R. 1930 Cal. 595 (596).

Ss. 105 and 106—Estoppel.

——*Evidence Act, S.* 115—*Application by landlord under S.* 105 *of the B. T. Act and by tenant under S.* 106—*Disposal of application under S.* 105 *stayed pending application under S.* 106 *by consent of parties—Decision under S.* 106 *is binding notwithstanding decision under S.* 105 *was given before final decision under S.* 106 *owing to the fact that the application under S.* 106 *was dismissed for default first, and then restored.*

Settlement of fair rent under S. 105 of the B. T. Act was applied for by a landlord. An application was made under S. 106 by the tenant in which he alleged that the tenancy had been held by him at a uniform rate for such a long time that he was entitled to the presumption under S. 50 of the Act. The hearing of the application under S. 105 was stayed until the disposal of the application under S. 106 on the ground that the case under S. 106 would dispose of the question whether the rent was fixed or not and this argument was not challenged on behalf of the landlord. The application under S. 106 was thrown out for default and revived and decided eventually in the tenant's favour; but in the interval between the date of its dismissal for default and the order for restoration, the application under S. 105 was taken up and a rent higher than that entered in the record-of-rights was fixed as fair rent.

Held (*Mukerjee J., Contra*) that as by the mutual consent of both the parties the question as to whether the rent was liable to be enhanced or not was to be settled in application under S. 106, the matter should be considered from the position which the parties would have occupied if the application under S. 106 had not

been dismissed for default and the application under S. 105 had not been taken up by the Revenue Officer and the parties should be bound by the decision in application under S. 106 and not by that in the application under S. 105. (*Walmsley and Mukerji, JJ.*) PRASANNA DEB RAIKET *v.* ACHHRUDDIN MUHAMMAD.

82 I. C. 953=A. I. R. 1925 Cal. 465.

S. 105—Estoppel.

——*Patta granted by Zemindar fixing perpetual rent precludes him from increasing rent—'Mokarari' implies perpetuity--Mere forbearance raises no presumption.*

Where the material portions of a patta of 1864 were "This mokarari patta is accordingly granted to you. Becoming Maliks of making, that is, becoming entitled to make sale and gift, etc. you down to your sons, grandsons etc. in succession shall continue to peacefully enjoy. If you hold possession of any land in excess to what is mentioned in this patta and if any land be found upon measurement to be in exceess, then you shall separately pay the rent thereof according to the rates of different classes of land ; and if the area of the land be found to be less, you shall get abatement of rent under a settlement at the aforesaid rates. The rates of rent according to classes will, in fact, never be enhanced or abated".

Held, the term Mokarari implied fixity of rent, the terms "down to your sons, grandsons etc" made the tenure Mourasi Mokarari. 12 C. W. N. 154 and 12 C. W. N. 175 and 35 C. L. J. 90, Foll. 1 C. L. J. 572 ; 46 I. A. 279; 47 Cal. 280 ; 19 C. W. N. 56, Appr.

Held further that landlords had, by the grant of the patta, precluded themselves from exercising the right vested in a zamindar, holding under the permanent settlement, to raise from time to time, the rents according to the parganah or current rates, of all the rent-paying lands within his zemindari though mere forbearance on the part of a landlord does not justify the inference that tenure is not enhanceable, but no question of presumption arises where, the terms of the contract have been reduced to writing. 9 C. W. N. 334 ; 38 C. L. J. 369, Dist. (*Mookerjee and Chotzner, JJ.*) BHAIRAB CHANDRA DAS *v.* THE MIDNAPORE ZAMINDARY CO. LTD. **38 C. L. J. 372=77 I. C. 1015=A. I. R. 1924 Cal. 513.**

S. 105—" Existing rent".

——The existing rent is the rent which the tenant is liable to pay under contract with the landlord. (*Suhrawardy and Garlick, JJ.*) KAILASH SUNDARI DASI *v.* MIDNAPUR ZEMINDARI CO., LTD., **32 C.W.N 999=115 I. C. 525=A. I. R. 1929 Cal. 47.**

S. 105 (4)—Fair rent.

——*All circumstances must be taken into consideration in settling fair and equitable rent.*

In proceedings for settling fair and equitable rent it is not enough to find that there has been an increase in the price of staple food crops but it is also necessary to find that the rent settled by the Court is fair and equitable taking all circumstances into consideration. (*Suhrawardy and Garlick, JJ.*) KAILASH SUNDARI DASI *v.* MIDNAPUR ZEMINDARI CO. LTD.

32 C.W.N. 999=115 I.C. 525=A. I. R. 1929 Cal. 47.

——*Rate in* kabuliyat *need not be adhered to.*

Where the landlord has invoked tht provisions of S. 105, he cannot contend that the Judge is necessarily bound in fixing the rent to adhere to the rate mentioned in the *kabuliyat.* No doubt the Judge would take this into account but if he finds that a strict adherence to the rate mentioned in the kabuliyat would make the rent in excess of what he considers a fair and equitable rent he is bound by terms of S. 105 to so adjust the rent irrespective of any contract between the parties, as to make it just and equitable. (*Greaves and Graham, JJ.*) PRASANNA KUMAR RAY *v.* ARUN CHANDRA SINGHA. **29 C W.N. 353 = 85 I. C. 693 = A.I.R. 1925 Cal. 656.**

S. 105—Finality.

———*Rent settled thereunder after Road Cess return was given—Bengal Cess Act, S. 20 is no bar to recovery of rent settled.*

The rent settled under S. 105 of the B. T. Act being lawfully settled subsequent to the lodging of the Road Cess return is final and it is not open to the defendant to dispute it. (*Coutts and Ross, JJ.*) NAZIR RAI *v.* KESHO PD. SINGH BAHADUR. **3 P. L. T. 141 = 65 I. C. 3 = 6 P. L. J. 622 = A. I. R. 1922 Pat. 55.**

S. 105—Land.

———*Word "land" includes share of tenant in holding and can form subject of proceedings under S.* 105.

The word "land" as used in S. 105 may include a share of a co-sharer landlord and may therefore include a share of a tenant in a holding. Therefore, the land in the occupation of a tenant need not be an entire holding to form the subject of proceedings under S. 105. 21 C. L.J. 592, Foll.; 25 Cal. 917 notes; 19 Cal. 610 and 7 C. W. N. 670, Ref. (*Suhrawardy and Garlick, JJ.*) SURENDRA CHANDRA *v.* KEDARESWAR CHOWDHURY. **48 C. L. J. 590 = 115 I. C. 269 = A. I. R. 1929 Cal. 156.**

S. 105—Landlord and Tenant.

———*Rent entered in the record-of-rights—Application to enhance rent—No application to correct the entry under S. 106—Rate of rent is not concluded against the landlord by such an application if tenants agree to pay higher rent.*

Revenue Court has no jurisdiction to correct an entry in the record-of-rights in an application made under S. 105 merely to enhance the rent unless there is an application to correct such entry under S. 106, and the rate of rent is not concluded against the landlord by reason of his having made an application under S. 105 when the tenants have agreed to pay a higher rent. (*Page and Duval, JJ.*) BHABESH CHANDRA *v.* SHYAMA SUNDARI. **108 I. C. 255 = A. I. R. 1928 Cal. 399 (1).**

Ss. 105 and 106—Nature of proceedings.

———*Proceedings under, are continuation of proceedings in connexion with preparation of Record-of-Rights.*

An application under S. 105 or even a suit under S. 106 is in the nature of a continuation of proceedings in connection with the preparation of Record-of-Rights. The requirement of the law is satisfied if the application is made by a party to the Record-of-Rights against a party in whose favour an entry has been made in the Record-of-Rights. A.I.R. 1921 Cal. 591. Diss. from; A.I.R. 1926 Cal. 1037 and A. I. R. 1928 Cal. 146, Foll. (*Suhrawardy and Graham, JJ.*) JABHAR ALI *v.* MONMOHAN PANDEY. **55 Cal. 1216 = 49 C. L.J.70 = 114 I. C. 485 = A. I. R. 1929 Cal. 110.**

S. 105 (1)—Necessary parties.

———*Application by landlord—Tenants need not be made parties—Limitation of two months is for making the application and not for making tenants parties.*

Section 105 (1) speaks of an application, and when the application is originally made it is not necessary for the landlord or the tenant in making the application under the section to name any person. All that is necessary is to indicate the holdings in the record in respect of which the settlement of fair and equitable rent is sought, and when the application is by the landlord no tenants need be made parties. It is only after the application has been made, which of course must be made within two months that the proceeding becomes a suit or in the nature of a suit and the provisions of the Code of Civil Procedure apply thereto. 25 C. W. N. 38, Dist. (*Greaves, Mukherji and Chakravarti, JJ.*) BIR BIKRAM KISHORE *v.* AMBIKA CHARAN. **43 C. L. J. 591 = 31 C. W. N. 860 = 97 I. C. 142 = A. I. R. 1926 Cal. 1037.**

———*Application under S. 105—Sole plaintiff karta of the family and the sole recorded proprietor—His sons need not be joined as plaintiffs.*

Where the sole plaintiff is not only the karta but he is the sole recorded landlord of the touzi, he can apply alone under S. 105 without joining his sons as plaintiffs: 16 C. L. J. 427 and 25 C.W.N. 38, Dist.; A.I.R. 1924 Pat. 104, Foll. (*Ross and Kulwant Sahay, JJ.*) KULDIP SARAN SINGH *v.* RAGHUNANDAN SINGH. **7 Pat. L. T. 540 = 1926 P. H. C. C. 256 = 97 I. C. 436 = A. I. R. 1926 Pat. 461.**

Ss. 105 and 188—Necessary parties.

———*Application under S. 105 must be made by all landlords.*

The Act aims at codifying the law governing the relation between the landlord and tenant and their mutual rights and liabilities. With a view to avoid multiplicity of suits and harassment to the tenant it contemplates that acts done and rights exercised must be done and exercised in concert by the entire body of landlords if there are more than one. S. 188 is enacted to secure that object. An application under S. 105 is one of the acts which a landlord is authorised to do under that Act. S. 188 read with S. 105 makes it obligatory that such application must be made by all the landlords. (*Suhrawardy and Duval, JJ.*) JOGENDRA NARAYAN SINGHA *v.* MOHAMED ISMAIL CHOUDHURY. **52 Cal. 139 = 86 I.C. 1035 = A. I. R. 1925 Cal. 637.**

———*Application for settlement of rents—Mitakshara joint family—Son born subsequent to final publication of record-of-rights—Son is necessary party and must be joined within two months from final publication of record-of-rights.*

An application under section 105 for settlement of fair and equitable rent must be made by all the landlords and cannot be maintained by some of the joint landlords. It cannot be held that only the persons entered in the record-of-rights have the right to make an application under section 105. In a Mitakshara family if there is a cause of action for a suit with respect to the family estate, a son subsequently born acquires an interest in the estate on his birth and therefore has to be made a party to such a suit (if instituted after his birth), the period of limitation runs from the date of the cause of action when it originally accrued, even though the infant was not born when such cause of action arose. The principle applicable to a suit would apply to an application under S. 105, Bengal Tenancy Act, which must be dealt with as a suit. Therefore, if a son is born subsequent to the final publication of the record-of-rights, but before the expiry of the prescribed period of two months, he is a necessary party to the application under S. 105, but the prescribed period of two months runs from the final publication of the record-of-rights and he must be added as a party within this period; otherwise the application will be invalid. (*Chatterjee and Panton, JJ.*) SATI PROSAD GARGA *v.* SANATON DHARA. **25 C. W. N. 38 = 61 I. C. 549 = A. I. R 1921 Cal. 591.**

S. 105—Notice.

——*In absence of plea of fraud, Court cannot try question as to non-service of notice in suit for rent after decision under S.* 105.

In the absence of a plea of fraud Court cannot try the question as to whether there was any service of notice on the defendant or not. If the defendant desires to challenge the proceedings under S. 105 on the ground of non-service of notice, he ought to question the proceedings before the Settlement Officer, or by appeal, or by way of proceedings proper for such relief. (*Chakravarti, J.*) TARAMONEE CHOUDHURANI *v.* SHEIKH ELIM.
92 I. C. 714=A. I. R. 1926 Cal. 582.

S. 105—Patni.

——*Suit for additional rent for additional area—Patnidar in possession of lands as given in record-of-rights—Record-of-rights not challenged—Suit will fail.*

Landlord brought a suit against certain patnidars for additional rent on the ground that the patni was originally in respect of the lands of one village only and that the patnidars were in possession of more lands than were settled with them. The landlords did not challenge the correctness of the record-of-rights, nor did they prove that the "lot" in the patni patta meant only one village.

Held, the word "lot" in the parlance of patni patta usually meant a group of villages and as the plaintiffs did not challenge the record-of-rights or prove that the "lot" in the patni patta comprised only one village, they were not entitled to additional rent for additional area. (*Greaves and Chakravarti, JJ.*) ARUN CHANDRA SINHA BAHADUR *v.* HEMANTA KUMAR BANERJEE. **98 I. C. 663=30 C. W. N. 906.**

S. 105—Permanent tenancy.

——*Lease granted from generation to generation—Permanent tenancy is created.*

Although no premium is paid, the tenancy is permanent, if the grantee is authorised to cultivate from generation to generation. (*Mukerjee and Panton, JJ.*) RISHIKESH LAW *v.* SATISH CHANDRA PAL.
35 Cal. L. J. 90=64 I. C. 774=
A. I. R. 1922 Cal. 123.

S. 105—Powers under.

——*Revenue Officer can enquire as to existing rent.*

Under S. 105 the Revenue Officer is entitled in order to settle fair and equitable rent to enquire as to existing rent and to determine all questions that may arise under S. 105-A or S. 106. 44 Cal. 783, Foll. (*Suhrawardy and Garlick, JJ.*) KAILASH SUNDARI DASI *v.* MIDNAPUR ZEMINDARY CO., LTD.,
32 C. W. N. 999=115 I. C. 525=
A. I. R. 1929 Cal. 47.

Ss. 105 and 50—Presumption.

——*Claim for amount on account of submerged land on basis of kabuliat and further for enhancement of rent for excess of land—Kabuliat materially changed by interpolation regarding unit of measurement—Kabuliat was held void for claim and in latter case presumption under S. 50 took effect.*

In a proceeding under S. 105, a landlord put forward a kabuliat as the governing document of the tenancy and on the basis of that asked first of all for Rs. 5 on account of the suspension of rent on account of 3½ bighas of land submerged under water at that time. The second relief was for enhancement of rent on account of the rise in the price of crops. Thirdly, he asked for additional rent on account of additional area. The kabuliat contained the usual terms: "Whenever you so desire at future time you will measure the land and for the land thus found out on measurement you will be competent to settle the jama according to the rates prevailing for the different classes of land in the village." In the margin there was a subsequent interpolation "measurement of the land will be made in accordance with the terms of the kabuliat by a rasi of 80 cubits, 1 cubit being equal to 18 inches." The kabuliat was thus materially altered.

Held, (*i*) that as the kabuliat formed the foundation of the claim of Rs. 5, kabuliat cannot be the evidence at all on the part of the landlord, and further (*ii*) that it cannot be evidence for additional rent as it was immediately necessary to enquire what land was comprised in kabuliat so as to determine amount of encroachment which in its turn necessitated the reference to the void instrument, and thereafter presumption under S. 50 took effect and took away the claim altogether. (*Rankin, C.J. and Cammiade, J.*) HARAN CHANDRA *v.* KISHORI LAL. **50 C. L. J. 173=A. I. R. 1929 Cal. 789.**

S. 105 (1)—Procedure.

——*Application for substitution even after two months from the final publication of Record-of-Rights is valid.*

When S. 105 (1), Bengal Tenancy Act, speaks of an application, it is not necessary for the landlord or the tenant making the application to name any person. It is only necessary to indicate the holdings in the record in respect of which a settlement of fair and equitable rent is sought, and therefore an application to bring on record the heir or transferee of the right of the tenant after two months from the final publication of the Record-of-Rights is perfectly good. A. I. R. 1926 Cal. 1037, Foll. (*Rankin, C. J. and Mitter, J.*) SIBA KUMARI DEVI *v.* DOSHI GHOSAIN. **46 C. L. J. 555=**
106 I. C. 836=A. I. R. 1928 Cal. 146.

——*Subsequent withdrawal of one of the plaintiffs—Application is not invalidated.*

After the application is properly made under S. 105 its subsequent progress is regulated by the rules of procedure provided by the Civil Procedure Code. The matter then passes from the control of the Bengal Tenancy Act to the dominion of the Civil Procedure Code. The subsequent withdrawal from the proceedings, of one of the landlords does not render them invalid unless they are so rendered by virtue of the C. P. Code (1923) P. H. C. C. 273, Foll. (*Suhrawardy and Duval, JJ.*) JOGENDRA NARAYAN SINGHA *v.* MOHAMED ISMAIL CHOWDHURY. **52 Cal. 139=86 I. C. 1035=**
A. I. R. 1925 Cal. 637.

——*C P. Code, O. 23, R.* 1 (4)—*Withdrawal by one co-plaintiff without consent of others is not permissible.*

The Revenue Court cannot permit one of the plaintiffs to withdraw without the consent of the other co-plaintiffs. (*Suhrawardy and Duval, JJ.*) JOGENDRA NARAYAN SINGHA *v.* MOHAMED ISMAIL CHOWDHURY. **52 Cal. 139=86 I. C. 1035=**
A. I. R. 1925 Cal. 637.

S. 105—Res judicata.

——*Two plots held under one landlord—Decree with regard to one operates as* res judicata *in other if parties to suits under S.* 105 *same and sued in same capacities.*

The decree of the Court under S. 105 with regard to one of the two plots held by tenants under one landlord is binding on the tenants and operates as *res judicata* with regard to the other plot if the parties to the subsequent suit under S. 105 and the capacity in which they are sued is the same. (*Page, J.*) FAREY HOSSEIN MIR *v.* NAGENDRA KISHORE ROY CHOUDHURY. **34 C. W. N. 730=A. I. R. 1930 Cal. 533.**

——*Rent found in previous suit—Finding is* res judicata *as regards rent for those years—Decision sufficient to rebut presumption from entry in Record-of-Rights.*

A decision as to the rent payable may not be *res judicata* in the sense that it finally decided the rate of rent between the parties. But it is *res judicata* that for the years for which that suit was brought the rent was the amount then found. The decision is sufficient to support the finding that the presumption arising from the entry in the Record-of-Rights had been rebutted. (*Newbould, J.*) BROJENDRA KISHORE ROY CHOUDHURY *v.* SH. SOMAR ALI. **68 I. C. 298 = A. I. R. 1923 Cal. 282.**

S. 105—Rule 63 (1.)

——*Rule cannot govern the construction of S.* 105 *the rule not being appositely worded.*

Rule 63 (1) cannot govern the true construction of the Act, and as the rule is not appositely worded it is the rule that must give way to the true construction of S. 105 (1). (*Greaves, Mukerji and Chakravarti, JJ.*) BIR BIKRAM KISHORE *v.* AMBIKA CHARAN.
43 C. L. J. 591 = 31 C. W. N. 860 = 97 I. C. 142 = A. I. R. 1926 Cal. 1037.

S. 105—Sco e.

——*Application made only against one of the joint tenants—Landlord's remedy under S.* 105 *is exhausted.*

Where an application for settlement of rent against one of the co-tenants was made and the matter was fought out to a finish in the landlord's presence and ultimately the application was dismissed on the ground that such an application must be brought against all the joint tenants,

Held, that in such a case the landlord's remedy under S. 105 must be deemed to be exhausted and he must pursue his remedies in civil court, if any. (*Rankin, C.J. and Mitter, J.*) SIBA KUMARI DEVI *v.* DOSHI GHOSAIN. **46 C. L. J. 555 = 106 I C. 836 = A. I. R. 1928 Cal. 146.**

——*Landlord proceeding under S.* 105—*Rent fixed takes effect from agricultural year next—Rent for back years for the additional area cannot be claimed.*

Where the landlord proceeds under S. 105 of the Act, the increased rental takes effect from the beginning of the agricultural year next after the date of the decision fixing the rent, and it is not open to him to sue on the contract for the back rents of the additional area. (*Cuming and Chakravarti, JJ.*) CHANDI CHARAN *v.* MEHER BANU. **52 Cal. 910 = 91 I. C 1016 = A. I. R. 1926 Cal. 172.**

——*Proceedings under—Purchaser at rent sale bound by subsequent decision.*

Any one who buys a holding at an auction must be taken to know perfectly well that he is buying a holding the rent of which may be enhanceable. If it is subsequently increased beyond the figure in the sale certificate even against representatives of the defaulting tenant by proceedings begun before the auction, the auction purchaser is bound by such proceedings. (*Rankin, J.*) KHETRA MOHAN DE *v.* SATISH CHANDRA GIRI.
83 I. C. 556 = A. I. R. 1923 Cal. 438.

——*C. P. Code, S.* 11—*Rent suit in respect of seven jotes dismissed—Seven jotes ceasing to exist as such but converted into two jotes—Suit in respect of one such jote under S.* 105, *Bengal Tenancy Act, is not barred.*

Where rent suits in respect of seven jotes were dismissed and subsequently thereto the seven jotes ceased to exist, being converted into two jotes and in respect of one such jote a suit under Section 105, Bengal Tenancy Act, was brought, *held*, whether the decision in the rent suits can operate as *res judicata* where the former suit was for payment of rent and the new suit for fixation of fair and equitable rent under very different sets of circumstances. (*C. C. Ghose and Chotzner, JJ.*) DEBI PROSAD BHAKAT *v.* OFFICIAL TRUSTEE OF BENGAL.
37 C. L. J. 314 = 72 I. C. 1013 = A. I. R. 1923 Cal. 333.

——*Rent fixed by compromise under S.* 105—*Subsequent decision fixing different rate is without jurisdiction.*

The rent was fixed under S. 105 by compromise. Later on in 1910 the suit was decreed based on lesser rate of rent admitted by tenant. In the present suit rent at rate fixed by the compromise was demanded.

Held, the Court which decided the rent suit in 1910 had jurisdiction to pass a decree for the rent for the years which were in suit in that particular case, but in view of the provision of S. 109 of Bengal Tenancy Act, it obviously had no jurisdiction to pass a decree fixing the rate of rent as this had already been decided in the proceeding under S. 105 by a compromise decree and in so far as it did so there was no doubt that it was acting without jurisdiction. This being so, the decision cannot be *res judicata*. (*Coutts and Ross, JJ.*) RAMESHWAR SINGH BAHADUR *v.* YONNUS MOMIN.
1922 P. H. C. C. 68 = 65 I. C. 474 = 3 Pat. L. T. 130 = 6 P. L. J. 588 = A. I. R. 1923 Pat. 101.

——*Section is not retrospective.*

The fair rent which had been settled in the proceeding under Section 105 cannot possibly have retrospective effect. (*Mookerjee and Cuming, JJ.*) RAJENDRA NARAYAN MAZUMDAR *v.* SHEIKH KALIM.
49 Cal. 875 = 67 I. C. 813 = 26 C. W. N. 758 = A.I.R. 1922 Cal. 575.

Ss. 105 and 105-A—Second appeal.

——*Decision by Special Judge—Question of principle involved—Second appeal lies.*

If the decision of the Special Judge does not merely settle a rent but involves a question of principle as to the basis upon which rent is to be settled, the decision of the Special Judge is appealable to the High Court. (*Greaves and Graham, JJ.*) PRASANNA KUMAR RAY *v.* ARUN CHANDRA SINGHA. **29 C. W. N. 353 = 85 I. C. 693 = A. I. R. 1925 Cal. 656.**

——*Question as to—Maintainability of suit—Second appeal lies.*

Second appeals not from decisions of Special Judge settling fair and equitable rents, but from decisions recording the maintainability of the suits, do lie. (*Adami and Bucknill, JJ.*) KUMAR MADHAV SURENDRA SAHI *v.* AWADH MISSIR. **3 Pat. L. T. 316 = 65 I. C. 349 = A. I. R. 1923 Pat. 86.**

S. 105—Settling rent.

——*'Settling rent' means deciding something previously unsettled—No rent fixed in Record-of-Rights or rent mentioned therein accepted as correct—Increase or abatement demanded—Decision in such cases would be decision settling rent.*

" Settling rent " has a technical meaning. Ordinarily " settle " would mean decide something which was previously unsettled. Where there was no rent fixed in the Record-of-Rights or where the rent mentioned in the Record of-Rights is accepted as correct and increase or abatement is demanded thereupon on one of the grounds mentioned in the Act, the decision of the Settlement Officer in such and similar cases would be a decision settling rent. " Settling a rent " must be distinguished from settling a dispute relating to rent. 31 Cal. 380, Foll. (*Suhrawardy and Garlick, JJ.*) KAILASH SUNDARI

DASI *v.* MIDNAPUR ZEMINDARY CO., LTD.
32 C. W. N. 999 = 115 I. C. 525 =
A. I. R. 1929 Cal. 47.

S. 105—Subsequent Suit.

——*Decision on rate of enhancement only—Decision does not operate as* res judicata *on question of correct rent.*

Where the decision under S. 105 does not determine what the correct rent of the holding is but merely decides what the rate of the enhancement should be, the decision will not operate as *res judicata* in the investigation of the question as to what the true rent was at the date of the entry in the khatian. 44 Cal. 783 ; A.I.R. 1926 Cal. 822. Ref. (*Mukerji, J.*) JAMIRADDIN *v.* KHADEJANESSA.
114 I. C. 407 = A. I. R. 1929 Cal. 685.

——*Suit to recover rent as settled in a proceeding under S.* 105 *for jama consisting of ten plots—Tenant contending that jama consisted of three plots and not of ten plots as alleged—No decision as regards the plots of which the jama consisted by the Revenue Officer—Decision under S.* 105 *was held to be not operative as* res judicata *and the Civil Court was held to have power to go into the question as to the rent of the holding.*

In a suit by a landlord *A* to recover rent as settled in a proceeding under S. 105 it was contended on behalf of the tenants that the jama consisted not of ten plots of land as alleged on behalf of *A*, but of three plots only and that the remaining seven plots did not appertain to Mudafat *G* which, according to *A*, was the Mudafat to which the jama appertained but to Mudafat *K* ; and it was further pleaded that the holder of Mudafat *K* had instituted a title suit against the parties to this suit and that, in that suit, which was decreed in 1920, it was declared that the said seven plots appertained to Mudafat *K* and the possession of the holders of that Mudafat was confirmed in respect of the said seven plots. *A* contended that the decision under S. 105 had the force and effect of a decree of a Civil Court and it should have been given effect to in that way.

Held, that the principle of constructive *res judicata* could not be applied to a decision under S. 105 and that although it was open to the Revenue Officer to have arrived at a decision as regards the plots of which the jama consisted, inasmuch as no decision with regard to that matter had in point of fact been arrived at, the decision fixing the fair rental for the ten plots of land of which the jama was alleged to consist would not in any way operate as *res judicata*. 44 Cal. 783, Rel. on. (*Mukerji, J.*) KIRAN CHANDRA ROY *v.* JAGANNATH BANIK. **114 I. C. 670 =**
A. I. R. 1928 Cal. 472.

——*Proceedings based on assumption that lands are rent-paying—Question of liability to pay rent not decided—Question is not barred.*

Where proceedings under S. 105 are based on the assumption that the land concerned is rent-paying and owing to there being no appearance on behalf of the tenants, the question whether the land is rent-paying or lakheraj land could not be agitated, the plea that lands are not rent-paying lands is not barred by the provisions of S. 105. (*Duval and Mitter, JJ.*) KSHETRA LAL SINGHA ROY *v.* PROHLAD CHANDRA. **101 I.C. 800 =**
A. I. R. 1927 Cal. 603.

——*Holding recorded in record-of-rights as rent-paying—Application by landlord under S.*105 *for settlement of rent, decided* ex parte—*Suits against landlord by tenants for declaration that they are lakherajdars, are not barred but decision under S.* 105 *cannot be declared to be inoperative.*

In the settlement proceedings certain holdings were recorded in the record-of-rights as rent-paying and liable to assessment of rent. An application was subsequently filed by the landlord under S. 105 for the settlement of fair and equitable rent for those holdings. Those proceedings were decided *ex parte* against the tenants who did not appeal. In suits against the landlord by the tenants for a declaration that the tenants were lakherajdars in respect of those lands, and for a further declaration that the lands did not appertain to the jamas as alleged by the landlord, and that the decisions of the Revenue Officer were not binding upon them.

Held, that the suits were not barred by S. 109. 45 Cal. 783, Foll ; 24 C.W.N. 123, Dist. A.I.R. 1925 Cal. 845 (F.B.), Expl. (*Suhrawardy and Mukerji, JJ.*) PRYAMBADA DEBI *v.* PRIYANATH. **43 C. L. J. 327 =**
30 C. W. N. 826 = 95 I.C. 334 =
A.I.R. 1926. Cal. 822.

S. 105—Subsequment Suit.

——*Application for additional rent for excess area, dismissed for non-prosecution—Subsequent suit for additional rent cannot be maintained but may be treated as a suit for rent at original rate.*

Where the plaintiff has made an application under S. 105 claiming additional rent for excess area and that application is dismissed for non-prosecution, the claim for additional rent for excess area cannot be maintained in a subsequent suit. A.I.R. 1925 Cal. 845, Foll. But where the claim for enhancement has been abandoned by the plaintiff the suit may be treated as a suit for rent at the original rate. 48 Cal. 157, Foll. (*Newbould and Graham, JJ.*) THAKURDIN TEWARI *v.* MAHAMMAD IBRAHIM. **91 I. C. 178.**

——*Suit in ejectment—Defendant cannot get advantage of stay of proceedings under S.* 111 *by merely raising a question of status.*

Section 111 does not mean that in any case in which the defendant chooses to raise a question as to status the landlord is prevented from taking action under the ordinary law in such matters.

A suit in ejectment was brought against the defendant alleging that he was an under-raiyat and that notice had been given under S. 49. The defendant claimed to be an occupancy raiyat, and having claimed to be an occupancy raiyat he contended that by S. 111 the proceedings against him should in effect be stayed until three months after the final re-publication of the record-of-rights.

Held, S. 111 did not apply to the case. 3 C. L. J. 133 3 C. L. J. 63n and A. I. R. 1925 Cal 1211 ; Ref. (*Rankin, C.J. and Costello, J.*) KHEMADANDA KUMAR *v.* RASHAMYA HALDAR. **32 C. W. N. 132 =**
106 I.C. 875 = A.I. R.1928 Cal. 388.

S. 105-A—Decision under.

——*Decision is* res judicata *and cannot be re-agitated even as defence.*

Where in a proceeding under S. 105-A of the Act it has been found that the relationship of landlord and tenant does not exist between the parties, that decision operates as *res judicata* and the defendants are not entitled in a suit for ejectment by the landlord to re-agitate the question. 3 P. L. J. 379, Foll. (*Jwala Prasad and Macpherson, JJ.*) LALJI SINGH *v.* LAKSHMI NARAIN SINGH. **10 Pat.L. T. 91 = 97 I. C. 708 =**
A. I. R. 1927 Pat. 32.

S. 106—Applicability.

———*Dispute as to whether certain piece of land is in exclusive possession of any party or in joint possession of the parties—S.* 106 *applies.*

The comprehensive words of Section 106 include a case where the dispute is as to whether a particular parcel is in exclusive possession of any one of the parties or in joint possession of two or more of the parties. (*Mookerjee, A. C. J. and Fletcher, J.*) GOBINDA RANI DASYA *v.* MOHIN CHANDRA. **35 C. L. J. 195 = A. I. R. 1921 Cal. 813.**

S. 106—Kabuliyat.

———On an application for enhancement of rent the facts were found to be these. At the time of which any historical knowledge was available, the tenure in question was created, the lands were not all cultivable and had to be reclaimed. The rent was therefore fixed not on the quantity of the lands left out but on the quantity of land that could be brought under cultivation by the Talukdar. It was specifically mentioned in the Kabuliyats of 1223 (B. S.) that the rent payable at the time was to be paid on the quantity of the land under cultivation until there was a measurement. A later document of 1249 contained no terms as regards enhancement. *Held*, that the document of 1249 was merely a recognition of the original tenancy created in 1223 and the rent could be increased according to the terms embodied in the Kabuliyat of 1223. (*Suhrawardy and Cuming, JJ.*) JOY CHANDRA CHAKRABURTHY *v.* SRIJUT KUMAR ARUNCHANDRA SINHA. **67 I. C. 241 (Cal.).**

S. 106—Nature of Suit.

———*Suit under S.* 106 *cannot pray for possession.*

A prayer for possession cannot be included in a suit under S. 106. 19 C. W. N. 911 and 15 C. W. N. 974, Foll. (*Mukerji and Mitter, JJ.*) BROJO MOHAN PAL *v.* DARSAN PAL. **49 C. L. J. 294 = 34 C. W. N. 47 = 120 I. C. 155 = A. I. R. 1929 Cal. 308.**

———A suit under S. 106 of the Act has no legal concomitants which differentiate it from any other ordinary civil suit. (*Bucknill, J.*) JANKI KOER *v.* WALI MUHAMMAD. **61 I. C. 420 (Pat.).**

S. 106—Powers of Revenue Officer.

———*Powers of Revenue Officer are to decide about possession only but can decide title of landlord and tenant except in case of neighbouring estates.*

A Revenue Officer in deciding disputes between rival proprietors under S. 106 is confined to the question of possession alone and is not competent to decide the question of title. It is quite true that the Revenue Officer is competent to decide the question whether the relationship of landlord and tenant exists, but, he is only competent to decide the question provided the question is not between neighbouring estates. Where plaintiff is asking the Court to determine that he ought to be recorded not as a tenure-holder but as a proprietor and that the proprietor's khewat with respect to the aforesaid land should be prepared in his name, he is definitely asking the Court to decide a question of title as between him and the defendants. Where the Settlement Officer had no jurisdiction to entertain the suit, he has no jurisdiction to make any order under S. 106 transferring the case to a competent Civil Court for trial. The Civil Court accordingly has no jurisdiction to try the suit. (*Ross and Bucknill, JJ*). E. A. MOORE *v.* RAI BABU GULABCHAND SAHEB. **4 Pat. L. T. 68 = 73 I. C. 5 = 1 Pat. L. R 157 = A. I. R. 1923 Pat. 213.**

S. 106—Record-of-rights.

———*Entry in Record challenged—Court should find if the evidence justifies entry.*

Where the Court has before it the evidence upon which the record was prepared and where the plaintiff denies the correctness of the record, the Court must come to a finding as to sufficiency of the evidence to justify the entry. (*Ross, J.*) JANKI KUAR *v.* USMAN SAIN. **62 I. C. 417 (Pat.).**

———*Civil suit to correct entry in record-of-rights is maintainable.*

A civil suit lies to correct an entry in the record-of-rights prepared under the provisions of the Bengal Tenancy Act. 35 Cal. 1013, Diss. from. (*Greaves and Newbould, JJ.*) MD. AYEJUDDIN MEA *v.* PRODYAT KUMAR. **48 Cal. 359 = 25 C. W. N. 13 = 61 I. C. 503 = A. I. R. 1921 Cal. 741.**

———*Entry affects proprietor of neighbouring estate.*

An entry in the record-of-rights operates in the same way between landlords of neighbouring estates as between landlord and tenant, or between tenant and tenant. (*Das and Adami, JJ.*) BIBI WAKILAN *v.* DEONANDAN PRASAD. **2 Pat. L. T. 81 = 59 I. C. 298 = A. I. R. 1921 Pat. 268.**

S. 106—Res judicata.

———*Tank recorded as niskar of defendant—Suit by plaintiff under Bengal Tenancy Act for correcting the entry but failing - Subsequent suit in Civil Court for possession and declaration that tank is his mal and not defendant's niskar is barred—C. P. Code, S.* 11.

Plaintiff sued to recover possession of a tank with its banks on declaration of his title therein alleging that it was not the niskar property of the defendant but part of his *mal* property. The tank and its banks were recorded in the Record-of-Rights as held by defendant 1 in niskar right. The plaintiff had prior to this suit instituted a suit under S. 106 for correction of the entry alleging that it was his *mal* property but failed therein.

Held, that the decision in the suit under S. 106 operated as a bar to the present suit. (Case-law considered.) (*Mukerji and Mallik, JJ.*) CHANDI CHARAN *v.* LAL BAXA. **49 C. L. J. 285 = 33 C. W. N. 623 = 120 I. C. 147 = A. I. R. 1929 Cal. 385.**

———Where a suit by the plaintiff under S. 106 of the B.T. Act for the correction of an entry in the Record-of-Rights after establishment of plaintiff's rent-free title is dismissed for default by a revenue court, a subsequent suit in a civil Court for declaration of plaintiff's rent-free title is barred. (*Walmsley and Greaves, JJ.*) APURBA KRISHNA ROY *v.* ATARMANI DASI. **64 I. C. 889 (Cal.).**

S. 106—Scope.

———The scope of a suit under S. 106 can extend to question of title. 12 C. W. N. 8 (Per Woodroffe, J), Expl.; 18 C. W. N. 938, Expl. and Dist.; 13 I. C. 311 and A.I.R. 1927 Cal. 216, Ref.; 24 C.L.J. 79, Dist.; 64 I.C. 889, Foll. (*Mukerji and Mitter, JJ.*) BROJO MOHAN PAL *v.* DARSAN PAL. **49 C. L. J. 294 = 34 C. W. N. 47 = 120 I. C. 155 = A. I. R. 1929 Cal. 308.**

———*Scope of suit to alter entry in Record-of-Rights is confined only to existing or actual possession.*

In a suit under S. 106 the Revenue Officer is confined to the question of possession and cannot be asked to adjudicate upon the title of rival claimants. What is the Revenue Officer has to go upon primarily is the question of actual possession in making an entry in the Record-of-Rights and therefore the scope of the suit or proceeding under S. 106 to alter an entry so made must also be limited to the question of actual or existing possession. 12 C. W. N. 8 and A. I. R. 1923 Pat. 213, Rel on. (*Fazl Ali and Chatterji, JJ*) JAGEYANAND *v.* GIRJANANDA. **117 I. C. 644 = A. I. R. 1929 Pat. 590.**

——A Revenue Officer deciding disputes under S. 106 is confined to the question of possession only. (*Cuming, J.*) SEBA DAS JANA *v.* NIRODA BALA DASI. **63 I. C. 602 (Cal.).**

Ss. 106 and 113—Scope.

——*Rectificatian of Record does not bar suit under S.* 113.

The rectification of the Record of Rights as regards the existing rights according to S. 106 does not amount to a settlement of rent so as to bar a suit under S. 113. (*Chaudhuri and Ghose, JJ.*) MANINDRA CHANDRA NANDI *v.* UPENDRA CHANDRA HAZRA. **60 I. C. 959 = 47 Cal. 1006.**

Ss. 106 and 109—Subsequent suit.

——*Application under S.* 106 *for correcting entry in Record-of Rights withdrawn without leave to institute fresh application—Subsequent suit for recovery of possession against applicant—Section bars only plaintiff and does not bar defendant though an applicant under S.* 106.

An application under S. 106 for correcting entry in the record-of-rights was withdrawn without leave to institute a fresh application. A suit for recovery of possession and declaration of title was subsequently brought against the applicant alleging that plaintiffs were reversioners of one Padarath. The defence was that long before succession opened he had purchased the land for value. Plaintiffs pleaded bar of S. 109 to the defence.

Held, that the subject-matter of the application was different from that of the suit and hence the section was not a bar. Further the bar was upon a plaintiff if he had already been an applicant but the defendant who had been an applicant before the Settlement Officer was not barred in any way. 24 C. L. J. 79, Foll.; 52 Cal. 894 (F. B.), Expl. and Dist. (*Courtney Terrell, C. J. and Mullick, J.*) RAM NARAYAN SINGH *v.* SUKHDEO TELI. **7 Pat. 786 = 117 I. C. 557 = 9 Pat. L. T. 609 = A. I. R. 1928 Pat. 579.**

S. 107—Decree.

——A decree in S. 105 proceedings operates as Civil Court decree. The Settlement Officer has jurisdiction to try the case under S. 105 to enhance rent in case of homestead lands and decision under S. 105 proceedings must be taken to be binding on the parties. A. I. R. 1924 Cal. 907, Foll.; A. I. R. 1926 Cal. 1101, Rel. on. (*Mukerji, J.*) MANMATHA NATH SARKAR *v.* DEVENDRA NATH SAMANTA. **107 I. C. 743.**

——*Decree of a Revenue Officer in a proceeding under S.* 105 *has the force of a decree of a Civil Court—B. T. Act, S.* 105.

The decree of a Revenue Officer under S. 105 has the force of the decree of a Civil Court.

Where the record-of-rights contained a decision by the Settlement Officer that a certain amount was fair and equitable rent,

Held, that so long as the decree subsisted it was not open to a defendant in a suit for rent to have the question whether the land was liable to rent tried again. (*Mukerjee and Rankin, JJ.*) DHARANI MOHAN ROY

v. ASHUTOSH MOOKERJEE. **40 C. L. J. 34 = 82 I. C. 396 = A. I. R. 1924 Cal. 907.**

S. 107—Procedure.

——*Does not make O. 6, R. 14, C. P. Code, applicable to applications under S.* 105, *B. T. Act.*

S. 107 of B. T. Act makes the procedure for the trial of suits laid down in the Civil Procedure Code applicable to proceedings under S. 105 of the Bengal Tenancy Act, and not to applications initiating the proceedings; and therefore it does not make the provisions contained in the Code of Civil Procedure relating to the verification of a plaint applicable to such proceedings. (*Dawson Miller, C.J and Kulwant Sahay, J.*) HAZARI LAL SAHU *v.* AMBICA GIR. **3 Pat. 67 = 1923 P. H. C. C. 273 = 79 I. C. 5 = 2 Pat. L. R. 169 = 5 Pat. L. T. 591 = A. I. R. 1924 Pat. 104.**

S. 107—Res judicata.

——*Decree in proceedings under S.* 105 *fixing the area and the rent of the holding—Landlord suing the tenants on that basis—The decree was held to be conclusive between the parties and the tenants were held to be bound to pay the rent fixed by the Settlement Officer.*

After the final publication of the Record-of-Rights proceedings under S. 105 were started at the instance of the landlords and the Revenue Officer settled the fair rent of the land in arrears at Rs. 18-5-9. The decree in those proceedings showed that the tenants were in possession of 21 bighas 5 cottas odd land and that the fair rent assessed on the same was Rs. 18-6-9. Upon the basis of this assessment the landlord brought a suit to recover arrears of rent against the tenants. The tenants contended that there should be entire suspension of rent as the landlord dispossessed the tenants from 5 bighas 8 cottas of land and that the holding in respect of which the rent suit was brought consisted of 25 bighas odd and was held at a rental of Rs. 15-6-11 gandas. The defence also alleged that there should, in any event, be proportionate reduction of rent. They further contended that the decree passed in proceeding under S. 105 was an *ex-parte* decree and the tenants did not raise the contention that they were entitled to suspension of rent by reason of dispossession by the landlord from a part of the disputed holding.

Held, that the decree under S. 105 was conclusive between the parties in suit on two questions, (1) the area of the holding; and (2) the rent of the holding. So long as the decree stood, tenants were bound to pay the rent fixed by the Settlement Officer in respect of the holding of 21 bighas found in their possession by the Settlement Officer. The fact that the decree was an *ex parte* one did not take away from the effect of the decree. A. I. R. 1924 Cal. 907, Foll. (*Rankin, C. J. and Mitter, J.*) SAJJAD AHAMAD *v.* TRAILAKYA NATH. **55 Cal. 464 = 116 I. C. 375 = 32 C. W. N. 472 = A. I. R. 1928 Cal. 479.**

S. 108—Limitation.

——*Twelve months limitation applies to making of application and not to passing of order.*

It is sufficient if the application for revision was made within the period of 12 months even if the order in revision was not passed until more than 12 months had expired from the date of the order sought to be revised. (*Greaves and Panton, JJ.*) RESHEE CASE LAW *v.* KEDARNATH MARIK. **30 C. W. N. 638 = 95 I. C. 971 = A. I. R. 1926 Cal. 849.**

S. 109—Bar of suit.

——*Subject-matter of application under S.* 105 *and subsequent suit under S.* 7 *not same—Suit is not barred—Similar nature of defence is immaterial.*

Where the subject-matter of the suit under S. 7 is not the same as the subject-matter of the application under S. 105, the suit is not barred under S. 109 even if the defence taken by the defendants in the suit is the same as the objection taken by them in the application under S. 105, namely, that the rent of the tenure was fixed for ever and was not liable to enhancement. The nature of the objection taken by the tenure-holder is not and cannot be considered to be the subject-matter of the application. A. I. R. 1925 Cal. 845 and A. I. R. 1929 P. C. 134, Dist. (*Courtney Terrel, C. J. and Kulwant Sahay, J.*) ABDUL SATTAR *v.* RAJKISHORE SAH. **A. I. R. 1930 Pat. 161.**

———*Application under S. 105 withdrawn or dismissed—Subsequent proceedings are barred.*

Once an application is made under S. 105 and subsequently withdrawn or dismissed for default, a suit on the same subject-matter is barred. A. I. R. 1921 Cal. 455 and A. I. R. 1925 Cal. 845 (F. B.), Rel. on.; A.I.R. 1927 Pat. 375, Dist. (*Wort, J.*) KANDHAYA LAL *v.* SHEO TAHAL AHIR. **A. I. R. 1930 Pat. 69.**

———*Decision under S. 105—Subsequent suit is barred.*

A subsequent civil suit based on the question of reduction of area will be barred under S. 109 when the question of area is constructively a matter of procedure determining the question under S. 105. (*Dawson Miller, C. J. and Mullick, J.*) KESHEO PRASAD SINGH *v.* BHAGWAT SARAN PANDE. **5 P. L. T. 98 = 75 I. C. 670 = 1924 P. H. C. C. 18 = A. I. R. 1924 Pat. 511.**

———*Suit under S. 106 withdrawn with liberty—Later suit in Civil Court—S. 109 is no bar.*

As suit under S. 106 allowed to be withdrawn with liberty to bring a fresh one, is to be treated as one never instituted, S. 109 is therefore no bar to the institution of a suit for declaration and possession in a Civil Court. (*Chatterjee and Suhrawardy, JJ.*) S. K. ACHARJI CHOUDHURY *v.* UMED ALI HAVALDAR. **35 C. L. J. 19 = 25 C. W. N. 1022 = 63 I.C. 954 = A. I. R. 1922 Cal. 251.**

———*Application dismissed for non-prosecution is within S.* 109.

An application which has been made, whether it is withdrawn or whether it is dismissed for non-prosecution, is nevertheless an application made within the meaning of the provisions of S 109. 40 Cal. 428; 28 C. L. J. 254, Doubted. (*Mookerjee, A. C. J. and Fletcher, J.*) AHEDA KHATUN *v.* MAJUBALI. **48 Cal. 157 = 33 C. L. J 304 = 59 I. C 760 = A.I. R. 1921 Cal. 455.**

S. 109—Bar under.

———*Previous applications by one co-sharer landlord under S. 105—Partition—Entire holding falling to co-sharer's lot—Fresh suit under S. 105—Suit held not barred under S.* 109.

A co-sharer landlord applied under S. 105 for settling fair and equitable rent of his share of holding, joining other co-sharers as *pro forma* defendants. The tenants objected to the application and their objections were allowed in two Courts. Subsequently High Court remanded the case to the first Court observing that application would be maintainable under certain circumstances notably if there were separate contracts between the parties. Whereupon the co-sharer landlord alleging that there were defects in the application which were irremediable withdrew the application. Thereafter on partition with co-sharers entire 16 annas share of the holding was allotted to the co-sharer landlord. The co-sharer landlord then instituted the suit under S. 105.

Held, that the subject-matter of subsequent suit was not the same as the previous application under S. 105 and the suit was not barred under S. 109. A. I. R. 1925 Cal. 845 (F. B.). Foll. (*Mukerji and Bose, JJ.*) HEMANTA KUMARI DEVI *v.* PRASANNA KUMAR DATTA. **56 Cal. 584 = 120 I. C. 249 = A. I. R. 1930 Cal. 32.**

———*Application under S. 105 for enhancement of rent under S. 30 (b) withdrawn—Subsequent suit for enhancement—Subject-matter different—S. 109 is no bar.*

Where plaintiff made an application under S. 105 for enhancement of rent under S. 30 (*b*) in 1916 but withdrew the same and subsequently filed a suit for enhancement of rent in 1923,

Held, that the subject-matter not being the same, S. 109 was no bar to the suit. A. I. R. 1925 Cal. 845 (F. B.). Discussed. (*Suhrawardy and Garlick, JJ.*) SOUDAMINI DASSYA *v.* BASIR MAMUD. **33 C. W.N 498 = 115 I. C. 586 = A. I. R. 1928 Cal. 841.**

———*Application by landlord for settling fair rent under S. 105 pending—Subsequent rent suit by landlord in respect of that holding not barred.*

To attract the opertation of S. 109, it is essential to establish that the civil suit has, for its subject, a matter which has already formed a subject of an application under S. 105. The defendant-tenant held 13 jamas under the plaintiff. There was settlement and survey under the Bengal Tenancy Act and the record was prepared by the settlement officer, and these 13 jamas were amalgamated and the rent shown to be Rs. 170 odd. After the final publication of the record an application was made by the landlord under S. 105, Bengal Tenancy Act, for assessment of fair and equitable rent. The tenant-defendant filed objections in that proceeding. The main objection being that he did not hold one jama, but 13 separate jamas under the landlord, and the settlement officer was wrong in consolidating those jamas without his consent. While that proceeding was still pending, the settlement officer not having come to any decision whatever upon the application the landlord instituted a rent suit with reference to one of those holdings.

Held, that the suit was maintainable and it cannot be held on the analogy of the doctrine of constructive *res judicata*, that the jurisdiction of the Civil Court has been constructively excluded even when a point has been neither raised nor decided under S. 105 read with S. 105-A. 14 C. W. N. 897; 19 C. W. N. 636, Rel. on; 24 C. W. N. 223, not Foll. (*Majumdar, J.*) SARAT CHANDRA *v.* MON MOHAN. **46 C. L. J. 46 = 104 I. C. 349 = A. I. R. 1927 Cal. 711.**

———*Proceedings based on assumption that lands are rent paying—Question of liability to pay rent not decided—Question is not barred.*

Where proceedings under S. 105 are based on the assumption that the land concerned is rent paying and owing to there being no appearance on behalf of the tenants the question whether the land is rent paying or lakheraj land could not be agitated, the plea that lands are not rent paying lands is not barred by the provisions of S. 105. (*Duval and Mitter, JJ.*) KSHETRA LAL SINGHA *v.* PROHLAD CHANDER MAJUMDAR. **101 I. C. 800 = A. I. R. 1927 Cal. 603.**

———*The lands recorded in record of rights as forming one jama—Application by landlord under S. 105 for increase of rent—Area of land considered in fixing rent—Suit for declaration of entry in record-of-rights to be erroneous is not barred.*

There was a record-of-rights in which the disputed lands were recorded as forming part of one jama. The landlord then made an application for increase of rent under S. 105. There was a decision and the rent was increased. Then a suit was brought for a declaration that the record-of-rights recording the two lands in two schedules as appertaining to one jama was erroneous.

Held, the question whether the lands given in the two Schedules of the plaint were included in one jama or not was not a matter about which the application under S. 105 was made. It may be that the area of the land for which application was made for increase of rent by the landlord was taken into consideration. But the question in dispute in the suit cannot be said to be a matter which was the subject of the application under S. 105. (*B. B. Ghose and Panton, JJ.*) BASANTA KUMARI DEVI *v.* BENI MADHAB MAHAPATRA. **95 I. C. 788 = A. I. R. 1926 Cal. 1058.**

——*Application under S. 105 or S. 106 is no bar to a rent suit.*

A suit for rent is for relief against an alleged grievance which the plaintiff is entitled to institute under the general law. It is not concerning any matter which may form the subject of an application or suit under S. 105 or S. 106. The mere fact that in dealing with the defence in the suit the Court has to decide on matters which were the subject of an application under S. 105 or S. 106 is no bar as S. 109 is only a bar to the entertainment of an application or suit and not the entertainment of a defence to an action. (*Suhrawardy and Mukerji, JJ.*) MAHENDRA NATH *v.* PROBAL CHANDRA. **53 Cal. 475 = 95 I. C. 87 = A. I. R. 1926 Cal. 980.**

——*Application for correction of record-of-rights dismissed for default is no bar to trial of the same question in a rent suit.*

An order purporting to dismiss an application under S. 105 or S. 106 for default without there being any adjudication on the merits does not amount to a decision. 18 C. W. N. 504, Foll. (*Suhrawardy and Mukerji, JJ.*) MAHENDRA NATH *v.* PROBAL CHANDRA. **53 Cal. 475 = 95 I. C. 87 = A. I. R. 1926 Cal. 980.**

——*Application under S. 105 made but withdrawn with liberty to bring suit—Suit in Civil Court for that relief is barred.*

If an application is made under S. 105 of the Bengal Tenancy Act, and subsequently withdrawn whether with or without the permission of the court to bring a suit, a fresh suit on the same subject-matter is barred by the provisions of S. 109 of the Tenancy Act. The words 'subject of an application made' admit of only one interpretation, and that is that once an application is made, the civil court cannot entertain an application, or suit in respect of the same matter. It is of no consequence what happens to the application ; it may be prosecuted to a conclusion, or abandoned, or dismissed for default, or withdrawn by leave of the court or without the leave of the court. It is the fact of the application being made, and not the manner of its disposal that has to be considered. (*Suhrawardy, J. dissenting.*) (*Walmsley, Newbould, C. C. Ghose, Suhrawardy and B. B. Ghose, JJ.*) BECHARAM CHOUDHRY *v.* PURNA CHANDRA CHATTERJI. **41 C.L.J. 456 = 88 I.C. 637 = 29 C. W. N. 755 = 52 Cal. 894 = A.I.R. 1925 Cal. 845 (F.B.).**

——*Previous application withdrawn — Section applies.*

S. 109 operates as a bar even in cases in which the previous application was withdrawn. (*Pearson and Graham, JJ.*) BIJOY KUMAR PAL *v.* NAGENDRA NATH CHOUDHRY. **83 I.C. 876 = A.I.R. 1925 Cal. 478.**

——*Withdrawal under S. 106 bars suit in Civil Court under S. 109.*

Withdrawal of suit under S. 106 with liberty to institute a fresh suit if not barred, bars a fresh suit for the same relief in the civil court under S. 109. (*Mookerjee and Walmsley, JJ.*) DINO NATH SIKDAR *v.* ANADI KRISHNA DUTT. **28 C.W.N. 703 = 83 I. C. 873 = A.I.R. 1924 Cal. 854.**

——*Application under S. 105 made and withdrawn —Civil suit for same relief is barred.*

There is no provision in the Bengal Tenancy Act that an application made under S. 105 and subsequently withdrawn has the effect of never having been made and therefore a civil suit against the same parties in respect of the same matter is barred by reason of S. 109. 48 C. 157, Foll. (*Walmsley and B.B. Ghose, JJ.*) (MAHARAJA) SASI KANTA ACHARJYA *v.* SALIM SEKH. **27 C.W.N. 987 = 74 I.C. 1001 = 50 Cal. 626 = A.I.R. 1923 Cal. 624.**

S. 109—Defence.

——*Tenant's application for abatement dismissed—Subsequent suit by landlord for rent—Tenant can claim abatement in defence.*

A previous dismissal of an application by the tenant for an abatement of rent on the ground that there had been a decrease in area does not debar him in a subsequent rent suit from contending that there had been a decrease in area and hence he was entitled to an abatement of rent. (*Cuming and Gregory, JJ.*) BENGARAM CHANGA *v.* BEJOY GOBINDA. **91 I.C. 738 = A.I.R. 1926 Cal. 513.**

——*Defence to an application or suit is not barred.*

Assuming the expression "entertain an application or suit" includes an application or suit made or instituted before the date of the application, suit or proceeding under Ss. 105 to 108, what is barred is the entertainment of an application or suit and not the entertainment of a defence to an application or suit. (*Mookerjee and Cuming, JJ.*) RAJENDRA NARAYAN MAZUMDAR *v.* SHEIKH KALIM. **49 Cal. 875 = 67 I.C. 813 = 26 C.W.N. 758 = A.I.R. 1922 Cal. 575.**

Ss. 109 and 106—Effect of decision.

——*Decision under S. 106 acts as* res judicata.

The decision in a proceeding under S. 106 that the defendant was a tenant and not a trespasser is *res judicata* in a proceeding by landlord under S. 109. 30 Cal. 339, 364, Dist.; 3 Pat. L.J. 379; 9 I.C. 651, Foll. (*Chatterjee and Pearson, JJ.*) JATINDRA NATH CHOWDHRY *v.* AZIZUR RAHOMAN SHANA. **50 Cal. 79 = 71 I.C. 307 = A.I.R. 1923 Cal. 433.**

Ss. 109 and 105—Res judicata.

——*Doctrine of, does not apply to proceedings under Ss.* 105-109, *B. T. Act—C. P. Code, S.* 11.

The tenant claimed abatement of rent under S. 52, but no such question was raised or investigated in the proceeding under S. 105. The landlord contended that as in a case where S. 11, C. P. Code, is applicable, a question which might and should have been raised is deemed to have been raised and decided, High Court should hold under S. 109 that a matter has been the subject of an application under S. 105 whenever it might and ought to have been raised and decided under S. 105 read with S. 105-A.

Held, that this contention is unsound. If this construction were accepted words which are not found there would have to be read into S. 109. It would be held no the analogy of the doctrine of constructive *res judicata*, that the jurisdiction of the civil court has been constructively excluded even when a point has been neither raised nor decided under S. 105 read with S. 105-A. 44 C. 783, Foll. (*Das J.*) MAHARAJA BAHADUR KESHO PRASAD SINGH *v.* BHAGWANT SARAN PANDE. **67 I. C. 710 = A.I.R. 1923 Pat. 174.**

S. 109—Scope.

———*Application under S. 106 for correcting entry in Record-of Rights withdrawn without leave to institute fresh application—Subsequent suit for recovery of possession against applicant—Section bars only plaintiff and does not bar defendant though an applicant under S.* 106.

An application under S. 106 for correcting entry in the Record-of-Rights, was withdrawn without leave to institute a fresh application. A suit for recovery of possession and declaration of title was subsequently brought against the applicant alleging that plaintiffs were reversioners of one Padarath. The defence was that long before succession opened he had purchased the land for value. Plaintiffs pleaded bar of S. 109 to the defence.

Held, that the subject-matter of the application was different from that of the suit and hence the section was not a bar. Further the bar was upon a plaintiff if he had already been an applicant but the defendant who had been an applicant before the Settlement Officer was not barred in any way. 24 C. L. J. 79, Foll.; 52 Cal. 894 (F.B.), Expl. and Dist. (*Courtney Terrell, C. J. and Mullick, J.*) RAM NARAYAN SINGH *v.* SUKHDEO TELI. **7 Pat 786 = 9 P.L.T. 609 = 115 I.C. 557 = A.I.R. 1928 Pat. 579 (586).**

S. 109—Second appeal.

———*Proceedings under S.* 105—*Revenue Court applying presumption under S.* 50—*Appellate Court holding that presumption was rebutted and remanding the case for settling fair rent—Appellate Court's order is decision under S.* 109 *and second appeal lies—Order of Appellate Court is final and not interlocutory—Bengal Tenancy Act, S.* 50.

Plaintiff commenced proceedings under S. 105 for settlement of fair and equitable rent in respect of certain lands. The defendants contested the case on the ground that they held the lands in dispute on a fixed rental as a permanent, heritable, transferable and mokarari tenure. The settlement officer held that the defendants were entitled to the presumption under S. 50 and evidence adduced by the plaintiff was not sufficient to rebut the presumption. Against this decision an appeal was preferred to the Special Judge and he came to the conclusion that the holding in suit was a non-mokurari tenure and liable to enhancement of rent, and after so holding he remanded the case to the lower court for assessment of fair and equitable rent.

Held, that the issue whether the defendants were non-mokurari tenure-holders or they were permanent tenure-holders paying rent which is fixed in perpetuity, being the cardinal issue in the proceeding, the order of the Special Judge was a decision under S. 109-A and therefore second appeal was competent.

Held, further, that with regard to the question as to whether the tenure was liable to enhancement of rent or not, the decision of the Special Judge was a final decision and the order was final and not interlocutory and, therefore, right of appeal from this order would not cease with disposal of the suit. 7 C.W.N. 440 Dist. (*Panton and Mitter, JJ.*) NEW BEERBHUM COAL CO. *v.* JYOTI PROSAD SINGH DEO. **31 C W.N. 936 = 104 I. C. 828 = A.I R. 1927 Cal. 686.**

Ss. 109 and 105—Suit under.

———*Application under S.* 105 *withdrawn (with or without permission)—Suit under S.* 109 *on same subject is barred.*

It is the making of the application that brings into play the prohibition of S. 109 and if an application is made under S. 105 and subsequently withdrawn, whether with or without permission of the court, a suit on the same subject matter is barred by the provisions of S. 109. A.I.R. 1925 Cal. 845 (F.B.), Appr. (*Lord Salvesen.*) RESHEE CASE LAW *v.* SATIS CHANDRA PAL. **56 I.A. 179 = 33 C.W.N. 705 = 116 I.C. 396 = 30 M.L.W. 279 = 10 P.L.T. 871 = 57 Cal. 118 = A.I.R. 1929 P.C. 134 = 57 M.L.J. 43 (P.C.).**

S. 109-A--Effect—Bar under.

———*Claim for additional rent for additional area.*

An appeal from a decree rejecting a claim for additional rent for additional area is not barred under S. 109-A as there is no question of settlement of fair and equitable rent. (*Rankin, C. J. and C. C. Ghose, J.*) NIRODE BASINI MITRA *v.* SITAL CHANDRA GHATAK. **51 C.L. J. 569 = A. I. R. 1930 Cal. 577 (1).**

S. 109-A (3)—Appeal.

———*Special Judge finding out original rent payable by tenant and then proceeding to settle fair rent under S.* 105 *with S.* 30—*Decision is not decision settling rent pure and simple and appeal lies.*

Where what the Special Judge had done was to find out what the original rent payable by the tenant was and then he proceeded to settle fair and equitable rent under S. 105 read with S. 30, Bengal Tenancy Act.

Held, that the decision of the Special Judge in these cases is not what may be said to be a decision settling a rent pure and simple. He had done something more than that; that is, he had found what the real rent payable by the tenants was and a second appeal would lie. (*Suhrawardy and Garlick, JJ.*) KAILASH SUNDARI DASI *v.* MIDNAPORE ZEMINDARY CO., LTD. **32 C. W. N. 999 = 115 I C. 525 = A. I. R. 1929 Cal. 47.**

———*Fixation of rent—Decision as to, is not appealable—Appeal lies where competency of Court to settle rent is disputed.*

The decision of the lower appellate Court fixing the rent payable by the tenant is not appealable. But an appeal lies where the question raised relates to the competency of the Court to settle rent. (*Suhrawardy and Cuming, JJ.*) RAM SUNDAR DAS *v.* SATINDRA MOHAN TAGORE. **89 I. C. 190 = A. I. R. 1926 Cal. 85.**

———An appeal lies from the order of Special Judge refusing to set aside the abatement of an appeal. 45 Cal. 638, Foll. (*Cuming and Panton, JJ.*) KRISHNADAS ACHARJEE CHOWDHURY *v.* SAMSON ALI SHEIKH. **37 C. L. J. 139 = 74 I. C. 925 = A. I. R. 1923 Cal. 431.**

Ss. 109-A and 188—Necessary parties.

———*All landlords need not join in appeal under S.* 109 *A.*

The act authorised by the Tenancy Act in the making of the application under S. 105 and S. 109-A does not authorise a new act but merely provides that in a case under S. 105 any party aggrieved by the decision of the Revenue Officer will have a right of appeal. The concert among the landlords insisted upon by S. 188 need not exist in an appeal under S. 109-A. 38 Cal. 270. Dist. (*Suhrawardy and Duval, JJ.*) JOGENDRA NARAYAN SINGHA *v.* MOHAMED ISMAIL CHOUDHURY. **52 Cal. 139 = 86 I. C. 1035 = A I. R. 1925 Cal. 637.**

Ss. 109-A and 105-A—Res judicata.

———*Application under S.* 105 *A—Custom of suspension of rent held not to exist—Decision not having been appealed against by tenant operates as* res judicata *in subsequent rent suit between the parties (Cuming, J., contra.)*

Per *Page, J.*—When the incidents of a tenancy to which the Bengal Tenancy Act applies had been canvassed and determined in a proceeding under Ss. 105 and 105-A, the decision of the revenue officer should be final and should not be challenged except in an appeal as provided in the Act. Notwithstanding the dismissal of the landlord's application for enhancement of rent under S. 105-A it is open to tenants to appeal to the Special Judge under S. 109-A against the decision of the revenue officer that a custom giving them a right of suspension of rent did not exist in the locality, and if they do not elect to take that course, the issue relating to that custom becomes *res judicata* in a subsequent rent suit between the parties. (*Cuming, J., dissenting.*) 11 Cal. 301 (P.C.); A. I. R. 1924 Cal. 907 and A. I. R. 1928 Cal. 479, Ref. (*Cuming and Page, JJ.*) MANI DASI *v.* UPENDRA NANDAN. **118 I. C. 338 = A. I. R. 1928 Cal. 706.**

S. 109-A—Second appeal.

——*Rent suit—No second appeal lies from the decision of a Special Judge, which settles a fair and equitable rent.*

The settlement of rent was asked for lands which the tenant had encroached upon beyond the original area let out to him. The Assistant Settlement Officer fixed the rent on the basis of a certain area which, according to his view, was the excess land. On appeal, the Special Judge thought that the measurement of the area given in the kabuliyat was not at all accurate and he held that since the landlord had allowed a lax measurement by his own officers, it was not fair that the tenant should be compelled to pay at the kabuliyat rate for the area found by the scientific measurement of the cadastral survey. He, therefore, held that it would be just and proper to enhance the rent of the holding by three annas in the rupee. It was contended that the decision fell within the provisions of S. 105 and, therefore, a second appeal lay from it.

Held, that no appeal lay as the decision only settled a fair and equitable rent. 43 Cal 603 (F.B.), Dist. (*B. B. Ghose and Roy, JJ.*) NAFAR CHANDRA PAL *v.* MARALI MONDAL. **55 Cal. 619 = 111 I. C. 79 = A. I. R. 1928 Cal. 496.**

——*Application covering matter other than that of settlement of rent—Second appeal lies.*

Where an application to the Settlement Officer for a settlement of fair and equitable rent does not cover only the matter of settlement of rent within the meaning of those words in S. 109-A but some other points also: there is a right of second appeal. (*Rankin, C. J. and Mitter, J.*) SIBA KUMARI DEVI *v.* DOSHI GHOSAIN. **46 C.L.J. 555 = 106 I.C. 836 = A. I. R. 1928 Cal. 146.**

——*Decision of Special Judge on question of status—Second appeal not barred.*

Where the decision of the Special Judge does not determine merely the amount of fair and equitable rent, but is in essence a decision upon the question of the status of the tenant, it is liable to be challenged by way of second appeal to the High Court. 43 Cal. 603, Ref. (*Mukerjee and Cuming, JJ.*) SARAT CHANDRA DE DAS *v.* TARAPRASANNA BHATTACHARYYA. **36 C. L. J. 333 70 I. C. 437 = A. I. R. 1923 Cal. 141.**

——*Proceeding under S. 105—Questions under S. 105-A gone into—Decision given is not merely settling rent under S. 109-A—Second appeal lies.*

If in any proceeding under S. 105 questions under S. 105-A have been investigated and determined, the order of the Settlement Officer though in form an order which settles a fair and equitable rent does in substance embody a decision of questions within the scope of S. 105-A and consequently of S. 106. Such a decision is not merely settling a rent within the meaning of S. 109-A and is consequently liable to be challenged by way of second appeal to the High Court. (*Mukerjee and Cuming, JJ.*) MIDNAPUR ZEMINDARY CO., LTD. *v.* SHRIDHAR MAHATA. **36 C. L. J. 96 = 67 I.C. 775 = 49 Cal. 866 = A. I. R. 1922 Cal. 152.**

S. 109-C—Fair rent.

——*Powers of settlement officer to settle fair and equitable rent.*

The Settlement Officer has under S. 109-C to determine in the first place whether the terms of the agreement are really such that if they were embodied in a contract they would not be enforced under this Act. If the conclusion is in the affirmative he is to satisfy himself that the rent agreed upon is fair and equitable. It is only in the event of his being so satisfied, not otherwise, that he can settle rent as fair and equitable rent. Where the order of the settlement officer was in these terms: "The tenant agrees. Though the increase is rather large the attested compromised rent may be settled as fair and equitable."

Held, that the agreement which was in contravention of S. 29 of the Bengal Tenancy Act was not accepted by the Revenue Officer under S. 109 C, because he was satisfied that the rent agreed upon was fair and equitable. (*Mukerjee and Chotzner, JJ.*) MOYDHANNESSA BIBI *v.* SATIS CHANDRA GIRI. **37 C. L.J. 118 = 70 I. C. 895 = A. I. R. 1923 Cal. 435.**

S. 109-C—Scope.

——*Landlord after mortgaging his interest entering into agreement with tenants in collusion with them to receive nagdi rent at a very low rate instead of Bhaoli rent—Agreement is not binding on mortgagee purchasing mortgaged property in execution—T. P. Act, S. 66—Execution sale.*

Where the mortgagor in possession entered into an agreement with his tenants after the date of mortgage that they should thenceforward pay him nagdi rents and up till the time of the agreement they paid produce rents and the rate settled on compromise was considerably lower than the fair rent, and this low rate was entered into in collusion with tenants after taking heavy nazarana because the mortgagor saw no means of saving his property.

Held, that the mortgagee would not be bound by the agreement. 1 P. L. J. 563, Rel. on. (*Coutts and Sultan Ahmed, JJ.*) MATHURA RAI *v.* MANDIL DAS. **1921 P. H. C. C. 165 = A. I. R. 1921 Pat. 183.**

S. 111—Interpretation.

——*'Shall not entertain' meaning of—Suit already instituted should be adjourned pending preparation of record-of-rights.*

The provision that a Civil Court shall not entertain a suit of a particular description does not mean that a suit, if instituted, shall be dismissed. The proper course is to adjourn the trial of the suit until after the final publication of the record-of-rights.

The expression "shall not entertain" in S. 111 would include the cases not only not already instituted but cases where suits have already been instituted but not tried. That section means that after an order has been made under S. 101, Civil Courts shall not try any suit, if such suit has already been instituted, until three months after the final publication of the record-of-rights. (*Chatterjee and Panton, JJ.*) PRAMODE NATH ROY *v.* BASIRUDDIN QAZI. **51 Cal. 230 = 81 I. C. 993 = 28 C. W. N. 631 = 40 C. L. J. 177 = A. I. R. 1924 Cal. 704.**

S. 111 A—Fishing.

——*Right to rear fish in another's tank is not valid right.*

A suit will lie to declare that a right to rear fish recorded in the Record-of-Rights in the tank of plaintiff did not exist as the right is a novel right which a Court of law will not recognise as it is too vague. (*Newbould and B.B. Ghose, JJ.*) CHAND MIA MUNSHI *v.* TUKAMIA. **28 C. W. N. 516 = 80 I. C. 805 = A. I. R. 1924 Cal. 667.**

Ss. 111 A and 104-H—Limitation.

——*Entry in Record-of-Rights as tenure-holder—Suit to declare entry erroneous and to declare the person raiyat is within proviso to S. 111-A and is governed by Limitation Act, Art.* 120.

A suit for a declaration that the entry in Record-of-Rights that a person is a tenure-holder is erroneous and that he should be declared a raiyat is within the proviso to S. 111-A and that the period of limitation applicable to such suits is that provided by Art. 120 and not by S. 104-H. 15 C.W.N. 896, Appr. (*Sir Benod Mitter.*) MIDNAPORE ZAMINDARI CO., LTD. *v.* SECRETARY OF STATE. **56 I. A. 388 = 30 M. L. W. 600 = 51 C. L. J. 1 = 34 C. W. N 1 = 32 Bom. L. R. 114 = 120 I. C. 56 = A. I. R. 1929 P. C. 286 = 57 M. L. J. 849.**

——*Suit for declaration of raiyati right—Time run from final publication of Record-of-Rights.*

S. 111 A gives plaintiffs the right to institute a suit for a declaration that they have raiyati and under-raiyati rights, on the publication of the Record-of-Rights or, in other words they had a statutory cause of action which arose on the date of the final publication. (*Newbould and Panton, JJ.*) BADERUDDIN MUNSHI *v.* SARAPADDIN BEPARI. **68 I. C. 489 = A. I. R. 1923 Cal. 307.**

S. 111-B—Limitation.

——*Suit under—Time begins to run from publication of Record-of-Rights—Period of three months after certificate is only suspended.*

A cause of action for a declaratory suit under S. 111 B arises on final publication of Record-of-Rights as a cloud is cast upon the title of the plaintiff, on the publication of the record. But as no suit under S. 111 B shall be instituted within three months from the date of the certificate of final publication the period of limitation is subsequently suspended for three months after the certificate is made. 23 C.W.N. 883 and A.I.R. 1925 Cal. 518, Rel. on. (*Suhrawardy and Jack, JJ.*) ASUTOSH BHUIYAN *v.* RADHIKA LAL. **56 Cal. 407 = 119 I. C. 121 = A. I. R. 1929 Cal. 481.**

S. 113—Scope.

——*Rent settled under Ch. X—Reduction in area—Rent cannot be reduced.*

Rent of a tenure settled under Ch. X is not liable under S. 113 to be reduced on account of reduction in the area. (*Cuming and Page, JJ.*) NARESH CHANDRA BASU *v.* HUJJATALI AKON. **97 I. C. 470 = A. I. R. 1926 Cal. 1240.**

S. 114—Cost of Survey.

——*Apportionment—Assessment is not upon land but upon persons in respect of land.*

The *putni* lease, after providing for the payment of the usual cesses proceeded as follows: "Should any tax, toll, rent or whatever sum under whatever denomination be assessed in future, then the same should be paid by the lessee if they were assessed on the two taluks, but it was to be payable to the lessor if the same was assessed not on the taluks but on the lessor's income." The Government recovered from the lessor a certain sum as his proportionate share of the cost of the cadastral survey and settlement.

Held, that the sum paid by the lessor was assessed on him in respect of the land and not on the land, and so it was not recoverable by him from the lessee.

The intention of the Legislature was to make the expenses of the proceeding under the chapter liable to be defrayed, either in their entirety or in part, at the discretion of the Local Government, by the landlords, tenants, and occupants of land in that local area, estate, tenure or part thereof, within which the settlement operations have been carried out; and the question of apportionment amongst the persons so liable to defray the expenses of the proceedings is a matter for decision by the Local Government. *Prima facie*, then the inference follows that this is an assessment not upon the land but upon certain persons in respect of the land.

There is a distinction between an assessment on land and an assessment on a person in respect of land. (*Mookerjee, A. C. J. and Fletcher, J.*) BIJOY SINGH *v.* HEMCHANDRA. **33 C. L. J. 349 = 62 I. C. 925 = A. I. R. 1921 Cal 520.**

S. 115—Applicability.

——S. 115 does not come into operation until all possible proceedings under Chapter X have been exhausted. 37 C. 30, F.B., Foll. (*Mookerjee and Walmsley, JJ.*) NARENDRA LAL CHOUDHURY *v.* BENODE BEHARI SADHUKHAN. **27 C. W. N. 740 = 80 I. C. 577 = A. I. R. 1924 Cal. 143.**

S. 115—Interpretation.

——*The word 'thereafter' refers to a period subsequent to a publication of record-of-rights.*

The word "thereafter" refers to a period subsequent to the publication of the record-of-rights. But what is provided is that the presumption under S. 50 shall not, thereafter, that is to say, after the particulars mentioned in S. 103 have been recorded, apply. (*Dawson Miller, C. J. and Foster, J.*) RAMSARAN MAHTON *v.* SYED MD. ARADUT HUSSAIN. **6 P. L. T. 221 = 80 I. C. 926 = A. I. R. 1925 Pat. 181.**

Ss. 115 and 50—Scope.

——*Record-of-Rights becoming final—Tenant cannot claim the presumption under S. 50—"Thereafter" in S. 115 means after all provisions in Chap. 10 regarding finality of decision are resorted to—Other circumstances may be considered.*

After a Record-of Rights becomes final, a tenant is debarred by the provisions of S. 115 from claiming the presumption under S. 50. The expression "thereafter" in S. 115 means "after the particulars have been finally recorded after recourse to all the provisions contained in Chap. 10 of that Act for the attainment of finality in this respect." A.I.R. 1922 Cal. 146 Foll. Although the tenants are not entitled to the benefit of the presumption under S. 50, cl. (*b*) of the Act, the other circumstances of the case should be considered in order to enable the Court to come to a conclusion whether the rent payable by them is enhancible or not. (*M. N. Mukerji J.*

BENGAL TENANCY ACT (1885), S. 115.

SARAT CHANDRA PAL *v.* MAHOMED AKBAR.
86 I. C. 753 = A. I. R. 1926 Cal. 256.

———*Presumption under S. 50 ceases owing to S. 115 when particulars under S. 102 are mentioned.*

The presumption arising under S. 50 only ceases to apply by reason of S. 115 when the particulars required by the order of the Local Government directing the survey and record-of rights to be prepared have been in fact recorded. As a rule the order would require the particulars mentioned in S. 102, as to whether the tenure is permanent or not and as to whether the rent of a tenure is liable to enhancement or not, to be recorded. (*Dawson Miller, C.J. and Mullick, J.*) KAMALUDDIN AHMAD *v.* RAMANAND SINGH. **3 Pat. 120 = 1924 P. H. C. C. 1 = 78 I. C. 605 = A. I. R. 1924 Pat. 443.**

———*Tenant is not precluded from showing that entry in Record-of-Rights is presumably based on evidence of uniform payment.*

S. 115 provides against clashing of presumptions. It will not permit the presumption under S. 50 of the Act to override that raised from the record of particulars under Chapter X. The marginal note against the section lends support to this view. It will not be reasonable to suppose that the Legislature intended by enacting S. 115 to preclude evidence of uniform payment of rent in the record-of-rights where such entry is presumably based on the evidence of such uniform payment. It would be shutting out a very valuable piece of evidence in favour of a comparatively weak one. If the tenant succeeds in proving uniform payment of rent from the time of permanent settlement the rent shall not be liable to be increased whereas the presumption of the correctness of an entry in the record-of-rights though based on such uniform payment is only a rebuttable one. (*Richardson and Suhrawardy, JJ.*) DWARKA NATH BANERJI *v.* RASH BEHARI GUHA. **27 C. W. N. 936 = 76 I. C. 401 = A. I. R. 1923 Cal. 365.**

———*Suit for enhancement of rent not coming under Ch. X of the Act—Presumption under S. 50 does not apply.*

The expression 'thereafter' in S. 115 of the Act clearly signifies "after the particulars have been finally recorded after recourse to all the provisions contained in Ch. X for the attainment of finality in this respect". S. 115 does exclude the application of the presumption when the particulars had been recorded under Ch. X. A suit for enhancement of rent is not a suit instituted under Ch. X of the Bengal Tenancy Act. Consequently in such a suit the tenant is not entitled to the benefit of the presumption under S. 50. 36 Cal. 617 and 12 C.W.N. 904. Dist.; 37 Cal. 30, Foll.; 26 Cal. 617, Dist. ; 64 I.C. 445, Foll. (*Mukerjee and Cuming, JJ.*) PRASANNA KUMAR SEN *v.* DURGA CHARAN CHAKRABURTHY. **49 Cal. 919 = 26 C. W. N 947 = 70 I. C. 537 = 36 C. L. J. 291 = A. I. R. 1922 Cal. 146.**

Ss. 115, 50 and 106—Scope.

———*After final publication of Record-of-Rights presumption under S. 50 applies only to suit under S. 106.*

When there has been a final publication of the Record-of-Rights the tenant is entitled to the benefit of the presumption under S. 50 of the B.T. Act only in a suit under S. 106 of the B. T. Act. (*Das and Bucknill, JJ.*) GOBIND LAL SIJUAR *v.* RAM SARAN LAL. **2 P. L. T. 642 = 68 I. C. 433 = A. I. R 1921 Pat. 435.**

S. 116—Occupancy Right.

———*Lessees from person holding for a term of years—Possession is as lessees from year to year—Occupancy rights will not accrue in their favour.*

BENGAL TENANCY ACT (1885), S. 116.

Persons holding under a lease for a term of years cannot make any contracts of tenancy with raiyats except contracts for a term not exceeding the period of their lease. The tenants, therefore, will be presumed to be in possession for successive terms of one year by oral lease; S. 116 does not permit the accrual of occupancy rights in favour of such tenants. They cannot claim the rights of a non-occupancy raiyat under any part of the Bengal Tenancy Act and the special law of limitation in Sch. III of the Act does not apply; therefore the tenants are liable to ejectment as trespassers on the expiry of the tenancy of their lessors with which their own was coterminous. (*Mullick and Bucknill, JJ.*) CHANCHAL MAHTON *v.* BHAGWAN GIR. **88 I. C. 874 = A. I. R. 1925 Pat. 771.**

———*Bengal Tenancy Act—Lands in landlord's khamar held on lease for term of years—Tenant cannot have occupancy raiyat's status.*

As regards lands held under a lease for a term of years and lying in the khamar of the landlord nothing in Ch. V can confer status of occupancy raiyat on tenant. (*Mukerji, A.C.J. and Fletcher, J.*) MOHESH DUTT *v.* SHEIKH BASIR. **25 C. W. N. 714 = 67 I. C. 946 = A. I. R. 1921 Cal. 530.**

S. 116—Zerait land.

———*There is no absolute bar to accrual of occupancy right in proprietor's zerait lands. 4 Pat. 89 = 6 P. L. T. 240 = A.I.R. 1925 Pat. 241 = 84 I.C. 305, Overruled.*

There is no absolute bar to the accrual of occupancy rights in zerait lands and the only bar to the acquisition of such rights is under circumstances contained in S. 116, namely, when it is held under a lease for a term of years or under a lease from year to year. If the landlord does not take precaution of letting out the zerait land under a lease for a term of years or under a lease from year to year he cannot prevent the accrual of occupancy right in zerait land. A.I.R. 1929 Pat. 392; A.I.R. 1926 Pat. 112, Foll.; A.I.R. 1929 Pat. 444; A.I.R. 1922 P.C 142; A.I. R. 1926 P.C. 60, Dist.; 12 W.R. 277 ; 23 W.R. 288 ; 20 W.R. 288; 26 Cal. 546; 1 C.L.J. 456; 34 Cal. 57; 44 Cal. 267; 3 P.L.J. 1, Ref.; 4 Pat. 89 = 6 P.L.T. 240 = A.I.R. 1925 Pat. 241 = 84 I. C. 305, Overruled. (*Kulwant Sahay, Macpherson and Dhavle, JJ.*) TENGAROO *v.* CHATTHU. **10 P. L. T. 569 = 118 I.C. 316 = A. I. R. 1929 Pat. 460.**

———*Non-occupancy rights can be acquired in zerait land.*

Non-occupancy rights can be acquired in zerait lands provided such lands are not held under a lease for a term of years or under a lease from year to year. 44 Cal. 267 and 9 C. W. N. 144, Ref.; A. I. R. 1922 P.C. 142; A. I. R. 1926 P.C. 60 and A. I. R. 1925 Pat. 241, Dist.; 26 Cal. 546; 34 Cal. 57; 1 C. L. J. 456 and 3 P. L. J. 1 (F.B.), Rel. on. (*Ross and Chatterji, JJ.*) SHIVA SHANKAR *v.* KALI OJHA. **8 Pat. 471 = 10 P. L. T. 565 = 118 I.C. 309 = A. I. R. 1929 Pat. 392.**

———*No raiyati interest can be created in zerait lands by tenants under a registered lease for a term—After the term they are tenants from year to year.*

In zerait lands tenants cannot acquire occupancy rights under S. 116 where they were inducted upon the lands under a registered lease for a term of years. The tenants cannot acquire any right or interest either occupancy or non-occupancy in the lands during the continuance of the lease. They also hold over under the same conditions as the registered leases after the expiry of the lease and they become tenants from year to year. To such a case S. 116 would apply. (*Jwala Prasad, A.C. J. and Kulwant Sahay, J.*) RAMJI RAM *v.* BANSI RAUT.

BENGAL TENANCY ACT (1885), S. 116.

4 Pat. 89 = 6 P.L.T. 240 = 1924 P.H.C.C. 337 = 84 I. C. 305 = A. I. R. 1925 Pat. 241.

———Even apart from a registered lease for a term of years or from year to year no tenancy of occupancy or non-occupancy rights in zerait lands can arise. (*Jwala Prasad, A.C.J. and Kulwant Sahay, J.*) RAMJI RAM *v.* BANSI RAUT. **4 Pat. 89 = 6 P.L.T. 240 = 1924 P.H.C.C. 337 = 84 I. C. 305 = A. I. R. 1925 Pat. 241.**

S. 120—Evidence.

———*Admission in kabuliyat as to nature of land is evidence to determine character of land.*

An admission in a kabuliyat is an evidence as to the character of the land for the purpose of determining the character of the land. A.I.R. 1926 P. C. 79, Rel. on. (*Ross and Wort, JJ.*) RAGHUNANDAN SINGH *v.* RADHAKRISHNA THAKURJI. **A. I. R. 1930 Pat. 297.**

———*Deeds executed subsequent to the 1st March 1883—Recitals therein are relevant to decide whether lands are proprietor's private lands or not.*

Recitals in deeds executed subsequently to the 1st March 1883 are relevant evidence and have to be taken into consideration by the Court in coming to the conclusion whether lands are proprietor's private lands or not. (*Das and Kulwant Sahay, JJ.*) SATYENDRA NARAYAN *v.* SHYAMSUNDER SINGH. **7 Pat. 212 = 109 I. C. 526 = 9 P. L. T. 696 = A. I. R. 1928 Pat. 267.**

———*Admission in kabuliyat as to character of land is relevant—"Agreement or compromise" is one relating to character of land.*

The admission in the kabuliyat as to the character of the land is relevant evidence and admissible, and the question of its probative force is a question of fact. It is immaterial whether the admission is made subsequent to the 2nd March 1883 or prior. This view is not displaced by S. 2-*a* of Bengal Act I of 1907. The words: "any agreement or compromise" in S. (2-*a*) must refer only to an agreement or compromise, of a question in discussion as to the character of the land at the time when the agreement or compromise was made. If, when land is let in Bengal or Bihar there is no doubt, and consequently no discussion or compromise as to the character of the land, there is no reason why the agreement for letting of the land, lease, putta, or kabuliyat, which contains a statement of the character of the land, should not be admissible in evidence against a party to it. 13 C. W. N. 135, Appr. (*Sir John Edge.*) BINDESWARI PRASAD SINGH BAHADUR *v.* KESHAO PRASAD SINGH. **53 I.A. 164 = 5 Pat. 634 = 7 P.L.T. 553 = 95 I. C. 1025 = 31 C. W. N. 74 = 44 C. L. J. 86 = A.I.R. 1926 P. C. 79 = 51 M. L. J. 587 (P.C.).**

S. 120—Interpretation.

———*"Bakasht Malik or Thekadar" meaning explained—Landlord and tenant.*

The term "Bakasht Malik, or Thekadar" means "in cultivating possession of the Malik or Thekadar" and applies to those lands which are held directly by the malik or tenure-holder which are not zerait land as defined in S. 120. (*Dawson Miller, C. J. and Mullick, J.*) HIRA LAL SINGH *v.* MATUKDHARI SINGH. **7 Pat. 275 = 9 P.L.T. 589 = 109 I. C. 461 = A. I. R. 1928 Pat. 316.**

———*'Bakasht' conveys the same meaning as khudkhasht—It might imply raiyati lands temporarily come into possession of landlord and under his cultivation.*

BENGAL TENANCY ACT (1885), S. 120.

The term 'bakasht,' invented by the revenue officers to meet a certain contingency, conveys to all intents and purposes the same meaning as khudkasht which is admittedly the same as *sir* or zerait. It might, however, imply raiyati lands that had temporarily come into the possession of the landlord and were temporarily under cultivation. (*Mr. Ameer Ali.*) DHAKESHWAR PRASHAD NARAIN SINGH *v.* MT. GULAB KUER. **53 I. A 176 = 5 Pat. 735 = 7 P.L.T. 483 = 97 I. C. 217 = 31 C.W.N. 341 = A.I.R. 1926 P. C. 60.**

S. 120—Presumption.

———*Cultivation by landlord or recognition by village usage not shown—Presumption is that land is not proprietor's private land—But he can show that it is his private land.*

No doubt where it is not shown that the land was cultivated by the proprietor himself or recognized by village usage as proprietor's land, there is presumption that the land is not proprietor's private land but it can be shown by the proprietor though he has never cultivated the land himself, it is nevertheless his private land. A. I. R. 1926 P. C. 79, Foll.; 8 C. L. J. 533, Expl. and Diss. from. (*Das and Wort, JJ.*) SANTAKI MANDAR *v.* RAMESHWAR SINGH. **7 Pat. 187 = 114 I.C. 469 = 11 P.L.T. 12 = A. I. R. 1929 Pat. 41.**

S. 120—Zerait land.

———*Proprietor must prove cultivation as* zerait *for 12 years or village usage—Evidence of assertions of title before 2nd March 1883 is conclusive.*

In order to succeed it is necesary for the proprietor to prove either that the disputed land was cultivated by himself as *zerait* with his own stock or by his own servants or by hired labour for 12 continuous years immediately before the passing of the B. T. Act or that the land is recognised by village usage as proprietor's private land. 17 Cal. 466, not Foll.

There is nothing in S. 120 itself to cut down the generality of the expression "any other evidence that may be produced" used by the Legislature in S. 120, para. 2 of the B. T. Act. If it were the intention of the Legislature to exclude such evidence as may be furnished by the dealings between landlords and tenants subsequent to the 2nd day of March 1883, it should have expressed that intention in more clear terms. As S. 120 stood at the time when the Act was passed, it allowed the Court to consider "any other evidence that may be produced" in connection with the question whether the land claimed as *zerait* was in fact *zerait*. The Evidence Act deals with the question what evidence is relevant evidence, and there is no power in the Court to reject any evidence is irrelevant evidence if the landlord offers that evidence, and the Evidence Act says that it is relevant evidence.

If there is any evidence of an assertion of a title on the part of the landlord and communicated to the tenant before the 2nd day of March 1883, the matter is conclusive under the B. T. Act, but if the evidence is to the effect that there was an assertion of a title communicated to the tenant after the 2nd day of March 1883, that evidence will not be conclusive on the question whether the land claimed as *zerait* is in fact *zerait* land, although it is open to the Court to take that evidence into consideration.

The Bengal Tenancy Act has certainly conferred special privileges on the landlords in regard to the *diara* lands; and apart from any other consideration, the community may regard the *diara* land as the proprietor's private land, since it is not land in which any tenancy rights have ever been exercised. Local customs may give such land to the landlord as his *zerait*, if it is not identifiable with previously existing tenancy land. Where there is a request from a lessee that he should be granted occupancy tenant's right, the presumption is the land was *zerait* land. Ordinarily when a landlord purchases occupancy holdings of the tenants, he holds them, not as *zerait*, but to use a term well known to the Revenue Offices *bakasht* ; but that is because the landlord is unable to show that the lands were at any time the proprietor's private land ; and the law does not permit him to increase his stock of *zerait* land. But the case is entirely different where the lands were initially *zerait*. It may be that for a time they were severed from the parent stock ; but there is no reason whatever why the land should not come back to the original stock when the proprietor recovers those lands. (*Das and Kulwant Sahay, JJ.*) KESHO PRASAD SINGH BAHADUR *v.* BABU PERMESHRI PRASAD SINGH.

71 I.C. 902 = 4 P. L. T. 135 = 1923 P. H. C. C. 65 = 1 Pat. L. R. 111 = 2 Pat. 414 = A. I. R. 1923 Pat. 276.

——*Recital of Zerait is not enough—There must be evidence required by the section—Survey Record—Presumption arising from is a rebuttable one.*

A description of a land as *Zerait* in a lease will not be any evidence to show that the land was really *zerait* for there must be evidence under S. 120 to show either that the land was held in the *seer* cultivation of the landlord for 12 continuous years immediately before the passing of the Act or that it was recognized by village usage as proprietor's *Khamar*, *Zerait*, *Seer*, *Nij Jote* or *Kamat*.

Clause (2) of S. 120 allows the evidence of the land being specifically let as proprietor's private land, before the 2nd of March 1883. The presumption afforded by the survey of record-of-rights is a rebuttable one. (*Jwalaprasad and Bucknill, JJ.*) BENICHAUDHURI *v.* TRILOKENATH TIWARI. **A. I. R. 1922 Pat. 425.**

Ss. 121 and 54 (3)—Distraint.

——*Rent payable on 1st December—Distraint order and attachment made three days after is legal.*

Where the rent is payable on the 1st December, it is in arrear on the 2nd December and a distraint order and attachment made on the 2nd and 4th December are legal. (*Sanderson, C. J. and Mookerjee, J.*) GOVERNMENT OF BENGAL *v.* KOJAL HADADAR.

33 C. L. J. 24 = 25 C.W.N. 209 = 22 Cr. L. J. 491 = 62 I.C. 187 = A. I.R. 1921 Cal. 361.

S. 128 (2) (d)—Will.

——*Interest of occupancy raiyat of a non-transferable holding is interest in immovable property and therefore bequeathable—Such raiyat has as much right to bequeath as transfer as is not limited by the Act.*

The right of an occupancy raiyat in a non-transferable holding is a right in immovable property and not a mere personal right and he has a right to transfer it. The right to bequeath is also one of the incidents of ownership; it cannot be taken away or restricted except by express enactment. Therefore, a raiyat holding a non-transferable holding has as much right to make a testamentary disposition of the holding as he has to transfer its subject to the limitation mentioned in the Act. (*Case Law considered.*) (*Suhrawardy and Garlick, JJ.*) DAKSHA BALA DASYA *v.* RAJO MANDAL. **49 C. L. J. 122 = 56 Cal. 630 = 115 I. C. 364 = A. I.R. 1929 Cal. 127.**

S. 147-A—Non-compliance.

——*Court in proper seisin of case—Compromise decree under S. 147-A is not nullity for not complying with procedure under S. 147-A.*

Where the Court in seisin of the case which resulted in a compromise decree is properly in seisin of that case, the consent decree under S. 147-A cannot be regarded as a nullity on the ground that the formalities indicated in the section were not complied with : A. I. R. 1923 Oudh 9; A.I.R. 1929 Pat. 287 ; A.I.R. 1926 Cal. 1101, Rel. on : A. I. R. 1924 Pat. 204, *held* not good law. (*Das, Kulwant Sahay and Dhavle, JJ.*) ASKARAM BAID *v.* DEOLAL SINGH. **10 P. L. T. 717 = 118 I.C. 723 = A.I.R. 1929 Pat. 568.**

——*Non-compliance with provision does not render compromise void.*

Compromises are not nullity even though the provisions of Cl. (3), S. 147-A have not been complied with : A. I. R. 1924 Pat. 204 ; 17 C. W. N. 496, *held wrongly decided* ; A.I.R. 1926 Cal. 1101 ; A.I.R. 1924 Pat. 374, Foll. (*Das and Ross, JJ.*) LOKI GOPA *v.* RAMA NANDAN. **8 Pat. 372 = 10 P.L.T. 189 = 118 I. C. 722 = A. I. R. 1929 Pat. 287.**

——*Provisions not complied with—Decree passed is not without jurisdiction but can be assailed in proper proceedings.*

A decree for enhanced rent under the provisions of S. 147-A cannot in a subsequent suit for rent be treated as without jurisdiction and a nullity on the ground that the procedure laid down in that section for compliance by the Court was not complied with. Such a decree may be assailed in proper proceedings as erroneous but it cannot be said to have been passed without jurisdiction. 48 Cal. 138, (F. B.) Foll. 17 C. W. N. 496, *Dissented from.* (*B. B. Ghose and Graham, JJ.*) ISHAN CHANDRA BANIKYA *v.* MOOMRAJKHAN.

30 C. W. N. 940 = 45 C. L. J 24 = 97 I. C. 770 = A. I R. 1926 Cal. 1101.

——*Consent decree though not conforming with para. 3, cannot be reopened.*

Where the Court which passed the consent decree, did not act in conformity with paragraph 3 of section 147-A of the Bengal Tenancy Act.

Held, that the consent decree which the Court did pass was not a nullity and could not be reopened later on. A.I.R. 1922 Patna 44 Relied on. (*Das and Adami, JJ.*) DEOLAGAN SINGH *v.* MT. GULBANSAI KOER.

1 Pat. L. R. 43 = 69 I. C. 616 = A. I. R. 1924 Pat 374.

——*Compromise decree, not complying with the section, is a nullity.*

Where provisions of S. 147 A are not complied with a compromise decree passed between landlord and tenant in a rent suit is a nullity and no effect can be given to it and the fact that the rate of rent recorded in the compromise was also recorded in the partition proceedings showing that the compromise was acted upon can make no difference. 17 C. W. N. 496 Foll. (*Ross J.*) KUNJ BEHARY CHAUDHURY *v.* CHARAN SINGH.

72 I. C. 40 = A. I. R. 1924 Pat. 204.

——*Objection cannot be taken in execution proceedings.*

Under a compromise in a rent suit, the defendant, took some more land and entire rent was fixed for the whole land, original and additional. The Court did not in passing the decree, comply with S. 147-A. *Held*, that the objection could not be taken in execution proceedings. (*N. R. Chatterjee and Newbould, JJ.*) HEMCHANDRA CHOUDHARI *v.* CHANDRA MOHAN NAMODAS.

60 I. C. 204 = 24 C. W. N. 1070.

S. 147-A [Inserted by Eastern Bengal and Assam Tenancy (Amendment) Act (I of 1908), S 42]—Rent Suit.

—*Compromise decree—Additional land given and new* *rent settled—Non compliance with section—Objection in execution cannot be raised.*

In a suit for rent, a decree was made on compromise and the tenant took some additional land and a rent was fixed for the area formerly held by him together with the added area When execution was sought objection was taken on the ground of non-compliance with S.147-A of the Eastern Bengal and Assam Tenancy Act. *Held*, the objection raised as to the validity of the decree could not be raised in execution proceedings. 17 C. W.N. 496 Dist. (*Chatterjee and Newbould, JJ.*) HEM. CH. CHOUDHURY *v.* CHANDRA MOHAN NAMODAS.

60 I.C. 204 = 24 C.W.N. 1070.

S. 147 A. Scope

——*Decree under S. 147-A. has not all elements of consent decree*

A decree under S. 147-A. though in one sense a consent decree, has not all the elements of a consent decree. The rule, therefore, that a consent decree can be set aside in an action commenced for the purpose on any ground that would invalidate an agreement has no application to a decree under S. 147-A. Huddersfield Banking Co. *v.* Lister, (1895) 2 Ch 273, Ref. (*Das, Kulwant Sahay and Dhavle, JJ.*) ASKARAN BAID *v.* DEOLAL SINGH.

10 P.L.T. 717 = 118 I. C. 723 = A.I.R. 1929 Pat. 568 (F.B.).

——*Suit for trespass—Alternative relief under S.*157 *—Still suit is not one between landlord and tenant within S. 147-A.*

The mere fact that in a suit for trespass the plaintiff is claiming an alternative remedy such as S. 157 concedes to him does not make the suit any more a suit between landlord and tenant. S. 147-A has no application to such a case. (*Das, Kulwant Sahay and Dhavle, JJ.*) ASKARAN BAID *v.* DEOLAL SINGH. **10 P. L. T. 717 = 118 I. C. 723 = A.I.R. 1929 Pat. 568 (F.B.).**

——*Suit for rent compromised—Compromise is binding if it settled* bona fide *disputes.*

Where after a case under S. 103, Ben. Ten. Act, in the settlement proceedings, the landlord brought suits for rent and these suits were determined by compromises and the rate agreed to in the compromises was admittedly a rate which exceeded the khatian rate:

Held: that the compromises were not bad as there was a *bona fide* dispute as to the rate of rent which ended in the compromises. (*Das and Ross, JJ.*) LOKI GOPA *v.* RAMANANDAN. **8 Pat. 372 = 10 P.L.T. 189 = 118 I. C. 722 = A.I.R. 1929 Pat. 287.**

——The principle that a consent decree is not more valid than a contract itself is recognised in the section. (*Mookerjee and Suhrawardy, JJ.*) GANESH CHANDRA PAL *v.* CHANDRA MOHAN DATTA. **28 C.W.N. 984 = 84 I. C. 730 = A.I.R. 1925 Cal. 199.**

——S. 147-A of the Bengal Tenancy Act gives effect to the whole scheme of the Act, *viz.*, to prevent the landlord from circumventing the provisions of the Act to the detriment of the illiterate tenant. (*Suhrawardy and Cuming, JJ.*) NAFAR CHANDRAPAL CHOWDHURY *v.* BHASI MOLAX. **65 I. C. 581 (Cal).**

S. 147 B—Interpretation

——*"Shall have regard" does not mean that Court will not presume entries to be correct.*

The expression "shall have regard" in S. 147-B ordinarily means shall consider as of value or of importance; but certainly the provision does not mean that the Court will not presume the entries to be correct until the contrary is shown. (*B.B. Ghose and Graham, JJ.*) FAZLAR RAHMAN BISWAS *v.* GULAM KADER MIA.

30 C.W. N. 689 = 96 I. C. 959 = A I.R. 1926 Cal. 862.

S. 148—Jurisdiction

—— *Rent suit—Question of title involved—Court is not debarred from trying the suit—Procedure under section is a summary one like the special jurisdiction under the Small Cause Courts Act.*

There is no rigid rule of law to the effect that in a rent suit properly so called and filed under the provisions of Section 148 a question of title may not be determined if it arises. 48 I. C. 726, Dist. When a claim which is not for rent is included in a suit which is tried under Section 148, there is no lack of jurisdiction on the part of the trial Judge to deal with the claim

There is a distinction between the provisions as regards the Small Cause Courts and the provisions of Section 148 regarding rent suit. In the former case the matter is one of special jurisdiction which is given by the provisions of the Small Cause Courts Act and in the case of Section 148, the prescribed procedure is not a special jurisdiction but a summary procedure. (*Rankin and Buckland, JJ.*) TINKARI BOSE *v.* NAGENDRA PRASAD BASU.

27 C.W.N. 716 = 77 I.C. 10 = 50 Cal. 807 = A.I.R 1923 Cal. 699

S. 148- Procedure

——*Rent suit—Holding must be completely represented.*

In a suit for rent of a holding the holding must be completely represented; otherwise the decree obtained in the suit will be regarded as a money decree and not as a rent decree. (*Das and Allanson, JJ.*) HITNARAIN SINGH *v.* RAMBARAI RAI.

7 Pat. 733 = 9 P.L.T. 484 = 115 I.C. 196 = A. I. R. 1928 Pat. 459

Ss. 148 (a) and 159 (b)—Scope.

——*Person recorded as full 16-annas proprietor but really only co-sharer—He can obtain decree for rent but unless he complies with Ss.* 148(a) *and* 159 (b) *his decree will not be rent decree so as to entitle him to obtain by purchase in execution of that decree, holding itself.*

A person, who though recorded as a full 16-annas proprietor is in fact only a co-sharer landlord, can obtain a decree for rent, but unless he complies with the provisions of Ss. 148 (*a*) and 159 (*b*) the decree obtained by him will not by a rent decree so as to entitle him to obtain by purchase in execution of that decree the holding itself free from all encumbrances. He will be entitled to realize his decree by the sale of the right, title and interest of the judgment-debtor. A. I.-R. 1925 Cal. 297, Rel. on. (*Jwala Prasad and Wort, JJ.*) BALIRAM PRASAD *v.* HARNANDAN. **8 Pat. 375 = 118 I.C. 733. A.I R. 1929 Pat 357.**

——*Tenure extended by natural accretions—Rent suit confined to lands actually leased cannot be dismissed.*

When subsequent to the creation of the tenure there has been an accretion of lands in the bed of a contiguous river the tenants are entitled to the accreted lands as an increment to their tenure. But the fact that the landlord does not include the accreted lands in his suit for rent but confines himself to the lands actually let does not make his suit liable to be dismissed. (*Walmsley and B. B. Ghose, JJ.*) DHIRENDRA CHANDRA RAI *v.* NAWAB KHAJA HABIBULLAH **29 C. W N. 505 = 87 I C. 412 = A.I.R. 1925 Cal. 758.**

——*A suit for plaintiff's share alone but praying that under section conditions decree for the amount due to all co-sharers might be passed is untenable.*

Where the plaintiffs sue for their share of tne rent alone, and they state that a certain amount might be due to the co-sharer landlords and the prayer is that under certain conditions a decree for the total amount due might be passed.

Held, that the plaint was not in accordance with S. 148-A.(1) : 34 C. L. J. 462, Dist.

The terms of the section should be strictly complied with. A substantial compliance is not enough. (*Newbould and B. B. Ghose, JJ.*) GANGAMANI BISWAS *v.* RABJA ALI CHAUKIDAR.

51 Cal. 935 = 84 I.C. 145 = 40 C.L.J. 512 = A.I.R. 1925 Cal. 106

Ss. 148-A and 163—Decree.

——*Decree in a suit under S. 148-A—Decree-holder taking every step necessary to execute decree as rent decree—Decree is rent decree even though Court fail to issue simultaneously order for attachment and proclamation.*

Where the holder of a rent decree takes every step necessary to be taken under the Act to execute the decree as a rent decree obtained in a suit framed as under S. 148-A, the mere fact that the Court failed to issue simultaneously the order for attachment and the proclamation cannot make the decree any-the-less a decree for rent. 57 I. C. 492, Foll. (*Das and Kulwant Sahay, JJ.*) KULDIP NARAIN *v.* RAM LAL. **7 Pat. 260 = 107 I. C. 821 = A. I. R. 1928 Pat. 318.**

——*Rent suit—Non-transferable holding sold—Some co-sharer landlords recognizing transfer—Others not recognizing and bringing a suit for rent, making consenting landlords and original owner defendants—Purchaser not made party—Decree is rent decree.*

Where a non-transferable holding is sold and the transferee is recognized by some co-sharer landlords, while remaining co-sharer landlords do not recognize the transfer and bring a suit for rent under S. 148-A, making the original owners of the holding and the consenting landlords defendants to the suit, but the purchaser is not made a party, the decree obtained is a rent decree and not a money decree. 24 C. W. N. 152 (notes) Dist. (*Greaves and Panton, JJ.*) BAMAPADA SARKAR *v.* SAKUNTALA DASI. **30 C W. N. 494 = 96 I. C. 689 = A. I. R. 1926 Cal. 733.**

——*A single co-sharer's suit complying with S. 148-A makes the decree a rent decree.*

Where a co-sharer landlord in a suit for rent mentioned in his plaint rent payable in the sixteen annas share and in the different shares and the amount due for the period in suit with damages in the whole and for the shares of all the co-sharers and the amount due to the other co-sharers and the refusal by the co-sharers to let plaintiff know the amount due to the plaintiff and where the plaintiff alleged that if, the co-sharer defendants wished to be added as plaintiffs on disclosing the share due to them they might be made co-plaintiffs.

Held, that S. 148-A was complied with and, therefore, the decree in the suit was a rent decree. (*Walmsley and Suhrawardy, JJ.*) JAGABANDHU NANDI *v.* ABDUL HAMID MEA. **85 I. C. 214 = 28 C. W. N. 757 = A. I. R. 1925 Cal. 82.**

——*Decree for arrears of rent obtained against some tenants only is not rent decree.*

Where the tenants were a group of lohars and a kumri, and not a joint family.

Held, the lohars could in no way represent the interest of the kumri, and the decree for rent passed against lohars cannot be declared to be a rent decree. (*Foster, J.*) RAMJAS PANDEY *v.* AWADH MAHTON.

88 I. C. 830 = A. I. R. 1925 Pat. 783.

S. 148-A—Procedure.

——*Co-sharers should sue for rent due to all—Dues to other co-sharers not known—Plaintiff would be entitled to proceed with the suit for his share only.*

In order that plaint may be in accordance with the provisions laid down in S. 148-A. the first requisite is that the co-sharer landlord should sue for recovery of rent due to all the landlords and secondly, if he is unable to find out the dues of the co-sharers, he would be entitled to proceed with the suit for his share only. A. I. R. 1925 Cal. 106, Foll.; A. I. R. 1925 Cal. 82 and 15 C. W. N. 820, Dist. (*Mukerji and Graham, JJ.*) DHERENDRA NATH *v.* RAJENDRA NATH. **103 I. C. 827 = A. I. R. 1927 Cal. 945.**

——*Rent suit by one co-sharer—Omission to state that plaintiff is entitled to sue for his share is not fatal if contrary is not proved.*

Mere omission to state specifically in the plaint that the plaintiff is entitled to sue for his share of the rent will not take the suit out of the purview of S. 148-A, if as a matter of fact, the contrary has not been proved in the case. (*Mukerji, J.*) SASI BHUSAN *v.* KHIRODA SUNDARI. **95 I. C. 42 = A. I. R. 1926 Cal. 963.**

——*Suit must be for whole rent due.*

For a suit to fall under the provisions of S. 148-A it must be a suit to recover the whole of the rent due. The essence of a suit under S. 148-A is that either the whole rent is due or else the plaintiffs are unable to ascertain whether or not the whole of the rent is due. (*Greaves and Mukerji, JJ.*) HARI MOHAN DALAL *v.* PURENDRANATH NAG. **90 I. C. 955 = A. I. R. 1926 Cal. 356.**

——*Suit must be for whole arrears due as distinct from rent payable under the contract.*

A suit under S. 148-A must be for the whole of the *arrears* due and not for the whole of the rent *payable* for the holding under the contract. 27 C. L. J. 10 Dist. 18 C. W. N. 1016 Foll. (*Chatterjea and Pearson, JJ.*) PROFULLA CHANDRA *v.* BABURAM MANDAL.

34 C. L. J. 462 = 65 I. C. 1 = A. I. R. 1921 Cal. 289.

S. 148 A—Scope.

——*Co-sharer landlord can sell holding notwithstanding his inability to get his co-sharers to join in suit.*

The purpose of S. 148 A is to enable a co-sharer landlord to get the advantage of the right to sell the holding notwithstanding that he is unable to get his co-sharers to join with him as plaintiffs instituting a suit. (*Rankin, C.J. and B. B. Ghose, J.*) TANWANGINI DEBI *v.* ABHOYA CHARAN SARDAR.

33 C. W. N. 1221 = 57 Cal. 480 = A. I. R. 1930 Cal. 169.

——*Decision as regards rent in former suit between co-sharer landlord and tenant is not binding on other co-sharer landlord though joined as defendant with tenant.*

The decision as regards the rate of rent in a former suit brought by a co-sharer landlord who proceeds with it for his share of the rent only under S. 148-A cannot operate as binding on the other co-sharer landlord who is joined as defendant with the tenant. There is no provision in the law under which any plea set up by the tenant defendant is to be served on the defendant landlord. Under such circumstances it cannot be said that any issue was raised as between the tenant defendant and the landlord defendant which was decided in the suit brought by the co sharer landlord under the provisions of S. 148-A. (*Rankin, C.J. and B. B. Ghose, J.*) TANWANGINI DEBI *v.* ABHOYA CHARAN SARDAR.

33 C. W. N. 1221 = 57 Cal. 480 = A. I. R. 1930 Cal. 169.

——*A suit to fall under S. 148-A must be for the entire rent due and not a suit for the co-sharer's share of the rent only—Plaint should be looked at to see whether a case does or does not satisfy the test.*

A suit which is not one primarily for the whole of the rent due for a tenancy. To discover whether a case does or does not satisfy this test it is necessary to look at the plaint itself. A suit which is primarily for the rent due on the plaintiff's own share is not a suit within the meaning of S. 148-A even though the plaintiff co-sharer prays in the plaint that if the defendant objects to pay the plaintiff's share of the rent separately then the co-sharer landlord's share should also be included. *Case law referred to.* (*Cuming and Mukherji, JJ.*) RAMA NATH *v.* HARISH CHANDRA. **108 I. C. 41 = A. I. R. 1928 Cal. 347.**

——One of the landlords brought a suit in form for the whole rent and in substance for the separate share of the rent in arrears asking for his share of the rent and specifically stating that if rent is in fact due to the other landlords, who were made *pro forma* defendants a decree for an additional sum may be passed on payment of further Court-fee. And the whole body of the landlords was impleaded with the allegation that the plaintiff was not able to ascertain what, if any, rents are due to them.

Held, that the suit was properly framed under the provisions of S. 148-A as it satisfied all the conditions laid down under that section: 4 P. L J. 500, Foll. (*Das and Ross, JJ.*) GURUSAHAY SINGH *v.* NOORAN MAHTON. **114 I. C. 193 = 9 P. L. T. 809.**

——*Terms should be strictly complied with—Substantial compliance is not enough.*

The terms of S. 148-A should be strictly complied with and a substantial compliance with the requirements of the section would not be enough to give the auction-purchaser a title to annul incumbrances: A. I. R 1925 Cal. 106, Foll. (*Mukherji and Graham, JJ.*) DHERANDRA NATH *v.* RAJENDRA NATH. **103 I. C. 827 = A. I. R. 1927 Cal 945.**

——*Suit under—Co-sharer landlords made defendants and not denying plaintiff's share—Tenants not alleging payment of rent to co-sharer landlord in excess of share alleged by plaintiff to belong to such co-sharer—Tenant cannot question plaintiff's share.*

In a suit framed according to the provisions of S. 148-A, where the tenant-defendants do not allege that any co-sharer landlord has been left out from the suit, or that they had paid rent to the co-sharer in excess of the share alleged by the plaintiffs to be held by such co-sharer, it is not open to the tenant-defendants to question the share of the rent payable to the plaintiffs landlords. A. I. R. 1925 Cal. 26 Dist. (*Kulwant Sahay, J.*) BIBI SALEHA *v.* HULAS MAHTON. **86 I. C 559 = 6 P. L. T. 780 = A. I. R. 1925 Pat 564.**

——*Suit by co-sharer for his share of rent or in the alternative for whole rent—Co-sharers made parties—Suit is properly framed.*

In a case under S. 148-A. the plaintiff co-sharer will be entitled to proceed with the suit for his share only of the rent and a decree obtained in a suit so framed shall be as effectual as a decree obtained by the sole landlord in a suit brought for the rent due to all the landlords. If in the suit it is found that the co-sharer defendants have realised rent in excess of their shares, then they will be liable to reimburse the plaintiff to the extent of the excess realised by them. Where, plaintiffs sued, for their share of rent or in the alternative claimed a joint decree in favour of all the co-sharers, on payment of additional court-fee, *Held*, though the contract for separate collection was not proved the plaint conformed to provisions of S. 148.-A and plaintiff was entitled to a decree 4 P.L.J. 500 Foll.; 27 C.L.J. 101 Dist. (*Dawson Miller, C.J. and Mullick, J.*) RAJGIRI SINGH *v.* JADUNATH RAY. **4 Pat. L. T. 39 = 1922 P. H C.C. 355 = A. I. R. 1923 Pat. 41.**

Ss. 148-A, 158-B and 169—Scope.

——*Share of holding sold in execution of decree by some co-sharers for share of rent—Subsequent sale of entire holding in execution of decree for entire rent—Purchaser in latter sale is entitled to khas possession as against purchaser under former.*

Where some co-sharers brought a suit for rent against the tenants in respect of their share of the rent due obtained a decree and in execution of that decree sold their share of the holding and it was purchased by the defendant, and later on some of the other co-sharers brought a suit for the entire rent against all the tenants and in execution of that decree the entire holding was sold and plaintiff became the purchaser.

Held: that the position of the defendant was only that of an unregistered transferee and that he cannot insist the claim the plaintiff for khas possession. An arrangement among co-sharers to realise rent separately merely affects the right to sue separately and in no other respect modifies the terms of the holding and the right to bring the tenure to sale for arrears of rent remains intact. A co-sharer landlord has a right to claim the whole rent on behalf of the entire body of landlords and it is only in a case so framed that the decree has the effect of a rent decree. (*Chatterjea and Pearson, JJ.*) SASTI CHARAN CHAKERBUTTY *v.* AKUBJAN BIBI. **26 C. W. N. 639 = 64 I. C. 591 = 35 C L. J 30 = A. I. R. 1922 Cal. 243.**

——*Suit for share of rent being entire arrears due—Suit is in conformity with section and is maintainable.*

The essential principles underlying the S. 148-A are that the suit should in form B for whole rent and in substance for the separate share of rent in arrears. The whole body of landlords can be impleaded on the allegation that the plaintiff has not been able to ascertain what, if any, rents are due to the former. In such cases the whole rent due must in the nature of things be always a matter of speculation for the plaintiff and he is entitled to assert that he believes that his share of the rent due is the entire rent due and ask that Court to decide on the accuracy of the belief, if and when the impleaded co-sharers appear and claim any arrears as due to themselves. The cause of action for rent in plaint alleging that plaintiff's share of rent collection is separate is not at all against the principle of section 148-A. (*Jwala Prasad and Bucknill, JJ.*) MASUL AHMED *v.* JAGAN SINGH. **3 Pat. L. T. 439 = 68 I. C. 625 = A I. R. 1922 Pat. 560.**

S. 149 (3)—Res judicata.

——*Decision under, does not decide finally substantial rights of parties—Incidental decision on question of title does not operate as* res judicata*—C. P. Code, S. 11.*

Sub-S. (3) of S. 149 contemplates a suit which culminates not in a decree but in an order of a limited kind, an order restraining payment out of the money, and it is therefore an order not finally decisive of the substantial rights of the parties but providing a machinery for the purpose of carrying out the scheme whereby it is sought to relieve a tenant from harassment. If in a suit of this sort the Court incidentally goes into the question of title in order to determine a question but the decision does not operate as *res judicata* in subsequent suit on the question of title. (*Mukerji and Graham, JJ.*) KHETRA MOHAN *v.* AKHIL CHANDRA. **100 I. C. 427 = A.I.R. 1927 Cal. 431.**

S. 150—Applicability.

———Section 150 does not apply where the rate of rent is in issue. 30 Cal. 947, Foll. (*Greaves and Cuming, JJ.*) DHIRENDRA NATH GHOSE *v.* CHARUSHASHI DEBYA. **A. I. R. 1926 Cal. 191 = 90 I. C. 431.**

———*Tenant pleading that he has cultivated lesser area than that for which rent is claimed—S.* 150 *applies.*

Irrespective of the question as to whether the burden of proof lies on the plaintiff or not, in cases where the defendant admits that money is due from him to the plaintiff on account of rent, his plea that the amount claimed is in excess of the amount due cannot be taken cognizance of by the Court unless the defendant pays into Court the amount so admitted to be due. 30 Cal. 947 Diss. Hence where the tenant pleads that he has cultivated a lesser area than that in respect of which rent is claimed, S. 150 would apply. (*Mullick and Kulwant Sahay, JJ.*) KESHO PRASAD SINGH *v.* TRILOKE NATH. **4 Pat. 304 = 86 I. C. 841 = 6 P. L. T. 757 = A. I. R. 1925 Pat. 489.**

S. 150—Excess.

———*Plea of excess shall not be taken cognizance of unless it is accompanied with deposit.*

Section 150 is applicable to cases where the defendant admits that money is due from him to the plaintiff on account of rent and plea of tender shall be rejected if it is not accompanied with deposit: 30 Cal. 947 and 4 Pat. 304. Ref. (*Suhrawardy and Cammiade, JJ.*) RAKHAL CHANDRA *v.* BAIKUNTHA NATH. **32 C. W. N. 1082 = 117 I. C. 687 = A. I. R. 1928 Cal. 874.**

S. 150—Procedure.

———*Tenant admitting part of rent claimed but not depositing in Court—Trial Court going on with trial—Deposit made in appellate Court—Appellate Court can accept it.*

Part of rent claimed was admitted by the tenant defendant, but was not deposited in Court. Still the trial Court went on with the trial. The amount, however, was deposited in appellate Court which accepted the deposit.

Held: that the appellate Court was right in accepting the deposit. A.I.R. 1925 Pat. 489. (*Ross, J.*) NAUNIT PRAYAJI *v.* BANDHU MAHTON. **A.I.R. 1930 Pat. 414.**

S. 153—Amount Claimed.

———*Includes not only statutory interest at 12½ per cent. and statutory damages but even 75 per cent. interest if agreed.*

The amount claimed in the suit can be read so as to include interest at a high contractual rate such as 75 per cent. A claim for statutory interest 12½ per cent. under S. 67, Bengal Tenancy Act, or a claim for statutory damages not exceeding 25 per cent. on the amount decreed as provided for by S. 68 of the Act are ordinary incidents of a rent suit and must be taken into consideration in ascertaining for the purposes of S. 153 whether the amount claimed in the suit does not exceed Rs. 100. (*Rankin, C. J., C. C. Ghose, Suhrawardy, B. B. Ghose and Mukherji, JJ.*) TARINI CHARAN *v* KEDAR NATH HALDAR. **56 Cal. 723 = 115 I. C. 593 = 48 C. L. J. 327 = 33 C. W. N. 126 = A. I. R. 1928 Cal. 777 (F. B.).**

S. 153—Appeal.

———*Substance of the matter involved in petty case relating only to irregularity of proceedings under C. P. Code, O. 21, R. 90—Question under Limitation Act, S. 18 incidentally involved—Still no appeal lies.*

When S. 153 says that the question as to the irregularity of the proceedings in publishing or conducting a sale is not a question relating to title to land, it does not mean that in every case under R. 90, O. 21, C. P. Code, there is nevertheless to be an appeal, because in every case under R. 90 there must be a finding not merely as to the regularity of the proceedings but also as to substantial injury. Such an interpretation would give no meaning to the Explanation consistent with the exception. Again, the Explanation does not mean that, if in the course of deciding the question of regularity under R. 90 the Munsif has to decide a question of limitation incidental to the application before him, then the Explanation ceases to take effect and the right of appeal emerges. The meaning of the Explanation must at least be this that where the decision holds that on the ground of irregularity in the sale proceedings the sale is to be set aside or that the sale must stand not-withstanding the allegations of irregularity therein the case is not to be deemed to be one within the exception and consequently no right of appeal will exist. Where the trial Court's ultimate finding and the whole of the ultimate effect of his order in a petty case were to set aside the sale on the ground of irregularity and dealt with the question of fraud while dealing with the question of limitation under S. 18.

Held, that the Explanation to S. 153 means that there was to be a right of appeal in these cases: where any incidental matter such as limitation or *locus standi* had to be decided before the application under R. 90 could be disposed of. Such proceedings were intended to be proceedings which in petty cases were to be disposed of without appeal. (*Case-law discussed.*) (*Rankin, C. J. and C. C. Ghose, J.*) JUGAL CHANDRA ANUNI *v.* RAMESH CHANDRA CHAKRAVARTY. **34 C. W. N. 331 = A. I. R. 1930 Cal. 490.**

———*Execution sale in rent decree set aside on ground of fraud—Appeal is competent.*

Where an execution sale arising out of a decree in rent suit covered by S. 153 (*b*) is set aside on the ground of fraud an appeal is competent, as the explanation to S. 153 does not contemplate, 'fraud' and is limited to irregularity in publishing or conducting sale; 19 C. W. N. 953, Foll., A. I. R. 1927 Cal. 633, Ref. (*Wort, J.*) JAINARAIN SINGH *v.* RAMESHWAR SINGH. **11 P. L. T. 812 = A. I. R. 1930 Pat. 371.**

———*Utbandi tenancy—Court deciding rate of rent or whether rent is payable—Appeal lies.*

Even if tenancy is an utbandi tenancy, still if the Court has decided what is the rate of rent which is payable, or whether the rent is payable in respect of certain lands, appeal can lie against the decision. (*Mitter, J.*) NAFAR CHANDRA *v.* JATINDRANATH. **118 I. C. 881 = A. I. R. 1929 Cal. 206.**

———*No declaration as to amount of rent in the decree—Question as to amount annually payable by tenant actually decided—Exception to S.* 153 *applies and the order is appealable.*

Having regard to the wording of the exception to S. 153, no declaration in the order or in the decree as to the amount of rent that is annually payable by the tenant to the landlord in respect of the jama, is necessary and a case comes within the exception contained in S. 153, even though there is no such declaration in the decree or order if a question as to the amount annually payable has been decided in the decree or order, and an appeal lies from the decision. (*Mukerji, J.*) DALILUDDI *v.* MATAHAR ALI. **107 I. C. 470 = A. I. R. 1928 Cal. 254.**

——*Irregularity in publishing or conducting sale also includes fraud.*

Fraud in publishing or conducting a sale cannot be kept separate from irregularities in the publication or conduct thereof for the purpose of the explanation to S. 153; 18 C.W.N. 1266 and 22 C. L. J. 244, Diss.; 17 C.W.N. 84, Dist. where the Munsiff dismissed an application to set aside a rent sale on the ground of fraud in publishing and conducting it.

Held that no appeal lay to the District Judge. (*Mookerji and Roy, JJ.*) MAHARAJ BAHADUR SINGH *v.* KARANI MAI. **45 C.L.J. 566 = 104 I.C. 199 = 32 C. W. N. 57 = A. I. R. 1927 Cal. 633.**

——*Suit for rent—Defence that plaintiff not entitled to whole, there being another co-sharer landlord—Decree for whole passed—Appeal lies.*

Where in a suit for rent the defence is that the plaintiff is not entitled to whole of the rent, there being another co-sharer landlord, and plaintiff is given a decree for the whole amount on the ground of plaintiff being the sole landlord there is a question as to the amount of rent payable to the landlord being determined and an appeal is competent. (*Chakravarti, J.*) RAHIM SHEIKH *v.* SALIM UDDIN AHAMAD. **97 I.C. 138 = A.I.R. 1926 Cal. 1229.**

——*Question of amount of rent dependent on finding that there are other co-sharers—Finding if in the negative—No question of amount of rent is decided and no appeal lies.*

Where the questions of the amount of rent are dependent entirely on the tenant's averment that there is a co-sharer or there are co-sharers, then in those cases it becomes necessary, to go into those defences only in the event of the court finding that there is a co-sharer or that there are co-sharers. If the finding be that there is no co-sharer of the plaintiff the other questions do not arise and there is no occasion or necessity for the court to decide the question of the amount of rent. The decision of the court in such cases, whether dismissing the suit on the ground of non-joinder of plaintiffs or decreeing the suit in plaintiff's favour, does not expressly decide and cannot by implication be held to have decided the question of the amount of rent and no appeal is competent. A.I.R. 1922 Cal. 417 and 10 C.W.N. 280 (N), Dist.; 28 C.W.N. 72 (N) Rel. on. (*Cuming and Mukerji, JJ.*) SALIMUDDIN AHAMMAD *v.* RAHIM SHEIK. **30 C.W.N. 850 = 44 C.L.J. 414 = 97 I.C. 1038 = A.I.R. 1926 Cal. 1113.**

——*Rent suit for less than Rs. 50 tried by Munsif specially empowered—Appeal does not lie.*

No appeal lies against the decision, in a rent suit, of a Munsif specially empowered under S. 153 (*b*) of the Bengal Tenancy Act, where the value of the suit does not exceed Rs. 50. (*Suhrawardy and Graham, JJ.*) SURENDRA KRISHNA ROY CHOWDHURY *v.* ABBAS ALI. **85 I.C. 760 = A.I.R. 1925 Cal. 1237.**

——*Rent decree—Execution proceedings—No appeal lies from an order of Special Judge where decretal amount is less than Rs. 50.*

Under S. 153 no appeal lies against an order passed by a Special Judge on an application to set aside a sale in execution of a rent decree for an amount less than Rs. 50 on the ground of fraud. 32 Cal. 957 (F.B.) Rel. on. (*Greaves and Mukerji, JJ.*) MAHARAJA SASHI KANTA ACHARJYA BAHADUR *v.* MANU SHEIKH. **88 I. C. 667 = A.I.R. 1925 Cal. 1064.**

——*Rent suit—Plea of non-joinder of necessary parties and of absence of separate collection—No appeal lies.*

The only objections to the plaintiffs right to recover rent were that plaintiff had other co-sharers and so the suit was bad for defect of parties and that there was no separate collection.

Held, that none of these grounds came within the exception to the rule that in a suit for rent below a certain value no appeal lies. 17 Cal. 489 (F.B.) and A.I.R. 1922 Cal. 417 Dist. (*Suhrawardy and Chotzner, JJ.*) WAJUDDI PRAMANIK *v.* MAHOMED BOLAI MORAL. **85 I. C. 576 = 30 C. W. N. 63 = A. I. R. 1925 Cal. 1032.**

——*Bengal Cess Act, Ss. 54 and 47—Decision as to liability to pay cess in absence of notice under the Cess Act is not appealable.*

Where the decision is as to the liability of the defendant to pay cess when the plaintiff has not published the notices contemplated by the Bengal Cess Act, S. 53 of the B. T. Act is a bar to the appeal. 16 Cal. 638; 20 Cal. 254, Foll.; 21 Cal. 132 and 4 C. L. J. 119, Dist. (*Mookerjee and Chotzner, JJ.*) BIRENDRA KISHORE MANIKYA *v.* TRAILOKHYA NATH ROY. **74 I. C. 547 = 37 C. L. J. 521 = A. I. R. 1923 Cal. 673.**

——*Decision as to whether plaintiff is entitled to whole or two-fifths share of rent—Appeal lies to District Judge.*

Where primary Court had decided the question, whether the plaintiff was entitled to the whole rent, or only to a two-fifths share, *Held*: it was a decision of the question of the amount of the rent annually payable by the tenant within the meaning of S. 153 and consequently the appeal to the District Judge was competent. The expression "amount annually payable by the tenant" signifies the amount annually payable by the tenant to the landlord who had instituted the suit for recovery of rent. (*Mookerjee and Panton, JJ.*) SUDHANNA SANTRA *v.* BASANTA KUMAR SARKAR. **64 I. C. 733 = 49 Cal. 538 = 26 C. W. N. 96 = 34 C. L. J. 579 = A. I. R. 1922 Cal. 417.**

[Reversing 61 I. C. 194. Ed.]

——*Fraud and irregularity established—Appeal lies.*

Where there are both fraud and irregularity established, the fact that they are coupled together does not exclude an appeal. Unless there is irregularity alone and irregularity untainted by fraud an appeal lies. 19 C. W. N. 953 followed. (*Greaves, J.*) JATIRAM GAYAN DAS *v.* DINO NATH SAMANTHA. **77 I. C. 520 = A. I. R. 1922 Cal. 163.**

——*Rent suit—Only question being the existence of relationship of landlord and tenant—No appeal lies.*

Where in a rent suit tried by a Munsif specially authorized in this behalf the sole issue decided was as to the existence of the relationship of landlord and tenant between the parties no appeal lies from the decision of the Munsif. (*Newbould, J.*) SUDHANYA SANTRA *v.* BASANTA KUMAR SARKAR. **26 C. W. N. 96 = 61 I. C. 194 = 34 C. L J. 579.**

[Reversed on L. P. Appeal *See* **64 I. C. 733.]**

S. 153—Exception.

——Fraud in publishing or conducting a sale is not meant to be kept separate from irregularities in the publication or conduct thereof for the purpose of the Explanation to S. 153 and that where an application is made under O. 21, R. 90, C. P. Code, for setting aside a sale on the ground of material irregularity or fraud, the mere fact that fraud is alleged would not give rise to a question of title within the meaning of the Exception so as to take the case out of the substantive provisions of S. 153, and thus give a right of appeal which is forbidden by that section: A. I. R. 1927 Cal. 633, Foll. 32 Cal. 597 (F. B.). 31 C.W.N. 107(n), Ref. (*Mukerji, J.*) MUJIBUDDIN CHOWDHURY *v.* REAJUDDI MATBAR. **107 I. C. 471.**

——*Decision that jama set up formed part of bigger jama does not come within exception to S.* 153.

Where the decision in a rent suit was that the jama set up had no separate existence, but formed part of a bigger jama.

Held: that no question has been decided which would bring the case within the exception referred to in S. 153. (*Mukerji and Graham, JJ.*) KUMARISH CH. MUKKHO PODHYA *v.* RAM TARAN GHOSH. **31 C. W. N. 436 = 102 I. C. 357 = A. I. R. 1927 Cal. 939.**

——*Setting aside sale in execution of rent decree is not excepted from operation of S.* 153.

An order setting aside a sale in execution of a rent decree under O. 21, R. 90, is not excepted from the operation of S. 153 of the Bengal Tenancy Act: 32 Cal. 957 (F. B.), Expl. (*Newbould and Pearson, JJ.*) GOUR ROUTH *v.* DIGAMBAR GIRI. **30 C. W. N. 586 = 96 I. C. 669 = A. I. R. 1926 Cal. 790.**

S. 153—Frame of Suit.

——*Prayer for enhancement of rent does not necessarily make the suit one for assessment of rent.*

A right to enhance or vary the rent is a question which is contemplated for decision in a suit for rent. It cannot therefore be said that because there was a prayer for enhancement of rent the suit should be considered as one for assessment of rent 10. C. L. J. 629 Dist. (*Cuming and B. B. Ghose, JJ.*) BENI MADHAB *v.* BEJOY CHAND. **44 C. L. J. 296 = 96 I. C. 570 = A. I. R. 1926 Cal, 1182.**

S. 153—Interpretation.

——*Expression " has decided a question of title " qualifies both decree and order—Order in execution must decide question of title.*

Under S. 153 of the Bengal Tenancy Act an order passed in execution of a decree, whether the decree is appealable or not must be an order itself deciding a question in respect of the title to or some interest in land as between parties having conflicting claims thereto. The expression " had decided a question relating to title " etc., in S. 153 of the B. T. Act, qualifies both decree and order. (*Suhrawardy, J.*) JOYMANGAL SEN *v.* SARAFAT ALI. **78 I. C. 236 = A. I. R. 1925 Cal. 299 (2).**

——' Rent ' does not include interest. (*Buckland and Cuming, JJ.*) HAFIZULLA *v.* LATEEFUNESSA. **63 I. C. 529 (Cal.)**

S. 153—Scope.

——*Question of custom of remission of rent for failure of crop is not question of rent annually payable.*

The question regarding the existence of a custom that on failure of crops in any particular year the tenants would get remission of their rents for that year is not a question regarding the amount of rent annually payable by tenants. (*Rankin, C. J. and C. C. Ghose and B. B. Ghose, JJ.*) RAIMONI DASI *v.* UPENDRA NANDAN DAS. **A. I. R. 1930 Cal. 251.**

——When a decree is given at the rate of rent admitted by the defendants it is not a case of determination of the annual rent payable as mentioned in S. 153: 1 C.W.N. 711 Foll. (*Mallick, J.*) KANTESWAR SAKAR *v.* INDRAMANI DASHYA. **109 I. C. 25 = A. I. R. 1928 Cal. 512.**

——*Prayer for assessment coupled with prayer for recovery of rent—Suit is not one for rent within S.* 153.

A suit where a prayer for assessment of fair rent is added to the prayer for recovery of rent is not a suit for rent within the contemplation of S. 153. 10 C. L. J. 629 Foll. (*Chakravarti, J.*) BEJOY CHAND MAHATAB *v.* BENI MADHAB CHOUDHURY. **90 I.C 71 = 52 Cal. 689 = A. I. R. 1925 Cal. 936.**

——A question as to the payment of money in default of payment in kind " is a question of the amount of rent annually payable by a tenant" within S. 153. (*Sanderson, C. J. and Richardson, J.*) HAMED ALI *v.* RAM KUMAR. **62 I. C. 639 (Cal.).**

——*Irregularity due to fraud or negligence also is covered by Explanation.*

The question whether the proceedings in publishing or conducting the sale were regular or not would fall within the Explanation, whether that irregularity was due fraud or negligence or for any other reason: 32 Cal. 957 (F. B.) deemed nullified by Expl. 16 C. L. J. 542 and 18 C.W.N. 1266 Dist. *Chatterjea, J.* in 22 C. L. J. 244 Diss. from A. I. R. 1927 Cal. 633, Foll. (*B. B. Ghose and N. K. Bose, JJ.*) JAHIR MANDAL *v.* RANI RADHA RANGINI DEVI. **48 C. L. J. 581 = A. I. R. 1928 Cal. 859.**

——*Munsif holding wrongly that a suit was barred under S.* 109—*District Judge can interfere.*

Where the Munsif declined to exercise jurisdiction wrongly, on the ground that S. 109, Bengal Tenancy Act. barred the suit and instead of going on with the suit dismissed it.

Held that the District Judge could interfere under S. 153. (*Majumdar, J.*) SARAT CHANDRA *v.* MON MOHAN PANDAY. **46 C. L. J. 46 = 104 I. C. 349 = A. I. R. 1927 Cal. 711.**

——*Civil Courts Act, S.* 8.—*Additional Dist. Judge —Powers.*

An additional Judge can hear an application under the proviso to S. 153 of the Bengal Tenancy Act transferred to him for disposal by the Dt. Judge, 5 C. W. N. 48 (S. Notes) Dist. (*Richardson and Ghose, JJ.*) (LAL) BEHARI BASAK *v.* AKHIL CHANDRA SANTRA. **72 I. C. 794 = 27 C.W.N. 315 = A I. R. 1923 Cal. 469.**

S. 153—Second appeal.

——*Fraud not established but only alleged—No second appeal lies.*

In cases in which an appeal will lie only if fraud is established, it is not open to a litigant to avail himself of the right of appeal, simply because in the original application in respect of which the appeal arises, an allegation of fraud has been made. In such cases an appeal will lie only if the allegation of fraud is established. (*Page and Graham, JJ.*) ASWINI KUMAR *v.* RAJ KUMAR. **54 Cal. 1050 = 103 I. C 705 = A. I. R. 1927 Cal. 845.**

——*Rent suit decreed by Munsif not specially empowered is appealable to Sub-Judge—Order of Sub-Judge in appeal is not appealable to High Court unless title question is involved.*

A decree in a rent suit passed by a Munsif not specially empowered is appealable to a Subordinate Judge whose order in appeal is not appealable to the High Court unless a question of title or some interest in land is involved. (*Dawson Miller, C. J. and Kulwant Sahay, J.*) BAIDIK LACHMI NARAINJHA *v.* NAJABAT KHAN. **102 I. C. 603 = A. I. R. 1927 Pat. 300.**

——*Suit for rent—In absence of question of amount of rent where value is below Rs.* 100 *no second appeal lies.*

Where the value is below 100 rupees, under Section

153 of the Bengal Tenancy Act, no second appeal lies when no question as to the amount of rent is either raised or decided in the suit for rent. (A.I.R. 1922 Cal. 417, Dist.) (*Greaves and Chakravarti, JJ.*) BHARAT CHANDRA DHUPI *v.* HARI KRISHNA PATARI.

82 I. C. 829 = A. I. R. 1925 Cal. 395.

———*C. P. Code, S. 100—Question as to rent payable can be allowed in second appeal.*

Where, in defence to a suit for rent, it is pleaded by the tenant that the rent claimed by a landlord in respect of fruit trees is not payable, the question is one relating to the amount of rent payable and second appeal is allowable. (*Dawson Miller, C. J. and Mullick, J.*) RAMESHWAR SINGH *v.* SHEIKH WAZUL HAQUE.

78 I. C. 463 = A. I. R. 1925 Pat. 294.

———*Dispute about amount of rent does not bar second appeal.*

Where the dispute is only about the amount of rent annually payable as to the extent of which the parties are at variance. Sec. 153 does not bar a second appeal. 23 C. L. J. 557, Dist. (*Mookerjee and Rankin, JJ.*) JONARDI MANDAL *v.* ANADI NATH RAY.

81 I.C. 567 = 39 C. L. J. 334 = A. I. R. 1924 Cal. 838.

———*Decision as to amount of rent—Second appeal lies.*

Where Judge has decided the question of the amount of rent annually payable a second appeal is competent. 1 C. W. N. 687, Foll. (*Dawson Miller, C. J. and Mallick, J.*) RAJGIRI SINGH *v.* JADUNATH RAY.

4 Pat. L. T. 39 = 1922 P. H. C. C. 355 = A. I. R. 1923 Pat. 41.

S. 153—Question of title.

———*Suit for recovery of rent not exceeding Rs. 50—Defendants disclaiming liability by pleading transfers —Suit involves question of title within meaning of S. 153.*

If in a suit for recovery of rent valued at less than Rs. 50, some of the defendants disclaim their liability to pay rent to the landlord under the cover of transfer in favour of other defendants, then the suit involves a question of title, whether the title lay in the alleged transferees or in the transferring tenants, and liability of such tenants to pay rents and as such there is surely a question of title between persons having conflicting claims thereto within the meaning of S. 153. 31 C. W. N. 140 s. n , Foll. (*Mitter, J.*) BIPIN CHANDRA *v.* RAJ KUMAR. **A. I. R. 1929 Cal. 645.**

S. 153 A. Cls. (a) and (b —Procedure.

———Where an application is made to set aside an *ex parte* decree for rent and the tenant denies that any rent is due, and therefore no deposit is made under S. 153-A (*a*) the Court should not admit the application without recording under S. 150-A (*b*), in writing that it is satisfied that the deposit is not necessary. (*Beachcroft, J.*) AMANULLA *v.* AYFARJAN BIBI. **62 I.C. 444 (2) (Cal.).**

S. 153 A—Scope.

———*Intention is that the Court should regulate the amount of deposit—In all cases reasons for the order passed should be recorded.*

Section 153-A does not say that it is only in a case where there has been an admission of any amount due that such a deposit has to be made, or that the deposit must be in respect of the admitted amount only and not of any amount in excess thereof. The obvious intention of the Legislature is that the Court should regulate the amount of the deposit, and in all cases it should record its reasons for the order it passes, whether it requires or excuses a deposit. 19 C. W. N. 970, Dist.; A. I. R. 1921 Pat. 284. Diss. from. (*Mukerjee and Mallik, JJ.*)

TANIJANNESSA *v.* PURNA CHANDRA.

47 C. L. J. 66 = 103 I. C. 853 = A. I. R. 1927 Cal. 821.

———*Court may not necessarily insist on depositing the amount admitted by defendant before setting aside ex parte decree.*

Although under S. 153-A the Court may ask the applicant applying to set aside the *ex parte* decree to deposit in Court the amount admitted by defendant to be due to plaintiff, it may allow such application without deposit where the decree is passed by mistake for which the defendants are not seriously to be blamed. (*Bucknill, J.*) MUKHTAR AHMAD *v.* WASI AHMED KHAN.

93 I. C. 289 = 1926 P. H. C. C. 42 = 7 P. L. T. 441.

———*Defendant not admitting any rent to be due—No deposit in Court need be made.*

Where the applicant does not admit any rent to be due by him, he need not deposit any amount in Court before applying for setting aside a decree for rent and enhancement of rent. (*Jwala Prasad, J.*) CHANDRA CHUR DEO *v.* BHOLA RAI **2 P. L. T. 372 = 1921 P. H. C. C. 301 = 62 I C. 80 = A. I. R 1921 Pat. 284.**

Ss. 154 and 30—Enhancement of rent.

———It would be manifestly unfair in a case which has been prolonged to order any enhancement of back rents, that is to say rents from the commencement of the suit. The ordinary course is no doubt laid down in S. 154 of the Bengal Tenancy Act. (*Dawson Miller, C. J. and Foster, J.*) RAMJI RAM *v.* RAMASRE RAUT.

83 I. C. 124 = 1924 P. H. C. C. 217 = A. I. R. 1924 Pat. 761.

S. 155—Decree.

———*Decree under S. 155 is alternative.*

The decree as contemplated by S. 155 is a decree in the alternative. If the part directing removal of mischief and the compensation is satisfied the part directing ejectment cannot be enforced. But in case the part directing removal of mischief and compensation is not satisfied, part directing ejectment can be enforced without obtaining a further decree. (*B. B. Ghose and Bose, JJ.*) KIRON CHANDRA *v.* HAMID KHAN.

33 C. W. N. 1224 = A. I. R. 1930 Cal. 800.

———*Appellate Court's decree also should fix date for ejectment.*

The appellate Court should fix a date for ejectment in its judgment. But when the first Court's decree fixes a certain date, the appellate Court's decree is to be presumed to incorporate the terms of the first Court's decree and therefore the Appellate Court's decree should not be set aside, on account of omission to fix a date. (*Chatterjea and Suhrawardy JJ.*) KORIM *v.* ASWINI KUMAR. **25 C. W. N. 658 = 63 I. C. 236 = A. I. R. 1921 Cal. 492.**

S. 155—Notice.

———*Miras karsha lease—Covenant for re-entry on breach of any condition—Landlord must give notice under S. 155.*

Whenever a landlord sues for ejectment of a tenant on the ground that he has broken a condition in the lease, he is bound to follow the procedure laid down in S. 155 as there is nothing in S. 155 or in general law to hold that because a tenant commits an act in breach of the terms of the tenancy, he ceases to be a tenant within the meaning of S 155. He continues to be tenant until he is declared by a Court of Justice that he has forfeited his tenancy and is liable to be ejected. 29 C. L. J. 40, Foll ; 24 C. L. J. 40,. Dist. In a lease creating a *miras karsha* there was a covenant that if the tenant transferred the holding without the landlord's consent, the landlord would have the right of re-entry. The tenant sold the holding to another person and continued to remain in possession as a sub-lessee under him. In a suit brought by the landlord,

Held, that the suit was not maintainable in view of S. 155 without serving a notice on the tenant. (*Suhrawardy and Cammiade, JJ.*) ATAHARUDDIN TALUQDAR *v.* MURARI MOHUN DUTT. **47 C. L. J. 21 = 107 I. C. 735 = A. I. R. 1928 Cal. 193.**

S. 155 (b)—Notice.

——*Landlord and tenant—Tenant precluded from transferring the land in any way--Condition that if any such transfer was effected the landlord would have a right of re-entry—Landlord or a person claiming under him can eject the transferee from the tenant—Landlord need not give notice under S.* 155 (b).

Where a tenant, holding land under a kabuliyat which precludes him from transferring it in any way, either by sale or gift or any other manner and gives the landlord right of re-entry if any such transfer is effected, transfers the land and holds a portion of it under a sub-lease from the transferee, both the purchaser from the tenant and the tenant holding land under the sub-lease from the transferee are liable for ejectment by the landlord or a person claiming under him, even without a notice under S. 155 (*b*) of the Act. A. I. R. 1924 Cal. 900, Not Foll.; 21 C. W. N. 117, Rel. on, (*B. B. Ghose and Roy, JJ.*) GOHUR SHAIKH *v.* AHMED ALI. **105 I. C. 786 = A. I. R. 1928 Cal. 113.**

——*Suit for ejectment—Misuse of tenancy—Notice not asking remedy of misuse is invalid.*

A notice under S. 155 not requiring the tenant to remedy the misuse, though it is capable of remedy, but only asking for compensation to remedy the misuse, is not valid. (*Woodroffe and Ghose, JJ.*) SHIB CHARAN CHAKRABURTY *v.* BEPIN BEHARI CHAKRABURTY. **77 I. C. 1047 = 27 C. W. N. 144 = A. I. R. 1923 Cal. 149 (1).**

S. 155—Plaintiff's remedy.

——*Failure to pay compensation and remedy misuse does not entitle plaintiff to ejectment and compensation but only to ejectment.*

If the defendant does neither pay the compensation within the fixed period nor remedy the misuse, the proper course for the plaintiff is to ask for ejectment and not ejectment and compensation both. (*B. B. Ghose and Bose, JJ.*) KIRON CHANDRA *v.* HAMID KHAN. **33 C. W. N. 1224 = A. I. R. 1930 Cal. 300.**

S. 155—Scope.

——There cannot be a decree for ejectment as well as for compensation under S. 155. (*Chatterjea and Suhrawardy, JJ.*) KORIM *v.* ASWINI KUMAR. **25 C. W. N. 658 = 63 I. C. 236 = A. I. R. 1921 Cal. 492.**

S. 158 (3)—Appeal.

——*Order under, is subject to appeal as a decree.*

Under S. 158, cl. (3) the order on any application made under that section shall have the effect of and be subject to appeal like a decree. The plain meaning of the section is that such an order should be regarded as a decree under Sch. 3, cl. 4 and time should run from the date of the order. Although in case where the order itself is a decree, formal decrees are drawn up to show the result of the litigation, it cannot be held that such decrees must be filed along with the memorandum of appeal and that time for presentation of appeals ought to be calculated from the dates of such decrees. 15 C. L. J.

498, Expl. (*Suhrawardy and M. N. Mukerji, JJ.*) DEBENDRA NATH *v.* NAGENDRA NATH. **43 C. L. J. 106 = 30 C. W. N. 479 = 95 I. C. 245 = A. I. R. 1926 Cal. 688.**

S. 158—Applicability

——*Rate of rent not ascertained at the time of application for settlement of fair rent—S.* 158 *applies.*

Cl. (*d*) of S. 158 entitles a Court to determine the rent payable by the tenant at the time of application, and there is no reason why this should be restricted to cases where the rate of rent has already been ascertained. If the contract is that the tenants shall pay a fair and equitable rent, then that is the existing rent payable and it is the business of the Court to ascertain it. (*Mullick and Ross, JJ.*) RAM GOBIND *v.* SHASHI SEKHAR. **6 P. L. T. 849 = 1925 P. H. C. C. 153 = 88 I. C. 959 = A. I. R. 1925 Pat. 517.**

S. 158 (d)—Fair rent.

——*Revenue officer is competent to ascertain the rate of rent and if there is none, to determine a fair and equitable rent.*

The revenue officer is, on a local enquiry, competent to ascertain the contract rent or rate of rent, but if he finds that there is none such, he is equally competent to determine a fair and equitable rent for each of the holdings. 3 C. W. N. 15; 6 C. W. N. 592 and 18 Cal. 182 (F. B.), Expl. (*Mukerji and Graham, JJ.*) PRIYA NATH MANNA *v.* OFFICIAL TRUSTEE, BENGAL. **105 I. C. 133 = A. I. R. 1928 Cal. 43.**

——*Landlord can ask for decree for back rents at a fair and equitable rate which is found for the years in suit.*

The determination of the rent under the section when it is fair and equitable rent for the holding must be such as is payable at the time of the application and on its basis only rent for future years may be realized and not for the years in arrears in the suit; while there is nothing to prevent the landlord from asking for a decree for back rents at such rate as the Court may find to be fair and equitable for the years in suit. 22 C. W. N. 685 and A. I. R. 1925 Pat. 559, Expl. (*Mukerji and Graham, JJ.*) PRIYA NATH MANNA *v.* OFFICIAL TRUSTEE, BENGAL. **105 I. C. 133 = A. I. R. 1928 Cal. 43.**

Ss. 158 and 188—Jurisdiction.

——*S.* 158 *does not oust the general jurisdiction of Court under C. P. Code, S.* 9 *to entertain a suit for settlement of fair rent—Hence suit by some only of the co-sharers is competent.*

S. 158 is not restrictive and the right to claim a fair and equitable rent is an obligation arising out of the contract between the parties and is enforceable in the ordinary Civil Courts under the provisions of S. 9 of the C. P. Code. Hence S. 158 of the B. T. Act is no bar to the maintenance of a suit for fair and equitable rent, by plaintiffs who are not the entire body of the landlords. It cannot be held that the only jurisdiction for assessing a fair rent, where no rent has at any time been previously assessed, is that conferred by Ss. 52, 105 and 157, 158 and similar sections of Act VIII of 1885. (*Mullick and Ross, JJ.*) RAM GOBIND *v.* SHASHI SEKHAR. **6 P. L. T. 849 = 88 I. C. 959 = 1925 P. H. C. C. 153 = A. I. R. 1925 Pat. 517.**

S. 158—Landlord and tenant.

——*Application under—Court can determine relationship of landlord and tenant.*

In an application under S. 158 it is open to the Court to determine whether the relationship of landlord and tenant does exist between the parties. (*Cuming and B. B. Ghose, JJ.*) KAILASH CHANDRA *v.* MEHERUDDI SHEIKH. **A. I. R. 1927 Cal. 51 = 97 I. C. 604.**

S. 158—Nature of proceedings.

——*C. P. Code, O. 9, R. 9—Application under B. T. Act—S. 158 is not a suit—O. 9, R. 9 does not apply.*

The suit was instituted in 1919 by the plaintiffs as landlords against the defendants as tenants claiming compensation for occupation of certain land for the last three years and a determination of the annual amount of rent payable by the tenants. The only question in the appeal was whether the suit for assessing the rent at a certain rate according to the nature of the land was barred by reason of O. 9, R. 9. It appeared that a claim for assessment of rent was preferred by the same plaintiffs against the same defendants in respect of the same land in the year 1915. That application failed for default and was dismissed.

Held, the rule applies only to the case of suits and the relief sought in the present case in so far as it is for past rent is clearly not a relief which is barred by any previous suit for past rent in the year 1915 and in so far as the relief sought is for assessment of fair rent in a case where no rent has been paid previously it is not a suit at all an application under S. 158, clearly cannot be regarded as a suit within the meaning of O. 9, R. 9. 18 C. W. N. 466, Ref. (*Dawson Miller, C. J. and Mullick, J.*) JANKI RAY *v.* RAJA KALANAND SINGH. **2 Pat. 192 = 74 I. C. 464 = 4 P. L. T. 705 = A. I. R. 1923 Pat. 381.**

S. 158—Remand.

——*C. P. Code, O. 41, R. 23—Court need not remand a case if the only object is to have enquiry under S. 158.*

There is no point in sending the case down to the trial Court if the only object of adopting that course is to have an enquiry under S. 158, Bengal Tenancy Act, by a Revenue Officer. The result of such enquiry may be taken into consideration by the appellate Court itself and then the appeal may be finally disposed of. (*Mukerji and Graham, JJ.*) PRIYA NATH MANNA *v.* OFFICIAL TRUSTEE OF BENGAL. **105 I. C. 133 = A. I. R. 1928 Cal. 43.**

S. 158-B—Estoppel.

——*Person being party to sale as* pro forma *defendant is not estopped from asserting title subsequently. Evidence Act, S. 115.*

There is no duty cast upon a person who is made *pro forma* defendant in the suit under B. T. Act, S. 148-A, to give notice to intending purchasers that the rent-suit of the execution sale or the proceedings in execution are not such as to confer title on the purchaser as contemplated under the special provision of S. 158-B of the Bengal Tenancy Act. His silence cannot influence the conduct of the auction-purchaser in any way and it cannot be said that the person keeping silent will be estopped from asserting his title. (*B. B. Ghose, J.*) SURENDRA NATH *v.* JABED ALI. **85 I. C. 747 = A. I. R. 1926 Cal. 420.**

S. 158-B—Execution sale.

——*Purchase by landlord in execution of decree against some co-tenants of tenure—Only interest of judgment-debtors passes unless they represent whole estate.*

Where a landlord sues only the recorded co-tenants of a tenure, obtains a decree, and purchases the tenure in pursuance of the decree but omits to implead a purchaser from one of the co-tenants all that he obtains by the purchase is the interest of the defendant judgment-debtor. But the whole tenure including the interest of the purchase will pass under the auction purchase pursuant to the decree if the facts warrant a finding that the tenants who were impleaded in the circumstances represented the whole estate. (*Rankin, C. J. and Page, J.*) FARIDPUR LOAN OFFICE, LTD. *v.* NIRODE KRISHNA ROY. **56 Cal. 462 = 118 I. C. 864 = A. I. R. 1929 Cal. 452.**

——*Tenure passes to purchaser only after actual sale under decree.*

Under S. 158-B the tenure passes to the purchaser when it is sold in execution of rent decree. Until the sale takes place the tenant recorded in the landlord's serishta must be deemed to have been the person in whom the tenure was vested. (*Sen, J.*) RAMESHWAR SINGH *v.* PURAN CHANDRA. **3 Pat. L. R. 341 = 7 P. L. T. 717 = 95 I. C. 303 = A. I. R. 1926 Pat. 213.**

——*Portion of holding purchased at auction sale—Whole interest does not pass.*

There is nothing in S. 158-B or indeed in any other section which would give the purchaser the right to acquire the rights therein mentioned except by a purchase of the whole holding. So that if he purchases a portion only of the holding he does not acquire the rights therein mentioned but merely the right, title and interest of the judgment-debtor. (*Dawson Miller, C.J. and Mullick, J.*) DIPA MAHTON *v.* LALA SHEONADAN PRASAD. **1 Pat. L.R. 467 = 80 I.C. 570 = A.I.R. 1924 Pat. 342.**

Ss. 158-B and 177 (Ch. XIV)—Landlord and tenant.

——*Sale by decree-holder in execution of a rent decree—It must be shown that he was a landlord on the date of application for execution—Superior interest in occupancy holding sold—Subsequent sale in execution of a decree for rent transfers only right of tenant and not tenancy.*

In order to attract the provisions of Ch. XIV, Bengal Tenancy Act, it is necessary that the decree-holder should hold the position of a landlord not merely at the time of the decree but also at the time of an application for execution. A.I.R. 1914 P.C. 111, Foll.; 25 C.L.J. 626, Dist. Where a landlord has sold his superior interest of an occupancy holding, a subsequent sale of that holding in an execution of a decree for rent of that holding merely conveys right, title and interest of the tenant and not the tenancy. (*Cammiade and S.K. Ghose, JJ.*) BAHIMUDDI *v.* CHADDAN. **32 C. W. N. 1060 = 117 I. C. 686 = A. I. R. 1928 Cal. 768.**

Ss. 158-B and 159—Limitation.

——*Limitation Act, Art. 139—The rights of the purchaser in a rent-decree are determined by B. T. Act.*

Per *Woodroffe, J.*—Article 139 of the Limitation Act is applicable only where the purchaser acquires the right, title and interest of the judgment-debtor. But the rights of a purchaser at a sale under a decree for rent must be governed by the Bengal Tenancy Act. Where a rent-decree has been properly obtained the tenure itself passes to the purchaser and not the right, title and interest of the judgment-debtor only. The rights of the purchaser must be determined by the provisions of the B. T. Act under S. 158-B and S. 159. *B. T. Act, Ss. 159 and 161—Prescriptive title.* The word "encumbrance" as used in Ss. 156 and 161 of the Bengal Tenancy Act includes a statutory title acquired by a trespasser by adverse possession of the land of a defaulting tenant. (*Woodroffe, J., on difference between Walmsley and Suhrawardy, JJ.*) JNANENDRA MOHAN DUTT *v.* UMESH CHANDRA GUHA. **26 C. W. N. 985 = A. I. R. 1922 Cal. 544.**

——Sale contrary to—Suit for declaration of invalidity is governed by Art. 120 of the Limitation Act. (*Das, J.*) GHANSHYAM *v.* BASDEB JHA. **60 I. C. 529 (2) = 3 U. P. L. R. (Pat.) 27.**

S. 158-B—Notice.

——*Co-sharer landlord may waive right to have the notice served under this section.*

The obligation to serve notice upon the co-sharer landlord is enacted to protect his interest. In such a case the person upon whom it is required to serve notice may, at his option, waive the necessity for such notice. A.I.R. 1924 Cal. 408, Foll.; A.I.R. 1914 P.C. 129, Dist. (*Dawson Miller, C. J. and Adami, J.*) BADLU PATHAK *v.* SIBRAM SINGH. **7 Pat. 155 = 107 I.C. 310 = 9 P.L.T. 241 = A. I. R. 1928 Pat. 234.**

——*Notice not served on co-sharers—Rent-sale is altered to execution sale in money-decree.*

The non-service of notice upon the co-sharers in accordance with the provisions of S. 158-B (2) does not invalidate the rent sale but totally alters it to a sale in execution of a money decree. 23 C.W.N. 931, not Foll. (*Graham, J.*) NAKHAL CHANDRA *v.* RAJENDRA CHANDRA. **104 I.C. 196 = A. I. R. 1927 Cal. 873.**

——*Service of notice to some is not service to all co-sharers.*

Service, on some of co-sharers, of notice of the execution of a rent-decree and the sale thereunder is not a service to all. A.I.R. 1924 Cal. 408. Dist. (*Greaves and Cuming, JJ.*) JABED ALI *v.* SURENDRA NATH. **42 C.L.J. 477 = 90 I. C. 333 = A. I. R. 1926 Cal. 351.**

——*Sale without notice is not a nullity but a mere irregularity—Effect.*

The notice under S. 158-B (2) is not essential to the validity of the sale and omission to serve the notice is a mere irregularity. The effect of such a sale is at least that of a sale in execution of a decree for money. (*Ross and Kulwant Sahay, JJ.*) DURGA SINGH *v.* MT. RAM DASI KUAR. **6 Pat. 80 = 7 P.L.T. 871 = 96 I. C. 569 = A. I. R. 1926 Pat. 503.**

——Where the co-sharer landlord was satisfied with the regularity of the execution proceedings, and withdrew the money which was in Court in satisfaction of his dues, *held*, it is impossible to hold that the omission to serve upon the co-sharer landlord the notice contemplated by sub-S. 2 of S. 158 B either nullified the sale or altered its character to that of a sale held in execution of a money decree. (*Mookerjee and Chotzner, JJ.*) RAJINI KANTA GHOSE *v.* SHEIKH RAHMAN GAZI. **37 C.L.J. 447 = 82 I. C. 507 = 27 C.W.N. 765 = A. I. R. 1924 Cal. 408.**

Ss. 158-B' 177 (Chap. XIV)—Objection under.

——*Judgment-debtor not raising objection to execution proceedings under the chapter that decree is not a rent decree—He cannot subsequently raise the plea.*

Where a person against whom a decree purporting to be a rent decree is passed has not taken exception to the execution proceedings under Chap. 14, Bengal Tenancy Act, on the ground that the decree is not a rent decree, he is precluded from doing so at a subsequent stage. (*Panton and Mitter, JJ.*) AMBICA CHARAN *v.* HAR KISHORE. **103 I. C. 707 = A. I. R. 1927 Cal. 825.**

——*Execution of rent decree—Objection to, can be raised by tenant—Special procedure under Chapter XIV—Effect of.*

It is competent for a tenant against whom a decree for arrears of rent has been passed to raise an objection in the execution proceeding that execution of such a decree is barred under the special provisions of Chapter XIV of the Act. Such an objection cannot be taken if the decree is executed as a decree for money under the provisions of the C. P. Code. (*Chatterjee and Panton, JJ.*) ATULCHANDRA BASU *v.* ARIPSHAIK. **65 I. C. 810 (Cal.)**

S. 158-B—Representatives

——*Ijaradar of absent co-sharer being party in his capacity as another co-sharer does not sufficiently represent the absent co-sharer.*

The special provision of the Bengal Tenancy Act which allows one or more co-sharer landlords to sell a tenure or holding in execution of their decree must be strictly followed in order to give complete title to the auction-purchaser and it will not be sufficient to say that the ijaradar under a particular co-sharer was a party in another capacity being himself a co-sharer in the zamindari and therefore the absent co-sharer was sufficiently represented in order to bring into operation the special provisions laid down in S. 158-B of the Bengal Tenancy Act. (*B. B. Ghose, J.*) SURENDRANATH *v.* JABED ALI. **85 I.C. 747 = A. I. R. 1926 Cal. 420.**

Ss. 159 to 177—Form of decree.

——*Though suit can be brought with respect to separate holdings consequent decrees must be moulded so as to apply distributively to separate holdings—C. P. Code, O. 2, R. 3.*

Although the original suit can be brought against a holder in respect of all his separate holdings, there is nothing in the Civil Procedure Code or in the Bengal Tenancy Act to prevent the consequent decrees and orders from being so moulded as to enable their provisions to apply distributively to the separate holdings in respect of which the suit is brought. (*Lord Atkin.*) PRAFULLA NATH *v.* SATYA BHUSAN. **56 I.A. 238 = 33 C.W.N. 822 = 119 I.C. 618 = 30 M.L.W. 310 = 10 P.L.T. 829 = A. I. R. 1929 P.C. 171 = 57 M.L.J. 132 (P. C.).**

Ss. 159 and 161—Interpretation.

——The word "encumbrance" as used in Ss. 156 and 161 of the Bengal Tenancy Act includes a statutory title acquired by a trespasser by adverse possession of the land of a defaulting tenant. (*Woodroffe, J, on difference between Walmsley and Suhrawardy, JJ.*) JNANENDRA MOHAN DUTT *v.* UMESH CHANDRA GUHA. **26 C.W.N. 985 = A. I. R. 1922 Cal. 544. (d).**

——*Incumbrance includes statutory title acquired by trespasser.*

The word "incumbrance" as used in Ss. 159 and 161 has been interpreted to include a statutory title and interest, acquired by a trespasser by adverse possession, of a part of the lands of the defaulting tenure or holding. (*Mookerjee and Panton, JJ.*) ISAN CHANDRA BAKSHI *v.* SAFFULLA SIKDAR. **35 C.L.J. 36 = 68 I.C. 219 = 26 C.W.N. 703 = A. I. R. 1922 Cal. 331.**

Ss. 159 to 177—Scope.

——*Several tenures lumped together—Sub-tenure-holder required to pay arrears due even on tenures not connected with his tenure—Object of the Act is defeated.*

The provisions of the Act are devised for the purpose of protecting the persons interested in each separate tenure put up for sale. A sub tenure-holder may have to pay the arrears due upon the whole tenure under which he holds, but no more; and it would defeat the objects of the Act if several tenures could be lumped together in one order for sale so that a sub-tenure-holder to get protection would have to pay the arrears not only on the specific tenure under which he held, but on other tenures with which he had no connexion. (*Lord Atkin.*) PRAFULLA NATH *v.* SATYA BHUSAN. **56 I.A. 238 = 33 C.W.N. 822 = 119 I. C. 618 = 30 M.L.W. 310 = 10 P.L.T. 829 = A.I.R. 1929 P.C. 171 = 57 M.L.J. 132 (P.C.).**

——*S. 159 is for benefit of landlord—Incumbrancer cannot take advantage of the section.*

Section 159 is for the benefit of the landlord in order to expedite the sale, and that does not affect the interest of the judgment debtor or the purchaser in any way. The incumbrancers, therefore cannot claim any benefit on the ground that the sale was not under the Bengal Tenancy Act. (*B. B. Ghose and Panton, JJ.*) KALI PROSANNA RAY *v.* PREMCHAND MAHAPATRA. **95 I C. 853 = A. I. R. 1926 Cal. 1062.**

——*Purchaser of a part of a non-transferable occupancy holding who has been evicted by landlord in execution of rent decree against the recorded tenant cannot apply under O. 21, Rr. 100 and 101, C. P. Code.*

Purchasers of a portion of a non-transferable occupancy holding not recognized by the landlord are in the position of sub-tenants of the recorded tenants and in that position they cannot have any better rights than the recorded tenants and are liable, on the purchase by the landlord of the whole holding in execution of a rent decree to be ejected, as the interest in a non transferable occupancy holding need not be annulled as an incumbrance by the landlord purchaser in execution of a rent-decree. (A. I. R. 1924 Cal. 1005, Rel. on). Therefore when such purchasers are so evicted they cannot apply under Rr. 100 and 101. (*Duval, J.*) DOST MAHAMUD MULLA *v.* MAJED ALI NASKER. **95 I. C. 146 = A. I. R. 1926 Cal. 956.**

S. 160—Applicability.

——*Settled raiyat remaining in possession for 12 years and acquire occupancy rights—Protection under S. 160 applies.*

If the *raiyat* has in the first instance the right of a *raiyat* at a fixed rate, and if he subsequently by continuous possession for twelve years can acquire and does acquire a right of occupancy, there is no reason why he should not be protected under S. 160. (*Sanderson, C.J. and Richardson, J.*) SARBESWAR PATRA *v.* BEJOY CHAND MOHATAP. **63 I. C. 986 = 49 Cal. 280 = 34 C. L. J. 233 = 26 C. W. N. 15 = A.I.R. 1922 Cal. 287.**

S. 160—Scope.

——*A raiyat holding at a fixed rent is entitled to the benefit of S. 50.*

A raiyat holding land at a fixed rent can acquire a right of occupancy and claim protected interest under S 160, Ben. Ten. Act. He is entitled to the benefit of S. 50 if he proves the particular state of facts laid down therein. A. I. R. 1922 Cal. 287, Foll. (*Suhrawardy, and Graham, JJ.*) TARINI CHARAN *v.* SRISH CHANDRA. **56 Cal. 173 = 48 C.L.J. 97 = 32 C.W.N. 587 = 115 I.C. 181 = A. I. R. 1928 Cal. 880.**

——*Occupancy raiyat subsequently obtaining fixed rate grant—His right is still 'protected interest'.*

The right of an occupancy raiyat, who subsequently obtains a grant of fixed rate, continues to be 'protected interest' within S. 160. A.I.R. 1922 Cal. 287. Foll. ; 13 C. W. N. 1025, Not Foll. (*Duval and Mitter, JJ.*) MIDNAPORE ZAMINDARY CO. *v.* SADHUMONI DASSI. **54 Cal. 681 = 104 I. C. 744 = A. I. R. 1927 Cal. 846.**

——*Mortgage of patni created with zamindar's consent—Mortgage is protected interest.*

A mortgage of patni created with consent and for benefit of the *Zamindar* is protected interest within S. 160 (*g*). (*Greaves and Mukerji, JJ.*) HARI MOHAN DALAL *v.* PURENDRA NATH NAG. **90 I. C. 355 = A. I. R. 1926 Cal. 356.**

——*Sub-tenure ceasing on the annulment of tenure by sale for arrears—Owner of sub-tenure can apply to avoid sale.*

S. 160 (*b*) refers to a temporary revenue settlement. Where on the annulment of a tenure by sale for arrears, the sub-tenure would cease with it, the owner of sub-tenure would be interested in making the payment to avoid the sale. (*Adami and Sen, JJ.*) DEBLAL JHA *v.* KUMAN DAS. **93 I. C. 994 = 7 P. L. T. 478 = 1925 P. H. C. C. 236 = A. I. R. 1925 Pat. 737.**

——*Landlord recognising person as tenant of portion of occupancy holding—The portion is "protected."*

Where a landlord recognises a person as the purchaser and tenant of a portion of a certain occupancy holding and permits the latter to pay rent in respect of such portion he gets an occupancy right in the portion of the holding, so that, that portion is a protected interest within the sense of S. 160 of the B. T. Act. (*Foster, J.*) HANKAR SONAR *v.* BASUDEO SINGH. **86 I. C. 575 = A. I. R. 1925 Pat. 556.**

——*C. P. Code, O. 21, R. 90—Sale under B. T. Act for arrears of rent—Holder of protected interest cannot apply under O. 21, R. 90.*

A person who holds a protected interest under the B. T. Act in a holding which has been sold under that Act for arrears of rent is not entitled to apply under O. 21, R. 90 as, by Ss. 159 and 158-B of the B. T. Act, a protected interest is not affected by such sale. (*Foster, J.*) HANKAR SONAR *v.* BASUDEO SINGH. **86 I. C. 575 = A .I. R. 1925 Pat. 556.**

——*Rent sale and incumbrance before Record-of-Rights was published—Incumbrancers cannot rely on the Record—Provision for enhancement of rent under circumstances over which landlord has no control does not negative fixed-rate tenancy.*

Where in s suit in 1916 for possession by an auction-puchaser at a rent sale, held in 1911 after annulment of incumbrances, which had been effected in 1912, it was contended relying on the entries in the settlement *Khatian* of 1917 that the *howladars* are protected by virtue of the provisions of S. 160 (*b*).

Held, reliance cannot be placed on the entry in the record-of rights, the sale having been made, notices issued to annul the incumbrances, and the suit commenced before the record-of-rights was published. Where the question is whether the appellants are to be deemed *raiyats* holding at fixed rates of rent, having regard to the terms upon which they hold.

Held, that a provision for enhancement by the immediate landlord which is in respect of enhancements under circumstances, over which the immediate landlord has no control does not necessarily negative a fixed rate tenancy. (*Greaves and Ghose, JJ.*) SRIMATI JODHRA BANOO *v.* GANGA CHANDRA CHOWDHURY. **77 I. C. 1044 = A. I. R. 1922 Cal. 222.**

Ss. 161 and 167—Applicability.

——*Sections apply to all holdings.*

Ss. 161 and 167 apply to all holdings whether transferable or non-transferable. (*Adami and Macpherson, JJ.*) HARGOBIND DAS *v.* RAMACHANDRA JHA. **6 Pat. 235 = 97 I. C. 309 = 8 P. L. T. 464 = A. I.R. 1927 Pat. 53.**

S, 161—Incumbrance.

——*Estate growing up by sufferance was assumed to be an incumbrance.*

An interest not directly created by the *talukdar* but allowed so to be grown up by sufferance and negligence was assumed to be an incumbrance for purposes of the judgment without a final opinion on the point. (*Lord

Phillimore.) BIPRADAS PAL CHAUDHARY *v.* KAMINI KUMAR LAHIRI. **66 I. C. 674 = 15 M. L. W. 180 = 49 Cal. 27 = 30 M. L. T. (P. C.) 138 = 26 C. W. N. 465 = 48 I. A. 499 = A. I. R. 1922 P. C. 48 = 41 M. L. J. 638 (P. C.).**

Ss. 161 and 167—Scope.

———*Mortgage of non-transferable holding—Purchaser at rent sale must annul the mortgage—Purchaser steps in the shoes of the tenant and not the landlord—Purchaser not annulling mortgage is not entitled to avoid mortgage but only to redeem it.*

A mortgage of a non-transferable holding without the consent of the landlord may make the incumbrance invalid so far as the landlord is concerned, but it cannot be said that the mortgage is altogether invalid, for it will be valid against the tenant who created it, and in the same way it will be valid against the person who purchases at a sale in execution of a rent-decree obtained against the tenant. Mortgage is an incumbrance, which under S. 167, the purchaser at the rent sale must annul within one year or lose all right to annul the incumbrance. A. I. R. 1922 Patna 355, Dist.; (1920) P. H. C. C. 19, Foll. The purchaser becomes a tenant of the landlord and does not step into the landlord's shoes. The relative rights of the purchaser at a rent sale and the mortgagee should be determined with reference to their position at the time of the rent sale ; and if the purchaser at the rent sale has not availed himself of the privilege of annulling the mortgage within the prescribed period, he holds the property subject to the mortgage and is entitled to redeem. 6 C. W. N. 834, Diss. from and A. I. R. 1922 Cal., 32, Foll. (*Adami and Macpherson, JJ.*) HARGOBIND DAS *v.* RAMACHANDRA JHA. **6 Pat. 235 = 97 I. C. 309 = 8 P. L. T. 464 = A. I R. 1927 Pat. 53.**

Ss. 161 and 167—Separate suit.

———*Purchaser of Putni in rent sale—Encumbrances created not by putnidar but by tenure-holder of inferior grade need not be annulled under S. 167, but may be avoided dy suit.*

What is required to be annulled under S. 167 is the sub-tenancy created by the putnidar, *i. e.*, the darputni as it was created and which would include all the interests created or carved out of it. Any encumbrance created by any tenure-holder of an inferior grade can be avoided by a suit within 12 years from the date of the sale being final under Article 121 of the Limitation Act, such interest coming into existence after the creation of the putni. Such encumbrances created by tenure-holder of inferior grade need not be annulled under S. 167. 14 C. W. N. 352, Dist. ; 17 C. W. N. 1064, Foll. (*Chatterjea and Greaves, JJ*). MONMOTHA NATH *v.* ANATH BANDHU. **25 C. W. N. 106 = 61 I.C. 469 = A. I. R. 1921 Cal. 754.**

S. 163 (2) (a)—Proclamation.

———*Wrong form used for proclamation through oversight—To find out purchaser's right, intention of the decree should be looked to—Execution sale.*

Where by carelessness or oversight, a wrong form is used for the proclamation of sale, in order to find what rights the auction-purchaser obtained under the sale, the true meaning of the decree under which the sale took place as well as the proceedings leading up to the sale should be looked into. (*B. B. Ghose and Panton, JJ.*) KALI PROSANNA RAY *v.* PREM CHAND MAHAPATRA. **95 I.C. 853 = A. I. R. 1926 Cal. 1062.**

S. 167—Burden of proof.

———*Onus is on party questioning proper service of notice.*

The onus is upon the person questioning the validity of the notice to establish that the notice under S. 167 was not served in accordance with law. A. I. R. 1924 Pat. 515, Foll (*Das and Kulwant Sahay, JJ.*) KULDIP NARAIN *v.* RAM LAL. **7 Pat. 260 = 107 I. C. 821 = A. I. R. 1928 Pat. 318.**

S. 167—Incumbrance.

———*Incumbrance subsists till notice is served as prescribed.*

Until the notice has been properly served under S. 167 upon the incumbrancer, the incumbrance subsists and it is obligatory on the purchaser to show that the notice has been served in the manner prescribed. 7 C.L.J. 262, Foll. (*Mallik and Garlick JJ.*) RASIK CHANDRA *v.* JAGABANDU. **113 I. C. 904 = A. I. R. 1929 Cal. 392.**

———*Annulment of incumbrance—Application for, after one year from sale—Purchaser must prove date when he got notice of sale.*

Where a purchaser in execution of a rent decree makes an application for annulling an encumbrance after one year from the date of the sale, and seeks extension of that period for presenting an application to the Collector on the ground that the date when he had first notice of the encumbrance was later than the date of the sale, the purchaser is to prove the fact in order to claim the extended period in his favour and show that the application is within time. A. I. R. 1924 Pat. 515, Expl. (*B. B. Ghose and Cammiade, JJ.*) MAKHAN LAL *v.* BEJOY GOPAL NUNDY. **114 I. C. 481 = 32 C.W.N. 1079 = A. I. R. 1928 Cal. 892.**

———*Auction-purchaser can annul incumbrance even during mortgage suit by the encumbrancer provided application is within twelve months of knowledge.*

The mortgagee of an occupancy holding in a suit on his mortgage impleaded the landlord of the holding who had purchased the same in execution of a rent decree. The landlord alleged that the incumbrance has been annulled owing to a notice under S. 167, *held*, that a mortgage suit or any other suit by the encumbrancer cannot deprive the auction purchaser of his right to encumbrance provided his application is within time. *Held*, further, that once the Collector had issued the notice the inbumbrance must have been deemed to have been annulled. It does not mean that the validity of the notice and the consequent annulment of the encumbrance cannot afterwarde be called in question. The effect of the section is only to lay the burden of proof upon the person questioning the validity of the notice. Therefore, the mortgagee must prove that landlord had notice of the encumbrance more than 12 months prior to the landlord's application. (*Dawson Miller, C. J. and Mullick, J*). N. K. CHOUDHURY *v.* RAMESWAR SINGH. **78 I.C. 476 = 2 Pat. L. R. Civ. 19 = A. I. R. 1924 Pat. 515.**

———*Holding mortgaged—Subsequent sale of holding for arrears of rent—Purchaser cannot after one year after sale question the validity of mortgage.*

On the expiry of one year from the date of the rent sale or from the date when the landlord had notice of the incumbrance, the mortgage could not be annulled. From that date onwards the holding in the hands of the landlord purchaser would be subject to a mortgage no longer liable to be impeached or extinguished 22 C. W. N. 662 ; 22 Cal 364 ; 24 C.W.N. 961. Followed. A.I.R. 1918 P. C. 341, Distinguished. The relative rights of the purchaser at the rent-sale and the mortgagee must be determined with reference to their position at the time of that sale. The purchaser acquired the statutory right to annul the mortgage within a prescribed period who has not availed himself of the privilege. He consequently holds the property subject to the mortgage and is entitled to redeem. (*Mookerjee and Panton, JJ.*) SITAL CHANDRA MAJHI *v.* PARBATI CHARAN CHAKRABARTI. **69 I. C. 841 = 35 C. L. J. 1 = A. I. R. 1922 Cal. 32.**

———*Possession as tenant is not encumbrance.*

Possession as a tenant however long such possession might have been held, cannot be adverse to the landlord and it cannot be encumbrance. (*Chatterjea and Greaves, JJ.*) MONMOTHA NATH *v.* ANATH BANDHU. **25 C.W. N. 106 = 61 I. C. 469 = A. I. R. 1921 Cal. 754.**

———*Adverse possessor's interest is encumbrance only when it has continued for statutory period.*

The interest of an adverse possessor is an encumbrance only when the adverse possession has continued for the statutory period. 14 C.L.J. 136 and 17 C.W.N. 340, Foll. (*Chatterjea and Greaves, JJ.*) MONMOTHA NATH *v.* ANATH BANDHU. **25 C.W.N. 106 = 61 I. C. 439 = A. I. R. 1921 Cal. 754.**

———*Mortgage decree—Mortgagee purchasing holding in execution—Holding subsequently sold under rent decree—There is no encumbrance which purchaser at latter sale must annul.*

A mortgagee purchased in execution of his mortgage decree a portion of a holding and subsequently the whole holding was sold in execution of a rent decree.

Held, that after the sale in execution of the mortgage decree, the mortgagee purchaser became the owner of the property and there was no subsisting encumbrance at the date of the sale under the rent decree which the purchaser at that sale was bound to annul under S. 167. (*Chatterjea and Newbould, JJ.*) SABJAN MANDAL *v.* HARIPADA SAHU. **25 C.W.N. 424 = 66 I. C. 103 = A.I.R. 1921 Cal. 599.**

———*Rent decree and mortgage decree against holding —Purchaser in execution of, former decree must redeem mortgage within the time fixed by section.*

Where a holding is sold under two decrees first under a rent decree and second under a mortgage-decree, the purchaser under the rent decree is entitled to possession but with the condition that he redeems the mortgage which still subsists, within time prescribed by S. 167 of the Act. (*Chatterjea and Newbould, JJ.*) BIDHU MUKHI DASI *v.* BABA SUNDARI DASI. **59 I.C. 868 = 24 C.W.N. 961 (Cal.).**

S. 167—Limitation.

———*One year is to be counted not from actual sale but from confirmation.*

"Within one year from the date of sale" means one year from the confirmation of sale and not from the date of actual sale. 45 Cal. 151, Foll. (*Courtney Terrel, C.J. and Jwala Prasad, J.*) PARBHA NARAYAN *v.* RAMADHAR. **10 P.L.T. 396 = A. I. R. 1929 Pat. 236.**

———*Limitation Act, Arts.* 137, 140 *and* 144—*The rights of a purchaser in a rent decree are governed by B. T. Act.*

Plaintiffs were owners of a miras tenure and under them was a *darmiras* tenure held by the defendants. This under-tenure was sold in execution of a rent decree and purchased by a stranger who never obtained possession. In execution of a rent decree obtained against the stranger the under-tenure was again sold more than twelve years after and purchased by the plaintiffs who sued for possession.

Held. Per Walmsley, J.—(*Woodroffe and Suhrawardy, JJ.*, contra). Art. 137 applied to the case and the suit was barred.

Per *Suhrawardy, J.*—Art. 140 or Art. 144 applied to the case.

Per *Woodroffe, J.*—None of the articles of the Limitation Act applied to the case but the suit was barred under S. 167 of the Bengal Tenancy Act. (*Wooroffe, J. on difference between Walmsley and Suhrawardy, JJ.*) JNANENDRA MOHAN DUTT *v.* UMESH CHANDRA GUHA. **26 C.W.N. 985 = A.I.R. 1922 Cal. 544.**

S. 167—Notice.

———*Notices must be separately served.*

A joint notice under S. 167 to all defendants is not enough as there must be separate service on each of them. 5 C. W. N. 272, not Foll. (*Suhrawardy and Jack, JJ.*) DURGANATH BHATTACHARYA *v.* HURKISHORE CHAKRAVARTY. **33 C.W.N. 117 = 119 I.C. 123 = A.I.R. 1929 Cal. 218.**

———*Entries in order-sheet are not* prima facie *evidence against the incumbrancer that notice was served.*

The entries in the order-sheet are not *prima facie* evidence against the incumbrancer that the notice was served and it is obligatory on the purchaser to show that the notice under S. 167 had been served in the manner prescribed. 7 C. L. J. 262; 22 C. W. N. 788; 9 I. C. 248; and A. I. R. 1925 Cal. 1199, Foll.; A.I.R. 1924 Pat. 515 and 1 Pat. L. W. 440, Dist. (*Das and Allanson, JJ.*) HITNARAIN SINGH *v.* RAMBARAI RAI. **7 Pat. 733 = 9 P.L.T. 484 = 115 I.C. 196 = A. I. R. 1928 Pat. 459.**

———*Opinion of Collector as to service of notice is not binding upon civil Court.*

The opinion of the Collector as to the service of notice to the incumbrancer is not binding upon the civil Court and the civil Court has a right to determine for itself the question whether the notices were in fact served or not. (*Das and Allanson, JJ.*) HITNARAIN SINGH *v.* RAMBARAI RAI. **7 Pat. 733 = 9 P. L. T. 484 = 115 I. C. 196 = A. I. R. 1928 Pat. 459.**

———*Under notification of Local Government all Sub-Divisional officers can issue notice—Due service of notice must be proved—Order sheet is not sufficient proof.*

By a notification published in the Calcutta Gazette, dated 7th January, 1915 all the Sub-Divisional officers of places to which the Bengal Tenancy Act applies are empowered to issue notices under S. 167. A mere production of the order sheet is not sufficient to prove due service of notice. It is imperative on the plaintiff asking for the annulment of an encumbrance to prove due service of notice. (*Suhrawardy and Duval, JJ.*) SH. KRISHNA KAMINI DASI *v.* PRATAPENDRA CHANDRA PANDEY. **85 I.C. 790 = A. I. R. 1925 Cal. 1199.**

———*Annulment of incumbrance—Notice is necessary.*

In order to enable the plaintiff to succeed in his suit for annulment of incumbrance, he must apply for the service of notice of annulment under the section. (*Sanderson, C. J. and B. B. Ghose, J.*) JATINDRA MOHAN CHARAVARTI *v.* BIJOY CHAND MAHATAB. **71 I. C. 284 = A. I. R. 1924 Cal. 396.**

S. 167—"Purchaser."

———*Includes assignees or transferees from a certificated purchaser—A real owner is not precluded from giving notice under S.* 167.

The person for whose benefit notice under S. 167 is to be given is the real purchaser and there is no reason to limit the meaning of the words "purchaser" to the certificated purchaser at an execution sale. The word "purchaser" includes assignees or transferees from a certificated purchaser, and therefore a real owner for whom the benamidar merely holds the property in trust cannot be precluded from giving such notice when, as a matter of fact, he is perfectly entitled to enforce his right in a Court of law as against a third party. 21 C. L. J. 65, Dist. (*Cuming and Mukerji, JJ.*) ABINAS CHANDRA *v.* PRATAB CHANDRA. **55 Cal. 1070= 32 C. W. N. 759=108 I. C. 585= A. I. R. 1928 Cal. 448.**

S. 167—Scope.

———Under the rules framed by the Government of Bengal which have the force of law, the service of notices under S. 167 must be as provided in the C. P. Code. (*Suhrawardy and Jack, JJ.*) DURGANATH BHATTACHARJYA *v.* HURKISHORE CHAKRAVARTY. **33 C. W. N. 117=119 I. C. 123= A.I.R. 1929 Cal. 218 (d).**

———*Plaintiff knowing encumbrance failing to have proper service—Decree subject to annulment of encumbrance cannot be granted by applying for fresh notice.*

A decree subject to an annulment of encumbrance by applying to the Collector for a fresh and proper service of notice under S. 167 cannot be granted to the plaintiff when he knew the existence of the encumbrance and when knowing that the service of notice was not proper, he took no steps to have the proper service made. 24 C. W. N. 657 and 24 C. W. N. 659, Ref. (*Suhrawardy and Jack, JJ.*) DURGANATH BHATTACHARJYA *v.* HURIKISHORE CHAKRAVARTY. **33 C. W. N. 117=119 I. C. 123= A. I. R. 1929 Cal. 218.**

———*Holdings sold in execution of rent decree—Mortgagee of the holding from tenant also purchasing it in his decree—Latter cannot dispossess landlord nor can he redeem him—His only remedy is payment in Court prior to rent sale.*

A mortgagee of a non-transferable occupancy holding, who has obtained a decree on the mortgage and purchased the property in execution, cannot claim possession from the landlord who has purchased the holding in execution of a decree for rent, or from the raiyat settled on the land by the landlord, although the landlord purchaser did not annul the mortgage under S. 167. He is not entitled to redeem the landlord, putting himself in the position of 2nd mortgagee. A. I. R. 1928 Pat. 234, Foll. (Case-law considered). Pat. S. A. No. 68 of 1925, Reversed. His only remedy was to make payment into Court before the rent sale. (*Courtney Terrell, C. J. and Jwala Prasad, J.*) SOURENDRA *v.* KUNJBIHARI. **10 P. L. T. 129= 8 Pat. 439=116 I. C. 518=A. I. R. 1929 Pat. 222.**

S. 170—Applicability.

———*Portion of the holding cannot be sold in execution.*

Under S. 170 attachment and sale of the entire holding is contemplated in execution of a decree for rent. A portion of the holding cannot be sold in execution of a decree for rent. 3 C. W. N. 386, Foll. (*Panton and Mitter, JJ.*) KRISHNA CHANDRA *v.* DINA NATH. **54 Cal. 1064=107 I. C. 357=A. I. R. 1928 Cal. 94.**

S. 170 (2)—Application under.

———*May be oral and may be made to the Nazir but must be before tenure is knocked down to purchaser—*Bona fides *need not be gone into—C.P. Code, O.* 21, *R.* 69 *does not apply.*

An application under S. 170 (2), of the Bengal Tenancy Act, for release of the tenure on the ground that the decree has been satisfied may be made orally and to the officer conducting the sale and the holding should be released from attachment and the Court need not go into the *bona fides* of the application. But the application must be made before the holding is knocked down to the purchaser. When the application was made after the sales had taken place and the bid was accepted by the Court, *held* that the sales could not be set aside. *Held* further that O. 21, R. 69 of the C. P. Code does not apply to such cases. (*Jwala Prasad, J.*) JAGDHERI RAI *v.* LANGAT GOPE. **4 P. L. T. 495= 75 I. C. 676=A. I. R. 1923 Pat. 572.**

S. 170 (3)—Deposit.

———*Occupancy holding put to sale in execution of decree by landlord—Under-raiyat whose interest is not created by registered lease or consent of landlord can make deposit under S.* 170 (3).

If an under-raiyati interest has not been created by a registered lease or with the consent of the landlord, and the landlord decree-holder seeks to put up to sale the holding of the occupancy raiyat under whom the under-raiyat, *held* the interest of the under-raiyat is voidable at the sale and he is therefore entitled to make a deposit under S. 170 (3). A. I. R. 1926 Cal. 934 (F. B.) and A.I.R. 1927 Cal. 513, Dist. (*Mukerji and Mitter, JJ.*) BADARADDIN MANDAL *v.* NAZIR HUSSAIN JOADDAR. **56 Cal. 1064=121 I. C 744= A. I. R. 1930 Cal. 163.**

———*Under-raiyati interest in contravention of S.* 85 (2) *is not an incumbrance and holder of such interest is not entitled to make deposit.*

The expression "voidable on the sale" in S. 170, Cl. (3), does not mean an interest injuriously affected by the sale but an interest which subsists and which is to be avoided after the sale, and refers to interests coming within the description of "incumbrance", which, unless steps are taken to avoid them, subsist after the sale. An under-raiyati interest in contravention of S. 85 is not such an incumbrance. A. I. R. 1926 Cal. 934 (F. B.) and 19 C. W. N. 412, Foll. (*Mukerji and Graham, JJ.*) JNANENDRA CHANDRA *v.* ROY MAN SHEIKH. **31 C. W. N. 580=A. I. R.1927 Cal. 513.**

———*Purchaser of non-transferable occupancy holding not recognized by landlord is not entitled to make deposit.*

A purchaser of the whole or portion of a non-transferable occupancy holding who has not been recognized by the landlord has not an interest in the holding which is voidable on the sale and so he is not entitled to make a deposit under S. 170 (3) of the B.T. Act. 13 C W. N. 1175 ; 12 C.L.J, 609 ; 17 C.W.N. 163 and 20 C. W. N. 39, Overruled ; A.I.R. 1924 Cal. 1005, Foll. (*Chatterjea, Cuming, B. B. Ghose, Panton and Page, JJ.*) JHARU MONDAL *v.* KHETRA MOHAN BERA. **54 Cal. 15=96 I. C. 363=43 C.L.J. 554= 30 C. W. N. 729=A. I. R. 1926 Cal. 934 (F. B.).**

———*Transferee of non-transferable holding cannot deposit.*

The deposit of the decretal amount cannot be made by a person who is merely transferee of a non-transferable holding whose transfer is not recognised by the landlord as he gets no interest voidable on the sale. (17 C. W. N. 163, Not Foll ; 16 C. W. N. 421, Foll. (*Newbould and B. B, Ghose, JJ.*) BARADA PROSAD ROY CHAUDHURY *v.* FOIJUDDI HALDAR. **39 C. L. J. 428=83 I. C. 384=28 C. W. N. 845= A.I.R. 1924 Cal. 1005.**

———*Transferee not entitled to make deposit.*

Landlord brought to sale in execution of a decree for rent the holding of the opposite party who applied to make a deposit under S. 170, sub-section (3) alleging that he was a mortgagee of the holding in question. The landlord objected to this deposit.

Held, that the transferee was not entitled under S. 170, sub-section (3) to make the deposit. C. R. 591 of 1921 (Cal.). Foll. (*Panton, J.*) RADHA BENODE MONDAL *v.* NITAI CHAND SANT. **38 C. L. J. 147 = 76 I. C. 358 = A.I.R. 1924 Cal. 185.**

———*Reversioners are not persons having an interest in the tenure voidable on the sale—Order allowing deposit by them of the decree amount, is revisable—C. P. Code, S.* 115.

Reversioners have not within the meaning of the words of Bengal Tenancy Act (VIII of 1885). S. 170 (3) an 'interest in the tenure or holding voidable on the sale," and hence, where the executing Court allows the reversioners to deposit the decretal amount (in satistaction of a decree for rent obtained against a Hindu widow), he exercises a jurisdiction not vested in him by law or he is acting in the exercise of his jurisdiction illegally or with material irregularity and C. P. Code, S. 115 applies to this case. (*Sanderson, C. J. and Chotzner, J.*) MOHENDRA NATH NAND *v.* BAITYA NATH TRIPATHI. **26 C. W. N. 167 = 70 I. C. 127 = A.I.R. 1922 Cal. 95.**

S. 170 (3)--Estoppel.

———*Transferee of a holding allowed to make deposit without notice to landlord—Landlord withdrawing deposit is estopped from questioning transfer—Not giving notice is immaterial.*

An occupancy holding was put to sale in execution of rent decree. The transferee of the holding was allowed to deposit the decretal amount under S. 170 (3). The order was passed without notice to the landlord. The landlord withdrew the amount deposited.

Held, that it must be presumed that the landlord had knowledge of the transfer and hence he was estopped from questioning the validity of the transfer. A. I. R. 1926 Cal. 1215, Dist.

Held, further, that it did not matter that no notice was given to the landlord before allowing deposit to be made. 27 C. L. J. 385, Foll. (*Rankin, C. J. and Mukerji, J.*) KANDARPA NARAIN *v.* BINDA BASHINI. **114 I C. 657 = A. I. R. 1928 Cal. 730.**

S. 170—Powers of Court.

———*Court can ascertain the nature of the property, when its jurisdiction is sought to be excluded—The executing Court can ascertain whether the decree is under B, T. Act.*

When the jurisdiction of a Court is sought to be excluded on the ground that the property attached is of a particular description, it is open to the Court to ascertain the true nature of the property. The Court executing the decree can go into the question whether the decree was a decree under the provisions of the B.T. Act so as to bring into play the operation of S. 170 of the Act and prevent a claim being preferred to the property attached. 36 Cal. 765 and 12 C. L. J. 549, Foll.; 28 Cal. 382 (F. B.), Dist. (*Richardson and B. B. Ghose, JJ*) JOTINDRA MOHAN PAL *v.* BHOLA NATH BHAKAT. **27 C. W. N. 817 = 80 I. C. 353 = A. I. R. 1923 Cal. 715.**

S. 170 (1)—Scope.

———*S.* 170 (1) *does not bar substantive suit by transferee of tenure for declaration of title and for restraining landlord from selling it in execution of decrees not binding on the transferee.*

The effect S. 170 (1) is that there can be no investigation in execution proceedings held under Chap. XIV. Tenancy Act, of claims by third parties to an interest in the tenure but it does not bar a substantive suit by a third party transferee of the tenure for a declaration of his title and for restraining the landlord from selling i

in execution of decrees which are not binding upon him. It is only arrears of rent that are charged by S. 65 upon the tenure and it is only such arrears that can be realized in execution by the sale of the tenure. Chap. XIV of the Act does not purport to enlarge or restrict the exercise of this right but only provides the machinery for working it out. If landlord seeks to use this machinery for recovery of something that is not rent to the prejudice of a third party on whom a decree is not binding, it would be a manifest injustice to deny him the right to object and it would require very clear words in the Act to impose this penalty upon him. (*Sir George Lowndes.*) JITENDRA NATH GHOSE *v.* MONMOHAN GHOSE. **A. I. R. 1930 P. C. 193.**

———*Under S.* 170, *a person not denying landlord's title nor the arrears due to him cannot object to attachment under C. P. Code, O.* 21, *R.* 58.

A person preferred a claim under O. 21, R. 58, C .P. Code to the property attached in execution of rent decree by landlord, but did not deny that the decree-holder was landlord of the holding that was attached. It was not also expressly controverted by him that there were actually arrears due on the holding for the years in suit.

Held, that in view of S. 170, a claimant cannot take the advantages of O. 21, R. 58, C. P. Code: *Bannerji, J.*, in 28 Cal. 382 (F.B.), Foll. : A.I.R, 1926 Pat. 210; A. I. R. 1926 Pat. 213; 4 C. W. N. 732, Ref.

Held, further that the onus to show that arrears were due on the holding is shifted from the decree-holder to the claimant, by the very fact of the decree. 28 Cal. 382, (F.B.), Foll. (*Fazl Ali, J.*) DWARKA SINGH *v.* NEMA SINGH. **10 P. L. T. 118 = 117 I. C. 203 = A. I. R. 1929 Pat. 195.**

———*C. P. Code, O.* 21, *R.* 58—*Rule does not apply to rent decrees by virtue of Bengal Tenancy Act, S.* 170.

The provisions of S. 170 are clearly imperative and they lay down that the provisions of the C.P. Code, as to claim cases, *viz.*, O. 21, R. 58, shall not apply to a tenure or holding attached in execution of a decree for arrears of rent thereof. A.I.R. 1926 Patna 210, Rel. on. (*Sen, J.*) RAMESHWAR SINGH *v.* PURAN CHANDERA. **3 Pat. L. R. 341 = 95 I. C. 303 = 7 P. L. T. 717 = A. I. R. 1926 Pat. 213.**

———*C. P. Code, O.* 21, *R.* 58—*Rule does not apply to rent decrees by virtue of Bengal Tenancy Act, S.* 170.

By virtue of S. 170. O. 21, R. 58 does not apply to an execution of a rent decree. A landlord is not bound to go beyond his own record to enforce his claim for arrears of rent and any person not recorded as a tenant must seek his remedy elsewhere and cannot be permitted to stand in the way of the landlord selling the holding for the realisation of the decree obtained against his recorded tenant. (*Jwala Prasad, A. C. J. and Macpherson, J.*) RAMESHWAR SINGH *v.* MT. RAJO CHOWDHRAIN. **3 Pat. L. R. 339 = 95 I. C. 293 = 7 P. L. T. 625 = A. I. R. 1926 Pat. 210.**

S. 171—Interpretation.

———*"Payment into Court"—Direct payment to plaintiff under Court's orders is such payment.*

Where the defendant asked permission to deposit the money in Court and the Court instead of granting that permission allowed the defendant to pay directly to the plaintiffs-decree-holders.

Held, this is tantamount to payment into Court as required by Art. 171. (*Coutts and Das, JJ.*) MOSEFIR LAL DAS *v.* GANESH JHA. **71 I. C. 473 = 1922 P. H. C. C. 347 = 4 P. L. T. 134. = A. I. R. 1922 Pat. 656.**

S. 171—Scope.

——*Decree against Darputnidar obtained by Putnidar —Order under S.* 171 (3) *obtained by Seputnidar— Darputnidar's interest already sold under mortgage decree—Purchaser is bound by order under S.* 171 (3).

A decree was obtained by a Putnidar against a Darputnidar. The Seputnidar deposited the money and obtained an order under S. 171 (3). But before that, the Darputnidar's interest had been purchased by plaintiff under a mortgage decree. Plaintiff sued the Seputnidar for arrears of rent.

Held, that the defendant was entitled to a deduction of the amount deposited by him with interest. The execution proceedings are a continuation of the suit and when an order under S. 171 is made, the result is to satisfy the decree in the suit, in other words, to complete the relief granted by the decree to the plaintiff. (*Mookerjee and Buckland, JJ.*) JNANENDRA NATH SINGHA *v.* MT. BHUBANESHWARI DEBI.

33 C. L. J. 494 = 63 I. C. 1004 = A. I. R. 1921 Cal. 350.

S. 173 (3)—Appeal.

——*Sale set aside—Appeal by auction-purchaser is not competent.*

From an order setting aside the sale under S. 173, B. T. Act no appeal lies at the instance of the auction-purchaser 3 C. W. N. 184 ; 3 C. W. N. 14 (*notes*) ; 13 C W.N. 100 (*notes*); and 19 C.L.J. 81 Foll. (*Mukerji and Roy, JJ.*) TAMIRUNNESSA BIBI *v.* MT. KACHIMAN BEWA. **32 C.W. N. 98 = 106 I. C. 561 = A. I. R. 1928 Cal. 202.**

——*C. P. Code, O.* 21, *R.* 90—*Application for setting aside sale under R.* 90 *and also on the ground under S.* 173, *B. T. Act—Sale set aside under both provisions —Order setting aside sale is not appealable.*

Where an application for setting aside a sale is made on two grounds, first on the ground under the provisions of S. 173, Ben. Ten. Act, and also under O. 21, R. 90, C. P. Code, and the sale is set aside under the provisions of both the order setting aside the sale is conclusive and an appeal against the order so far as it purports to be under R. 90, O, 21, is infructuous and an appeal against the order under R. 90. O.21, should not be entertained because the appellate Court cannot give any relief to the appellant although the order under O. 21. R. 90 might be erroneous. (*Chakravarti, J.*) DURGA CHARAN SARKAR *v.* BISINUPADA SANA. **104 I.C. 825 = 46 C.L.J. 172 = A.I.R. 1927 Cal. 833.**

——*Order under S.* 173 *setting aside sale—No appeal lies.*

No appeal lies against an order setting aside a sale under S. 173, B.T.Act. 3 C. W. N. 184 and 19 C. L. J. 81 Foll. (*Suhrawardy and Cuming, JJ.*) SURENDRA NATH *v.* LAKSHAN CHANDRA. **87 I.C. 744 = A.I. R. 1926 Cal. 213.**

——*Appeal lies against order under S.* 173 *where case falls under C. P. Code, S.* 47—*Auction purchaser cannot appeal— C. P. Code, S.* 47.

Where the question is one which is covered by S. 47, C. P. Code an appeal is allowable from an order passed under S. 173, B. T. Act, though no provision for appeal is made in the Act itself. The right to appeal therefore from an order passed under S. 173, B. T. Act, depends upon the questions raised and upon the party appealing. 19 C 683 and 24 C. 707, Dist. 13 C. L. J. 257, Ref. 19 C. L. J. 81, Foll, (*Suhrawardy and Duval, JJ.*) AZAM KHAN *v.* UMEDALI MORAL.

85 I. C. 750 = A. I. R. 1925 Cal. 1223.

——*O.* 21, *R.* 90—*Sale set aside under both sections—Appealability of order under latter section will not confer right of appeal against order under power.*

Where the sale to the auction-purchaser of a holding for arrears of rent was set aside on two distinct and several grounds under S.173, B.T. Act and O. 21, R. 90, C. P. Code and the order under the latter was appealable while under the former Act it was not.

Held the sale was set aside on two distinct grounds and the fact that an appeal lay so far as one ground was concerned would not confer a right of appeal in respect of the other. *Hara Bandhu Adhicari* v. *Harish Chunder Dey*, 3 C. W. N. 184 Foll. (*Richardson and Ghose, JJ.*) AMAR PRASAD DEB *v.* GAGAN CHANDRA HALDAR. **77 I. C. 522 = A. I. R. 1922 Cal. 180.**

S. 173—Limitation.

——*Limitation Act, Art.* 166—*Governs application under S.* 173, *B. T. Act.*

Article 166 of the Limitation Act governs an application under S. 173 of the B. T. Act, because the application is cognizable under S. 47 of the C. P. Code. Article 166 is quite general in its terms and all applications for setting aside an execution sale come under its scope. (*Pearson and Graham, JJ.*) HARIPADA HALDAR *v.* BARADAPROSAD ROY CHOUDHURY.

82 I. C. 322 = 51 Cal. 1014 = A.I.R. 1925 Cal. 351.

S. 173 (3)—Revision.

——*C. P. Code, S.* 115—*Order setting aside sale of a holding under S.* 173 (3) *of B. T. Act—No prejudice caused—Order is not revisable.*

Court has got discretion to decide whether the sale of a holding is voidable or not under S. 173 (3) of the B. T. Act and its decision is not revisable unless serious prejudice has been caused. (*Suhrawardy and Duval, JJ.*) BROJENDRA NATH MUKERJEE *v.* JADUNATH PALTA. **83 I. C. 708 = A. I. R. 1925 Cal. 293.**

S. 173 (3)—Scope.

——*Co-sharer purchaser of non-transferable holding cannot deposit rent decree amount under C. P. Code, O.* 21 *R.* 89.

A purchaser under a money decree of a non-transferable holding cannot invoke the provisions of S.170 (3) in his aid and has therefore no *locus standi* to pay the money of the rent decree of his own co-sharers though he himself was a fractional landlord. (*Bucknill, J.*) BISHUN DAYAL SINGH *v.* JAYADISH NARAYAN SINGH.

80 I.C. 823 = 2 P. L. R. (Civ.) 12 = A.I.R. 1924 Pat. 513.

——*Sale in execution of decree to judgment-debtor is voidable.*

A sale in execution of a decree to the judgment-debtor himself is voidable under sub-Cl. (2) of S. 173, and remains valid until duly set aside. (*Mullick and Bucknill, JJ.*) MD. AMIRUL HASAN *v.* MD. GEWAD HUSSAIN. **74 I. C. 769 = 5 P.L.T. 13 = A.I.R. 1924 Pat. 318.**

S. 174—Appeal.

——*C. P. Code, S.* 47.

An order under S. 174, B.T. Act does not fall within S. 47, C. P. Code. 3 C. W. N. 344 Foll. 11 C. L. J. 202 Dist (*B. B. Ghose and S. K. Ghose, JJ.*) ABDUL GAFUR *v.* KALIDHAN MONDAL. **50 C. L. J. 532 = 34 C. W. N. 250 = A. I. R. 1930 Cal. 302.**

——No appeal lies against an order setting aside a sale under S. 174. (*B. B. Ghose and S. K. Ghose, JJ.*) ABDUL GAFUR *v.* KALIDHAN MONDAL.

50 C. L. J. 532 = 34 C. W. N. 250 = A. I. R. 1930 Cal. 302.

——An order under S. 174 is not appealable. (*Cuming and B. B. Ghose, JJ.*) HEMANT KUMARI DEBI *v.* RAJENDRA KISHORE NATH. **97 I. C. 306 = A. I. R. 1926 Cal. 1236 (c) (1237).**

——*Sale set aside—No appeal lies at the instance of auction-purchaser.*

An order setting aside a sale under the provisions of S. 174 is not appealable at the instance of the auction-purchaser. Where however an appeal preferred against such an order is entertained by the appellate Court and the order is set aside, the High Court will interfere in revision if the order of the appellate Court is wrong on merits. (*Ross, J.*) ASHRAFI DHIMAR *v.* MUHAMMAD. **7 P. L. T. 11 = 88 I. C. 989 = A. I. R. 1926 Pat. 55.**

——*Question between judgment-debtor and the auction-purchaser—No appeal lies.*

On a question under S. 174 between the judgment-debtor and the auction-purchaser no appeal lies. (*Mullick and Ross, JJ.*) RAGHUNANDAN PANDEY *v.* GARJU MANDAL. **91 I C. 217 = 4 Pat 718 = 6 P. L. T. 795 = 1925 P. H. C. C. 183 = A. I. R. 1925 Pat. 525.**

——*Order refusing to set aside sale is not appealable.*

An order dismissing an application for setting aside an execution sale under rent decree by an unregistered purchaser of the holding for want of prosecution under S. 174 of the B.T. Act is not appealable. (*Mookerjee, J.*) DEBRANI DEBYA *v.* KUMAR SARAT KUMAR ROY. **86 I. C 264 = 39 C. L. J. 522 = A.I.R. 1924 Cal. 791.**

S. 174—Applicability.

——*Satisfaction of decree out of Court between parties —Application by judgment-debtor still comes under S.* 174.

Where instead of actually depositing the money in Court for the satisfaction of the decree the decree was satisfied by an arrangement come to between the parties the application by judgment-debtor which otherwise comes under S. 174 still falls under S. 174 (*Cuming and B. B. Ghose, JJ.*) HEMANT KUMARI DEBI *v.* RAJENDRA KISHORE NATH. **97 I. C. 306 = A. I. R. 1926 Cal. 1236.**

——*Suits in Orissa under old law in Revenue Court —S.* 174 *applies after the B. T. Act was extended to Orissa.*

After the B. T. Act was extended to Orissa, S. 174 of that Act applies to suits instituted in the Revenue Court under the old law. 16 C. W. N. 311 Appr. (*Lord Dunedin.*) LAKSHMIDAR MAHANTI *v.* RATNAKAR MAHAPATRA. **48 Cal. 811 = 48 I. A. 123 = 38 C. L.J. 229 = 25 C. W. N. 1009 = 30 M. L. T. (P. C.) 32 = 14 M. L. W. 358 = 1921 M.W. N. 399 = 2 P. L. T. 453 = 61 I. C. 1 = 75 I.C. 278 = A. I. R. 1921 P.C. 34 = 40 M. L.J. 546 (P. C.).**

S. 174—Deposit.

——*Short deposit made due to mistake of Court official—Deficiency paid on discovery of mistake—Judgment-debtor has complied with provision of S.* 174.

When a judgment-debtor deposits money, if by some mistake a short deposit is made and that deposit is accepted by the Court official as the correct amount and when the mistake is discovered the judgment-debtor pays the full amount, the judgment-debtor has complied with the provisions of S. 174, provided the judgment-debtor establishes that he was prejudiced by the act of the Court and the mistake was attributable to that act. The only thing that can be done in such a case is that at most he should be made liable to pay interest for a few days that the mistake was not discovered and the money was not paid. 26 Cal. 449 (F.B.), Foll. (*B. B. Ghose and S. K. Ghose, JJ*) ABDUL GAFUR *v.* KALIDHAN MONDAL. **50 C. L. J. 532 = 34 C. W. N. 250 = A. I. R. 1930 Cal. 302.**

——*Deposit made fully but in slightly erroneous manner—Sale need not be set aside.*

A deposit under S. 174 need not be made by two separate *chalans*, one in favour of the decree-holder and the other in favour of the auction purchaser. Where, therefore, the total amount of the deposit made by the judgment-debtor was correct, the mere fact that deposit was made on two *chalans* as above and that the amount deposited on the *chalan* in favour of the decree-holder was slightly in excess and the amount deposited on the *chalan* in favour of the auction purchaser slightly less, then the respective amounts due does not affect the maintainability of the application to set aside the sale. (*Ross, J.*) ASHRAFI DHIMAR *v.* MUHAMMAD. **7 P. L. T. 11 = 88 I. C. 989 = A. I. R. 1926 Pat. 55.**

Ss. 174 and 170—Notice.

——*Application to set aside sale—No notice is necessary.*

The provisions of O. 21, R. 92, requiring notice to be served do not apply to proceedings brought by the judgment-debtor to set aside a sale under S. 174 of the B. T. Act. (*Dawson Miller, C.J. and Ross, J.*) PAHLAD SINGH *v.* SAJIWAN RAI. **61 I.C. 126 = 6 P. L J. 16 = 2 P. L. T. 66 = A. I. R. 1921 Pat. 54.**

S. 174 (3)—Scope.

——*Sale under—Tenant's holding is sold and not his interest—Judgment-debtor having no interest in holding sold is no ground for setting aside sale under C. P. Code, O.* 21, *R.* 91—*C. P. Code, O.* 21, *R.* 91.

The words in S. 174 (3) are words which in their ordinary meaning raise only the question of fact, viz. : was the sale held under the chapter or was it not? They do not mean a sale in all respects rightfully held under the chapter. Therefore an auction-purchaser cannot apply under O. 21, R. 91, to have the sale set aside on the ground that the judgment-debtor had no saleable interest. In the case of a sale which purports to be held under Chapter 14, Bengal Tenancy Act, what is put up for sale and what the purchaser purports to bid for is the holding itself and not the tenant's right and title. Even if the decree is a true rent decree, he may take nothing by his purchase and yet cannot set aside the sale; 28 Cal. 382, Ref. If the decree is not a true rent decree, third parties are not bound by the sale but the judgment-debtor is presumably bound by it, since he has allowed orders for this form of sale to be made against him. Accordingly, if he has any interest in the holding it will pass to the auction-purchaser. But it is another matter altogether to say that if he has no interest the purchaser can set aside the sale. (*Rankin, J.*) SHASHADHAR *v.* BISHUN NARAIN. **43 C. L. J. 279 = 94 I. C. 292 = A. I. R. 1926 Cal. 738.**

——*Judgment-debtor's holding sold in execution to third party —Payment of* 5 *per cent. made within thirty days—Decree-holder joining with judgment-debtor in applying to set the sale aside—S.* 174 *was held to be not sufficiently complied with.*

Where in execution of a decree of rent the tenant's holding was sold and was purchased by a third party, but within thirty days of the sale the deposit of 5 per cent. of the purchase money for payment as compensation to the auction purchaser was made in Court and the deposit was accompanied by a petition stating that the amount recoverable under the decree had been paid to the decree-holder who himself joined in this petition.

Held: that the provisions of S. 174 were not sufficiently complied with. (*Mullick and Ross, JJ.*) RAGHUNANDAN PANDEY *v.* GARJU MANDAL. **91 I. C. 217 = 4 Pat. 718 = 6 P. L. T. 795 = 1925 P. H. C. C. 183 = A. I. R. 1925 Pat. 525.**

——*Judgment-debtor is not bound to pay cost of copy of decree and of separate vakalatnama for execution—Being misled by a Court clerk as to amount is no excuse to judgment-debtor—Judgment-debtor can claim relief if his mistake has been caused by Court's neglect.*

A judgment-debtor failing to deposit full amount cannot claim relief on the ground that he has been misled by a clerk of the Court as to the amount to be paid. He can do so if the mistake is not as to one of the component parts of the costs but in reckoning up the costs and if he has had nothing to go upon except the account given by the execution clerk, the executing Court itself not having stated what the amount of costs were. (16 C. W. N. 736, Foll.; 1 P.L.T. 450, Dist.) If the judgment-debtor has been prejudiced by the neglect of the Court to let him know that the amount he had deposited was insufficient, he can claim relief. It is the duty of the Court to announce the amount of the costs. 26 Cal. 449 Foll.) (*Adami, J.*) MIR DILDAR ALI *v.* KUSUM KUMARI. **71 I. C. 925 = 4 P. L. T. 642 = A. I. R 1924 Pat. 256.**

S. 174—Separate Suit.

——*Suit to set aside order under, is not maintainable.*

A suit does not lie to set aside an order passed under S. 174 of the B. T. Act. 18 C. 481 followed. (*Walmsley and Greaves, JJ.*) BRINDABUN BEHARI ROY *v.* BHUPAL BHUSAN ADHIKARI. **62 I. C. 743 (Cal.).**

——*Suit does not lie to set aside sale.*

A suit is not maintainable to set aside a sale under the provisions of S. 174 of the B. T. Act. 18 Cal. 481, Foll. (*Dawson Miller, C. J. and Ross, J.*) PAHLAD SINGH *v.* SAJIWAN RAI. **61 I.C. 126 = 6 P.L.J. 16 = 2 P. L. T. 66 = A. I. R. 1921 Pat. 54.**

S. 178—Applicability.

——*Section does not apply to a compromise concerning the very existence of occupancy right.*

Where the question in dispute in a suit was clearly whether an occupancy right existed or whether it did not and there was undoubtedly a *bona fide* dispute between the parties as to the existence of such a right and if by a compromise the parties agreed that such a right did not exist and that agreement is enforced by a decree, then it is no longer open to either of the parties to question the findings or validity of that decree and to plead the non-extinction of occupancy right by having recourse to Section 178. (*Dawson Miller, C. J. and Kulwant Sahay, J.*) C. G. MACDONALD *v.* TEKNARAIN RAI. **75 I. C. 997 = A. I. R. 1925 Pat. 113.**

——*Agreement not to claim a share of compensation if holding was acquired by Government—S. 178, Cl. (a) does not apply.*

An agreement that an occupancy raiyat will not in the event of acquisition by the Crown, claim a share of the compensation money, is a covenant not affecting the title or status of the raiyat and is therefore not affected by Cl. (*a*) of S. 178 of the B. T. Act. It is therefore legal and enforceable. (*Mookerjee and Buckland, JJ.*) ASUTOSH CHANDRA MITRA *v.* HARIPADA GANGULI. **62 I. C. 793 = 35 C. L J. 133 = A. I. R. 1922 Cal. 187.**

——*Tenancy created by compromise decree—S. 178 applies.*

Where a compromise decree creates a tenancy for certain number of years at a certain annual rent, the tenant cannot be ejected otherwise than in accordance with the Act notwithstanding anything contained in the compromise and embodied in the decree. (*Mookerjee and Panton, JJ.*) GOPAL KRISHNA *v.* HARI NATH. **34 C. L. J. 157 = 66 I. C. 766 = A. I. R. 1921 Cal. 565.**

Ss. 178 (3) (b) and 23—Scope.

——*Cutting trees is using land within S. 23—Occupancy raiyat stipulating not to cut trees—Stipulation is not binding—Tenant covenanting not to appropriate trees is bound by the covenant irrespective of any custom.*

One of the uses of the land under S. 23 is to cut down trees. If an occupancy raiyat covenants that he will not be entitled to cut down trees, where there is no custom to the contrary, that contract will not take away his right to cut down trees. It is otherwise with regard to the right of appropriating trees. If any tenant has covenanted not to appropriate any trees, he would be bound by that covenant even if there be a custom that the tenants on the locality are entitled to appropriate trees. (*B. B. Ghose and Cammiade, JJ.*) LAKHI NATH BERA *v.* NABADWIP CHANDRA NANDI. **100 I. C. 7 = 31 C. W. N. 192 = A. I R. 1927 Cal. 268.**

——*Proprietor creating putni lease with condition that putnidar should recover any lands that the proprietor required—Proprietor leasing out lands on the same condition—S. 178 (1) (a) and (c) is not infringed.*

The proprietor of the land created a putni lease and it was provided that if the proprietor required certain of the lands leased out these would be reconveyed or assigned to him by the putnidar and the lands therefore in the hands of the putnidar were subject to this obligation. The putnidar leased out the lands with the same condition about reconveyance as in the putni lease.

Held, that it cannot be said that the covenant entered into by the lessee and the putnidar was any infringement of the provisions of S. 178 (1) (*a*) and (*c*) and the proprietor was entitled to claim back the lands he wanted. (*Greves and Mukerji, JJ.*) JAGESHCHANDRA *v.* ASABAKHATUN. **44 C. L. J. 220 = 98 I. C. 46 = A. I. R. 1927 Cal. 41.**

——In the Bengal Tenancy Act, where a raiyat is defined as a person who takes land for the purposes of cultivation, the only distinction between orchard land and land generally described as agricultural is to be found in the proviso to sub-S. (3), S. 178, which makes special provision for contracts for the temporary cultivation of orchard lands. (*James and Chatterji, JJ.*) SALOO JOLAHA *v.* SAMPAT KUMAR. **A. I. R. 1930 Pat. 529 (a) at 530.**

——*Stipulation entitling landlord to assessment of rent at prevailing rate—Lease entered into before the Act and not falling under Sub-S (1)—Stipulation is valid.*

Where according to the terms in a lease entered into before the passing of the Act, the landlord is entitled to assessment of rent according to the prevailing rate and the contract does not fail under any of the classes of contract mentioned in S. 178 (1), stipulation must be given effect to. (*Cuming and B. B. Ghose, JJ.*) JITENDRANATH ROY *v.* BANKU BEHARI SAHA. **96 I. C. 565 = A. I. R. 1926 Cal. 1177.**

——*Stipulation by a tenant to pay higher rate than recoverable under the Act is not illegal.*

Per *Cuming, J.* There is nothing illegal in a stipulation to pay rent at a rate higher than that recoverable under the Act. Such a stipulation does not fall within the provisions of S. 178. Neither is such contract void. The mere fact that it is not enforceable in law does not prevent it from being a condition of a contract the failure to comply with which would justify the other party in not carrying out his share of the contract. The covenant to pay the rent at a higher rate than is recoverable under the Act may not be enforceable but it may still be a condition precedent to renewal. (*Greaves and Cuming, JJ.*) ASHRAF ALI *v.* ARMANKHAN.

90 I. C. 893 = A. I. R. 1926 Cal. 162.

———*Object of the section is to prevent contracting out of the statute by the tenant—Agreement frustrating the object is void.*

S. 178 was enacted in order to safeguard the interests of raiyats. The scope of that section is to prevent certain contracts between landlord and tenant, the effect of which may be to place the raiyat out of the protection afforded to him by the B. T. Act. It therefore enacts that the rights conferred by the B. T. Act upon the raiyat cannot be destroyed by means of any agreement. Where the effect of the agreement is to prevent the defendant who has been found to be a settled raiyat of the village acquiring the right of occupancy in the land in suit under S. 21 of the B. T. Act, the agreement is void. The view that because at the time when a certain agreement was entered into there was no right in the defendant, the agreement could not in any sense contravene the provisions of S. 178, B.T. Act, is not correct. (*Suhrawardy and Duval, JJ.*) KASEM SHEIK *v.* TARAKESWAR DUTTA.

85 I. C. 793 = A. I. R. 1925 Cal. 1065.

———The landlord and the tenant cannot contract themselves out of the provisions of S. 49, B. T. Act (*Mookerjee and Suhrawardy, JJ.*) GANESH CHANDRA PAL *v.* CHANDRA MOHAN DATTA. **84 I. C. 730 = 28 C. W. N. 984 = A. I. R. 1925 Cal. 199.**

———*No raiyati interest can be created by contract, but registered lease after occupying Zerait is not illegal.*

S. 178 only bars a contract against the accrual of occupancy right. S. 178 is not contravened by the execution of registered lease after occupation of the Zerait lands for some time. (*Jwala Prasad, A. C. J and Kulwant Sahay, J.*) RAMJI RAM *v.* BANSI RAUT.

84 I. C. 305 = 4 Pat. 89 = 6 P. L. T. 240 = 1924 P. H. C. C. 337 = A. I. R. 1925 Pat. 241.

———*Tenants having status of raiyats at fixed rent in* 1890—*Acceptance of tenancy on new terms is not invalid.*

Assuming that the tenants had the status of raiyats at a fixed rate of rent in 1890 it was still open to them to accept a tenancy on new terms. And S. 178 would not affect the validity of such new contract. (*Mookerjee and Cuming, JJ.*) SARAT CHANDRA DE DAS *v.* TARAPRASANNA BHATTACHARYA. **70 I. C. 437 = 36 C. L. J. 333 = A. I. R. 1923 Cal. 141.**

S. 179—Abwab.

———*Tenancy before Act—Tenant entitled to exclude abwab—S.* 179 *cannot make* abwab *payable.*

If a lease was created before the Act came into force, the provisions of S. 179 do not apply to it; and if at the time when the Tenancy Act came into force the tenant was entitled to exclude the *abwab* in calculating his rent, the landlord cannot apply S. 179 to make the *abwab* payable. 10 C. W. N. 527, Rel. on. (*Das and James, JJ.*) GOPAL SARAN *v.* MAHESHWARI PRASAD.

10 P. L. T. 329 = 8 Pat. 655 = 119 I. C. 65 = A. I. R. 1929 Pat. 307.

S. 179—Scope.

———*Permanent* Mokarrari *Tenant and landlord can contract as they like—The particular lease was held to create permanent* Mokarrari *tenure.*

Where the effect of an agreement and Kabuliyat executed simultaneously was that the plaintiff let out certain land to the defendant as a *kaimi jama* (Permanent Tenancy) which was heritable, and where there were covenants in the *kabuliyat* restraining the tenant from excavating a pond or tank and cutting trees, and the tenant agreed to pay additional rent for any additional area that may be found by measurement in his possession but was not to be entitled to claim reduction of rent for diminution in area, and the tenant also undertook to pay in future any sum that might be assessed by the original maliks of the land or by the Government.

Held, that the effect of the documents was to create a permanent *mokarrari* tenancy and that the lease was therefore governed by S. 179 of the Bengal Tenancy Act.

Held, further that it was open to the parties to enter into a contract on any terms agreed upon by them. A.I.R. 1923 Cal. 505; Foll. (*Suhrawardy and Duval, JJ.*) KASEN SHEIKH *v.* TARAKESWAR DUTTA.

85 I. C. 793 = A. I. R. 1925 Cal. 1065.

———*Permanent* Mocurrari *tenure—Interest is payable on rent.*

Where the word "*Mocurrari*" has not been used in the document and there is no express provision in the document that the rent shall not be enhanced, but there is some indication in the document to show that the parties did not intend that there should be an enhancement of rent, and the *Kabuliyat* provides that, if there was an increase in the land on measurement, the tenant would have to pay rent separately for the excess area at the rate stipulated in the *Kabuliyat*.

Held, that the rent was a fixed one because it could not have been intended that the tenant would pay for the excess area at the rate stipulated in the *Kabuliyat* and also pay at an enhanced rate for the original area mentioned in the *Kabuliyat*. The tenure is permanent *Mocurrari* and interest is payable on rent as agreed. (*Chatterjee and Henderson, JJ.*) CHANDI CHARAN LAW *v.* AZIZERNESSA. **80 I. C. 315 = A. I. R. 1922 Cal. 18.**

S. 180—Interpretation.

———*'Chur' is land formed by fluvial action.*

The word "chur" must be understood in its ordinary sense of land formed by fluvial action, that is to say, it is a word referring to the character of the soil and not to site of the deposit. (*Walmsley and M. N. Mukerji, JJ.*) CHANDRA KUMAR AICH *v.* JIBAN KRISHNA NATH MOHAJAN. **80 I.C 702 = 29 C. W. N. 290 = A. I. R. 1925 Cal. 249.**

S. 180-A and 180-B—Effect of.

———*Addition of S.* 180 (*a*) *and* (*b*) *under Amendment Act does not interfere with arrangement or custom previously existing.*

Addition of S. 180 (*a*) and (*b*) under the Amendment Act (X of 1923) does not interfere with any previous arrangement or custom that might have regulated the rights as between the landlords and tenants. (*Mitter, J.*) NAFAR CHANDRA *v.* JATINDRA NATH.

118 I. C. 881 = A. I. R 1929 Cal. 206.

Ss. 180-A and 180 B—Fair rent.

———*Liability arises to pay a fair and equitable rent for lands held in utbandi system by a tenant after he has acquired a right of occupancy therein under S.* 180.

There is nothing in S. 180-A or 180 B which takes away the rights which are conferred by S. 180 upon an utbandi raiyat who has acquired a right of occupancy and, even if resort is not made to the provisions of Ss. 180-A and 180-B for the purpose of fixing a uniform

annual money rent in respect of utbandi lands, the general liability of an occupancy raiyat to pay a fair and equitable rent for the lands that he holds will accrue to a person who was in the position of an utbandi raiyat and has acquired a right of occupancy under the provisions of S. 180. (*Rankin, C. J. and Mukherji, J.*) NAFAR CHANDRA PAL *v.* JATINDRA NATH DAS.
50 C.L.J. 294=34 C. W. N. 127=
A. I. R 1929 Cal. 614.

S. 181—Scope.

——*S.* 181 *does not affect rights acquired under Act* (*X of* 1859), *S.* 6.

The provisions of S. 181 relate to the prevention of the acquisition of occupancy rights during the continuation of the Act itself and they do not affect the rights acquired as under the provisions of S. 6 of Act X of 1859: 27 C.L.J. 556 and 31 Cal. 1021, Foll. (*Greaves and Panton, JJ.*) KHETRA MOHAN *v.* LAKHI KANTA
44 C. L. J. 271=98 I. C. 862=
A. I R. 1927 Cal. 46.

S. 181—Service tenure.

——The term "service tenure" really signifies "service tenancy" and does not imply in S. 181 a tenure in contradistinction to a holding. (*Kulwant Sahay and Macpherson, JJ.*) MITA DUSADH *v.* ANU MAHTO.
7 Pat 566=109 I. C. 287=
A. I. R. 1928 Pat. 603.

——*Occupancy right cannot be acquired in service tenancies of a police character, except under usage or custom.*

Except where there is any usage or custom, no statutory right of occupancy can accrue in a service tenure of a police character and any incumbrance on the tenancy including a right of remaining on it is not binding on any succeeding incumbent who has not ratified it or acquiesced in it for the statutory period of limitation: 1 C.L.J. 138; 33 Cal. 630; and 28 C.L.J. 249; Foll. (*Kulwant Sahay and Macpherson, JJ.*) MITA DUSADH *v.* ANU MAHTO.
7 Pat. 566=109 I. C. 287=
A I. R. 1928 Pat. 603

S. 182—Applicability.

——*Homestead not held as part of holding—Section applies.*

In order to decide the question whether the section applies to a particular set of facts, it should be seen first whether the tenant is a raiyat; and secondly whether he holds his homestead otherwise than as a part of his holding as a raiyat. Where the defendant was a raiyat and the homestead was not held as a part of his holding as a raiyat.

Held, that the section applies to the case of the defendant. (*Cuming and B.B. Ghose, JJ.*) SUKH LAL SHAH *v.* PROSANNA KUMAR SHAHA.
44 C. L. J. 302=96 I. C. 541=
A. I. R. 1926 Cal. 1199.

——*Provisions apply to lands held by raiyat.*

The provisions of the Act are applicable to lands held by a raiyat. If the provisions of S. 182 did already apply to the homestead then these provisions of S. 182 need not be invoked for the purpose of application of S. 182. (*Cuming and Chakravarti, JJ.*) RAHIMUDDI MEAJI *v.* AMINA BIBI. **43 C. L. J. 132=**
94 I. C. 920= A. I. R. 1926 Cal. 662.

——*Land let for shop and used as such—T. P. Act applies and not B.T. Act—T. P. Act, S.* 106.

Where the land was admittedly taken by defendants not for the purpose of a homestead from which the defendants were to cultivate their jotes but was taken for the purpose of a shop and continued to be used for that purpose:

Held, that S. 182 of the B. T. Act had no application but the case was governed by the provisions of the Transfer of Property Act: 43 Cal. 195 Dist. (*Cuming and Chakravarti, JJ.*) PURUSOTTAM *v.* PANCHANAN.
90 I. C. 805=42 C. L. J. 197=
A. I. R. 1926 Cal. 373.

——*Person not a raiyat but residing in village homestead—S.* 182 *does not apply but Contract Act applies—Incidents of permanent tenancy pointed out.*

Where it was found that defendant who was not a raiyat in the village was in possession of a house in the homestead land of proprietors for about ten years and he had been living in the village, though not in the same house for about 25 to 30 years, and that for a period of ten or eleven years the rent had not varied, that there was no finding that the landlord had treated the tenancy or defendants as heritable, nor that the site was let out to defendants for building house thereon:

Held, that S. 182, Bengal Tenancy Act, did not apply; that the rights of the parties must be determined by Contract Act, and that defendants had not acquired permanent rights of tenancy in the land: 16 C. W. N. 567, Dist. (*Kulwant Sahay, J.*) MADHUSUDAN SINGH *v.* JEOLAL. **100 I. C. 584=**
A. I. R. 1926 Patna 606.

——*Tenant holding only a portion—That portion not a part of any other holding of his—B.T. Act does not apply.*

Where the defendants had a tenancy right in a part of land which was however not a part of any other holding of theirs as a raiyat.

Held, that such tenancy is not governed by the provision of the Bengal Tenancy Act. The provisions of S. 182 are not applicable to such a case. (*Kulwant Sahay, J.*) HARIHAR PRASAD *v.* GHARBHARAN KOERI. **88 I.C. 553=3 Pat. L. R. 174=**
A. I. R. 1925 Pat. 612.

——*Part of disputed land used for keeping agricultural cattle—Provisions of the Act apply.*

The defendant had been found to be a settled *raiyat* of the village where the disputed land was situated. He had also been found to have lands under cultivation. He got these lands cultivated by hired labourers whom he supplied with his own cattle and ploughs. He had also his granary and *khamar* within his own homestead.

Held, that in these circumstances, as the defendant is a *raiyat*, the disputed land is governed either by S. 182 or by the other provisions of the Bengal Tenancy Act. A land is manifestly used for agricultural purposes; if the *raiyat* keeps on the land cattle used for the purpose of agriculture. 20 C. W. N. 550 Ref. (*Mookerjee and Chotzner, JJ.*) GIRIS CHANDRA BHATTACHARYA *v.* BHABATARAN SHAKARI. **74 I. C. 552=**
37 C. L. J. 524=A. I. R. 1923 Cal. 667.

Ss. 182 and 49—Ejectment.

——*Under-raiyats holding homestead along with other lands as part of their tenancy—Landlord can eject from whole of demised premises by service of notice.*

Where the under-raiyats hold the homestead along with other lands as part of their under-raiyati tenancy and, if the landlord is entitled to eject them from the lands held by them by service of notice, there is nothing under the law which prevents them from ejecting the tenants from the whole of the demised premises —S. 182 does not apply to such a case. A. I. R. 1926 Cal. 662, Rel. on. (*B. B. Ghose and Graham, JJ.*) CHANDRA MOHAN *v.* MAHERJAN BANU.
44 C. L. J. 311=99 I. C. 216=
A. I. R. 1927 Cal. 191.

———A settled raiyat holding homestead as an under-raiyat, could not be ejected from the latter, because the incidents thereof will be governed by the provisions of the Bengal Tenancy Act applicable to raiyats. Incidents of raiyati and under-raiyati holdings considered. (*Jwala Prasad, J.*) SHAIKH KHAIRULLAH *v.* BEHARI HAJJAM. **123 I. C. 628.**

S. 182—Ejectment.

———*Culturable lands forming part of homestead—Defendant is protected from eviction.*

Where the culturable lands of a raiyat are included in the homestead, and are part thereof, the defendant is protected from eviction by the provisions of S. 182. (*Greaves and Cuming, JJ.*) ASWAP ALI BEPARI *v.* DULA MIA. **92 I. C. 843 = A. I. R. 1926 Cal. 580.**

S. 182—Homestead.

———*Provisions regarding homestead of under-raiyat are same as raiyat.*

According to the provisions of S. 182, the provisions regulating the homestead, of an under-raiyat would be the provisions which regulate the raiyati as to ejectment from the homestead. 21 C. L. J. 475, Foll. (*Greaves and B. B. Ghose, JJ.*) NITAI PADA DAS *v.* SARAT KUMARI DASI. **91 I. C. 183 = A. I. R. 1927 Cal. 96.**

———*Contractual rights have been abrogated.*

The rights derived from a contract have been abrogated with regard to the homestead land of a raiyat without any exception as to pre-existing contracts under the provisions of the B. T. Act, although under Ss. 178 and 179 certain rights have been excluded from the operation of this Act. (*Cuming and B. B. Ghose, JJ.*) SUKH LAL SHAH *v.* PROSANNA KUMAR SHAHA. **44 C. L. J. 302 = 96 I. C. 541 = A. I. R. 1926 Cal. 1199.**

S. 184—Limitation.

———*Limitation not pleaded—Suit instituted after period prescribed in Schedule—Court must dismiss suit.*

Under S. 184 the Court is bound to dismiss the suit if it be a suit specified in Sch. 3 and is not instituted within the time prescribed in that schedule, although limitation has not been pleaded. (*Courtney Terrell, C. J., Kulwant Sahay and James, JJ.*) GAJADHAR RAI *v.* RAM CHARAN. **11 P. L. T. 197 = A. I. R. 1930 Pat. 256 (F. B.).**

———*Section prescribes period of limitation but does not exclude application of S. 14, Limitation Act.*

S. 184 provides the period of limitation, and S. 14 Lim. Act, provides, not the period of limitation but means to compute that period which is an entirely different thing. Therefore S. 184 does not exclude the application of S. 14, Lim. Act. (*Cuming and Mallik, JJ.*) SATI PROSAD *v.* GOVINDA CHANDRA. **33 C. W. N. 227 = 56 Cal. 805 = A. I. R. 1929 Cal. 325.**

———*Landlord and tenant.*

Where the dispossession is not made by landlord the special rule of limitation has no application. (*Panton and Chakravarti, JJ.*) CHARUBALA DASI *v.* NIHAR KUMARI DASI. **105 I. C. 600 = 46 C. L. J. 247 = A. I. R. 1927 Cal 831.**

———*Limitation Act, S. 3—Court is assumed to have decided plea of limitation unless contrary is shown.*

Though it is the Court's duty to decide the point of limitation, even if it was not taken by the parties it must be assumed, until the contrary is shown, that the Court decided the question of limitation and if unfortunately it decided wrongly that does not affect its jurisdiction to make the order. (*Mullick and Scroope, JJ.*) LACHUMAN PANDEY *v* DUKHI SAHU. **101 I. C. 694 = 8 P L. T. 494 = A. I. R. 1927 Pat. 261.**

———*Limitation Act, S. 3—Question as to raised in written statement but not pressed in trial Court—Defendant can press it in appeal.*

Where the question as to limitation was raised in the written statement and an issue was framed, but it was not pressed in the trial Court.

Held, that the defendants respondents were entitled to press that point on appeal. S. 3 of the Limitation Act, and S. 184 of the Bengal Tenancy Act, are clear upon the point. (*Kulwant Sahay, J.*) PALLAKDHARI THAKUR *v.* BANKEY THAKUR. **89 I. C. 340 = 3 Pat. L. R. Civ. 132 = 7 P. L. T. 253 = A. I. R. 1925 Pat. 549.**

S. 184, Sch. III. Art. 6—Limitation.

———*Limitation Act, 1908, S. 19—Limitation for execution of rent decree fixed by Art. 6 of the Tenancy Act can be extended by acknowledgment under S. 19 of the Limitation Act*

Three years after a rent decree an application for execution was made but there were some acknowledgments of liability within three years of the date of the decree.

Held, S. 19 of the Limitation Act applies to such cases, and an acknowledgment of liability under that section made by a judgment-debtor, in respect of the decree-holder's right to execute a rent decree, gives the decree-holder a fresh starting point for counting the period of limitation prescribed by Art. 6 of Sch. III of the Bengal Tenancy Act. (*Chatterjee and Newbould, JJ.*) PARESH NATH PAL CHOUDHURY *v.* ISMAIL SARDAR. **64 I. C. 993 = 26 C W N. 486 = 34 C. L. J. 195 = A. I. R. 1922 Cal. 187 (2).**

S. 185 and Sch. III, Art. 3.

Quaere—Whether on the determination of the period of limitation prescribed by Art. 3, the right of title in the property will also be extinguished? 14 C. L. J. 292, Ref. (*Courtney-Terrell, C. J. and Chatterji, J.*) BANKEY BEHARY LAL *v.* GUDO CHOUDHURY. **11 P. L. T. 447 = A. I. R. 1930 Pat. 476.**

S. 185 (2)—Interpretation.

———*Limitation Act (as amended by Act X of 1922), S. 29 (2) (b)—S. 29 (2) (b) is not conflicting with Bengal Tenancy Act, S. 185 (2).*

There is no conflict between S. 29 (2) (*b*), Limitation Act, and S. 185 (2). Ben. Ten. Act. There is an express reference in S. 29 (2) to S. 3 which itself refers to Ss. 4 to 25 and consequently Ss. 4, 9 to 18 and 22 are specifically made applicable so far as not expressly excluded; and the only reasonable way in which Cl. (*b*) can be read is that the remaining provisions of the Act if they are to apply are to be specially applied. They will not be applied by force of the Limitation Act itself. 3 C.L.J. 347; 10 C. L. J. 517; 9 C. W. N. 1025; A. I. R. 1922 Cal. 187, Ref. 45 Cal. 934; 46 Cal. 199 and 22 C.W.N. 817, Dist. (*Das and Ross, JJ.*) HASON IMAM *v.* BRAHMDEO SINGH. **A. I. R 1930 Pat. 301.**

S. 188—Applicability.

———*Rent claimed on separate holdings under separate agreement—Section does not apply.*

The right to sue for assessment is a right given by the general law and S. 188 will not apply in a case where rent is claimed for lands as forming separate holdings under separate agreements. (*Das and Adami, JJ.*) PARTAP MAHTON *v.* MT. WAZIR-UN-NISSA. **88 I. C. 687 = 4 Pat. 604 = 6 P. L. T. 367 = 1925 P. H. C. C. 125 = A. I. R. 1925 Pat. 559.**

———S. 188 has no application to a suit in ejectment of a trespasser because that section applies only to cases of landlord. (*Sanderson, C. J and Ghose, J.*) REAJUDDIN PATWARI *v.* SYED ABDUL JOBBAR. **69 I. C. 504 = A. I. R. 1924 Cal. 445.**

——*Operation against tenants—Section does not apply to tenants.*

S. 188 applies to joint landlords and applies only where the landlord is required or authorized by the Bengal Tenancy Act to do something. But it has no direct application to the tenants; and it certainly does not touch the question whether the tenants being authorized to claim a right as against the landlords and acting together can put forward that claim in a suit by a co-sharer landlord. The principle that underlies S. 188 is that where two or more persons have a joint right, they cannot assert that right except jointly. 21 C. L. J. 315 Dist. (*Coutts and Das, JJ.*) MAHARAJA KESHO PRASAD SINGH *v.* RAMDEVI SINGH.

74 I. C. 454 = 2 Pat. 183 = 4 P. L. T. 689 = A. I. R. 1923 Pat. 397.

S. 188—Interpretation.

——*Some co-sharers subsequently repudiating the application—S. 188 is not contravened.*

Where the application under S.105, B.T. Act appears to have been filed by all co-sharer landlords, the subsequent conduct of some of the joint landlords in repudiating the authority of the others to sign the application on their behalf and retiring from the case will not attract the provisions of S. 188 so as to defeat the application if the other joint landlords choose to proceed with it. (*Dawson Miller, C. J. and Kulwant Sahay, J.*) HAZARI LAL SAHU *v.* AMBICA GIR. **79 I. C. 5 = 3 Pat 67 = 1923 P. H. C. C. 273 = 2 Pat. L. R 169 = 5 Pat. L. T. 591 = A. I. R. 1924 Pat. 104.**

——*Separate agreement to pay rent at different rate, to one co-sharer landlord creates separate tenancy—Accretions to tenure—Same rent must be paid as for parent tenure—Separate interests do not merge necessarily unless they are co-extensive—T. P. Act, S. 111.*

The mere fact that the tenant agrees to pay rent separately to one of the co-sharer landlords would not constitute a separate tenancy. Where however, there is a separate *kabuliyat* in favour of one of the co-sharer landlords it can be held that there is a separate tenancy. The question whether a separate tenancy is created, depends upon the circumstances of the case. The accreted land must be considered as an increment to the tenure and governed by the same terms and conditions, and, in the absence of any special circumstances, the rate of rent payable for the accreted land would be the same as that for the land of the parent tenure. Under S. 188 of the B. T. Act some of the joint landlords of a *jote* right cannot bring a suit for enhancement of rent in respect of it. Apart from statute, a tenure does not necessarily merge in the proprietary right upon the union of the two interests. There can be no merger of separate interests in a person with respect to a land unless they are co-extensive. (*Chatterjee and Newbould, JJ.*) MANMODHA PAUL CHOUDHURY *v.* MOHENDRA NATH BOSE. **65 I. C. 469 = A. I. R. 1922 Cal. 284.**

Ss. 188 and 105—Procedure.

——*Application under S. 105—Sole plaintiff karta of the family and the sole recorded proprieter—His sons need not be joined as plaintiffs.*

Where the sole plaintiff is not only the karta but he is the sole recorded landlord of the touzi, he can apply alone under S. 105 without joining his sons as plaintiffs. 16 C. L. J. 427 and 25 C. W. N. 38, Dist; A. I. R. 1924 Pat. 104, Foll (*Ross and Kulwant Sahay, JJ.*) KULDIP SARAN SINGH *v.* RAGHUNANDAN SINGH. **7 P. L. T. 540 = 1926 P. H. C. C. 256 = 97 I. C. 436 = A. I. R. 1926 Pat. 461.**

S. 188—Right to sue.

——*Suddar Malguzar is agent of the proprietors and can file suits on their behalf.*

The word " agent " in S. 188 includes agents. Bengal Tenancy Act or any other law makes no special provision to restrict the meaning of the word "agent" to a single individual. Therefore the Saddar Malguzars who constitute the entire body of landlords must be deemed to be agents of the proprietors whose rights remain in abeyance, so long as the property is managed by the Malguzars under the regulation. The Malguzars therefore can file suits as agents. (*Suhrawardy and Duval, JJ.*) RAMIJUDDIN *v.* RAI RADHA KANTA AICH BAHADUR. **80 I. C. 987 = A. I. R. 1925 Cal. 245.**

S. 188—Suit for enhancement.

——*Co-sharer landlord can sue for enhancement under kabuliyat.*

Co-owner landlords of the property within whose share the land in suit lies, are entitled to bring a suit for enhancement of rent based on a kabuliyat executed by the tenants in their favour, 7 C. W. N. 670, Foll.; 18 C. W. N. 942 and 35 Cal. 417, Rel. on. (*Page and Mallik, JJ.*) RASHMONI BEWA *v.* DHIRENDRA NATH ROY. **33 C. W. N. 311 = 120 I. C. 145 = A. I. R. 1929 Cal. 397.**

——*All co-sharers must be joined as plaintiffs.*

In a suit for enhancement of rent all co-sharers landlords must be joined as plaintiffs or at least it must be shown that those co-sharer landlords who have been joined as defendants had refused to join as plaintiffs. 38 C. 270. (P. C.) Foll. (*Suhrawardy and Page, JJ.*) SRISH CHANDRA PAL CHOWDHURY *v.* DEBENDRA NATH SINGHA ROY. **A. I. R. 1925 Cal. 522 = 79 I. C. 369.**

S. 188—Suit for rent.

——*Plaintiffs at the date of suit completely representing the estate—Persons subsequently becoming interested in the estate joined as plaintiffs—Suit as originally filed does not become defective.*

Where at the time of the institution of a suit for rent the estate is properly represented by the plaintiffs, but subsequently, due to certain events, other persons become interested in the estate, and it becomes necessary to join them as plaintiffs, the suit as orginally framed does not become defective. (*Greaves and Cuming, JJ.*) AMIYA PAL CHOWDHURY *v.* SHARBA MANGALA DEBI. **A. I. R. 1926 Cal. 737 = 91 I. C. 657.**

——*Suit for rent by co-sharer landlords—Receiver appointed to collect rents in respect of one co-sharer's share not made party—Suit will not fail.*

Where two co-sharers filed a suit under S. 105 of the Act against tenants, without joining with themselves the Receiver who had been appointed in another suit to collect the rents and profits in respect of the share belonging to one co-sharer *held* that the non-joinder will not affect the maintainability of the suit.

If the Receiver had been appointed in a suit in which the title of the co-sharer was in dispute, it would be absolutely necessary to implead him also. The Receiver in such a case would be entitled to be represented in a suit the result of which may be to affect the property *in custodia legis.* But where as in this case there is no dispute as to the title of the co-sharers and the Receiver was appointed merely to collect the rents he is not a necessary party to a suit for rent under S. 105 of the Act. (*Adami and Bucknill, JJ.*) CUMAR MADHAV SURENDRA SAHI *v.* AWADH MISSIR. **3 P. L. T. 316 = 65 I. C. 349 = A. I. R. 1923 Pat. 86.**

——*Co-sharers—One can sue for whole rent after making others parties.*

There is nothing in S. 188 of the act to prevent one co-sharer from bringing a suit for the whole rent after making the co-sharers, who refuse to join as plaintiffs-defendants in the suit. If a co-sharer can prove that there is a contract express or implied by which tenant is liable to pay his share of the rent separately, then he may bring a suit for that part of the rent without joining his co-sharers as defendants but the decree obtained by him is to be executed as a money and not a rent decree. On the other hand, notwithstanding such arrangement for separate collection all the co-sharers may sue jointly for the whole rent. 35 Cal. 331 P. C. Foll. (*Dawson Miller, C. J. and Mullick, J.*) RAJGIRI SINGH *v.* JADUNATH RAY. **4 Pat. L.T. 39 =**
1922 P. H. C. C. 355 = A. I. R. 1923 Pat. 41.

———*Suit for rent by manager of joint Hindu family —Section does not apply—Other members are not necessary parties.*

The provisions of S. 188 have no application to the institution of a suit for arrears of rent. The tendency of modern decisions is in favour of recognition of the representative character of the manager though, no doubt, the question must be decided in each individual case or special class of cases, subject to the operation of relevent statutory provisions, if any, such as the one embodied in section 188, B. T. Act. A suit for rent instituted by the managing members of a joint Mitakshara family cannot fail merely because the infant co-parceners have not been placed on the record as joint plaintiffs or *pro forma* defendants. (*Mookerjee and Chotzner, JJ.*) KALIPADA DAS *v.* RAJA SATI PRASAD GARGA BAHADUR. **27 C. W. N. 372 =**
72 I. C. 722 = 36 C.L.J. 234 =
A. I. R. 1922 Cal. 468.

S. 192—Applicability.

———*Contract of lease before passing of the Act—Section does not apply—Some of the lands leased resumed by Government and settled with Zamindar and higher rent fixed—Tenant is not affected and can hold the land at original rate.*

The words "lease or contract in force" in S.192 of the B.T. Act have reference to the words "lease," or "contract" in the opening lines of the section and do not affect contracts entered into before the passing of the B.T. Act. S. 192 of the Act does not, either expressly or impliedly, give a power to a revenue officer to fix a rent so as to affect contracts entered into before the passing of the Act. The tenant has right to the lands settled with Zamindar after resumption by Government, where the intention of the parties to the contract was that the lease should comprise all the lands within it and the rent was settled at a lump sum for all the lands leased out. (*Chatterjee and Pearson, JJ.*) PRAFULLA NATH TAGORE *v.* T. C. TWEEDIE, RECEIVER.
35 C. L. J. 14 = 65 I. C. 234 =
A. I. R. 1922 Cal. 248.

S. 192—Landlord and Tenant.

———*Prohibition to sub-let at a rate higher than that fixed by settlement—Contract to pay a higher rent cannot be enforced.*

Where in temporarily settled estates Government has prohibited sub-letting lands at a rate higher than that fixed by temporary settlement, contract to sub-let at a higher rent cannot be enforced. 32 Cal. 463 and 37 Cal. 449, Dist. (*Suhrawardy and Garlick, JJ.*) BANSIDHAR DOBEY *v.* BUDANGAL DAS. **49 C. L. J. 65 =**
33 C. W. N. 362 = 117 I. C. 604 =
A. I. R. 1928 Cal. 763.

S. 193—Applicability.

———*Land let for residential or other non-agricultural function coupled with fishing—S. 193 does not apply.*

If looking at a letting it is found that it was a letting for residential purposes of certain land coupled with letting of a right to fishery with single rent reserved for both the cases it would not come within the purview of S. 193. In the same way if it was open to the tenant to use the embankment for non-agricultural purposes paying a consolidated rent for the whole thing, it would not come under S. 193. But where the right created in the soil refers to the user of land and water for the purpose of fishing or if it refers to liability undertaken by the grantee to repair the embankment in the interest of fishing the case is covered by the expression "right over fisheries" to be found in S. 193 (*Rankin, C. J. and C. C. Ghose, J.*) NANI LAL MANDAL *v.* PRIYA NATH ROY. **50 C. L. J. 19 = 56 Cal. 1170 =**
A. I. R. 1929 Cal. 545.

S. 195 (e)—Applicability.

———*Rights of patnidar under Patni Regulation are not affected by the Act.*

The B. T Act does not in view of the provisions in S. 195 (*e*) affect the rights of patnidars under the Patni Regulation : 24 C.L.J. 180; 18 Cal. 360 and 14 Cal. 592 Appl. (*Suhrawardy and Duval, JJ.*) DURLAV CHANDRA *v.* JAMIRUDDIN AHAMED.
90 I. C. 405 = A. I. R. 1926 Cal. 314.

———*Tenancy Act applies where Patni law is silent —Bengal Patni Regulation, S. 11.*

S. 195 (*e*) of the B. T. Act says that the B. T. Act would not apply to enactments relating to patni tenures in so far as it relates to those tenures. Where the patni law is silent, the provisions of the general rent law would apply. The Patni Regulation does not take away the right of the zamindar to proceed in the ordinary way under the general law to recover arrears of rent; it only gives him an additional right to recover rent by a summary process of sale which is restricted to the recovery of rent for only one year : 22 C. W. N. 131 and 19 Cal. 504 Foll (*Jwala Prasad and Bucknill, JJ.*) ABDUL GAFFAR *v.* F. P. DOWNING.
8 P. L. T. 343 = 5 Pat. 415 = 98 I. C. 893 =
A. I. R. 1926 Pat. 465.

Sch. 3—Applicability.

———*Relation of landlord and tenant must exist.*

The test of the applicability of the provisions regarding limitation is whether the suit was between landlord and tenant to whom the provisions of the Act apply. (*Ross and Wort, JJ.*) ACHUTANAND SINGH *v.* GAYANCHAND MAHTON. **8 P.L.T. 673 =**
102 I. C. 768 = A. I. R. 1927 Pat. 313.

Sch. 3—Limitation.

———*Limitation for suit under S. 64-A is governed by Rules under Bengal Tenancy Act, Sch. 3.*

The same rules of limitation are to be applied to a case under S. 64-A as would apply in rent suits to recover rent of a transferable tenure or holding, that is, limitation will be governed by rules under Sch. 3, B. T. Act : 24 Cal. 27, Dist. (*Greaves and Panton, JJ.*) SATYA NIRANJAN *v.* EBRAHIM MANDAL.
95 I. C. 843 = A. I. R. 1926 Cal. 1069.

Sch. 3—Presumption.

———*Real purchaser in possession for two years—Effect of.*

Where a *benami* purchaser at an execution sale is kept out of possession for a period of two years by the real purchaser, the former's title becomes extinguished under Sch. III to the B. T. Act. (*Teunon and Newbould, JJ.*) HARISH CHANDRA GUHA *v.* NRIPENDRA COOMAR CHAKRAVARTI. **59 I. C. 719 = 24 C. W. N. 1024 (Cal.).**

Sch. 3– Rent decree.

——*Rent decree does not cease to be so though made payable by instalments.*

Under the B. T. Act the court has no jurisdiction to make the decree for rent payable by instalments ; but, if such a decree is made, it is merely an error of law and does not go to affect the jurisdiction of the Court making such a decree. 11 C. W. N. 857, Foll. (*Ross and Wort, JJ.*) ACHUTANAND SINGH *v.* GAYANCHAND MAHTON. **8 P.L.T. 673 = 102 I C. 768 = A. I R. 1927 Pat. 313.**

Sch. 3, Art. 1 (a)—Interpretation.

——*Art.* 1 (*a*) *has to be read with S.* 44.

Art. 1 (*a*), Sch. 3, providing the period of limitation for a suit to eject a non-occupancy raiyat on the ground of the expiration of the term of his lease is to be read along with S. 44. (*Fazal Ali and Chatterji, JJ.*) AMBIKA PRASAD *v.* ACHAMBIT THAKUR. **9 Pat. 405 = A. I. R. 1930 Pat. 378.**

——*Lease means registered lease.*

The word "lease" as used in Art. 1 (*a*) must be taken to refer to a registered lease. (*Fazal Ali and Chatterji, JJ.*) AMBIKA PRASAD *v.* ACHAMBIT THAKUR. **9 Pat. 405 = A. I. R. 1930 Pat. 378.**

Sch. 3, Art. 1 (a) –Limitation.

——*Ejectment of tenants who are not non-occupancy raiyats—Art.* 1 *does not apply—Art.* 139, *Limitation Act, applies.*

Art. 1 (*a*) of Sch. III of the B. T. Act, 1885, does not apply to suits to eject persons, who were not in law non-occupancy *raiyats* of the land. Art. 139 of the Limitation Act applies to such suits. (*Sir John Edge.*) MAHANTH JAGANNATH DAS *v.* JANKI SINGH **35 C. L. J. 506 = 66 I. C. 337 = 3 Pat. L. T. 197 = 1922 M. W. N. 410 = 26 C. W. N. 833 = 1 Pat. 340 = 49 I. A. 81 = 31 M. L. T. 231 = A. I. R. 1922 P. C. 142 = 43 M. L.J. 55 (P. C.).**

——*Suit for ejectment for breach of condition—Compensation also claimed—Limitation Act. Art.* 32 *applies to latter claim—Limitation Act, Art.* 32.

In a suit for mandatory injunction upon the defendants, to fill up a tank which had been excavated on a portion of the land comprising the tenancy held by some of the defendant under the plaintiffs in breach of a condition in the Kabuliyat, for compensation and for ejectment of the defendants therefrom the claim for compensation is independent of and not ancillary to the claim for ejectment and can be maintained although the latter claim fails. Art. 32 of the Limitation Act applies to such claim for compensation and not Art. 1 of Sch. 3 of the B. T. Act. (*Chatterjee and Newbould, JJ.*) KRISHNA DAS *v.* MOHENDRA CHANDRA. **25 C. W. N. 930 = 62 I. C. 779 = A. I. R. 1921 Cal. 62.**

——*Non-occupancy tenant — Sub-lessee from—Suit for ejectment—Limitation.*

A sub-lease of a non-occupancy tenant is not a non-occupancy tenant but is merely a tenant of the non-occupancy tenant. He does not hold under a lease from the landlord and there is no relation of landlord and tenant. A suit, therefore, by the landlord to eject such a tenant is governed by the general law of limitation and not by Art. (1) (*a*) of Sch. III to the B. T. Act. (*Ross, J.*) JAWAHIR OJHA *v.* P. MORGAN. **62 I. C. 392 (Pat.).**

Sch. 3, Art. 2—Ejectment.

——*Landlord and tenant—Suit for ejectment—Right to claim rent is not ordinarily in suspense pending the suit.*

It is established as a general principle that the right to demand the rent which falls due during the pendency of a suit for ejectment is not in suspense during the pendency of the litigation. The cases in 12 M. I. A. 244 (P. C.) and 30 Cal. 1033 (P. C.) are exceptions to the general rule. (*Newbould and Panton, JJ.*) NAGENDRA NATH SEN *v.* SADHU RAM MANDAL. **48 Cal. 65 = 25 C. W. N. 954 = A. I. R. 1921 Cal. 525.**

Sch. 3, Art. 2 (iii) (b)—Landlord and Tenant.

——*Suit by assignee of arrears of rent—Limitation.*

A suit by an assignee of arrears of rent to recover such arrears does not fall under Art. 2 (*b*) of Sch. III of B. T. Act but under Art. 110 of the Limitation Act. (*Das and Adami, JJ.*) HAYAT MAJID *v.* HAZARI LAL. **63 I. C. 424 (Pat.).**

Sch. 3, Art. 2—Limitation.

——*Practice—New plea—Limitation plea if under special law must be raised in written statement.*

Although a plea of limitation can be raised at any stage of the suit and even for the first time in appeal, a special plea of limitation ought to be taken in the written statement. The defendant must raise question of special limitation in the written statement where the determination of that question depends upon a finding of fact, *e. g.* the fact as to when service of notice of the deposit was made on the landlord. (*Ghose, J.*). SADAKALI KHAN *v.* JANAKINATH SINGHA ROY **69 I. C. 194 = A. I. R. 1924 Cal. 463.**

Sch. 3, Art. 3—Applicability.

——*Application of Art.* 3 *is not restricted only to suits for dispossession between landlord and tenants.*

Art. 3 does not speak of dispossession by the landlord. It prescribes the period of two years within which a suit by a raiyat or an under raiyat must be brought for recovery of his holding. There is nothing in the law to show that such a suit must be by a tenant against the entire body of landlords. (*Suhrawardy and Garlick, JJ.*) MOHIN CHANDRA *v.* KANAILAL SAHA. **33 C. W. N. 1085 = A. I. R. 1930 Cal. 311.**

——*Does not apply unless* (1) *plaintiffs are raiyats and* (2) *plaintiffs have been dispossessed by defendants.*

Where the plaintiffs were neither raiyats nor they were dispossessed by the defendants,

Held, Art. 2 of Sch. III did not apply. 1917 P.L.J. 567, Dist. (*Ross and Sen, JJ.*) HARI MOHAN PRASAD CHAUDHURY *v.* MD. BASHIDUL HAQUE. **84 I. C. 130 = 1924 P. H. C. C. 268 = 5 P L. T. 616 = A. I. R. 1924 Pat. 780.**

——*Suit for recovery of possession from landlord of land settled by tenant with others is within the article.*

Suit by tenant for possession of *Nakdi jote* land, who had settled the land with others on dispossession by landlord is governed by Article 3. (*Das and Ross, JJ*). GAYANI DAS *v.* DWARKA MANDAR. **3 Pat. 540 = 1924 P. H. C. C. 269 = 6 P. L. T. 321 = 82 I.C. 79 = A. I. R. 1924 Pat. 557.**

——*Suit between two tenants—Article does not apply.*

Art. 3 gives the plaintiff two years to recover possession of land which he claims as *raiyat*, the two years to be counted from the date on which the plaintiff was dispossessed. The article in question has no application in a suit between two tenants unless the dispossession of the plaintiff-tenant can be attributed to the agency of the landlord. (*Richardson and Suhrawardy, JJ*). JANAKINATH SAHA *v.* BAICUNTA NATH CHOLLAK. **70 I. C. 602 = 27 C. W. N. 259 = 36 C. L. J. 140 = A. I. R. 1922 Cal. 176.**

———*Plaintiff not dispossessed—Art does not apply—Adverse possession against mortgagor does not affect simple mortgagee.*

The plaintiff has never in fact been dispossessed and adverse possession against the mortgagor does not affect a simple mortgagee who as such is not entitled to possession. 44 Cal. 425 followed. (*Mukerjee and Panton, JJ*). SITAL CHANDRA MAJHI *v.* PARBATI CHARAN CHAKRABARTI. **69 I. C. 841 = 35 C. L. J. 1 = A. I. R. 1922 Cal. 32.**

———*Dispossession of Tenant—Limitation.*

Art. 3 of Sch. III applies only where it is shown that the landlord was taking part in the *dispossession* which is therein referred to. The landlord or somebody acting in concert with him must have caused the dispossession, 24 Cal. 40. Rel. (*Sanderson, C. J, and Chotzner, J.*) GOBINDA CHANDRA GOPE *v.* AKHIL CHANDRA DAS. **64 I. C. 858 (Cal.).**

———*Dispossession of tenant without reference to landlord—Limitation.*

The fact that a tenant was dispossessed by a third person under the authority of the landlord is not by itself sufficient to bring the cause under Art. 3 of Sch. III of the B. T. Act, unless it is found that the landlord had a hand in the ouster. (*N. R. Chatterjee and Panton, JJ.*) ALOM SHEIKH GAZI *v.* HARINATH MITRA. **62 I. C. 763 (Cal.).**

———*Suit for recovery of a portion of an occupancy holding—Art. 3 applies.*

It cannot be held that because the dispossession was not with regard to the whole holding, but only with regard to a portion, the special rule of limitation provided for by Art. 3 does not apply. (*Coutts and Ross, JJ*). JOWHAR ALI MIAN *v.* ALARAKHU. **63 I. C. 481 = 2 P. L. T. 615 = A. I. R. 1921 Pat. 362.**

Sch. 3, Art. 3—Dispossession.

———*Art. 3 is applicable only in case of dispossession by landlord and not in mere discontinuance of possession.*

Art. 3 can be made applicable only where the dispossession has been effected by the landlord or by his agent. Dispossession implies the coming in of a person and the driving out of another from possession, while discontinuance implies going out of the person in possession and his being followed into possession by another. Where on discontinuance of possession by a tenant of a non-transferable occupancy holding some of the co-sharer landlords take khas possession of the holding, there is no dispossession by them so as to attract the operation of Art. 3, 22 C.L.J. 283 and 32 C.L.J. 9, Rel. on. (*Graham and Mitter, JJ*). RAKHAL DAS *v.* KHIRODE BANDHU. **51 C. L. J. 36 = A. I. R. 1930 Cal. 247.**

———*Raiyat out of possession of his holding for two years forfeits his right to sue and title and no subsequent occupation within 12 years can remit him to raiyati status.*

On the general principle underlying S. 28, Lim. Act. if a landlord keeps a raiyat out of possession of his holding for the period specified in Sch. 3, Art. 3, the raiyat not only forfeits his right to recover possession but his title as well and no subsequent possession by the raiyat within 12 years of his dispossession can remit him to his status as raiyat. 11 B. L. R. 237 ; 21 All. 204 and 16 C. W. N. 351, Ref. (*Mukerjee and Mallik, JJ.*) NALINI BHUSAN ROY *v.* HIRALAL ROY. **33 C. W. N. 1077 = A. I. R. 1930 Cal. 225.**

———*Dispossession must be by landlord and entry in* gair mazrua khata *is no proof of dispossession.*

In order to attract application of Sch. 3, Art. 3, the dispossession must be by the landlord and the mere fact that the land stood recorded in the *gair mazrua khata* of the landlord does not show that the tenant was dispossessed by the landlord. The entry in the record of rights neither creates nor extinguishes rights : 2 P. L. J. 124. Ref. (*Courtney Terrel, C.J. and Chatterji, J.*) BANKEY BEHARI LAL *v.* GUDO CHOUDHURY. **11 P. L. T. 447 = A. I. R. 1930 Pat. 476.**

———*Dispossession by landlord as auction-purchaser—Art. 3 does not apply.*

Art. 3, Sch. 3 does not apply if the dispossession is by the landlord as an auction-purchaser of the holding. 2 P. L. J. 567 = 41 I. C. 533, Overruled : A. I. R. 1927 Pat. 43, Approved. (Cases discussed,) (*Courtney-Terrell, C. J. Kulwant Sahay and James, JJ.*) GAJADHAR RAI *v.* RAM CHARAN. **11 P. L. T. 197 = A. I. R. 1930 Pat. 256 (F.B.).**

———Whether Art. 3, Sch. 3, is applicable to the dispossession of a raiyat in execution of a writ for delivery of possession issued by the civil Court to the auction-purchaser, who is the landlord. 2 Pat. L.J. 567 ; 2 Pat. L. W. 45 ; A I.R. 1927 Pat. 43 ; A.I.R. 1928 Pat. 218, Ref. (F.B.). (*Das, James and Rowland, JJ.*) WAJIBUNNISSA *v.* BANKE BIHARI SINGH. **11 P. L. T 61 = A. I. R. 1930 Pat. 177 (F.B.).**

———*Dispossession need not necessarily be by landlord as such.*

Dispossession contemplated in Col. 3 is not necessarily dispossession by landlord as such. If it is shown that the plaintiff raiyat is in fact a tenant of the defendants who dispossessed him in respect of the land claimed in the suit, then Art, 3 applies to the suit. The reason or excuse good, bad, indifferent, given or supposed to have been given by the landlord for dispossessing his tenant has no bearing on the enactment. 2 P. L. J. 567, Appr. *Obiter.*—The meaning of dispossession is satisfied when the defendant landlord comes in against the will of occupying tenant even by the machinery of a Court of law. (*Rankin, C. J. C. C. Ghose and Mitter, JJ.*) SATISH CHANDRA *v.* HASHEM ALI. **54 Cal. 450 = 31 C. W. N. 634 = 103 I. C. 124 (2) = A. I. R. 1927 Cal. 488.**

———*Landlord purchasing the holding at sale in execution of rent decree inoperative against the tenant—Dispossession by landlord—(Cuming, J.* contra *Page, J.)—Art. 3 does not apply.*

Per *Cuming, J.*—A special law of limitation which largely curtails the ordinary rights of the subject by reducing the period of limitation, within which he can come to enforce his rights, requires to be most strictly construed. Art. 3, Sch. 3, can only apply when the landlord dispossesses his tenant in the capacity of landlord. When the dispossession is by the landlord in his capacity of auction-purchaser, the article does not apply. A. I. R. 1924 Cal. 623. Diss. from.

Per *Page, J.*—Where the relationship of landlord and tenant exists at the time of dispossession, in what capacity the landlord dispossesses the tenant, is immaterial and Art. 3, Sch. 3 will apply. A. I. R. 1924 Cal. 623 Foll. (*Cuming and Page, JJ.*) SATISH CHANDRA *v.* HASIM ALI. **98 I. C. 140 = A. I. R. 1927 Cal. 109.**

———*Dispossession in execution of a writ by civil Court is not dispossession of landlord.*

Dispossession in execution of a writ for delivery of possession issued by a civil Court cannot be said to be a dispossession by the landlord within Art. 3. 17 C. W.

N. 817, Foll. ; 21 C. W. N 978, not Foll. (*Ross and Kulwant Sahay, JJ.*) MAHADEO RAO *v.* PARGASH RAI. **8 P. L. T. 243 = 97 I. C. 629 = A. I. R. 1927 Pat. 43.**

——*For the Article to operate, there must be actual dispossession—Constructive dispossession is not sufficient.*

For the Article to operate, there must be actual dispossession by the landlord of the tenant ; it cannot be extended to the case of constructive dispossession where the landlord has never allowed the tenant to take possession of the land. 31 C. L. J. 199 Dist. (*Greaves and Mukerji, JJ.*) RAJANI KANTA *v.* PANCHANON. **90 I. C. 793 = A. I. R. 1926 Cal. 350.**

——*Plaintiff dispossessed by purchaser from landlord—Art.* 3 *does not apply.*

Where it was found that the defendant had purchased the land and dispossessed the plaintiff as such purchaser and not as an agent of the landlord,

Held, that the plaintiff's dispossession was not by the landlord, nor was it on his behalf, and therefore, plaintiff's suit to recover possession is not barred by Art. 3. (*Cuming and Chakravarti, JJ.*) DURGA PRASAD LAHIRI *v.* RATAN MAHOMED SARKAR. **92 I. C. 897 (Cal.).**

——*Article applies to dispossession by fractional landlord but not dispossession by trespasser.*

Article 3 of Sch.3 of B.T.Act relates only to a suit brought by a raiyat or under-raiyat against his landlord and does not govern a suit by a tenant against third parties who are trespassers. 18 Cal. 317 ; 17 Cal. 926 and 28 Cal. 127, Foll. 7 C. W. N. 542 and 19 I.C. 545, Ref. The two years' rule is applicable to dispossession by a fractional landlord as well as to dispossession by the sole landlord or by the entire body of landlords. 28 C. 127, Foll. A non-transferable occupancy holding was purchased by plaintiffs. Plaintiffs then approached the landlords for recognition of the purchases made by them. All the landlords other than the defendant accepted the plaintiffs as their tenants. The defendant did not recognise the plaintiffs and dispossessed them from the entire holding. The plaintiffs instituted a suit to recover possession of the holding.

Held, that the plaintiffs were entitled to recover possession of the share of the holding which belonged to the landlords who had recognised them as their tenants, and that Article 3 of Schedule III to the Bengal Tenancy Act did not apply to the case as the defendant was not plaintiff's landlord in respect of any share of the holding. (*Mookerjee and Panton, JJ.*) ABDUL KADER *v.* LAL MAHOMED. **39 C. L.J. 581 = 84 I. C. 25 = A. I. R. 1921 Cal. 775.**

——*Landlord granting settlement to his peons—Latter effecting dispossession with help of landlord's servants and at his instigation—Art.* 3 *applies.*

Where a person has been dispossessed by another who subsequently takes settlement from, or is recognized as tenant by, the landlord, and the landlord has had no hand in the ouster, such dispossession does not amount to dispossession by the landlord, and in such a case the plaintiff will not be barred by Art. 3 of Sch. 3, nor in a case where the landlord simply favoured the dispossession by a third party. The doctrine of constructive dispossession should not be extended. But where the landlord granted a settlement to his peons and the dispossession was effected by them with the help of landlord's *barkundazes* and at the instigation of the landlord, all of them acting in concert,

Held, that the case comes under Art. 3. (*Chatterjee and Suhrawardy, JJ.*) ARMAN PEADA *v.* MANIK SARKAR. **27 C. W. N. 86 = 62 I. C. 690 = A. I. R. 1921 Cal. 522.**

——*Occupancy raiyat dispossessed by persons inducted by landlord at latter's instigation—Suit by occupancy raiyat—Art.* 3 *applies.*

Where plaintiff, an occupancy raiyat, has been dispossessed by the tenants inducted by the landlord at his instigation, the landlord is a necessary party to suit and Art. 3 applies. (*Chatterjee and Panton, JJ.*) PEARY MOHAN *v.* ARUNODOY GHOSE. **25 C. W. N. 168 = A. I. R. 1921 Cal. 349.**

——*Delivery of possession to landlord as auction-purchaser—Subsequent dispossession by tenants of co-sharer landlords with help of landlord's naib—Art.* 3 *would apply.*

Where the dispossession was not by the landlord at the time of delivery of possession to him as auction-purchaser. but subsequent to the delivery of possession, and the dispossession was effected by the tenants who had been settled upon the land by the co-sharer landlords, and with the help of the landlord's naib, the question of the landlord being the auction-purchaser does not arise and the suit would be barred by limitation, if the Court finds that the dispossession was by the landlord or his agent. 25 C. W. N. 168 Ref. (*Chatterjee and Pearson, JJ.*) PRAFULLA CHANDRA *v.* BABURAM MANDAL. **34 C. L. J. 462 = 65 I. C. 1 = A. I. R. 1921 Cal. 289.**

——*Dispossession must be by landlord or his agent.*

The third column of Art. 3 does not specify the person by whom the dispossession had been made ; but as this provision is found in a statute which amends and consolidates enactments relating to the law of landlord and tenant, the Article can be made applicable only where the dispossession has been effected by the landlord. On first principle, it further follows that the Article also applies where the dispossession has been effected, not by the landlord personally but by an agent acting within the scope of his authority. But the principles of constructive dispossession must not be extended unduly. Merely because the landlord had settled the lands with certain persons, it cannot be said that he had authorised them to oust the persons who were in possession. 4 C. W. N. 326 ; 24 Cal. 40 ; 9 C.W.N. 54 ; 13 C.W.N. 108; 21 C.W.N. 976; 21 C.W.N. 978, Dist.; 29 Cal. 610 (F.B.). Foll. (*Mookerjee, A.C.J. and Fletcher, J.*) HARAN CHANDRA *v.* MADAN MOHAN. **25 C. W. N. 102 = 61 I. C. 899 = A. I. R. 1921 Cal. 249.**

——*Dispossession by landlord.*

Obiter.—Where the landlord purchases the holding in execution of a rent-decree it merges in the landlord's interest and when he or a lessee from him, proceeds to take possession from the original tenant, the dispossession is one by the landlord within Art. 3 (*Teunon and Abdul Majid, JJ.*) ENIDAJ ALI BISWAS *v.* ARJUN CHANDRA BISWAS. **62 I. C. 704 (Cal.).**

Sch. 3, Art. 3—Landlord and tenant.

——*Suit for possession by tenant—Defendant recognized by landlord as tenant in his own right—Art.* 3, *does not apply.*

Where in a suit by a tenant for possession of his holding it was found that the landlord had no hand in the ouster and he recognized the defendant as a tenant after he had entered into the land on his own account and had kept the plaintiff out of possession,

Held, that the suit was not barred by the two years' rule of limitation under Art. 3 of Sch. III. (*Chakravarti, J.*) SHEIKH MOHARAMDI *v.* SHEIKH ASMAT. **91 I. C. 493 = A. I. R. 1926 Cal. 751.**

——*Applies only to suit between landlord and tenant —Time runs from decision of First Court.*

Art. 3 does not apply to a suit which is not a suit between the landlord and tenant. Where that article applies, time begins to run from the decision of the First Court and not from the date of the appellate decree. (*Greaves and Ghose, JJ.*) GOPINATH *v.* BHAJA HARI DAS. **68 I. C. 472 = A.I.R. 1923 Cal. 327.**

Sch. 3, Art. 3— Limitation.

———*Property sold in execution of rent decree and formal possession given—Suit brought alleging that decree under which property was sold was money decree—Defendant pleading limitation—Plaintiff alleging that delivery was given without his knowledge—Special limitation would not apply.*

Two years after property was sold in execution of a rent decree and formal delivery was given, a suit was brought alleging that the decree under which the property was sold was not rent decree but money decree, and so the property was not liable to be sold, the defendants pleaded limitation, but the plaintiffs alleged that the landlord obtained decree secretly and the formal delivery was given without his knowledge and that he was dispossessed long after formal delivery was given in consequence of case under S. 107, Cr. P. Code.

Held, that the special law of limitation would not apply to this case. 3 I.C. 315, Ref. (*Suhrawardy and Costello, JJ.*) JOBEDA KHATUN *v.* SHEIK MONABALI. **A. I. R. 1930 Cal. 479.**

———*In case of suit for recovery of possession by a raiyat or under-raiyat dispossessed by landlord special rule of limitation of two years applies—It is not necessary that dispossession must be by landlords as such or that they should plead special limitation.*

When a raiyat or an under-raiyat sues for recovery of possession and when the dispossession is by the landlord a special rule of limitation laid down in Sch. 3, Art. 3, applies and he must come within two years. It is not necessary that the dispossession must be by the landlords as such or by the entire body of the landlords or that all the co-sharer landlords or any of them should plead special limitation. A. I. R. 1927 Cal. 488; 7 C. W. N. 542 and 31 C. L. J. 199, Ref. (*B.B. Ghose and S. K. Ghose, JJ.*) JOGENDRA NATH SEN *v.* BEHARILAL DAS. **34 C. W. N. 358 = A. I. R. 1930 Cal. 450.**

———*Special provision contained in Art. 3 overrides general principles of Limitation Act, and is not restricted to suits between landlord and tenant only.*

The idea which induced the Legislature to enact the special provision of limitation in Tenancy Act was to benefit the landlord by enabling him to give security of his right to let out the land if the old tenant does not claim to be reinstated within two years from dispossession. It being a special provision intended for the benefit of landlord, it overrides the general provisions of Limitation Act and it does not exonerate a mortgagee or other transferee of the holding from bringing the suit within two years. (*Suhrawardy and Garlick, JJ.*) MOHIM CHANDRA *v.* KANAILAL SAHA. **33 C. W. N. 1085 = A. I. R. 1930 Cal. 311.**

Sch. 3, Art. 3 and S. 185.

———*Quaere.*

Whether on the determination of the period of limitation prescribed by Art. 3, the right of title in the property will also be extinguished? 14 C.L.J. 292 Ref. (*Courtney Terrel and Chatterjee, JJ.*) BANKEY BEHARI LAL *v* GUDO CHOUDHURY. **11 P. L. T. 447 = A. I. R. 1930 Pat. 476.**

———*Widow selling her widow's estate in occupancy holding to landlord—Suit by reversioner to recover possession will not be governed by Art. 3, Sch. 3.*

A widow sold to the landlord the occupancy holding which she possessed as her widow's estate. Just six years after widow's death her reversioner brought a suit for possession of the holding.

Held, that although the landlord remained in possession after widow's death, it could not be said that there was any dispossession by the landlord so as to apply two years' rule of limitation contained in Art. 3, Sch. 3. (*Cammiade and S.K. Ghose, JJ.*) SIRISH CHANDRA *v.* BROJOBASHI PRAMANIK. **48 C. L. J. 554 = 115 I. C. 355 = A. I. R. 1929 Cal. 157.**

———*If at the time of actual taking possession, the person so taking possession occupies position of landlord the article applies—Whether he occupied that position when he purchased interest of which he dispossessed the tenant is immaterial.*

All that Art. 3 says is that the special period of limitation of two years is laid down for suits for recovery of possession by a raiyat or an under-raiyat where the dispossessor is a landlord, and that the date from which the limitation runs is the date of dispossession. If, at the time of the actual taking of possession, the person so taking possession occupied the position of landlord, the article applies. It is perfectly immaterial whether or not that person occupied that position at the time he purchased or purported to purchase the interest of which he dispossessed the tenant. (*Cammiade and S.K. Ghose, JJ.*) DUDU BHUIYA *v.* DUMAN BHUIYA. **112 I. C 618 = A. I. R. 1928 Cal. 586.**

———*Rent decree obtained by landlord—Tenants' land sold in execution—Dispossession of the tenant by the purchaser—Special rule of limitation under Sch. 3, Art. 3, B. T. Act, is not applicable.*

In order to make the special rule of limitation laid down in the Bengal Tenancy Act applicable it must be shown by clear evidence that it was the landlord who caused or took part in the dispossession of the tenant. 21 C.W.N. 373; 20 C.W.N. 872; and 4 Pat. L.J. 645, Foll. (*Allanson and Sen, JJ.*) SHYAM SUNDER *v.* GOBARDHAN KANTI. **7 Pat. 129 = 109 I. C. 519 = 9 P. L. T. 735 = A. I. R. 1928 Pat. 218.**

———*Plea of special limitation may be raised by persons claiming under the landlords and so it can be inquired into in a suit in which landlords are not impleaded.*

The plea of special limitation under Art. 3, Sch. III, B. T. Act, is available not only to the landlord but also to persons claiming under the landlord and therefore the question relating to special limitation may be inquired into even if the landlords were not parties to the suit, or if the landlords being made parties to the suit, did not appear to contest the suit but were satisfied with the order passed by the Court below and did not challenge it on appeal. (24 Cal. 40, Ref.) (*Suhrawardy and Chotzner, JJ.*) ABDUL MAZID MIR *v.* GOSHAI DAS BECHAR. **79 I. C. 569 = A. I. R. 1925 Cal. 461.**

———*Special period of limitation—Relationship of landlord and tenant—Proof.*

Where there is a relationship of landlord and tenant between the parties and the landlord after obtaining a decree for rent attaches the crops and dispossesses the tenant, a suit by the latter for the recovery of possession is governed by Art. 3 of Sch. III of the B. T. Act.

Semble.—The special limitation does not apply where the landlord dispossesses the tenant as auction-purchaser. 24 C.W.N. 38; 25 C.W.N. 102, Rel. on. (*N. R. Chatterjee and Panton, JJ.*) BAIKUNTHA NATH GHATAK *v.* SHEIKH FAZIL. **64 I. C. 192 (Cal.).**

Sch. 3. Art. 3—"Onus."

The language of Art. 3, Sch. 3, is the same as Art 142, Lim. Act and therefore the onus is undoubtedly upon the plaintiffs to prove that dispossession took place within three years. It is not sufficient merely to prove title coupled with enjoyment at some earlier period. 7 C. L. R. 364; A. I. R. 1916 P. C. 21. Dist.; 8 M. I. A. 199 (P. C.), Rel. on.; A. I. R. 1921 Pat. 237 (F. B.), Ref. (*Wort, J.*) BADRINATH UPADHYA *v.* BAIJANATH MANDAL. **123 I. C. 612 = A. I. R. 1930 Pat. 134.**

Sch. 3, Art. 3—Scope.

——Art. 3 applies to a case of dispossession by a person who at the time of dispossession occupied the position of a landlord. Sch. III, Art. 3 will apply, even where the possession is obtained by the landlord by a fraudulent and collusive decree against a person who was in fact not the tenant and purchased the property and dispossessed the real tenant. (*Suhrawardy and Page, JJ.*) KEDAR NATH BISWAS *v.* KAMINI SUNDER DASYA. **78 I. C. 514 = 28 C. W. N. 482 = A. I. R. 1924 Cal. 623.**

Sch. 3, Art. 6—Applicability.

——*Suit for declaration and possesssion—Plaintiff himself denying existence of tenancy—Art.* 6 *is not applicable.*

The nature of a suit depends on the plaint and not on the decree passed in the suit. Where in a suit for khas possession of property on declaration of title thereto the plaintiff himself denies the existence of tenancy in his plaint, Art. 6 is not applicable to the case. (*Newbould and Graham, JJ.*) MAHENDRA NATH *v.* ASHUTOSH PRADHAN. **91 I. C. 478 = A. I. R. 1926 Cal. 545.**

——*Essentials—No relationship of landlord and tenant—Art.* 6 *does not apply.*

The essential conditions which must be satisfied in order to attract the operation of Article 6, Schedule 3 of the B. T. Act are these: First, the decree must be obtained in a suit between the landlord and tenant and secondly, the provisions of the Bengal Tenancy Act must be applicable to them. The plaintiffs were the fractional landlords; but at the time when they instituted the suit there was no relationship of landlord and tenant as between the plaintiffs and the defendants. They attempted to execute a money-decree against the defendant.

Held, Art. 6, Sch. 3 of the B. T. Act did not apply. (*Coutts and Das, JJ.*) RAGHUNATH SAHAY *v.* CHOWA MAHTON. **3 Pat. L. T. 525 = 67 I. C. 882 = A. I. R. 1922 Pat. 602.**

——*Suit for rent and declaration—Decree is not taken out of the scope of Art.* 6.

An application for execution of rent decree is not taken out of the scope of Art. 6, Sch. III, only because the landlord had in the suit asked for an unnecessary declaration regarding share to certain *Bhaoli* rent in the suit. (*Coutts and Das, JJ.*) DARGAHI MIAN *v.* MT. MANGO KUER. **67 I. C. 869 = 3 P. L. T. 563 = 1 Pat. 779 = 1923 P. H. C. C. 5 = A. I. R. 1922 Pat. 566.**

Amendment Act (I of 1907)—Scope.

——*Act is not declaratory.*

Mallik, J.—Act I of 1907 is not an Act of a declaratory character. (*Cuming and Mallik, JJ.*) SHIBA KALI KUMAR *v.* CHUNI LAL. **31 C. W. N. 1007 = 103 I.C. 674 = A. I. R. 1927 Cal. 748.**

——The B. T. Act (Amending) Act (I of 1907) has no retrospective effect. (*Suhrawardy and Cuming, JJ.*) ABDUL RAKIB KHAN *v.* JALAL AHMED. **65 I.C. 584 (Cal.).**

BENGAL TOWZI MANUAL RULES

Rr. 102 and 115—Invalidity.

——*Bengal Land Revenue Sales Act,* (*XI of* 1859) *S.* 8—*Non-compliance with rules makes sale for arrears invalid.*

The question whether an estate is in arrears is not a mere matter of form but of substance—a legal position to be inferred from all the circumstances rather than a fact to be determined by a mere reference to the entries in the register as relating to the particular estate.

If the clerks of the Collectorate did not make a reasonable effort after kist day had expired to find out what the remittance was meant for, they failed in their duty.

There is no duty cast upon a remitter to be on the look-out for the return of the acknowledgment or for any endorsement that may happen to be made therein, unless he is warned to do so, and non-compliance of the rules providing for a notice to the proprietor of the fact that the revenue was not credited, by the revenue authorities, would make the sale contrary to the provisions of the Act and must be annulled. (*Cuming and Mukerji, JJ.*) DASHARATHI GHOSH *v.* KHONDKAR ABDUL HANNAN. **55 Cal. 624 = 105 I. C. 15 (2) = 47 C. L. J. 12 = 32 C. W. N. 359 = A. I. R. 1928 Cal. 68.**

BENGAL VILLAGE CHAUKIDARI ACT (VI OF 1870.)

S. 51—Rent.

——*Chaukidari Chakran Lands, resumed by Government and transferred to Zamindars under S.* 51—*Plaintiff claiming possession under a prior pottah from Zamindar—Plaintiff is entitled to possession only on payment of additional rent.*

In a suit to recover possession from the Zamindar of certain villages in Putni settlement of Chaukidari Chakran lands which had been resumed by the Government under the provisions of Bengal Act VI of 1870, and were transferred to the Zemindar subject to the payment of rent assessed on the lands in accordance with S. 51 of the Act, the plaintiffs (respondents) alleged that by a pattah of a previous date, the appellant Zamindar granted certain villages in putni settlement at a certain annual rent to the plaintiffs. The defendant Zamindar contended that the plaintiffs were not entitled to get possession thereof without paying some rent in addition to the annual rent fixed in the pattah.

Held, that the plaintiffs were entitled to obtain Khas or actual possession of the lands in suit, but that they could not do so without paying an additional rent to the Zamindar. 44 Cal. 841 (P.C.) and 46 Cal. 173 (P. C.), Expl. and Cons. A. I. R. 1925 Cal. 651, Appr. (*Lord Carson.*) BHUPENDRA NARAYAN *v.* NARPAT SINGH. **52 I. A. 355 = 6 L. R. P. C. 206 = 53 Cal. 6 = 30 C. W. N. 553 = 24 M. L. W. 221 = 42 C. L. J. 227 = 1925 M. W. N. 724 = 90 I. C. 607 = A. I. R. 1925 P. C. 226 (227) = 49 M. L. J. 722 (P. C.).**

——Putni Kabuliat *including* Chaukidari Chakran *lands—Putnidar must pay some rent to Zamindar.*

The *Chaukidari Chakran* lands on resumption or transfer to the Zamindar under the provisions of Act VI B.C. of 1870 are included in the *putni*, where in a *putni* contract there is no reservation in favour of these lands. The *putnidar* is, however, entitled to hold them subject to the payment of some rent to the Zamindar in addition to the amount payable to the *Chaukidari* fund after deducting the collection charges. (*Chatterjee and Newbould, JJ.*) CHAND MOHATAP BAHADUR *v.* KRISHNA CHANDRA MUKHERJEE. **A. I. R. 1922 Cal. 281.**

BENGAL VILLAGE CHAUKIDARI ACT (1870).

———*Transfer of* Chaukidari Chakran *lands to zamindar by Government*—Putnidar *cannot hold rent free.*

S. 51 does not entitle a *putnidar* upon resumption and transfer of *chaukidari chakran* lands by Government to the Zamindar to hold the lands rent-free. Its scope is to sustain the contract between the Zamindar and the *putnidar* under which the *putnidar* is entitled to possession or the lands as part of his tenure. (*Suhrawardy and Cuming, JJ.*) PRYAMBADA DEBI *v.* MANOHAR MUKHOPADHYA. **29 C. W. N. 328 = 86 I.C. 781 = 52 Cal. 576 = A. I R. 1925 Cal. 651.**

S. 61—"Final and Conclusive."

———"*Final and conclusive*" *refer to revenue as well as civil Court.*

When there is compliance with the provisions of S. 61 the propriety of the order cannot be questioned in the civil Court. The words "final and conclusive" must be taken in their ordinary and literal sense. The finality is not restricted to revenue Courts alone. 11 Cal. 632 and 2 C. L. J. 302, Foll.; 2 C. L. J. 306. not Foll. (*Walmsley and Mukerji, JJ.*) SHIB CHANDRA BANERJEE *v.* UMESH NATH ROY. **95 I. C. 536 (Cal).**

BENGAL VILLAGE SELF-GOVERNMENT ACT (V OF 1919.)

Ss. 8 and 101 (2) (e)—Election.

———*Meetings regarding election are different under rules framed under both sections.*

The meeting for the election under S. 8 is different from an ordinary meeting of the Union Board, the regulations of which meetings are prescribed under rules made under S. 101 (2) (*e*). (*Suhrawardy and Duval, JJ.*) NASARUDDIN *v.* ANANTH NATH CHOWDHURY. **52 Cal. 943 = 90 I. C. 700 = A. I. R. 1926 Cal. 279.**

S. 51—Jurisdiction.

———Civil Courts are not debarred from trying a suit to contest the validity of an election by reason of S. 51. (*Suhrawardy and Duval, JJ*) NASARUDDIN MANDAL *v.* ANANTH NATH CHOWDHURY. **52 Cal. 943 = 90 I. C. 700 = A. I. R. 1926 Cal. 279.**

Ss. 63 and 64—Proof.

———*Where S. 64 applies, plaintiff has also to show that his case does not fall within ambit of S. 63.*

In cases to which S. 64 applies, even if the plaintiffs have complied with the provisions of S. 64, it is incumbent upon them to satisfy the Court that their cause of action is not within the ambit of S. 63, and if they fail to do so, the suit or legal proceeding would fail. (*Page and Mallik, JJ.*) RAMCHANDRA *v.* SADAY CHANDRA. **55 Cal. 1351 = 32 C. W. N. 1138 = 115 I. C. 47 = A. I. R. 1929 Cal. 190.**

S. 64—Applicability.

———*S. 64 does not apply to all suits but only to those where compensation is claimed for some wrongful act of Union Board done in exercise or honestly supposed exercise of statutory powers.*

S. 64 is applicable only in those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Union Board or its members in the exercise or the honestly supposed exercise of their statutory powers and the notice in the section is meant to give the defendant the opportunity of making some pecuniary amends for the wrong without incurring the cost of litigation. A Union Board in a village decided to repair certain road and carried out the work of repair. Plaintiffs sued for declaration that land on which the road was, belonged to them, but no notice under S. 64 was given.

Held, that the suit was not barred for want of notice. 6 Cal. 8 (F. B.) and A. I. R. 1921 Cal. 91, Foll. (*Page and Mallik, JJ.*) RAMCHANDRA *v.* SADAY CHANDRA. **55 Cal. 1351 = 32 C. W. N. 1138 = 115 I. C. 47 = A. I. R. 1929 Cal. 190.**

S. 101 (2) (e)—Rules framed under—Applicability.

———The rules made under S. 101 (2) (*e*) have no application at all to the meetings held under the presidentship of the Government officer for the election of a new President after a General Election. (*Suhrawardy and Duval, JJ.*) NASARUDDIN *v.* ANANTH NATH CHOWDHURY. **52 Cal. 943 = 90 I. C. 700 = A. I. R. 1926 Cal. 279.**

BEQUEST.

See (1) HINDU LAW—RELIGIOUS ENDOWMENT AND WILLS.
(2) MAHOMEDAN LAW—WAKF AND WILLS.
(3) WILLS.

BERAR.

Interpretation.

———*Is not British India but not also a foreign territory.*

A Berar Court can hardly be said to be a foreign Court but it is not a Court contemplated by S. 14 of the Limitation Act, namely a Court in British India. (*Batten, J. C. and Prideaux, A. J. C.*) RAJANNA *v.* NARAYAN. **76 I. C. 305 = A. I. R. 1923 Nag. 321.**

BERAR ALIENATED VILLAGES TENANCY LAW (1921).

Interpretation.

———*The law is not repugnant to Waste Land Rules of 1865. R. 3.*

Whether the rights of the Izardars are governed by the sanad or by the Waste Land Rules, the power of determining the relations between them and their tenants, was reserved by the Government, and the making of the Berar Alienated Villages Tenancy Law which determines such relations cannot be said to be repugnant to either of them. (*Hallifax and Kotval, A. J. Cs.*) DATTATREYA *v.* SECRETARY OF STATE. **103 I. C. 309 = A. I. R. 1927 Nag. 304.**

Not ultra vires.

———*Act is not ultra vires or invalid.*

There cannot be any doubt that the provisions of the tenancy law which was passed do in fact interfere with the rights which the izardars and inamdars acquired over their own property under sanads granted to them by the Crown by giving large powers to the Courts and administrative officers to protect the actual occupiers of the land, to give them security of tenure and to fix the sums which they have to pay, and with the relations that previously existed between the principal proprietors and the actual occupiers of the land, but inasmuch as the Tenancy Act is a piece of legislation of a competent legislature, in the case the Governor-General in Council, it is effective to alter the rights of persons within the territory, and it is not invalid merely on that ground: A. I. R. 1927 Nag. 304, Confirmed. (*Lord Atkin.*) DATTATRAYA KRISHNA RAO *v.* SECY. OF STATE. **A. I. R. 1930 P. C. 267.**

BERAR ALIENATED VILLAGES TENANCY LAW (1921).

Perpetual tenant.

——*Perpetual tenant though subsequent to* 1895 *cannot be ejected.*

There is nothing to prevent an izardar from giving out fields to tenants permanently and therefore although a perpetual tenant may not actually come within the definition of a permanent tenant, he cannot be ejected from his field. (*Prideaux, A. J. C.*) WAIKUNTHARAO *v.* TANABA. **113 I. C. 253 = A. I. R. 1929 Nag. 88.**

S. 40—Anti-alienation tenancy.

——*Anti-alienation tenancy can be transferred—Such tenant cannot be ejected by landlord.*

Rights of anti-alienation tenant are transferable. Notwithstanding any contract to the contrary an anti-alienation tenant should not be ejected from his holding by his landlord as such for any cause. (*Prideaux, A. J. C.*) SHEIKH IMAM *v.* RAMCHANDRA. **71 I. C. 25 = A. I. R. 1923 Nag. 69 (70).**

S. 47—Continuous possession.

——*Vendee (by unregistered deed) in possession since* 1900—*His vendor in possession from* 1894—*Both possessions can be tacked.*

A person in continuous possession of a field since his purchase by an unregistered deed from a prior tenant who was cultivating from 1894 can tack his vendor's possession to that of his own. Such person is a tenant who, by himself or through his predecessor-in-title, has been cultivating since before 1895. (*Findlay, J. C.*) UDARAM BALWANT *v.* WALLOO. **104 I. C. 353 = A. I. R. 1927 Nag. 342.**

Ss. 47, 74 and 75—Dispossession.

——*Person tenant from prior to January,* 1895—*Notice by landlord to quit in March,* 1921—*Tenant forcibly dispossessed continues to be tenant under S.* 47—*Possession if voluntarily ceded, he cannot be reinstated.*

Where a tenant, who was holding the fields continuously from a date prior to 1st January, 1895 up to the spring of 1921, when he was given by the landlord notice to quit, is forcibly dispossessed, he is still a tenant holding land within the terms of S. 47. If, however, he has voluntarily ceded possession after receiving the notice he has no such right and his action under S. 47 must be dismissed. (*Viscount Dunedin.*) SADASHEO *v.* VITHOBA. **57 I. A. 45 = 13 N. L. J. 29 = 31 M. L. W. 568 = 121 I. C. 231 = 26 N. L. R. 108 = A. I. R. 1930 P. C 28 (29) = 58 M. L. J. 257 (P.C.)**

S. 47—Interpretation.

——*Words " has held land " imply " has held as tenant but not necessarily occupying."*

The words "has held land" in S. 47 imply " has held as a tenant but is not necessarily occupying or cultivating." The requirement thereof is not actual continuous possession as a matter of fact, but continuously holding as a tenant. (*Findlay, O. J. C.*) VITHOBA *v.* SADASHEO. **92 I. C. 58 = A. I. R. 1926 Nag. 253.**

S. 47—Stridhan.

——*Son in possession in the presence of daughter is trespasser.*

Sons, in the presence of a daughter, cannot be legal heirs of their mother to her stridhan property and their possession of that property must be considered as that of a trespasser. (*Macnair, A. J. C.*) GOVIND *v.* CHINTAMAN. **105 I. C. 840 = A. I. R. 1928 Nag. 55.**

BERAR INAM RULES.

R. 3—Grant.

——*The only way in which it can be decided whether a given grant falls into Cl.* 1 *or Cl.* 3 *is by a reference to the orders of the Government of India sanctioning the grant.*

BERAR INAM RULES, R. 5.

There is no real difference between a personal jagir and a personal or subsistence grant and the only way in which it can be decided whether a given grant falls into Cl. 1 or Cl. 3 is by a reference to the orders of the Government of India sanctioning the grant. If it is declared that the grant is governed by R. 3 of the Inam Rules, then the grant is a personal jagir of Cl. 1. If, on the other hand, it is declared that it is governed by R. 5, then it is a personal or subsistence grant other than a personal jagir. The fact that the grant in the past has been wrongly treated by officers under R. 5 will not alter the nature of the grant, nor will the fact that the rule is not quoted in the certificate prepared by the revenue officers make any difference. In all these cases one must refer to the actual order of the Government of India sanctioning the grant. 12 N. L. R. 150 ; A, I. R. 1925 P. C. 184 and (1925) C. P. and Berar Revenue Rulings 1, Rel. on. (*Subhedar, A. J. C.*) JALALUDDIN *v.* MOHAMAD AMIR. **124 I. C. 693 = A. I. R. 1930 Nag. 279**

BERAR INAM RULES (1859).

Rule 5—Alienation.

——*Alienation of inam is operative only during lifetime of then certificate-holder.*

Any permanent alienation or a transaction likely to result in a permanent alienation can only be acted on during the lifetime of the then certificate-holder and at his death, by the order sanctioning the appointment of another Inamdar, the Inam land passes to him free of any encumbrances imposed on the land by the last holder. (*Prideaux and Kinkhede, A. J. Cs.*) BALIRAM SINGH *v.* RAMCHANDRA. **78 I. C. 77 = A. I. R. 1924 Nag. 393.**

——*Inamdar in Berar—Alienation by inamdar—Rules as to.*

The law in Berar in respect of alienations by inamdars is that if an inamdar alienates an inam held under Rule 5 of Berar Inam Rules, he having only a life-interest, such an alienation cannot affect his successor or the next holder of an inam certificate, and in the case of such an alienation the plea of adverse possession cannot be successfully raised against the successor of the alienor. (*Hallifax, A. J. C.*) MAHOMED SURAJ-UD-DIN *v.* FAYAZ-UD-DIN. **59 I. C. 473 (Nag.).**

R. 5—Inheritance.

——*Quit-rent fixed at settlement—Inam becomes hereditary—Right of reversion to Government is taken away.*

Rule 5 distinguishes very clearly a quit-rent imposed at the time of confirmation from quit-rent on which the inam was held prior to and continues to be held after confirmation. When, therefore, at the time of settlement a quit-rent is imposed under R. 5, a free-hold estate is given to the inamdar, quit rent being imposed in return for Government giving up its rights of reversion. There is no provision in R. 5 for continuing an inam hereditarily but at the same time imposing a quit rent. (*Macnair, A.J. C.*) ABDUL LATIF *v.* MANSINGHRAO. **25 N. L. R. 107 = 118 I. C. 878 = A. I. R. 1930 Nag. 24 (2).**

——*' Lineal heirs' in R.* 5 *refer to heirs of first grantee.*

The lineal heirs referred to in R. 5, cl. 2 (first) are the lineal heirs of the first gantee under British rule. (*Kotval, A. J. C.*) CHANDRABHAGA *v.* GANESH KESHAO. **75 I. C. 932 = A. I. R. 1924 Nag. 234.**

——*Rule does not control terms of* sanad—*Grant limited to male descendants—Females cannot inherit.*

BERAR INAM RULES, R. 5.

The only correct method for the judicial decision of matters affecting a *Jagir* is to ascertain the meaning and effect of the grant in each case from the circumstances and objects with which, and the rules under which, the *sanad* for that *Jagir* was granted. The terms of a *sanad* are absolute. The rules are merely instructions to Revenue Officers for the original settlement of claim to *Jagirs*, and they lay down the conditions that shall ordinarily govern each grant. But there is nothing to prevent the authority, which says that certain conditions will be included in each grant it makes in the future, from altering any or all of the conditions in the case of a particular grant. Any such alterations are embodied in the *sanad*, and every Inam estate in Berar is subject to the terms of the *sanad* or Certificate in all matters mentioned in it and to the Berar Inam Rules in all matters not so mentioned.

Where in the case of a grant the *sanad* says that the estate is to be continued rent-free in perpetuity to the present holder and his male descendants for personal maintenance,

Held, that successions to the proprietary interest are limited to the male descendants and that no female can acquire a share in it by inheritance. 12 N. L. R. 150 and 6 M. I. A. 426. Referred to. (*Hallifax and Prideaux A. J. Cs.*) SUBHAN ALI *v.* IMAMI BEGAM. **21 N. L. R. 124 = 65 I. C. 194 = 4 N. L. J. 192 = A. I. R. 1922 Nag. 129.**

R. 5 (5)—Interpretation.

———Benefits of R. 5 (2) mentioned in R. 5 (5) mean the benefits of R. 5 (3). (*Macnair, A. J. C.*) ABDUL LATIF *v.* MANSINGH RAO. **118 I. C. 878 = 25 N. L. R. 107 = A. I. R. 1930 Nag. 24 (2).**

R. 5—Interpretation.

———*Government can alter or modify the rules.*

The Berar Inam Rules lay down the conditions which are usually to accompany an Inam grant, but they contain nothing to prevent Government from altering or modifying any of the conditions in the case of any particular grant; and where the right of inheritance is by the certificate confined to a particular class of descendants which in its exclusion of all females from enjoyment is in terms unambiguous, there is no reason why the grant in these terms should not have effect. Where the succession of a party to the Inam did not involve a re-grant by Government but was merely a continuance of the grant to him in accordance with its originally declared terms, he holds the estate burdened with the obligation of recognising the rights of the other party to the share of income declared by a decree against the party. (*Lord Blanesburgh, J.*) SUBHAN ALI *v.* IMAMI BEGAM. **52 I. A. 294 = 52 Cal. 971 = 88 I. C. 347 = 21 N. L. R. 117 = 30 C. W. N. 122 = 23 A. L. J. 667 = 1925 M. W. N. 535 = A. I. R. 1925 P. C. 184 = 50 M. L. J. 136 (P. C.).**

R. 5—Maintenance.

———*Inam under R. 5—Beneficiaries are entitled only to maintenance.*

An estate granted under Rule 5 of the Berar Inam Rules of 1859 cannot be divided up among the persons beneficially interested in it. The co-sharers in such an estate are not entitled to any defined shares in the income, but only to such portion of it as is sufficient to provide them with suitable maintenance. A. I. R. 1922 Nag. 52, Dissented. (*Hallifax and Kotwal, A. J. Cs.*) KUTUBUDDIN *v.* GULAM RABBANI. **21 N. L. R. 185 = 93 I. C. 199 = A. I. R. 1926 Nag. 225.**

R. 6—Deshpande Vatan.

———Deshpande Vatan *is governed by inam rules.*

BERAR INAM RULES, R. 5.

The *Deshpandia* allowance in Berar is an inam and is governed by the inam rules and the succession thereto is as prescribed by R. 5. (*Kotwal, A. J. C.*) CHANDRABHAGA *v.* GANESH KESHAO. **75 I. C. 932 = A. I. R. 1924 Nag. 234.**

R. 6 (2)—Succession.

———*Deshmukhi cash inam is not within the rule—A son of an illegitimate son of a Deshmukh can succeed to the share which his father could obtain.*

A Deshmukhi cash inam does not fall under Rule VI (2) so as to be governed by Rule V (2). The grant is a perpetual hereditary grant for the maintenance of the dignity of the members of the family and each person entitled for the time being to a share must be held to be holding that share for his life only. When an illegitimate son of a Deshmukh has obtained a share of Lawajama, his son can succeed to his share. (*Kotwal, A. J. C.*) SHANKAR RAO *v.* KHUSHAL RAO. **75 I. C. 999 = A. I. R. 1923 Nag. 329.**

R. 59—Jagir.

———*Land is liable to partition—Grant—*Jagir—*Incidents.*

Property consisting of an ordinary Inam village is liable to partition at the suit of a co-sharer except when it is held on *Saranjam* or other impartible tenure or where the terms of the original grant impose a condition upon its enjoyment that the management should rest with a particular branch of the family of the grantees. Under R. 59 of the Berar Inam Rules "Land" which term includes a village acquired by Pargana servants as Government officials, admits of division through Civil Courts. (*Dhobley, A. J. C.*) KRISHNA RAO *v.* NILKANTHA. **69 I. C. 800 = 18 N. L. R. 163 = 5 N. L. J. 25 = A. I. R. 1922 Nag. 52.**

Classes II and IV—Kazi Inam.

———*Contraction—Service was held not to be personal.*

Where the inam certificate itself does not mention the class of the grant and in the certificate the purpose of the grant is stated to be the service of Kazi and maintenance and the tenure to be in perpetuity conditional on service.

Held, the grant is both a maintenance and a service grant. As a service grant the inam does not fall under class II. The main purpose of the inam was the maintenance of the family and the service stipulated for is not necessarily personal service by the particular person in whose name the certificate for the time being stands but is service by any member or members of the family of the first grantee from the British Government. (*Kotwal, A.J.C.*) SYED WAZIRUDDIN *v.* SHAHABUDDIN. **71 I. C. 150 = A. I. R. 1922 Nag. 254.**

Class III, R. 5—Succession.

———*Grant by Muhamadan ruler to grantee and his* bafarzandan—*Recognised by Government without the word* farzand—*Daughter's son is entitled to succeed—Word* farzand *includes daughters but not their children.*

The devolution and incidents of an Inam Estate in Berar are regulated by the Berar Inam Rules of 1859, subject to the sanad or certificate or other document evidencing the special terms of the grant in the particular case. The Berar Inam Rules were made for the settlement of Jagir and Inam claims throughout Berar, both by declaring the grants the Government of India was prepared to recognize, and treating each recognition as a fresh starting point to provide conditions for its future enjoyment and devolution. In Berar an old "sanad" from the Muhammadan Government of the time granting a personal or subsistence Inam is not binding on the Government of India and the real starting point of the grant, so far as the Government of India is concerned, is the time when the grant is first recognised by it under the Berar Inam Rules of 1859. A maintenance grant was given by a Muhammadan Ruler in perpetuity to the grantee and his children (*bafarzandan*). It was recognized by the Government of India without using the word "*farzand*" or the expression "lineal descendants" in the certificate of recognition.

Held, the condition "bafarzandan" mentioned in the original grant was not continued by necessary implication when the grant was recognised. And therefore under the circumstances the devolution should be governed by the personal law of the parties subject to any limitation imposed by the Inam Rules. Such a case falls under cl. 3 of the Berar Inam Rules and is governed by R. 5 in which the expression "direct lineal heirs" is not intended to be used in the restricted sense in which the word "farzandan" is used in Mahammadan Law and that consequently a daughter's son was a lineal descendant. According to Mahammadan Law the term "farzand" includes daughters but not daughter's children. (*Dhobley, A. J. C*) CHOTE *v.* MIR AKABAR ALI. **65 I. C. 72 = A. I. R. 1922 Nag. 170.**

BERAR LAND REVENUE CODE (1896).

Construction.

——*Decision under similar provisions of Bombay Revenue Code are relevant.*

The Bombay decisions construing the provisions of the Bombay Revenue Code are relevant in construing the similar provisions of the Berar Land Revenue Code. (*Kinkhede, A.J.C.*) SECRETARY OF STATE *v.* BAGMAL KISANDAYAL. **22 N. L. R. 147 = 9 N. L J. 198 = 98 I. C. 22 = A. I.R. 1927 Nag. 10.**

S. 3—Interpretation.

——*Hindu Joint* Mitakshara *family—Can be co-occupant—Berar Land Revenue Code, S.* 209.

The cumulative effect of the definitions of 'occupant' and 'co-occupant', 'holder', 'holding' and 'to hold land' is that a person who is entitled to possession and enjoyment or disposal of un-alienated land or a person holding such right solely on his own account or wholly or partially in trust for another person or class of persons, or every one of such holders of the right, is a co-occupant.

A joint *Mitakshara* Hindu family is such a co-occupant and constitutes a single co-occupant irrespective of the number of the co-parceners constituting it. (*Kinkhede, A. J. C.*) KISAN *v.* SITARAM **81 I. C. 1009 = A. I. R 1925 Nag. 160.**

S. 4 (17)—Alienation.

——A grant in the soil is not necessary to make a village "alienated", 42 Bom. 112 and 43 Bom. 77, Rel. on. (*Jackson, A. J. C.*) GANPAT *v.* RAJE LAXMAN RAO. **26 N. L. R. 195 = 124 I. C. 451 = A. I. R. 1930 Nag. 213.**

S. 56—Alienated land.

——*Amount payable by inferior holder is charge on holding.*

The sum payable on account of a holding by the inferior holder who is not a tenant is land revenue and is as such a charge on the holding, whether the amount is payable direct to the Government or not. (*Kotwal, A. J. C.*) SHAM RAO *v.* SITARAM MAHARAJ. **18 N. L. R. 207 = 68 I. C. 289 = A. I R. 1923 Nag. 5.**

S. 59 (3)—Jurisdiction.

——*Government's ownership disputed—Revenue officer has no jurisdiction.*

Where the ownership of the Government is disputed, the Revenue officer has, or can have, no jurisdiction under S. 59 (3). (*Kinkhede, A. J. C.*) SECRETARY OF STATE *v.* BAGMAL KISANDAYAL. **22 N. L. R.147 = 9 N. L. J. 198 = 98 I. C. 22 = A. I. R. 1927 Nag. 10.**

S. 78.

——*Landlord has right to enhance rent payable by the tenant of antiquity.*

It is not always the case that permanency of tenure must necessarily carry with it permanency or fixity of rent. The Berar Land Revenue Code has, by enacting sub-S. (4), S. 78, expressly reserved the right of the landlord to enhance the rent payable by the tenant of antiquity, subject, of course, to its being just and reasonable, 5 N. L. R. 100, Foll. (*Kinkhede, A. J. C.*) DEOBLIA *v.* RAJE JANARDHAN. **11 N. L. J. 21 = 111 I. C. 488 = A. I. R. 1928 Nag. 153 (c).**

——*Meaning explained—It should not be taken in its commonly accepted meaning of absolute antiquity.*

The word "antiquity" in S. 78 (2), Berar Land Revenue Code, must be construed with reference to the nature of the history of the part of the country where the land is situated and to the possibility of getting evidence, and not in its commonly accepted meaning of absolute antiquity, 5 N. L. R. 100; 16 Bom. 646; 7 N. L. R. 100; 18 Bom. 22; 14 N. L. R. 11; S. A. No. 151-B of 1915; 34 Cal. 902 (P. C.); A. I. R. 1922 Bom. 25; A. I. R. 1922 Bom. 402; A. I. R. 1927 Bom. 270 Disc. and Rel. on. (*Kinkhede, A. J. C.*) DEOBLI *v.* RAJE JANARDHAN. **11 N. L. J. 21 = 111 I. C. 488 = A.I.R. 1928 Nag. 153 (c).**

——If it can be proved with certainty that the tenancy did not commence till after a certain point of time, then it cannot be said of such tenancy that evidence or its commencement has been lost by reason of its antiquity. A tenant of such a holding is not therefore protected by S. 78, cl. (2) (14 N. L. R. 111. Ref.). In the absence of any proof that the tenancy was perpetual, or that the defendant was an ante-jagir tenant, it must be assumed that he was an annual tenant. (*Dhobley, A. J. C.*) YESHWANT *v.* SHIWAPPA. **68 I. C. 178 = A. I. R. 1923 Nag. 129.**

S. 78 (4)—Enhancement of rent.

——*Clause* (4) *is general and applies in every case in which rent of tenants is sought to be enhanced, provided it can be legally enhanced.*

Clause (4) is general in its application to tenants and is not confined to cases where the rent of tenants falling under Section 72, Cl. (2), alone is sought to be enhanced. Once the rent of a tenant, of whatever class he may be, is sought to be enhanced, provided it can be legally enhanced, Cl. (4) comes into operation. (*Kotwal, A. J. C.*) DATTATRAYA *v.* RAJAYA. **59 I. C. 711 = A. I. R. 1921 Nag. 104.**

Ss. 78 and 79 (2)—Landlord and Tenant.

——*Notice of enhancement of the rent does not preclude landlord from issuing a further notice for ejectment of tenants.*

In the absence of an express provision contained in S. 79 (2) that it was to be subject to the provision contained in S. 78 it is preposterous to suggest that the more drastic remedy afforded by S. 79 is or could be abrogated by action under S. 78 and so mere issue of a notice of enhancement does not bar the landlord's resort to action for ejectment if that is otherwise legally open to him. (*Findlay, J. C.*) DEWAJI KUNBI *v.* AMRULLASHA. **10 N. L. J. 253 = 106 I. C. 813 = A. I. R. 1928 Nag. 84.**

S. 78 (2)—Presumption.

———*Enhancement of rent from time to time—Annual formal leases granted—Presumption is against permanent tenancy.*

Although the fact that the rent may be enhanced from time to time would not necessarily be destructive of a permanent tenancy, yet where from year to year there has been a formal and annual lease, the fact of the rent varying largely from time to time is a strong indication that the tenancy was only an annual one. (*Findlay, J. C.*) FAKIR *v.* DUTTATRAYA KRISHNA.

101 I. C. 252 = A. I. R. 1927 Nag. 200.

S. 78—Tenure.

———*Tenancy 48 years old at the date of suit—Tenant is not protected under S. 78 (2).*

Where the tenancy was traced to have commenced in 1874, *i.e.*, only 48 years before the suit.

Held, the tenant could not be called a tenant of antiquity and was not entitled to protection under S. 78 (2). (*Mohiuddin, A.J.C.*) C. GAMBHIRJI *v.* BALA SAHEB, SANSTHAN. **113 I. C. 225 = A. I. R. 1928 Nag. 169.**

———*Tenant of antiquity—Payment of enhanced rent by, does not take away the right to claim permanency of tenure.*

The mere circumstance that a tenant has paid, in the past, an enhanced rent to the landlord, would not take away from him the right to claim permanency of tenure, or, to say that he is a tenant of antiquity. Similarly, by a departure of an ephemeral character from a uniform course of conduct, he could not be "deemed to have lost his status of a tenant of antiquity, if he had acquired any, and in no case could he be thereby debarred from proving, in answer to a suit for ejectment, that the tenancy of the land in question could be treated as one of antiquity, and that he was, therefore, not liable to ejectment. (*Kinkhede, A. J. C.*) DEOLIA *v.* RAJE JANARDHAN. **11 N. L. J. 21 = 111 I.C. 488 = A. I. R. 1928 Nag. 153.**

———*Presumption under, has no reference to the individual—Tenancy of antiquity distinguished from annual tenancies.*

The presumption which S. 78 (2), Berar Land Revenue Code authorizes a Court to draw has no reference to the individual; it relates to the period as regards the intended duration for which any particular land is held in tenant-right. It is this peculiar incident of antiquity, namely of the duration of the tenancy being co-extensive with the duration of the tenure of the landlord, which is of the essence of every tenancy of antiquity, and which distinguishes it from the other class, namely, of annual tenancies. It attaches to the land, and must run with and remain attached to it in whosoever's hands it may be, for the time being. If the lands are heritable, transferable and divisable by will, they may have changed hands from time to time and gone into the hands of a defendant just a few days before suit; in spite of that they must still retain all their incidents including incident of antiquity, if that is one of their incidents. The words of S. 78 (2) of the Code do not seem to take account of the identity of the person, nor of the mode in which the land goes from one present holder to another, so long as the same is held under a title derived from the previous holder thereof. It neither says that the title of the tenant must be by devolution on succession only and by no other mode such as transfer, bequest etc., nor that the consent of the landlord is necessary for its validity. (*Kinkhede, A.J.C.*) DEOLIA *v.* RAJE JANARDHAN. **11 N. L. J. 21 = 111 I. C. 488 = A. I. R. 1928 Nag. 153.**

S. 79—Denial.

———An annual tenant cannot lose that status simply by refusing to pay rent or by refusing to execute a rent note. Such an attitude of the tenant will not put an end to the relationship of the landland and tenant unless there is an unequivocal denial of landlord title. (*Mohiuddin, A. J. C.*) MIR HAIDAR *v.* JANKIRAM.

122 I. C. 271.

S. 79—Notice.

———*Tenancy from year to year—Notice to quit is necessary.*

No notice is necessary in the case of a tenant for one year only, whereas it is necessary in the case of a tenance from year to year, 13 N.L.R. 11 and 14 N.L.R. 129. Expl. (*Baker, J.C.*) BALKRISHNA *v.* RAGHUNATHA

90 I. C. 43 = A. I. R. 1926 Nag. 201.

———*Registered post-card is proper notice.*

Section 79 of the Berar Land Revenue Code, unlike Section 106 of the Transfer of Property Act, does not lay down the mode in which the notice to quit has to be served upon the tenant. A registered post-card is a proper notice. (*Mitra, A. J. C.*) RAMCHANDRA *v.* RAGHOJI. **17 N. L. R. 25 = A. I. R. 1921 Nag. 116.**

S. 79—Proof.

———Lessor must prove that lease-money became due at close of agricultural year and not before. 27 Mad. 143, (P. C.), Dist. (*Macnair, A.J.C.*) DHARNIDHAR *v.* RADHABAI. **118 I. C. 52 = A. I. R. 1929 Nag. 90.**

S. 79—Right to sue.

———*One co-owner can sue to eject tenant so far as his share of property is concerned and can sue for his share of rent by making other co-owners parties to suit.*

One co-owner can sue to eject a tenant as regards his share in the property and can sue for his share of the rent making the other co-owners parties to the suit. As he can sue for ejectment as regards his share, he can give valid notice to quit as regards his share; but he, co-owner as such, cannot sue to eject a tenant as regards the whole of the property. 35 Cal. 331 (P.C.), Ref.; 2 N.L.R. 45, Rel. on; 4 N.L.R. 45; A.I. R. 1925 Nag. 140, Dist. (*Staples, A. J. C.*) TOTARAM KASAR *v.* KUTABUDDIN. **114 I.C. 615 = A.I.R. 1929 Nag. 207.**

S. 96 (1)—Presumption.

———*Court is bound to presume record-of-rights as correct.*

Under S. 96, cl. (1) the Court is bound to make an initial presumption of correctness about the entries in the Record-of-Rights. (*Kinkhede, A.J.C.*) DATTATRAYA *v.* AMRIT. **89 I. C. 763 = A. I. R. 1926 Nag. 55.**

———*Presumption of correctness attaches to entries in Record-of-Rights*

Under the provisions of S. 96-I of the Berar Land Revenue Code, an entry in Record-of-Rights carries with it a presumption of correctness, and would support the title of the recorded holder of the survey number or at any rate his possession. (*Kinkhede, A.J.C.*) DAULAT *v.* RAMAPPA. **90 I. C. 196 = A. I. R. 1926 Nag. 197.**

S. 160 (iii)—Cess.

———*Alienated village—Cess is recoverable from superior holder.*

Under S. 160, the cesses in an alienated village are recoverable from the superior holder, and it lies on him to show, how the case is taken out of the application of that section. (*Kotval, A. J. C.*) RAMCHANDRA *v.* ISHRABHO. **4 N. L. J. 42 = 64 I. C. 202 = A. I. R. 1922 Nag. 168.**

S. 160 (3)—Rules.

———If a *Chaudi* could conveniently accommodate a school or *vice versa*, it would none the less be regarded a

Chaudi. (*Subhedar, A.J.C*) VISHNU *v.* SECRETARY OF STATE. **120 I. C. 325 = A. I. R. 1929 Nag. 345.**

———*Rules under, R. 4—Identification of assessment registers made in December is proper.*

There is no provision in the Code or the rules framed thereunder, which prohibits the verification of assessment registers by the Revenue Officers after 30th November and declares such an action on their part as void, and so if verification is made in December, it is perfectly in order. (*Subhedar, A. J. C.*) VISHNU *v.* SECRETARY OF STATE. **120 I. C. 325 = A. I. R 1929 Nag. 345.**

———*Rules under, R. 5—Rule 5 does not provide for notices to be given to assessees individually.*

Rule 5 does not provide for notices to be given to the assessees individually and if only one notice to all the assessees in the village is posted in the *Chaudi* along with the copy of the register, it is sufficient compliance with R. 5. (*Subhedar, A.J.C.*) VISHNU *v.* SECRETARY OF STATE. **120 I. C. 325 = A. I. R. 1929 Nag. 345.**

S. 175—Scope.

———If the procedure adopted by the Revenue Officers acting under rules made under S. 160 (3) is irregular, person's remedy is by way of appeal to the higher revenue authorities and not by a civil suit. (*Subhedar, A. J. C.*) VISHNU *v.* SECRETARY OF STATE. **120 I. C. 325 = A. I. R. 1929 Nag. 345.**

S. 205—Interpretation.

———The words "in favour of a specified person" refer only to the case of relinquishment. (*Jackson, A. J. C.*) KESHEO *v.* PANDURANG. **121 I. C. 655 = A. I. R. 1929 Nag. 353.**

S. 205—Pre-emption.

———*Fact that property is sold by Official Receiver does not take away rights of co-occupant to pre-empt.*

The Official Receiver or the owner, if he decides to auction the property, can and should hold the sale subject to the right of the co-occupants to pre-empt and before confirming the sale to the highest bidder, he can and should offer the property to co-occupants at the figure bid and the mere fact that property is sold in an auction by the Official Receiver does not take away the rights of a co-occupant to pre-empt. 4 N. L. R. 138, Dist.; A. I. R. 1927 P. C. 113, Appl. 24 C.W.N. 1072, Ref. (*Jackson, A. J. C.*) KESHEO *v.* PANDURANG. **121 I. C. 655 = A. I. R. 1929 Nag. 353.**

———*Right of pre-emption is not lost on re-sale of property either to vendor or to stranger.*

A person's right of pre emption being presumably a right of substitution cannot be taken away by any transaction reconveying the property either to the vendor or to the stranger whether the reconveyance takes place before suit or after suit or decree. 2 N.L.R. 150; 5 N. L. R. 136, Rel. on. (*Kinkhede, A. J. C.*) LATAJI *v.* KRISHAJI. **115 I. C. 175 = A. I. R. 1929 Nag. 224.**

———*Pre-emption in trees does not exist in Berar.*

Right of pre-emption in trees does not exist under the Berar Land Revenue Code and hence pre-emption cannot be allowed. (*Prideaux. A. J. C.*) RAOJI *v.* RAGHO. **24 N. L. R. 171 = 11 N. L. J. 182 = 112 I. C. 642 = A. I. R. 1928 Nag. 324.**

———*Sale by Court in suit for specific performance of contract of sale—Right of pre-emption exists.*

The right of pre-emption exists in the case of a sale executed by the Court in a suit for the specific performance of a contract of sale. 4 N. L. R. 138, Dist. (*Kotval, A. J. C.*) TUKARAM JAGAPPA *v.* UKARDA. **76 I. C. 374 = A. I .R. 1924 Nag. 327.**

———*Right of pre-emption arises only on a complete sale and not merely on the making of a contract of sale.*

The right of pre-emption arises only on a complete sale taking place and not on the mere making of a contract of sale. (*Kotval, A. J. C.*) TUKARAM JAGAPPA *v.* UKARDA. **76 I. C. 374 = A. I. R. 1924 Nag. 327.**

———*A conveyance of land in lieu of* mehr *which is not fixed, does not amount to a sale.*

In case of a sale, price must be in some way ascertainable. A registered conveyance deed regarding land by a Muhammadan in favour of his wife in lieu of her dower without indicating the amount of *mehr* does not amount to a sale or relinquishment. It amounts merely to a family settlement. (*Prideaux, A.J.C.*) MAHITAT KHAN *v.* MT. ASHABI. **20 N.L. R. 126 = 76 I. C. 668 = A. I. R. 1923 Nag. 330.**

———*Co-occupant entitled to pre-empt may be a jurisdical person.*

Under the Berar Land Revenue Code the co-occupant who is entitled to pre-empt may be a juridical as well as a living person. (*Kotwal, A. J. C.*) BAKARAM *v.* HIRALAL. **71 I. C. 39 = A. I. R. 1923 Nag. 96.**

——— **Ss. 206 (1) and 209 (2)**—*Pre-emption.*

Where a share in a survey number is held by all the members of a Hindu joint family, notice to the manager of the family will ordinarily suffice for the purposes under S. 206 (I), Berar Land Revenue Code. The course would be an obvious one where all members other than the manager are minors, if however the would-be vendor chooses to depart from the procedure laid down in the Code and to rely upon a consent which would more properly be described as a definite expression of determination not to exercise the right of pre-emption he and his vendees should be careful to see that the substituted precaution is such as will bind all concerned. There is no presumption that where a manager does a certain act, he does it in the capacity of manager. (*Drake-Brockman, J. C.*) MOTIRAM *v.* BHIKAN RAO. **59 I. C. 601 (Nag.).**

Ss. 209 and 3—Interpretation.

———*Hindu Joint* Mitakshara *family—Can be co-occupant.*

The cumulative effect of the definitions of 'occupant' and 'co-occupant' 'holder', 'holding' and 'to hold land' is that a person who is entitled to possession and enjoyment or disposal of un-alienated land or a person holding such right solely on his own account or wholly or partially in trust for another person or class of persons, or every one of such holders of the right is a co-occupant. A joint *Mitakshara* Hindu family is such a co-occupant and constitutes a single co-occupant irrespective of the number of the co-parceners constituting it. (*Kinkhede, A. J. C.*) KISAN *v* SITARAM. **81 I. C. 1009 = A. I. R. 1925 Nag. 160.**

S. 210—Co-occupant.

———*Transfer to a co-occupant and a stranger jointly is not transfer to co-occupant.*

Where co-occupants of a survey number sold their land to another co-occupant and a stranger but it was found that the sale was solely for the benefit of the stranger and the plaintiff who was also a co-occupant, claimed pre-emption.

Held, S. 210, Berar Land Revenue Code, had no application as the transfer was not to a co-occupant, a stranger having been joined. (*Kotwal, A. J. C.*) SAKHARAM *v.* SHEO RAM. **21 N. L. R 189 = 92 I. C. 334 = A. I. R. 1926 Nag. 229.**

S. 211—Applicability.

———*Allahabad rulings have no application to the Code.*

BERAR LAND REVENUE CODE (1896), S. 211.

The decisions of the Allahabad High Court have little bearing on the interpretation of the provisions of the Berar Land Revenue Code, as there is no provision in the Code corresponding to S. 20, Agra Pre-emption Act. (*Macnair, A. J. C.*) RAMCHANDRA *v.* RUPCHAND.

23 N. L. R. 94 = 103 I. C. 242 = A. I. R 1927 Nag. 296.

S. 211—Pre-emption.

——*Vendee becoming a sharer before suit—The right of pre-emption is not lost.*

A co-occupant has a subsisting right of pre-emption even if the stranger purchaser becomes a co-sharer in the property before the date of suit. There is nothing in the Code which indicates that the plaintiff loses his right when the vendee subsequently becomes co-occupant. (*Macnair, A. J. C.*) RAMCHANDRA *v.* RUPCHAND.

23 N.L.R. 94 = 103 I. C. 242 = A. I. R. 1927 Nag. 296.

S 221—Alienated Village.

——*Survey settlement introduced in alienated village—Holder becomes as if occupant.*

On the introduction of a survey settlement into an alienated village the holders of land are placed in the same position as if they were occupants in an unalienated village. 43 Bom. 77 and 44 Bom. 110, Foll. (*Jackson, A. J. C.*) GANPAT *v.* RAJE LAXMAN RAO.

26 N.L.R. 195 = 124 I. C. 451 = A. I. R. 1930 Nag. 213.

——*S. 221, not being retrospective cannot be applied to alienated village into which survey settlement was introduced under Berar Settlement Rules of* 1865.

Provisions of S. 221 are prospective and not retrospective. Hence where a survey settlement was introduced into an alienated village under the Berar Settlement Rules of 1865 long before the Code was passed the provisions of S. 221 of the Code cannot be made applicable to that village. (*Jackson, A. J. C.*) GANPAT *v.* RAJE LAXMANRAO. **26 N. L. R. 195 = 124 I. C. 451 = A. I. R. 1930 Nag. 213**

S. 223—Proof.

——*Privity of estate must be proved as a fact—Nafargats prove only a chain of cultivators and not the nature of his title—Evidence Act, S.* 109.

A privity of estate whether by inheritance or by purchase is a question which must be proved like any other fact; it cannot be the subject of a legal presumption merely. The Nafargats only prove a chain of cultivators in succession, but they do not in themselves prove whether each successor came upon the land under a derivative title or independently of the landlord. So long as each cultivator held the land, there might arise a presumption under S. 109 of the Evidence Act that his tenancy had a continuance, but there is no presumption that his successor is necessarily a transferee from him. (*Kinkhede, A. J. C.*) RAMCHAND *v.* SHRI RATNANATH MAHARAJ SAMSTHAN OF BIHAR.

98 I. C. 674 = A. I. R. 1927 Nag. 99.

BERAR MUNICIPAL LAW (1886).

Taxable income.

——*Malkapur Muncipality—Taxable income—Outside income not brought within Municipal limits is not taxable.*

The income taxable is the income derived from the profession or art practised or trade carried on within the Municipal limits. If the outside income is brought in and mixed with the income made within the Muncipality and spent there, the whole income will no doubt be taxable, but if the outside income is not at all brought in, but is kept at the place where it is earned, it cannot be taken into consideration while assessing the professional tax. 35 Cal. 859, Foll. (*Dhobley, A. J. C.*) MALKAPUR MUNICIPALITY *v.* AMRIT WAMAN DALAL.

5 Nag. L. J. 214 = 65 I. C. 532 = 18 N. L. R. 121 = A. I. R. 1922 Nag. 10.

BERAR PATEL AND PATWARIS LAW (1900). S. 20.

S. 41 (1) A (b)—Interpretation.

——*Notification No.* 456, *dated 29th April*, 1913—*Effect—C P. Municipal Act* (*II of* 1922).

The operation of the Notification 456, dated the 29th April, 1913, is not subject to the maximum of Rs. 500 imposed by proviso 1 to R. 1 of the Hyderabad Residency O. 112. dated the 18th March, 1899. (*Kinkhede, A. J. C.*) DEPUTY COMMISSIONER, AKOLA *v.* GURU PRATAP SINGH. **22 N. L. R. 153 = 99 I. C. 422 = A. I. R. 1927 Nag. 102.**

S. 53—Jurisdiction.

——*Acting beyond jurisdiction—Act can be challenged in Civil Courts—Jurisdiction—Plaint allegations determine it.*

Errors in assessment which constitute irregularities merely and do not go to the ground work of the tax and render the assessment void, can be corrected wholly in the manner provided by the statute which creates the authority and the remedy so provided must be treated as exclusive. On the other hand, where the defects in assessment are jurisdictional, rendering them void, the persons aggrieved are entitled to invoke the ordinary judicial remedies, and all other violations of law give rise to jurisdictional questions. In other words, while mere erroneous exercise of judgment is not reviewable by the Civil Court, any excess of jurisdiction makes the act liable to challenge in such Court. The Jurisdiction of Courts depends upon the allegations in the plaint and not upon those which may ultimately be found true. But for an assertion that an act was objected to as *ultra vires* the plaint must make distinct allegations of fact or law how the act was *ultra vires*. (*Dhobley, A. J. C.*) MALKAPUR MUNICIPALITY *v.* AMRIT WAMAN DALAL. **5 Nag. L. J. 214 = 65 I. C 532 = 18 N. L. R. 121 = A. I. R. 1922 Nag. 10.**

BERAR PATEL AND PATWARIS LAW (1900).

S. 2—Interpretation.

——"*Village*" *includes a* "*khel.*"

The suggestion that there could not be more than one revenue patel for a village, or that separate revenue patels cannot be appointed for the different khels of one village, cannot be supported in view of S. 2 according to which the expression "village" means and includes a group of villages and the sub-division of a village known as a "khel". (*Hallifax, A J. C.*) SALABAT KHAN *v.* DEO RAO.

99 I. C. 436 = A. I. R. 1927 Nag. 398.

Ss. 20 and 6-A (4)—Jurisdiction.

——*Suit for division of balance of emoluments is not cognizable by Civil Court.*

A suit as to the division of balance of emoluments by the patel in proportion to share under S. 6-A (4) is not triable by Civil Courts. (*Kotwal, A. J. C.*) CHAMPAT *v.* GANPAT RAO.

68 I. C. 506 = A. I. R. 1923 Nag. 16.

Rules—Patwari.

——The wording of the rules is not very precise, but it seems to mean that patwari has no responsibility for any work arising outside his circle. (*Batten, J.C.*) LOCAL GOVT. C. P. *v.* MADHO PATWARI.

23 Cr. L. J. 557 = 68 I. C. 157 = A. I. R. 1923 Nag. 146.

BERAR WASTE LAND RULES (1865).

Proprietary rights.

——*Distinct election by the lessee followed by an application and agreement between lessee and Government and grant of sanad is essential for acquisition of proprietary rights.*

Where no application for proprietary rights or patelki rights was ever made during the continuance of the lease, the mere fact that on the expiry of the lease when the assessment was raised the tenant paid the enhanced assessment for two years is not enough to constitute the proprietary rights referred to in the rules, which contemplate a distinct election by the lessee followed by an application and an agreement between the lessee and Government to abide by the conditions and then the grant of sanad conferring proprietary rights. (*Baker, J. C.*) JANKUBAI *v.* PARVATI. **87 I. C. 1036 = A. I. R. 1925 Nag. 353.**

Scope.

——*Berar Alienated Villages Tenancy Law—The law is not repugnant to Waste Land Rules of* 1865, *R*. 3.

Whether the rights of the Izardars are governed by the sanad or by the Waste Land Rules, the power of determining the relations between them and their tenants, was reserved by the Government, and the making of the Berar Alienated Villages Tenancy Law which determines such relations cannot be said to be repugnant to either of them. (*Hallifax and Kotwal. A. J. Cs.*) DATTATRAYA *v.* SECRETARY OF STATE FOR INDIA. **103 I. C. 309 = A. I. R. 1927 Nag. 304.**

BETROTHAL.

See (1) DAMAGE.
(2) HINDU LAW —MARRIAGE.
(3) TORT.

BETTING.

See (1) CONTRACT ACT, S. 30.
(2) GAMBLING ACTS (LOCAL BENGAL, BOMBAY, BURMA AND IMPERIAL).

BHAGDARI TENURE—*See* LAND TENURE.

BIAS—*See* PRACTICE—JUDGE.

BID.

See (1) C. P. CODE, O. 21, RR. 69 AND 82.
(2) CONTRACT ACT, S. 2 (*a*) and (*b*).

BIDDER AND PURCHASER.

See (1) C. P. CODE, O. 21, RR. 69 AND 82.
(2) CONTRACT ACT, S. 2 (*a*) and (*b*).

BIGAMY—*See* PENAL CODE, Ss. 494 AND 495.

BIHAR AND ORISSA BOARD OF REVENUE ACT (B. & O. I OF 1913).

S. 1—Jurisdiction.

——*Bengal Estates Partition Act, S.* 119—*Action of Collector in allotting separate estates on final order from Commissioner cannot be challenged in Civil Court.*

When a final order of the Commissioner of Board of Revenue passed in first instance or on review has been received by the Collector, it is his duty to give the several proprietors possession of the separate estates allotted to them under S. 94 (1) and his action in so doing cannot be challenged in Civil Court. (*Courtney-Terrel, C.J., and Ross, J.*) RAMBAHADUR SINGH *v.* KESHAVA PRASAD SINGH. **8 Pat. 830 = 121 I. C. 456 = 11 P. L. T. 494 = A. I. R. 1930 Pat. 130.**

BIHAR AND ORISSA EXCISE ACT (1915), S. 47.

S. 6 (1)—Scope.

——*S.* 6 (1) *is not controlled by C. P. Code, S.* 114.

Section 6 (1) is not controlled by S. 114, C. P. Code, which does not apply to proceedings under the Estates Partition Act and therefore a Board of Revenue exercising jurisdiction on an application for review is not confined to newly discovered matters which could not with due diligence have been disclosed at the original hearing by the party applying for review. (*Courtney-Terrel, C.J, and Ross, J.*) RAMBAHADUR SINGH *v.* KESHAVA PRASAD SINGH. **11 P. L. T. 494 = 121 I. C. 456 = 8 Pat. 830 = A. I. R. 1930 Pat. 130.**

BIHAR AND ORISSA COURT FEES AMENDMENT ACT (II OF 1922.)

Scope.

——*Memo of appeal presented to wrong officer before and received by proper officer after the new Act—Court-fee under the new Act must be paid—Act has no retrospective effect.*

Where a memorandum of appeal was presented to a wrong officer before the new Court Fees Act came into force but was received and filed by the proper officer after the new Act came into force, *held*, that the memo of appeal must bear Court-fees under the new Act. But the copies of judgment of decree obtained before the present Act came into force must bear stamp under the old Act. The fact that they were filed after the new Act came into force would not make them inadmissible. The present Act cannot have retrospective operation so as to impose liability upon appellants to pay Court-fee which they were not liable to pay when the copies were obtained. (*Jwala Prasad, J.*) ANAND RAM BRAHMAN *v.* RAMGULAM SAHU. **3 P. L. T. 820 = 71 I. C 426 = 1922 P. H C C. 365 = 1 P. L. R. 12 = 2 Pat. 264 = A. I. R. 1923 Pat. 150.**

BIHAR AND ORISSA EXCISE ACT (II OF 1915.)

S. 2 (6) and (14)- Excisability.

——*Medicines containing alcohol are excisable.*

The statement of objects and reasons of the new enactment in Bihar and Orissa seems to indicate the intention of the legislature to make a medicinal preparation containing alcohol an excisable article. 24 Cal. 157, Not Foll. 45 Cal. 82, Rel. on. (*Jwala Prasad and James, JJ.*) EMPEROR *v.* GOBIND PANDEY. **10 P. L. T. 316 = 8 Pat. 884 = 120 I. C. 759 = 1929 Cr. C. 74 = A. I. R. 1929 Pat. 302.**

Ss. 47, 70 and 78—Arrest.

——*Sub-Inspector of Excise can arrest without warrant person found committing offence under S.* 47—*S.* 78 *has no application to such case.*

Under S. 70 of the Act the Sub-Inspector of Excise is entitled to arrest without a warrant a person found committing on offence punishable under S. 47 of the Act and S. 78 has no application to such a case. (*James, J.*) BECHU MIAN *v.* EMPEROR. **31 Cr. L. J. 465 = 123 I. C. 68 = A. I. R 1930 Pat. 344.**

S. 47 (a), (f) and S. 92—Punishment.

——*Circulars not published in Gazette, exempting any excisable article, are not law—Under such unpublished circulars respectable ayurvedic practitioners selling medicines containing alcohol may not be prosecuted—But if prosecuted even under misapprehension they must suffer at least technical punishment.*

S. 94 empowers the Local Government to exempt any excisable article from the provisions of the Act either throughout the province or in any specified area or as regards any specified class of persons. Under S. 92 such notification when published in the Bihar and Orissa Gazette shall have the effect as if enacted in the Act. Not so published the circulars in question have not the force of law. Therefore, though according to instructions contained in unpublished circulars the excise authorities would not prosecute a respectable medical practitioner (Kaviraj) of repute who sells medicinal preparations containing alcohol unless he is endeavouring to cheat the Government of excise revenue, but if a prosecution is started even under misapprehension, the Courts have to inflict some punishment. (*Jwala Prasad and James, JJ.*) EMPEROR *v.* GOBIND PANDEY. **10 P. L. T. 316 = 8 Pat. 884 = 120 I. C. 759 = 1929 Cr. C. 74 = A. I. R. 1929 Pat. 302.**

BIHAR AND ORISSA FOOD ADULTERATION ACT (II OF 1919).

S. 9 (2)--Proviso—Procedure.

——*Application to have sample analysed refused—Magistrate was wrong in refusing application for analysis of sample in custody of local authority.*

A complaint was lodged against the applicant, based on an inspection made by the Inspector of the applicant's factory. The inspection related to the manufacture of mustard oil which the applicant carried on in his factory. Sample of the oil was taken by the Inspector in three phials one of which was sent to the Chemical Examiner under S. 8 of the Act and the report of the Examiner showed that the sample was adulterated. That was the reason of the prosecution. During the trial, the applicant applied under S. 9 (2) of the Act that the sample in the hands of the local authority, which was kept by them under sub-S. (2), S. 7, may be sent to the Government analyst. The trying Magistrate held that by reason of the proviso to S. 9 he was prevented from acceding to the application.

Held that the trying Magistrate was wrong in not allowing the petition of the applicant to have the sample, in the custody of the local authority, analysed under S. 8. (*Wort, J.*) GOPINATH SAHU *v.* ARRAH MUNICIPALITY. **30 Cr. L. J. 895 = 118 I. C. 328 = 1929 Cr. C 270 = A. I. R. 1929 Pat. 510.**

S. 14—Interpretation.

——Neither the word "labelled" nor the word "sealed" necessarily means that it should contain the name of manufacturer. (*Jwala Prasad and Ross, JJ.*) EMPEROR *v.* SHIB DAS. **9 P. L. T. 434 = 29 Cr. L. J. 75 = 106 I. C. 587 = 9 A. I. Cr. R. 352 = A. I. R. 1928 Pat. 213.**

S. 14, Cl. (2)—Irregularity.

——*Inspector not purchasing the entire tin—Accused can take advantage of the irregularity.*

Where the Inspector acted illegally in not purchasing the entire tin as is required by Cl. (2), S. 14.

Held, yet the oil of the tin was found to be highly adulterated, the accused could take advantage of the illegality or irregularity as the procedure adopted by the Inspector had prejudiced the accused seriously and deprived him of the best evidence to prove his *bona fides*. (*Jwala Prasad and Ross, JJ.*) EMPEROR *v.* SHIB DAS. **9 Pat. 434 = 29 Cr. L. J. 75 = 106 I. C. 587 = 9 A. I. Cr. R. 352 = A. I. R 1928 Pat. 213.**

BIHAR AND ORISSA MUNICIPAL ACT (VII OF 1922).

S. 89 (c)—Interpretation.

——"*Amount of annual assessment*" *does not mean amount of annual assessment in respect of each holding.*

The expression "amount of annual assessment" does not mean amount of annual assessment in respect of each holding and it is open where there are more holdings than one to set out the lump sum of assessment instead of assessment against each separate holding and in the case of personal assessment assessee is not prejudiced by the lump sum of assessment being set out. (*Das and Wort, JJ.*) GANGA PRASAD *v.* MUNICIPAL COMMR., DUMRAON. **A. I. R. 1929 Pat. 745.**

S. 92—Interpretation.

——*Maximum of Rs.* 120 *is with respect to occupation of one single holding.*

In S. 92 the expression used is "in respect of the occupation of any holding," and therefore the maximum in regard to each holding shall not be more than Rs. 120. (*Das and Wort, JJ.*) GANGA PRASAD *v.* MUNICIPAL COMMR., DUMRAON. **A. I. R. 1929 Pat. 745.**

S. 98—Assessment.

——*Person assessed in* 1912 *under Bengal Municipal Act—Subsequent assessment under Act of* 1922 *is not* ultra vires—*Previous assessment is not a right within Bihar and Orissa General Clauses Act.* 1917, *S.* 8.

Assessment under S. 101, Bengal Municipal Act, is not a right acquired, within the meaning of Bihar and Orissa General Clauses Act, S. 8, merely because the assessment under that Act is more beneficial than the one subsequently imposed by the Bihar and Orissa Municipal Act but is a liability incurred. The assessment under the Bihar and Orissa Municipal Act is not, therefore, *ultra vires* when it is properly levied. Moreover the result of allowing the contention of *ultra vires* would be that any person who had been assessed under the old Bengal Act with all its provisions could not in any circumstances whatsoever come under the jurisdiction of the municipalities of Bihar and Orissa under the Act of 1922 and it will have the effect of repealing S. 1 of the Act of 1922 and thus result in assessment of such persons under an Act which is already repealed. *Colonial Sugar Refining Co., Ltd.* v. *Irving*, (1905) A. C. 369, Dist. (*Wort, J.*) COMMR., PATNA MUNICIPALITY *v.* KSHETRO DAS BOSE. **11 P. L. T. 390 = A.I.R. 1930 Pat. 189.**

S. 100 (1)—Liability.

——Under S. 100 (1) occupation is not the test of liability. (*Croope, J.*) BHAGALPUR MUNICIPALITY *v.* MAULAVI FAIK. **A. I. R. 1930 Pat. 370.**

Ss. 116 and 119—Procedure.

——*Procedure regarding imposition of assessment not questioned—It cannot be subsequently challenged in Civil Court unless it is shown to be* ultra vires—*Jurisdiction.*

Having regard to the provisions of Ss. 116 and 119 no Civil Court has jurisdiction to enquire into a question of fact which the legislature has placed within the jurisdiction of the municipal authorities the subject-matter of the Act, *e.g.*, imposition of tax on a holding as a dwelling-house when the validity of the proceeding under which or by which the municipal authorities came to assess this holding as a dwelling-house is not challenged and is not shown to be *ultra vires* of the authorities. 35 Cal. 859, Ref. (*Wort, J.*) PATNA MUNICIPALITY *v.* KSHETRO DAS BOSE. **11 P. L. T. 390 = A. I. R. 1930 Pat. 189.**

Ss. 116, 117 and 95—Scope.

——Provisions of Ss. 116 and 117 apply to an assessment under S. 95. (*Fazl Ali, J.*) MUNCPL. COMMR. OF BARH *v.* JAGDISH PRASAD. **11 P. L. T. 38 = 119 I. C. 884 = A. I. R. 1929 Pat. 235.**

BIHAR AND ORISSA MUNICIPAL ACT (1922), **S. 119.**

S. 119—Procedure.

——*Assessee preferring objection under Municipal Act—Municipality not disposing it of as provided in that Act and suing to enforce its claim—Suit can be rightly dismissed.*

Where an assessee preferred his objection under the Municipal Act, but the municipality failed to dispose of that objection in the manner provided in the Act, a suit by the municipality to enforce its claim for the tax assessed by it can be rightly dismissed. 1 Cal. 409, Dist. (*Fazl Ali, J.*) MUNCPL. COMMR. OF BARH *v.* JAGDISH PRASAD. **11 P. L. T. 38 = 119 I. C. 884 = A. I. R. 1929 Pat. 235.**

S. 196—Scope.

——In order that S. 196 may come into operation there must be proof that the property has vested in the Commissioners. (*Ross, J.*) RADHA KISHUN MARWARI *v.* EMPEROR. **27 Cr. L.J. 1111 = 97 I.C. 423 = A. I. R. 1927 Pat. 52.**

Ss. 197, 198, 200 and 201—Injunction.

——*Removal of encroachment on roads—Permanent or temporary injunction against removal cannot be granted.*

Ss. 197, 198, 200 and 201 lay down a scheme relating to removal of projections which show how little a householder can by recourse to the Civil Court resist the removal of even an old platform projecting over a public drain if Municipal Commissioners decide upon such removal and proceed in accordance with Ss. 197 and 198. Permanent injunction against the removal is so much opposed to the scheme, that even temporary injunction cannot be granted especially where the obstruction has already been removed on the ground that under the Act the householder would otherwise be deprived of the right to it although he may succeed in establishing his claim. A. I. R. 1923 Pat. 597, Dist. (*Dhavle, J.*) BHAN KUMAR CHAND *v.* ARRAH MUNICIPALITY. **120 I.C. 30 = A. I. R. 1929 Pat. 613.**

S. 230 (2) and S. 196—Operation.

——Failure to comply with a requisition issued by the Commissioners under S. 196 is a condition precedent to a person's liability to fine under S. 203. (*Ross, J.*) RADHA KISHUN MARWARI *v.* EMPEROR. **27 Cr. L. J. 1111 = 97 I. C. 423 = A. I. R. 1927 Pat. 52.**

S. 259 (1), (14)—Interpretation.

——"*Manufacture*" *does not cover the use of an oil engine.*

The plain meaning of the words "manufacture, process or business" used in Cl. 1, sub-Cl. (14) of S. 259 does not contemplate the use of an oil engine. (*Wort, J.*) LAL SINGH *v.* ARRAH MUNICIPALITY. **11 A. I. Cr. R. 25 = 29 Cr. L. J. 756 = 110 I. C. 788 = 10 P. L. T. 393 = A. I. R. 1928 Pat. 506.**

S. 259—Legality.

——*Renewal of license refused—No reason assigned—Refusal is not illegal.*

The provisions of sub-S. (2) of S. 259 of the Municipal Act themselves supply the only reason for which refusals of certain licenses can be made. But the omission of the commissioners to give the only reason which they could give for such refusal cannot be regarded as making their refusal illegal.

The Municipality has the right to declare that within the whole area of the municipality, certain offensive or dangerous trades cannot be carried on without a license. 17 C. W. N. 531, Foll. (*Bucknill and Ross, JJ.*)

BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT (1914), **S. 43.**

MADARAN KASSAB *v.* EMPEROR. **4 Pat. 311 = 86 I. C. 964 = 3 Pat. L. R. Cr. 150 = 6 P. L. T. 528 = 26 Cr. L. J. 900 = 1925 P. H. C. C. 44 = A. I. R. 1925 Pat. 540.**

S. 259 (1), (14)—Notification.

——*It is necessary for a municipality to notify to the public that a certain offence has been created under a certain resolution—Person cannot be convicted for the breach of the resolution in the absence of such notification.*

If an offence is to be created by a by-law or order or notice, then it is necessary for those who have power under the Act to create such offence to publish the fact so that the public at large may know that such an offence has been created. A meeting of the commissioners of a municipality resolved under S. 259 that certain trade should not be carried on within the area of that municipality without a license but no notification whatever to the public was made of this resolution. Prosecution of a certain person was commenced for a breach of this resolution.

Held, that conviction could not stand as it was necessary for the municipality, to notify to the public that such an offence had been created. (*Wort, J.*) LAL SINGH *v.* ARRAH MUNICIPALITY. **11 A. I. Cr. R. 25 = 29 Cr. L. J. 756 = 110 I.C. 788 = 10 P.L.T. 393 = A. I. R. 1928 Pat. 506.**

S. 263—Offensive Trade.

——*Pounding of tobacco leaf for the manufacture of hooka tobacco is not an offensive trade.*

Where it has been found that the mauufacture of hooka tobacco is not one giving rise to offensive or unwholesome smells, a person cannot be prosecuted under S. 263 for not taking out a license for carrying on the pounding of tobacco leaf for the manufacture of hooka tobacco. (*Mullick, J.*) CHAIRMAN, PURULIA MUNICIPALITY *v.* BISHUN SAO. **29 Cr. L. J. 1017 = 112 I. C. 345 = 11 A. I. Cr. R. 270 = A. I. R. 1928 Pat. 193.**

S. 356—Interpretation.

——"*Directed*" *means a direction by the body who are granted the power to make by-laws.*

The word "directed" in S. 356 does not refer to a direction by the Act, but it means a direction by the people or the body, who are granted the power to make by-laws, orders or to issue notices. (*Wort, J.*) LAL SINGH *v.* ARRAH MUNICIPALITY. **11 A. I. Cr. R. 25 = 29 Cr. L. J. 756 = 110 I. C. 788 = 10 P. L. T. 393 = A. I. R 1928 Pat. 506.**

S. 377 (1) and (2)—Scope.

——Section 377 (1) and (2) do not cover cases of contract: 65 I. C. 105, Rel. on. (*Macpherson, J.*) RAMBILAKH SINGH *v.* CHAIRMAN, DINAPUR NIZAMAT MUNICIPALITY. **7 P. L. T. 529 = 97 I. C. 128 = A. I. R. 1926 Pat. 462.**

BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT (IV OF 1914).

S. 43.

——*Plaintiff claiming benefit of general rule—Onus is on defendant to prove that general rule does not apply.*

Before the plaintiff can make out a case under the general rule, he need not establish that the proviso has no operation in his case. The onus of establishing that the case came within the proviso and not within the general law is upon the defendant. (*Das and Scroope,*

BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT (1914), S. 45.

JJ.) NABIN CHANDRA GANGULI *v.* MUNSHI MANDER. **6 Pat. 606 = 101 I. C. 707 = 8 P. L. T. 590 = A. I. R. 1927 Pat. 248.**

S. 45—Applicability.

———*Does not apply to suits to set aside sales held in* 1906.

The provisions of S. 45 of the Bihar and Orissa Public Demands Recovery Act, 1914 which was passed on the 1st of July, 1914 and came into force in November of that year were held not to apply to a suit to set aside a sale held on 3rd September, 1906. (*Ross, J.*) GOKARAN PRASAD SINGH *v.* MALIK WARIS ALI. **1 Pat. L. R. Civ. 285 = 71 I. C. 957 = A. I. R. 1924 Pat. 183.**

S. 46—Right to sue.

———*Recorded patnidar holding benami for another or transferring by private arrangement—Beneficiary or transferee cannot sue to set aside rent decree on grounds other than fraud.*

Where the recorded patnidar is a benamidar for another, or where the recorded patnidar has transferred his interest to another by private arrangement, that other is a representative of the recorded tenant and is bound by a rent decree obtained under the Act against the recorded tenant and by the sale held thereunder. His suit therefore for setting aside the sale on grounds other than that of fraud is barred by S. 46. (*Jwala Prasad and Bucknill, JJ.*) ABDUL GAFFAR *v.* F. B. DOWNING. **5 Pat. 415 = 8 Pat. L. T. 343 = 98 I. C. 893 = A. I. R. 1926 Pat. 465.**

Sch. II, R. 43—Auction Sale.

———*J. D. can purchase in auction in execution of certificate for other dues such as cess—Prohibited sale is voidable—Title vests from date of sale—Sale due to default of co-sharer purchaser enures for benefit of all.*

The prohibition contained in R. 43 applies only to sale of a tenure in execution of a certificate for arrears of due rent from the tenure. It does not apply to sales held in execution of certificate for any other dues such as cess. The execution with respect to a certificate for cess will therefore be governed by the general provisions of the Civil Procedure Code which enjoins no prohibition upon a judgment-debtor making any purchase. The purchase by a judgment debtor of a tenure or holding with respect to which the prohibition contained in S. 43 applies does not itself render the sale void but it can be avoided upon the application made by the decree-holder or any other person interested in the sale. The purchase by a co-sharer at the certificate sale does not ordinarily enure for the benefit of the other co-sharers. But where the sale is brought about by the default, laches or fraud of one of the co-sharers who purchases the property the co-sharer stands in fiduciary relationship with the other co-sharers in the property and he cannot take advantage of his own laches or fraud so as to deprive the other co-sharers of their interest in the property. The title of the purchaser in the certificate sale does not depend upon the delivery of possession in order to perfect his title. It vests in him from the date the sale took place. The further proceeding of obtaining sale certificate or *dakhaldehani* are merely in furtherance of the sale which has taken place. (*Jwala Prasad and Kulwant Sahay, JJ.*) MASUDANLAL *v.* RAM GULAM SAHU. **3 Pat 458 = 78 I. C. 807 = 5 P. L. T. 447 = 1924 P. H C. C. 240 = 3 Pat. L. R. Civ. 146 = A. I. R. 1924 Pat. 547.**

BIHAR AND ORISSA VILLAGE ADMINISTRATION ACT (III OF 1922).

S. 53—Panchayat.

———Where the Panchayat is competent to take cognizance of particular offences under S. 53 the Magistrate before whom the complaint is lodged in respect of such offences is bound to transfer the complaint to the Panchayat or to record a reason for his not doing so under the proviso to S. 53. If the Magistrate does not comply with the requirements of that proviso, the trial is bad. (*Jwala Prasad, J.*) SHEONATH OJAH *v.* EMPEROR. **29 Cr. L. J. 726 = 110 I. C. 582 = 10 A. I. Cr. R. 380.**

BILL OF EXCHANGE.

See NEGOTIABLE INSTRUMENTS ACT.

BILL OF LADING.

See SHIPPING.

BILLS OF EXCHANGE ACT (45 and 46 Vic. Ch. 61.)

Ss. 13 (2) and 89—Applicability.

———*Sections apply to negotiable instruments.*

The principle of S. 13, Cl. 2 of the Bills of Exchange Act taken with S. 89 is applicable to negotiable instruments though there is no express provision that antedating or postdating of a bill or a note or an endorsement does not by itself make the document invalid. (*Ramesam, J.*) NALLAYA GOUNDAN *v.* PALANI GOUNDAN. **1926 M. W. N. 726 = 98 I. C. 308 = A. I. R. 1926 Mad. 1154.**

S. 27 (3)—Holder.

———*Negotiable Instruments Act, S. 9—Holder having lien on the bill is a holder for value.*

A person holding a bill of exchange sent to him for collection with a lien on the bill is a holder for value or for consideration. (*Shah, Ag., C. J.*) ROYAL BANK OF SCOTLAND *v.* RAHIM CASSUM AND SON. **87 I.C. 982 = 49 Bom. 270 = 27 B. L. R. 506 = A. I. R. 1925 Bom. 369.**

BILLS OF LADING ACT (IX OF 1856).

S. 1—Applicability.

———Where goods are shipped under a bill of lading and the consignee claims the goods under that bill of lading, the ship owners need not show that the consignee expressly authorized his shipping agent to accept the terms in the bill of lading. The consignee is bound by the terms. (*Marten, C. J. and Blackwell, J.*) BOMBAY STEAM NAVGN. CO. *v.* VASUDEV. **52 Bom. 37 = 29 B. L. R. 1551 = 106 I. C. 470 = A. I. R. 1928 Bom. 5.**

S. 3—Evidence.

———*Bills of lading are* prima facie *evidence of articles being given to shipping Company unless stated otherwise.*

In the absence of any proof that the Bills of Lading were granted under a misrepesentation, without any default on the part of the person signing them, and wholly due to the fault of the shipper or the holder of such bills of lading, the particular marks as shown in the respective Bills of Lading must be held to have been put on board. But generally in view of the difficulty of verifying particular marks on articles of a similar nature shipped on board, the shipping Companies protect themselves by inserting a clause that the marks and numbers though shown in the Bill of Lading are unknown to them and that they do not admit that the marks or numbers shown in the Bill of Lading are

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correct. They also protect themselves against obliteration of marks. In such cases the onus is on the plaintiff to prove by evidence aliunde that articles bearing the particular marks are actually handed over to the shipping Company. (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*) MESSRS. POHUMAL BROS. *v.* THE KARACHI PORT TRUST. **18 S. L. R. 106 = 92 I. C. 206 = A. I. R. 1925 Sind 221.**

S. 3—Scope.

——S. 3 of the Bills of Lading Act is limited to the master or the person signing the bills. (*Kennedy J. C. and Rupchand Bilaram, A. J. C.*) MESSRS. POHUMAL BROS. *v.* THE KARACHI PORT TRUST.
18 S. L. R. 106 = 92 I.C. 206 = A.I.R. 1925 Sind 221.

BIRBHUM GHATWALI LAND REGULATION (BENG. REGN. XXIX OF 1814).

Alienation.

——*Bengal Ghatwali Lands Act (5 of 1859)—Bengal Regulation (4 of 1910), S. 8—Ghatwali tenures in Birbhum are not alienable.*

The inalienability of a ghatwali tenure is a settled principle of the general law and with regard to those in Birbhum, Bengal Regn. 29 of 1814 and Act No. 5 of 1859, which the Regulation of 1910 does not purport to affect, have specifically affirmed it. 9 Cal. 187 (P. C.), Ref. The regulation of 1910 far from being on its face a regulation altering the general law as recognized by the above Regulation of 1814 and Act of 1859, only brings in ghatwals as zemindars incidentally and for the sake of uniformity. Where the muchilika taken from a ghatwal provided "I will not allow any thief, badmash or absconder to live within the jurisdiction of my taluk, neither will I plot or conspire against Government nor help others in doing the same. I will not discharge, without the order of Government, such persons under me who have been engaged in doing police duties; if it be found necessary to discharge any such person, I will first send an information thereof or report his faults to the authorities and abide by such orders as will be passed by them."

Held, that the Ghatwal held under conditions which are more extensive than that of merely supporting within his zemindari the police, in respect of whom he has to pay the amount determined by the Deputy Commissioner, and which are also substantial enough to leave his inability to alienate unaffected, as if the Regulation of 1910 and its predecessors had not passed and that the Regulation of 1910 contains nothing which can be construed as or operates to the same effect as a release or discharge of the Government's right to have the inalienability of the tenure enforced unless and until it effectually puts an end to it. A. I. R. 1924 P.C. 5, Ref.

Held, further, that the maxim *cessente ratione legis, cessat et ipsa lex* or any corresponding rule would have no application to the case. (A.I.R, 1925 Pat. 346, *Reversed*). (*Viscount Sumner.*) ASHUTOSH DEO *v.* BANSIDHAR SHERAFF. **7 Pat. 744 = 55 I. A. 249 = 48 C. L. J. 64 = 32 C. W. N. 880 = 9 P. L. T. 549 = 109 I. C. 730 = 28 M. L. W. 798 = A. I. R. 1928 P. C. 177 = 55 M. L. J. 7 (P.C.).**

Ghatwali Tenure.

——*Land Tenure—Ghatwali tenure—Ghatwal can be a mourashi mokarraridar—Distinction between ghatwali within and outside Regulation pointed out.*

A person may be a mourashi mokarraridar and also a ghatwal. (1918 P. H. C. C. 305 and A.I.R. 1924 P.C. 5, Ref.) The distinction between a ghatwali within the regulation and ghatwali which is outside the regulation is that in the former case there is no tenure between the zamindar and the ghatwal who holds direct from the Government, while in the latter the tenure exists. In the former case, while the lands of the ghatwali are still deemed to be within the zemindari, the zemindar no longer pays the Government revenue for them and has, therefore, no claim to the underground rights; his only right connected with these lands is to receive the difference between the rent paid by the ghatwal and the amount of the Government revenue which was assessed on this part of the zemindari. If the Government does not claim the mineral rights there is no one to whom they can belong but the ghatwal. But in the latter case the zemindar still pays the Government revenue on these lands and if the ghatwal claims minerals he must show some transaction which grants him the minerals either expressly or by necessary implication. (*Das and Ross, JJ.*) SATYA NIRANJAN CHAKRAVARTY *v.* SUSHILA BALA DASI. **4 Pat. 799 = 90 I. C. 513 = A. I. R. 1926 Pat. 103.**

S. 5—Tenure.

——A suit by the purchaser of a tenure under S. 5 for recovery of possession is governed by 12 years period. (*Jwala Prasad and Ross, JJ.*) H. MATHEWSON *v.* SECRETARY OF STATE. **3 Pat. 673 = 84 I. C. 405 = A. I. R. 1924 Pat. 616.**

S. 5—Validity of Sale.

——Secretary of State cannot question sale for arrears of rent under S. 5. (*Jwala Prasad and Ross, JJ.*) H. MATHEWSON *v.* SECRETARY OF STATE.
3 Pat. 673 = 84 I. C. 405 = A. I. R. 1924 Pat. 616.

BIRT.

See (1) C. P. CODE, S. 60.
(2) HINDU LAW—RELIGIOUS OFFICE.
(3) T. P. ACT, S. 6.

BLINDNESS.

See HINDU LAW—SUCCESSION.

BOMBAY ABKARI ACT (V OF 1878).

Ss. 6 and 7—Public Servants.

——*Public servants (non-covenanted) of Government in Excise Department—Appointed by Commissioner—Dismissal—Provisions of S. 7 must be strictly complied with.*

The plaintiff was employed as Acting Inspector in the Excise Department on a salary of Rs. 125 per mensem. He was dismissed from the service by the Commissioner of Customs, after making a formal inquiry into certain charges of misconduct brought against him. Plaintiff filed a suit against the Secretary of State for India for wrongful dismissal, as the inquiry in respect of charges of misconduct against him was not conducted according to the regulations framed by Government for dismissal of the non-covenanted servants and therefore claimed Rs. 50,000 as damages for wrongful loss of service and injury to his reputation.

Held, that the plaintiff did not hold the appointment at the will and pleasure of the Government, that the plaintiff was appointed in the Excise Department by the Commissioner of Customs under S. 6 of Abkari Act, 1878, and not by the Government direct. *Gould v. Stuart*, (1896) A. C 575, Followed. The Legislature by statute has restricted the power of dismissal under S. 7 and that provision must be strictly complied with before an officer is dismissed. (*Kajiji, J.*) DINSHAW J. JAVERY *v.* SECRETARY OF STATE FOR INDIA
24 Bom. L. R. 210 = 67 I. C. 280 = A. I. R. 1922 Bom. 17.

BOMBAY ABKARI ACT (1878), S. 34.

S. 34—Pledge.

——*Bombay Land Revenue Code, S.* 137—*Pledger indebted to Government owing to unpaid instalments of foreign liquor license—Stock of wine already pledged—Government has priority over pledgee's rights.*

S was indebted to the Government on account of unpaid instalments of a foreign liquor license. But the stock of wines was already pledged to *P* Bank.

Held, that Government had priority over *P* Bank as pledgee. S. 137 was applicable to this case although the priority of Government as stated in the section is over any claim against any land or holder thereof. (*Wild, A. J. C.*) PEOPLES BANK OF NORTHERN INDIA *v.* MESSRS. SHAHANI BROS. **A. I. R. 1930 Sind 185.**

Ss. 43 (1) (a) and (b)—Apparatus.

——*Cr. P. Code, S.* 35 — *Offences of possessing illicit liquor and of possessing apparatus for manufacturing such liquor are distinct.*

The offence of possessing illicit liquor is not necessarily covered by the offence of possessing the apparatus for manufacturing such liquor. The two offences are quite distinct. (1890), Rat. Unrep. Cr. C. 523, Foll. (*Fawcett and Mirza, JJ.*) EMPEROR *v.* PANDU AVACHIT BHIL. **30 B. L. R. 378 = 108 I. C. 512 = 52 Bom. 277 = 29 Cr. L. J. 412 = 10 A. I. Cr. R. 114 = A. I. R. 1928 Bom. 141.**

S. 43—Punishment.

——*Cultivation of bhang—Deterrent punishment is called for as such offences are difficult for detection.*

The offences like cultivating bhang are difficult to detect and when discoverd should be dealt with in such a manner as to deter other persons from committing similar breaches of law. A fine of Rs. 25 was held to be entirely inadequate. (*Kincaid, J. C. and Barlee, A. J. C.*) EMPEROR *v.* BUDHO. **7 A. I. Cr. R. 290 = 28 Cr. L. J. 162 = 99 I. C. 594 = A. I. R. 1927 Sind 112**

——The more appropriate form of punishment for an offence under the section is imprisonment and not fine. (*Kennedy, J. C. and Tyabji, A. J. C.*) EMPEROR *v.* GULAB. **20 S. L. R 1 = 27 Cr. L. J. 300 = 92 I. C. 588 = A. I. R. 1926 Sind 176.**

S. 43 (1)—Search.

——*Cr. P. Code, S.* 103—*Panchas not witnessing every detail of search does not vitiate search if search carried on in presence of accused, provided possession of offending object can be proved beyond doubt from evidence.*

The mere fact that the Panchas are not present throughout a search under S. 43 (1) (*a*), and do not witness every detail of it is not sufficient in itself to vitiate the conviction, especially where the accused is himself present at the search, and it is open to the Court to find the fact of possession of an offending article proved, provided that on a consideration of all the evidence in the case it is satisfied that the fact has been proved beyond reasonable doubt. 4 Cr. L. J. 390, 20 Cr. L. J. 742, Dist.; 41 Cal. 350; A. I. R. 1925 All. 434 and A. I. R. 1926 All. 188, Foll. (*Mirza and Broomfield, JJ.*) DINKAR NHANU MANGAONKAR *v.* EMPEROR. **32 B. L. R. 344 = A. I. R. 1930 Bom. 169.**

S. 45 (c)—Sale.

——*Keeping for sale in forbidden bottles does not amount to selling.*

Where the accused is found in his shop to have kept for sale ordinary denatured spirit in bottles, which were not full corked quart or pint bottles,

Held, that the accused cannot be said to have violated the condition, because it is not proved that he sold ordinary denatured spirit in the forbidden bottles.

BOM. ACKNOWLEDGMENT OF DEBTS, INTEREST AND MORTGAGES REGN. (1827), Cl. 15.

Per *Fawcett, J.*—The word "sell" in condition 5 of the license cannot be properly construed as covering words such as " or keep for sale". (*Fawcett and Patkar, JJ.*) EMPEROR *v.* S. V. MARATHE. **29 Bom. L.R. 1012 = 103 I.C. 834 = 8 A.I.Cr.R. 442 = 28 Cr. L. J. 754 = A. I. R. 1927 Bom. 518.**

BOMBAY ACKNOWLEDGMENT OF DEBTS. INTEREST AND MORTGAGES REGULATION (V OF 1827)

S. 14—Interpretation.

——*It operates only in absence of contract to contrary—Applies to mortgage debt also.*

The word "debtor" in S. 14 is certainly wide enough to cover a debtor who has given security by way of mortgage. S. 14 must be read as if the words " in the absence of a contract to the contrary " preceded the operative words of the section. When a debtor tenders to a creditor really part of his debt, not the entire debt, and asks him to take that in full satisfaction of the debt it is clear law that the creditor is entitled to refuse to accept the tender, because otherwise he would virtually preclude himself from saying that he had not been paid the full amount due. The Court would construe S. 14 if possible, so as to be consistent with that part of the common law and the same rule is in fact enacted for India by S. 38, Contract Act. S. 38 only reproduces what was the old law applicable not only in England but in India prior to the enactment of the Contract Act. Leaving out of account S. 38 of the Contract Act, and S. 84 of the T.P. Act, if a debtor mortgagor tenders an insufficient sum in payment of the entire mortgage debt due from him and asks that the mortgagee shall accept that tender as being the full amount due to him under his mortgage then S. 14 will not operate to allow cessation of interest on the insufficient amount tendered. (*Fawcett, J.*) NADERSHAW SHERIARJI *v.* SHIRINBAI BAPUJI. **25 Bom. L. R. 839 = 87 I. C. 129 = A. I. R. 1924 Bom. 264.**

S. 15 (3)—Applicability.

——*Mortgagee having power to enter into possession of mortgage property but not bound to do so—Sub-S.* (3) *is applicable to such mortgages and is not limited to cases where creditor has been placed in possession and remains in possession.*

Sub-S. (3) is not limited to the case where the creditor has been placed in possession and remains in possession. The terms of S. 15 (3) are general and wide enough to cover mortgages whereby the mortgagee is not bound by the terms of the mortgage to enter into possession of the mortgage property though the mortgagee has power so to do. The mortgagee is, therefore, entitled by the institution of a civil suit to cause the mortgage property to be applied to the liquidation of his debts by sale of the property unless it could be shown that there was a special agreement or recognized usage or law to the contrary. (*Sir Lancelot Sanderson.*) NILKANTH BALWANT NATU *v.* VIDYA NARASINH BHARATHI SWAMI. **A. I. R. 1930 P.C. 188.**

Cl. 15 (3)—Sale.

——*In absence of contrary, contract property can be brought to sale.*

In absence of agreement to the contrary mortgagee can bring to sale the mortgaged property under cl. 15 (3). (*Macleod, C.J. and Shah, J.*) NILKANTH BALWANT NATU *v.* SHRI VIDYASHANKAR BHARATI AND OTHERS. **26 Bom. L. R. 455 = 80 I. C. 393 = A.I.R. 1924 Bom. 387.**

BOMBAY ADMINISTRATION OF ESTATES REGULATION (VIII OF 1827).

Taxation.

——*Bombay Pleaders Act* (17 *of* 1920), *Sch.* 3, *R.* 5 —*Succession Act* (1925), *S.* 390—*General Clauses Act* (1897), *S.* 8 (1).

Proceedings under the repealed and re-enacted Succession Certificate Act must be taxed in exactly the same way after, as before, the Act of 1925, for there is no substantial difference involved in the principle of the provisions. The words in sub-R. (*e*) (vi), of R. 5. of Sch, 3 to the Bombay Pleaders Act, *viz.*, " any other special or local Act," clearly cover Regulation 8 of 1827. Consequently R. 5 applies to all applications of appeals under any other special or local Act. (*Marten, C. J. and Baker, J.*) RAJARAJESHWARASHRAM *v.* SVARUPANANDTIRTHA. **29 Bom. L. R. 1031= 103 I. C. 637=A. I. R. 1927 Bom. 499.**

BOMBAY BHAGDARI AND NARWADARI TENURES ACT (V OF 1862).

S. 1—Separation.

——*Separation of a portion of narva land by proprietor—Recognition of the portion by Collector as separated sub-division—Such portion must be considered as a recognised sub-division.*

Where the proprietor of a recognised sub-division of a Narva separated from that land a portion for the purposes of building, and where the Collector recognised the separation of that portion for building purposes,

Held, that such separation in no way derogated from the constitution of the narva homestead, and that the separated portion must be considered as a recognised sub-division. (*Macleod, C.J. and Coyajee, J.*) BAI SAMJU *v.* LALLUBHAI TULSIBHAI. **27 Bom. L. R. 958=88 I. C. 1034= A.I.R. 1925 Bom. 476.**

S. 3—Adverse Possession.

——*Bhagdari lands are amenable to adverse possession as any other property.*

There is nothing in the Bhagdari Act to prevent any person from acquiring rights to bhagdari property by adverse possession against the previous proprietor of a bhag. 37 Bom. 380; 386 and 33 Bom. 116, Foll. 28 Bom. 399, Dist. (*Patkar, J.*) GULABBHAI *v.* BHAGVAN. **30 Bom. L. R. 980=114 I. C. 266= A. I. R. 1928 Bom. 377.**

S. 3—Lease.

——*Lease for a long period of time is void.*

A lease for 500 years is void under the Bhagdari Act. (*Shah, Ag. C. J. and Crump, J.*) CHATURBHAI LALLUBHAI *v.* MATIBHAI BAPUJI. **24 Bom. L. R.1315=77 I. C. 952= A. I. R. 1923 Bom. 146.**

S. 3—Transfer.

——*Transfer really of portion of bhag but ostensibly of whole— Transferor taking advantage of transfer for long period applying to avoid it—Subject to equities transfer is null and void.*

The transfer by the owner of a bhag ostensibly of the whole, but purporting to be of a portion of it is null and void provided where the transferor has taken the advantage of transfer for a considerable period, before he can be allowed to avoid it regard must be had to the equities of the case. (*Madgavkar and Allison, JJ.*) DAMODHER BECHHAR *v.* MOHAN JAVER. **31 B. L. R. 1422=A. I. R. 1930 Bom. 121.**

BOMBAY CITY MUNICIPAL ACT (III OF 1888).

Applicability.

——*Cr. P. Code, S.* 562 (1-*A*)—*S.* 562 (1-*A*) *does not apply to offences under the Act.*

BOM. CITY MUNICIPAL ACT (1888), S. 16.

Sub-Sec. (1-A), S. 562, is confined to cases of an offence under the Penal Code and does not apply to an offence punishable under the City of Bombay Municipal Act: A. I. R. 1926 Bom. 230, Foll. (*Fawcett and Mirza, JJ.*) MERWANJI M. MISTRY *v.* EMPEROR. **30 Bom. L. R. 375=109 I. C. 502= 52 Bom. 250=29 Cr. L. J. 566= 10 A. I. Cr. R. 286=A. I. R. 1928 Bom. 152.**

Construction.

——A construction which would facilitate the carrying out of the object of the Act ought to be adopted rather than a construction which would retard the fulfilment of the object. (*Rangnekar, J.*) MUNICIPAL CORPORATION OF BOMBAY *v.* CHARANDAS. **30 Bom. L. R. 169=108 I. C. 488= A. I. R. 1928 Bom. 104.**

Interpretation.

——*Premises do not mean contiguous buildings of one owner.*

Definition of the word "premises" meaning buildings which are contiguous to each other and owned by one private person, is not supported by any of the provisions of the Municipal Act. (*Patkar and Baker, JJ.*) AMRATLAL *v.* EMPEROR. **30 Cr. L. J. 5= 11 A. I. Cr. R. 500=30 Bom. L. R. 1422= 112 I. C. 773=A. I. R. 1928 Bom. 532.**

Private Rights.

——*Private rights cannot be interfered with beyond limited powers conferred by statute.*

The Court ought most strongly to deprecate the use of the Municipal Act for the purpose of interfering in any way with the rights of private ownership beyond those limited powers which the Corporation had obtained by statute for the necessary protection of the public and the enforcement of proper sanitation. (*Taraporewala, J.*) ALIMAHOMED SALEH MAHOMED *v.* MUNICIPAL COMMISSIONER OF BOMBAY. **27 Bom. L. R. 581=87 I. C. 771= A. I. R. 1925 Bom. 458.**

Ss. 3 (m) and 380—Interpretation.

——*Definition of " owner," in S.* 3 (m) *applies to S.* 380.

There is nothing is S. 380 which renders the definition of " owner" in S. 3 (*m*) inapplicable either to the case of the owner of a hut or shed or to the case of the owner of the land on which such hut or shed stands. In each case the definition is one that can properly be applied without there being inconsistency with the rest of the section. (*Fawcett and Mirza, JJ.*) LAXMAN PANDU *v.* EMPEROR. **30 Bom. L. R. 339= 109 I. C. 344=10 A. I. Cr. R. 176= 29 Cr. L. J. 520=A. I. R. 1928 Bom. 136.**

S. 16 (j)—Power to vote.

——*Employee in a newspaper inserting advertisements of Corporation is not disqualified to vote on that ground alone.*

The clause does not mean that no councillor who happens to be an employee in the office of a newspaper in which advertisements relating to the affairs of the Corporation are inserted can vote at a meeting of the Corporaton held to consider the question whether the fares charged by the Bombay Electric Company should or should not be increased. (*Mulla, J.*) K. F. NARIMAN *v.* MUNICIPAL CORPORATION, BOMBAY. **25 Bom. L. R. 689=83 I. C. 856=47 Bom. 809= A. I. R. 1923 Bom. 305.**

S. 33 – Revision.

———*Decision under—Revision does not lie—C. P. Code, S.* 115

A Judge acting under S. 33 is not a Court within the meaning of the C. P. Code and hence no revision lies from this decision under S. 115, C. P. Code. (*Macleod, C. J. and Crump, J.*) R. S. NAVALKAR *v.* MRS. SAROJINI NAIDU. **25 Bom. L. R. 463 = 73 I. C. 133 = A. I. R. 1923 Bom. 421.**

S. 36 (q)—Interpretation.

———"*Majority*" *means absolute majority.*

The word " majority " in S. 36 (*q*) of the Act means absolute majority having regard to the fact that the words used are "a majority of votes of the councillors present and voting on that question." (*Blackwell, J.*) J. B. PETIT *v.* MUNICIPAL CORPORATION, BOMBAY. **29 Bom. L. R. 1430 = 105 I. C. 759 = A. I. R. 1927 Bom. 622 (c).**

———*Councillor, to be disqualified must be interested in " the matter before the meeting.* "

In construing S. 36, cl. (*p*), regard must be had to the "matter" before the meeting. A Councillor having an interest in a lease of land within the meaning of Cl. (*g*) cannot be held by reason of his having that interest only to be disqualified from voting on a question relating to a loan to the Corporation contemplated by Cl. (*h*). (*Mulla, J.*) K. F. NARIMAN *v.* MUNICIPAL CORPORATION, BOMBAY. **25 Bom. L.R. 689 = 83 I. C. 856 = 47 Bom 809 = A. I. R. 1923 Bom. 305.**

———'*Interest*' *means pecuniary or material interest—Trustee of a share-holder—Medallion-holders—Editor with complimentary pass—Interest of.*

The interest contemplated by S. 36, cl. (*p*) and by S. 16, sub S. (1), cl. (*f*) of the Act, must not be too speculative and remote. It must not be a mere sentimental interest such as that which a father may have in the prosperity of his son. Where there is a pecuniary advantage, or a reasonable expectation of a pecuniary advantage, it must be regarded as an "interest" within the meaning of the section. The interest in a contract is pecuniary, it is immaterial that the amount involved is trifling. Even if the interest is not pecuniary, it must at least be a material interest. It is clear on the language of S. 36 (*p*) that a councillor, whose name stands as a share-holder on the register of the said company, and who has a beneficial interest in the shares, is disqualified from voting or taking part in discussion of any matter pertaining to the said company. It is also clear that if the shares stand, not in his name, but in the name of a nominee of his, the beneficial interest being in him, he is similarly disqualified. The shares again may stand in the name of a councillor who holds them not in his own right but as a trustee for another. Where the shares stand in the name of a person who has no beneficial interest, he cannot, it seems, vote at meetings of that company in a manner inconsistent with the interests of the beneficiaries. The reason is that he derives the position which he holds as a member of the company from the legal ownership of the shares. But if such person is also a member of the Corporation, he is entitled to vote and take part in the discussion of any matter relating to the company in which his name stands as a share-holder. He is under no obligation to vote in a manner beneficial to the interests of the *cestui que trust*, for he does not owe the membership of the Corporation having regard to the fact that he is a share-holder of that company. He commits no breach of contract if he votes in contravention of the interest of his

beneficiary. It is no part of his duty as a trustee to vote at meetings of the Corporation in matters affecting the company as the beneficiary would have him to do. If no such duty is imposed upon him by law it cannot be a case of conflict between two duties. Nor can it be a case of conflict between interest and duty. In a suit to decide the validity or otherwise of the votes of *A* and *B* at a meeting of the Bombay Corporation, held to decide the question of increase in the tramway fares, it was contended that their votes were invalid as they were the holders of a medallion from the said company. The medallion on one side bears the words "Member of Tramways Committee of the Bombay Municipality," and on the other, the words "Allowed to stand on back platform of cars when there is no room inside—Bombay Electric Supply and Tramways Co., Ltd." It was admitted that the holder of a medallion even though he had to stand when there was no room inside had to pay the usual fare like any other passenger.

Held, that it is impossible to conceive what share or interest a holder of a medallion could have in the said company. It cannot also be said on principle, that a Councillor, who happens also to be the editor of a newspaper and to whom as editor a complimentary pass is issued by the Tramway Company for correspondence purposes, has an interest in the company within the meaning of S. 36, cl. (*p*). (*Mulla, J.*) K. F. NARIMAN *v.* MUNICIPAL CORPORATION, BOMBAY. **25 Bom. L. R. 689 = 83 I C. 856 = 47 Bom. 809 = A. I. R. 1923 Bom. 305.**

Ss. 36 and 37—Vote.

———*Meeting to elect a president—Retiring president chairman of the meeting—Candidates getting equal votes—Chairman giving casting-vote by drawing lots—Vote is valid—Regulations of 28th March*, 1927 *are not* ultra vires.

On 1st April, 1927, a meeting of the Bombay Municipal Corporation was held to elect a president. The retiring president was elected chairman under the provisions of S. 36 (*g*), Bombay City Municipal Act. There were four candidates for election, but the fourth one withdrew his candidature. In the first ballot taken the three other candidates obtained votes as follows : the plaintiff, 36 ; the second defendant 31, and the third one 30. In accordance with certain regulations passed by the Corporation on 28th March, 1927, the third candidate's name was then eliminated, and a second ballot was taken. In that ballot the plaintiff and defendant 2 each obtained 49 votes. The chairman did his best to decide between the two candidates, and finding himself unable to draw any distinction between them on merits he drew lots in order to enable him to give his casting-vote impartially, and gave his casting-vote to defendant 2. Plaintiff sued to set aside the election of defendant 2,

Held, that ; (1) the legislature has not in S. 36 (*q*) of the Act in any way fettered the presiding authority as to the means by which he may make up his mind, whether by exercising his judgment, consulting a friend, spinning a coin, drawing lots, or otherwise, before intimating his preference for or choice of one candidate or another. The chairman, therefore had given a valid casting vote. The chairman did exercise his judgment in considering the respective merits of the two candidates, and by reason of their equality of merit he was entitled to assist himself in choosing between them by drawing lots. (2) S. 37 (1) of the Act does not prescribe the method of appointment or in any way fetter the decision of the members of the Corporation upon this question, and so the regulations of 28th March, 1927 are mere machinery for giving effect to the decision of the Corporation upon that question, and that the regulations are *intra vires*. (*Blackwell, J.*) J. B. PETIT *v.* MUNICIPAL CORPORATION, BOMBAY.

29 Bom. L. R. 1430 = 105 I. C. 759 = A. I. R. 1927 Bom. 622.

S. 63 (k)—Jurisdiction.

——*Building quarters for Municipal servants is for promoting public convenience—Such a matter is within the discretion of the Municipality and Court of law cannot interfere.*

The building of quarters for Municipal servants should be held to be a measure likely to promote public convenience. The matter lies within the discretion of the Municipal Commissioner and Corporation and a Court of law cannot interfere with the exercise of that discretion. (*Macleod, C. J. and Coyajee, J.*) MUNICIPAL CORPORATION OF BOMBAY *v.* RANCHODDAS VANDRAVANDAS. **27 Bom. L. R. 1130 = 90 I. C. 695 = A. I. R. 1925 Bom. 538.**

S. 63 (k)—Scheme.

——*Contemplation by Municipality for utilization of the ground-floor for shops cannot disentitle it from proceeding with the scheme.*

Where the Municipality had in contemplation the utilization of the ground floor of the premises to be built upon the area in suit as shops,

Held, that there was no sufficient ground for holding that the Municipality could not proceed with the scheme. (*Macleod, C.J. and Coyajee, J.*) MUNICIPAL CORPORATION OF BOMBAY *v.* RANCHODDAS VANDRAVANDAS.

27 Bom. L R. 1130 = 90 I. C. 695 = A. I. R. 1925 Bom. 538.

S. 69 (b)—Approval.

The approval in S. 69 (*b*) is to the "purpose" referred to in that sub-section, and not to the contract. (*Marten, C. J. and Blackwell, J.*) PANDU LAXMAN GAWAND *v.* MUNICIPAL CORPORATION OF BOMBAY.

A. I. R. 1930 Bom. 414.

Ss. 69 (b) and 92 (d)—Scope.

——A sanction given in a " particular case " within S. 92 cannot cover another subsequent contract, where there are variations in parties and terms between the first contract and the subsequent contract. (*Marten, C. J. and Blackwell, J.*) PANDU LAXMAN GAWAND *v.* MUNICIPAL CORPORATION OF BOMBAY.

A. I. R. 1930 Bom. 414.

S. 83—Dismissal.

——*Standing Committee is considered domestic tribunal with powers to dismiss or appoint servants without retaining ordinary law as to dismissal of servant by master—Safeguards to such right enunciated—As a rule no review by Civil Court is permissible nor can an appeal lie.*

Under S. 83 the Standing Committee is constituted a domestic tribunal delegating to it the right to appoint and the right to dismiss without retaining under it the ordinary law regulating the dismissal of a servant by his master. But this right is subject to certain safeguards, *viz.*, (1) that there must be evidence before the tribunal on which it can reasonably find that the ground of dismissal stated in the statute is in fact proved before it, and (2) secondly that any inquiry before it must be conducted in accordance with the principles of natural justice, and that in particular the accused must be given an opportunity of being heard in his own defence and of cross-examining the opposing witnesses and also of calling his own witnesses, and (3) thirdly, that the decision must not be based on purely capricious grounds. The matter further is not left open to be reviewed in a Court of law, nor does an appeal lie from the decision unless the servant can make out that the above safeguards have been violated : (English case law discussed.) (*Marten, C. J. and Blackwell, J.*) MANEKJI NAOROJI BALSARA *v.* MUNICIPAL COMMISSIONER OF BOMBAY.

32 Bom. L. R 463 = A. I. R. 1930 Bom. 320.

S. 91—Acquisition

——*Acquired property directly vests in Corporation and no transfer from Government is necessary—Land Acquisition Act, S.* 31, *does not apply.*

S. 91 *pro tanto* modifies the provisions in the Land Acquisition Act so as to vest the property in the Corporation on payment of compensation awarded, instead of in the Government and therefore no transfer from Government to the Corporation is needed. The provisions of S. 31 do not apply in the case of acquisitions made by virtue of the provisions of S. 91 of the Municipal Act and payment of the compensation amount by the Commissioner is enough. Where the Municipality retained the money as the price of the land which they had agreed to convey to the payee. S. 91 (2) cannot be said to be infringed. (*Setalvad, J.*) BOMBAY MUNICIPALITY *v.* DAMODAR BROS. **45 Bom. 725 = 23 Bom. L. R. 35 = 60 I. C. 571 = A. I. R. 1921 Bom. 214.**

——*No notice is necessary to eject tenants—Land Acquisition Act* (1894), *S.* 16.

On the acquisition of the lands, leases and underleases come to an end and no notice to the tenants and subtenants is necessary before they can be ejected. (*Setalvad, J.*) BOMBAY MUNICIPALITY *v.* DAMODAR BROS. **45 Bom. 725 = 23 Bom. L. R. 35 = 60 I. C. 571 = A. I. R. 1921 Bom. 214.**

S. 91—Applicability.

——*Bombay Rent* (*War Restrictions*) *Act*, (1918)—*Land Acquisition Act—Land acquired under—Rent Act does not apply—Land Acquisition Act.*

The Bombay Rent Act was not intended to apply to premises acquired under the Land Acquisition Act for public purposes. *Dodds* v. *Shepherd* (1876) 1 Ex. D. 75 Ref. (*Setalvad, J.*) BOMBAY MUNICIPALITY *v.* M. DAMODAR BROS. **45 Bom 725 = 60. I. C. 571 = 23 Bom.L. R. 35 = A. I. R. 1921 Bom. 214.**

Ss. 92 and 69.

——*Provisions requiring sanction are compulsory.*

Provisions requiring sanction of the Municipal Corporation to contracts are not merely directory but compulsory : Young & Co. Mayor, etc., of Royal Leamington Spa. (1883) 8 A.C. 517 ; 27 Bom. 618 and 27 All. 592, Foll. (*Marten, C. J. and Blackwell, J.*) PANDU LAXMAN GAWAND *v.* MUNICIPAL CORPORATION OF BOMBAY. **A. I. R. 1930 Bom. 414.**

S. 110—Debentures.

——*Negotiable Instruments Act, S.* 13—*Bombay Municipal debenture.*

The debentures issued by the Bombay Municipality are not in the ordinary form of a negotiable instrument and are not negotiable instruments either under the Negotiable Instruments Act or otherwise, in the absence of evidence of custom of the market. (*Marten, C. J. and Blackwell, J.*) MERCANTILE BANK *v.* D'SILVA.

52 Bom. 810 = 112 I. C. 824 = 30 Bom. L. R. 1225 = A. I. R. 1928 Bom. 436.

S. 147—Liability.

——*Additional Municipal tax—Tenant liable to pay such tax—Notice is not necessary—Bombay Rent* (*War Restrictions*) *Act* (*Bom. Act II of* 1918), *S.* 6.

S. 6 of the Bombay Rent (War Restrictions) Act, 1918 applies to an entirely different state of facts to that which was intended to be covered by the provisions of S. 147. Under S. 147 (1) where the rent paid by the tenant is less than the rateable value, the landlord can recover from the tenant the tax which he has to pay on the difference between the rent payable by the tenant and the rateable value fixed by the Municipality. The right to claim from the tenant, under S. 147 (1), payment of a certain portion of the Municipal taxes, which are primarily leviable under S. 146 from the lessor, has nothing to do with the question of rent payable by the tenant. (*Macleod, C.J. and Coyajee, J.*) SORABJI RUSTOMJI *v.* R. H. PATUK. **27 Bom. L. R. 1092 = 89 I. C. 859 = A. I. R. 1925 Bom. 532.**

Ss. 147 and 146—Tax.

———*Tenant sub-letting premises at rent higher than his own—Tax increased by Municipality—Tenant is liable to landlord for increased Tax levied—Landlord and Tenant.*

Plaintiff let to defendant a certain property at a certain monthly rent including all taxes and rates whatsoever. Defendant sub-let the same at a much higher rent and municipal taxes were increased on that basis. Plff. having paid them sued Deft. for the increased portion paid by him *Held*, that he was entitled to a decree. S. 147 means that the lessor from whom taxes are leviable under S. 146 has a claim against tenant if the rateable value of the premises exceeds the amount of rent payable by the tenant. Ordinarily when the lease is granted, it would be intended that the lessor should be liable to pay the taxes which would be based on the rent payable under the lease, and it is difficult to think that the parties contemplated that in case of an increase in the assessment, it should fall on the landlord and not on the tenant. (*Macleod, C. J. and Shah, J.*) DARASHAH BOMANJI DUBASH *v.* LIPTON AND CO., LTD. **24 Bom. L. R. 479 = 67 I. C. 430 = A. I. R. 1923 Bom. 70.**

S. 154 (2)—Valuation of property.

———*Deduction for tub baths etc. cannot be made.*

In respect of buildings no deduction in their rateable value should be allowed to the owner, for the cost of bath tubs and lavatories and electric lights and fans. Without these conveniences the premises would not be let. Electric fittings in a residence do not come within the term machinery. (*Macleod, C.J. and Shah, J.*) HAJI DAWOOD *v.* MUNICIPAL COMMISSIONER, CITY OF BOMBAY. **24 Bom. L. R. 476 = 67 I. C. 426 = A. I. R. 1922 Bom. 386.**

Ss. 162 and 485—Notice.

———*Notice for increased assessment—Service on rent collector on behalf of family of owner is legal.*

Under S. 162, Bombay Municipal Act, special notice on an owner of a house should be served when there is an enhancement in assessment. If the notice is served on a person who recovers rent on behalf of the family, the service may be called proper service under the Act, because such a servant is a servant of the family of the owners within the meaning of sub-Cl. (*b*) of S. 485, of the Act. (*Rangnekar, J.*) MUNICIPAL CORPORATION, BOMBAY *v.* CHARANDAS. **30 Bom. L. R. 169 = 108 I. C. 488 = A.I.R. 1928 Bom. 104 (a).**

S. 219—Revision.

———*Chief Judge of Small Cause Court, is* "persona designata" *and no revision lies against his order.*

Under S. 219, the Chief Judge of the Small Cause Court, Bombay, is a "*persona designata*" and not a Court. His order being final the High Court has no jurisdiction to entertain a revision application against his order. 21 Bom. 279; 31 Bom. 604; A. I. R. 1923 Bom. 421; A. I. R. 1923 Bom. 290, Foll. and 30 Mad. 326, Ref. (*Madgavkar and Wild, JJ.*) AHMED SULLEMAN DINATH *v.* MUNICIPAL COMMISSIONER OF BOMBAY. **32 Bom. L. R. 178 = 125 I. C. 448 = A. I. R. 1930 Bom. 231.**

S. 231—Rent farmer.

———*Rent farmer is deemed to be owner.*

A person who is a "rent farmer" in respect of certain property is deemed to be the owner thereof within the meaning of S. 231. A. I. R. 1928 Bom. 527, Foll. (*Mirza and Broomfield, JJ.*) SHFRIF DADU MIYAJI *v.* EMPEROR. **32 Bom. L. R. 332 = A. I. R. 1930 Bom. 165.**

S. 248—(amended)—Interpretation.

———*"Employed in any premises" means employed in private residence.*

The words "persons employed in any premises" in S. 248 should be construed as referring to the servants who are employed in the private residence. (*Patkar and Baker, JJ.*) AMRAT LAL *v.* EMPEROR. **30 Cr. L. J. 5 = 11 A. I. Cr. R. 500 = 30 Bom. L. R. 1422 = 112 I. C. 773 = A. I. R. 1928 Bom. 532.**

S. 248—Rent Contractor.

———*Rent contractor is liable to comply with requisition under S.* 248.

A rent contractor falls within the definition "owner" in S. 3, cl. (*m*) of the Act and as such he is the person who under S. 248 of the Act is liable to comply with the requisition of the Municipal Commissioner under S. 248. (*Patkar and Baker, JJ.*)) AZIZ GAFFOOR *v.* EMPEROR. **30 Cr. L. J. 17 = 30 Bom. L. R. 1439 = 112 I. C. 849 = A. I. R. 1928 Bom. 527.**

S. 248 (1) (c)—Rent farmer.

———*Municipality can proceed either against landlord or rent farmer.*

The proper construction of S. 248 (1) (*c*) is that the Municipality may at their option proceed either against the landlord or his lessee who under the terms of his lease is entitled to sub let the premises and receive rent from his sub-tenants. The term "owner," as defined in the Act, covers both cases. A. I. R. 1928 Bom. 527, Expl., A. I. R. 1928 Bom. 136, Ref. (*Mirza and Patkar, JJ.*) JAFFAR CASSAM MOOSA *v.* EMPEROR. **30 Bom. L. R 1442 = 112 I C. 861 = 11 A. I. Cr. R. 546 = 30 Cr. L. J. 29 = 53 Bom. 131 = A. I. R. 1928 Bom. 528.**

S. 249—Premises.

———A godown in which more than 20 persons are employed as workmen or labourers, though contiguous to a residential building of the same owner, is premises within S. 249. (*Patkar and Baker, JJ.*) AMRATLAL *v.* EMPEROR. **30 Cr. L. J. 5 = 11 A. I. Cr. R. 500 = 30 Bom. L. R. 1422 = 112 I. C. 773 = A. I. R. 1928 Bom. 532.**

S. 257 (1)—Notice.

———*Notice requiring owner to raise water to storage tank by means of hand pump can't be given under S.*257

The Commissioner can under S. 257 requisition work to bring the condition of the privy or water-closet within the previous provisions of the chapter with regard to their construction and maintenance, and nothing whatever is said throughout the chapter with regard to the water supply. The Commissioner is not entitled to give a notice under S. 257 (1) directing the landlord to maintain the water closet in good order by pumping a sufficient quantity of water into the cistern. (*Macleod, C. J. and Shah, J.*) S. MAHOMED HAJI *v.* EMPEROR. **26 Bom. L. R. 178 = 25 Cr. L. J. 968 = 81 I. C. 616 = A. I. R. 1924 Bom. 337.**

S. 296 (B)—Acquisition.

———*Municipality may acquire land outside the street.*

It is clear beyond all doubt, not only that the Municipality may acquire land for the purpose of making a street but that they may acquire, if it seems expedient, land outside the regular line of such street provided it is contiguous. In cases of this sort, each must be determined upon its own circumstances, and the circumstances consist first and foremost of the precise terms of the Act in question and, secondly the thing which is proposed to be done. (*Lord Dunedin.*) KHANDERAO VITHOBA KORE *v.* MUNICIPAL CORPORATION, BOMBAY. **22 A.L.J. 11 = 79 I.C. 948 = 19 M.L.W. 1 = 1924 M.W.N. 77 = 33 M.L.T. 462 = 28 C.W.N. 375 = 26 Bom. L. R. 193 = 51 I. A. 14 = 5 L. R. P. C. 53 = 48 Bom. 185 = 2 Pat. L. R. 108 = 39 C. L. J. 201 = A. I. R. 1924 P.C. 3 = 46 M.L.J. 169 (P. C.).**

———*Road construction—Corporation can acquire more land than necessary so as to recoup themselves for the expenses.*

The Corporation are entitled under the powers given them by Act III of 1888 to acquire more land than is necessary for the actual construction of a new road and the widening of an old road in order that by the re-sale of surplus land they may recoup themselves for the expenses of construction and widening. 47 Cal. 500 (P.C.). *Galloway* v. *Mayor and Commonalty of London* (1866) *L. R* 1 H. L. 34, Ref.

Per *Macleod, C. J.* Considering the whole of S. 296 together with Ss. 90, 91 and 92 it must be held that power has been given to the Commissioner to acquire frontages whenever it may seem expedient for the Corporation to acquire them, the only restriction on such powers being that the decision regarding the expediency must be arrived at honestly and on reasonable grounds. (*Macleod, C. J. and Fawcett, J.*) KANDERAO VITHOBA *v.* MUNICIPAL CORPORATION OF BOMBAY. **23 Bom. 361 = 63 I. C. 581 = A. I. R. 1921 Bom. 230.**

S. 349-A—Building.

———*Commissioner can allow to be erected to any height.*

The words " except with the written permission of the Commissioner " in S. 349-A of the Act form a general exception to the regulations in Ss. 349-A and 349-B and the Commissioner, if he thinks it proper, can allow building to be erected to any height. (*Scott, C. J. and Batchelor, J.*) ADVOCATE-GENERAL OF BOMBAY *v.* ISMAIL HASHIM. **61 I. C. 143 = 23 Bom. L.R. 158.**

S. 349-B—Building.

———*Maximum height of.*

The words " maximum prescribed by S. 349-A " in S. 349-B of the Act cover an alternative maximum, 70 feet or such other height as the Commissioner may authorize by written permit. (*Scott, C. J. and Batchelor, J.*) ADVOCATE-GENERAL OF BOMBAY *v.* ISMAIL HASHIM. **61 I. C. 143 = 23 Bom. L. R. 158.**

Ss. 380 and 3 (m)—Applicability.

———*Definition of "owner," in S.* 3 (m) *applies to S.* 380.

There is nothing in S. 380, which renders the definition of "owner" in S. 3 (*m*) inapplicable either to the case of the owner of a hut or shed or to the case of the owner of the land on which such hut or shed stands. In each case the definition is one that can properly be applied without there being inconsistency with the rest of the section. (*Fawcett and Mirza, JJ.*) LAKSHMAN PANDU *v.* EMPEROR. **30 Bom. L.R. 339 = 10 A.I. Cr. R. 176 = 29 Cr. L.J. 520 = 109 I.C. 344 = A. I. R. 1928 Bom. 136 (a).**

S. 402—Fruits.

———*Fruits are articles of human food.*

Fruits are articles of human food within the scope of S. 402, Cl. 2. (*Patkar and Murphy, JJ.*) BOMBAY MUNICIPALITY *v.* VENKANNA. **30 Bom. L. R. 1128 = 52 Bom. 780 = 12 A. I. Cr. R. 30 = 30 Cr. L. J. 168 = 113 I. C. 506 = A. I. R. 1928 Bom. 413.**

Ss. 402, 403 and 471—Private market.

———*Accused constructing a structure consisting of shops abutting a street—Shops let to tenants—No inter-communication between the shops—Tenants not selling the same commodity—Shops and user were held not to constitute a private market within Ss.* 402 *and* 403.

The accused with the sanction of the municipality erected a structure designed to be let as small shops abutting on a street. The shops were let to tenants. There was no inter-communication between the shops. Each tenant was independent of the other. Majority of tenants sold fruits. The shops looked like stalls or booths. The customers purchased the goods standing on the pavement of the road and had no right to enter the shops.

Held; that the structure was nothing more than a collection of shops and its user did not constitute a private market within the meaning of Ss. 402 and 403; 9 Bom. 272; 11 Bom. 106; *Mayor of Manchester* v. *Lyons*, (1882) 22 Ch. D. 287; 10 Mad. 216, Cons. (*Patkar and Murphy, JJ.*) BOMBAY MUNICIPALITY *v.* VENKANNA. **30 Bom. L.R 1128 = 52 Bom. 780 = 12 A. I. Cr. R. 30 = 30 Cr. L. J. 168 = 113 I. C. 506 = A. I. R. 1928 Bom. 413.**

S. 412-A (b)—Ghee.

———*Ghee does not come in "other milk products."*

The words " other milk products " appearing in S. 412-A (*b*) should be construed *ejusdem generis* with reference to what precedes those words and the meaning to be given to them should be less comprehensive than they would otherwise be if they stood by themselves without the words "milk, butter" preceding them. They would include such products of milk as are the direct results of milk and would be liable to speedy decay, like butter, as for example, whey, curd, or cream, and would not include ghee which is not the direct result of milk and is not liable to speedy decay. (*Mirza and Patkar, JJ.*) RATANSI MIRJI *v.* EMPEROR. **53 Bom. 627 = 120 I. C. 356 = 31 Bom. L. R. 581 = 31 Cr. L J. 103 = 1929 Cr. C 41 = A. I. R. 1929 Bom. 274.**

Ss. 471 and 394—Defence.

———*Storing oil without license—License having been wrongfully refused is no defence to charge.*

The fact that license was wrongfully refused is no answer to a charge of storing oil without license contrary to S. 394. (*Shah and Crump, JJ.*) NARANDAS KARSINDAS *v.* EMPEROR. **45 Bom. 1076 = 23 Bom. L. R. 353 = 22 Cr. L. J. 321 = 61 I. C. 49 = A. I. R. 1921 Bom. 445.**

S. 471—Sentence.

——*Offence under—Warning and discharging the accused on his removing the nuisance is not a sentence according to law.*

Warning and discharging the accused on his removing the nuisance complained of is not a form of sentence or order that the Magistrate has power to pass in the case of an offence under S. 471; the accused should either be punished or acquitted. (*Fawcett and Mirza, JJ.*) MERWANJI MISTRY *v.* EMPEROR.

52 Bom. 250 = 30 Bom. L. R. 375 = 29 Cr. L. J. 566 = 109 I. C. 502 = 10 A. I. Cr. R. 286 = A. I. R. 1928 Bom. 152.

S. 515—Interpretation.

——*Magistrate may direct Municipal Commissioner to take measures in matters other than those referred to in sections mentioned in sub-S.* (1)—*Court is not competent to consider whether Legislature should have conferred such powers on Court—Mere residence is enough qualification for complaint—Mental assurance that licence would be granted does not absolve from duty not to cause nuisance inside—General considerations about public convenience should not override main purpose of section.*

Purely as a matter of construction there is nothing in the terms of the section to justify the contention that the second part of cl. (*a*) of sub-S. (2), which relates to the direction to the Municipal Commissioner to take such measures as to such Magistrate shall seem practicable and reasonable, applies only to the exercise of the powers under any one of the sections mentioned in sub-S. (1). The scheme of the section clearly is to give the right to any person to make a complaint where there is any nuisance or where in the exercise of any of the powers conferred by the respective sections, more than the least practicable nuisance has been created. The extent of the power of the Court is indicated in sub-S. (2), and the whole of cl. (*a*) of sub-S. (2) applies both to the case of nuisance, as well as to the case where in the exercise of powers under certain sections of the Act more than the least practicable nuisance is created. The argument, that the Legislature could not have contemplated that a Court should control and regulate the discretion of the Municipal Commissioner as to matters, about which the Municipal Commissioner would possess special knowledge, is not acceptable. This section appears to have been enacted for the protection of persons residing in the city; and it provides a remedy which is open to any resident of the City. The extent of the power of the Court is to be found in the words of cl. (*a*) of sub-S. (2). That provision undoubtedly implies some limitation upon the powers of the Commissioner and so some control over his acts where a proper case for giving direction to him in connection with a nuisance is made out. It is not open to a Court to consider whether the Legislature should have conferred such powers upon the Court or not. It may be that the absence of proceedings under this section has tended to create an impression as to the meaning and scope of this section which is not accurate. It is open to the Court to consider whether the existence of stables, having regard to all the facts, is or may be dangerous to life or injurious to health, even apart from the question of malaria. Whether the complainant is a paying guest or a tenant is not material. If he resides in the house that is sufficient for the purpose of enabling him to complain of the nuisance. Where a complaint was made against certain stables as a nuisance and the owner had incurred heavy costs in putting them up, and had sound grounds for expecting grant of licence through

the support of the Municipal Commissioner, *held* that though he may have felt assured in his mind on account of the support which he had of the Municipal Commissioner, so far as the licence was concerned, he was not absolved from the obligation to see that no nuisance was caused by him to any residents in the locality. It has also to be remembered that while under the Rent Act, he may not be able to eject his present tenants, this nuisance itself, if allowed to remain, may be an effective means of enabling him to get possession. Where it was argued that the Commissioner's discretion should not be interfered with, so as to effect public convenience. *Held* that such general considerations cannot be allowed to override the main purposes of the section in dealing with a particular nuisance.

Per *Crump, J.*—The circumstance that the wrongdoer is in some sense a public benefactor has never been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed. 2 Ch. D. 692, 2 Ch. 588, Foll. (*Shah, Ag. C. J. and Crump, J.*) BOMBAY MUNICIPALITY *v.* L. R. MALLANDAINE. **48 Bom. 241 = 25 Bom. L. R. 1321 = 26 Cr. L. J. 374 = 84 I.C. 854 = A. I. R. 1924 Bom. 241.**

S. 515—Nuisance.

——*Private and public nuisances can be remedied by injunction by one or all residents affected—Court can order refusal to grant license for stables but the order does not govern all cases of license for stables.*

It is necessary for the protection of the health and comfort of the inhabitants of a big city like Bombay or Calcutta that any resident, who is affected by a nuisance in the manner mentioned in S. 3 (z) of the Municipal Act, should have a right to go to a Magistrate over the head of the Commissioner or the Corporation and ask that the Commissioner should be restrained from exercising his powers so as to affect the complainant's individual right as resident by the creation of a private nuisance. If private nuisance affects two or three houses, the inhabitants of the two or three houses might either join in a complaint before the Magistrate and ask the Magistrate to decide specifically that the particular nuisance is a private nuisance affecting the residents of houses *A, B* and *C*. With regard to a public nuisance also, any resident of Bombay can ask for an order under S. 515, and, if the Court finds a public nuisance proved the order of the Court would give relief to the public of the locality as against the nuisance, and vacating of any one or more houses would not mean an abatement of the nuisance in respect of the public. In the case of a public nuisance, no particular limits need be defined. The relief which the Court can grant, under S. 515 of the City of Bombay Municipal Act, in cases of public as well as private nuisance is, *inter alia*, abatement of the nuisance by ordering the Commissioner not to grant a license for stables, etc. But it does not follow from the Court's making an order on the Commissioner that he should not grant a license, that that order is to govern all circumstances and all cases at all times. Where the Court passes an order under S. 515 to abate a nuisance with reference to a particular house, and that house falls vacant subsequent to the passing of the order and is not to be used any more for purposes other than those connected with the stables, the order ceases to have any operation. (*Taraporewala, J.*) ALI MAHOMED SALH MAHOMED *v.* MUNICIPAL COMMISSIONER OF BOMBAY. **27 Bom. L. R. 581 = 87 I. C. 771 = A. I. R. 1925 Bom. 458.**

——*Person causing nuisance should ordinarily be treated as a necessary party to the proceeding.*

BOMBAY CITY MUNICIPAL ACT (1888), Sch. M.

The person who is said to have caused the nuisance, should be made a party to the proceedings, both in the inquiry which may be made by the Magistrate under S. 515 of the Act, and on the appeal in the High Court.

Quaere.—Is the Government Pleader entitled to be heard in a matter of this kind? (*Shah, Ag. C. J. and Crump, J.*) BOMBAY MUNICIPALITY *v.* L. R. MALLANDAINE. **48 Bom. 241 = 25 Bom. L. R. 1321 = 26 Cr. L. J. 374 = 84 I. C. 854 = A. I. R. 1924 Bom. 241.**

Sch. M, Part II—Interpretation.

———*"Oil (other sorts)" includes sweet and cocoanut oil.*

Sweet and cocoanut oil is "oil" within the meaning of the expression "oil (other sorts)" used in Sch. M, Part II of the City of Bombay Municipal Act. (*Shah and Crump, JJ.*) NARANDAS KARSANDAS *v.* EMPEROR. **45 Bom. 1076 = 23 Bom. L. R. 353 = 22 Cr. L. J. 321 = 61 I. C. 49 = A. I. R. 1921 Bom. 445**

BOMBAY CITY MUNICIPALITIES ACT (XVIII OF 1925.)

S. 46—Liability to pay Tax.

———*Seventeen tenants occupying a house—Each tenement having separate number, separate connexion with drain and separate entrance—Rule framed by City Municipality making each house liable for sullage water tax—Each tenement held liable to pay tax and every tenement was "house".*

A owned a house in Belgaum. It was entered as one house in the Municipal Property Register. It was divided into 17 separate tenements, and the tenements were given separate numbers in the city survey. All the tenements had separate drains which were connected with municipal gutter direct, and were separately occupied each by a different family. Lastly each tenement had a separate entrance leading through the gate into the highway. One of the Rules framed by the City Municipality of Belgaum under S. 46: Every house that lets out sullage water into the municipal gutters or municipal limits shall pay Rs. 5 per year.

Held, that the cess should be charged in respect of each tenement and that there was nothing inconsistent in construing the word "house" as separate tenements. *All-Church* v. *Hendon Union*, (1891) 2 Q. B. 436, *Foll.* and (1881) P. J. 41 Ref. (*Kemp, Ag. C. J.* and *Murphy, J.*) HARI GOVIND *v.* BELGAUM MUNICIPALITY. **54 Bom. 14 = 124 I. C. 239 = 31 Bom. L. R. 1249 = A. I. R. 1930 Bom. 68.**

S. 110—Revision.

———*Criminal Procedure Code, S. 435—Further revision does not lie from revisional orders passed on an order under S. 110.*

There is no right conferred by the statute on any of the aggrieved parties to make a further application for revision against the order passed by the Sessions Court in revision of the order passed by the Magistrate on appeal, against a notice of demand, under S. 110, Bombay City Municipalities Act. (*Patkar and Murphy, JJ.*) AHMEDABAD MUNICIPALITY *v.* VADILAL. **30 Bom. L. R. 1084 = 112 I. C. 585 = 29 Cr. L. J. 1081 = A. I. R. 1928 Bom. 376.**

S. 123—Construction of a building.

———*Reconstruction of a wall amounts to construction of a building.*

Any material alteration or reconstruction of any wall amounts to a construction of a building within the meaning of S. 123. 35 Bom. 236, Appr.; (1888) Rat. Un. Cr. C. 402 and 35 Bom. 412, Dist. (*Patkar and Baker, JJ.*) EMPEROR *v.* CHHOTALAL. **30 Bom. L.R. 1082 = 29 Cr. L. J. 1060 = 112 I. C. 564 = A. I. R. 1928 Bom. 389.**

BOMBAY CITY MUNICIPALITIES ACT (1925), S. 206.

Ss. 123 (7) and 118 (4)—"Continuing Contravention."

———*Failure to remove building in respect of which person was convicted under S. 123 (7) or S. 118 (4) is not "continuing contravention".*

The failure to remove a building in respect of which a person has been convicted under S. 123 (7) or S. 118 (4) is not a continuing contravention within the meaning of those sections, as the words "continuing contravention" refer to some further construction subsequent to the first conviction and not merely failure to pull down or remove a building in respect of which a conviction has been had. *Marshall* v. *Smith*, (1873) 8 C. P. 416 and *Welsh and Son* v. *West Ham Corporation*, (1900) 1 Q. B. 324 and A. I. R. 1928 Cal. 336, Foll. (*Mirza and Broomfield, JJ.*) BECHARDAS NAROTAMDAS *v.* EMPEROR. **32 Bom. L. R. 768 = A. I. R. 1930 Bom. 340.**

S. 123—Interpretation.

———*Direct method provided by the Act—Indirect and capricious method cannot be deemed to have been contemplated by Legislature.*

When the Act provides a direct, straightforward and perfectly effective method of securing the removal of a building which has been erected in contravention of the law, there is no reason why the Legislature should be supposed to have provided an alternative method which is indirect and liable to become both capricious and oppressive. (*Mirza and Broomfield, JJ.*) BECHARDAS NAROTAMDAS *v.* EMPEROR. **32 Bom. L. R. 768 = A. I. R. 1930 Bom. 340.**

S. 137—Notice.

———*Notice signed by Chief Officer—Notice referring to resolution of Standing Committee showing that Chief Officer signed it on behalf of Standing Committee—Notice held valid.*

A notice under S. 137 was issued and it was signed by the Chief Officer and not by the Chairman of the Standing Committee. In the notice there was a reference to a resolution of the Standing Committee.

Held, that, although the Chief Officer cannot sign the notice under S. 137, still the notice will not be invalid if he signs it on behalf of the Standing Committee, and the reference to the resolution of the Standing Committee makes it clear that he signed it only on behalf of the Standing Committee. The omission to write such words as "by order" or "on behalf of" is a mere defect of form which can be cured by cl. 4, S. 192. (*Mirza and Broomfield, JJ.*) EMPEROR *v.* HEPTULLA ALIBHAI. **32 Bom. L. R. 757 = A. I. R. 1930 Bom. 352.**

S. 200—Limitation.

———*Limitation for prosecution for continuing offence begins when offence is first committed.*

Limitation for a prosecution for a continuing offence runs from the time when the offence was first committed, or where the offence consists in the failure to remove a building after conviction, from the date of the conviction. 37 Cal. 545 and A. I. R. 1927 Bom. 401, Rel. on. (*Mirza and Broomfield, JJ.*) BECHARDAS NAROTAMDAS *v.* EMPEROR. **32 Bom. L. R. 768 = A. I. R. 1930 Bom. 340.**

S. 206—Procedure.

———*Procedure in S. 110 not followed—Still assessee can bring suit under S. 206.*

There is nothing to prevent a suit being filed under S. 206 even though the assessee may not have followed in its entirety the procedure for appealing to the Magistrate laid down in S. 110. (*Kemp, Ag. C.J. and Murphy, J.*) HARI GOVIND *v.* BELGAUM MUNICIPALITY. **54 Bom. 14 = 31 Bom. L. R. 1249 = A. I. R. 1930 Bom. 68.**

BOMBAY CITY POLICE ACT (IV OF 1902)

S. 23 (3)—Disobedience.

———*Accused knowing that disobedience will result in conflict with police—Disobedience of order under S. 23 (3) constitutes offence under S. 188, I. P. C.*

Where having regard to the circular issued by the accused and his admissions that he convened the meeting, there is adequate ground for drawing the inference that the accused knew that the disobedience of the order of the Commissioner of Police would at least result in a conflict with police and the disobedience of the order under S. 23 (3) in such a case fulfils all the conditions necessary to constitute an offence under Penal Code, S. 188. A. I. R. 1923 All. 606, Ref. (*Patkar and Wild, JJ*) BHALCHANDRA TRIMBAK *v.* EMPEROR. **31 Bom. L. R. 1151 = 1929 Cr. C. 545 = A.I.R. 1929 Bom. 433.**

———**S. 23 (3)** enlarges ambit of offence under Penal Code, S. 188—Disobedience of order under S. 23 (3) is punishable under S.127 and equally under Penal Code, S. 188. *Lowe* v. *Dorling and Son*, (1906) 2 K. B. 772 and *Rex* v. *Wright*, (1758) 1 Burr. 543, Ref. (*Patkar and Wild, JJ.*) BHALCHANDRA TRIMBAK *v.* EMPEROR. **31 Bom. L. R. 1151 = 1929 Cr. C. 545 = A. I R. 1929 Bom. 433.**

S. 23 (3)—Order of Commissioner—Validity of.

———Power given to Police Commissioner can be used so as to interfere with rights of subjects as little as possible—Order issued by Police Commissioner prohibiting assembly to be convened even in private place is valid if necessary for public safety. 12 Bom. 490, Rel. on.; *Duke of Bedford* v. *Dawson*, (1875) 20 Eq. 353, Ref. (*Patkar and Wild, JJ.*) BHALCHANDRA TRIMBAK *v.* EMPEROR. **31 Bom. L. R. 1151 = 1929 Cr. C. 545 = A. I. R. 1929 Bom. 433.**

S. 23 (3)—Promulgation of order.

———*Order misdescribed as notification is not vitiated—Meeting convened against order of Police Commissioner—Order held duly promulgated under Penal Code, S.* 188.

On 19th July, 1920, the Commissioner of Police issued an order, styling it a "notification" under S. 23 (3) prohibiting the President, the Secretary, the members of the Managing Committee and the members of the Girni Kamgar Union from holding, convening, or calling together any assembly of mill hands or employers of the textile mills of Bombay for one week from the date of the order. The notification was duly promulgated in the mill area. On 13th July, 1929, a circular was issued purporting to be signed by six persons including the accused inviting the strikers to attend the meeting. The meeting was held in the evening and in consequence the accused were placed before a Magistrate who convicted them under I. P. C., S. 143.

Held, that in issuing the order under S. 23 (3) the Commissioner of Police properly exercised his discretion for the preservation of the public peace and safety and that it was lawfully promulgated within the meaning of Penal Code, S. 188.

Held further, that the order in writing was not vitiated by the misdescription as a notification, *Sharp* v. *Wakefield*, (1891) A. C. 17; A. I. R. 1924 Bom. 1, Ref. (*Patkar and Wild, JJ.*) BHALCHANDRA TRIMBAK *v.* EMPEROR. **31 Bom. L. R. 1151 = 1929 Cr. C. 545 = A.I.R. 1929 Bom 433.**

S. 23 (3)—Scope.

———*Any assembly or procession includes assembly in o en space between chawls.*

The words "any assembly or processsion" in S. 23 (3) are very wide and are not restricted to an assembly or procession in a public place or street but includes an assembly convened in an open space between the chawls. (*Patkar and Wild, JJ.*) BHALCHANDRA TRIMBAK *v.* EMPEROR. **31 Bom L. R. 1151 = 1929 Cr. C. 545 = A.I R. 1929 Bom. 433.**

S. 33—Bail.

———Magistrate can grant bail to an accused who has been arrested in persuance of S. 54 (7) of the Criminal P. C. whom, he has been asked to retain in custody, by the Dt. Magistrate of a Native State.

Per *Fawcett, J.*—As S. 54 (7) does not apply to arrests in Bombay, when the accused is arrested without warrant in Bombay, he must be deemed to have been arrested under S. 33 (*g*). But even in such a case under S. 23 of the Extradition Act, the Magistrate has power to grant bail. (*Marten and Fawcett, JJ.*) SHRIRAM SHAMBHUDAYAL—*In re.* **87 I. C. 100 = 26 Bom. L. R. 984 = 26 Cr. L. J. 948 = A. I. R. 1925 Bom. 104 (105.)**

S. 40 (1)—Interpretation.

———*Penal Code, Ss.* 145 *and* 151—"*Commanded in the manner prescribed by law to disperse*"—"*Lawfully commanded to disperse*"—*Bombay City—Command by Magistrate is not enough.*

In the City of Bombay the expressions "Commanded in the manner prescribed by law to disperse" in S. 145 and "lawfully commanded to disperse" in S. 151 of the Penal Code, mean commanded as prescribed in S. 40 (1) of the City of Bombay Police Act, 1902. Under this section, the Magistrate had no power to give the order. (*Macleod, C. J., and Shah, J*) KESHAV GOVIND *v.* EMPEROR. **60 I. C. 1008 = 23 Bom. L. R. 350 = 22 Cr. L. J. 320 = A. I. R. 1921 Bom. 322.**

S. 45—Scope.

———The Act does not generally, nor does S. 45 in particular deal with criminal Courts or their special powers. The special power of the Chief Presidency Magistrate, under S. 45, is not as a criminal Court, but as a persona designata: 38 Mad. 581; 21 Bom. 279 A. I. R. 1923 Bom. 421; 36 Bom. 47 and A. I.R. 1930; Bom. 231; Ref. (*Madgavkar, Ag. C.J. and Barlee, J.*) **A.I.R. 1930 Bom. 486.**

S. 63—Evidence.

———*Terms of S.* 63 *identical with old Cr. P. Code, S.* 162—*Objection to evidence must therefore fall under S.* 63, *Bombay City Police Act.*

The terms of S. 63 have remained unaffected by amendment of S. 162, Cr.P. Code, by the Amending Act of 1923 and remain identical with the corresponding section of the old Code. Therefore, any objection to the evidence being admissible must fall within the terms of S. 63, Bombay City Police Act, 1902. (*K. Kemp, J.*) EMPEROR *v.* WAHIDUDDIN HAMIDUDDIN NO. 2. **32 Bom. L. R. 327 = A. I. R. 1930 Bom. 158.**

Ss. 70, 72 and 74—Police Custody.

———*Accused though arrested under requisition from Magistrate are in police custody.*

The mere fact, that the Chief Presidency Magistrate is furnished with certain information to enable him to make the requisition does not mark the completion of police investigation and the commencement of an inquiry or trial before him. Therefore accused are, when arrested not in Magistrate's custody but are in police custody. (*Macleod, C. J. and Coyajee, J.*) P. B. PONDE *v.* EMPEROR. **49 Bom. 623 = 27 Bom. L. R. 612 = 26 Cr. L. J. 1181 = 88 I. C. 605 = A. I. R. 1925 Bom. 387.**

Ss. 89 (3) and 134 (2)—Notice.

———*Service of order on the Presidents, Secretary and Members of Committee or Union is sufficient in view of Ss.* 89 (3) *and* 134 (2) *and Cr. P. C., S.* 69 (3)—*Knowledge of service of notice may be proved by circumstances.*

Having regard to the provisions of S. 134, Cl. (2), S. 89 (3), and Criminal P. C., S. 69, Cl. (3), the service on the Presidents, the Secretary, the Members of the Managing Committee and the Members of Union, of the order issued by Commissioner of Police and duly promulgated is not irregular. Though the order was not personally served on the accused, yet the knowledge of the order by the accused may be proved by circumstances which would clearly show or give rise to an inference that the accused had such knowledge. Rat. 30 and A. I. R. 1927 Cal. 28, Ref. (*Patkar and Wild, JJ.*) BHALCHANDRA TRIMBAK *v.* EMPEROR. **31 Bom. L. R. 1151 = 1929 Cr. C. 545 = A. I. R. 1929 Bom. 433.**

S. 112 (d)—Reputed thief.

The fact of there being two previous convictions for theft suffices to make the accused a 'reputed thief' within the meaning of cl. (*d*) of S. 112. (*Fawcett and Madgavkar, JJ.*) EMPEROR *v.* CHAND MAHABOOB. **27 Bom. L. R. 1388 = 27 Cr.L.J. 123 = 91 I. C. 699 = A.I.R. 1926 Bom. 46.**

S. 122—Charge.

———*Cr. P. C, S. 227—Magistrate can alter a charge under S.* 122 *of Act* (1902), *to one under S.* 352, *I.P.C.*

Where an accused is sent up on a police report for trial for an offence punishable under S. 122 of the Bombay City Police Act, the trying Magistrate can alter the charge and convict him of an offence under S. 352, I. P. C. 36 Cal. 869, Foll. (*Marten and Madgavkar, JJ.*) FRAMJI BOMANJI *v.* EMPEROR. **28 Bom. L. R. 291 = 93 I. C. 896 = 27 Cr. L. J. 496 = A. I. R. 1926 Bom. 255.**

S. 127—Procedure.

———*No special procedure is prescribed for offence under S.* 127.

All the offences under a special law are tried in accordance with the Cr. P. C., and there is no special procedure prescribed for an offence under S. 127 for disobedience of an order under S. 23 (3). *Institute of Patent Agents* v. *Lockwood*, (1894) A. C. 347 and *Queen* v. *Hall*, (1891) 1 Q. B. 747, Ref. (*Patkar and Wild, JJ.*) BHALCHANDRA TRIMBAK *v.* EMPEROR. **31 Bom. L. R. 1151 = 1929 Cr. C 545 = A. I. R. 1929 Bom. 433.**

BOMBAY CIVIL COURTS ACT (XIV OF 1869)

S. 25—Jurisdiction.

———*Special Jurisdiction—First Class Sub-Judge can entertain proceedings in cases arising in the whole district—Notification to that effect interpreted.*

A First Class Subordinate Judge has jurisdiction to entertain proceedings under the Act in cases arising in the whole district under the special jurisdiction conferred by S. 25 and in view of the Notification by the Bombay Government giving jurisdiction to Subordinate Courts to exercise jurisdiction in all classes of cases arising within their local limits. (*Crump and Baker, JJ.*) ACOJI VITHAL *v.* NARHARI KESHEO. **51 Bom. 809 = 29 Bom. L. R. 947 = 104 I. C. 780 = A. I. R. 1927 Bom. 460.**

S. 28-A.—Jurisdiction.

———A Sub-Judge does not cease to be a Sub-Judge because he exercises some or all of the powers of a District Judge under S. 28-A. 32 Bom. 634, Ref. (*Percival, J.C. and Barlee, A. J. C.*) HOTCHAND *v.* NAVALRAI. **121 I. C. 173 = A. I. R. 1930 Sind 91.**

BOMBAY COLLECTORS OF LAND REVENUE REGULATION (XVI OF 1827).

Ss. 19 and 20—Scope.

———S. 20 must be read with the preceding S. 19. (*Fawcett and Madgavkar, JJ.*) BODHRAO *v.* SHRINIWAS. **50 Bom. 128 = 28 Bom. L. R. 399 = 94 I. C. 649 = A. I. R. 1926 Bom. 259.**

S. 20—Alienation.

———*Alienation by Mutalik of Deshpande of lands held for remuneration is not affected by S.* 20.

An alienation by a person of lands held by him as remuneration for his services as Mutalik of the Deshpande, is not affected by S. 20, as S. 20 only covers the case of an alienation of lands by an incumbent of the hereditary office of Deshpande and not an alienation by any grantee of that incumbent. (*Fawcett and Madgavar, JJ.*) BODHRAO *v.* SHRINIWAS. **50 Bom. 128 = 28 Bom. L. R. 399 = 94 I. C. 649 = A. I. R. 1926 Bom. 259.**

BOMBAY CO-OPERATIVE SOCIETIES ACT (VII OF 1925)

S. 54.

———*Presidency Towns Insolvency Act, S. 25—Co-operative Credit Society obtaining award against debtor and choosing to recover through Collector as land revenue—Collector ordering his detention in civil prison—Debtor applying for insolvency—Insolvency Court should not refuse to grant him interim protection against detention merely because Society chose to enforce its claim through Collector.*

A Co-operative Credit Society, having obtained an award against a debtor under S. 54. Bombay Act (VII of 1925) adopted the alternative course of recovering through the Collector as arrears of land revenue under S. 59 of the Act. The Collector ordered the detention of the debtor in civil prison who as a counter-move filed a petition for insolvency under Presidency Towns Insolvency Act.

Held, that it would be an improper exercise of discretion to refuse to grant interim protection to the debtor against arrest or detention for a debt due to the Society, and to permit his being detained in prison, and at the same time to take possession of his property for rateable distribution amongst his creditors, merely and solely because the Society has chosen the alternative remedy of enforcing the claim by approaching the Collector. A. I. R. 1928 Rang. 81; A. I. R 1927 Sind 123, Dist. (*Rupchand, A. J. C.*) *In the matter of* JAN MAHOMED IBRAHIM. **A. I. R. 1930 Sind 263.**

BOMBAY COTTON DUTIES ACT (II OF 1896).

S.16—Scope.

———*Free access to godown is covered by the section.*

Where the accused had notice to remove the lock and to give the complainant free access and he declined to do so.

Held, there was wilful obstruction on the part of the accused. (*Shah, Ag. C. J. and Fawcett, J.*) MUKUNDLAL BANSILAL *v.* KING EMPEROR. **26 Bom. L. R. 721 = 25 Cr. L. J. 1281 = 82 I. C. 353 = A. I. R. 1924 Bom. 492.**

S. 25, Cl. 9—Wilful obstruction.

———*Wilful obstruction does not require any overt act.*

BOMBAY COURT OF WARDS ACT (1905), S. 4.

The Inspector of cotton excise wanted access to the godown of the accused's mill for inspection of the goods or account books. The godown was locked. The requisition of the complainant to have it opened was not complied with. It was not suggested in the case that the accused had not the necessary control over the key and that he was not in a position to open the godown if he was minded to do so.

Held, under these circumstances if the accused refused to open the godown he undoubtedly caused an obstruction to the free access to this godown to which the complainant was entitled. It does not matter as to what the object of the complainant was in asking the accused to open the godown. Obstruction is caused no less because the purpose for which it was wanted is not established as alleged by the complainant. (*Shah, Ag. C. J. and Fawcett, J.*) MUKUNDLAL BANSILAL *v.* KING-EMPEROR. **26 Bom L. R. 721 = 25 Cr. L. J 1281 = 82 I. C. 353 = A. I. R. 1924 Bom. 492.**

BOMBAY COURT OF WARDS ACT (I OF 1905).

S. 4—Procedure.

——*Section challenged—Secretary of State is necessary party.*

The sanction accorded under S. 4 of the Act by the Governor-in-Council in the Presidency proper or by the Commissioner in Sind, under his delegated powers in this Province, is accorded by them as agents of the Secretary of State for India, and, if that sanction is challenged, the Secretary of State for India is a necessary party to the suit. The sanction under S. 4 cannot be assailed in this suit for want of proper parties; the action of the Court of Wards which has purported to act in pursuance of that sanction cannot be successfully impugned. A. I. R. 1927 P. C. 176, Foll. (*Rupchand Bilaram, A.J.C.*) VISHNOMAL *v.* COURT OF WARDS, SIND. **22 S. L. R. 63 = 105 I. C. 729 = A. I. R. 1928 Sind 76.**

Ss. 7 and 4—Sanction.

——*Permission under S. 7 is necessary before granting sanction under S. 4.*

S. 3, Cl. (2) of the Act provides that from the date of the sanction under S. 4 the property of the ward shall be deemed to be under the superintendence of the Court of Wards, and if effect is to be given to this clause, permission under S. 7 of the Act should be obtained before a valid sanction is granted under S. 4. (*Rupchand Bilaram, A. J. C.*) VISHNOMAL *v.* COURT OF WARDS, SIND. **105 I.C. 729 = A. I. R. 1928 Sind 76.**

Ss. 13 (2) and S. 4—Cause of action.

——*Notification under S. 13 itself gives rise to cause of action.*

Where by virtue of S. 13, Cl. (2), Court of Wards Act, read with S. 4, the Court of Wards has assumed the superintendence and is dealing with property, there is nothing to be restrained. The notification issued under S. 13 of the Act affords a cause of action. (*Rupchand Bilaram, A.J.C.*) VISHNOMAL *v.* COURT OF WARDS, SIND. **22 S. L. R. 63 = 105 I. C. 729 = A. I. R. 1928 Sind 76.**

S. 17, Sub-S. (1)—Certificate.

The necessity of a certificate under S. 17, sub s. (1) is not qualified by any other section of the Act. (*Percival, J. C and Wild, A. J. C.*) KUNDOMAL *v.* KURAROSHAH. **123 I C 703 (1).**

S. 22—Guardian—Appointment of.

——*No guardian of person can be appointed by Court of Wards unless it has assumed superintendence.*

BOMBAY DT. MUNICIPAL ACT (1901).

If there is a Court of Wards competent to appoint a guardian of the person of a minor, then the jurisdiction of the District Court is to that extent ousted. But the competency of the Court of Wards in Bombay Presidency depends on S. 22 of the Bombay Court of Wards Act, and that section clearly gives power to the Court of Wards to appoint a guardian of the person only in those cases where the Court of Wards has assumed superintendence of the person, otherwise the Dt. Judge has jurisdiction to appoint a gaurdian of the person of the minor. (*Shah, Ag. C. J. and Crump, J.*) NAGAWA GURLINGAYA *v.* COLLECTOR OF BELGAUM. **25 Bom. L. R. 1232 = 77 I. C 702 = A. I. R. 1924 Bom. 157.**

Ss. 23 and 27—Arbitration—Reference to.

——*Court of Wards can refer dispute to arbitration if it is for minor's benefit.*

There can be no objection to the Court of Wards in the exercise of its powers under Ss. 23 and 27, referring to arbitration a dispute, affecting the rights of a minor, who is under its superintendence provided the reference to arbitration is for the benefit of the minor. 44 Cal. 829 and 51 I. C. 999, Ref. (*Aston, A. J. C.*) ISRIBAI *v.* PEVIBAI. **121 I. C. 164 = A. I. R. 1930 Sind 195.**

S. 31—Applicability.

——*S. 31 does not apply to suit against Bombay Court of Wards Officer.*

S. 31, Court of Wards Act, refers to a suit which is intended to be filed against or in respect of the person or property of a Government ward, and has nothing to do with a suit against the Officer himself for an unauthorized act done purporting to be done by him in an official capacity. (*Rupchand Bilaram, A. J. C.*) VISHNOMAL *v.* COURT OF WARDS, SIND. **22 S. L. R. 63 = 105 I.C. 729 = A. I. R. 1928 Sind 76.**

S. 31—Interpretation.

——Limitation Act, S 15 (2)—Defts. Government wards, at the date of cause of action—Their ceasing to be wards before hearing—Time is extended by two months. (*Macleod, C. J. and Shah J.*) KHANDERAO SHIDRAMAPPA DESAI *v.* CHANMALLAPPA SHIDDAPPA TORGAL. **81 I. C. 760 = 26 Bom. L. R. 364 = A. I. R. 1924 Bom. 364.**

BOMBAY DISTRICT MUNICIPAL ACT (II OF 1884).

S. 32, Cl. (h)—Rule for assessment.

——*Bombay District Municipal Act* (1901), *S. 2—Rules by Ahmedabad Municipality, R. 74—Provisions not complied with—Only assessment, at rate fixed for previous year, can be levied.*

R. 74 of the Ahmedabad Municipality distinctly indicates that the amount payable for the year is the amount fixed at the commencement of the year. Unless the increased amount is determined in the manner contemplated by R. 74 the only amount that could be said to be due by the owner for a particular year is the amount which was fixed for the next preceding year R. 74 is not *ultra vires* of the Municipality. (*Shah and Crump, JJ.*). AMBALAL SARABHAI *v.* AHMEDABAD MUNICIPALITY. **45 Bom. 611 = 23 Bom. L. R. 48 = 60 I.C. 578 = A. I. R. 1921 Bom. 236.**

——(III OF 1901).

Acquisition of Land.

——*No section of the Act empowers Municipality to acquire land by agreement with owner—Before spending*

Municipal funds they must show that the land is required for public purposes.

There is no section of the Act under which the Municipality has power to acquire any portion of a person's land by agreement with him. They certainly have no power whatever to call upon him to surrender to them a strip of land. If they require to obtain possession of any portion of the land, they will have to show that it was required for a public purpose before they can spend Municipal funds on the acquisition. (*Macleod, C. J. and Coyajee J.*) VALLI ABA *v.* NASIK MUNICIPALITY. **28 Bom. L. R. 535 = 95 I. C. 262 = A. I. R. 1926 Bom. 347.**

Applicability.

——*Electricity Act (IX of 1910), S. 14—Licensee asked to remove poles and line by licensor for latter's convenience—Licensor must bear cost of removal.*

The defendants were a Corporation who had obtained a license under the Indian Electricity Act, (Act IX of 1910) and as licensees under the Act had put up an aerial line etc,, on a certain street within the Municipal District of the Municipality of Karachi, the plaintiffs. The Municipality having arranged with the North Western Railway Co., that the latter should effect an overbridge, the aerial line and poles had to be shifted from their position. The plaintiffs' suit was for declaration that the cost of removal should be borne by defendants.

Held, that S. 14 of the Electricty Act applied and not the Bombay District Municipal Act and that plaintiffs must bear the cost of removal. (*Tyabji, A. J. C.*) MUNICIPALITY OF KARACHI *v.* KARACHI ELECTRIC SUPPLY CORPORATION. **95 I. C. 226 = A. I. R. 1926 Sind 115.**

Limit Value for Tax.

——*Octroi Schedule—Construction—Amount on 3rd column is the limit value upon which the rate is to be levied*

The Municipality claimed to charge on the plaintiff's goods, which were bales of cloth, an *ad valorem* rate on the value of the maunds according to their present value and not according to the value, appearing in the schedule of rates. The Octroi Schedule was divided into three columns ; in the first column were the names of various articles; in the 2nd column was the rate per cent. load; in the 3rd column was the weight in maunds or price. For cloth the rate per cent. load was 12 annas per every Rs. 100 or part of it. In the 3rd column the price was to be taken at Rs. 500 per cent. load of 16 maunds.

Held, it is clear that Rs. 500 was the limit value of a full cart-load of cloth of all sorts and articles made of cotton, silk, etc., upon which the rate of 12 annas per cent was to be levied; otherwise the amount of Rs. 500 in the third column has no meaning. If it is considered desirable in the interest of the Municipality that certain articles should be charged on their actual value *ad valorem*, it would certainly be necessary to add to the schedule, rules prescribing how the real value of these goods was to be ascertained. It would also be necessary to set up the proper machinery for arriving at such valuation. (*Macleod, C. J. and Crump, J.*) LAXMICHAND JAVERMAL *v.* MUNICIPALITY, NANDURBAR. **74 I. C. 205 = A. I. R. 1923 Bom. 413.**

Second meeting not Illegal.

——*Second meeting held to avoid deadlock is not illegal.*

Where the first meeting was adjourned, *sine die*, a further meeting was necessary to avoid a deadlock, and a second meeting was convened. there is nothing in the Act, as it then stood, to show that the meeting so convened is illegal in any sense. (*Shah, Ag. C. J. and Percival, J.*) BASAYA *v.* MURGAYA. **28 Bom. L. R. 1184 = 98 I. C. 454 = A. I. R. 1926 Bom. 576.**

Water Supply when not cut off.

——*Surat Municipality Bye-laws, Ch. 11, Bye-law 6—Municipality has no power to cut off the water-supply of one who tenders water charges but objects to other charges.*

Under R. 245, Surat Municipal Rules, the management of the Surat Municipality sent one consolidated bill for various rates, including water rate. The plaintiff refused to pay the consolidated bill. He tendered merely that part of the bill which related to the water charges and to one other item. The municipality declined to allow him to pick and choose in this way and they next proceeded to cut off his water-supply. Plaintiff sued for a mandatory injunction to connect water-supply and for damages.

Held, that the municipality cannot cut off the water-supply because charges other than water charges were not paid.

Held, further that the plaintiff should be given a mandatory injunction without prejudice to future circumstances. (1908) 10 Bom. L. R. 622, Ref. to.

Held, also, that the plaintiff is entitled to damages as the municipality were acting in excess of their legal powers. (*Marten, C. J. and Crump, J.*) BHUKHANDAS LALLUBHAI *v.* THAKORERAM KAPILRAM. **29 Bom. L. R. 1465 = 106 I. C. 147 = A. I. R. 1927 Bom. 640.**

S. 2—Rule for Assessment.

——*Bombay District Municipal Act (II of 1884), S. 32, Cl. (h)—Rules by Ahmedabad Municipality, R. 74—Provisions not complied with—Only assessment, at rate fixed for previous year., can be levied.*

R. 74 of the Ahmedabad Municipality distinctly indicates that the amount payable for the year is the amount fixed at the commencement of the year. Unless the increased amount is determined in the manner contemplated by R. 74 the only amount that could be said to be due by the owner for a particular year is the amount which was fixed for the next preceding year. R. 74 is not *ultra vires* of the Municipality. (*Shah and Crump, JJ.*) AMBALAL SARABHAI *v.* AHMEDABAD MUNICIPALITY. **60 I. C. 578 = 45 Bom. 611 = 23 Bom. L. R. 48 = A. I. R. 1921 Bom. 236.**

S. 3 (12).—Interpretation.

——*Words "such space" in exception refer to "every vacant space" at beginning of para., and are not connected with previous para.—Vacant space, being in fact road, is street within meaning of S. 3 (12).*

Grammatically the words "such space" in the exception refer back to the words "every vacant space" at the beginning of the paragraph, and are not connected with the previous paragraph " every vacant space " which satisfies certain requirements, is included in the definition if there is no right of way of any sort across it. Logically, too, the words cannot refer back to the first paragraph for the definition would then exclude private streets, which as Cl. (3) shows, are included in the term "street." If, therefore, a vacant space is in fact a road or footway which is accessible to the public, it is a street, and that para. 2 refers only to such vacant spaces as are neither "roads, footpaths, squares, Court-alleys or passages." A. I. R. 1923 Bom. 456; 30 Bom. 558 and A. I. R. 1922 Lah. 41, Rel. on; 6 Bom. 686; *Curtis* v. *Embery*, 7 Ex. 369 ; 25 Bom. 319 and (1913) 1 Ch. 337, Dist. (*Barlee, A J. C.*) GURMUKHSING JAVERSING *v.* KARACHI MUNICIPALITY. **122 I. C. 385 = A. I. R. 1930 Sind 30.**

——*Definition of " Building " is not exhaustive—It includes also foundation.*

The definition of the word " building " in S. 3 (7) is not intended to be an exhaustive definition. The word " include" is not equivalent to the word" mean. " The word " building " is quite wide enough to include the foundations. (*Fawcett and Patkar, JJ.*) CHOJAN LAL MOTIRAM *v.* EMPEROR. **51 Bom. 818 = 29 Bom.L.R. 733 = 8 A.I.Cr. R. 418 = 103 I. C. 602 = 28 Cr. L. J. 714 = A. I. R. 1927 Bom. 401.**

S. 3 (12)—Street defined.

——*Open space accessible to others is a street though owned privately.*

An open space owned by the accused but accessible to the occupiers of other houses in the same dehal is a street. " All other persons" would mean persons other than the occupier of such building, and would not mean all occupiers of all the buildings within that space. (*Shah, Ag. C. J. and Crump, J.*) DAYABHAI LALLUBHAI *v.* AHMEDABAD MUNICIPALITY. **25 Bom. L. R. 1218 = 25 Cr. L. J. 990 = 81 I. C. 638 = A. I. R. 1924 Bom. 116.**

Ss. 3 (12) and 96—Vacant portion.

——The accused left a vacant portion for passage between two proposed buildings the site of which belonged to him. Kurla Municipal Bye-Law No. 132 provided that the height of the building should not be more than the width of the street on which it abutted.

Held, that the vacant space left by the accused between his buildings was not a street within S. 3 (12). (*Macleod, C. J. and Shah, J.*) TYABALLI MULLA LUKMANJI *v.* EMPEROR. **26 Bom. L. R. 216 = 25 Cr. L. J. 1188 = 82 I. C. 52 = A. I. R. 1924 Bom. 365.**

S. 10 (2)—Suit against nominated members.

——*Suit against nominated members for injunction not to attend meetings of the Municipality—Government is a necessary party—Act* XIV *of* 1869, *S.* 32—*District Judge shall try the suit.*

The plaintiffs claiming to be rate-payers and voters brought a suit contending that "the Commissioner of the northern Division directly nominated the defendants Nos. 1 to 9. The Commissioner has got no authority to nominate in this way. And as the appointment of such nominated members is illegal, they have got no right to sit in the Municipality as members and to work therein. In spite of this plaintiffs strongly apprehend that they taking shelter of the unlawful orders of the Commissioner are about to sit in the Municipality as members and to work therein," and prayed that it might be declared that the nomination of the defendants Nos. 1 to 9 as members of the Nadial City Municipality made by the Government was illegal, and that they might be restrained by a permanent injunction from attending the meetings of the Municipality and from doing any work on behalf of the Municipality, and that the defendant No. 10 (*i.e.* the Municipality) might be restrained by a permanent injunction from treating them as members, their nomination being illegal.

Held, that the Secretary of State was a necessary party to the suit and the Subordinate Judge had no jurisdiction to try the suit. (*Shah and Coyajee, JJ.*) SECY. OF STATE *v.* PATEL NARSIBHAI DADABHAI. **48 Bom. 43 = 25 Bom. L. R. 992 = 77 I. C. 241 = A. I. R. 1924 Bom. 65.**

S. 14 (3)—Water rate whether tax.

——*Water rate under S.* 71 (1) (*b*) *is not a tax.*

Water rate under S. 71 (1) (*b*) is not a tax under

S. 14 but only a contractual charge. *Bab Cock* v. *Hunt*, 22 Q.B.D. 145 Foll. (*Fawcett, J. C. and Kemp, A. J. C.*) COMMITTEE OF MANAGEMENT OF HYDERABAD *v.* SETH RAMCHAND LOWNKIRAM. **87 I. C. 258 = 16 S. L. R. 98 = A. I. R. 1923 Sind 1.**

S. 15-F.

——*X elected member of District Municipality but subsequently held disqualified for such election—In the meanwhile but after his disqualification ceased, he was elected on the School Board—But he was held disqualified by Chairman of School Board—His disqualification for Municipality did not necessarily imply disqualification for District Board—Chairman was not competent to decide question of disqualification, presumption in absence of statutory authority being in favour of suits in ordinary Courts—Bombay Primary Education Act* (IV *of* 1923), *R.* 13.

A person was elected a member of a District Municipality but was subsequently held to be disqualified for election under S. 15-F, District Municipalities Act. In the meanwhile but after his disqualification for election to the District Municipality had ceased, the Municipality elected him to be a member of the School Board. When he was held to be disqualified for election to Municipality, the Chairman of the School Board refused to send him notices of the meetings of the School Board.

Held, that the decision of disqualification for the Municipality did not necessarily imply, nor was the Chairman competent to decide the question of a person's disqualification for the School Board.

Held further: that in the absence of any statutory authority to decide on the question of a person's disqualification for the School Board, the presumption would be in favour of suits in ordinary Courts of law and not of authority vested in the Chairman. (*Madgavkar and Patkar, JJ.*) KESHAV MAHADEV *v.* LAKSHMAN NARAYAN. **124 I. C. 815 = 32 Bom. L. R. 614 = A.I.R. 1930 Bom. 378.**

S. 22—No revision.

——*District Judge acting under, is not Court, so an order by him refusing to set aside election cannot be revised under C. P. Code, S.* 115.

The District Judge acting under S. 22 is not a Court, within the meaning of the word, in S. 115, but, is a *persona designata* so that the High Court has no jurisdiction to revise his order refusing to set aside an election. 21 Bom. 279, Appr. (*Macleod, C. J. and Coyajee J.*) GANGADHAR *v.* HUBLI MUNICIPALITY. **50 Bom. 357 = 94 I.C. 660 = 28 Bom.L.R. 519 = A. I. R. 1926 Bom. 344.**

Ss. 24 (2), 179, 186 (a)—Powers of Committee of Management.

——*Committee of Management under S.* 179 *can act under S.* 186 (*a*)—*S.* 24 (2) *does not apply to Chairman of such Committee—Bombay District Municipalities Act* (1901), *Ss.* 24 (2) *and* 179.

A Committee of Management appointed under S. 179 is not precluded from exercising the power of the Municipality under Section 186 (*a*). Procedure is not " power and duty," the exercise of power and duty is the goal, procedure is the road by which we reach it. The whole of the procedure laid down in the Act need not be followed in its entirety and it is not verbally incumbent upon any persons or person appointed by Government to carry on the functions of the Municipality. It is enough that the persons who are delegated to do the duties of the Municipality carry out their functions in a reasonable and equitable manner, keeping an eye, as far as possible, on the provisions of the

Municipal Act, but not being bound by them with the same strictness as the elected Municipality would be. Section 24 (2) of the Bombay District Municipal Act has no application to the Chairman of a Committee of Management appointed under Section 179. (*Kennedy, J.C. and Aston, A.J.C.*) SANTDASS MANGHARAM *v.* SECRETARY OF STATE FOR INDIA.

17 S. L. R. 46 = 80 I. C. 951 = A. I. R. 1921 Sind 125.

Ss. 36 (2) and 96—Power to revoke.

——*New buildings—Permission granted by P. W. Committee—General Body can revoke the permission.*

The order permitting to build a new house made by the Public Works Committee of the Defendant Municipality under S. 96 could be cancelled or revoked by the General Body either of its own motion or on the application of a person injuriously affected thereby, subject to the qualification that the cancellation or revocation was otherwise consistent with the provisions of S. 96. (*Macleod, C. J., Shah and Fawcett, JJ.*) MULJI TRIBHOVAN SEVAK *v.* DAKOR MUNICIPALITY.

69 I. C. 19 = 46 Bom. 663 = 24 Bom. L. R. 178 = A. I.R. 1922 Bom. 247.

S. 38—Interpretation.

——*S.* 38 *covers a case of irregularity as to the Chairman continuing as such after election of President.*

Under S. 38, the proceedings of a Municipality are not vitiated by reason of any disqualification of the Chairman in acting as the President or presiding authority of the General Meeting after the President is elected. It covers the case of an irregularity, if any, in continuing the Chairman as the Chairman of the General Meeting after the President is elected. (*Shah, Ag. C. J. and Percival, J.*) BASAYA *v.* MURGAYA.

28 Bom. L. R. 1184 = 98 I. C. 454 = A. I. R. 1926 Bom. 576.

S. 40—Applicability.

——*Water rate under S.* 71 (1) (*b*)—*S.* 40 *does not apply.*

S. 40 does not apply to water rate under S. 71 (1) (*b*), though it is a contractual charge. (*Fawcett, J. C. and Kemp, A. J. C.*) COMMITTEE OF MANAGEMENT OF HYDERABAD *v.* SETH RAMCHAND LOWNKIRAM.

87 I.C. 258 = 16 S. L. R. 98 = A. I. R. 1923 Sind 1.

Ss. 42, 54 and 58—' Misapplication '

——*Rules under S.* 58. *R.* 3—*Primary schools—Government inspection disallowed—Maintenance of schools is not 'misapplication'.*

The word ' misapplication ' in S. 42 means the wrong application of funds: the use of funds for purposes outside the scope of the Act. The use of funds for the maintenance of primary schools which the Government Inspectors are not allowed to inspect is not ' misapplication'. (*Macleod, C. J. and Crump, J.*) THE SECRETARY OF STATE FOR INDIA *v.* MANILAL HARIVALLAVDAS BHAGAT. **88 I. C. 43 = 27 Bom. L. R. 371 = A. I. R. 1925 Bom. 278.**

S. 46—Interpretation of rule for water tax.

——*Ahmedabad Municipality Rules, R.* 3—*Water tax—Construction of " shall accrue due on* 1*st April," explained.*

The construction, that the water tax and house and property tax in R. 2 are not leviable except on 1st April is untenable for two reasons; firstly, it is inconsistent with the words " in advance," secondly because, it is difficult to imagine that the municipality, merely because a house was completed on 2nd April, or the exemption of a building ceased at any date after 1st April, would forego their entire tax payable annually in advance. By 31st May, 1923, the municipal pipes were brought within 75 ft. of the mill buildings belonging to the plaintiff company, and there were two stand pipes within 500 ft. The plaintiff company filed a suit for declaration that they were not amenable to water tax contending that under R. 3, they were not liable to pay the tax for any period prior to 1st April, 1924.

Held, that the company were liable to pay the water tax from 1st June, 1923. (*Madgavkar, J.*) RAIPUR MANUFACTURING CO. *v.* AHMEDABAD MUNICIPALITY. **54 Bom. 80 = 31 Bom. L.R. 1224 = 122 I.C. 430 = A.I.R. 1930 Bom. 145.**

S. 46—Liability for tax.

——*Ahmedabad Municipality Rules, R.* 6 (b)—*Mill buildings within ambit of water pipe and stand pipe—All such buildings become liable for tax.*

In view of R. 6 (*b*), not merely the actual physical buildings within 75 ft. of a water pipe or 500 ft. of a stand-pipe as the case may be, are liable for assessment, but if any appreciable portion of a mill building falls within these radii the whole building of the mills becomes liable. (*Madgavkar, J.*) RAIPUR MANUFACTURING CO. *v.* AHMEDABAD MUNICIPALITY.

54 Bom. 80 = 31 Bom.L.R. 1224 = 122 I.C. 430 = A. I R. 1930 Bom. 145.

S. 46 (2)—Power of Court.

——*Karachi Municipality—Rules—Dismissal in accordance with rules and bye-laws—Court cannot enquire further—But if dismissal is wanton or against rules and bye-laws, servant can succeed as in ordinary suit between master and servant—C. P. Code, S.* 9.

In a suit for damages for wrongful dismissal brought by an officer or servant of the Karachi Municipality against the Municipality, once the Court is satisfied that the plaintiff's dismissal has been in accordance with the rules and bye-laws of the Municipality, it has no jurisdiction to probe any further into the question. If however the Court finds that the plaintiff's dismissal had been wanton and in utter disregard of the rules and bye-laws of the Municipality, the Municipality would forfeit the protection and privileges afforded to them by Statute and the plaintiff would be entitled to succeed as in an ordinary suit between master and servant for wrongful dismissal. *R.* v. *Darlington School Governors*, (1844) 6 Q.B. 682, Rel. on. (Case-law considered) (*Lobo, A.J.C.*) ABRAHAM REU BEN *v.* KARACHI MUNICIPALITY.

113 I. C. 387 = A. I. R. 1929 Sind 69.

S. 48 (f)—Information about children of school-going age.

——*Bye-law* 4—*Not* ultra vires *Bombay Primary Education Act* (*I of* 1918). *S.* 18 *does not curtail powers of Municipality to frame bye-laws.*

The accused was convicted for refusing to furnish information required by the Municipality under bye-law 4 framed under S. 48 (*f*) of the Bombay District Municipal Act, 1901, with regard to children of school-going age.

Held, that the bye-law is in no way inconsistent with the principal Act or with the rules made by the Local Government under Act I of 1918, (Primary Education Act). The powers of the Municipality to frame bye-laws under S. 48 of the principal Act are not in any way curtailed by the powers conferred under S. 18 of that Act. (*Shah and Kajiji, JJ.*) EMPEROR *v.* PARSHOTAM JAGJIVAN. **25 Bom. L. R. 767 = 25 Cr. L. J. 330 = 77 I. C. 186 = A. I. R. 1924 Bom. 47.**

S. 48—Refund of terminal tax.

——*Karachi Municipality — By-law framed by Municipality laying down conditions under which refund of terminal tax can be claimed is not* ultra vires.

No bye-law of the Municipality can cut down an exemption allowed by the Legislature. If the Municipality has its bye-laws framed so as to cut down that exemption such a bye-law would be invalid. But in the case of a terminal tax there is no such exemption given by the statute. It is only under the bye-law that any one is entitled to the refund of the terminal tax at all. It is competent, for the authorities which out of mere grace allow an exemption, to prescribe and lay down under what conditions it will grant that exemption. 21 Bom. 250, Ref. (*Kennedy, J. C. and Aston, A. J. C.*) KARACHI MUNICIPALITY *v.* M. R. D'SA.

80 I. C. 990 = 17 S. L.R.58 = A.I.R. 1921 Sind 175.

S. 48 (j)—Rules.

———Dhewan Municipality Rules of 31st December, 1920, are not *ultra vires* or unreasonable. (*Raymond and Kennedy, A. J. Cs.*) FIRM OF NARUMAL BHAGCHAND *v.* THE SEHWAN MUNICIPALITY.

78 I. C. 432 = 18 S. L. R. 141 = A. I. R. 1924 Sind 149.

S. 50 A—Government not a necessary party.

———*Government not a necessary party—Rights of Govt.*

Even where a specific relief of setting aside an order of the City surveying officer is prayed for Government is not a necessary party. The mere fact that Government would have some interest in all public streets vested in Municipalities, is not any reason for holding that Government is a necessary party in a suit which really concerns private persons on one hand and Municipality on the other. In spite of the vesting of public streets, the Government have some interest in the sub-soil of and in the column of air above public streets. 44 Cal. 689; 25 Mad. 635 and 38 Bom. 565, Foll. (*Shah, A. C. J. and Crump, J.*) BAI PARVATI *v.* NADIAD MUNICIPALITY. **47 Bom. 315 = 79 I. C. 197 = 25 Bom. L. R. 63 = A. I. R. 1923 Bom. 459.**

Ss. 50 (A) and 3 (17).

———S. 50-A applies to a case where any property is claimed by the Municipality or by any person as against the Municipality and then there may be an order by the Collector. Where, however, there is no such claim by or against the Municipality the section is inapplicable. (*Marten, C. J. and Patkar, J.*) RAMACHARYA *v.* RAMRAO. **32 Bom. L. R. 900.**

———*Government not a necessary party.*

In a suit against Municipality which by necessary implication seeks to set aside the order passed first by the City Survey Officer, and then by a superior officer in appeal that a certain land was "street land" Government is not a necessary party. The decision of Survey Authorities that the site in question formed part of a street as defined in the Bombay District Municipal Act, does not mean that the decision was that the Government had any interest in the land. It is really a decision relating to a dispute between private owners and the Municipality, that it was part of street land, which would mean that the Municipality would have certain powers with reference to such land which had been given under the Statutes. It is not necessary formally to sue to set aside the decision of the Survey authorities. Even if there was a prayer to set aside that decision, that would not render it necessary to join Government as a party. (*Shah, A. C. J. and Crump, J.*) NATHA LAL RAMDAS *v.* NADIAD MUNICIPALITY.

47 Bom. 306 = 79 I. C. 192 = 25 Bom. L. R. 58 = A. I. R. 1923 Bom. 456.

S. 59—Double house tax.

———*Scope—Double house tax—Municipality cannot levy a tax on the building and land on which it stands and again another tax on the land.*

In the case of every building or any plot of land yielding or capable of yielding a yearly rent of more than Rs. 10, but not more than Rs. 15 the rate of tax of the Sholapur Municipality is 12 annas per annum. Further rates are given for buildings or lands yielding higher rents but it was provided that buildings or lands, yielding or capable of yielding a yearly rent not exceeding Rs. 10 should be exempted from the payment of the rate on buildings and lands. The plaintiff sued to get a refund of Rs. 52 from the defendant Municipality, and for an injunction restraining the defendant from levying double house tax for the plaintiff's land.

Held, under the bye-laws passed by the Municipality under S. 59 of the Bombay District Municipal Act, III of 1901, the Municipality may impose a rate on buildings, or lands, or both, situated within the Municipal District and under the bye-laws, a general rate on buildings and lands on the scale defined therein is recoverable in respect of all buildings and lands which are not the property of Government. The Municipality can levy a rate either on the building or on the land on which the building stands, or it can levy one rate for both building and land. But it cannot levy a rate which would include the rate on building and land and a second rate on the land itself. If an owner of a house has to pay ground rent, he pays that ground rent out of the rent which he receives from his tenants. That rent, therefore, is made up of the ground rent and the return on the capital expended by the owner of the house. Therefore unless it has been made clear that the Municipality were levying from the owners of these various buildings on the plaintiff's land a rate calculated on that part of the hypothetical rental which represented merely the return on the cost of building, it would be presumed that the Municipality were already taxing these particular properties at their full amount. (*Macleod, C. J. and Shah, J.*) SHOLAPUR MUNICIPALITY *v.* SHANKAR SHESBHAT AMBALJI. **46 Bom. 205 = 64 I. C. 177 = 23 Bom. L. R. 1018 = A. I. R. 1922 Bom. 158.**

S. 59 (b) (ii)—Plying in Municipal limits.

———*Vehicle plying for hire within Municipal limits—Is not liable to tax.*

A vehicle kept outside the Municipal limits but plying for hire inside the Municipal area is not liable to pay wheel-tax under S. 59 clause (2) of the Act. (*Macleod C.J. and Heaton, J.*) SURAT MUNICIPALITY *v.* MANEKLAL ICHARAM AND CO.

22 Bom. L. R. 1104 = 59 I. C. 389.

Ss. 60 and 59—Terminal tax.

———*Terminal tax—Government according sanction omitting one item—Representation to Government to sanction the omitted item and the item sanctioned but formalities of law not observed in respect of this item—Imposition of tax on such item is illegal.*

The necessary formalities under S. 60 were observed, and the sanction of Government was obtained to the imposition of terminal tax on the articles mentioned in a schedule, with the exception of item 20 which included fruits. The Municipality then published a notice under S. 62 that a tax would be levied on these articles from a certain date. The Municipality, however, were dissatisfied with the order of Government disallowing the item 20, and they moved the Government to accord their sanction to the addition of item 20 to the list of articles liable to the terminal tax. This was done without observing the formalities required by S 60 and without giving any notice to the objector, or affording the many opportunity of raising any objections to the proposed addition. The suggestion of the Municipality was approved by

Government, and item 20, including fruits, was added to the list.

Held, that the levy of tax on articles included in item 20 amounted to the imposition of a new tax and therefore for this addition made the procedure provided by Chap. 7 should have been followed and the Municipality had no right to levy a new tax without complying with the formalities which are laid down by the Act. (*Marten, C. J. and Baker, J.*) KALU KARIM *v.* CITY MUNICIPALITY, BROACH. **51 Bom. 764 = 29 Bom. L. R. 1041 = 104 I. C. 666 = A. I. R. 1927 Bom. 527.**

S. 65 (1)—General Sanitary cess.

——*Levy of Sanitary cess under S.* 59 (*vii*)—*No notice under S.* 65 (1) *issued—Levy is not illegal.*

The levy of general sanitary cess by a Dt. Municipality under S. 59 (*vii*) of the Act is not illegal on the ground of want of notice under S. 65 (1). (*Macleod, C.J. and Crump, J.*) KALYAN MUNICIPALITY *v.* GOVIND KARSAN RAMJI. **89 I.C. 580 = 27 Bom. L. R. 447 = A. I. R. 1925 Bom. 419.**

S. 65 (4)—Legality of List not signed.

——*List not signed by Officer—Legality of levy is not affected.*

It may be that if the list is not signed it cannot be accepted as conclusive evidence as provided by sub-sec. (6). But the mere fact that the officer did not sign the list cannot affect the question as to whether the levy was legal or not, particularly when the amount fixed under the list is not challenged. (*Shah and Crump, JJ.*) AMBALAL SARABHAI *v.* AHMEDABAD MUNICIPALITY. **45 Bom. 611 = 23 Bom. L. R. 48 = 60 I. C. 578 = A. I. R. 1921 Bom. 236.**

S. 69—Responsibility on Municipality.

——*For grant of refund, municipality alone is responsible—Municipality cannot escape duty as laid in S.* 69 *by any act of delegation.*

S. 69 throws a duty on the municipality to grant a refund and the Municipality cannot escape that duty by any act of delegation; of course it is necessary to make enquiry in such matters and power to make enquiry can be delegated. But the municipality remains responsible for the due performance of their statutory duty. (*Percival, J. C. and Barlee, A. J. C.*) REWACHAND FATEHCHAND *v.* KARACHI MUNICIPALITY. **122 I. C. 398 = A.I. R. 1930 Sind 93.**

Ss. 71 (1) B and 46 (1) and 60.—Refund of water charges.

——*Water rate under S.* 71 (1) (b) *does not require—Publication for validity.*

Plaintiff sued committee of management of Hyderabad for the refund of charges paid for supply of water by the Municipality to a private connection to his house on the ground that the rules were not first published under S. 60.

Held, apart from the words "subject to the provisions of Ch. VII" rules under S. 46 (1) do not require preliminary publication for the purpose of inviting objections but merely require the sanction of the Governor in Council or the Commissioner under provision (*a*) to S. 46. The words "subject to the provisions of Ch. VII" cannot in themselves make the provisions of S. 60 applicable to a case of water rate under S. 71 (1)(*b*) which is outside the particular one dealt with namely, the case where Municipality proposes to impose a tax. The main provision in the rules under S. 46 (1) and S. 71 (1) is that Municipality will supply water to private persons on certain terms and this clearly makes an offer to such private persons to supply them with water on the terms laid down and the water rate revised is a contractual charge. (*Fawcett, J. C. and Kemp, A. J. C.*) COMMITTEE OF MANAGEMENT OF HYDERABAD *v.* SETH RAMCHAND ZOWNKIRAM. **87 I. C. 258 = 16 S. L. R. 98 = A. I. R. 1923 Sind 1.**

S. 77, Cl. 2—'Defraud'.

——A man is defrauded if thereby he is deprived of some right or property to which he is entitled, and any act done with the intention of wrongfully depriving him of the benefit of such right would amount to an attempt to defraud him within the meaning of S. 77(2). (*Fawcett and Madgavkar, JJ.*) EMPEROR *v.* HARJIVAN VALJI. **50 Bom. 174 = 28 Bom. L R. 115 = 27 Cr. L.J. 1335 = 98 I. C. 407 = A. I. R. 1926 Bom. 231.**

S. 80—Person importing goods whether a merchant.

——*Quaere—Is a person importing goods a merchant —If not are arrears of octroi recoverable from them.*

The merchant who takes the benefit of the clause of 31st Dec. 1920, cannot complain if he is exposed to certain restrictions and obstructions in case he does not comply with the terms thereof. (*Raymond and Kennedy, A. J. Cs.*) FIRM OF NARUMAL BHAGCHAND *v.* THE SEHWAN MUNICIPALITY. **78 I. C. 432 = 18 S. L. R. 141 = A. I. R. 1924 Sind 149.**

S. 81-A—Auction of right.

——*The right to levy fees due for temporary occupation of Municipal land cannot be auctioned.*

The Municipal Act does not give to a Municipality, either expressly or by necessary implication, power to lease or auction the right to levy the fees due for temporary occupation of Municipal land. *Dundee Harbour Trustees* v. *D. and J. Nicol*, (1915) A.C. 550, Ref.; 36 Mad. 113, Dist. (*Patkar and Baker, JJ.*) SHOLAPUR MUNICIPALITY. *v.* SHIVRAM BHAGWANT. **52 Bom. 414 = 30 Bom. L. R. 715 = 111 I. C. 620 = A. I. R. 1928 Bom. 282.**

Ss. 81-A and 70—Interpretation.

——The toll referred to in S 81-A. does not include the fee authorized under S. 70. (*Patkar and Baker, JJ.*) SHOLAPUR MUNICIPALITY *v.* SHIVRAM BHAGWANT. **52 Bom. 414 = 30 Bom. L. R. 715 = 111 I. C. 620 = A. I. R. 1928 Bom. 282.**

S. 82 (3)—Interpretation.

——*Municipality sufficiently complies with law by stating in bill next step they will have recourse to.*

As Cl. (3) does not expressly say that all the liabilities including the ultimate liability incurred in default of payment are to be specified in a bill of water-tax, on the ordinary canons of interpretation it is correct to hold that the municipality sufficiently complies with the law by stating in the bill the next step to which they would have recourse, viz., a notice of demand. *Partington* v. *Attorney-General*, (1869) 4 H.L. 100; 16 Bom. L.R 749; *The Queen* v. *Official Principal of the Consistory Court*, (1862) 31 L. J. Q. B. 106. Ref. (*Madgavkar, J.*) RAIPUR MANUFACTURING CO. *v.* AHMEDABAD MUNICIPALITY. **54 Bom. 80 = 31 Bom. L. R. 1224 = 122 I. C. 430 = A. I. R. 1930 Bom. 145.**

S. 86—Revision of Magistrate's order.

——*Magistrate's order on appeal under S.* 86 *is not revisable by High Court under Cr. P. C., S.* 435.

Under S. 86 a Magistrate hearing an appeal is merely an appellate authority having jurisdiction given by the Act to deal with the question of a civil liability. He is, therefore, not an inferior criminal Court within S. 435, and the High Court has no power to revise his order, 9 Bom. L. R. 1347, Foll, (*Kincaid, J. C. and Barlee,* *A. J. C.*) KARACHI MUNICIPALITY *v.* JAFFERJI TAYABJI. **21 S. L. R. 51 = 27 Cr. L. J. 1127 = 97 I. C. 647 = A. I. R. 1927 Sind 23.**

S. 90 (3)—Manner of Work.

———*Manner of work must be specified.*

Where the manner in which the work is to be carried out is not attempted to be specified, the conviction must be set aside. (*Shah, Ag. C. J. and Crump, J.*) DAYABHAI LALLUBHAI *v.* AHMEDABAD MUNICIPALITY. **25 Bom.L. R. 1218 = 25 Cr. L. J. 990 = 81 I. C. 638 = A. I. R. 1924 Bom. 116.**

S. 90—Old public streets.

———*Applies to old as well as new streets.*

S. 90 is not confined to new public streets alone. It applies to all public streets whether old or new. (*Raymond and Aston, A. J. Cs.*) HYDERABAD MUNICIPALITY *v.* KAZI FAKHRUDIN. **81 I. C. 134 = 17 S. L. R. 273 = 25 Cr. L. J. 646 = A. I. R. 1925 Sind 90.**

Ss. 90, 50 and 122—Purpose not authorised by statute.

———*Under S. 90 a Municipality cannot authorize the use of a strip of a street for purpose not authorized by statute—Corporation.*

A strong presumption arises that the Legislature did not intend, by the general powers it gives to the Municipality to discontinue or stop up public streets, that they should use that power for a purpose which contravenes the intention shown by S. 122. It rests upon anyone who supports the action of the Municipality to show that it had statutory authority to divert a portion of a public street for such a purpose. A Municipality has no power to authorize the use of a part of the street for the purpose of keeping logs of wood for sale. (*Fawcett and Madgavkar, JJ.*) EMPEROR *v.* VISHVANATH. **50 Bom. 674 = 28 Bom. L.R. 1033 = 27 Cr.L.J. 1160 = 97 I. C. 744 = A. I. R. 1926 Bom. 535.**

S. 91-A (3)—'Permission.'

———"Permission" in S .91-A (3) means the permission referred to in S. 96 (2) and does not include right to proceed given in S. 96 (4). (*Aston, A. J. C.*) NIHALCHAND HARUMAL *v.* KARACHI MUNICIPALITY. **120 I. C. 85 = A. I. R. 1930 Sind 20.**

S. 92 (1) (b)—What is sufficient compliance.

———*Wooden pillars supporting gallery facing street —Replacement of wooden pillars by masonry—Removal of old gallery and replacement of new one—Gallery held to have been demolished and reconstructed within the meaning of S. 92 (1) (b).*

There were wooden pillars facing a street ; on them was a continuous gallery or balcony which formed part of a room without any wall dividing the gallery from the room and with a common roof over the two. The owner of the house removed the old wooden pillars and replaced them by pillars of masonry. He also removed the old galleries and replaced them by new galleries forming part of the room next to them and without any dividing wall. The galleries were within alignment area.

Held, that the whole portion within the alignment area was demolished and reconstructed. (*Aston, A. J. C.*) NIHALCHAND HARUMAL *v.* KARACHI MUNICIPALITY. **120 I. C. 85 = A. I. R. 1930 Sind 20.**

———*Portion of building coming within alignment area—Owner of house demolishing and erecting the portion—Owner attracts provisions of S. 92.*

A portion of a building was within alignment area about two and a half feet on one side and six feet at the other end. The external masonry wall was demolished and pillars and door frames and doors were erected. Parts of the floor and parts of the side wall came within alignment area on the street side. The flooring and side wall within alignment area were renewed.

Held, that the owner of the house took down a material portion of the projecting part of his building projecting beyond the regular line of the street as determined on for the future within the meaning of S 92. (*Aston, A. J. C.*) NIHALCHAND HARUMAL *v.* KARACHI MUNICIPALITY. **120 I. C 85 = A. I. R. 1930 Sind 20.**

Ss. 96 and 97—Alteration of charge.

———*Charge of offence under S. 96—Offence not proved—Charge cannot be altered into one under S. 97 read with S. 155.*

The Magistrate, when once he had come to the conclusion that the offence of the accused of erecting huts on Municipal land without permission did not come within S. 96, could not alter the charge and treat the offence as if it was punishable under S. 97 read with S. 155. (*Macleod, C. J. and Shah, J.*) MATUBHAI M. SHAH *v.* EMPEROR. **66 I. C. 323 = 24 Bom. L. R. 105 = 46 Bom. 657 = 23 Cr. L.J. 259 = A. I. R. 1922 Bom. 97.**

Ss. 96, 92 and 91 A—Building beyond street-line.

———*Permission to build—Permission subject to keeping land within regular line of street unbuilt upon is legal—Building beyond the line is an offence.*

The Rander Municipality granted permission to the accused to build, subject to the condition that the house should be built after leaving open the land within the alignment of the road in front. The accused, in spite of the condition, built up his house within the alignment.

Held, that the accused had offended against S. 96 as amended in 1914 ; for he was bound to ask for permission to re-construct his building within the regular line of the street and the Muncipality were entitled to issue such orders as they thought proper not inconsistent with the Act and to impose in writing such conditions with reference to the location of the building in relation to any street existing or projected as they thought proper. Under S. 92 certain powers are given to a Municipality, if any of the conditions mentioned therein exist, to require the owner by written notice to remove his building to the regular line of the street or the front of the adjoining building on either side. (*Macleod, C. J. and Coyajee, J.*) EMPEROR *v.* THAKORDAS MOTIRAM. **89 I. C. 1031 = 26 Cr. L. J. 1463 = 27 Bom. L. R. 1023 = A. I. R. 1925 Bom. 505.**

S. 96 (5)—Interference by High Court.

———*High Court will interfere in revision where Municipality has acted capriciously or unreasonably—Motive of Municipality is irrelevant where it has acted in accordance with law.*

No doubt High Court will interfere where it is clearly shown that a Municipality, or other public body, has acted capriciously, arbitrarily, or unreasonably to the prejudice of the applicant, in delaying the sanction. But a Court of law is not entitled to go into the question of the exact motives with which the Municipality or an officer of the Municipality has acted, provided that the action taken is in accordance with law. The question of motive then becomes irrelevant. (*Fawcett and Patkar, JJ.*) CHHAGANLAL MOTIRAM *v.* EMPEROR. **51 Bom. 818 = 29 Bom. L. R. 733 = 103 I. C. 602 = 28 Cr. L. J. 714 = 8 A. I. Cr. R. 418 = A. I. R. 1927 Bom. 401**

Ss. 96 (5) and 161 (1)—Interpretation.

——*Foundation begun long before 6 months—Walls begun within 6 months—Prosecution in respect of walls is in time—" Makes " means not only beginning of a building but also its continuance.*

The erection of a wall of a building is a distinct stage from the stage of laying its foundations; and house-walls, as well as compound walls are covered by the word "building" in S. 96. A.I.R. 1921 Bom. 62 Ref. The words "or makes" show that is is not only the mere beginning of a building that is punishable, but its continuance even to completion without the requisite permission, or in defiance of legal orders. Therefore, where the walls of a building for which no sanction has been obtained have been built within 6 months, prosecution in respect of such walls is in time although the foundation was begun long before 6 months. (*Fawcett and Patkar, JJ.*) CHHAGANLAL MOTIRAM *v.* EMPEROR. **51 Bom. 818 = 29 Bom. L. R. 733 = 8 A. I. Cr. R. 418 = 103 I. C. 602 = 28 Cr. L. J. 714 = A. I. R. 1927 Bom. 401.**

——*" Further orders " also include demand for further particulars.*

The words " further orders " in Cl. (*b*) of S. 96 (4) do not mean only orders of the kind referred to in sub-S. (2) and they include any demand for further particulars. (*Fawcett and Patkar, JJ.*) CHHAGANLAL MOTIRAM *v.* EMPEROR. **51 Bom. 818 = 29 Bom. L. R. 733 = 8 A.I. Cr. R. 418 = 103 I. C. 602 = 28 Cr. L. J. 714 = A. I. R. 1927 Bom 401.**

——*" All information they may require " etc.—Demand for modified plan excluding land falling within alignment of a proposed street is included.*

The words " all information they may require regarding the location of the building with reference to any existing or projected streets " in S. 96 (1) (*b*) are wide enough to include a demand for a modified plan, excluding certain land which falls within the alignment of a proposed street and proposed to be built upon. (*Fawcett and Patkar, JJ.*) CHHAGANLAL MOTIRAM *v.* EMPEROR. **51 Bom 818 = 29 Bom. L. R. 733 = 8 A. I. Cr. R. 418 = 103 I. C. 602 = 28 Cr. L. J. 714 = A. I. R. 1927 Bom. 401.**

——*" Regarding the limits, etc. " refer to limits of building apart from its location.*

The words " regarding the limits of the proposed building " in sub-S. (1) of S. 96, refer to the limits of the building apart from any question as to its location with reference to any existing or projected streets. (*Fawcett and Patkar, JJ.*) CHHAGANLAL MOTIRAM *v.* EMPEROR. **51 Bom. 818 = 29 Bom. L. R. 733 = 8 A. I. Cr. R. 418 = 103 I. C. 602 = 28 Cr. L. J. 714 = A. I. R. 1927 Bom. 401.**

——*' Any building ' in the section covers one in a private Mahala.*

The words " any building " in S. 96 are wide enough to cover a building in a private Mahala. (*Fawcett, J.C. and Kemp, A. J. C.*) EMPEROR *v.* JANA FAKIR. **66 I. C. 999 = 15 Sind. L. R 171 = 23 Cr. L. J. 343 = A. I. R. 1922 Sind 22.**

S. 96—Permission amounting to refusal.

——*Grant of permission amounting practically to refusal—Municipality cannot order.*

The Municipality have no power on an application to build, to pass an order which practically amounts to a refusal. They would be entitled to direct that the proposed building should be set back to a certain distance from the street, but they would not be entitled to order that on each side of the building open spaces should be left with the object of preventing the applicant from building at all. The Municipality must acquire the land in the proper way if they wish to create open spaces. (*Macleod, C. J. and Crump, J.*) AHMED SULEMAN JIVA *v.* RANDER TOWN MUNICIPALITY. **27 Bom. L. R. 429 = 87 I. C. 948 = A. I. R. 1925 Bom. 345.**

S. 96 (5)—Privies.

——*Pen Municipality—By-laws 9—Does not apply to privies built without permission.*

So far as rule 9 is concerned, it seems clear that the communication that is required by rule 9 to be made after the completion of the privy relates to a privy with reference to which permission has been granted under rule 8, and not to a privy which has been constructed without the permission of the municipality. (*Shah, Ag. C. J. and Fawcett, J.*) KING EMPEROR *v.* EZEKIEL MOSES PENKAR. **26 Bom. L. R. 715 = 25 Cr. L. J. 1290 = 82 I. C. 362 = A. I. R. 1924 Bom. 484.**

Ss. 96 and 3 (7)—Rebuilding.

——*Erection of wall on old foundation—Permission is necessary.*

Rebuilding of a wall from its foundation is equivalent to " Building " under the Act and Committee's permission is necessary. (*Macleod, C. J. and Crump, J.*) BANDRA CITY MUNICIPALITY *v.* D. A. D'MONTE. **A. I. R. 1923 Bom. 407 = 76 I. C. 478.**

S. 96 (4)—Reconstruction.

——*Scope—Owner of house has no right to reconstruct part of his building without notifying his intention to municipality.*

S. 96 (4) only authorizes a person to proceed in such manner as is not inconsistent with any provisions of the Act including S. 91-A or of any bye-law. It is unreasonable to hold that under S. 96 (4) a person has a right to reconstruct a material part of his building within set back area unless in his notice or in the plans submitted under S. 96 (1) he has clearly given notice to the municipality of his intention to do so: 37 All. 220; 19 Bom. L. R. 65; 42 Bom. 629; A. I. R. 1922 Bom. 247; (1899) 1 Q. B. 444; Keir *v.* Corporation of Preston, 6 Ch. D. 463 and 36 Bom. 61, Dist.; 7 C. W. N. 853, Ref. (*Aston, A. J. C.*) NIHALCHAND HARUMAL *v.* KARACHI MUNICIPALITY. **120 I. C. 85 = A. I. R. 1930 Sind 20.**

S. 96—Revocation of permission.

——*Permission to build once granted cannot be revoked.*

A permission to build once granted cannot be revoked whatever the rights of the Municipality against the party concerned, in respect of the land may be. (*Shah and Crump, JJ.*) MUNICIPALITY OF SHOLAPUR *v.* ABDUL WAHAB. **45 Bom. 797 = 23 Bom. L. R. 244 = 61 I. C. 428 = A. I. R. 1921 Bom. 439.**

Ss. 96 and 113—Sixteen years old Projection.

——*Bombay Act* (6 *of* 1873), *Ss.* 33 *and* 42—*Projections overhanging public street not coming under S.* 113 (3) *cannot be removed by municipality after long delay.*

Projections overhanging public streets and built contrary to permission of Municipality but not coming under S. 113 (3) and allowed to remain for 16 years must not be removed by the municipality by executive action. Scope of Ss. 96 and 113 of Act III of 1901 and of Ss. 33 and 42 of Act VI of 1873 and case-law

discussed. (*Macleod, C. J. and Fawcett, J.*) AHMEDABAD MUNICIPALITY *v.* MANILAL CHHAGANLAL.
23 Bom. L. R. 193 = 62 I. C. 913 = A. I. R. 1921 Bom. 130.

S. 96—Stone compound wall.

———*Erection of stone compound wall at a distance is erecting building.*

Erecting a stone compound-wall at a distance from the house is erecting a building within the meaning of S. 96. (*Macleod, C. J. and Shah, J.*) EMPEROR *v.* RAMRAO ABAJI. **45 Bom. 1151 = 23 Bom. L. R. 831 = 22 Cr. L. J. 622 = 63 I. C. 158 = A. I. R. 1921 Bom. 62.**

Ss. 101 (1) and 107 (1)—Distinction.

———*Distinction is difficult to make.*

A notice served upon the Respondent by which he is called upon to repair two sinks on the first storey so as to discharge waste water into the drainage-cess-pool falls under S. 101 (1) and not under S. 107. It is difficult to lay down with precision the scope of S. 107 sub-section 1; and it may not be always easy to draw the dividing line between orders falling under S. 107 (1) and those under S. 107. (*Shah and Kajiji, JJ.*) EMPEROR *v.* RAMCHANDRA GANGADHAR.
25 Cr. L. J. 1148 = 81 I. C. 972 = A. I. R. 1924 Bom. 70.

S. 106 (3)—Discretion.

———*Municipality has discretionary power to order alteration in position of trap-door sanctioned by managing committee.*

When a person puts in, the trap-door to the privy to the south opening on to a street with the permission of the managing committee, it is open, under the discretionary powers given by S. 106 (3), to the Municipality if it considers it to be a nuisance to order him to alter it to the east: A. I. R. 1922 Bom. 247, Ref. (*Madgavkar, J.*) RAVISHANKAR CHHAGANLAL *v.* DOHAD MUNICIPALITY. **31 B. L. R. 1295 = 124 I. C. 105 = A. I. R. 1930 Bom. 43.**

Ss. 107 and 131—Service of Notice.

———*Notice cannot be served on a person as agent nor can he be prosecuted on such notice.*

Under S. 154, cl. (2) it is open to the Municipality to issue the notice addressed to the owner of the premises without specifying his name. If they do so they can prosecute the trustee who was recovering rents from tenants of the property, as the owner of the premises under S. 3, cl. (8) of the Act, but he could not be prosecuted for failure to comply with notice addressed to another person and delivered to him as the agent of that person. (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*) HARSOMAL M. GURBUXANI *v.* EMPEROR.
18 S. L. R. 90 = 88 I. C. 187 = 26 Cr. L. J. 1099 = A. I. R. 1925 Sind 262.

S. 113—Private Street.

———*House abutting private street—Height of the eaves cannot be regulated.*

S. 113 which empowers the Municipality to regulate the height of the eaves does not apply to the eaves of a house which abuts on a private street: 44 Bom. 198; A. I. R. 1921 Bom. 130 and 27 Bom. 221, Dist. (*Patkar and Baker, JJ.*) EMPEROR *v.* GAFUR DAND BOHRA. **31 Bom. L. R. 578 = 120 I. C. 360 = 1929 Cr. C. 37 = 31 Cr. L. J. 108 = A. I. R. 1929 Bom. 286.**

S. 120—Private Well.

The Municipality has no right to require a private individual owning well used by the public to keep up the well. (*Kennedy and Rupchand Bila Ram, A. J. C's.*) ALLAHDINO *v.* THE SHIKARPUR MUNICIPALITY. **17 S. L. R. 330 = 79 I. C. 409 = A. I. R. 1924 Sind 139.**

S. 122—Power to issue Notice.

———*Municipality has no power to issue under.*

S. 122 gives no power to a Municipality to issue a notice to a person alleged to have erected an encroachment to remove it. Although the Municipality may send such a notice, it is not a notice under the section. Such a notice may be sent as a matter of courtesy, preliminary to the Municipality taking action under the powers given them by the section to remove an encroachment themselves. (*Macleod, C. J. and Coyajee, J.*) ATMARAM SHAMJI *v.* EMPEROR.
24 Bom. L. R. 384 = 66 I. C. 817 = 23 Cr. L. J. 321 = A. I. R. 1923 Bom. 30.

S. 122—Thirty years old Obstruction.

———*Obstruction in a public street—Municipality cannot—Removal of, after 30 years—Limitation Act, Art. 146-A.*

The plaintiff who encroached upon a portion of a public street by building upon it, was called upon by the defendant Municipality to remove the obstruction, after 30 years under S. 122 of the Bom. Dt. Municipal Act. In the suit by the plaintiff to restrain the Municipality from removing the obstruction.

Held, that the defendant Municipality could take no action under S. 122 of the Act after 30 years to remove the encroachment, it having been barred from filing a suit for the possession of the site encroached upon, the site was no longer a part of the public street but belonged to the plaintiff. *Tayaballi* v. *Dohad Municipality* (22 Bom. L. R. 951 followed. (*Macleod, C. J. and Shah, J.*) ABAJI RAGHO MHALAS *v.* MUNICIPALITY OF JALGAON. **46 Bom. 335 = 64 I. C. 202 = 23 Bom. L. R. 1028 = A. I. R. 1922 Bom. 111.**

S. 131—Liability of Occupier.

An occupier of land cannot plead as a defence to a notice under S. 131, that none but the owner is responsible to remove a nuisance. (*Kennedy, J. C. and Aston, A. J. C.*) HAJI UMAR *v.* KING-EMPEROR.
18 S. L. R. 104 = 87 I. C. 104 = 26 Cr. L. J. 952 = A.I.R. 1925 Sind 264.

S. 142 (1)—Scope.

———*Section does not create any offence.*

No offence with reference to meat can be committed under S. 142 (1). The power which the section gives to the Municipality is the power to destroy forthwith the unwholesome article. (*Shah and Kajiji, JJ.*) EMPEROR *v.* HAJI ABOO. **45 Bom. 193 = A. I. R. 1921 Bom. 155.**

S. 145 A—Rebuilding.

———*Permission to build on old wall—Pulling down the wall and rebuilding it—Municipality cannot withhold permission.*

Plaintiff wanted to build another storey on his western wall, and got permission. According to a compromise in a dispute with his neighbours he agreed to pull down the old wall on which he was going to build and to build further back. The Municipal Committee objected to this. The plaintiff therefore began to follow out his old plan. The Municipality again objected.

Held, the objection was factious. The Municipality was not entitled to object to the rebuilding of the old wall where it stood with the addition to which it had given permission. (*Macleod, C. J. and Shah, J.*) BANDRA MUNICIPALITY *v.* JOHN C. DE. MELLO.
A. I. R. 1922 Bom. 344.

S. 151—Continuing Fine.

——*For awarding continuing fine it must be proved that accused was continuing offence after prior conviction—Unless such charge is specifically made and finding is given as to number of days of continuing breach, an order awarding continuing fine is unwarranted.*

Before a continuing fine is imposed for a continuing offence it must be alleged and proved that the accused had continued to use the premises for a specific number of days after his conviction, and that he had no license during those days. This charge must be the subject of a separate prosecution, and a separate inquiry. It is only on proof of the charge so laid that the Magistrate is called upon to exercise his discretion and to determine what would be the proper amount of fine per day which the accused should be made to pay and to give a finding as to the number of days for which such fine is to be levied. (*Rupchand and DeSouza, A. J. Cs.*) HUSSAIN HAJI UMAR *v.* EMPEROR.
23 S. L. R. 125 = 115 I. C. 307 = 30 Cr. L. J. 442 = 12 A. I. Cr. R. 260 = A. I. R. 1929 Sind 50.

S. 151 (1) (n)—Interpretation.

——*Keeping wood for selling comes properly within Cl. (n).*

Where the accused used what is described as a shop for selling wood, and kept wood there in order to sell it. *Held*, that it is a case which properly comes within the meaning of Cl. (*n*), as there would be continual storing of wood for the purpose of selling it, and not a casual storage of a few days' supply for domestic use. 29 Bom. 193. Dist. (*Shah and Fawcett, JJ.*) EMPEROR *v.* NANUBHAI. **50 Bom. 760 = 28 B. L. R. 1070 = 27 Cr. L. J. 1179 = 97 I. C. 811 = A. I. R. 1926 Bom. 546.**

S. 151 (1)—Manufacture of Oil.

——*Person manufacturing oil by machinery without license can be convicted.*

A manufactory or place of business where machinery is used for the purpose of extracting oil does involve a risk of fire. A person can, therefore, be convicted for manufacturing oil by means of machinery within the Municipal district without obtaining a license in respect thereof. (*Rupchand and De Souza, A. J. Cs.*) HUSSAIN HAJI UMAR *v.* EMPEROR.
23 S. L. R. 125 = 115 I. C. 307 = 30 Cr. L. J. 442 = 12 A. I. Cr. R. 260 = A. I. R. 1929 Sind 50.

S. 155—Daily fine.

——*For daily fine, person must be first convicted for principal breach and secondly conviction for continuing the same.*

There must first be a conviction for the breach, and again a subsequent conviction for continuing the breach from the date of the first conviction, before an order can be passed inflicting a daily fine : A. I. R. 1929 Sind 50, Foll. (*Percival and Rupchand, A. J. Cs.*) JETHANAND *v.* EMPEROR. **23 S. L. R. 222 = 115 I. C. 308 = 30 Cr. L. J. 443 = 12 A. I. Cr. R. 424 = A. I. R. 1929 Sind 52.**

——*No previous conviction—Imposing daily fine is illegal.*

A Court cannot sentence a person to pay a fine for a prospective offence, but can only impose a daily fine for failure or disobedience which is proved to have continued for a certain period after the date of the first conviction or after the date of such notice or requisition as may be required by the enactment. The last words in S. 155 show that there should be a conviction for a previous breach, and then a subsequent conviction for continuing the breach after the date of that first conviction, and therefore when there is no previous conviction under S.155, a Magistrate cannot impose a continuing daily fine. (*Fawcett and Madgavkar, JJ.*) EMPEROR *v.* DHARALA MUNGAL. **28 Bom L. R. 1040 = 98 I. C. 400 = 27 Cr. L. J. 1328 = A. I. R. 1926 Bom. 526.**

S. 155—Disobedience of notice.

——*S. 155—Lawful order —Notice under S. 122, is not a lawful order and disobedience thereto is no offence*

Where the accused was served with a notice under S. 122 of the Act to remove an *otla* which he had constructed and was convicted under S. 155 for having disobeyed a lawful order ; *held*, on application to the High Court that no notice need be issued under S. 122 and therefore disobedience of such a notice does not amount to disobedience of a lawful order within S. 155. (*Macleod, C. J. and Coyajee, J.*) ATMARAM SHAMJI *v.* EMPEROR **24 Bom. L. R. 384 = 23 Cr. L. J. 321 = 66 I. C. 817 = A I. R. 1923 Bom 30**

S. 160 (3)—Execution of order.

——*Order can be executed as decree.*

An order made or a decision given by the District Court under S. 160 (3) of the Bombay District Municipal Act (Bom. Act III of 1901) can be executed and it is not necessary to make any application to the Court to pass a decree in accordance with the order on decision before execution can be taken. (*Macleod, C. J. and Crump, J.*) BROACH CITY MUNICIPALITY *v.* GHULAM RASUL HAJI. **25 Bom. L. R. 305 = 47 Bom. 654 = 72 I. C. 636 = A. I. R. 1923 Bom. 289.**

S. 161—Extension of period.

——*Application by accused under consideration—Time is not extended.*

The delay caused by the fact that petitions made by the accused were under consideration cannot extend the period of six months allowed in such cases. (*Percival and Rupchand A. J. Cs.*) JETHANAND *v.* EMPEROR. **23 S. L. R. 222 = 115 I. C. 368 = 30 Cr. L. J. 443 = 12 A. I Cr. R. 424 = A. I. R. 1929 Sind 52.**

S.167—Applicability.

——*Suit based upon contract does not fall under S. 167—Neither one month's notice is necessary nor rule of six months' limitation applies to such suit.*

A suit based upon contract is excluded from the purview of S. 167 as it may fairly be assumed that every person knows that the law expects him to act according to his contract and not to break it and where he has not acted in accordance with his contract he has thereby knowingly disregarded the provisions of the statute and cannot expect the protection given by it. No notice is, therefore, necessary nor is the rule of six months' limitation applicable to such a suit. (Case law considered.) (*Rupchand and Wild, A. J. Cs.*) LAKANA MUNICIPALITY *v.* ATMARAM. **123 I. C. 237 = A. I. R. 1930 Sind 209.**

——*S. 167 does not apply to suit for compensation—Land legally acquired—Cause of action in such suit is not entry but refusal to pay.*

To a suit for compensation for land legally acquired, S. 167 does not apply. The cause of action in such a case is not the entry but the refusal to pay: or at any rate time runs from the date of an award of compensation under S. 160. Were it otherwise, a municipality might avoid payment by delaying the appointment of arbitrators under the Act. (*Barlee, A. J. C.*) GURMUKH SING JAVERSING *v.* KARACHI MUNICIPALITY. **122 I. C. 385 = A. I. R. 1930 Sind 30.**

———*Non-performance of Contract—Deduction from deposit — Suit for recovery of, will be governed by S. 167.*

A suit by plaintiff to recover the deduction, for non-performance of contract, made under S. 40 from the deposit made by plaintiff will come within the provision of S. 167. (*Macleod, C J. and Shah, J.*) BABAN HEMRAJ *v.* CITY MUNICIPALITY, POONA.

46 Bom 123 = 23 Bom. L. R. 881 = 64 I.C. 357 = A. I. R. 1922 Bom 380.

S. 167—Effect on Limitation Act.

———*Section excludes application of S. 15 (2) of the Limitation Act—Limitation Act, S. 15 (2).*

The section in plain and unambiguous terms prevents the claimant from commencing his suit after six months from the date of act complained of and thereby expressly excludes the time being extended, under S. 15, Cl. (2) of the Limitation Act. Public interests require that such suits should be instituted without any delay and the period of six months is sufficiently long to enable a claimant to comply with both the conditions precedent required by S. 167 of the Municipal Act. 32 Cal. 277, Foll. (*Rupchand Bilaram, A. J. C.*) REVACHAND FATEHCHAND *v.* KARACHI MUNICIPALITY.

90 I. C. 44 = A. I. R. 1925 Sind 322.

S. 167—Extension of period.

———*S. 167 is controlled by Ss. 29 and 15 (2), Lim. Act.*

Under S. 167, District Municipal Act, read with Ss. 29 and 15 (2), Lim. Act, a plaintiff is entitled to add the period allowed him for notice to the six months within which he has to sue : A.I.R. 1925 Sind 322, overruled (*Percival, J. C. and Barlee, A. J. C.*) REWACHAND FATEHCHAND *v.* KARACHI MUNICIPALITY.

122 I. C. 398 = A. I. R. 1930 Sind 93.

S. 167—No fresh cause.

———*An application for re-consideration by a party does not afford a fresh cause of action.*

The refusal by the Managing Committee and not its subsequent refusal to re-consider the matter is the act which affords the plaintiff his cause of action. Every application for re-consideration filed by a litigant does not afford him a fresh cause of complaint. To do so will be to render the provision of S. 167 of the Act nugatory and will enable a litigant to revive stale claims by repeating his requests. (*Rupchand Bilaram, A. J. C.*) REVACHAND FATEHCHAND *v.* KARACHI MUNICIPALITY. **90 I. C. 44 = A. I. R. 1925 Sind 322.**

S. 178—Default in Duty.

———*Default in performing duty 'under the Act'—Governor in Council can direct commissioner to fix a period for performance.*

It is within the scope of S. 178 for the Governor in Council to direct the commissioner to fix a period for the performance of a particular duty by the Municipality under S. 178, provided that the Municipality have made a default in performing any duty imposed on them by or under the Act. (*Shah and Fawcett, JJ.*) MANIBHAI GOVINDBHAI *v.* NADIAD CITY MUNICIPALITY.

51 Bom. 105 = 100 I. C. 98 = 28 B. L. R. 1465 = A.I.R. 1927 Bom. 55

S. 178 (1)—Interpretation.

———*By or under this Act.*

Per *Fawcett, J.*—The words " by or under this Act " are not limited to duties imposed by some provision of the Act itself. (*Shah and Fawcett, JJ.*) MANIBHAI GOVINDBHAI *v.* NADIAD CITY MUNICIPALITY.

51 Bom. 105 = 28 B. L. R. 1465 = 100 I. C. 98 = A. I. R. 1927 Bom. 55.

S. 178 (3)—Meaning of 'person'.

———*Direction need not be to a Municipal servant.*

It is not essential under sub-S. (3) of S. 178 that the person to whom the direction is given must be a Municipal servant. (*Shah and Fawcett, JJ.*) MANIBHAI GOVINDBHAI v. NADIAD CITY MUNICIPALITY.

51 Bom. 105 = 28 B. L. R. 1465 = 100 I. C. 98 = A. I. R. 1927 Bom. 55.

Ss. 178 and 58—Rules by Government.

———*Rules under S. 58 by Government of Bombay regarding public education—Municipality is under an obligation to observe.*

Under S. 178 there is an obligation on the Municipality under the Act to observe the rules framed under S. 58 by the Governor in Council for the purpose of prescribing the extent of the independent authority of the Municipality in respect of public education . A.I.R. 1925 Bom. 278, Expl. (*Shah and Fawcett, JJ.*) MANIBHAI GOVINDBHAI *v.* NADIAD CITY MUNICIPALITY.

51 Bom. 105 = 28 B. L. R. 1465 = 100 I. C. 98 = A. I. R. 1927 Bom. 55.

Ss. 179, 186 (a) and 24 (2)—Powers of Committee of Management.

———*Committee of Management under S. 179 can act under S. 186 (a)—S. 24 (2) does not apply to chairman of such Committee—Bombay District Municipalities Act* (1901), *Ss.* 24 (2) *and* 179.

A Committee of Management appointed under S. 179 is not precluded from exercising the power of the Municipality under S. 186 (*a*). Procedure is not " power and duty," the exercise of power and duty is the goal, procedure is the road by which we reach it. The whole of the procedure laid down in the Act need not be followed in its entirety and it is not verbally incumbent upon any persons or person appointed by Government to carry on the functions of the Municipality. It is enough that the persons who are delegated to do the duties of the Municipality carry out their functions in a reasonable and equitable manner, keeping an eye, as far as possible, on the provisions of the Municipal Act, but not being bound by them with the same strictness as the elected Municipality would be. S. 24 (2) of the Bombay District Municipal Act has no application to the Chairman of a Committee of Management appointed under S. 179. (*Kennedy, J.C. and Aston, A. J. C.*) SANTDAS MANGHARAM *v.* SECRETARY OF STATE FOR INDIA. **17 S. L. R. 46 = 80 I. C. 951 = A. I. R. 1921 Sind 125.**

Ss. 184 and 46 (e)—Dismissal without Notice.

———*Karachi Municipal Rules, R. 90 — Servant of Karachi Municipality cannot be dismissed without giving him opportunity of being heard.*

A statutory power to appoint, fine, reduce, suspend or dismiss officers and servants is vested in the Karachi Municipality by reason of Ss. 184 and 46 (*e*). But the provisions of R. 90 of the Rules framed by the Karachi Municipality constitute a statutory restriction or limitation to the power given by Statute to the Municipality to dismiss their servants. R. 90 is manifestly for the protection and benefit of officers and servants of the Municipality and the existence of such a rule is inconsistent with the position that a servant of the Karachi Municipality is a servant who may be dismissed at pleasure at any time without notice and without reason. 18 C..W.N. 106; 6 L. W. 284 ; *Gould* v. *Stuart*, (1896) A.C. 575 and Bom Civil Suit No. 596 of 1917 Dist. ; A. I. R. 1927 Cal. 311 ; 27 Bom. 189 ; Rel. on. (Case law referred). (*Lobo, A. J. C.*) ABRAHAM REUBEN *v.* KARACHI MUNICIPALITY. **113 I. C. 387 = A.I.R. 1929 Sind. 69.**

S. 188—Interpretation.

———*Notified Area rules—R.* 18 *Proviso.* 1.

Proviso to R. 18 contemplates that the occupier from whom the taxes are leviable should be a tenant of the property. 43 Bom. 864, Ref. (*Mirza and Patkar, JJ.*) *In re* NURMAHOMED KARAMELAHI. **31 Bom. L. R. 541 = 30 Cr. L. J. 992 = 1929 Cr. C. 46 = 119 I. C. 191 = A. I. R. 1929 Bom. 273.**

S. 188 (1)—Scope.

———*Rules under Rr.* 27 (1), (2), (3), (4) *and* (5)—*Permission cannot be refused for indefinite period—Notice given under R.* 27 (1)—*Conviction under R.* 27 (5) *is wrong.*

An order refusing permission for an indefinite period cannot be passed. There is no justification for the conviction under R. 27 (5) if the petitioner has given notice as required by sub-rule (1) and the Municipal Committee have neither passed orders under sub-rule (2) nor issued any provisional order or demand for further particulars under sub-rule (3). (*Macleod, C. J. and Shah, J.*) ARDESHWAR JIVANJI MISTRI *v.* EMPEROR. **66 I. C. 331 = 24 Bom. L. R. 102 = 23 Cr. L. J. 267 = A. I. R. 1922 Bom. 221.**

BOMBAY DISTRICT POLICE ACT (IV of 1890)—Ss. 11, 51 (e) and 53, Sch. B—What 'on duty' includes.

———*Police Officer aiding another officer, outside his jurisdiction, but in same district where he serves, is deemed to be on duty—Penal Code, S.* 353.

For the purposes of this act Police Officers of every grade are appointed to an entire district in which they have to serve and are to be deemed to be on duty in all parts of that district. Although a Police Officer may be outside the area of his jurisdiction, he is bound within the limits of the district for which he is appointed to aid another Police Officer when called on by him to do so or to keep order as required under Ss. 51 (*e*) and 53. Therefore, any person assaulting a Police Officer while he is engaged in discharging the duty under Ss. 51 (*e*) and 53 is guilty of an offence under S. 353, Penal Code. 40 All. 28 Dist. (*Kincaid, J.C. and Aston, A.J.C.*) KHAIRO *v.* EMPEROR. **88 I. C. 15 = 18 S. L. R. 221 = 26 Cr. L. J. 1071 = A. I. R. 1925 Sind 280.**

Ss. 25, 25-A and 79—Error in notification.

———*Errors in notification are immaterial if provisions are substantially followed.*

Where the provisions of the Act are substantially complied with, any errors in the notification will not invalidate the proceedings. (*Viscount Sumner*) BHAGCHAND *v.* SECRETARY OF STATE. **104 I. C. 257 = 51 Bom. 725 = 54 I. A. 338 = 25 A. L. J. 641 = 29 Bom. L. R. 1227 = 46 C. L. J. 76 = 1927 M. W. N. 561 = 1 L. C. 291 = 32 C. W. N. 61 = 26 M. L. W. 809 = A. I. R. 1927 P. C. 176 = 53 M. L. J. 81. (P.C.).**

Ss. 25, 25-A and 26—Legality of alteration in notification.

———*Notification altering previous notification not legal.*

The Government have no power and under the sections to call upon A to pay for B as an agent of B. Where plaintiffs were regarded as agents, but the effect of the notification in law was clearly to impose a new tax on the plaintiffs.

Held : so long as in substance it is a tax or rate on another class of persons living within the area concerned it is within the legal authority of the Government. An obligatory provision in the statute cannot be allowed to be ignored without adequate grounds. Where the tax or rate may be legal its recovery by the Collector cannot be illegal. At least where it is partially legal for the Collector to collect, for the rest the direct reference to the Collector is in the nature of an irregularity, which cannot affect the legality of the tax. The express provision as to finality would apparently exclude the application of S. 21 of the General Clauses Act. It is difficult to reconcile this provision as to finality with the idea of the Collector being able to vary it from time to time. S. 25-A does not provide for any enquiry as to orders under S. 25-A (1) (*b*). The words "after such inquiry as he deems necessary" are to be found in sub. S. (1), Cl. (a). and do not govern Cl. (*b*). The omission to hold an inquiry which was only departmentally arranged, is not sufficient to vitiate the directions given by him under S. 25-A (1) (*b*). The provisions of S. 79 of the District Police Act would condone such an irregularity in procedure. With the previous sanction of the Commissioner and subject again to revision by him the District Magistrate may pass a fresh order. *Per Kemp, J.*—In effect he thus obtains the revision of the reviewing authority. The scheme of the section is to make the Commissioner and not the Court the reviewing authority. The finality provided for an order under S. 25-A, Cl. (4) of Bombay Act, IV of 1890 means to give a final effect to the ultimate order that the District Magistrate with the previous assent of the Commissioner, may, subject to revision by the Commissioner or in accordance with any such revision, pass. Cl. (4) is not intended to exclude the powers which by S. 21 of the Bombay Act, I of 1904 are included in a power to issue an order. S. 25-A does not require the rate for compensation to be assessed on property although the word "rate" would seem to imply the ownership of property. S. 25-A is not intended to permit the Court to enquire into the question of who were the persons really responsible for doing the objectionable acts. (*Shah, Ag. C.J. and Kemp, J.*) BHAGCHAND DAGADUSHA *v.* SECRETARY OF STATE FOR INDIA. **48 Bom. 87 = 26 Bom. L. R. 1 = 90 I. C. 13 = A. I. R. 1924 Bom. 1.**

Ss. 25 and 25-A—Recovery of tax.

———*Actual complicity of persons to be taxed is immaterial.*

The Act does not require proof of the active complicity of a section of the inhabitants before recovery is ordered to be made from it. (*Viscount Sumner*). BHAGCHAND *v.* SECRETARY OF STATE. **51 Bom 725 = 54 I. A. 338 = 25 A.L.J. 641 = 29 B. L. R. 1227 = 46 C. L. J. 76 = 1927 M. W.N. 561 = 1 L.C 291 = 104 I.C. 257 = 32 C. W. N. 61 = 26 M. L. W. 809 = A.I.R. 1927 P. C. 176 = 53 M. L. J. 81 (P.C.).**

Ss. 25-A (1) (a) and (1)(b) Consultation with superiors.

———*Action under S.* 25 *A* (1) (*b*) *is not judicial—District Magistrate may act with consultation with superior officers—Taxing is not restricted to one occasion only.*

The Magistrate's action under S. 25-A (1) (*b*) is not a judicial proceeding, and there is nothing in the Act which requires that his action in this matter should be taken wholly on his own initiative or without instructions or recommendations from his superiors. Nothing prevents the Commissioner's sanction from being given from time to time or after consultation, nor is there anything about it which confines it to starting the Magistrate on a course of action, which he is thereafter to pursue independently and alone. Furthermore, there is nothing in S. 25-A (1) (*a*) or 25-A (1)(*b*) to restrict the exercise of this taxing function to one occasion and one only. The powers which they give are not spent by a single exercise. The finality referred to in S. 25-A (4) relates exclusively to the Commissioner's function of review and the directions of the District Magistrate are not capable of being challenged otherwise than is thereby provided. (*Viscount Sumner.*) BHAGCHAND *v.* SECRETARY OF STATE. **51 Bom. 725 = 54 I. A. 338 = 25 A. L. J. 641 = 29 B. L. R. 1227 = 46 C. L. J. 76 = 1927 M. W. N. 561 = 1 L. C. 291 = 104 I.C. 257 = 32 C. W. N. 61 = 26 M. L. W. 809 = A. I. R. 1927 P. C. 176 = 53 M. L. J. 81 (P.C.)**

S. 25 A—Omission to inquire.

———*Order directing enquiry whether persons to be charged were with Government during riots—Omission to enquire is not an illegality.*

Where the District Magistrate, in passing an order under S. 25-A added that to prevent injustice the Deputy Collector should hold an enquiry at which the people to be charged should be given an opportunity of furnishing proof that, before, during and after the riots, they were actively and publicly on the side of Government.

Held that the District Magistrate's suggestions formed no part of the order made under S. 25-A constituted a condition precedent to its validity. (*Viscount Sumner.*) BHAGCHAND *v.* SECRETARY OF STATE. **51 Bom. 725 = 54 I. A. 338 = 25 A.L.J. 641 = 29 B. L. R. 1227 = 46 C. L. J. 76 = 1927 M. W. N. 561 = 1 L. C. 291 = 104 I.C. 257 = 32 C. W. N. 61 = 26 M. L. W. 809 = A.I.R. 1927 P. C. 176 = 53 M. L. J. 81 (P. C.)**

S. 26 (1) Proviso—Interpretation.

———*"In default of recovery" do not mean wilful default by Municipality—If old levy is superseded by new one, S. 26 (1) must be again complied with.*

The words "in default of recovery" by the Municipality in proviso to S. 26 (1) do not mean "in case of wilful default." The provision that, when Government decrees integrally a levy for the recovery of the cost of additional police, its execution must be put into and left in the hands of the Municipality, when there is one, until default is made, is more than a form, and cannot be waived, nor is it a matter in which irregularity can be excused. It has a constitutional importance, which must be recognized. Where therefore an old levy is superseded by a new one to be recovered from different people and to be recovered in a different manner, there is a new exercise of the power by Government under S. 25 (2) and the mandatory provisions of S. 26 (1) would apply to such new levy. (*Viscount Sumner, Lords Atkinson, Carson and Darling, and Sir Lancelot Sanderson.*) BHAGCHAND *v.* SECRETARY OF STATE. **51 Bom. 725 = 54 I. A. 338 = 25 A. L. J. 641 = 29 B. L. R. 1227 = 46 C.L.J. 76 = 1927 M.W.N. 561 = 1 L. C. 291 = 104 I. C. 257 = 32 C.W.N. 61 = 26 M.L.W. 809 = A. I. R. 1927 P.C. 176 = 53 M.L.J. 81 (P.C.).**

Ss. 29 and 30—Interpretation.

———*Words in Ss. 29 and 30 "note of enquiry made in writing under his signature in language of District or in English" do not mean that Commissioner as officer is bound to make detailed enquiry.*

It does not appear that the words in S. 30 that "a note of enquiry made in writing, under his signature in the language of the district or in English" mean that the Commissioner as officer is bound to make the detailed enquiry which is necessary in a case. Where a Commissioner as Inspector-General of Police appoints a tribunal for making enquiry into a case and report to him and passes an order dismissing a police officer after a careful consideration of the report made by the tribunal and the conclusions arrived at by them, the Commissioner does not offend against the provisions of Ss. 29 and 30 even though no notice was given to the officer dismissed. (*Percival, J. C. and Haveliwala, A. J. C.*) HIRANAND GHUMAMUAL *v.* SECRETARY OF STATE. **A.I.R. 1930 Sind 219.**

S. 41—Revision of order.

———*An order after judicial enquiry passed under this section is only an executive order and no revision lies.*

The Order under any of the sections in Ch. IV (including S. 41) is an executive order and not one of an inferior Court with which a High Court can interfere. The mere fact that there is an enquiry of a judicial nature cannot suffice to give the High Court jurisdiction (1917), 11 S. L. R. 113; 12 Bom. L. R. 1029 and 5 S. L. R. 54 foll.) (*Fawcett, J. C. and Kincaid, A. J. C.*) SATAN *v.* EMPEROR. **64 I.C. 663 = 15 S.L.R. 126 = 23 Cr.L.J. 39 = A.I.R. 1922 Sind 21.**

Ss. 51 (1) (b) and S. 80 (1)—Applicability. of S. 80 (1).

———*The act of investigating police officer of reducing a statement of a witness in writing is one done under colour or in excess of duty imposed by S.* 51 (1) (*b*) *even if he acts* mala fide.

Where an investigating police officer reduces a statement of a witness to writing his act is one done under colour or in excess of a duty imposed or an authority conferred on him by S. 51 (1) (*b*), whether he acts *bona fide* or otherwise and even if he acts *mala fide* and in deliberate disregard of his proper duty or authority and deliberately takes down the statement of such witnesses incorrectly S. 80 (3) applies: (1885) Rat. 220 and 41 Bom. 737, Foll. (*Fawcett, Madgavkar and Mirza, JJ.*) NARAYAN HARI *v.* YESHWANT RAOJI. **114 I.C. 246 = 30 B.L.R. 1018 = 52 Bom. 832 = 30 Cr.L.J. 278 = 12 A.I.Cr.R. 154 = A.I.R. 1928 Bom. 352 (F. B.)**

S. 53—Failure to obey order.

———*Hindu procession proceeding in particular authorised street—Mahomedan procession coming in opposite direction ignoring orders of police to go by another route—Accused are guilty under Penal Code, S. 153.*

In ordinary circumstances undoubtedly a police constable has not the power to stop a person from proceeding along a particular street and order him to go by another. He can stop him for a certain time in order to regulate traffic so as to prevent the traffic getting mixed up and obstructing passage along the street. Where the accused Mahomedans formed themselves into a procession, and proceeded along a certain route at the time when another procession of Hindus was passing in the opposite direction along the same route as settled by authorities, ignoring the orders of policemen stationed there to control traffic that they should go by another route, and a riot with injury to many persons was the result.

Held that the act of the accused in refusing to comply with the orders of the police was an offence under Penal Code, S. 153, the orders of the police being valid under Bombay District Police Act, S. 53. (*Fawcett and Mirza, JJ.*) GULAM KADAR *v.* EMPEROR. **30 B. L. R. 367 = 10 A. I. Cr. R. 204 = 29 Cr.L.J. 489 = 109 I.C. 217 = A.I.R. 1928 Bom. 156.**

S. 53 (1) (a)—Interpretation.

——*Control—Meaning explained.*

The ordinary meaning of the verb "control" conveys an idea of hindering or checking a person in doing something; and the extent of any particular prevention must depend upon the special necessities of the occasion. (*Fawcett and Mirza, JJ.*) GULAM KADAR *v.* EMPEROR. **30 B. L. R. 367 = 109 I. C. 217 = 10 A. I. Cr. R. 204 = 29 Cr. L. J. 489 = A. I. R. 1928 Bom. 156.**

Ss. 57 and 58 (2)—Right of finder when no claim.

——*Finder of property—No claim by anybody—Finder is entitled to it.*

Property not claimed by anybody after a proclamation is issued under S. 58 (2) should be made over to the finder. (*Marten and Crump, JJ.*) *In re* MARUTI BAPUJI SONAR. **69 I.C. 96 = 24 B. L. R. 707 = 47 B. 71 = 23 Cr. L. J. 656 = A. I. R. 1922 Bom. 240.**

S. 61 (o)—Failure to frame charge.

——*Cr. P. Code, S.* 403 (1)*—Acquittal under S.* 160, *Penal Code, is a bar to subsequent trial under S.* 61 (o).

Failure to frame alternative charges both under S. 160 I.P. Code and also under S. 61 (*o*), Bombay District Police Act, and acquittal under the former operate as a bar to the fresh prosecution under the latter: 45 Cal. 727 and 1 B.L.R. 15 Foll. (*Patkar and Baker, JJ.*) EMPEROR *v.* KALLASANI. **29 Bom. L.R. 1478 = 28 Cr. L.J. 1032 = 106 I. C. 216 = A. I. R. 1927 Bom. 629.**

S. 61 (a)—Ignorance of law.

——*Ignorance of law is no excuse.*

That the driver accused was ignorant of the requirements of law, by itself would not be a lawful excuse within S. 61 (*a*), for his driving a cart without a lamp. (*Shaha and Fawcett, JJ.*) EMPEROR *v.* CHHITIA DHURIYA. **28 Bom. L.R. 1058 = 97 I. C. 976 = 27 Cr. L. J. 1216.**

S. 61 (a)—Interpretation.

——*Lawful excuse must be reasonable and not opposed to any law—Person, driving a bullock-cart unexpectedly kept out till dark, is not reasonable excuse.*

The word "excuse" in clause (*a*) of S. 61 conveys the idea of an excuse that is (*a*) reasonable and (*b*) not opposed to any law or principle of law. If an owner or driver of a vehicle fails to have a lamp available in cases where he may find such a lamp required by law, he is not "taking all steps reasonably practicable" to prevent the vehicle being without a lamp. There is, in such a case, an implied duty to have a lamp or lantern available when required; and therefore, the mere excuse that the accused was unexpectedly kept out till dark is not ordinarily a reasonable one except under exceptional circumstances. (*Shah and Fawcett, JJ.*) EMPEROR *v.* BHANGDA FAKIRA. **28 Bom. L.R. 1061 = 27 Cr. L. J. 1182 = 97 I. C. 814 = A. I. R. 1926 Bom. 530.**

——*Lawful excuse.*

Per *Shah, J.* What a lawful excuse is, is a question which must be determined on the facts and circumstances of each case. (*Shah and Fawcett, JJ.*) EMPEROR *v.* BHANGDA FAKIRA. **28 Bom. L.R. 1061 = 27 Cr. L.J. 1182 = 97 I. C. 814 = A. I. R. 1926 Bom. 530.**

S. 61-A—Lands used as streets.

——*Lands in Borsad temporarily vesting in Municipality do not cease to be lands included for purposes of Land Revenue Administration—Corporation.*

The mere fact that the lands used as streets, vest for the time being in the Municipality, as trustees under the Bombay District Municipal Act, does not prevent the lands being included within the limits of the town for the purposes of the Land Revenue Administration and S. 61-A will apply to such lands. (*Fawcett and Madgavkar, JJ.*) CHUNILAL HARGOVAN *v.* EMPEROR. **28 Bom. L.R. 1023 = 97 I.C. 668 = 27 Cr. L.J. 1148 = A. I. R. 1927 Bom. 67.**

S. 62—Extension of Act XI of 1890.

——*Prevention of Cruelty to Animals Act (XI of* 1890), *S.* 1 (3)*—No notification under S.* 1 (3)*—Mere extension of Act XI of* 1890 *does not repeal S.* 62, *in any locality.*

The mere extension of the Prevention of Cruelty to Animals Act (XI of 1890), where there is no notification under S. 1 (3) of that Act, does not repeal S. 62 of the Bombay District Police Act. (*Shah and Crump, JJ.*) EMPEROR *v.* BHAGHWAN KRISHNA THORAT. **45 Bom. 203 = 63 I.C. 824 = 22 Cr. L. J. 696 = A. I. R. 1921 Bom. 249.**

S. 66, cl. (f)—Obstruction with permission of Municipality.

——*Municipality authorising exposure of timber for sale—Public street obstructed—Person exposing is still not exempted under S.* 61.

The mere fact that the Municipality has authorised some persons to use a portion of the public street for exposing logs of timber for sale, does not exempt those persons from being prosecuted under S. 61 (*f*) if such exposure has caused obstruction in that public street. (*Fawcett and Madgavkar, JJ.*) EMPEROR *v.* VISHWANATH NANA KARPE. **27 Cr. L.J. 1160 = 97 I. C. 744 = 28 Bom. L.R. 1033 = 50 Bom. 674 = A. I. R. 1926 Bom. 535.**

Ss. 80 (1) and S. 51 (1) (b)—Applicability.

——*The act of investigating police-officer of reducing a statement of a witness in writing, is one done under colour or in excess of duty imposed by S.* 51 (1) (*b*), *even if he acts* mala fide.

Where an investigating police-officer reduces a statement of a witness to writing his act is one done under colour or in excess of a duty imposed or an authority conferred on him by S. 51 (1) (*b*), whether he acts *bona fide* or otherwise and even if he acts *mala fide* and in deliberate disregard of his proper duty or authority and deliberately takes down the statement of such witnesses incorrectly S. 80 (3) applies. (1885) Rat. 220 and 41 Bom. 737, Foll. (*Fawcett, Madgavkar and Mirza, JJ*) NARAYAN HARI *v.* YESHWANT RAOJI. AND DATTATRYA *v.* ANNAPPA. **30 Bom. L.R. 1018 = 52 Bom. 832 = 30 Cr. L.J. 278 = 12 A.I.Cr. R. 154 = 114 I. C. 246 = A. I. R. 1928 Bom. 352 (F.B.).**

S. 80 (4)—Applicability.

——*Suit for damages for assault and battery by police-officer while investigating cognizable offence—Police-officer is not entitled to notice either under S.* 80 (4) *or C. P. Code, S.* 80.

A Sub-Inspector of Police while investigating a cognizable offence against two *berads* sent for the plaintiff and questioned him as to his connexion with the *berads*. The plaintiff disclaimed all knowledge about the *berads.* Then it was alleged, defendant 1, the Sub-Inspector, grew angry and abused the plaintiff and pulled him up by his moustache. It was further alleged that defendant 2 at the instance of defendant 1 beat the plaintiff. The plaintiff filed a suit to recover damages from the defendants for their alleged wrongful treatment of him. *Held*, that both the defendants were acting in the discharge of the duty imposed and the authority

BOMBAY DISTRICT POLICE ACT (1890), S. 80.

conferred by S. 51 (1), cl. (*b*), Bombay District Police Act, when they summoned the plaintiff and questioned him in regard to the alleged offence: but that the alleged assault or battery cannot be said to have been committed under colour or in excess of such duty or authority within S. 80 (1) and that the defendants are not entitled to notice either under S. 80 (4), Bombay District Police Act or Civil P. Code, S. 80; 26 All. 220, Diss. from; 41 Mad. 792, (F.B.), and 7 A.L.J. 301, Foll. (*Fawcett, Madgavkar and Mirza, JJ.*) NARAYAN HARI *v.* YESHWANT RAOJI AND DATTATRAYA *v.* ANNAPPA. **30 B.L.R. 1018 = 52 Bom. 832 = 30 Cr. L.J. 278 = 12 A.I.Cr. R. 154 = 114 I. C. 246 = A.I.R. 1928 Bom. 352 (F.B.).**

——*Order to recover amounts not covered by the sections.*

Where the order practically directed the Collector to recover the particular amounts from a class of persons. *Held*, that does not appear to be an order to any particular class of persons to perform any duty or act or to conduct or order themselves in a particular manner. Besides S. 81 provides an additional remedy which the party concerned may follow; but it does not bar a suit which may be otherwise open to the party to file. (*Shah, Ag. C.J and Kemp, J.*) BHAGCHAND DAGADUSHA *v.* SECRETARY OF STATE EOR INDIA. **48 Bom. 87 = 26 Bom. L.R. 1 = 90 I.C. 13 = A. I. R. 1924 Bom. 1.**

BOM. GENERAL CLAUSES ACT (I OF 1904).

S. 21—Applicability.

——*Previous notification can be rescinded only subject to conditions governing those notifications.*

The resolution of the Municipality which purports to rescind the prior notification of 1919 must be published in the Local Government Gazette, and must have received the previous sanction of the Local Government because under S. 21 of the Bombay General Clauses Act (I of 1904) the Municipality would have the power of rescinding the notification published in 1919 subject to the sanction and conditions to which the first notification was subject. (*Shah and Kajiji, JJ.*) EMPEROR *v.* PARSHOTAM JAGJIVAN. **25 Bom. L R. 767 = 25 Cr. L.J. 330 = 77 I.C. 186 = A. I. R. 1924 Bom. 47.**

S. 21—Meaning of 'Bombay Act.'

——*Any Bombay Act includes previous Acts.*

The scheme of the Act is to distinguish between provisions which are intended to apply to all Bombay Acts and those which are intended to apply to Bombay Acts passed after 1904. The use of the words "any Bombay Act" in S. 21 indicates that the section was intended to be of general application. (*Shah, Ag. C. J. and Kemp, J.*) BHAGCHAND DAGADUSHA *v* SECRETARY OF STATE FOR INDIA. **48 Bom. 87 = 26 Bom. L.R. 1 = 90 I.C. 13 = A. I. R. 1924 Bom. 1**

BOMBAY HEREDITARY OFFICES ACT (III OF 1874).

Applicability.

——*Contract Act, S. 1—Contract Act does not supersede Hereditary Offices Act.*

The general provisions of the Indian Contract Act cannot supersede the provisions of a special later enactment such as Bombay Hereditary Offices Act. (*Fawcett and Mirza, JJ.*) LINGO RAOJI *v.* SECRETARY OF STATE. **30 B.L.R. 570 = 111 I. C. 278 = A.I.R. 1928 Bom. 201.**

Suit for refund of contribution.

——*Bombay Revenue Jurisdiction Act (X of 1876), S. 4—A suit for refund of contribution under Art III of 1874 is barred unless exempted by Act XI of 1852.*

BOMBAY HEREDITARY OFFICES ACT (1874), S. 5.

Land Revenue in S. 3 is defined as including " any cess or rate authorized by Government under the provision of any law for the time being then in force," and the suit for a refund of the contribution levied under Act III of 1874 would, therefore, be barred unless exemption is claimed by virtue of an adjudication under Act XI of 1852, which declares the particular property to be exempt. (*Sir John Wallis.*) LAXMANRAO MADHAVRAO JAHAGIRDAR *v.* SHRINIWAS LINGO NADGIR. **54 I.A. 380 = 105 I.C. 694 = 51 Bom. 830 = 29 Bom. L.R. 1484 = 46 C.L.J 393 = 39 M.L.T. 527 = A.I.R. 1927 P. C. 217 = 53 M.L.J. 475 (P.C.).**

Ss. 4 and 5—Applicability.

——*Mortgagee or permanent lessee of vatan land is not vatandar within S. 4 and such alienation enures only up to alienor's lifetime.*

Where a person holds vatan lands as a mortgagee or a permanent lessee from a vatandar, he cannot be said thereby himself to have become a vatandar, as he cannot be said to have legally acquired the title to property within the meaning of S. 4 and the alienation in his favour can enure only upto the lifetime of the alienor vatandar under S. 5. (*Fawcett and Madgavkar, JJ.*) GANAPATRAO *v.* GANESH. **28 Bom. L.R. 395 = 94 I.C. 651 = A.I.R. 1926 Bom. 280.**

Ss. 4 and 15—Kulkarni vatan.

——*Services commuted—Cash allowance payable by treasury is exclusive property of the officiating Kulkarni—It does not become joint family property.*

The kulkarni cash allowance, payable by the treasury and subject to the modification or withdrawal to a representative kulkarni vatandar does not cease to be exclusive property of the officiating kulkarni by reason of the commutation of the kulkarni service and it does not become from the date thereof the property of the joint family and descendants of the original vatandars: 12 B. H. C. 224 per Westrop, C. J., Foll.; A.I.R. 1926 Bom. 364, Diss. from; 8 Bom. 426, Expl. and Dist. (*Madgavkar, Patkar and Wild, JJ.*) GANGADHAR NATHU *v.* VISHNU VITHAL. **31 Bom. L.R. 935 = 53 Bom. 739 = A.I.R. 1929 Bom. 368.**

S. 5—Auction-sale when valid.

——Vatan *lands—Bombay Hereditary Offices Act S. 5—Auction sale against widow—Reversioners bound by sale in purchaser is also a* vatandar.

The sale of the *vatan* lands in execution against the widow of a *vatandar* in respect of a decree that had been passed against him is valid and binding upon reversioner provided the auction-purchaser is a *vatandar* of the same *vatan* since the widow would be able to alienate her husband's immovable property for legal necessity under S. 5 of the Bombay Hereditary Offices Act. (*Macleod, C. J. and Shah, J.*) GANESH RAMACHANDRA KULKARNI *v.* LAXMIBAI VENKATESH NARAYAN. **24 Bom. L.R. 249 = 67 I.C. 209 = 46 Bom. 726 = A.I.R. 1922 Bom. 96.**

——*Auction sale against widow—Reversioners bound by sale in purchaser is also a* vatandar.

The sale of the *vatan* lands in execution against the widow of a *vatandar* in respect of a decree that had been passed against him is valid and binding upon reversioner provided the auction-purchaser is a *vatandar* of the same *vatan* since the widow would be able to alienate her husband's immoveable property for legal necessity under S. 5 of the Bombay Hereditary Offices Act. (*Macleod, C. J. and Shah, J.*) GANESH RAMCHANDRA KULKARNI *v.* LAXMIBAI VENKATESH NARAYAN. **24 Bom. L.R. 249 = 67 I.C. 209 = 46 Bom. 726 = A.I.R. 1922 Bom. 96.**

S. 5—Extent of validity of alienation.

——*Mortgage by* Vatandar *void against heir of* Vatandar—*Decree or other arrangement thereon is also void against them.*

After the death of the *Vatandar*-mortgagor, the decree-holder applied against the mortgagor's heirs to recover the full amount of the decree by attachment and sale of the property in the hands of the heirs of the mortgagor. The decree on the mortgagee against the *Vatandar*-mortgagor provided that the mortgage-debt was to be satisfied by payment of an annual sum out of the profits of the mortgage lands; and in the case of deficit, the mortgagor was personally liable to make good the deficiency.

Held, any decree or any arrangement based on the mortgagee's rights under a mortgage, is also void against the heirs of the *Vatandar*, if the mortgage is in its inception void against the heirs of the *Vatandar*. (*Fawcett, J.*) GANESHI EKNATH KAULGI *v.* BHANSAHEB BHAWANRAO DESHMUKH. **46 Bom. 345 = 64 I.C. 208 = 23 Bom. L.R. 1037 = A.I.R. 1922 Bom. 110.**

S. 5—Ghadi Vatan.

——*Mortgage of Ghadi Vatan by vatandar confers no right as mortgagee by adverse possession during mortgagor's life-time.*

Possession by mortgagee of Ghadi Vatan lands granted by Government as service emoluments during the life-time of the mortgagor is not adverse to him and a suit brought by his widow within eight years is not time-barred. (*Shah, Ag. C. J. and Fawcett, J.*) SHIVAPPA MALAPPA *v.* AVALI LUNNANNA. **26 Bom. L.R. 814 = 83 I.C. 145 = A.I.R. 1924 Bom. 521.**

——*Vatan—Alienations of* Inami *and* Mirasi *rights —No evidence to show that* Mirasi *rights were acquired independently by* Vatandar — *Alienation whether by* Vatandar *or by Court is inoperative beyond the life-time of* Vatandar.

Where there is no evidence to show that the *Mirasi* rights were independently acquired by the original *Vatandar* and the lands according to the record, such as it is, are treated as *Vatan* lands, the alienation of *Mirasi* rights cannot be saved when the lands are sought to be resumed on the ground that the alienation of *Inami* rights has ceased to be operative after the life-time of the original *Vatandar*. Whether the alienations are of the *Inam* rights or of the *Mirasi* rights they are operative only during the life-time of the *Vatandars* whose right, title and interest were alienated and therefore, after their deaths, the successor is entitled to the possession of the lands in question, 44 Bom. 237, Foll. (*Macleod, C. J. and Shah, J.*) BAIKU SIDU KUMBHAR *v.* VYANKATESH VAMAN DESHPANDE. **46 Bom. 52 = 23 B.L.R. 799 = 62 I.C. 942 = A.I.R. 1922 Bom. 192.**

S. 5—Kulkarni Vatan.

——*Mortgage of Kulkarni Vatan—Personal covenant to repay in case mortgagee is deprived of possession* —Per *Macleod, C. J., covenant is not void*—(*Shah, J.*). *It is doubtful if covenant will apply to dispossession due to mortgage coming to end due to mortgagor's death.*

A Kulkarni Vatan was mortgaged with possession in lieu of interest. The mortgagor covenanted that he would repay the money at the stipulated time and further that if before the expiry of that period or any time thereafter the land passed out of the mortgagee's possession on one cause or another, the mortgagor should be personally liable to pay the principal together with the interest at a certain rate from the date the mortgagee was deprived of possession.

Held, per *Macleod, C. J.* that the covenant was not void under S. 5 of the Vatan Act.

Per *Shah, J.* The applicability of the covenant to dispossession in consequence of the mortgage coming to an end on the death of the mortgagor in virtue of the provisions of the Bombay Hereditary Offices Act is doubtful. 44 Bom. 500, Ref. (*Macleod, C. J. and Shah, J.*) VITHOBA MAHIPATI *v.* BALKRISHNA SAKHARAM. **45 Bom. 1206 = 23 Bom. L.R. 529 = 63 I.C. 234 = A.I.R. 1921 Bom. 437.**

S. 5—Liability of alienee.

——*Mortgagee from vatandar is liable to pay mesne profits if he retains possession after mortgagor's death.*

Mortgagee from a vatandar is liable to pay the mesne profits after the original mortgagor's death for the period between the death of the mortgagor and the time when his successor to the vatan obtains possession. 44 Bom. 500, Dist. 24 Bom. 556 (P.C.), Foll. (*Macleod, C. J. and Coyajee, J.*) SUNDARABAI VITHAL *v.* LAXMAN RAMCHANDRA. **49 Bom. 583 = 87 I.C. 723 = 27 Bom. L.R. 497 = A.I.R. 1925 Bom. 326.**

Ss. 9 (2) and 11-A—Assessment.

——*Resumption and levy of full rent by Collector— Rent is payable to Vatandar as profits.*

Where the lands have been assessed at the full rent by Collector, the property reverts to the Vatan which means that rent must be paid by the person in possession, if eviction is not ordered, and the rent should be considered as the profits of the land which will go to the Vatandar. (*Macleod, C. J. and Shah, J.*) DATTATRAYA KESHAV *v.* LAXUMAN CHIMNAJI. **23 Bom. L.R. 561 = 64 I.C. 7 = A.I.R. 1921 Bom. 37.**

S. 9 (2)—Interpretation.

——*Collector fixing rent—"Decision is final" does not mean that Collector is precluded from altering under justifiable circumstances rent fixed.*

Decision of the Collector as to the amount of rent leviable under S. 9 (2) is final in the sense that it cannot be questioned either by any appellate or revisional authority under the Act, or by any suit in a Civil Court, but the Collector is not precluded from altering the rent previously fixed, should circumstances justify that course. (*Fawcett, Ag. C. J. and Murphy, J.*) KALU NARAYAN PATIL *v.* SECRETARY OF STATE. **30 Bom. L.R. 1404 = 112 I.C. 789 = A.I.R. 1928 Bom. 534.**

S. 10—Applicability.

——*Vatandar not a party to decree—S.* 10 *does not apply.*

Where the vatandar is not a party to the decree, S. 10 and the certificate purporting to be under the section have no application. (*Madgavkar and Patkar, JJ.*) MAHADAJI *v.* COLLECTOR OF SATARA. **52 Bom. 213 = 30 Bom. L.R. 434 = 110 I.C. 697 = A.I.R. 1928 Bom. 181.**

——*Alienee of vatan lands mortgaging the same with possession—Alienation declared null and void by Government and mortgagee required to pay full rent to vatandar—Alienee obtaining possession from mortgagee through Court—Court on Collector's application ordered to deliver possession to Collector or mortgagee—Order* ultra vires *and alienee is entitled to retain possession on full payment of rent to vatandar.*

The alienee of certain vatan lands, alienated before the passing of the Vatan Act, mortgaged with possession the same; Government declared the alienation to be null and void and required the mortgagee to pay full rent to the vatandar, on the application of the heir of the vatandar. The alienee obtained possession from the mortgagee under a decree in Civil Court; but on the application of the Collector, the alienee was ordered by the Court to deliver over possession to the Collector or the mortgagee. *Held*, that even under S. 10 the Court had no power to pass order compelling the alienee to deliver possession to the Collector or mortgagee and that the alienee, on his paying full rent to the vatandar, as the mortgagee, was entitled to remain in possession. (*Madgavkar and Patkar, JJ.*) MAHADAJI *v.* COLLECTOR OF SATARA. **52 Bom. 213 = 30 Bom. L.R. 434 = 110 I. C. 697 = A. I. R. 1928 Bom. 181.**

S. 10—Refusal to issue Certificate.

———*Collector refusing to issue certificate under S. 10—Whether revision lies to High Court is doubtful.*

It is doubtful whether the High Court cannot interfere with the decision of the Collector made in the exercise of his discretion, refusing to issue a certificate under S. 10 of the Bombay Hereditary Offices Act: 8 Bom. 264, Doubted. (*Macleod, C. J. and Coyajee, J.*) GOVIND *v.* BALKRISHNA. **28 Bom. L. R. 456 = 94 I. C. 760 = A. I. R. 1926 Bom. 308.**

Ss. 11 and 11-A—Interpretation.

———*Rent becomes due from date of declaration "Thenceforward revert to vatan" only mean that restoration is complete after assessment.*

The predecessor-in-title of defendants Nos. 2 to 8 had in the year 1886 alienated their Vatan land to the plaintiff. After the death of the alienor, the defendants applied to the Collector to take proceedings for the protection of the Vatan and the Collector on October 5, 1904, made a declaration under S. 11 that the alienation was null and void, but did not fix the assessment on that date. Later, on July 6, 1908, the Collector held further proceedings and assessed the land at a rental of Rs. 75 per annum.

Held, that the assessment levied under S. 11-A would be charged from the date of the declaration, *i. e.*, the 5th October, 1904. The words " thenceforward revert to Vatan " in S. 11-A can only mean that the act regards the restoration of the Vatan complete after dispossession or assessment. But they do not indicate that the assessment should not be levied from the date of the order requiring such assessment to be made. (*Pratt and Fawcett, JJ.*) DHONDI SUBHANE *v.* SECRETARY OF STATE. **25 Bom. L. R. 785 = 77 I. C. 146 = A. I. R. 1923 Bom. 478.**

Ss. 11, 11-A and 9 (2)—Jurisdiction of Civil Court.

———Civil Court has no jurisdiction to set aside orders made under Ss. 11, 11-A and 9 (2). (*Macleod, C.J. and Coyajee, J.*) BASLINGAPPA GOUDA *v.* SECRETARY OF STATE. **28 Bom. L. R. 651 = 95 I. C. 1008 = A. I. R. 1926 Bom. 417.**

S. 15 (1)—Applicability.

———*Consent must be in existence when the order of Collector is made.*

Under Cl. (1), S. 15, in order to have a valid order, there must be an existing consent of the holder of the watan when the order of the Collector is made, and if it is shown that the consent was not in existence that would affect the validity of the order. (*Fawcett and Mirza, JJ.*) LINGO RAOJI *v.* SECRETARY OF STATE. **30 Bom. L. R. 570 = 111 I. C. 278 = A.I.R. 1928 Bom. 201.**

S. 15—Devolution.

———*Services commuted — Collector can introduce devolution in a particular line.*

Under S. 15 the Collector is competent to introduce a condition in the settlement deed laying down a particular line of devolution for the direct descendants of the person who enjoyed the allowance first. (*Madgavkar, Patkar, Wild, JJ.*) GANGADHAR NATHU *v.* VISHNU VITHAL. **53 Bom. 739 = 31 Bom. L. R. 935 = A. I. R. 1929 Bom. 368 (F.B.).**

S. 15—Effect of agreement.

———*Provisions authorizing agreements contemplated by S. 15 must be treated as conditions precedent to the exercise of powers conferred by statute.*

Agreements of the kind contemplated by S. 15 are not ordinary agreements and these agreements being authorized by statute, the provisions of the enactments which authorize them as to the conditions under which such agreements can be made must be treated as conditions precedent to the exercise of the powers conferred by the statute, in accordance with the ordinary principle applicable in such cases. (*Fawcett aad Mirza, JJ.*) LINGO RAOJI *v.* SECRETARY OF STATE. **30 Bom. L.R. 570 = 111 I. C. 278 = A. I. R. 1928 Bom. 201.**

Ss. 15 (1) and 45 (c)—Interpretation.

———*Representative vatandar disqualified under S. 45 (c) is still holder within S. 15 (1)—His consent binds his son.*

A representative vatandar disqualified from officiating as a Kulkarni under S. 45 (*c*) is still the holder of a vatan within the meaning of Cl. (1), S. 15 and his consent given under S. 15 (1) is binding on his son : A.I.R. 1925 Bom. 365, Dist. (*Fawcett and Mirza, JJ.*) SECRETARY OF STATE *v.* YELLO RAMCHANDRA. **52 Bom. 369 = 30 Bom. L. R. 581 = 111 I. C. 268 = A. I. R. 1928 Bom. 215.**

———*Knowledge of Mamlatdar or Chitnis is not knowledge of Collector in so far as Ss. 15 and 73 are concerned.*

In so far as S. 15 and the connected S. 73 emphasize the personal responsibility of the Collector, the knowledge of the Mamlatdar or Chitnis cannot be said to be also the knowledge of the Collector. (*Fawcett and Mirza, JJ.*) LINGO RAOJI *v.* SECRETARY OF STATE. **30 Bom. L. R. 570 = 111 I. C. 278 = A. I. R. 1928 Bom. 201 (c).**

———*Widow holding life interest in vatan property is not 'holder'.*

A widow holding an interest in vatan property for the term of her life or until her marriage is not a holder within the meaning of that term in S. 15 of the Act III of 1874. (*Macleod, C.J. and Crump, J.*) BHIKAJI LAXMAN *v.* THE SECRETARY OF STATE FOR INDIA. **49 Bom. 554 = 92 I. C. 110 = 27 Bom. L. R. 463 = A. I. R. 1925 Bom. 365.**

S. 18—Appointment of Panchayat by karkun.

———Mharki Vatan—*Panch not appointed by Collector but by karkun—Award by such Panch is invalid—Suit, independent of award does not lie in Civil Court.*

A dispute regarding a *Mharki Vatan* was referred under S. 18 to a panchayat. The parties failed to appoint the panchas, the Deputy Collector therefore directed the Mamlatdar to appoint them; the Mamlatdar ordered his Head Karkun to appoint the Panchas and appointed the Head Karkun as a Sar Panch. The Panch thus constituted made an award, which was subsequently approved by the Deputy Collector. On the validity of the award being challenged, *Held* that the procedure followed was not a substantial compliance with S. 18 and that the Panch so constituted could not make a valid award. The award being a nullity, a suit by the Mahar Vatandars to restrain the villagers of their village from delivering the carcasses of dead animals and paying *baluta* to the mangs, is not cognizable by a Civil Court, having regard to S. 18, 25 Bom. 186, Foll. (*Shah, Ag.C.J. and Crump, J.*) MAHADU KASHIBA *v.* KRISHNA TATYA MAHAR. **47 Bom. 95 = 68 I. C. 746 = 24 Bom. L. R. 917 = A. I. R. 1922 Bom. 410.**

S. 32.

———*Vatan—Cash allowance in commutation of kulkarni vatan belongs to whole family and cannot be exclusively claimed by representative vatandars.*

A cash allowance granted by Government, in commutation of kulkarni vatan services cannot be claimed exclusively by the representative vatandars and members of his family, but belongs to the whole family, like the vatan; 8 Bom. 426, Appr. (*Macleod, C. J. and Crump, J.*) VAMAN *v.* JAGANNATH. **28 Bom. L. R. 556 = 95 I. C. 528 = A. I. R. 1926 Bom. 364.**

S. 36—Suit for declaring Vatandar.

———*Order of Government not set aside—Suit for declaring watandar maintainable.*

Even though the order of Government or of its duly authorized officer cannot be set aside, a suit for declaration that plaintiff is a "vatandar" is maintainable; Bom. First Appeal No. 1269 of 1918; A. I. R. 1926 Bom. 417; (1888) P. J. 224; (1896) P. J. 666; 34 Bom. 101; 40 Bom. 55, Ref. (*Patkar and Wild, JJ.*) HANMANT RAMCHANDRA KULKARNI *v.* SECRETARY OF STATE. **54 Bom. 125 = 32 Bom. L. R. 155 = A. I. R. 1930 Bom. 254.**

S. 36, Cl. 3—Suit in Civil Court.

———*Declaration of status of "vatandar" and of nearest heirship can be granted by Civil Court—Bombay Revenue Jurisdiction Act (X of 1876), S. 4.*

A Civil Court has jurisdiction to try a suit for declaration that the plaintiff has a right to the status of a "vatandar" and that he is the nearest heir of the deceased "vatandar". Such a suit not being barred by S. 4, Bombay Revenue Jurisdiction Act: 8 Bom. 25; 18 Bom. 516; (1888) P. J. 224; (1896) P. J. 666; 34 Bom. 101; 40 Bom. 55; Foll. and A.I.R. 1927 P.C. 17, Expl. (*Patkar and Wild, JJ.*) HANMANT RAMCHANDRA KULKARNI *v.* SECRETARY OF STATE. **54 Bom. 125 = 32 Bom. L. R. 155 = A. I. R. 1930 Bom. 254.**

Ss. 64 and 18—Suit to declare Vatan Register void.

———*No order under S. 4 (a), para. 3 of the Rev. Jurisdiction Act—Suit does not lie—No action can be taken under S. 18 without an application.*

Where the order given by the Collector is not an order within the meaning of S. 4 (*a*), Para. 3, Revenue Jurisdiction Act, but merely a direction to give effect to the Vatan Register as settled in 1895 a suit to declare that a Vatan Register was void and should not be given effect to would certainly not lie. No action will be taken under S. 18 unless an application is made by an interested party. (*Macleod, C. J. and Coyajee, J.*) GOVIND BALKRISHNA BAVE *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. **A. I. R. 1922 Bom. 155.**

S. 73—Interpretation.

———*Reasons for decision not in the Collector's handwriting—Order of Collector is not invalid.*

The rule of procedure that the reasons should be recorded in the Collector's handwriting, must be made

subordinate to the ends of justice rather than to reverse the process and to say, that, merely because the reasons have to be implied from the actual words used, therefore, the order of the Collector must be treated as invalid. (*Fawcett and Mirza, JJ.*) SECRETARY OF STATE FOR INDIA *v.* YELLO RAMCHANDRA KULKARNI. **52 Bom. 369 = 30 Bom. L. R. 581 = 111 I. C. 268 = A. I. R. 1928 Bom. 215.**

———*Knowledge of Mamlatdar or Chitnis is not knowledge of Collector in so far as Ss. 15 and 73 are concerned.*

In so far as S. 15 and the connected S. 73 emphasize the personal responsibility of the Collector, the knowledge of the Mamlatdar or Chitnis cannot be said to be also the knowledge of the Collector. (*Fawcett and Mirza, JJ.*) LINGO RAOJI *v.* SECRETARY OF STATE. **30 Bom. L. R. 570 = 111 I. C. 278 = A. I. R. 1928 Bom. 201.**

S. 73—Non-compliance with procedure.

———*Bombay Rev. Jurisdiction Act (X of 1876), S. 4 (a)—Order of commutation of vatan services passed without observing S. 73—Suit to set aside the order lies.*

Where a Collector orders, at the instance of the widow of the last vatandar, commutation of kulkarniki services and the procedure prescribed by the Bombay Hereditary Offices Act, S. 73 is not observed by the Collector while passing the order, the order is *ultra vires*. A suit in a Civil Court to set aside the order is not barred by the provisions of the Bombay Revenue Jurisdiction Act (X of 1876), S. 4 (*a*). (*Macleod, C.J. and Crump, J.*) BHIKAJI LAXMAN *v.* THE SECRETARY OF STATE FOR INDIA. **49 Bom. 554 = 27 Bom. L. R. 463 = 92 I. C. 110 = A. I. R. 1925 Bom. 365.**

———*Non-compliance with the procedure laid down in S. 73 makes order* ultra vires.

If there is no record of any investigation having been made or if there is nothing to show that an opportunity had been given to the other members of the vatan family of being heard or that any reasons were recorded by the Collector for his decision, an order directing commutation is *ultra vires*. (*Macleod, C. J. and Crump, J.*) BHIKAJI LAXMAN *v.* THE SECRETARY OF STATE FOR INDIA. **49 Bom. 554 = 27 Bom. L. R. 463 = 92 I. C. 110 = A. I. R. 1925 Bom. 365.**

———Amendment Act (V of 1886).

Retrospective effect.

———*Patkar, J.*—The disqualifying Act V of 1886 cannot be given a retrospective effect. (*Patkar and Baker, JJ.*) BASANGOWDA *v.* RUDRAPPA. **52 Bom. 393 = 30 Bom. L R. 591 = 110 I. C. 633 = A. I. R. 1928 Bom. 291.**

S. 2—Adverse possession by female.

———*Property held in adverse possession by a Hindu female—Character of the tenure is not changed—Male heirs take in preference to a maternal grand daughter.*

Where a Hindu female takes possession of vatan property in contravention of the Vatan Act and continues in adverse possession for more than 12 years, the property still remains vatan property and she becomes vatandar *de facto* with all the rights and subject to all the restrictions incident to that tenure. The property does not lose its character of vatan property and after the death of the female the property would go to her male heirs in preference to her maternal grand-daughter. 24 Bom. 556 (P. C.), Foll. (*Patkar and Baker, JJ.*) ANNA *v.* GOJRA. **30 Bom. L. R. 867 = 114 I.C. 390 = A. I. R. 1928 Bom. 333.**

S. 2—Applicability.

———*S. 2 is not restrospective—Daughter succeeding to father before operation of Act takes absolutely and becomes fresh stock of descent.*

The Vatan Act (V of 1886) is not retrospective and a daughter succeeding to her father as vatandar before the operation of the Act commenced acquires an absolute interest in the property and becomes a fresh stock of descent: 21 Bom. 118; Bom. First Appeal No. 50 of 1907, Foll. and A. I. R. 1927 Bom. 191, Ref. (*Patkar and Wild, JJ.*) HANUMANT RAMCHANDRA KULKARNI *v.* SECRETARY OF STATE. **54 Bom. 125 = 32 Bom. L. R. 155 = A. I. R 1930 Bom. 254.**

———*Daughter's son as heir of deceased female vatandar—Male member of original vatan family cannot succeed—Only preferred to Crown—For female to be postponed to male both must belong to same family.*

The existence of daughter's son as an heir of the deceased female vatandar would preclude a member of the original vatan family from inheriting to her, though as a blood relation he is entitled to succeed in preference to the Crown. The question of postponement of females to males can only arise where the male belongs to the same family as the female. (*Patkar and Wild, JJ.*) HANMANT RAMCHANDRA KULKARNI *v.* SECRETARY OF STATE. **54 Bom. 125 = 32 Bom. L. R. 155 = A. I. R. 1930 Bom. 254.**

———*Exclusion of female vatandar by male member of vatan family—Proof that common ancestor was the holder of the vatan lands is necessary.*

The plaintiffs who were the sisters of the last holder of half-share of the patilki inam property sued to recover possession of the half share from the defendants who were the holders of the other half. The grant was an ancient one, and there had been many degrees in the family since the date of the grant and as such no direct evidence of the precise relationship could be expected but from what evidence was brought it could be concluded that the two families descended from a common ancestor but it was not possible to say whether the common ancestor existed before or after the acquisition of the vatan

Held, that it is not sufficient for the defendants to show that there was a common ancestor from whom these two families descended. They must also show that the common ancestor was a holder of the vatan, and as the defendants failed to prove that both the plaintiffs and themselves descended from a common ancestor holding the vatan they have failed to show that the plaintiffs, are excluded from succession by the operation of S. 2, Bombay Act, V 1886: 41 Bom. 677, Foll. (*Marten, C. J. and Crump, J.*) HUCHANGOUDA *v.* KALLAVA. **52 Bom. 132 = 30 Bom. L. R. 38 = 107 I. C. 268 = A. I. R. 1928 Bom. 166.**

———*Daughter of vatandar inheriting vatan before the Act —Property does not cease to be vatan and her son will succeed in preference to her daughter.*

On the death of the original Mharki vatandar his daughter inherited the vatan property before Act V of 1886 came into force. She was never married but bore an illegitimate son and a daughter.

Held: that the property did not cease to be watan property and her family remained to be watan family within the meaning of S. 2. Consequently her son was entitled to succeed in priority to her daughter. (*Marten, C. J. and Patkar, J.*) BALAI SHIDLI *v.* SUBHA SANTU. **29 Bom. L. R. 246 = 101 I. C. 135 = A. I. R. 1927 Bom. 191.**

S. 2—Widow appointed Patil.

——*Widow appointed patil can remain in possession of family lands according to custom in the family.*

Where the widow of the last male patilki watan holder was in possession of the watan lands since her husband's death and she was appointed patil by the Government and there was a custom in the family that the lands were to go to the vatandar.

Held: in the absence of any evidence to the contrary, there was no reason why, being considered fit and having to discharge the duties of a representative vatandar patil, she should not be allowed the enjoyment, as long as she is patil, of the lands, according to the custom of the family: 7 All. 1, Dist. (*Fawcett and Madgavkar, JJ.*) SHANKAR *v.* LAXMIBAI. **50 Bom. 243 = 95 I.C. 864 = 28 Bom. L. R. 740 = A. I. R. 1926 Bom. 356.**

———Amendment Act (X of 1923).

No Retrospective Effect.

———The Amending Act is not retrospective. (*Macleod, C. J. and Shah, J.*) ADIVEVA FAKIRGOWDA *v.* CHANMALLGOWDA RAMAN GOWDA. **26 Bom. L. R. 360 = 81 I. C. 1018 = A. I. R. 1924 Bom. 393.**

BOMBAY HIGH COURT CIVIL CIRCULARS

R. 17—Contents of proclamation.

———*Application to Collector to set aside sale—Collector should at once refer applicant to Court executing decree.*

In every proclamation for sale carried out under the rules it should be notified that any person wishing to set aside the sale under O. 21 of the Code has to make his application to the Court, and not to the Collector to whom the decree has been sent for execution, within thirty days from the date of the sale. If in spite of that notification any applicant still makes an application to the Collector to set aside the sale, he should be referred to the Court without a moment's delay. 44 Bom. 50, Ref. (*Macleod, C. J. and Shah, J.*) SHANT MURTI DEVAPPA *v.* NARAYAN RAMCHANDRA. **45 Bom. 1132 = 23 Bom. L. R. 476 = 62 I. C. 221 = A. I. R. 1921 Bom. 209.**

Ch. 1, R. 55—Pleader as witness.

———*C. P. Code, O. 16, R. 2—Pleader, summoned as witness—Subsistence allowance—Special fees cannot be allowed.*

A pleader was merely called to give evidence as to what had occurred in a previous suit in which he was engaged as a pleader.

Held, that no special fees could be paid to ordinary witnesses, and if that has been the practice in the District Courts then it must be said that there is no warrant for it in law. There is no such rule either in the C. P. Code or in the Civil Circulars applicable to this case; and in the absence of any such rule, the order of the lower Court, which is based apparently upon the practice of that Court, cannot be supported. (*Macleod, C. J. and Shah, J.*) VALI ASMAL *v.* A. U. MALJI. **64 I. C. 78 = 46 Bom. 89 = 23 Bom. L. R. 898 = A. I. R. 1922 Bom. 116.**

R. 69—Distinction between rules and circulars.

———*Circulars have not the force of law unless issued under some enactment—Decree against father—Sale of joint family property—Omission to state whether some share was being sold is not conclusive that his interest was not sold—Interpretation of statutes—Circulars.*

The circulars in the Manual of Civil Circulars issued by the High Court are not on the same footing as rules

BOMBAY HIGH COURT CIVIL CIRCULARS, Ch. 23, R. 16.

which are passed in accordance with the prescribrd procedure in Part X of the C. P. Code. Unless a particular circular is passed under some enactment, which gives it the force of law, obviously the mere fact that it is issued under the authority of the High Court is not sufficient to give it that force. Although the proclamation of sale in execution of a decree against the father may not state that the sons' interests are being put up for sale, yet the circumstances may be such as to fully justify a Court in holding that those interests were actually sold: 22 Bom. L. R. 970, Rel. on. (*Fawcett and Madgavkar, JJ.*) DAYANAND *v.* DAJI. **50 Bom. 793 = 28 Bom. L. R. 1082 = 98 I. C. 754 = A. I. R. 1926 Bom. 548.**

Ch. 23, R. 16—Remuneration in excess.

——*Receivers other than official receivers—Receiver's remuneration should be proportional to the amount of dividend distributed—Prov. Ins. Act* (1920), *S.* 56.

R. 16 of Ch. 23 of the Manual of Circulars issued by the Bombay High Court directs that the remuneration of receivers, other than official receivers, shall be in such proportion to the amounts of the dividends distributed as the Court may direct, provided that it does not exceed five per centum of the amount of dividends and therefore, a Court is not justified in directing payment to the receivers at the rate of five per cent. on the whole amount realised. (*Macleod, C. J. and Coyajee, J.*) B. S. JORAPUR *v.* VENKATESH BALWANT JOSHI. **90 I. C. 656 = 27 Bom. L. R. 1116 = A. I. R. 1925 Bom. 472.**

BOMBAY HIGH COURT RULES.

——Admiralty Rules.

Rr. 3, 4, 14, 15—Writ of Summons.

——*Admiralty jurisdiction—Suit in Admiralty—Warrant of arrest of ship sufficient—No writ of summons is necessary.*

The Bombay High Court, in its admiralty jurisdiction is not bound by the provisions of the C. P. Code but are governed by its own Admiralty Rules in accordance with the old Admiralty Procedure which it inherited under the old charters. Under the said Rules it is not essential to issue a writ of summons in addition to issuing warrant of arrest. Not that a writ can never be issued in an admiralty suit, but it is unnecessary if a warrant is issued. (*Marten, J.*) FREEMAN *v.* SS. CALANDA AND CAPT. YANOVSKY. **24 Bom. L. R. 1167 = 76 I. C. 433 = A. I. R. 1923 Bom. 51.**

R. 27—Non-passing of order.

——*Caveat filed—Non-passing of orders does not vitiate sale of ship.*

Where the caveator is himself a plaintiff and the decree is passed in his presence without protest and the evidence is that he actually attended the sale of the ship, *held* that the non-passing of an order on the caveat will not vitiate the sale. (*Marten, J.*) FREEMAN *v.* SS CALANDA AND CAPT. YANOVSKY. **24 Bom. L. R. 1167 = 76 I. C. 433 = A. I. R. 1923 Bom. 51.**

R. 36—Interference by Civil Court.

——*Sale of ships in conformity with—Court should not set aside under its inherent powers—C. P. Code, S.* 151.

When the sale of a ship has been carried out in strict conformity with R. 36 of the Admiralty Rules, the fact that the procedure was against the practice in such cases and worked great hardship, should not be grounds for exercising the powers under S. 151, C. P. Code to set aside the sale. (*Marten, J.*) FREEMAN *v.* SS. CALANDA AND CAPT. YANOVSKY. **76 I. C. 433 = 24 Bom. L. R. 1167 = A. I. R. 1923 Bom. 51.**

——(Appellate Side).

Rule 2, Heads 2 and 7—Extension of time.

——*C. P. Code, O.* 41, *R.* 14—*Single Judge can excuse delay.*

Excusing delay and extending time, for issuing fresh notice under C. P. Code, O. 41, R. 14, under Heads 2 and 7 of R. 2 of the Appellate Side Rules can be done by a single Judge. (*Fawcett and Madgavkar, JJ.*) BABANNA SANGAPPA *v.* PARAVA NINGABASAPPA. **50 Bom. 815 = 28 Bom. L. R. 1446 = 100 I. C. 147 = A. I. R. 1927 Bom. 68.**

O. 21, R. 72-A., C. P. Code—Sale when vitiated.

——*Sale for amount smaller than that due on mortgage—Sale can be set aside.*

Sale of the property under R. 72-A for an amount smaller than the amount due under the mortgage in contravention of the R. 72-A is a material irregularity vitiating the sale. (*Murphy and Broomfield, JJ.*) MAHOMED ABDULLA *v.* SAKHARAM HABAJI MISTRY. **32 Bom. L. R. 436 = A. I. R. 1930 Bom. 290.**

——(Original Side).

Attendance of witness.

——*Practice—Costs—Question how far attendance of witness or party necessary is discretionary with master to be decided according to usual and established practice.*

Question how far the attendance of a witness is necessary and material is one for master to decide and that discretion must be exercised in a fair and reasonable way according to the usual and established practice and allowance in respect of such matters, otherwise the Court or Judge will interfere and review the discretion of the master who has not so exercised it: *M'Alpine v. Poles*, (1833) 1 C. and M. 795, Ref. (*Rangnekar, J.*) LANGLEY *v.* D. ARCY. **31 Bom. L. R. 1020 = 54 Bom. 62 = 122 I. C. 121 = A. I. R. 1930 Bom. 24.**

Costs of Pleaders.

——*Pleader; cost of—Costs before Taxing Master are not allowed.*

It is not the usual practice to allow costs of counsel attending before the Taxing Master. (*Kemp, J.*) JIVANLAL PANALAL *v.* BAI MANCHHA. **87 I. C. 1043 = 27 Bom. L. R. 532 = A. I. R. 1925 Bom. 355.**

Interference with Taxing Master's order.

——*Costs—Discretion of Taxing Master is not generally interfered with.*

The Court will never interfere in taxation unless the Taxing Master is wrong in principle or very clearly wrong in detail. Where it is a question of whether the Taxing Master has exercised his discretion properly, or it is only a question as to the amount to be allowed, the Court is generally unwilling to interfere with his judgment. *Robb.* v. *Connor*, (1874) Ir. R. 9 Eq. 373, Dist.; *Hill* v. *Peel*, (1870) L. R. 5 C. P. 172, Foll. (*Pratt, J.*) SADASUKH GAMBHIRCHAND *v.* BAIJNATH HARNANDRAI. **45 Bom. 1234 = 23 Bom. L. R. 854 = 63 I. C. 37 = A. I. R. 1921 Bom. 87.**

Powers of Commissioner and master of equity.

——*Commissioner and Master of Equity are judicial officers.*

In Bombay, Commissioner and Master of Equity on the original side are judicial officers taking the place of a Judge. (*Marten, C. J. and Patkar, J.*) KERSHAJI DHANJIBHAI *v.* KAIKHUSHRU KOLHABHAI. **121 I. C. 414 = 31 Bom. L. R. 1081 = A. I. R. 1929 Bom. 478.**

Same person in two capacities.

———*Originating summons—Same person cannot appeal both as applicant and respondent or on one side in two capacities.*

The same person cannot appear both as an applicant and as a respondent, nor can the same person appear as two persons, even on the same side in two different capacities and appear by two different sets of Counsel in an originating summons. (*Heaton, A. C. J. and Marten, J.*) JAMSEDJI NAOROJI *v.* SARABJI NAOROJI.
25 Bom. L. R. 1137 = 85 I. C. 504 = A. I. R. 1921 Bom. 414.

Taxation.

———*Taxation depending on discretion of Master—Court will not interfere in review unless question of principle is involved.*

Generally a Court or Judge will not interfere with the order of taxation to be reviewed on a question that depends on the discretion of the master as for instance where objection is as to the amount. But where principle is involved it will always interfere : *Hill* v. *Peel*, (1870) 5 C. P. 172, Rel. on. (*Rangnekar, J.*) LANGLEY *v.* D. ARCY. **31 Bom. L. R. 1020 = 54 Bom. 62 = 122 I. C. 121 = A. I. R. 1930 Bom. 24.**

———*Claim and counter-claim—Apportionment of costs—English Practice should be followed.*

In the matter of apportionment of costs the practice laid down in English cases should be followed. Where the claim and counter-claim involve separate and distinct issues and both are allowed with costs, Taxing Master should not take the plaintiff's bill of costs separately from that of the defendants. He should tax both bills simultaneously and decide as to what items in the respective bills are to be attributed solely to the plaintiff's claim and what items are to be attributed solely to the defendants' counter-claim, and what items were common to both so as to be apportioned. *Saner* v. *Bilton*, (1879) 11 Ch. D. 416 and *Baines* v. *Bromeley*, (1881) 6 Q. B. D. 691, Rel. on. (*Mirza, J.*) AHMED AHDULLA *v.* ABDUL GAFUR. **29 Bom. L. R. 673 = 105 I. C. 899 = A. I. R. 1927 Bom. 449.**

———*English practice should be followed.*

Courts in India will follow the decisions of the English Courts in matters of taxation and the Taxing Officer should follow as far as it can be ascertained the practice observed in England. (*Macleod, C. J. and Coyajee, J.*) P.D. SHAMDASANI *v.* TATA INDUSTRIAL BANK. **50 Bom. 69 = 27 Bom. L. R. 1195 = 91 I. C. 153 = A. I. R. 1926 Bom. 18.**

———*Party taking, must pay costs—Taxing Master can make the party taking review pay costs of the other party.*

On the warrant to tax, the party taking the taxation must pay the costs of the proceedings on that warrant. But if the Txing Master is of opinion that the party bringing in the bill has unnecessarily or vexatiously increased the costs he may report accordingly and the Chamber Judge, will make such order as to those costs as he thinks fit. The proper procedure in such a case is by summons. The costs of warrant to review should follow the event of such review. The Taxing Master not only has the power to award costs against the party taking out such a review but he has also the power to make him, in a proper case, pay the other party's costs. (*Kemp, J.*) JIVANLAL PANALAL *v.* BAI MANCHHA. **27 Bom. L. R. 532 = 87 I. C. 1043 = A. I. R. 1925 Bom. 355.**

R. 64—Reference on point of law.

———*Practice—Full Bench—Chief Justice can refer point of law to Full Bench even in suit before single Judges—(Kemp, J., doubting).*

There is power under R. 64 or otherwise for the Chief Justice to direct that a point of law be dealt with by a Full Bench, although the suit has only come before a single Judge. (*Marten, C.J., Kemp and Blackwell, JJ.*) SITARAM *v.* DHARMASUKRAM. **29 Bom. L. R. 1124 = 103 I. C. 906 = 51 Bom. 971 = A. I. R. 1927 Bom. 487 (F.B.).**

R. 118—Set-off and Counter-claim distinguished.

———*C. P. Code, O. 8, R. 6—Equitable set-off—Difference between a set-off and counter-claim—Set-off not arising in same transaction as plaintiff's suit cannot be allowed.*

A claim for damages not arising from the same transaction which is the subject-matter of the plaintiff's suit cannot be treated as equitable set-off. Counter-claim is bad if it could not form the subject-matter of a separate suit in the same Court. *Grientoveen* v. *Hamlyn & Co.*, (1892) 8 T. L. R. 231, Dist. A set-off can be pleaded as a defence and can only arise where the claim to be set-off, one against the other whether by the plaintiff or defendant exists in the same right. A set-off can also be the subject-matter of a separate action or a counter-claim. Every set-off can be pleaded as counter-claim if the defendant so desires, but every counter-claim cannot be pleaded as a set-off. For an equitable set-off the claim for damages must arise from the same transaction which is the subject-matter of the plaintiff's suit; and it is only when the claim for damages forms the subject-matter of a counter-claim that it makes no difference whether damages are based on a claim arising on the subject-matter of the suit or are based on some transaction which is entirely outside the plaintiff's claim. (*Macleod, C. J. and Coyajee, J.*) VITHALDAS GULABDAS SETH *v.* THE HYDERABAD SPINNING. **24 Bom. L. R. 328 = 67 I. C. 326 = 47 Bom. 182 = A. I. R. 1923 Bom. 24.**

R. 119—Applicability.

———*Presidency Towns Insolvency Act—Official Assignee is bound to adjudicate within certain time.*

Per *Kemp, J.*—The Official Assignee is bound to adjudicate upon the proof submitted by claimant within seven days of the latest date mentioned in the notice of dividend as the latest date for lodging proofs. (*Fawcett and Kemp, JJ.*) KRISHNA CHINNOO & SONS *v.* MATUBHAI KASANBHAI. **31 Bom. L. R. 35 = 53 Bom. 290 = 117 I. C. 440 = A. I. R 1929 Bom. 107.**

———*Counter-claim—Counter-claim against plaintiff alone requires no separate title—High Court Rule override provision of C. P. Code, Sch. 1.*

Where the defendant's counter-claim is directed against the plaintiff alone there is no provision for a separate title in the High Court Rules and these rules supersede the provisions of Sch. 1, C. P. Code. (*Mirza, J.*) SAMARATHRAI KHETSIDAS *v.* KASTURBHAI JAGABHAI. **32 Bom. L. R. 212 = A. I. R. 1930 Bom. 216.**

R. 122—Contents of Notice.

———*Presidency Towns Insolvency Act—Latest date of proving must be given in notice—Date is important for limitation for appeal.*

Per *Kemp, J.*—The notice must state the latest date within which creditors can prove. The necessity of giving such a date is important because it limits the time for proof and dates the rejection of the proof within that time as the starting point for an appeal against the Official Assignee's decision. (*Fawcett and Kemp, JJ.*) KRISHNA CHINNOO *v.* MATUBHAI KASANBHAI. **31 Bom. L. R. 35 = 117 I. C. 440 = 53 Bom. 290 = A. I. R. 1929 Bom. 107.**

Rr. 130 and 131—Order refusing directions.

——*Letters Patent (Bombay), cl.* 15—*Order refusing directions is not judgment.*

An order by which directions under Rules 130 and 131 of the High Court Rules are refused is not a "judgment" within cl. 15 and no appeal lies against such order. 8 Beng. L. R. 433, Foll. (*Macleod, C. J. and Fawcett, J.*) CHARAN DAS CHATURBHUJ *v.* CHAGANLAL PITAMBARADAS. **45 Bom. 428 = 59 I. C. 533 = A. I. R. 1921 Bom. 320 (321).**

Rr. 130 and 131—Scope.

——*C. P. Code, S.* 11, *Explanation* 4—*Matter not actually decided by Court, can be* res judicata *only if explanation* 4 *applies—Order on summons for directions under Bombay High Court Rules (Original Side), Rr.* 130 *and* 131—*Trial Court's jurisdiction is not made* res judicata.

The only way in which a matter at issue between the parties can be held to be *res judicata* when it has not been actually decided by the Court is under S. 11, Expl. 4 of the C. P. Code. On a summons for directions under Rr. 130 and 131 of the Bombay High Court Rules (Original Side), it is not necessary to decide whether the Court which is to try the suit has jurisdiction to try the suit as between the defendant and the third party. Hence the mere fact that on such summons for directions, the liability between the third party and the defendant is directed to be tried at the trial does not necessarily make the question of the trial Court's jurisdiction *res judicata*. (*Macleod, C. J. and Heaton, J.*) KARIM ELAHI SHETH *v.* SHER AHMED HAJI MIR AHMED. **45 Bom. 24 = 59 I. C. 28 = A. I. R. 1921 Bom. 195.**

R. 193 (1)—Extension of time.

——*Chamber Judge can in his discretion extend time in cases under C. P. Code. O.* 37.

The discretion is vested in the Chamber Judge in a fit case to extend the period of ten days allowed under rule 193, sub-rule (1), in cases to which Order 37 is applicable. (*Mirza, J.*) MOHANLAL *v.* DARUWALA. **28 Bom. L. R. 1080 = 97 I. C. 766 = A. I. R. 1926 Bom. 578.**

Rr. 212 to 220—Applicability.

——Plaintiffs, certain trustees under a deed of settlement, agreed by correspondence to sell certain plots of land comprised in the deed of settlement, to the defendants. The defendants then paid Rs. 40,000 to the plaintiffs as earnest money. They sent to the plaintiffs several requisitions on title and in the course of correspondence raised several objections to the plaintiffs' title. On September 6, 1924, they wrote to the plaintiffs that unless the plaintiffs made out a marketable title and completed the sale by October 21, 1924, they would treat the contract as at an end, time being of the essence of the contract. On October 30, 1924, they intimated to the plaintiffs that the contract was put an end to as the plaintiffs having failed to make out a marketable title. They asked back the earnest money paid by them. Thereupon the plaintiffs took out an originating summons for the determination of the questions (1) whether the plaintiffs had failed to make out a marketable title; and (2) whether the defendants should be ordered to specifically perform the agreement. The defendants contended that the trustees had no power to sell under the deed of settlement and even if they had such power, that could according to provisions of the settlement only be exercised by a resolution passed by a majority of three-fourths of the votes of the entire number of the trustees for the time being and as no such resolution was passed, the plaintiffs had failed to make out a marketable title. On construction of the deed of settlement,

Held, that it was permissible on an originating summons to ask the following questions: (*i*) Whether the notice of September 6, 1924, is valid; (*ii*) whether the defendants ever determined the contract, and if so, when? and (*iii*) whether the defendants are entitled to a refund of Rs. 40,000 with interest thereon at the rate of six per cent. per annum from November 1, 1923, and to the costs of and incidental to the investigation of title? (*Marten, C.J. and Kemp, J.*) LAXMIDAS & CO. *v.* DORAB TATYA. **51 Bom. 247 = 29 Bom. L.R. 19 = 101 I.C. 229 = A.I.R. 1927 Bom. 195.**

R. 214—Declaratory decrees.

——*Specific Relief Act, S.* 42—*Declaratory relief-Originating summons—Court can grant declaratory relief in.*

In the matter granting declaratory relief the proper procedure to be followed is regulated by C. P. Code and High Court Rules. By High Court Rule 214, which is the chapter dealing with proceedings by way of originating summons it is clear that the Court can pass a declaratory decree in originating summons provided that case falls within S. 42 of the Specific Relief Act. (*Macleod, C.J. and Kanga, J.*) DINKERRAO GANPATRAO *v.* NARAYAN VISHWANATH MANDALIK. **47 Bom. 191 = 24 Bom L. R. 449 = 82 I. C. 628 = A. I. R. 1922 Bom. 84.**

(Amended) R. 215—Applicability.

——*Existence of partnership in dispute—Rule does not apply.*

Although the words "when the existence of the partnership or the right to, or the fact of the dissolution thereof, is not in dispute" which occurred in the old rule 213, are omitted, and the words "and for the determination of any question arising in such partnership whether to be dissolved or wound up or not" are added in the corresponding new rule 215, rule 215 does not apply where the existence of a partnership is in dispute. In omitting these words from rule 215, the rule has been brought into line with rules 212 and 214. (*Mulla, J.*) SUKHANAND GURUMUKHRAI *v.* BHIMRAJ R. PATDAR. **25 Bom. L. R. 390 = 73 I. C. 254 = A. I. R. 1923 Bom. 394.**

Rr. 242 and 243—Reasons for order.

——*Order on petition to Chamber Judge adjourned in Court—Reasons for order need not be given, for the order to be valid.*

It is not necessary on the Original Side of the High Court for a Judge in Chambers to give his reasons why he should make any particular order on a summons or petition. In an ordinary case a Judge undoubtedly should give his reasons for his decision, but a mere adjournment into Court does not necessarily involve that the Judge should give his reasons for his final decision. (*Marten, C. J. and Kemp, J.*) MATHERAN STEAM LIGHT TRAMWAY *v.* B. N. LANG. **51 Bom. 267 = 29 Bom. L. R. 126 = 100 I. C. 941 = A. I. R. 1927 Bom. 113.**

R. 329—Scope.

——*S.* 95, *C.P. Code, is not applicable to suits under ordinary original civil jurisdiction by virtue of R.* 329.

S. 95 applies to the mofussil Courts, but does not apply to suits under the ordinary original civil jurisdiction of the High Court by virtue of R. 329 and therefore the amount of damages to be awarded to the defendant is not limited to Rs. 1,000. *Newcomen* v. *Coulson*, (1878) 7 Ch. D. 764, Foll.; 22 Bom. 42, Dist. (*Mirza, J.*) HAJI ABDUL RAHMAN *v.* MUNJIBHAI KHATAO & CO. **28 Bom. L. R. 1077 = 97 I. C. 763 = A.I.R. 1926 Bom. 523.**

R. 385—Poundage when disallowed.

———*Sheriff's poundage—Where money is realized and is in Sheriff's hands relief against him for levying poundage is by summons—Where money is not realized Sheriff's remedy is by suit—Money paid before attachment—Sheriff is not entitled to poundage.*

Where as the result of a levy of execution certain property or moneys have come into the hands of the Sheriff the party aggrieved by it may on a summons ask for a relief against the Sheriff in respect of such levy, but where the property or money has not reached the hands of the Sheriff, and the Sheriff claims his poundage in respect of the attachment from the parties personally it is a matter fit for a suit rather than for informal directions by the Chamber Judge.

Where the Sheriff's Bailiff proceeded for effecting attachment under O. 21, R. 43 but before the attachment was effected the judgment-debtor paid the decretal amount under protest,

Held, the Sheriff was not entitled to any poundage. *Mortimore* v. *Cragg*, (1878) 3 C. P. D. 216, Foll. (*Mirza, J.*) JAPAN COTTON TRADING CO. *v.* UNIVERSAL FIRE AND INSURANCE CO.

29 Bom. L. R. 686 = 103 I. C. 452 = A.I.R. 1927 Bom. 420.

R. 484—Applicability.

———*Does not apply where Commissioner allows an objection once disallowed.*

Where a Commissioner recorded a finding on an objection, disallowed the same but afterwards issued a warrant to review his finding and a summons was taken out for an order that Commissioner's issue of the said warrant was illegal, *held*, that rule No. 484 did not apply to the case. (*Mulla, J.*) J. P. FERNANDEZ *v.* P. D. RODRIGUES. **47 Bom. 593 = 25 Bom L. R. 280 = 82 I. C. 593 = A. I. R. 1924 Bom. 231.**

R. 505—Costs of adjourned summons.

———*Summons adjourned to date of hearing—Costs thereto are in trial Judge's discretion.*

When a summons is adjourned to be dealt with by the Judge at the hearing of the action it becomes merged in the hearing and the costs relating thereto are at the discretion of the trial Judge. (*Macleod, C. J. and Coyajee, J.*) P. D. SHAMDASANI *v.* TATA INDUSTRIAL BANK. **50 Bom. 69 = 27 Bom. L.R. 1195 = 91 I.C. 153 = A. I. R. 1926 Bom. 18.**

Rr. 521 and 522—Details of Costs.

———*Taxation of attorney's costs—Instructions for brief—Details of charges should be given—Instructions to counsel do not cease on the day brief is delivered; they continue till termination of trial—Record must be kept of all attendances and interviews.*

A solicitor is entitled to charge for instructions for brief for the work which he has done in order to put himself in a position to instruct counsel properly in the matter. This is of course subject to the deduction of items for which he has already separately charged and been adequately remunerated for in the bill.

Speaking generally, solicitors must not be allowed costs for work done prior to the date of the suit. But it will be quite misleading to adopt some English dictum and say that solicitors for the defence are not entitled to charge for work done prior to the service of the writ, seeing that in India proceedings are begun by a plaint and not by a writ as is the case in England.

Instructions to counsel do not cease on the day that briefs are delivered, but the Taxing Master should consider all the work done by the solicitors up to the termination of the trial.

The charge for instructions should not be put in one lump sum, without giving any summary showing under certain leading heads what the solicitors actually claim to have done.

It is the duty of attorneys to keep a strict record of all attendances and interviews for which they propose to make a charge, whether they propose to charge for them separately, or whether they propose to put them forward under the general heading of "Instructions for Brief". The heading "Instructions for Brief" is intended to cover all work necessarily done by solicitors in order to enable them to instruct counsel from the start of the suit to the finish. (*Marten, C. J. and Blackwell, J.*) P. D. SHAMDASANI *v.* TATA INDUSTRIAL BANK, LTD. **29 Bom. L. R. 1093 = 103 I. C. 731 = A. I. R. 1927 Bom. 529 (535).**

R. 522—Objection by a party.

———*Party objecting can point out mistake of law or principle on the part of Taxing Officer.*

It is open to a party objecting to show that the Taxing Officer erred on a question of principle or has omitted to take into consideration all those matters which he is required to take into consideration. The Taxing Officer is not at liberty to lay down a scale for discretionary charges which is out of all proportion to the work done. In order to enable the Taxing Officer to exercise his discretion, where large sums are charged for instructions, it is necessary that attorneys should give him all the necessary particulars so that he may be able to decide what is reasonable to be allowed. Proper attention must be paid by the Taxing Officer to the difficulty or triviality of the points raised, and the existing means of knowlege in the hands of the defendants to meet the attack. The Taxing Officer must have some sense of proportion, and must form some idea of the actual work done and the actual time taken by the attorneys in preparing the brief, with a view to awarding them reasonable remuneration for the work done, having regard also to the other charges made in the bill for particular items of work. (*Macleod, C. J and Coyajee, J.*) P. D. SHAMDASANI *v.* TATA INDUSTRIAL BANK. **50 Bom. 69 = 27 Bom. L. R. 1195 = 91 I. C. 153 = A. I. R. 1926 Bom. 18.**

R. 602—Rival wills.

———*Succession Act* (1925), *S.* 295—*Rival will set up for same Estate—Will set up by caveator must also be filed and propounded.*

Where two wills are set up by two persons in regard to the same Estate the parties interested in opposing the grant of probate have to file their respective caveats in each case so that the petition becomes a suit in each case and the suits are numbered and both the suits are heard together or are consolidated. It is, therefore necessary that even the caveator must produce the will set up by him along with his petition and it must be filed and propounded before the suit can proceed. 22 Bom. 261, Ref. (*Rangnekar, J.*) VENIDAS NEMCHAND *v.* BAI CHAMPABAI. **53 Bom. 829 = 31 Bom. L. R. 1014 = 122 I. C. 126 = A. I. R. 1930 Bom. 29.**

R. 736—Additional security.

———*Appeal—Security for costs would be demanded in exceptional cases.*

Where the appellant was a Sadhu who had not paid Rs. 26,358 odd, party and party costs taxed for the respondent in the final Court, and his attorneys got themselves discharged on the ground that they were not placed in funds for prosecuting the appeal, the Court of Appeal demanded, as being an exceptional case, a security for Rs. 5,000 in addition to the usual security lodged by the appellant along with his appeal, for the costs of the respondent. (*Macleod, C. J. and Madgav-*

kar, J.) SEVADASJI CHANDRADASJI *v.* MUNICIPAL CORPORATION FOR THE CITY OF BOMBAY.
27 Bom. L. R. 1216 = 94 I. C. 654 = A. I. R. 1926 Bom. 42.

BOMBAY HINDU HEIRS RELIEF ACT (VII OF 1866).

S. 2—Scope.

———*C.P. Code, S. 53—Decree against Hindu father—Although lands inherited by agriculturist son cannot be attached, the rents thereof are liable to attachment for satisfaction of the decree to extent of property inherited.*

The rents of the property inherited by the son as the representative of his father, though they did not come into his hands at the time of the death of the father, are liable for the satisfaction of the father's debt and can be attached in execution of a decree against the father to the extent of the property which is inherited by him and which has not been duly applied by him for the payment of the decretal amount, although the land belonging to the Hindu father is exempt from attachment in the hands of agriculturist son, under Deccan Agriculturists' Relief Act, S. 22. 8 Bom. 220; 9 B. H. C. R. 116 and 2 W. R. 296, Rel. on. (*Patkar and Murphy, JJ.*) ANANT GOVIND JOG *v.* TUKARAM KUSHABA SHINDE. **53 Bom. 463 = 31 Bom L. R. 442 = 119 I.C. 179 = A. I. R. 1929 Bom. 233.**

BOMBAY IRRIGATION ACT (VII OF 1879).

Ss. 3, 31, 34 and 35—Suit for Compensation.

———*Suit for compensation for loss for non-supply of water—Civil Court has no jurisdiction to try.*

Under S. 36, the decision of the Collector either under S. 34 or 35 as to the amount of the compensation to be awarded, shall be final unless there is an appeal to a higher authority in which case the decision of the higher authority shall be conclusive. These words show that it was intended that the jurisdiction of the Civil Courts should be ousted, so that the holder of land should not be entitled to bring a suit for compensation for loss alleged to have arisen out of interruption to the supply of water to his lands. (*Macleod, C. J. and Shah, J.*) VISHNU VINAYAK VAZE *v.* SECRETARY OF STATE FOR INDIA. **46 Bom. 738 = 24 Bom. L.R. 264 = 67 I.C. 43 = A.I.R. 1922 Bom. 8.**

Ss. 22 and 23—Control over supply.

———*Water supply—Control over.*

Ss. 22 and 23 give control over the supply of water from the water-course. The right however to regulate water from a Government or public channel or canal is the right of Government alone. (*Fawcett, J.C. and Kemp, A. J. C.*) NAWAZALI SHAH *v.* RUSTOMALI SHAH.
62 I. C. 225 = 14 S. L. R. 53.

S. 23—Service of Summons.

———*Jurisdiction under—Service of summons and hearing of objections are conditions precedent.*

The service of summons and hearing of objections are conditions precedent to the exercise of jurisdiction conferred by the S. 23, and failure to comply with those conditions makes an order made under it a nullity, nor is such an order protected by the theory of inherent jurisdiction. (*Fawcett, J. C. and Kemp, A. J. C.*) NAWAZALI SHAH *v.* RUSTOMALI SHAH.
62 I. C. 225 = 14 S. L. R. 53.

BOMBAY KHOTI SETTLEMENT ACT (I OF 1880).

Custom.

———*Khot—Terms of kabuliat to Government must conform to custom except as altered by Bombay Act I of 1865, Ss. 37 and 38.*

A Khot's interest in the khoti village is limited, not absolute. He possesses in some measure a proprietary right. He is an occupant with all rights and liabilities affecting such a status. The Khot has to secure to Government the payment of the village revenue while the village lands which he has to manage in accordance with the restrictions mentioned in the kabuliat fall under three distinct items, *viz.*:—(1) Dharekari lands the tenants of which have a transferable and heritable right paying Dhara alone to the Khot; (2) Khot nisbat lands which are in the hands of permanent occupancy tenants or tenants with less permanent right paying Fayda to the Khot and Government assessment; and (3) Khoti Khasgi lands, private lands in the possession of the Khot of which he can make such use as he pleases. With regard to Khot nisbat lands the right of the Khot to exact rent or Fayda in addition to the assessment is limited by the kabuliat which is in accordance with the decision of the Government Officer fixing the demand of the Khot on his tenants under S. 38, Bombay Act I of 1865. Khots in the district of Kolaba are hereditary farmers of the revenue and are entitled to hold their villages as Khoti on their entering every year into the customary kabuliats. If the Government wish to impose upon the Khot a new form of kabuliat they must not infringe the customary rights of the Khots except as altered by S. 38 of Bombay Act I of 1865. A Khot of a village in the Kolaba District, at first used to pass annual kabuliats to Government in the form which was then in use. Government offered, in 1915-16, to the plaintiff a kabuliat in another form which contained several new clauses. Cl. 6 empowered a permanent tenant of Khot nisbat land to compel the Khot either to consent to a transfer or to take up the land himself. Cl. 8 required the Khot to keep the land at the disposal of a Dharekari who had deserted. Cl. 21 worded ambiguously. As the Khot objected to pass the kabuliat in the new form the Government attached the Khoti village.

Held, that the Khot was justified in refusing to sign a kabuliat which contained any one of such objectionable clauses, *viz.*, 6 and 8 which were in infringement of the customary right of the Khot and that the attachment of the village for refusing such a kabuliat was, therefore, illegal and the Khot was entitled to mesne profits and damages. (*Macleod, C. J. and Shah, J.*) GANPATI GOPAL RASBUTT *v.* SECRETARY OF STATE.
48 Bom. 599 = 26 Bom. L. R. 754 = 83 I. C. 370 = A. I. R. 1925 Bom. 44.

S. 8—Interpretation.

———*In the absence of specific agreement between tenant and Khot, tenant is yearly tenant and tenant is entitled to notice under Bombay Land Revenue Code (Act V of 1879), S. 84.*

Under the provisions of S. 8 in the absence of any specific agreement between the tenant and the Khot, the tenant must be held to be a yearly tenant liable to pay rent to the Khot at the rates prescribed and accordingly he is entitled to the notice prescribed in the case of yearly tenants under S. 84 of the Bombay Land Revenue Code. (*Macleod, C. J. and Fawcett, J.*) VISHNU BHIKAJI *v.* BABLA LACKA. **45 Bom. 1001 = 23 Bom. L. R. 411 = 61 I. C. 594 = A. I. R. 1921 Bom. 38.**

S. 9—Managing Khot.

———*Managing Khot can give the consent.*

It is within the ordinary duties of a managing Khot to consent to a transfer of a permanent tenancy. (*Macleod,* *C. J. and Shah, J.*) IBRAHIM MOHIDIN MHATE *v.* KRISHNAJI LAXMAN. **26 Bom. L. R. 421 = 80 I. C. 458 = A. I. R. 1924 Bom. 459.**

S. 10 (as amended by Act IV of 1913)—Applicability.

———*Transfer by manager—Transferer's share is forfeited but not that of any other co-parcener.*

Where the manager of a joint Hindu family mortgages the interest of the family in property held under Khoti tenure, the interest of the manager alone is forfeited under S. 10 and the forfeiture does not affect the interest of other co-parceners in the family property. (*Macleod, C. J. and Coyajee, J.*) KRISHNAJI *v.* GANGAJI. **50 Bom. 189 = 28 Bom. L. R. 71 = 93 I. C. 123 = A. I. R. 1926 Bom. 166.**

S. 10—Interpretation.

———'*Transfer' includes simple mortgage.*

A simple mortgage is a transfer of the interest of the tenant within the meaning of the section. Even the satisfaction of the mortgage by the khatedar prior to the suit by the Khot does not destroy the right of the Khot. (*Shah and Crump, JJ.*) VASU KRISHNA VENKAVDA *v.* MADHAVRAO MORESHWAR BHANDARKAR. **24 Bom. L. R. 1160 = 73 I. C. 880 = A. I.R. 1923 Bom. 33.**

———*Transfer of a portion of the Khoti land by the occupant—Only such portion will be at the disposal of the Khot.*

There is no indication in S. 10 of the Bombay Khoti Settlement Act that all the lands of the occupant are intended to be at the disposal of the Khot even though one of them or only a portion of one land may have been transferred, by him without the consent of the Khot. (*Shah and Pratt, JJ.*) MADHAVRAO MORESHWAR BHANDARKAR *v.* KRISHNAJI SATURAO RANE. **46 Bom. 470 = 24 Bom. L. R. 131 = 68 I. C. 277 = A. I. R. 1922 Bom. 257.**

S. 21 and Ss. 16 to 20—Meaning of decision.

———*Mere entry in Botkhat is not a 'decision'.*

The Act nowhere provides that the mere entry in the Settlement Register of the name of a particular person as the occupant of the survey number is either final and conclusive or that it is binding upon all the parties concerned, unless and until it is reversed or modified by a decree of the Civil Court. What is made binding by the provisions of S. 21 is the decision of the Recording Officer and not a mere entry of a person's name in the Settlement Register. Preceding sections make it clear that the mere entry of the name of some particular person as occupant was not intended to be included among those decisions of the Recording Officer. An entry in Botkhat is not a decision. S. A. No. 850 of 1914, Ref. (*Macleod, C. J. and Coyajee, J.*) R. S. POTPHODE *v.* J. G. YESHWANTRAO. **46 Bom. 966 = 24 Bom. L. R. 323 = 67 I. C. 322 = A. I.R. 1922 Bom. 329.**

S. 33—Object of Section.

———*Section prevents private arrangements being made by Khots with tenants.*

The whole scheme of S. 33 is to prevent arrangements being made in an unauthorized way by the Khots with the tenants contrary to the terms of the Botkhat. (*Macleod, C. J. and Coyajee, J.*) BALSHET *v.* HARI. **27 Bom. L. R. 1487 = 92 I. C. 542 = A. I. R. 1926 Bom. 119.**

S. 37—Absence of new settlement.

———*Expiry of settlement—New rates not fixed—Khot is entitled to fall back on "mamuli vahivat".*

On the expiry of the old settlement and in the absence of a new settlement the khot is entitled to go back to the "mamuli vahivat" and recover his dues on that basis. 36 Bom. 290, Dist. (*Madgavkar and Wild, JJ.*) ABDUL RAHIM *v.* PANDU SADHU. **32 Bom. L. R. 175 = A. I. R. 1930 Bom. 190.**

S. 38—If powers not exercised.

———*Government to fix demands of khot—In absence of order of evidence of intention to continue old rates Khot can fall back on "mamuli vahivat."*

In the absence of the exercise of their powers by Government under S. 38 or in the absence of evidence of intention on their part to continue the rates of the expired settlements the Khot cannot be prevented from falling back upon his right under 'mamuli vahivat.' (*Madgavkar and Wild, JJ.*) ABDUL RAHIM *v.* PANDU SADHU. **32 Bom. L. R. 175 = A. I. R. 1930 Bom. 190.**

BOMBAY LAND CUSTOM ACT (XXIX OF 1857).

S. 8—Interpretation.

———*"At any station, etc.", must be read after "passed or attempted to be passed" in para. 2—S. 8 does not cover case of goods whose conveyance is complete.*

Para. 2, S. 8 must be read as if the words "at any station established for the levy of duties and passing of goods" followed the words "passed or attempted to be passed." It is doubtful whether it would cover a case of goods whose conveyance from foreign territory had been completed so that they could not be said to be in the process of being passed or attempted to be passed. (*Fawcett, Ag. C. J. and Murphy, J.*) SECRETARY OF STATE *v.* VASUDEO VENKATESH. **53 Bom. 97 = 30 Bom. L. R. 1494 = 115 I. C. 409 = A. I. R. 1929 Bom. 46.**

S. 14—Applicability.

———*S. 14 is confined to officer at station under Act.*

S. 14 is in express terms confined to an Officer of Customs employed at a station established under the Act. It does not cover the case of the seizure by another officer, who is not so employed. (*Fawcett, Ag. C. J. and Murphy, J.*) SECRETARY OF STATE *v.* VASUDEO VENKATESH. **53 Bom. 97 = 30 Bom. L. R. 1494 = 115 I. C. 409 = A. I. R. 1929 Bom. 46.**

S. 21—Good faith.

———*Good faith should not be brought in construing S. 21—S. 21 should be confined to seizure proper under the Act.*

Question of good faith cannot be brought into the construction of S. 21. That section must be confined to cases where goods have been properly seized as liable to confiscation or properly detained as under-valued, that is to say seized or detained under circumstances at least approximating to those where the Act authorized such seizure or detention. The words "under this Act" must be given due weight. (*Fawcett, Ag. C.J. and Murphy, J.*) SECRETARY OF STATE *v.* VASUDEO VENKATESH. **53 Bom. 97 = 30 Bom. L.R. 1494 = 115 I.C. 409 = A.I.R. 1929 Bom. 46.**

BOMBAY LAND REVENUE CODE (V OF 1879).

Interpretation.

———The Code is in the nature of a penal statute and, therefore, must be strictly considered in favour of the subject. (*Marten, C. J. and Crump, J.*) SECRETARY OF STATE *v.* ABDUL HUSEN. **29 Bom. L. R. 1350 = 106 I.C. 239 = A.I.R. 1927 Bom. 601.**

Sanad by City Survey.

———Ex parte *grant of Sanad at City survey confers no title.*

There is nothing in the Bombay Land Revenue Code justifying the conclusion that a person who gets a sanad at the City Survey on his *ex parte* application, is entitled to turn out the person in possession of the land, unless such person proves a better title. (*Macleod, C. J. and Coyajee, J.*) TRIMBAK NARAYAN PUJARI *v.* DAMU BHAN SALI. **27 Bom. L.R. 656 = 95 I.C. 881 = A.I.R. 1925 Bom. 430.**

S. 37—Blocking highways.

———*Government cannot block public road—Highway.*

Government have no inherent power to block or to divert existing public highways. If they wish to obtain it, legislation is necessary. (*Marten, C.J. and Murphy, J.*) ARDESHIR JEVANJI *v.* AIMAI KUVARJI. **53 Bom. 187 = 31 Bom. L.R. 97 = 117 I.C. 513 = A.I.R. 1929 Bom. 94.**

Ss. 48 and 214—Scope.

———*Agricultural land converted to building sites—Assessment is altered but not added—Altered assessment goes to the grantee of the village.*

S. 48 does not provide for an additional assessment, it only provides for an altered assessment to be imposed according to rules. Where, therefore, the raiyats' agricultural assessment in virtue of a grant of the village is given to the grantee, the altered or building assessment also goes to him. (*Viscount Dunedin.*) BOMANJI ARDESHIR *v.* SECRETARY OF STATE. **31 Bom. L.R. 256 = 114 I.C. 1 = 53 Bom. 230 = 56 I. A. 51 = 1929 A. L. J. 47 = 49 C.L.J. 179 = 33 C.W.N. 293 = A.I.R. 1929 P.C. 34.**

S. 53—Occupancy rights.

———*Assessment paid by tenants though not conclusive evidence affords ground for strong presumption in Satara District of occupancy rights—Rent equivalent to assessment cannot be enhanced unless custom is established.*

The fact that the tenants pay the amount of assessment may not be conclusive evidence in the Satara District, but it would afford strong presumption that the tenants have attained to occupancy rights by virtue of their long holding. The word "Miras" should not be used in case of persons who by virtue of their long holding are presumed by reason of the provision of S. 53 to have acquired fixity of tenure. In cases where rent is equivalent to assessment it cannot be enhanced unless a right to do so is established by custom or otherwise. (*Macleod, C.J. and Crump, J.*) SITARAM SADASHIV *v.* PARASURAM BHAU PATIL. **77 I.C. 878 = A.I.R. 1923 Bom. 449.**

S. 56 (as amended by Act VI of 1901)—Fallow-forfeited.

———*Effect of amendment on the grant of fallow-forfeited land to co-owner—Such grant is personal.*

The grant of fallow-forfeited land to only one of several co-owners of joint property subsequent to 1901 is in the absence of any other circumstance a grant to him personally and this is more so in survey numbers granted on restricted tenure. (*Rupchand and Barlee, A.J.Cs.*) ABDUL RAHMAN *v.* HAJI MD. IDRIS. **23 S.L.R. 461 = 118 I.C. 207 = A.I.R. 1929 Sind 212.**

S. 61—Unauthorized occupation.

———*Area which has deteriorated for purposes of cultivation or for quarrying is contemplated.*

Occupation in the sense of the amount of area which has deteriorated for purposes of cultivation or for quarrying is the area contemplated by the Act as being occupied. (*Madgavkar and Patkar, JJ.*) SULEMAN *v.* SECRETARY OF STATE. **30 Bom. L. R. 431 = 109 I.C. 545 = A.I.R. 1928 Bom. 180.**

Ss. 63 and 64—Proportionate rent.

———*Landlord is entitled to charge proportionate rent for alluvion sold to him by Government.*

Where the Government under S. 63 granted some alluvion which had formed itself to the lands held by the lessee on Mulgani (permanent lease),

Held, that the landlord could demand proportionate rent since the alluvion is to be treated as an entirely separate piece of the land. (*Macleod, C.J. and Shah, J.*) MANJAYA SUBRAYA *v.* TAMMAYA VASUDEV. **26 Bom. L.R. 520 = 80 I.C. 427 = A.I.R. 1924 Bom. 449.**

S. 65—Agricultural land.

———*Application to use agricultural land for cattle shed—Refusal of permission without enquiry—Procedure is wrong—Orders to pull down shed are* ultra vires.

Plaintiff applied to the Collector for permission to erect a shed in an agricultural land for his cattle. The Collector instead of merely sending the acknowledgment to the plaintiff that he had received the application sent a reply that the application was refused.

Held, that because the Collector refused the application without due inquiry, that did not debar the plaintiff entirely from building when he did not hear anything further in the matter with regard to the result of the inquiry within the period of three months, and if he built his shed after three months it cannot be ordered to be demolished. There having been no order after due enquiry within three months any further proceedings of the Collector were defective and must be taken to have been entirely beyond his powers. The decision of the Collector is to be a proper decision after due inquiry. (*Macleod, C.J. and Shah, J.*) SHIVPALSINGH BHAGVATSING PARDESHI *v.* THE SECRETARY OF STATE FOR INDIA. **26 Bom. L.R. 371 = 81 I.C. 491 = A.I.R. 1924 Bom. 369.**

S. 66—Penalty.

———*Penalty is to be recovered on the actual area of the building and not on the whole holding.*

Where a portion of land assessed or held for purposes of agriculture is used without the permission of the Collector for any other purpose than that of agriculture, *e.g.*, for non-agricultural building purposes, the penalty leviable, under S. 66 can be levied with reference to the actual area built upon and not on the whole holding. (*Marten, C.J. and Crump, J.*) SECRETARY OF STATE *v.* ABDUL HUSEN DASAJI. **29 Bom. L.R. 1350 = 106 I.C. 239 = A.I.R. 1927 Bom. 601.**

———*Bombay Land Revenue Code, S. 148—S. 148 has no bearing on fine under S. 66.*

S. 148 has no bearing whatever upon the question of a fine leviable under the provisions of S. 66. (*Marten, C. J. and Crump, J.*) SECRETARY OF STATE FOR INDIA *v.* ABDUL HUSEN DOSAJI. **29 Bom. L.R. 1350 = 106 I.C. 239 = A.I.R. 1927 Bom. 601.**

S. 68—Tenant.

———*Origin of tenancy not known—Tenant is not occupant.*

Where the holder of land is a tenant, the origin of whose tenancy owing to antiquity cannot be determined, he is not an occupant within the meaning of that word in S. 68. (*Macleod, C.J. and Coyajee, J.*) KONDI RAMJI *v.* VITHALRAO. **50 Bom. 155 = 94 I.C. 662 = 28 Bom.L.R. 424 = A.I.R. 1926 Bom. 257.**

S. 73-A—Restricted tenure.

———*S. 73-A includes transfer of interest in restricted occupancy tenure.*

The prohibition contained in S. 73-A is not confined to an absolute and out-and-out transfer of an occupancy but that it includes the transfer of an interest in the occupancy without the sanction of the Collector. A mortgage, therefore, of a share in land held on restricted tenure, without the sanction of the Collector, is void and conveys no right to the mortgagee. (*Aston, A.J.C.*) DHARAMDAS THAWARDAS *v.* SORABJI. **121 I.C. 876 = A.I.R. 1930 Sind 75.**

———*Property held by person on restricted tenure sold without sanction of Collector—Such sale is merely voidable.*

If property held by a person on restricted tenure is transferred by him without the previous sanction of the Collector, though it is not so transferable, such sale is voidable and not void as the vendee has right to sell with the sanction of the Collector and it is not that he has absolutely no right to convey the property. (*Kalumal, A. J. C.*) ABDUL RAHIM, FATEH MOHAMED KHAN *v.* KADU. **118 I. C. 203 = A. I. R. 1930 Sind 12.**

———*Agreement to sell land held on restricted tenure—Performance contingent on sanction of revenue authorities being obtained—Failure to obtain sanction—Suit for specific performance or damages is not maintainable—Contract Act, S. 32—Specific Relief Act, Ss. 9 and 27 (b).*

J contracted to sell agricultural land held on a restricted tenure to plaintiff and subsequently sold the land to *N* with sanction of the revenue authorities under S. 73-A, Bombay Land Revenue Code, and *N* took possession of the land. Plaintiff instituted a suit against *N* for recovery of possession under S. 9, Specific Relief Act, and another against *J* for specific performance of the contract as per contract, and in the alternative for damages for breach of contract.

Held, that the sanction given by the Collector under S. 73-A, Bombay Land Revenue Code, in favour of a particular transferee did not mean that the character of restricted tenure impressed upon the land was so completely removed as to render it transferable at will.

Held, further, that the permission of the Collector not having been granted and having been impliedly refused, the contract entered by *J* with plaintiff was never a completed contract at any time and, therefore, it was not a contract which could be specifically enforced as against *J*. (*DeSouza, A.J.C.*) ISMAIL KHAN *v.* OFFICIAL RECEIVER. **22 S. L. R. 396 = 105 I. C. 735 = A.I.R. 1928 Sind 63.**

Ss. 74 and 88—Transfer of Property.

———*Notices of relinquishment received by Inamdar are exempt from registration only when Survey Settlement is introduced or powers under S. 88 are conferred.*

It is only when the Survey Settlement has been introduced, or when the powers contemplated in S. 88 have been given to the inamdar, that he is entitled to receive notices of relinquishment under S. 74 from the persons in occupation of the inam lands, and only such notices are exempt from registration under S. 90 of the Indian Registration Act. 13 Bom. 294 and 41 Bom. 510, Dist. (*Macleod, C. J. and Fawcett, J.*) SIDHRAJ BHOJRAJ *v.* DURI SANTARAM. **45 Bom. 898 = 23 Bom. L. R. 272 = 61 I. C. 464 = A. I. R. 1921 Bom. 371.**

———The plaintiffs held plots in a talukdari estate free of rent and free also of assessment and local fund. It appeared, however, that the talukdars of the estate paid assessment and local fund for the whole estate to Government in the form of *jama*. The talukdar having relinquished the said plots in favour of the Government,

Held, that the Government could recover the local fund and the assessment from the plaintiffs. (*Kemp, A. C. J. and Murphy, J.*) NATHURAM *v.* SECRETARY OF STATE. **32 Bom. L. R. 907.**

———*Transfer—Rajinama and kabuliyat do not constitute transfer.*

A rajinama and kabuliyat do not by any means take the place of a sale-deed. Before they really do evidence a transfer of ownership, there must be either evidence or indications furnished by lapse of time and possession and so forth, and that there was in fact an intention to transfer ownership. They only serve as documentary evidence of transfer if that transfer can properly be inferred from the totality of the facts proved. (*Macleod, C. J. and Heaton, J.*) CHANDANMAL HAMBIRMAL *v.* BHASKAR WAMAN. **59 I. C. 114 = 22 Bom. L. R. 1079.**

Ss. 79-A and 68—Summary Eviction.

———*Grant under S. 68—Grantee prohibited from alienation—Contract for alienation is not breach of condition of grant—Summary eviction of grantee under S. 79 A is illegal.*

Where in a grant of occupancy of certain lands made by Government the grantee is prohibited from alienating the land, a contract for alienation does not amount to a breach of the condition of the grant so as to make the grantee liable to be summarily evicted under Bombay Land Revenue Code, S. 79-A. (*Shah and Crump, JJ.*) DHANJI JAIRAM *v.* SECRETARY OF STATE. **45 Bom. 920 = 23 Bom. L. R. 279 = 61 I. C. 347 = A. I. R. 1921 Bom. 381.**

———*Limitation Act, Art. 14—Summary eviction under—Conditions necessary for such eviction not present—Officer does not act in official capacity—Suit by evicted person—Art. 14 of Limitation Act does not apply.*

Where the conditions necessary for the exercise of the power of summary eviction conferred by S. 79-A do not in fact exist, the District Deputy Collector cannot be held to act in his official capacity if he evicts a person under that section. So, Limitation Act, Art. 14 does not apply to a suit for possession by the evicted person. 24 Bom. 435; 36 Bom. 325 and 30 Mad. 280, Foll. (*Shah and Crump, JJ.*) DHANJI JAIRAM *v.* SECRETARY OF STATE. **45 Bom. 920 = 23 Bom. L. R. 279 = 61 I. C. 347 = A. I. R. 1921 Bom. 381.**

S. 81—Failure to pay assessment.

———*Registered occupant failing to pay assessment—Action taken by Collector under section—Co-sharer paying up and* khata *transferred in his name—Registered occupant does not lose his occupancy rights.*

The plaintiff, who was registered occupant of certain lands, failed to pay assessment on the land and on action being taken under S. 81 plaintiff's co-sharer paid up the arrears due and his name was put in the *khata* of the land. The plaintiff sued to recover possession of the land from the defendants who contended that the plaintiff had no title to sue as his interest was forfeited by the action taken under S. 81.

Held, though under S. 81, plaintiff's interest as a registered occupant had ceased yet he had occupancy rights in the land and therefore he had a right to sue.

(*Macleod, C. J. and Shah, J.*) Vinayak Dattatraya Joshi *v.* Ganesh Anant Hasabnis.
46 Bom. 221 = 23 Bom. L. R. 1024 = 64 I. C. 201 = A. I. R. 1922 Bom. 198.

S. 83—Enhancement of rent.

——*Onus is on the landlord to prove his right to enhance.*

Once the permanent tenancy is proved, the concluding clause of S. 83 clearly places the onus on the landlord of proving his right to enhance the rent. (*Macleod, C. J. and Madgavkar, J.*) Giriappa *v.* Govindrao.
49 Bom. 902 = 27 Bom. L. R. 1336 = 91 I. C. 314 = A. I. R. 1926 Bom. 52.

——*'Usage' has to be proved by landlord.*

The usage referred to in S. 83 provision has to be proved by the landlord, landlord's right to enhance rent by usage in the case of *mirasi* tenures in Deccan has no application to *watan* land in Gujrat. (*Marten and Fawcett, JJ.*) Jiwasingji Motisingji Thakor *v.* Dola Chhala. **27 Bom. L. R. 890 = 91 I. C. 272 = A. I. R. 1925 Bom. 390.**

——*Court can consider the particular usages in considering the limit of enhancement.*

In considering what is the limit of enhancement permissible to the landlord under S. 83 the Court is entitled to take into consideration not only the general usage of the District, but also what has been the particular usage in regard to the lands in suit. (*Macleod, C. J. and Fawcett, J.*) Sitaram Sadashiv *v.* Thukaram Daji. **45 Bom. 994 = 23 Bom.L. R. 395 = 61 I. C. 577 = A.I.R. 1921 Bom. 78.**

S. 83—Origin of Tenancy.

——The period of a century is too long and indefinite a period to constitute satisfactory evidence of the commencement of a tenancy within the meaning of S. 83. A. I. R. 1922 Bom. 402, Expl. (*Fawcett and Patkar, JJ.*) Shripadbhat Anantbhat *v.* Rama Babaji.
29 Bom. L. R. 274 = 101 I. C. 340 = A. I. R. 1927 Bom. 270.

——*Tenancy traceable to the time of foundation of village in particular year—Origin of tenancy may yet be shown to be indefinite.*

Where once a definite commencement of a tenancy is found then there is no room for the presumption to be raised under S. 83. But it does not follow that because the defendants trace their origin and connection with the land back to the foundation of the village in a particular year their particular tenancy or that of their ancestors began on that particular definite date. The defendants can show by means of other evidence that they had been tenants of the lands prior to that date, from some period which cannot be definitely fixed. (*Marten and Fawcett, JJ.*) Amarsangji Indrasangji *v.* Ranchhod Jethabhai. **27 Bom. L. R. 267 = 91 I. C. 265 = A. I. R. 1925 Bom. 294.**

——*Origin of tenancy though old, traceable—Section does not apply.*

The provisions of S. 83 of the Bombay Land Revenue Code, 1879, do not apply to a tenancy though very old when its commencement can be traced to a specified year. (*Shaw and Pratt, JJ.*) Chikko Bhagwant Nadgir *v.* Shidnath Martand.
46 Bom. 687 = 24 Bom. L. R. 226 = 66 I. C. 315 = A. I. R. 1922 Bom. 25.

S. 83—Permanent Tenancy.

——*Permanent tenant—Landlord cannot recover more than three times the assessment.*

In cases of permanent tenants under S. 83, the landlord should not recover from the tenants, in any one year more than three times the assessment. (*Macleod, C. J. and Madgavkar, J.*) Gangaram *v.* Ganesh.
27 Bom. L. R. 1339 = 91 I. C. 318 = A. I. R. 1926 Bom. 49.

S. 83—Presumption.

——Where the tenant has been in occupation for a period of nearly a century without disturbance or enhancement of rent, the presumption that he is a permanent tenant can hardly be defeated from the simple fact that the owner is able to produce his own title deed, which may be of years before. On the other hand, in the absence of documentary evidence, difficult to procure in the case of ancient tenancy, it is not enough if the landlord proves that the tenancy, notwithstanding its long duration, commenced at a definite date, meaning thereby not the day, month and year, but at least an paproximate period when it began and not merely large periods such as 25 years or 30 years between which it began. Such an approximate point of commencement might be sufficient to defeat the presumption of a permanent tenancy which might otherwise be made. A. I. R. 1921 Bom. 224 and (1893) P. J. 323, Rel. on ; A. I. R. 1922 Bom. 402 ; 18 Bom. 433 ; A. I. R. 1922 Bom. 25 and A. I. R. 1926 Bom. 55, Ref. (*Madgavkar and Murphy, JJ.*) Mansukh Panachand Shaha *v.* Trikambhai Ichhabai Patel.
31 Bom. L. R. 1279 = 123 I.C. 492 = A. I. R. 1930 Bom. 39.

——*Presumption cannot be drawn when particular year is shown as beginning of tenancy.*

When a particular year is indicated as that in which the tenancy began, the case is excluded from those in which a presumption can be drawn under S. 83. 23 Bom. L. R. 533 ; A. I. R. 1922 Bom. 25, Discussed. (*Fawcett, and Madgavkar, JJ.*) Ramchandra *v.* Datta. **27 Bom. L. R. 1258 = 91 I.C. 347 = A. I. R. 1926 Bom. 55.**

——*Existence of tenancy shown for nearly 80 years—Origin not known—Tenancy should be presumed to be permanent and ancient.*

Where the plaintiff-tenant put in title deeds going as far back as 1835, in the earliest of which the land, was described as *pasaita* land meaning 'land given in charity to Brahmins, etc.,' on a quit-rent of Rs. 5 and where there was no evidence to show when the tenancy was created,

Held, that the tenant was entitled to the presumption under S. 83 of the Code, that he was a permanent tenant at a fixed quit-rent. (*Marten and Fawcett, JJ.*) Jawasingji Motisingji Thakor *v.* Dola Chhala.
27 Bom. L. R. 890 = 91 I. C. 272 = A. I. R. 1925 Bom. 390.

——*Long occupancy—Tenant signing* kabuliyat *with full knowledge that landlord was denying the permanent nature of tenancy—Presumption from long occupancy is destroyed.*

No doubt when it has been proved that a tenant has been in occupation of certain land so long that one cannot ascertain the commencement of the tenancy, the mere fact, that during the currency of his holding he has signed a *kabuliyat* which purports to be in terms an agreement for an annual tenancy, may not be sufficient to displace the advantage he has obtained from his long holding, if he continues in possession for many years after he had signed the *kabuliyat* on the same rent. But each case of this class must stand entirely on its facts. At first, the tenant claiming to hold as a permanent tenant must establish the facts which would entitle him to the presumption of S. 83. But that can be rebutted by the landlord by the production of acknowledgment. Again the effect of the *kabuliyat* can be destroyed by further evidence on the part of the tenant. The fact of the signing of the *kabuliyat* as, merely an isolated instance in the midst of a long holding at the same rent, will not necessarily prevent the tenant from succeeding. Where the purpose of the plaintiff in taking *kabuliyats* was perfectly clear, and the tenants must have known that the plaintiffs were asking for *kabuliyats* because plaintiff was asserting his rights against any claims of the tenants to hold as permanent tenants and that many of the tenants were signing these *kabuliyats*.

Held, the signing of the *kabuliyat* at once destroyed any presumption that might have arisen from the previous holding of the defendants of the suit lands. (*Macleod, C. J. and Crump, J.*) VIJBHUKANDAS KASHIDAS *v.* SIRDAR ISHWARDAS. **25 Bom. L. R. 431 = 74 I. C. 292 = A. I. R. 1923 Bom. 397.**

———*Tenancy—Presumption—Commencement of the tenancy—Means commencement within a particular period of time.*

In a case where the tenancy does not go back into obscurity but is bounded by a definite time or period, there is satisfactory evidence of the commencement of the tenancy within the meaning of S. 83 and the presumption in favour of the tenant that the tenancy is co-extensive in time with the tenure of the landlord does not arise. 18 Bom. 433, Foll. (*Pratt and Fawcett, JJ.*) NARAYAN RAMCHANDRA THITA *v.* PANDURANG BALAKRISHNA DESHPANDE. **47 Bom. 4 = 24 Bom.L.R. 831 = 76 I.C. 71 = A.I.R. 1922 Bom. 402.**

———*Commencement of tenancy proved but not terms—Presumption under S. 83 (2) does not arise.*

Where it is proved that the tenancy commenced in a particular year although the actual terms of the tenancy are not proved, the presumption under S. 83 (2) does not arise.

Paragraph 2 of S. 83 says nothing whatever about the terms of the tenancy. It is the tenant, who alleges that he is a permanent tenant, who in the first instance has to prove that, and if he has got no document which gives him a right on the land as a permanent tenant, the presumption is that he is an annual tenant. But if he can show that he has been on the land so long that the commencement of his tenancy cannot be ascertained, then the presumption under para. 2 of S. 83 arises.

Paragraph 2 of S. 83 has only to do with the point of time at which the tenancy commences. There is not a word in that section with regard to the actual terms of the tenancy. The paragraph has only to do with duration. When the presumption arises, then the Court must hold that the tenancy is co-extensive with the duration of the lessor's tenure. That means that the tenant cannot be turned out as long as the landlord's tenure continues. But there is no presumption as to what the terms of the tenancy are, that is to say, with regard to rent and other matters. 18 Bom. 433, Ref. (*Macleod, C. J.*) SIDHANATH MARTAND *v.* CHIKO BHAGWANTRAO. **23 Bom. L. R. 533 = 63 I.C. 935 = A. I. R. 1921 Bom. 454.**

———*Person setting up permanent tenancy need not rely on a grant—Rent note for single year is not sufficient to rebut presumption arising from antiquity of tenancy.*

There is no need for a person who sets up a permanent tenancy to rely upon a grant. Further, a rent note for a single year, in favour of the landlord, is not sufficient to rebut the presumption arising from the antiquity of tenancy and fixity of rent. 2 Bom. L. R. 93, Rel. on. (*Macleod, C. J. and Fawcett, J.*) RAMA RANCHHOD *v.* ABDUL RAHIM. **45 Bom. 303 = 59 I. C. 278 = A. I. R. 1921 Bom. 395.**

———*Ejectment suit by landlord—Presumption is, tenancy is annual—On tenant proving antiquity of tenancy landlord must prove intended duration—Otherwise tenancy will be co-extensive with landlord's tenure.*

In an ejectment suit by a landlord the presumption is that the tenant is an annual tenant and the *onus* lies upon him to prove he is something more. A defendant who wishes to prove he is a permanent tenant must prove, first of all, if he has not got a document of permanent tenancy, the antiquity of his tenure. Then under the second paragraph of S. 83, the landlord has to prove that there is evidence of the intended duration of the tenancy either by agreement or by usage. If he cannot do that, then it is presumed that the tenancy is co-extensive with the duration of the tenure of the landlord. (*Macleod, C. J. and Fawcett, J.*) MANEKLAL VAMANRAO *v.* BAI AMBA. **45 Bom. 350 = 59 I.C. 751 = A. I. R. 1921 Bom. 224.**

S. 84—Notice.

———Where it was shown that the tenancy was to end in May and no subsequent contract to end it in October was proved,

Held, that notice dated 22nd June did not in law terminate the tenancy. (*Mirza and Baker, JJ.*) ICHHALAL JAGMOHAN DAS *v.* ANJIBAI ZUJYA. **30 Bom. L. R. 1602 = 114 I. C. 272 = A. I. R. 1929 Bom. 32.**

———*Annual tenancy—Disclaimer of landlord's title causes forfeiture—Notice to quit is unnecessary.*

A disclaimer of the lessor's title by the annual tenant of a holding to which S. 84 applies, is, if made prior to suit, a sufficient cause of action to enable the lessor to recover possession without proof of notice to quit, even where the T.P. Act does not apply. 20 Bom. 354 (F.B.), Foll.; 22 Bom. L. R. 1214, Dist. (*Macleod, C. J. and Coyajee, J.*) VIDYAVARDHAK SANGH COMPANY *v.* AYYAPPA SANGIRIMALLAPPA. **49 Bom. 842 = 90 I. C. 614 = 27 Bom. L. R. 1152 = A. I. R. 1925 Bom. 524.**

———*Ten days' notice is invalid.*

The words of the particular notice given by the plaintiffs were :—" You are hereby given notice that within ten days from the date of receipt hereof you should pay over to us rent of the last year and you should give in writing a kabuliyat to pay rent for the lands you cultivate, failing which you should hand over to us the lands which you cultivate, and in default steps will be taken against you to take over possession from you or obtain any other remedy according to law."

Held, that it cannot be implied that the notice to quit was to quit at the termination of the cultivating season and that it did not comply with S. 84.

Held, further, that though the form of notice referred to in S. 84 was not imperative, it still indicates the class of notice which the Indian legislature had in mind, and that notice would be very much what would be required under English Law and the notice in the present case was not a valid notice to quit. (*Marten and Fawcett, JJ.*) AMARSANGJI INDRASANGJI *v.* RANCHHOD JETHABHAI. **27 Bom. L. R. 267 = 91 I. C. 265 = A. I. R. 1925 Bom. 294.**

———*Disclaimer of landlord's title—Notice to quit is still necessary.*

Per *Fawcett, J.*—Even where there has been a disclaimer of the landlord's title, a notice to quit is necessary to determine an annual agricultural tenancy under Bombay Land Revenue Code, S. 84. 15 Bom. 407 and 32 Bom. 78, Rel. on. (*Macleod, C. J. and Fawcett, J.*) RAMA RANCHHOD *v.* ABDUL RAHIM. **45 Bom. 303 = 59 I. C. 278 = A. I. R. 1921 Bom. 395.**

——*Khoti Settlement Act* (*Bombay Act I of* 1880), *S.* 8—*In the absence of specific agreement between tenant and Khot, tenant is yearly tenant and tenant is entitled to notice under S.* 84.

Under the provisions of S. 8 in the absence of any specific agreement between the tenant and the Khot the tenant must be held to be a yearly tenant liable to pay rent to the Khot at the rates prescribed and accordingly he is entitled to the notice prescribed in the case of yearly tenants under S. 84 of the Bombay Land Revenue Code. (*Macleod, C. J. and Fawcett, J.*) VISHNU BHIKAJI ADHIKARI *v.* BABLA LACKA JATHAR.

45 Bom. 1001 = 23 Bom. L. R. 411 = 61 I. C. 594 = A. I. R. 1921 Bom. 38.

Ss. 86 and 87 (4)—Recovery of rent.

——*Civil suit lies to recover money if levied in excess by superior holder but not to cancel or amend Collector's order.*

The object of Ss. 86 and 87 of the Land Revenue Code is to enable superior holders to recover rent or land revenue expeditiously when their title is clear, by written application to the Collector, but the orders passed on such applications are neither decrees nor have they the force of a decree. Such an order is purely an executive order and under S. 87 (4) the party dissatisfied with it can file a suit in the Civil Court not to set aside his order but the superior holder may sue to recover such amount as may be still due to him, and the inferior holder to recover the amount "levied" from him in excess of what was due. The latter's suit therefore becomes one "for the recovery of moneys had and received" and his cause of action arises when a sum in excess of what he contends is due is levied from him. It is only at this stage permissible to him to have recourse to the Civil Courts not for cancelling or amending the order of the Revenue Officer but for the refund of the amount levied from him in excess of what was actually due. (*Kennedy, J. C. and Raymond, A. J. C.* HOTKHAN SHERKHAN *v.* PAHLUMAL UKERMAL.

17 S. L. R. 82 = 80 I. C. 955 = A. I. R. 1924 Sind 87.

S. 103 (as amended in 1913)—Survey Settlement.

——*Government sanctioning rates on 5th July* 1926—*Notification published on 26th July* 1926—*Survey Settlement is legally introduced for* 1925-26.

Two conditions are laid down under S. 103 to validate the introduction of the survey settlement, first, the sanction under S. 102, and second, the notice in accordance with the rules made by the Governor-in-Council. Where Government sanctioned the rates for the various classes of land recommended by the Commissioner on 5th July 1926 and the notification according to the rule was published by the Police Patil in the village on 26th July 1926.

Held, the introduction of the survey settlement was in the year 1925-26 and the notification inviting objections was superfluous. (*Patkar and Murphy, JJ.*) MORESHWAR JANARDHAN *v.* EMPEROR.

30 Bom. L. R. 1255 = 30 Cr. L. J. 353 = 114 I. C. 854 = A. I. R. 1928 Bom. 497.

S. 103—Survey Settlement.

——*Government Resolution of* 1903 *and Note* 19 *of Anderson's Manual are only departmental orders having no force of statutory rules—Non-observance of these rules does not nullify the validity of the survey settlement legally introduced under S.* 103.

Government Resolution No. 6141 of 1903 and note No. 19 in Anderson's Manual at p. 8 to the effect that when Government raises the rates proposed by the Settlement Officer, a fresh notice must be issued and a fresh opportunity of objection must be afforded, are departmental orders and have not the force of a legislative enactment or statutory rules. If the introduction of the settlement is legal under S. 103, the mere fact that certain formalities, which are required to be observed under a Government resolution, are not so observed, does not nullify the validity of the introduction of the survey settlement under S. 103. (*Patkar and Murphy, JJ.*) MORESHWAR JANARDHAN *v.* EMPEROR.

30 Cr. L. J. 353 = 114 I. C. 854 = 30 Bom. L. R. 1255 = A. I. R. 1928 Bom. 497.

S. 119—Dispute.

——*Word "dispute" means dispute between two neighbouring owners and not dispute between Collector and owner—Determination of dispute between Collector and owner does not oust jurisdiction of Civil Court.*

The word "dispute" in the second part of the S. 119 means a dispute between two neighbouring owners and not a dispute between the Collector and the owner. The jurisdiction of the Civil Court is not ousted in case of dispute between the Collector and the owner. It is only when a boundary dispute arises between the owners of adjoining lands and the Collector is called upon to determine the dispute, that his determination becomes final under S. 121, so as to oust the jurisdiction of the Civil Court. A. I. R. 1927 Bom. 140; 10 Bom. 456; 25 Bom. 312, Ref. (*Madgavkar, J.*) MALKARJUNAPPA SIDRAMAPPA *v.* ANANDRAO AMARAO.

53 Bom. 766 = 31 Bom. L. R. 957 = A. I. R. 1929 Bom. 391.

S. 121—Jurisdiction.

——*Settlement by revenue authority subsequent to suit—Civil Court's jurisdiction to settle boundaries is not ousted.*

Where there has been no determination by the Collector prior to the suit the appointment of a Survey Officer as Commissioner by the Court and a subsequent determination by that Officer and by the Collector *pendente lite* cannot oust the jurisdiction of the Court to decide a dispute regarding the settlement of boundaries and its own independent consideration. (*Marten, C.J. and Madgavkar, J.*) KANHAI LAL BADRIDAS *v.* ISMAILBHAI KASAM BHAI. **28 Bom. L. R. 1498 = 99 I. C. 823 = A. I. R. 1927 Bom. 140.**

——*Civil suit lies from decision of Survey Officer on a title dispute.*

Decision of a Settlement Officer regarding the title to certain area is open to challenge in a subsequent civil suit where the dispute did not involve any question as to boundaries. (*Shah, Ag. C.J. and Kincaid, J.*) NARSINGJI MEHRAMANSINGJI *v.* BAI ACHRAT.

26 Bom. L. R. 1264 = 85 I. C. 204 = A. I. R. 1925 Bom. 151.

——*Enquiry Officer—Decision as to rights of one owner over the land of adjoining owner—Decision is* ultra vires *and does not oust jurisdiction of Civil Court.*

It would be the duty of the Enquiry Officer in making survey of land in a town to settle the boundary between the lands of adjoining house owners, which would ordinarily be by means of a line drawn on a plan, and that line, according to the provisions of S. 121 would be determinative of the rights of the landholders on either side of the boundary so fixed. But it would not be determinative of any rights which the holder of one number should claim to exercise over the land belonging to the holder of the adjoining number. Enquiry Officer's decision on the point is without jurisdiction and it does not oust the jurisdiction of the Civil Court.

(*Macleod, C.J. and Shah, J.*) GANESH VENKATESH JOGLEKAR *v.* RAMCHANDRA NARAYAN JOGLEKAR. **46 Bom. 390 = 23 Bom. L.R. 1209 = 64 I. C. 564 = A. I. R. 1922 Bom. 293.**

——*Settlement of boundary line by Collector does not bar Civil Court's jurisdiction to try a suit for acquisition of portion by adverse possession.*

When the settlement of a boundary is made by the Collector, it is no more than to establish where the boundary line lies and the owners of the respective survey numbers are entitled to their property according to the boundary lines fixed by the Collector, but it does not prevent one of the disputing parties filing a suit in a Civil Court on the ground that he had acquired a portion of his neighbour's survey number by adverse possession. S. A. No. 472 of 1917, Foll. 10 Bom. 456, Expl. (*Macleod, C.J. and Heaton, J.*) BHAGA MOTIJI *v.* DORABJI SORABJI. **45 Bom. 67 = 59 I. C. 440 = A. I. R. 1921 Bom. 63.**

——*Boundaries, fixing of—Right to sue in Civil Court to recover possession on ground of adverse possession is not barred.*

The fixing of boundaries by the Collector, of survey-numbers under S. 121 of the Code merely shows what land belongs to the persons in whose names the survey numbers are registered. But it does not affect the right of any one of those persons to show in a Civil Court that he has acquired a title by adverse possession against a registered occupant. (*Macleod, C. J. and Heaton, J.*) MANAK *v.* NARAYAN. **59 I. C. 437 = 22 Bom. L. R. 1114 (foot note).**

S. 133—Sanad.

——*Sanad is a document of title—Entries in Collector's books are not much evidence of title—Sanad holder need not prove possession within 12 years of suit.*

An entry in the Collector's books that a certain person is the occupant and liable to pay revenue, does not afford much evidence of title. But when a sanad is given under S. 133, after due inquiry, in the form in Schedule H, the sanad itself is a document of title. There is a presumption in favour of the sanad holders that they were in possession, considering the nature of the land under the title given to them by the sanad, and it would lie upon anybody disputing their title to show that he had acquired a title by adverse possession. It is not incumbent upon the sanad holders once they prove the sanad, to show that they were in possession within twelve years of the date of their suit. (*Macleod, C. J. and Coyajee, J.*) ULAWAPPA BASAWANEPPA HUGAR. *v.* GADIGEWA HUGAR. **27 Bom. L. R. 948 = 89 I. C. 894 = A. I. R. 1925 Bom. 477.**

S. 135—Record-of-Rights.

——*Record-of-rights raises no presumption as to ownership.*

All that this section lays down is that an entry in the record-of-rights shall be presumed to be true until the contrary is proved, but it does not raise any presumption as to the ownership of the land. (*Kennedy, J. C. and Raymond, A. J. C.*) SANT SINGH *v.* RARIBAI. **17 S. L. R. 206 = 76 I. C. 408 = A. I. R. 1924 Sind 17.**

Chaps. 10-A (135-A to 135-L) and 8 (Ss. 95 to 117-B.)

——*Preparation of record-of-rights can be made in alienated villages without inamdar's consent.*

There is no exclusion of alienated villages from the application of the Ch. X-A or any of the section therein and, therefore, the Government are entitled to maintain the record-of-rights in alienated villages without the consent of the inamdar, and the provisions of Ch. 8 do not

apply in any way to the maintenance of the record-of-rights. (*Macleod, C. J. and Coyajee, J.*) RAGHAVENDRA *v.* SECRETARY OF STATE. **28 Bom. L.R. 559 = 96 I. C 303 = A. I. R. 1926 Bom. 373.**

——*Omission of filing certified copy or record-of-rights in trial Court can be cured by appellate Court.*

Where the plaintiff omits to annex a certified copy of the entry in the Record-of-Rights to his plaint in a suit relating to land according to S. 135-H, and the Court passes a decree, the appellate Court should not reject the plaint merely on the ground of the omission; but should give an opportunity to the plaintiff to produce the entry within a fixed time. (*Macleod, C. J. and Shah, J.*) GIRIJA BAI NAGAPPA *v.* HEMRAJ VRINDAWAN DAS. **45 Bom. 1339 = 23 Bom. L. R. 595 = 64 I. C. 681 = A. I R. 1921 Bom. 64.**

——*Review—Extracts from records-of-rights not produced in the First Court—Plea abandoned in appeal—Non-production is no ground for review—Bombay Land Revenue Code, S. 135 H, sub S. 2.*

Where a certified copy of an extract from the record-of-rights relevant to the case was not produced at the trial as required under in S. 135-H of Bombay Land Revenue Code and the point was abandoned in appeal.

Held, the defect should be cured by allowing the plaintiff to put in the certified copies of the extract from the record-of-rights and that the previous non-production is no sufficient ground for reviewing the decision. The High Court has the power as the Original Court has to allow a reasonable time for the production of the extracts if it has not been produced and what is or is not reasonable time is a matter entirely within the discretion of the High Court. Though the consequence of the omission on the part of the plaintiff to put in the necessary certified copy is as let down in Sub-s. 2 of S. 135-H, it cannot be said that the consequence must necessarily be given effect to at any stage of the litigation. (*Shah and Crump, JJ.*) GANESH BALKRISHNA *v.* VITHAL TRIMBAK. **46 Bom. 79 = 23 Bom.L.R. 745 = 64 I. C. 156 = A. I. R. 1922 Bom. 114.**

——*Bombay Land Revenue—Entries in record-of-rights are not conclusive but are evidence of fact—Evidence Act, S. 35.*

Entries in record-of-rights are not in any way conclusive, but they are evidence of the facts recorded therein and as such are relevant under Evidence Act, S. 35. A. I. R. 1920 P. C. 46 and 18 All. 176 (P. C.), Dist. (*Sir Binod Mitter.*) GANGA BAI *v.* FAKIRGOWDA SOMAYPAGOWDA DESAI. **57 I. A. 61 = 123 I. C. 166 = 32 Bom. L. R. 368 = A. I. R. 1930 P. C. 93 = 58 M.L.J. 322 (P. C.).**

S. 137—Priority.

——*Pledgor indebted to Government owing to unpaid instalments of foreign liquor license—Stock of wine already pledged—Government has priority over pledgee's rights—Bombay Abkari Act, S. 34.*

S was indebted to the Government on account of unpaid instalments of a foreign liquor license. But the stock of wines was already pledged to P Bank.

Held, that Government had priority over P Bank as pledgee. S. 137 was applicable to this case although the priority of Government as stated in the section is over any claim against any land or holder thereof. (*Wild, A. J.C.*) PEOPLES BANK OF NORTHERN INDIA *v.* MESSRS. SHAHANI BROS. **A. I. R. 1930 Sind 185.**

S. 148—Penalty.

——*S. 148 has no bearing on fine under S. 66.*

S. 148 has no bearing whatever upon the question of a fine leviable under the provisions of S. 66.

(*Marten, C. J. and Crump, J.*) SECRETARY OF STATE *v.* ABDUL HUSEN. **29 Bom. L. R. 1350 = 106 I. C. 239 = A. I. R. 1927 Bom. 601.**

S. 154—Distrain.

——*Income-tax Act, S. 36—No warrant is necessary for distraining the moveable property of the defaulter.*

Under the Income-tax Act no warrant is necessary at all for effecting the distraint of the defaulters' moveable property under S. 36 as arrears of income tax are to be recovered as arrears of land revenue and under S. 154 of the Land Revenue Code no warrant is necessary to enable a Tapedar or a Munshi who can read and write and who is acting under the orders of the Collector or the Mahalkari to distrain. Although the Income Tax Act provides a form of warrant, that is, for the convenience and instructions for the Revenue Officers and there is nothing in the Income-tax Act which renders the form obligatory. Of course if a warrant is issued it is expedient to issue it in the form as appended to the Act. But this does not take away from the Collector the right to collect the income-tax without warrant. (*Kennedy, J. C. and Aston, A. J. C.*) EMPEROR *v.* GULABRAI. **16 S. L. R. 161 = 26 Cr. L. J. 195 = 83 I. C. 899 = A. I. R. 1921 Sind 51.**

——*Cash and currency notes can be distrained.*

Under S. 154 cash and particularly currency notes may be distrained and sold. (*Kennedy, J. C. and Aston, A. J. C.*) EMPEROR *v.* GULABRAI. **83 I. C. 899 = 26 Cr. L. J. 195 = 16 S. L. R. 161 = A. I. R. 1921 Sind 51.**

S. 157—Arrest.

——*Provincial Insolvency Act, S. 23—Person arrested under order of Manager, Encumbered Estates under S. 10 with S. 157, Bombay Land Revenue Act—Insolvency Court cannot grant him interim order of protection.*

Where a person is arrested under the orders of the Manager, Encumbered Estates, under the provisions of S. 10 of the Sind Encumbered Estates Act read with S. 157 of the Bombay Land Revenue Code, the Insolvency Court has no jurisdiction to grant him an interim order of protection as he is not under arrest in execution of a decree of any Court for payment of money. (*Kincaid, J. C. and Barlee, A. J. C.*) GHANSHAMDAS KHATUMAL *v.* MANAGER, ENCUMBERED ESTATES. **28 Cr. L. J. 194 = 7 A. I. Cr. R. 345 = 99 I. C. 930 = A. I. R. 1927 Sind 123.**

S. 160—Attachment.

——*Temporary attachment of village does not affect Khot's rights which he independently has.*

The temporary attachment of the village would not affect the other rights which the Khot might have independently of the right of management. Such right of management would, of course, cover acts such as letting out waste or uncultivated lands in the village, which he can do in his capacity as a Khot. (*Fawcett and Madgavkar, JJ.*) PURSHOTTAM *v.* GANPATI. **50 Bom. 306 = 28 Bom. L. R. 750 = 98 I. C. 794 = A. I. R. 1926 Bom. 410.**

——*Alienation of Khoti-nisbat lands without Khot's consent while under attachment by Government—Khot can sue for possession.*

A Watandar Khot, whose lands are under attachment by Government under S. 160, can sue for possession of the Khoti-nisbat lands which are forfeited to him on account of their alienation by the tenant without his consent. (*Fawcett and Madgavkar, JJ.*) PURSHOTTAM *v.* GANPATI. **50 Bom. 306 = 98 I. C. 794 = 28 Bom. L. R. 750 = A. I. R. 1926 Bom. 410.**

S. 166—Notice.

——*Notice containing wrong description of years is not invalid.*

Where notice was given but there was a mistake of detail as to the years for which the land revenue was in arrears,

Held, that it was a misdescription which in no way misled the plaintiff as he was aware that the rent was due from the date of the Collector's order in 1904. Nor this misdescription in any way involve a violation of the terms of S. 166 for the terms of that section do not make it obligatory upon the Collector to specify for what years the land revenue was in arrears. (*Pratt and Fawcett, JJ.*) DHANDI SUBHANA *v.* SECRETARY OF STATE. **25 Bom. L. R. 785 = 77 I. C. 146 = A. I. R. 1923 Bom. 478.**

S. 202—Patelkiship.

——*Exemption from payment of revenue granted to plaintiff's family for their lands, in return for Patelki service—Patelkiship ceasing—Possession of plaintiff's family does not become wrongful.*

Lands which had been continued to plaintiff's ancestors as *Pasaita* lands by the Paishwa Government were eventually settled by the British Government as Pateiki land and the land revenue was alienated to plaintiff's family under the class of alienations to village servants.

Held, that when the plaintiff's family ceased to hold the Patelkiship, their claim to exemption from paying the land revenue to the lands came to an end. But their right to possession was not at an end, and they cannot be said to be in wrongful possession of the land so that an order under S. 202 of the Bombay Land Revenue Code could be made. (*Macleod, C. J. and Shah, J.*) BHAVAN MOGAR *v.* SECRETARY OF STATE. **45 Bom. 894 = 23 Bom. L. R. 259 = 61 I. C. 267 = A. I. R. 1921 Bom. 167.**

Ss. 203, 204—Rent-free Land.

——*Land held free of rent—Notice of demand to pay assessment by Mamlatdar is not an 'order'.*

Notice of demand to pay assessment by the Mamlatdar cannot be treated as an order or decision within the meaning of Ss. 203 and 204. (*Macleod, C. J. and Shah, J.*) NATHURAM HIRARAM THAKOR *v.* SECRETARY OF STATE FOR INDIA. **24 Bom. L. R. 402 = 46 Bom. 811 = 67 I. C. 842 = A. I. R. 1922 Bom. 274.**

S. 211—Revision.

——*Sheri lands leased for 30 years—Before termination of lease in 1913—Deputy Collector in 1912 in pursuance of Government Resolution directing full occupancy tenure to lessee and permanent tenancy right to tenants on payment of three times assessment as rent—Collector reversing order of Deputy Collector—Suit for declaration by lessee that Collector's order was void and for possession—Revisional powers of Collector under S. 211 held rightly exercised and lease having expired agreement by tenants to pay rent three times of assessment could not be acted upon.*

Certain "Sheri" lands were let by Government to *D* on a lease for thirty years expiring in 1913. In accordance with a resolution passed by the Government in October 1912, a District Deputy Collector made enquiries and directed that the lands should be given to *D* on full occupancy tenure on condition of his paying twenty times the annual assessment of the land as occupancy price and that the tenants were to be given the rights of permanent tenancy by the lessee, on the basis of a rent payable by them amounting to three times the assessment of the land they held. After three years the Collector reversed the District Deputy Collector's order and directed that the tenants should be given occupancy rights on the usual terms. *D* in 1918 filed a suit for declaration that the order of the Collector, dated 12th June 1917, being illegal and unlawful, was void and that he be put into actual possession of the land with a declaration that the right of permanent tenancy of the tenants had been extinguished by their acting contrary to *D*'s right.

Held: that on the merits the Collector's order was correct and that of the District Deputy Collector was wrong, and that the Collector was acting under the revisional authority conferred by S. 211, and since no period of limitation is laid down for the making of an order under the same section, he had a right to interfere.

Held also: that the agreement by the tenants to pay rent to the plaintiff at the rate of three times the assessment could not be acted upon as the lease had expired, and in the absence of a final order, he had no right or title left in the land. (*Kemp, Ag. C. J. and Murphy, J.*) DATTATRAYA JAYARAM *v.* SECRETERY OF STATE. **31 Bom. L.R. 1235 = 54 Bom. 19 = A. I. R. 1930 Bom 95.**

S. 214—Government's Right.

———*Rules framed under R. 93—Government's right is confined to reserved trees at date of settlement.*

R. 93 framed under S. 214 of the Bombay Land Revenue Code indicates that the right of the Government is confined to reserved trees existing at the date of the settlement and that all subsequent growths belong to the occupant. (*Shah and Hayward, JJ.*) EMPEROR *v.* YELLEPPA RAMANGOWDA. **45 Bom. 110 = A. I. R. 1921 Bom. 435.**

S. 216—Rent free grants.

———*Grants in unalienated villages absolutely free or paying portion only of the revenue—S. 216 does not apply to them.*

In unalienated villages there may be many cases of grants of certain fields by Government to be held on certain terms either absolutely free from payment of revenue or merely on payment of a portion of the revenue. Such lands were not intended to be brought within the purview of S. 216.

Fawcett, J.—The ordinary case to which cl. (*b*) of S. 216 is applicable is one where there is an Inamdar who has been granted a definite share of particular village and who is accordingly entitled to a corresponding proportion of the revenue of the village, Government having the remainder. (*Macleod, C. J. and Fawcett, J.*) SITARAM SADASHIV *v.* TAKARAMA DAJI. **45 Bom. 994 = 23 Bom. L. R. 395 = 61 I.C. 577 = A. I. R. 1921 Bom. 78.**

S. 216—Stare decisis.

———*Construction of S. 216 in 18 Bom. 525 should be followed at least on the principle of* stare decisis *if once it has been adopted in a previous suit between the same parties.*

Per *Macleod, C. J.*—"Whether S. 216 of the Bombay Land Revenue Code was rightly construed in 18 Bom. 525 is doubtful but where in a previous suit that decision was adopted, the question will be concluded by *stare decisis* in a subsequent suit between the same parties. But the Court would not be bound to follow the principle of *stare decisis* if the question arose again between different parties."

Per *Shah, J.*—No clear case for a reconsideration of the decision in 18 Bom. 525 was made out.

Per *Fawcett, J.*—The meaning of S. 216 (*b*) of the Bombay Land Revenue Code is not so clear as to preclude the application of the principle of *stare decisis* in the case. (*Macleod, C.J., Shah and Fawcett, JJ.*) SITARAM SAKHARAM *v.* LAXMAN VISHNU **45 Bom. 1260 = 23 Bom L. R. 749 = 64 I. C. 162 = A. I. R. 1921 Bom. 87 (F.B.).**

S. 217—Alienated village.

———*Whole property in the soil granted to Inamdar—Even then village is alienated.*

The village would be an alienated village within the meaning of S. 217 notwithstanding that the whole property in the soil was granted by the Government to the Inamdar. Where the plaintiff was a Kadim Inamdar of certain lands in a village and was a grantee of the soil and not merely of the royal share of the revenue, and Survey Settlement was introduced into that village with his consent; the defendant as a permanent tenant of the lands used to pay as rent the amount of assessment fixed for the land, in a suit by plaintiff to enhance the rent.

Held that the defendant was entitled to hold the lands on payment only of the amount of assessment and that the plaintiff is not entitled to enhance the rent. 43 Bom, 77. Foll, (*Shah and Hayward, JJ.*) PANDU BALA *v.* CHANDRA GANESH. **45 Bom. 61 = 63 I. C. 671 = A. I. R. 1921 Bom. 23.**

S. 217—Applicability.

———*Section does not affect contractual rights arising before the Survey.*

With regard to an unalienated village it would be competent to Government to enter into contractual relationship with tenants or occupants. They might acquire fixity of tenure and fixity of rent. Where the village had been alienated and the alienee had entered into a contract with a person granting not only fixity of tenure but also fixity of rent, there is nothing in the provisions of S. 217 which would enable the alienees of the village to avoid their contractual liability; therefore, they could not enforce against their permanent tenants the payment of the assessment levied on occupancy land. (*Macleod, C. J. and Coyajee, J.*) SURYAJIRAO GANPATRAO *v.* SIDHANATH DHONDDEO GARUD. **89 I. C. 65 = 27 Bom. L. R. 645 = A. I. R. 1925 Bom. 435.**

———S. 217 invites the application of the provisions applicable to the occupants in an unalienated village to the holders in an alienated village "so far as may be." The special right which a holder claims in virtue of any grant or contract between him and the Inamdar is not in the slightest degree effected by S. 217 or Ss. 64 and 66 which are rendered applicable to the holders in an alienated village. 28 Bom. 74 Foll. (*Shah, Ag. C. J. and Pratt, J.*) DAMODAR MAHADEO BHONDE *v.* KASHINATH SADASHIV. **76 I.C. 897 = 24 Bom. L. R 1040 = A. I. R. 1923 Bom. 79.**

———*Rights as between Jagirdar and Zemindar to cut and sell timber—S. 217 does not apply.*

The application of S. 217 depends on the question whether the person who claims under it is a holder of land, as defined by S. 3 (11) of the Land Revenue Code *i. e.*, whether he is the person in whom the right to hold the land is vested. 36 Bom. 315 (Foll). S. 217 also refers mainly to the right of the occupant or holder to cultivate land included in his holding and even if it could be said to cover the case of the right of an occupant to cut trees under S. 40 of the Land Revenue Code yet this only deals with the rights of occupants as against Government. It could not affect the rights of third parties (*Fawcett, A. J. C.*) PIR MAKHDUM *v.* MALIK BOOLA KHAN. **79 I.C. 819 = 16 S. L. R. 87 = A. I. R. 1921 Sind 109.**

BOMBAY LOCAL BOARDS ACT (VI OF 1923), S. 27—Illegal election.

———*Chairman and Vice-Chairman to continue to perform duty till new Board begins to function—*

Balance of convenience is on the side of granting injunction and should not, therefore, be refused.

Where it is clear that if the new Board is not legally constituted its acts will be *ultra vires* and that if it be restrained from functioning, the duties of the Board cannot be carried on at all, the Chairman and Vice-Chairman of the old Board should continue to perform their routine duties until the new Board begins to function, and in such a case the balance of convenience is on the side of a person who has brought a suit for a declaration that the election to the Board is illegal and for an injunction to prevent the Board functioning, temporary injunction should, therefore, be granted. (*Barlee, J. C. and Kalumal, A. J. C.*) MOHAMMAD AZIM *v.* DIST. LOCAL BOARD. **A. I. R. 1929 Sind. 224.**

S. 35 (2) (b)—Notice.

——*Service of notice by post is sufficient.*

It is sufficient for the Board to circulate notices of a meeting by post, and it is not essential that a notice should be served personally on every member. (*Marten, C. J. and Crump, J.*) GOPAL NARAYAN *v.* SANMUKHAPPA NINGAPPA. **29 Bom. L. R. 1325= 106 I. C. 265=A. I. R. 1927 Bom. 603.**

S. 35 (4)—President.

——*Meeting properly convened—President cannot dissolve.*

If in fact a meeting is properly convened, the president has no power to dissolve it. (*Marten, C. J. and Crump, J.*) GOPAL NARAYAN *v.* SANMUKAPPA NINGAPPA. **29 Bom. L. R. 1325=106 I. C. 265= A. I.R. 1927 Bom. 603.**

——*President illegally dissolving a meeting—Members present can go on with it with new chairman.*

It is the duty of a chairman to preserve order, conduct proceedings regularly, and take care that the sense of the meeting is properly ascertained with regard to any question before it ; but he has no power to stop or adjourn a meeting at his own will ; and if he purports to do so, it is competent for the meeting to resolve to go on with the business for which it has been convened, and to appoint another chairman for that object. *National Dwellings Society* v. *Sykes*, (1894) 3 Ch. 159, Foll. (*Marten, C. J. and Crump, J.*) GOPAL NARAYAN *v.* SANMUGAPPA NINGAPPA. **29 Bom. L. R. 1325= 106 I. C. 265=A.I.R. 1927 Bom. 603.**

S. 63—Applicability.

——*Service of notice of meetings—S. 63 does not apply.*

The service of notice for meeting of the Board being specially provided for under S. 35 (2) (*b*). S. 63 does not apply. (*Marten, C. J. and Crump, J.*) GOPAL NARAYAN KULKARNI *v.* SANMUKHAPPA LINGAPPA. **29 Bom. L. R. 1325=106 I. C. 265= A.I.R. 1927 Bom. 603.**

S. 117 (3)—" Toll."

——" *Any toll* " *includes* " *toll for public ferries* " *also.*

The expression "any toll " in S. 117 (3) is not restricted merely to the " tolls " for roads and bridges but includes " toll for public ferries " also. (*Haveliwala, A. J. C.*) CHELLARAM KEWALRAM *v.* DISTRICT LOCAL BOARD OF KARACHI. **A.I.R. 1930 Sind 176.**

S. 133 (e).

——*Rules under Local Board Act, and Education Act are so interwoven that it is difficult to separate them —Bombay Primary Education Act* (1923), *S.* 27.

The rules under the two Acts are so interwoven that it is difficult to separate them. If the Board is to function in any way at all, it must necessarily function under the rules made under the District Local Board Act, because it is obviously of no advantage to a person to be appointed to be a member of the School Board if he cannot perform any function as such member and if no money is allotted to the Board. (*Percival, J. C., and Haveliwala, A. J. C.*) MAHOMED AZAM *v.* DISTRICT LOCAL BOARD. **A. I. R. 1930 Sind 246.**

S. 136—Ferry toll.

——*Legislative Council can authorize local authority to impose ferry toll—Act on the part of Local Board purporting to recover arrears of such toll is under Local Boards Act and so one month's notice is necessary before filing suit.*

The Legislative Council can authorize a local authority to impose a ferry toll under S. 117 ; and when such toll is imposed, any sum due to the Local Board from a lessee can be recovered as an arrear of land revenue. Hence any act purporting to recover such sum would be an act purporting to have been done in pursuance of the Act, and so a month's notice would be necessary before filing a suit. (*Haveliwala, A. J. C.*) CHELLARAM KEWALRAM *v.* DISTRICT LOCAL BOARD OF KARACHI. **A.I.R. 1930 Sind 176.**

——*Relief sought being that person should become member of School Board and perform functions of that Board—Case falls under S.* 136.

Where the relief sought is that the particular person should become a member of the School Board and he should perform the functions of that Board and deal with money allotted to that Board, the case falls under S. 136 and notice is necessary. (*Percival, J. C. and Haveliwala, A. J. C.*) MAHAMAD AZAM *v.* DISTRICT LOCAL BOARD. **A.I.R. 1930 Sind 246.**

BOMBAY MAMLATDARS' COURTS ACT (2 OF 1906).

S. 5 (1)—Construction.

——The words " not being a person who has been a former owner or part-owner " in Cl. (1) qualify only the words immediately preceding " of any other person," the determination of whose tenancy or other right is in question. (*Madgavkar, J.*) KISAN YEMAJI *v.* SHRIPAT TATYA. **112 I. C. 462=30 Bom. L. R. 889= A. I. R. 1929 Bom. 114.**

S. 5, Expl.—Jurisdiction.

——*Person claiming joint possession ousted by co-sharer—Court cannot decree joint possession under Expl. to S.* 5 (*obiter*).

A Court has no jurisdiction under Expl. to S. 5 to decree-joint possession in favour of one who claimed to be in joint possession but was ousted by the co-sharer (obiter); (1883) P. J. 120; (1890) P. J. 316 and A. I. R. 1922 Bom. 126, Foll.; (1895) P. J. 502, not Foll. (*Madgavkar, J.*) KISAN YEMAJI *v.* SHRIPAT TATYA. **112 I. C. 462=30 Bom. L. R. 889= A. I. R. 1929 Bom. 114.**

——*Suit for possession by landlords against trespasser —Dispossession by trespasser while tenant in possession-- Suit brought within six months of dispossession and tenancy relinquished at the date of suit—Mamlatdar has jurisdiction.*

Where a tenant was in possession at the time of the dispossession but at the time of the suit the tenancy has ended, the tenant having relinquished the same and the landlord brings his suit for possession against the trespasser within six months of dispossession, the Mamlatdar has jurisdiction to pass an order in favour of the landlord 28 Mad. 238, Foll. 20 Bom. 260 (F. B.) and 32 Bom. 46, Dist. (*Fawcett and Mirza, JJ.*) MORO KUSHINATH *v.* GANESH HARI. **52 Bom. 453= 30 Bom. L. R. 683=111 I. C. 629= A. I. R. 1928 Bom. 243.**

——*Possessory suit against co-sharer—Joint possession cannot be given.*

In a possessory suit against a co-sharer, the Mamlatdar has no jurisdiction to award joint possession under the Act. (*Macleod, C. J. and Shah, J.*) JINA JIJIBHOY BARIA *v.* MATHUR JIJIBHOY BARIA. **68 I. C. 225= 46 Bom. 289=23 Bom. L. R. 1016= A. I. R. 1922 Bom. 126.**

S. 5—Right to sue.

——*Where tenant of one co-sharer is obstructed in possession by another co-sharer it is not landlord but tenant who must sue.*

Possession of tenant is not possession of landlord under Mamlatdars' Courts Act and where a tenant of one co-sharer is obstructed in his possession by another co-sharer, it is not the landlord but the tenant who must sue. And the Court in such cases need not consider if the lease of the tenant would conclude by the time the Court's order would be enforced, 20 Bom. 260 (F. B.) and (1893) P. J. 147, Foll. (*Madgavkar, J.*) KISAN YEMAJI *v.* SHRIPAT TATYA. **112 I. C. 462= 30 Bom. L. R. 889=A. I. R. 1929 Bom. 114.**

S. 5 (1) Prov.—Summary Remedy.

——*Possessory suit brought in mamlatdar's Court—Defendant subsequently filing suit in civil Court—Mamlatdar may refuse to exercise his power.*

Where subsequent to the filing of a possessory suit in a mamlatdar's Court, the defendant brings a suit in a civil Court for a declaration that he is a permanent tenant, it is open to the mamlatdar, under S. 5, to refuse to exercise the power vested in him and to refer the matter to the Civil Court. A. I. R. 1928 Bom. 53 Dist. (*Madgavkar and Alison, JJ.*) WASUDEO SADASHIVO *v.* BHIWA PANDU. **32 Bom.L. R. 85= A. I. R. 1930 Bom. 184.**

——*Co-sharer having sole possession dispossessed by another taking law into his hand, is entitled to the summary remedy of the Act.*

A cosharer, when he actually has sole possession, and is dispossessed by another co-sharer who has taken the law into his own hands, is entitled to the summary remedy of the Act. (*Madgavkar, J.*) KISAN YEMAJI *v.* SHRIPAT TATYA. **112 I. C. 462= 30 Bom. L. R. 889=A. I. R. 1929 Bom. 114.**

S. 23—Collector's Powers.

——*Collector has power to set aside Mamlatdar's order where it is founded upon misappreciation of evidence amounting to error of fact as well as law.*

When the finding of Mamlatdar is based on nothing but the unsupported allegations of the plaintiff it must be called a finding based on a total misappreciation of what evidence was. It is not based on evidence such as is necessary to establish a disputed claim and the error in the Mamlatdar's finding amounts therefore not only to an error of fact but also an error of law. In such a case therefore the Collector is perfectly justified in setting aside the finding of Mamlatdar. (*Kennedy, J. C. and Madgavkar, A. J. C.*) **16 S. L. R. 106= 79 I. C. 847=A. I. R. 1922 Sind 18.**

S. 23—Procedure.

——An applicant or his pleader is entitled to a hearing before the Collector. A. I. R. 1925 Bom. 522 Foll. (*Madgavkar and Alison, JJ.*) VASUDEO SADASHIV *v.* BHIWA PANDU. **32 Bom. L. R. 85= A. I. R. 1930 Bom. 184.**

——*Application to Collector for revision must not be rejected without hearing applicant or his pleader.*

A person dissatisfied with the decision of the mamlatdar under the Mamlatdar's Courts Act, is entitled to be heard either in person or through his pleader when he applies to the Collector under S 23 of the Act to revise the order of the Mamlatdar, before his application is rejected. (*Macleod, C. J. and Coyajee, J.*) GANPATI KONDAJI *v.* MARUTI GANGAJI. **90 I. C. 654= 27 B. L. R. 1115=A. I. R. 1925 Bom. 522.**

S. 23—Revision.

——*Complicated questions are not beyond jurisdiction.*

An order of the Mamlatdar can be revised only if it is illegal or improper and not because complicated questions beyond the scope of that Act have been gone into since such questions can be gone into, to decide the question of possession. (*Macleod, C. J. and Shah, J.*) JAGANNATH DEOKARAN MARVADI *v.* DHONDU ANANDA KUNBI. **48 Bom. 384= 26 Bom. L. R. 265=80 I. C. 266= A. I. R. 1924 Bom. 352.**

——*Collector revising order by Mamlatdar under S. 5 and sending case back for trial—Mamlatdar is bound to give a decision after trial.*

Where the Collector set aside in revision the Mamlatdar's order under S. 5 of the Act and ordered him to proceed with the trial *held*, that the Mamlatdar is bound to give a decision after trial and cannot submit the evidence taken by him to the Collector for decision. (*Shah, Ag. C. J. and Crump, J.*) RASUL MUSA MAFAT *v.* ASMAN MUSA DADI. **76 I. C. 442= 24 Bom. L. R. 1311=A. I. R. 1923 Bom. 60.**

S. 24—Jurisdiction.

——*J. C's Court, has powers of revision over Collector's orders.*

Under S. 24 of the Act, J. C.'s Court has the same powers as the High Court has in the presidency and that Court undoubtedly does exercise such revisional powers over the order of the Collector in its capacity as successors to the *Sadar Diwani Adalat* which exercised these powers under Regulation 11 of 1917 and which powers were vested in the High Court by the Statute, 24 and 25 Victoria, Chapter 104.

But two conditions are necessary for such revision; 1st is illegality or patent material irregularity, and 2ndly there should be no remedy except that by revision to the applicants. (*Kennedy, J. C. and Madgavkar, A.J. C.*) MOTUMAL PARUMAL *v.* LACKHUMAL. **79 I. C. 847=16 S. L. R. 106= A. I. R. 1922 Sind 18.**

S. 26—Bar to suits.

——*Jurisdiction of Mamlatdar cannot be ousted by merely filing suit in Civil Court.*

S. 26 clearly shows that a defendant in a possessory suit cannot *ipso facto* by filing a suit in the Civil Court oust the jurisdiction of the Mamlatdar. It is a question for the Mamlatdar whether he should proceed to decide the possessory suit or not. (*Madgavkar and Alison, JJ.*) VASUDEO SADASHEO *v.* BHEWA PANDU. **32 Bom. L. R. 85=A. I. R. 1930 Bom. 184.**

——*Mamlatdar cannot try a possessory suit when there is civil suit pending between the parties.*

Per *Patkar, J.*—S. 26, Cl. (*b*), bars the jurisdiction of a Mamlatdar to try a possessory suit between parties when there is a civil suit pending between them in respect of any dispossession, recovery of possession or disturbance of possession of the property in suit.

BOMBAY MAMLATDARS' COURTS ACT (1906), S, 26.

(*Madgavkar and Patkar, JJ.*) MOTI JAGTA *v.* INDURAI. **52 Bom. 203=107 I. C. 719= 30 Bom. L. R. 98=A. I. R. 1928 Bom. 53.**

S. 26 (b)—Words.

——*Words "has been" are used to include pending proceedings.*

The words "has been" in S. 26 (*b*) are used to include present proceedings, that is to say, proceedings that are pending. (*Madgavkar and Patkar, JJ.*) MOTI JAGTA *v.* INDURAI. **52 Bom. 203= 107 I.C. 719=30 Bom.L.R. 98= A. I. R. 1928 Bom. 53.**

BOMBAY PLEADERS ACT (XVII OF 1920).

Mukhtyar.

——*Cr. P. Code S.* 4 (1) (*r*)—*Legal Practitioners Act* (18 *of* 1879), *Ss.* 6, 7, 10.

In Bombay Presidency "Mukhtyar" is a person who can with the permission of the Court represent an accused in any proceeding within the meaning of S. 4 (1) (r), Cr. P. Code, and so a general order of a District Magistrate against employment of Mukhtyars in criminal cases in his district is improper. (*Patkar and Baker, JJ.*) *In re* BAJIRAO ABOJI KULKARNI. **113 I. C. 402=29 Bom. L. R. 1587= 107 I. C. 56=29 Cr. L J. 226=9 A. I. Cr. R 403= A. I. R. 1928 Bom. 33.**

S. 10 (3)—Vakalatnama.

——*Section not exhaustive and no fresh Vakalatnama necessary for applying to set aside* ex parte *decree.*

S. 10 (3) is not exhaustive, and it should not compel the Court to decide that if a party or his pleader is late in attending a Court, and his case comes on for hearing in his absence, the pleader, if he appears after the case has been decided cannot be heard until he has gone back to his client and obtained a fresh Vakalatnama authorizing him to make an application to set aside the *ex parte* decree. (*Macleod, C. J. and Kanga, J.*) BACHUBHAI JHIVAD *v.* IBRAHIM ISAK MOTIWALA. **69 I. C. 169=24 Bom. L. R. 744=47 B. 11= A. I. R. 1922 Bom. 207.**

——*Execution proceedings—Vakil appearing in suit —No separate vakalatnama is necessary.*

Applications for execution of decrees are nothing but continued proceedings in suit and therefore under S. 10 (1) of the Act no separate vakalatnama is required. (*Macleod, C. J. and Shah, J.*) ISOOB SAIBA *v.* HAIDAR SAIBA. **64 I. C. 55=46 Bom. 125= 23 Bom. L. R. 883=A. I. R. 1922 Bom. 113.**

S. 17—Pleader's fee.

——*Agreement with pleader by client to conduct litigation for settled fee—Client if can alter agreement by compromising his claim before trial—If client compromises his claim before trial, right of pleader to retain whole fee paid to him.*

Where the agreement between a pleader and his client is that in return for a settled amount as fee, the pleader should conduct a litigation for the client, it does not lie in the client's power to alter that agreement by compromising the suit before trial.

A pleader entered into an agreement with his client to conduct certain litigation contemplated by the latter for a fee of Rs. 125. The pleader asked for more particulars before drawing up the plaint. His client instead of supplying the particulars, compromised his claim and filed a suit against the pleader to recover the fee of Rs. 125. The Subordinate Judge applied the principles of "quantum meriut" and passed a decree in favour of the client in the sum of Rs. 70 on revision.

BOMBAY PLEADERS ACT (1920), S. 18.

Held, that the pleader was entitled clearly to retain the whole fee which was paid to him: 12 Bom. 557 and A. I. R. 1925 Bom. 513, Dist. (*Kemp, Ag. C. J. and Murphy, J.*) AMBHASHANKAR-UTTAMRAM *v.* HEPTULLA SARAFALLI. **31 Bom. L. R. 1221= 54 Bom. 1=122 I. C. 855=A. I. R. 1930 Bom. 22.**

——*No special agreement between pleader and client —Pleader dying before final decree—Proportionate fees on basis of* quantum meriut *only can be claimed—Legal Practitioner.*

In the absence of any special agreement, a pleader shall be entitled to receive fees allowed on taxation between himself and his client for his services until the final decree or order in the proceeding is passed. If a pleader dies before such final decree or order is passed or for any reason the engagement of his services by his client is put an end to, then the pleader will only be entitled to ask the Court to award him certain proportionate fees on the basis of a *quantum meriut.* 12 Bom. 557, Ref. The Court in assessing the *quantum meriut* might be guided by the percentages laid down by law for the regulation of costs between party and party, but is not bound to adopt that guide where circumstances of the case would render it unjust to do so. (*Macleod, C. J. and Coyajee, J.*) MOTILAL GOPALDAS *v.* KRISHNABAI GOPALRAO. **27 Bom. L. R. 1156= 90 I. C. 604=A. I. R. 1925 Bom. 513.**

S. 18—Pleader's fee.

——*Pleader's fee should be assessed on the value of the subject-matter in a suit even though it may be case of injunction.*

The valuation of a suit for the purpose of assessing pleader's fees should not depend purely upon the caprice of a plaintiff, so as to prevent the opponent recovering proper pleader's fees, if the suit fails, but pleader's fee should be assessed on the value of the subject-matter even though it may be a case of injunction. Plaintiff brought a suit for injunction against a Municipality praying to restrain it from spending a certain sum for a certain purpose but the suit was withdrawn, and he was ordered to pay costs of the Municipality and Secretary of State for India.

Held, that pleader's fee should be assessed on the amount valued in the resolution of the Municipality, the adoption of which the plaintiff tried to prevent: A. I. R. 1926 Bom. 369, Foll. (*Fawcett and Mirza, JJ.*) KASANJI KIWERJI *v.* SURAT MUNICIPALITY. **30 Bom. L. R. 673=111 I. C. 886= A. I. R. 1928 Bom. 247.**

——On an application to execute a decree passed in an appeal pending when the Bombay Pleaders Act came in force, the pleader's fees are to be taxed as provided in that Act. (*Macleod, C. J. and Shah, J.*) BAI JAYAGAVRI *v.* RAMANLAL CHHOTALAL. **48 Bom. 355= 26 Bom. L. R. 187=79 I. C. 749= A. I. R. 1924 Bom. 302.**

——*Suit by landlord to eject tenant—Pleader's fee must be calculated on actual value of property and not the value for Court-fees—Court Fees Act, S.* 7 (*IX*) (cc) *—Legal Practitioner.*

In a suit to eject the defendant, plaintiff's tenant, from her house, the claim for purposes of Court-fee was valued at Rs. 1,080 (the amount of rent for one year) and for purposes of jurisdiction it was valued at Rs. 15,000, the value of the house. The suit being decreed in the trial Court the defendant appealed to the High Court, valuing her claim at Rs. 1,080 both for Court-fee purposes and for pleader's fees but failed in appeal. A question having arisen how the pleader's fees should be assessed.

BOMBAY PLEADERS ACT (1920), S. 19.

Held, the pleader's fees should be assessed on the value of the house. (*Macleod, C. J. and Shah, J.*) BAI METHERBAI NANBHAI BANAJI *v.* MRS. P. R. DADINA. **46 Bom. 396 = 64 I. C. 1000 = 23 Bom. L. R. 1183 = A.I.R. 1922 Bom. 171.**

S. 19 (3)—Scope.

———*S. 19 (3) defines what a client is entitled to in respect of professional services in return for fee.*

S. 19 (3) merely states what are the services which the client can demand in return for the fee, and that, apart from any agreement the pleader would not be allowed to say that the fee which he received was merely for a portion of the litigation before the final order or decree. The clause is for the purpose of defining what the client is entitled to in respect of professional services in return for fee, (*Kemp, Ag. C. J. and Murphy, J.*) AMBHASHANKAR UTTAMRAM *v.* HEPTULLA SARAFALLI. **31 Bom. L. R. 1221 = 54 Bom. 1 = 122 I. C. 855 = A.I.R 1930 Bom. 22.**

S. 20 (a) (b) & (c)—Court's certificate.

———*Court's certificate is not necessary to tax two pleader's fees.*

Unless the Court otherwise directs, the fees of two pleaders shall be taxed in the bill of costs in cases falling under Cls. (*a*), (*b*) and (*c*) of S. 20. (*Fawcett and Patkar, JJ.*) TULSI LALJI *v.* ONKAR HUNA. **51 Bom. 492 = 29 Bom. L. R. 897 = 102 I.C. 661 = A.I.R. 1927 Bom. 399.**

S. 25—Disciplinary jurisdiction.

———*Letters Patent (Bombay), Cl. 10—Disciplinary jurisdiction—High Court has full power to suspend the sanad of a pleader if he has been adjudicated an insolvent until he obtains discharge.*

High Court in its disciplinary jurisdiction has full power to suspend the sanad of a pleader, if he has been adjudicated an insolvent, until he obtains a discharge, if, in the circumstances of the case, it considers that the insolvency coupled with the surrounding circumstances supplies a reasonable cause for such a suspension. It is largely a matter of discretion. The Chief Justice receiving an application of this kind can well be satisfied from the circumstances that are put forward that there is no objection to grant an insolvent pleader permission to continue to practise, and in doing so he would be acting on behalf of the Court, but if he considers that the case is one where there is reason to doubt the advisability of granting such permission, he can ask the Government Pleader to bring it before the Court in its disciplinary jurisdiction. (*Fawcett and Mirza, JJ.*) GOVT. PLEADER *v.* DATTATRAYA NARAYAN DESHPANDE. **52 Bom. 559 = 114 I.C. 259 = 30 Bom. L. R. 1011 = A. I. R. 1928 Bom. 385.**

———*Extent of pleader's authority in writing a notice to a judicial officer under S. 80 discussed—Legal practitioner.*

It is the duty of counsel towards their clients to use their own judgment and experience and discretion and as a result, whatever be their instructions, to exclude all topics and observations of which the case does not properly admit. They should be careful to express anything in a form which will not be unduly insulting or opprobrious to the officer, who has to receive the notice. Where a notice by a pleader contained the following extracts: "You should not have asked my client to attend the Court at 11 a.m., when he was not going to be examined at that time. He was not bound in law to wait indefinitely till you chose to call him for examination. A witness's time is as much valuable, if not more than the time of the Court... Obviously enough, your order was not only arbitrary and high-handed, but also spiteful and malicious . . . From what is stated above, you will clearly see the enormity of your own acts."

Held: that there was a clear excess of the privilege of the Bar, amounting to improper conduct. (*Fawcett and Mirza, JJ.*) GOVT. PLEADER *v.* L. B. BHOPATKAR. **30 Bom. L. R. 934 = 113 I. C. 519 = A. I. R. 1928 Bom. 338.**

S. 25—Improper conduct.

———*Criticism pending trial in public meeting is improper conduct—Disciplinary action—Letters Patent (Bombay), Cl. 10.*

While certain persons were on their trial a resolution moved by the second and supported by the third opponent was passed under the presidentship of 1st opponent, a Dist. Pleader congratulating them upon their sacrifice.

Held: The opponents acted improperly in being parties to a resolution of this character. Anything done or said which may amount to criticism of any proceedings pending in a Court of Justice is calculated to hinder the even and impartial administration of justice. Pleaders have privileges, but they have responsibilities also, and a pleader who acts so as to hinder and embarrass the administration of justice is guilty of "improper conduct" within the meaning of those words as used in S. 26, Bombay Pleaders Act. and such conduct furnishes "reasonable cause" for the exercise of disciplinary jurisdiction under S. 25. (*Shah, A. C. J. and Crump, J.*) THE GOVERNMENT PLEADER, HIGH COURT, BOMBAY *v.* VINAYAK BALWANT CHAUKAR. **24 Bom. L. R. 1049 = 76 I. C. 78 = 47 Bom. 117 = A. I. R. 1922 Bom. 361.**

S. 26—Improper conduct.

———District Pleader sending circular post card giving his name, description and address would amount to advertisement and therefore is improper conduct if in addition he adds false statements in the postcard that he is High Court pleader and authorized by Court to examine waqf accounts, amounts to an offence under S.26. (*Marten, C. J. and Murphy, J.*) GOVERNMENT PLEADER *v.* S. A. PLEADER. **53 Bom. 640 = 31 Bom. L. R. 625 = A. I. R. 1929 Bom. 335.**

Sch. 3, Rr. 1 and 2—Pleader's fee.

———*Altering amount in plaint in defendant's favour—Notice to plaintiff is necessary.*

A Court is not entitled to alter the amount for the pleader's fees stated in the plaint in favour of the defendants without giving notice to the plaintiff. (*Marten, C. J. and Murphy, J.*) LOKAPPA CHAMIRAPPA *v.* HIRAMANI KHUSHALDAS. **31 Bom. L. R. 471 = 118 I. C. 799 = A. I. R. 1929 Bom. 223.**

———*Suit dismissed for default—Costs should be awarded under R. 2 (c) and not R. 1 (a).*

Where a suit has been dismissed for default of appearance it does not decide on the merits the real dispute between the parties within the meaning of R. 1 (*a*) and costs should therefore be awarded not under R. 1 (*a*) but under R. 2 (*c*). (*Marten, C. J. and Murphy, J.*) LOKAPPA CHAMIRAPPA *v.* HIRAMANI KHUSHALDAS. **31 Bom. L. R. 471 = 118 I. C. 799 = A. I. R. 1929 Bom. 223.**

Sch. 3, R. 1 (b)—Pleader's fee

———*Suit to restrain Government from taking proceedings—Pleader's fees are to be calculated on value of lands.*

In a suit for injunction by a claimant in land acquisition proceedings to restrain Government from taking proceedings, on a point of procedure, pleader's fees are to be calculated on the value of the subject-matter of the suit. (*Macleod, C. J. and Coyajee, J.*) NUR MAHOMED *v.* SECY. OF STATE. **28 Bom. L. R. 582 = 96 I. C. 329 = A. I. R. 1926 Bom. 369.**

——*Succession Act* (1925), *S.* 390—*General Clauses Act* (1897), *S.* 8 (1)—*Bombay Regulation* (8 *of* 1827).

Proceedings under the repealed and re-enacted Succession Certificate Act must be taxed in exactly the same way after as before the Act of 1925, for there is no substantial difference involved in the principle of the provisions. The words in sub-R. (*e*) (vi), of R. 5 of Sch. 3 to the Bombay Pleaders Act, *viz.*, "any other Special or Local Act," clearly cover Regulation 8 of 1827. Consequently R. 5 applies to all applications or appeals under any other special or local Act. (*Marten, C. J. and Baker, J.*) RAJRAJESWARAM *v.* SVARUPANANDTIRTHA. **29 Bom. L. R. 1031 = 103 I. C. 637 = A. I. R. 1927 Bom. 499.**

BOMBAY (PLEADERS CASTE QUESTIONS) REGULATION (II OF 1827).

S. 5—High Courts Power.

——*High Court can interfere in revision apart from S.* 115, *C. P. Code—Government of India Act, Ss.* 106 *and* 130.

It is competent under Bombay Regulation 2 of 1827 to the Bombay High Court to call for the proceedings of any subordinate Civil Court, and to issue such orders thereon as the case may require, although the same is repealed by Act 12 of 1873, by virtue of Ss. 106 and 130 of Government of India Act, 1915; but such a power should be exercised only in very exceptional cases. 40 Bom. 86 and A. I. R. 1924 Bom. 65, Foll. (*Marten, C. J. and Blackwell, J.*) BOMBAY STEAM NAVIGATION CO., LTD. *v.* VASUDEV BABURAO. **52 Bom 37 = 106 I. C. 470 = 29 Bom. L. R. 1551 = A. I. R. 1928 Bom. 5.**

S. 54—Applicability.

——*S.* 54 *still applies to Sind—Pleader ill and notifying his inability—Party if entitled to reasonable adjournment for engaging another pleader.*

The provisions of S. 54 are still applicable to Sind. Where therefore the pleader for the appellant has notified to the Court his inability to proceed with the appeal on account of his illness, the appellant is entitled to an adjournment for a reasonable time to enable him to engage another pleader. (*Wild, J. C. and Rupchand Bilaram, A. J. C.*) MOHANLAL KOTUMAL *v.* DALPATRAI ISARDAS. **112 I. C. 539 = A. I. R. 1929 Sind 40.**

BOMBAY PREVENTION OF GAMBLING ACT (IV OF 1887).

Common gaming house.

——*Probability of profit to the owner is sufficient.*

To prove that a particular house, room or place is common "gaming house" it need not be extablished that the owner or occupier takes a fixed commission which is irrespective of the result of gaming, or that he manipulates the conditions in such a manner that he cannot possibly lose. It is sufficient if the house is one in which instruments of gaming are kept or used for the profit or gain of the person keeping or using such place, *i.e.*, where the person keeping or using the house knows that profit or gain will in all probability result from the use of the instrument of gaming. The profit or gain may not actually result from such use. But if profit or gain is the probable and the expected result of the game itself and if that is the purpose of keeping or using the instruments, it would be sufficient to bring the case within the scope of the definition. 23 Cr. L. J. 196, Diss. (*Shah, Ag. C. J. and Coyajee, J.*) EMPEROR *v.* DATTATRAYA SHANKAR. **47 Bom. 960 = 25 Bom. L. R. 1089 = 25 Cr. L. J. 531 = 77 I. C. 995 = A. I. R. 1924 Bom. 184.**

S. 3—Betting.

——A bet need not be as regards the issue of a future uncertain event and may be upon a past event, *e.g.*, whether a particular horse won a race in a certain year. In such a case the bet is upon the accuracy of the information, belief or memory of the parties and the event is the proof that one or the other was accurate. A person may bet against what he believes the issue will be, *e.g.*, a man may bet against a horse which he believes will win in order to secure himself against loss in either event; *Thacker* v. *Hardy* (1878) 4 Q. B. D 685; *Carlill* v. *Carbolic Smoke Ball, Co.*, (1892) 2 Q. B. 484, Rel. on. (*Patkar and Wild, JJ.*) EMPEROR *v.* ISMAIL HIRJI. **31 Bom. L. R. 1349 = 1930 Cr. C. 113 = 54 Bom. 146 = 31 Cr. L. J. 633 = A. I. R 1930 Bom. 49.**

S. 3—Instrument of gaming.

——*Public Gambling Act* (1867), *S.* 1—*Books of record are instruments of gaming.*

Books used for the purpose of registering or recording any gaming transaction would fall within the definition of "instruments of gaming" 6 Bom. L. R. 249; 29 Bom. 264; and 40 Bom. 263, Rel. on. A register or record of transactions in American Futures was held to be an instrument of gaming: 28 Bom. 616, Dist.; so also a book which contained a register or Kacha Khandi transaction and Teji Mandi transactions. A. I. R. 1922 Bom. 408 and 37 Bom. 264, Ref.; 24 Bom. 227, Rel. on; *Thacker* v. *Hardy* (1878) 4 Q.B. D. 685, Dist. (*Mirza and Baker, JJ.*) EMPEROR *v.* THAVARMAL RUPCHAND. **53 Bom. 367 = 116 I. C. 251 = 31 Bom. L. R. 158 = 30 Cr. L. J. 595 = 12 A. I. Cr. R. 466 = A. I. R. 1929 Bom. 157.**

Ss. 3, 4 and 6—Scope.

——*Passage surrounded by building appropriated for betting business—Passage is "place" within Ss.* 3, 4, *and* 6.

Where the passages are surrounded by buildings and are closed at night by doors and the accused have appropriated them for the business of betting, the business of betting is localized and this localization converts the passage into a "place," within the meaning of Ss. 3, 4 and 6: 37 Bom. 651, Rel. on. *Powell* v. *Kempton Park Race Course Co.*, (1899) A. C. 143; *Eastwood* v. *Miller*, (1874) 9 Q. B. 440 and *Brown* v. *Patch*, (1899) 1 Q. B. 892, Ref. (*Patkar and Wild, JJ.*) EMPEROR *v.* ISMAIL HIRJI. **31 Bom. L.R. 1349 = 1930 Cr.C. 113 = 54 Bom. 146 = 31 Cr. L. J. 633 = A. I. R. 1930 Bom. 49.**

Ss. 4 and 5—Common Gaming-house.

——*Stranger obtaining a bet on horse race—Other documentary evidence as betting books—House can be inferred to be common gaming-house.*

From the fact that a stranger went into the house and obtained a bet on a horse race, coupled with the discovery of documentary evidence, such as betting books, etc., found when the police searched the house very shortly afterwards, the proper inference that the house was a common gaming house can be drawn. (*Marten and Madgavkar, JJ.*) EMPEROR *v.* ABASBHAI. **50 Bom. 344 = 28 Bom. L. R. 272 = 27 Cr. L.J. 503 = 93 I. C. 967 = A. I. R. 1926 Bom. 195.**

Ss. 4 and 5—Evidence.

——*Evidence of a stranger recording a bet is admissible to show nature of house.*

The evidence of a stranger who recorded a bet is admissible as part of the evidence to show that the house in question is a common gaming-house under S. 4

or S. 5. (*Marten and Madgavkar, JJ.*) EMPEROR *v.* ABASBHAI. **50 Bom. 344 = 28 Bom. L. R. 272 = 27 Cr. L. J. 503 = 93 I. C. 967 = A. I. R. 1926 Bom. 195.**

———*Specific evidence that game played was one of luck and not of skill must be given in loubtful circumstances, e.g., playing cards by respectable persons.*

There is no doubt a presumption from the use of instruments of gambling like cards that gambling has taken place, yet where the circumstances are ambiguous, it is more desirable that there should be some evidence that game actually being played at the moment was not a game of skill but of chance and that in view of the number and position and the income of players the game was one where loss might be the result not of lack of skill but of lack of luck which is the essence of the offence of gambling. (*Kennedy, J. C. and Rupchand Bilaram, A.J.C.*) TILLOCKCHAND *v.* EMPEROR. **20 S.L.R. 66 = 26 Cr.L. J. 1356 = 89 I.C. 396 = A. I. R. 1926 Sind 65.**

S. 4—Gaming-house.

———*Habitual use is not necessary.*

Under S. 4 it need not be shown that the house was habitually used for gaming. (*Kincaid, J.C. and Lobo, A.J.C.*) BHANJI *v.* EMPEROR. **20 S. L. R. 10 = 27 Cr. L. J. 905 = 96 I. C. 217 = A. I. R. 1926 Sind 254.**

S. 4—Joint owner of house.

———*Joint owner of house present when gambling presumed to be going on—He can be convicted for having knowingly permitted it to be so used.*

Where the joint owner of house is present when gaming is presumed to be going on in his house, he can be convicted under S. 4 for having knowingly permitted the house to be used as a gaming-house. (*Mirza and Broomfield, JJ.*) EMPEROR *v.* NANALAL DWARAKADAS. **32 Bom. L. R. 794 = A .I. R. 1930 Bom. 350.**

Ss. 4 and 5—Procedure.

———*Offence under, is cognizable within Cr. P. Code, S. 4 (1) (f).*

As under S. 6 certain officers have power to issue warrants of search and also of arrest, and to cause search or arrest without warrant personally, the offence under S. 4 or 5 of Bombay Act 4 of 1887 is a cognizable offence under S. 4 (1) (*f*), Cr. P. Code. (*Marten and Madgavkar, JJ.*) EMPEROR *v.* ABASBHAI. **50 Bom. 344 = 28 Bom. L.R. 272 = 27 Cr. L. J. 503 = 93 I. C. 967 = A.I.R. 1926 Bom. 195.**

S. 5—" Found in Gaming-house."

———*Person seen coming out of gaming-house and arrested then—He is found in the house.*

When a police-officer armed with a warrant sees a person come out of a house, and he is arrested as he comes out, he is found in the house. " Found in the house " does not mean " arrested in the house ": 8 B. H. C. R. 1: and 22 P. R. 1895, Rel. on. (*Mirza and Baker, JJ.*) TRIBHOWAN MOTI RAM *v.* EMPEROR. **53 Bom. 137 = 117 I. C. 434 = 31 Bom. L. R. 53 = 30 Cr. L.J. 794 = A. I. R. 1929 Bom. 74.**

S. 5—Procedure.

———*Honorary Magistrate can issue warrant under S. 5.*

Whatever the powers of the Honorary Magistrate may be under the Cr. Procedure Code, there is nothing in the Bombay Gambling Act which requires that a Magistrate issuing a warrant thereunder should be vested with any special jurisdiction. All that is required is that there should be a warrant by a First Class Magistrate and therefore an Honorary First Class Magistrate is entitled to issue a search warrant. (*Kennedy, J.C. and Rupchand Bilaram, A. J. C.*) TILLOCKCHAND *v.* EMPEROR. **20 S. L. R. 66 = 26 Cr. L. J. 1356 = 89 I. C. 396 = A.I.R 1926 Sind 65.**

S. 5—Wager.

———*Date of horse race postponed—Bets were entered into irrespective of adjournment—Accused not contending that either race or particular horse should run on given particular date—Agreement to bet held to be wager amounting to offence.*

Evidence in a case showed that the race which was to be run on 29th September was adjourned to 6th October early in the morning and still in the afternoon of that day bets were entered into with regard to the meeting which had already been adjourned, and the bets were to remain good for the race that was to be run on 6th October. The accused did not intend either that the race should run on 29th September or that a particular horse should run that day, as the condition of the agreement.

Held, that even though the race was postponed, the agreement to bet would be a wager and would amount to an offence under S. 5. (*Patkar and Wild, JJ.*) EMPEROR *v.* ISMAIL HIRJI. **31 Bom.L.R. 1349 = 1930 Cr. C. 113 = 54 Bom. 146 = 31 Cr. L. J. 633 = A. I. R. 1930 Bom. 49.**

S. 6—Complaint.

———*S. 6 does not impose any limitation on power of any person to make complaint.*

Section 6 does not impose any limitation on the power of any person to make a complaint on oath to the Commissioner of Police. As a general rule any person, having knowledge of the commission of an offence, may set the law in motion by a complaint, even though he is not personally interested or affected by the offence: 13 Bom. 600, Foll.; A.I.R. 1929 Bom. 74, Ref. (*Patkar and Wild, JJ.*) EMPEROR *v.* ISMAIL HIRJI. **31 Bom. L. R. 1349 = 1930 Cr. C. 113 = 54 Bom. 146 = 31 Cr.L.J. 633 = A.I.R. 1930 Bom. 49.**

———*Complaint on oath may be oral or in writing—It need not be recited in warrant—Issuing of warrant raises presumption that complaint was on oath.*

The complaint on oath referred to in S. 6 does not appear necessarily to be a complaint in writing on the filing of which process is to issue as in ordinary criminal trials. It may be either oral or in writing. It is not necessary that it should be recited in the warrant or set out in any complaint that may be subsequently filed before the Magistrate. The fact that the warrant has been issued would raise a presumption that *omnia rite esse acta*. (*Mirza and Baker, JJ.*) TRIBHOWAN MOTIRAM *v.* EMPEROR. **53 Bom. 137 = 31 Bom. L. R. 53 = 117 I. C. 434 = 30 Cr.L.J. 794 = A.I.R. 1929 Bom. 74.**

S. 6—Construction.

———*Provisions should be strictly construed.*

The powers given under S. 6 are very wide and are apt seriously to interfere with the liberty and property of the subject; the section therefore should be strictly construed and the conditions required for its coming into operation should be strictly complied with. Where a warrant contained somewhat inaccurate description of the place to be searched but it was clear from the rest of the description contained in the warrant that the inaccuracy was not so material or substantial as to mislead a stranger if one were to go to the locality and attempt to find the place intended to be raided, with the help of the warrant.

Held, that the inaccuracy did not amount to more than a misdescription and was not of a nature to vitiate the warrant: A.I.R. 1926 Bom. 195, Dist.

Per *Baker, J.*—The absence of numbers of buildings would not vitiate the warrant if the buildings to be searched are otherwise sufficiently described: 6 Bom. L.R. 52; A.I.R. 1926 Sind 254; (1905) A. W. N. 105, Ref. (*Mirza and Baker, JJ.*) EMPEROR *v.* THAVARMAL RUPCHAND. **31 Bom. L. R. 158 = 116 I. C. 251 = 53 Bom. 367 = 30 Cr. L. J. 595 = 12 A. I. Cr. R. 466 = A. I. R. 1929 Bom. 157.**

S. 6—Evidence.

——*Extraneous evidence to prove special warrant cannot be allowed.*

A warrant is not a special warrant if it is not on the face of it a special warrant; and if it is not directed to a special officer, extraneous evidence cannot be admitted to prove that it was meant to be executed by a Special Police Officer personally and only by him. (*Barlee and Kalumal, A. J. Cs.*) ASSUDOMAL *v.* EMPEROR. **30 Cr. L. J. 1075 = 119 I. C. 535 = 23 S. L. R. 441 = 1930 Cr. C. 123 = A. I. R. 1930 Sind 59.**

S. 6—Procedure.

——S. 6 is wide enough to include a complaint on oath made by a police-officer. (*Mirza and Broomfield, JJ.*) EMPEROR *v.* NANALAL DWARKADAS. **32 Bom. L. R. 794 = A.I.R. 1930 Bom. 350.**

——There is nothing illegal if the warrant is issued to the police-officer who has sworn on the complaint before the District Superintendent of Police. (*Mirza and Broomfield, JJ.*) EMPEROR *v.* NANALAL DWARKADAS. **32 Bom. L. R. 794 = A. I. R. 1930 Bom. 350.**

——Under S. 6 the Commissioner of Police can arrest without warrant: 31 Bom. 438 and A. I. R. 1926 Bom. 195, Rel. on. (*Patkar and Wild, JJ.*) EMPEROR *v.* ISMAIL HIRJI. **31 Bom.L.R. 1349 = 1930 Cr.C. 113 = 54 Bom. 146 = 31 Cr. L. J. 633 = A. I. R. 1930 Bom. 49.**

——*Arrest by police-officer authorized to arrest by Commissioner of Police and in his presence though not within view is not illegal.*

Where the arrests by a police-officer are under the express authority of the Commissioner of Police and in the presence of the Commissioner, though not within his view, the arrests by the police-officer are not illegal. (*Patkar and Wild, JJ.*) EMPEROR *v.* ISMAIL HIRJI. **31 Bom. L. R. 1349 = 1930 Cr. C. 113 = 54 Bom. 146 = 31 Cr. L. J. 633 = A. I. R. 1930 Bom. 49.**

——*Special warrant must be directed to person by name.*

A special warrant must be a warrant which is specially directed to a person by name and not one which can be endorsed over to any other police-officer of similar rank: 3 S. L. R. 56, Foll. (*Barlee and Kalumal, A. J. Cs.*) ASSUDOMAL *v.* EMPEROR. **30 Cr.L.J. 1075 = 119 I. C. 535 = 23 S. L. R. 441 = 1930 Cr. C. 123 = A. I. R. 1930 Sind 59.**

——*Warrant comprising more than one tenement does not cease to be special.*

The words " house, room or place " contained in S. 6 have no reference to a particular house, room or place, or to houses, rooms or places if they are owned by one and the same person and are used for a common purpose. The words should be taken broadly as meaning houses, rooms or places apart from the more restricted notion of a tenement. If the houses, rooms or places have

substantially been utilized for the common purpose of gambling it would not matter if the houses, rooms or places comprised more than one tenement. The fact therefore that the warrant comprized more than one tenement would not make it a general warrant. The term " special warrant " has reference only to the limitation as regards the person or persons who would be competent to execute it. (*Mirza and Baker, JJ.*) EMPEROR *v.* THAVARMAL RUPCHAND. **53 Bom. 367 = 31 Bom. L. R. 158 = 116 I. C. 251 = 30 Cr. L. R. 595 = 12 A. I. Cr. R. 466 = A. I. R. 1929 Bom. 157.**

——*Cr. P. Code, S. 98—Special warrant cannot be endorsed to another officer.*

The special warrant when issued authorizes the officer or officers named therein to do all the things that are detailed in the warrant. It cannot be endorsed over to any other police-officer of similar rank. The only person who can execute such a warrant is the officer who is named in the warrant. (*Mirza and Baker, JJ.*) EMPEROR *v.* THAVARMAL RUPCHAND. **31 Bom. L. R. 158 = 53 Bom. 367 = 116 I. C. 251 = 30 Cr. L. J. 595 = 12 A. I. Cr. R. 466 = A. I. R. 1929 Bom. 157.**

S. 6—Scope.

——*District Supt. of Police if can administer oath to complainant.*

S. 6, Gambling Act, confers the power *inter alia* on the District Superintendent of Police to receive a complaint on oath in cases contemplated by the section and such a power necessarily implies that the District Superintendent of Police is competent in cases contemplated by S. 6 to administer an oath to the person making the complaint before him. (*Mirza and Baker, JJ.*) TRIBHOWAN MOTI RAM *v.* EMPEROR. **53 Bom. 137 = 31 Bom. L. R. 53 = 30 Cr. L. J. 794 = 117 I.C. 434 = A. I. R. 1929 Bom. 74.**

S. 7—Irregularity.

——*Omission to mention sub-division of a house is not material.*

If the description of the warrant is such that an ordinary person can identify the spot, the Crown can take advantage of the presumption created by S. 7. An omission to mention sub-division of a building is immaterial. 6 Bom. L. R. 52, Rel. on. (*Kincaid, J. C. and Lobo, A. J. C.*) BHANJI *v.* EMPEROR. **20 S. L. R. 10 = 27 Cr. L. J. 905 = 96 I. C. 217 = A. I. R. 1926 Sind 254.**

S. 7—Presumption.

——*Special warrant not issued under S. 6—Presumption cannot be drawn.*

No presumption under S. 7 can be drawn where the warrant is not a special warrant issued under S. 6 of the Act. (*Barlee and Kalumal, A. J. Cs.*) ASSUDOMAL *v.* EMPEROR. **30 Cr. L. J. 1075 = 119 I. C. 535 = 23 S. L. R. 441 = 1930 Cr. C. 123 = A. I. R. 1930 Sind 59.**

——*If search warrant is bad, presumption under S. 7 cannot be made but that does not prevent prosecution from establishing their case by other evidence.*

If the warrant under which a search is made is bad then the presumption under S. 7 of the Act cannot be made, but the mere fact that such presumption cannot be raised does not prevent the prosecution from establishing by evidence in the ordinary way that on the facts proved the accused were guilty of the offences charged: 37 Bom. 402, Foll. (*Marten and Madgavkar, JJ.*)

BOMBAY PREVENTION OF GAMBLING ACT (1887), S. 12.

EMPEROR *v.* ABASBHAI. **50 Bom. 344 = 28 Bom. L R. 272 = 27 Cr. L. J. 503 = 93 I. C. 967 = A. I. R. 1926 Bom. 195.**

S. 12—Gaming in public street.

——*Person sitting in a shop readily accessible to public is liable.*

A person sitting in a shop at a place where he is readily accessible to any person who wished to bet with him from the public street without having to enter the shop at all, is liable for betting or gaming in the street under S. 12. 15 Bom. L. R. 101; 30 Bom. 348 and 31 Cal. 910, Dist. (*Fawcett and Madgavkar, JJ.*) FAKIRBHAI *v.* EMPEROR. **28 Bom. L R. 92 = 27 Cr. L.J. 452 = 93 I. C. 244 = A. I. R. 1926 Bom. 149.**

S. 12 (a)—Hotel.

——"*Any place to which public have or are permitted to have access*" *includes hotel.*

The words in the amended S. 12, Gambling Act, "in any place to which the public have or are permitted to have access" would include a hotel. The public have a right to go to a hotel provided there is accommodation available in it, and can be said to have or to be permitted to have access to it: 30 Bom. 348 and 14 Cr. L. J. 167, Expl. and Dist. (*Mirza and Broomfield, JJ.*) MANGUBHAI DAHYABHAI *v.* EMPEROR. **32 Bom. L. R. 790 = 1930 Cr. C. 848 = A. I. R. 1930 Bom. 369.**

S. 12—Instrument of gaming.

——*Currency notes and cash if used for gaming are instruments of gaming.*

Although currency notes and cash found on the person alleged to be a gambler cannot in themselves be regarded as "instruments of gaming" but if they are used as a subject or means of gaming they would fall within the definition of "instruments of gaming" 16 Bom. 283 (F. B.) *held* overruled by Act 6 of 1919. (*Mirza and Baker, JJ.*) TRIBHOWAN MOTI RAM *v.* EMPEROR. **53 Bom. 137 = 117 I.C. 434 = 31 Bom. L. R. 53 = 30 Cr. L. J. 794 = A. I. R. 1929 Bom. 74.**

S. 12 (a)—Object of amendment.

——The object of the amended S. 12 (*a*) was to free the word "place" which had been originally used in that section from the restricted meaning which it was held to bear, appearing as it did between the expression "public street" and the word "thoroughfare". (*Mirza and Broomfield, JJ.*) MANGUBHAI DAHYABHAI *v.* EMPEROR. **32 Bom. L.R. 790 = 1930 Cr. C. 848 = A. I. R. 1930 Bom. 369.**

BOMBAY PREVENTION OF PROSTITUTION ACT (XI OF 1923).

Ss. 3 and 10 (1)—Arrest without Complaint.

——*Arrest by police-officer without complaint is illegal—Magistrate has no jurisdiction to try the accused.*

A police-officer, who is not specially authorised by the Commissioner of Police as required by S. 10 (1) cannot arrest a woman under S. 10 (1) without a complaint under S. 3 of the Act, and the Magistrate has no jurisdiction under S. 190 of the Cr. P. Code, to try the woman so wrongly arrested for the offence, unless a complaint within the meaning of S. 4 (1) (*h*) is made to him. (*Marten and Fawcett, JJ.*) CANDRI BAWOO *v.* EMPEROR. **49 Bom. 212 = 26 Cr. L. J. 441 = 26 Bom. L. R. 1225 = 85 I.C. 57 = A.I.R. 1925 Bom. 131.**

S. 6—Procuration.

——*Brothel-keeper availing herself of the supply of the procuress is guilty of abetment.*

BOMBAY PRIMARY EDUCATION ACT (1923), R. 13.

S. 6 is directed against attempts to seduce the virtue of a woman or a girl for the purpose of prostitution, whether with or without her consent or whatever her age. The section is directed against both a brothel-keeper and her procuress; the brothel-keeper who avails herself of the supply of the procuress is guilty of abetment of the offence under S. 6, Bom. Act 11, 1923. The brothel-keeper facilitates the prostitution and completes it. (*Madgavkar, J.*) EMPEROR *v.* VITHABAI SUKHA. **52 Bom. 403 = 30 Bom. L.R. 613 = 29 Cr. L. J. 993 = 11 A. I. Cr. R. 221 = 112 I.C. 209 = A. I. R. 1928 Bom. 336.**

S. 7—Prostitute.

——*Mistress is not necessarily prostitute.*

The idea underlying prostitution is that a woman should surrender her body for a monetary consideration to some one who is not in law entitled to have sexual intercourse with her. The position of a mistress is not necessarily that of a prostitute. The relationship is of a more permanent nature than the casual relationship implied in prostitution. Having a stray paramour would not constitute a woman a prostitute. (*Mirza and Murphy, JJ.*) EMPEROR *v.* LALYA BAPU. **31 Bom.L.R. 521 = 117 I. C. 336 = 30 Cr. L. J. 787 = A. I. R. 1929 Bom. 266.**

——The matter whether a woman is an ordinary or common prostitute rests more on degree than on kind. (*Mirza and Murphy, JJ.*) EMPEROR *v.* LALYA BAPU. **31 Bom. L. R. 521 = 117 I. C. 336 = 30 Cr. L. J. 787 = A. I. R. 1929 Bom. 266.**

BOMBAY PRIMARY EDUCATION ACT (IV OF 1923).

S. 27.

——*Bombay Local Boards Act* (1923) *S.* 133 (*e*)—*Rules under Local Board Act, and Education Act are so interwoven that it is difficult to separate them.*

The rules under the two Acts are so interwoven that it is difficult to separate them. If the Board is to function in any way at all, it must necessarily function under the rules made under the District Local Board Act because it is obviously of no advantage to a person to be appointed to be a member of the School Board if he cannot perform any function as such member and if no money is allotted to the Board. (*Percival, J. C. and Havelivala, A. J. C.*) MAHOMED AZAM *v.* DISTRICT LOCAL BOARD. **A. I. R. 1930 Sind 246.**

S. 27 (1) and S. 4, Cl. 5, R. 21—Quorum.

——*School Board meetings—Quorum not prescribed—Common law rule that majority of members should attend a meeting applies.*

The School Board is a public corporation as opposed to a private corporation and has been created by statute. In the absence of a quorum having been prescribed either by the statute creating it or by the rules framed thereunder, there is no reason why the ordinary common law rule prevailing in England should not apply. The Common law rule provides that when a statute grants powers on any definite number of persons in respect of a public as opposed to a private trust, and contains no indication to the contrary, it is necessary that a majority of that number should act together and should attend every meeting when any corporate act is done or purported to be done. (*Percival, J. C. and Rupchand Bilaram, A. J. C.*) SETH LALCHAND *v.* ISSERSINGH. **23 S. L. R. 128 = 107 I. C. 446 = A. I. R. 1928 Sind 126.**

R. 13.

——*Election to Municipal Board—Disqualification—S. 15 (f), Bom. Dist. Mun. Act—Subsequent Election*

BOMBAY PRIMARY EDUCATION (DT. MUNICIPALITIES) ACT (1918), S. 9.

to School Board—Chairman refusing to recognise him—Rights of elected member.

X elected member of Municipality but subsequently held disqualified for such election—In the meanwhile but after his disqualification ceased, he was elected on the School Board—But he was held disqualified by Chairman of School Board—His disqualification for Municipality did not necessarily imply disqualification for District Board—Chairman was not competent to decide question of disqualification, the presumption, in absence of statutory authority being in favour of suits in ordinary Courts. (*Madgavkar and Patkar, JJ.*) KESHAV MAHADEV *v.* LAKSHMAN NARAYAN.

32 Bom. L. R. 614 = 124 I. C. 815 = A. I. R. 1930 Bom. 378.

BOMBAY PRIMARY EDUCATION (DISTRICT MUNICIPALITIES) ACT (I OF 1918).

Ss. 9, 10 and 8 (b)—Scope.

———*Provision Mandatory—Right of parents to give education elsewhere not taken away—Object is that the child should get education somewhere—Instruction need not conform to standards in recognised schools.*

The words "and after such enquiry as it considers necessary" in S. 9 are not merely permissive. That expression has a compulsory force, regard being had to the object of the enactment, to the wide powers conferred on the committee in derogation of the parents' rights and to the language of S. 9 itself. It is clearly the function of the Court when a complaint is made under S. 10 to see whether it is proved that the parent failed to send the child to a recognised school, without reasonable cause on or after the date specified in the attendance order. The Act does not inflict penalty on a parent for a mere failure to carry out an attendance order passed under S. 9. For, it is not to be supposed, unless the statute clearly said so, that once attendance order is made by the school committee under S. 9 the parent is for all time deprived of the right to give efficient instruction to his own child otherwise than in a recognised primary school. The main object of the enactment is to see that a child is not left without the benefit of education. It is sufficient if it is receiving efficient instruction elsewhere than in a recognised primary school. It is not essential that the instruction in order to be efficient within the meaning of S. 8 (*b*) should conform to the standard as adopted in the recognised primary schools. (*Shah, Ag. C. J. and Coyajee, J.*) KING-EMPEROR *v.* NEMCHAND NATHA.

47 Bom. 942 = 25 Bom. L. R. 896 = 77 I. C. 226 = 25 Cr. L. J. 338 = A. I. R. 1924 Bom. 105.

BOMBAY PUBLIC CONVEYANCES ACT (VII OF 1920).

S. 2 (b)—Interpretation.

———*Plying for hire and 'letting for hire' distinguished.*

There seems to be a difference between "letting for hire" and "plying for hire". If *A* keeps motors at Poona in order to let them out to clients who wish to go to Mahabaleshwar the motors would not become on that account public conveyances; it would be otherwise if *A* kept a motor bus which plied regularly between Poona and Mahabaleshwar. (*Maclead, C. J. and Crump, J.*) EMPEROR *v.* NASARVANJI BAWANJI.

25 Bom. L. R. 95 = 72 I. C. 70 = 24 Cr. L. J. 310 = A. I. R. 1923 Bom. 248.

S. 26—License.

———***Driving without license—License suspended by Assistant Superintendent of Police under powers orally*** *delegated by Superintendent of Police under S. 12 (2)—Conviction for failure to produce license is bad—Bombay General Clauses Act (Bom. 1 of 1904), S. 19.*

Where the accused a licensed public conveyance driver was convicted under S. 26 (2) of Act 7 of 1920 for failure to produce his license and it was found that his license had been suspended by Assistant Superintendent of Police under S. 12 (2) in exercise of the powers delegated to him only orally by the Superintendent of Police. *Held*, the conviction of the accused was illegal. The delegation of powers under the Act of 1920 can be effected but in a case where there has been an exercise of a power under alleged delegated authority it is clearly necessary that the delegation should be clearly shown. The question of such authority should not depend on a general verbal order but it should be by written orders, giving references to the various sections of the Act and specifying particular powers and duties delegated to an Assistant or Deputy Superintendent of Police. (*Fawcett and Madgavkar, JJ.*) EMPEROR *v.* KARIM.

27 Bom. L.R. 1421 = 27 Cr. L. J. 150 = 91 I.C. 886 = A. I. R. 1926 Bom. 77.

BOMBAY REGULATION (I OF 1808).

S. 41—Land Tenure.

———*Suti Lease by Government to defendant's predecessors-in-title in 1831—Plaintiff claiming that his predecessors were in possession of land prior to lease—Fixed rent paid up to 1915 but enhanced in 1915-16—Plaintiff was held to be sutidar and Regn. 1 of 1808 applied to the lands—Defendants are not entitled to enhanced rent—Tenure does not come to end by change in the use of land.*

Village Chincholi was leased by Government in 1831, and the defendants khots were the successors-in-title of the lessee; plaintiff claimed to be the successor-in-title of a person who was in possession of the land in suit prior to the above-mentioned lease; plaintiff's title was traced to 1867; a considerable portion of the land was utilized for building purposes; up to 1915 only the fixed annual payment was charged but in 1915-16 enhanced assessment was levied; plaintiff claimed that lands were suti and subject only to fixed annual payment and that the defendants were entitled to nothing more than the fixed payment.

Held, that the plaintiff was a sutidar of the lands in suit to which Regulation 1 of 1808 applied; that the lands in suit were subject to a perpetual fixed grain rental commuted into money payment and continued to be invariable until there had been a decennial valuation changing the commutation rate by Government that the tenure did not come to an end by reason of the change in the use of the lands, and that the rate fixed by the survey assessment did not amount to the decennial valuation contemplated in S. 41, Regn. 1 of 1808, and that the assessment in excess of the fixed annual payment levied invariably from the year 1867 could not be recovered by defendants. (*Patkar and Baker, JJ.*) KISANLAL RATANLAL *v.* JANMEJAYA.

30 Bom. L. R. 992 = 118 I. C. 244 = A. I. R. 1928 Bom. 457.

———**(II OF 1827).** *See* BOMBAY (PLEADERS CASTE QUESTIONS) REGULATION.

———**(V OF 1827).** *See* BOMBAY ACKNOWLEDGMENT OF DEBTS, INTEREST AND MORTGAGES REGULATION (V OF 1827).

———**(VIII OF 1827).** *See* BOMBAY ADMINISTRATION OF ESTATES REGULATION.

———**(XVI OF 1827).** *See* BOMBAY COLLECTORS OF LAND REVENUE REGULATION.

Applicability.

———*Land Acquisition Act—Land acquired under—Rent Act does not apply—Land Acquisition Act—Bombay Municipal Act* (1888), *S.* 91.

The Bombay Rent Act was not intended to apply to premises acquired under the Land Acquisition Act for public purposes. *Dodds* v. *Shepherd* (1876) 1 Ex. D. 75, Ref. (*Setalvad, J.*) BOMBAY MUNICIPALITY *v.* DAMODAR BROS. **45 Bom. 725 = 23 Bom. L. R. 35 = 60 I. C. 571 = A. I. R 1921 Bom. 214.**

Dwelling-house.

———*Premises occupied mainly for dwelling purposes—Tenant also carrying on business in the premises—Premises are to be deemed as used as dwelling-house.*

The fact that a tenant carries on business or works in the same premises, which he uses for dwelling in, cannot thereby prevent those premises coming within the category of premises used as a dwelling-house. (*Macleod, C.J. and Coyajee, J.*) LAXMAN SANTU SINTRE *v.* BALKRISHNA KESHAV SHETYE. **27 Bom. L. R. 937 = 89 I. C. 878 = A.I.R. 1925 Bom. 398.**

Execution.

———*C. P. Code, O. XXI, Rr.* 97, 99, *O.* 1, *R.* 7—*Ejectment decree against lessee—Execution—Sub-tenants cannot resist delivery of possession—Bombay Rent* (*War Restrictions*) *Act*, 1918.

An owner of premises suing for possession may find it advantageous to join all the persons in possession of the suit premises, to avoid difficulties which may otherwise arise when he attempts to execute his decree, but the non-joinder will not enable a sub-tenant to resist delivery of possession to the owner in execution of his decree for ejectment against his lessee. (*Macleod, C.J.*) JAFFERJI IBRAHIMJI *v.* MIYADIN MANGAL. **46 Bom. 526 = 23 Bom.L.R. 1251 = 64 I.C. 692 = A.I.R. 1922 Bom. 273.**

Notice.

———*Notice to quit given while the Act is in force—Fresh notice is not necessary after the Act ceases to apply.*

The mere fact that the tenant is entitled to retain possession while the Act remains in force is not sufficient to create any relationship of landlord and tenant between the parties as would require a fresh notice to terminate it. The right to have notice is a statutory right the limits of which are to be found in the terms of the statute; and the moment the statute ceases to extend that protection to him he ceases to have the protection as against the landlord which the statute gave him up to a certain period. Where a landlord has, during the continuance of the Act given a notice to his tenant asking him to quit certain premises which he was using as business premises, it is not necessary for the landlord to give the tenant a fresh notice to quit after the Rent Act has ceased to apply to the premises. (*Shah, J.*) KISHOREDAS P. MANGALDAS *v.* AHMED SULEMAN. **27 Bom. L.R. 1086 = 94 I.C. 564 = 49 Bom. 567 = A.I.R. 1925 Bom. 516.**

Premises.

———*Landlord is entitled to use the premises for his own residents if required.*

An owner of premises, if he says he wishes to use them for his own purposes, is entitled to do so, and he is entitled to use any part of the premises as his residence. What the Rent Act endeavours to provide for is the case of a landlord who evicts the existing tenants in order that he may let them to another tenant at a higher rent, or exact a higher rent from the tenant on a threat of eviction. (*Macleod, C.J. and Shah, J.*) RUSTOMJI DINSHAW *v.* DOSIBAI RUSTOMJI. **45 Bom. 1236 = 23 Bom. L.R. 850 = 63 I.C. 41 = A.I.R. 1921 Bom. 34.**

Scope.

———*Satisfaction caused — Municipality acquiring premises—Premises necessary for scheme of large public utility—Satisfactory cause exists within the meaning of Act.*

The necessities of a scheme of large public utility undertaken by the Municipality, which has acquired the premises, are a satisfactory cause. (*Setalvad, J.*) BOMBAY MUNICIPALITY *v.* DAMODAR BROS. **45 Bom. 725 = 23 Bom. L.R. 35 = 60 I. C. 571 = A.I.R. 1921 Bom. 214.**

Sub-tenants.

———*Sub-tenants have no greater right than the tenant as against landlord.*

There is nothing in the Bombay Rent Act to protect sub-tenants from ejectment by the landlord of the premises, with whom there was no privity of contract. (*Macleod, C.J.*) JAFFERJI IBRAHIMJI *v.* MIYADIN MANGAL. **46 Bom. 526 = 64 I.C. 692 = 23 Bom. L.R 1251 = A.I.R. 1922 Bom. 273.**

Suit for possession.

———*Suit for possession by landlord—Possession of whole house can be decreed though portion may be enough for landlord's occupation.*

Where the whole property passed by one lease, possession of the whole of it can be decreed in a suit for ejectment of the tenant though only a portion may be enough for landlord's occupation. If the limitations created by S. 9 are removed, the landlord's previous rights again come into full operation. (*Kincaid, J.C. and Kennedy, A. J. C.*) HUSSANLAL MAHAMMAD *v.* BACHAL HAJI NATHU. **15 S. L. R. 79 = 62 I.C. 860 = A. I. R. 1921 Sind 7.**

S. 1, cl. (a), (ii), 4—Premises.

———*Reconstruction of wall and extensive alterations make new premises.*

Where a landlord reconstructs the wall which has fallen down and makes extensive alterations, he is entitled to regard them as new premises. A.I.R. 1921 Bom. 224, Rel. on. (*Madgavkar, J.*) IBRAHIM FAZALBHAI *v.* JAN MAHOMED RAHIM. **29 Bom. L.R. 1439 = 105 I.C. 764 = A.I.R. 1927 Bom. 648.**

S. 2—Interpretation.

———*T. P. Act, S.* 105—*Easements Act, S.* 52—*Distinction between license and lease—Grant of an indefinite area the position of which varies from time to time for keeping chattels is a license.*

It is essential to the creation of a tenancy of a corporeal hereditament that the tenant should have the right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the premises without exclusive possession operates as a license, and not as a lease. Having regard to the rights of a lessee, which are specified in S. 108 of the Transfer of Property Act, in particular the rights to growing crops and to put up structures, it seems difficult to say that there could be a valid lease not of a definite area of immoveable property but of an area the position of which varies from time to time. On the other hand, it may be said that "immoveable property" (as defined in the General Clauses Act) includes not only land but benefits to arise out of the land so that there can be a lease of the benefit of keeping chattels, such as a car and carriage, within certain special limits although the place occupied by the chattels might vary from time to time. Ordinarily the law takes it that a case of that kind is not one of a demise, but that of a license. The mere fact that a person has had the exclusive use of a particular cubicle for two years and that it was the intention of the parties that no one else should use that cubicle so long as the person kept his car on the premises is not in law sufficient to show that the agreement was a demise or a lease and not a license. (*Fawcett, J.*) THE INDIAN HOTELS COMPANY, LTD *v.* PHIROZ SORABJI CONTRACTOR. **25 Bom. L. R. 84 = 88 I.C. 316 = A. I. R. 1923 Bom. 228.**

S. 2 (1) (b) (ii)—Premises.

——*Premises changed to lose identity are new.*

Where the whole house including the second floor is entirely changed so as to lose its identity the house becomes new premises within S. 2 (1) (*b*) (ii). A.I.R. 1921 Bom. 224 and A.I.R. 1927 Bom. 648, Rel. on. (*Patkar and Baker, JJ.*) GOPALJI UMERSEY *v.* DEVJI NARANJI. **53 Bom. 432 = 31 Bom. L.R. 387 = 118 I. C. 545 = A. I. R. 1929 Bom. 220.**

——*Owner exercising right of control over premises occupied by others—Occupier is not a tenant but a licensee.*

The definition of "premises" excludes the case of lodger: it must *prima facie* also be taken to exclude the analogous case of a single cubicle reserved not for the occupation of a human being but for the occupation of a chattel, *viz*, a motor car; provided of course that the owner of the premises does exercise a general right of control. (*Fawcett, J.*) THE INDIAN HOTELS CO. *v.* PHIROZ SORABJI. **25 Bom. L. R. 84 = 88 I.C. 316 = A. I. R. 1923 Bom. 228.**

S. 2 (a) (i)—Standard Rent.

——*Standard rent is rent for which premises were originally let after* 1916. *January 1st—"Standard rent" between tenant and sub-tenant is not different.*

The only object of including in the definition of 'landlord' a tenant, and in the definition of 'tenant' a sub-tenant, is to extend the benefits of the Rent Act to sub-tenants, but it was not intended that the standard rent was to be determined by different standards between the original landlord and the tenant and between the tenant and the sub-tenant. Standard rent is the rent at which the premises were originally let after 1st January, 1916. The standard rent is to be fixed in relation to premises and not in relation to persons and can, therefore, be only one and not varying as between different individuals. *King* v. *York* (1919) W.N.K. 59, Ref. (*Setalvad, J.*) CHAPSI UMERSI *v.* KESHAVJI DAMJI. **45 Bom. 744 = 23 Bom. L. R. 133 = 60 I.C. 960 = A.I.R. 1921 Bom. 224.**

S. 2—Sub-tenant.

——*Sub-tenant let in without landlord's consent is not a "tenant" with respect to original landlord.*

If a tenant sub-lets premises, he becomes a landlord with regard to his own tenant. But his tenant does not come in contact with the original landlord unless there has been an assignment by which the rights and liabilities of the original tenant have been transferred to his sub-tenant, so that privity of contract arises between the landlord and the sub-tenant. Consequently the sub-tenant is only a tenant under the Rent Act with regard to his own immediate landlord, and when the owner of the premises seeks to evict his own tenant, he cannot be

opposed by the person who has been put in possession without his consent by his tenant. (*Macleod, C. J. and Coyajee, J.*) PERURI SURYANARAYANAN *v.* W. L. NARASIMHA. **49 Bom. 685 = 89 I. C. 881 = 27 Bom. L.R. 938 = A. I. R. 1925 Bom. 415.**

S. 2 (b) (ii) (as amended by III of 1923)—Tenancy.

——*Premises let mainly and substantially for purpose of shop—Tenant will not be protected.*

Where the real, main and substantial purpose for which certain premises were let, was the purpose of a shop and not of a dwelling-house, the tenant cannot be protected: Espon's case, (1919) W. N. 171, Dist.; *Waller* v. *Thomaz*, (1921) 1 K.B. 541; *Colls* v. *Parnham*, (1922) 1 K.B. 325; *Duke of Richmond* v. *Dawes*, (1924) 38 T.L.R. 151 and *Greig* v. *Francis*, (1922) 38 T.L.R. 519, Rel. on. (*Rupchand Bilaram, A. J. C.*) KANJI LADHA *v.* KANJI GOWA. **22 S. L. R. 417 = 115 I.C. 316 = A. I. R. 1929 Sind 36.**

Ss. 3 and 12—Re-entry.

——*Lease providing for lessor's right of re-entry on non-payment of rent—Provision operates only to the extent of standard rent.*

Although the Act does not make the payment by the tenant of the stipulated rent, being in excess of the standard rent, illegal and does not purport to affect the contract between the parties contained in the lease regarding the right of the lessor to determine the lease on failure to pay the stipulated rent. The right of re-entry on failure to pay the stipulated rent is an auxiliary provision to secure the payment of rent. *Howard* v. *Fanshawe* (1895) 2 Ch. 581, Foll.

The Legislature by the Rent Act has cut down the stipulated rent and enacted that the standard rent is the only rent that the tenant is bound to pay. When, therefore, the principal obligation is thus modified by reducing the rent, this auxiliary right is, after the passing of the Rent Act, available only for the purpose of securing the payment of the rent which is payable under the law, *viz.*, the standard rent. *Durell* v. *Greard*, (1914) 84 L. J. K. B. 130, Foll. (*Setalvad, J.*) KASTURBHAI MANIBHAI *v.* HIRA LAL DAHYABHAI. **45 Bom. 535 = A. I. R. 1921 Bom. 307.**

S. 6—Liability to pay tax.

——*City of Bombay Municipal Act (Bombay Act III of* 1888), *S.* 147—*Additional Municipal tax—Tenant liable to pay such tax—Notice is not necessary.*

S. 6 of the Bombay Rent (War Restrictions) Act, 1918 applies to an entirely different state of facts to that which was intended to be covered by the provisions of S. 147. Under S. 147 (1), where the rent paid by the tenant is less than the rateable value, the landlord can recover from the tenant the tax which he has to pay on the difference between the rent payable by the tenant and the rateable value fixed by the Municipality. The right to claim from the tenant, under S. 147 (1), payment of a certain portion of the Municipal taxes, which are primairly leviable under S. 146 from the lessor, has nothing to do with the question of rent payable by the tenant. (*Macleod, C. J. and Coyajee, J.*) SORABJI RUSTOMJI SUBEDAR *v.* R. H. PATUCK. **27 Bom. L. R. 1092 = 89 I. C. 859 = A. I. R. 1925 Bom. 532.**

S. 7 (1)—Interpretation.

——*Extra sum charged for electric light—Sum not taken into account in fixing standard rent—No offence is committed.*

The supplying of electric lights on the passages of the building of which the premises in question form part is a matter of arrangement or contract between the tenant and the landlord. Anything charged for it does not necessarily form a part of the rent, and where there is nothing to show that it did form part of the standard rent, its collection is not an offence. (*Shah and Kajiji, JJ.*) EMPEROR *v.* RAM GOPAL. **45 Bom. 188 = A. I. R. 1921 Bom. 162.**

S. 8—Applicability.

——*Not restricted to landlord but extends to lessee who grants a sub-lease.*

S. 8 does not in terms refer to a landlord. Any person who enters into an agreement in consideration of grant, renewal or continuance of a tenancy of any premises to require the payment of any premium or any other like sum in addition to the rent is within the scope of S. 8.

There was an agreement between the parties by which the defendant, who was a sub-tenant of certain premises for 3 years, was to procure the plaintiffs a lease for occupation of the premises and to secure the same for ten years to the plaintiffs in consideration of their paying the standard rent Rs. 225 per month and of their agreeing to pay 2,275 per month for a period of ten years making a total of Rs. 2,73,000 to the defendant for his trouble in securing the premises to the plaintiffs. *Held* the agreement was unlawful.

Quaere whether a person who is in no sense connected with the premises would be within the scope of the section. (*Shah, Ag. C. J. and Crump, J.*) SHAVAKSHAW DINSHAH *v.* MOTOR UNION INSURANCE CO. **25 Bom. L. R. 1313 = 84 I. C. 953 = A. I. R. 1924 Bom. 295.**

S. 9—Compromise.

——*Portion of premises demised required by landlord for his own use—Tenant offering to give up a part under a compromise—Court can enforce the compromise.*

In a suit for ejectment by landlord of his tenant if he establishes that he requires only a portion of the premises for his own use, which portion can be severed and the tenant is willing to give up, under a compromise arrived at during the pendency of the suit the Court can order the tenant to give up such a portion only. (*Macleod, C. J. and Shah, J.*) KUNDANMAL DOWLATRAM *v.* LAKHMICHAND CHHOGMUL. **45 Bom. 1294 = 23 Bom. L. R. 559 = 63 I. C. 1007 = A. I. R. 1921 Bom. 73.**

S. 9 (1) and (2)—Condition precedent.

——*Payment of arrears of rent before suit is condition precedent to claiming protection under Act.*

S. 9 (1) does not mean that the conditions there laid down are conditions which apply at the date of the order, and that even if a tenant has made any default in paying the rent and is in arrears at the time that the suit is filed, yet he has under S. 9 (1), a *locus poenitentoe* and if he brings the arrears of rent into Court, the Court cannot make an order for the recovery of possession. In both the English and the Indian sections the words "continues to pay" and the word "pays" respectively, refer to the time anterior to the filing of the suit. S. 9 (2) is in the past tense because it refers to past acts of waste or conduct in the past which has been an annoyance. S. 9 (1) is in the present tense because that section merely describes the sort of tenant who is entitled to claim protection under the Act. (*Pratt, J.*) MATHURADAS MAGANLAL *v.* NATHUBHAI VITHALDAS. **25 Bom. L. R. 345 = 70 I. C. 920 = 47 Bom. 756 = A. I. R. 1923 Bom. 387.**

S. 9—Ejectment.

——*Landlord requiring rented premises reasonably and* bona fide—*Landlord and not the Court, is to decide how much space he requires.*

To prevent the Landlord from occupying a space in his own premises equal to the space previously rented by him for his own business in another place would be going entirely beyond the jurisdiction of the Court in cases falling under the Rent Act. It is for the landlord and not for the Court to decide whether he should occupy as much or less space for his business in his own premises. (*Macleod, C. J. and Shah, J.*) NOWROJI HORMASJI PATHAK *v.* SRINIVAS PRABHU. **24 Bom. L. R. 95 = 66 I.C. 929 = 46 Bom. 632 = A. I. R. 1922 Bom. 222.**

——*Ejectment of a tenant by the landlord—Occupation of servant is not that of landlord where it is in part for remuneration—But such occupation is a sufficient cause for ejecting tenant.*

Where the staff of employees of the landlord company occupy premises under circumstances which show that their accommodation is part of their remuneration, the occupation by the staff is not the occupation of the landlord under S. 9 (2) of the Rent Act. But the accommodation of the staff is a satisfactory cause, within the meaning of the above section for the ejectment of a tenant who is not one of the staff. (*Pratt, J.*) NIPPON MENKWA KALMSHIKI *v.* F. PORTLOCK. **24 Bom. L. R. 54 = 65 I. C. 677 = A. I. R. 1922 Bom. 70.**

S. 9—Lease.

——*Sub-lease—Rights of sub-tenant when the lease terminates, also terminate.*

The term " tenant " in S. 9 does not include a sub-tenant. The sub-tenants hold on a precarious title and when the tenancy under the head lease terminates their right to possession terminates too. Unlike trespasser they come in by right but like trespassers they hold over without right, and they are in the same position as trespassers. (*Pratt, J.*) SUGAN CHAND SAVAICHAND *v.* MOTILAL DURGAPRASAD. **24 Bom. L. R. 154 = 67 I. C. 130 = A. I. R. 1922 Bom. 197.**

S. 9 (2)—Premises.

——*Landholder must not be kept out if he wants premises for his own use.*

It is not the policy of the Act that a man should be kept out of his premises, if he shows good ground that he wants them for his own use. (*Macleod, C. J. and Fawcett, J.*) BHAGWANDAS MAGANLAL *v.* KAIKHUSHRU ADURJI. **45 Bom. 928 = 23 Bom. L R. 287 = 61 I. C. 273 = A. I. R. 1921 Bom. 212.**

S. 9—Reasonable requirement.

——A *bona fide* requirement of a small fraction of the premises leased does not amount to a reasonable requirement of the whole of the premises. (*Pratt, J.*) VITHALDAS BHAGVANDAS *v.* NAGUBAI M. JOSHI. **23 Bom. L. R. 856 = 68 I. C. 330 = A. I. R. 1921 Bom. 54.**

S. 9 (2)—Satisfactory cause.

——*Tenant making default in payment of rent even when demanded—He harassing landlord by his conduct—He subsequently tendering overdue rent—His conduct is satisfactory cause within S. 9, Cl. (2)—Subsequent tender or payment in Court is of no avail.*

A person *S* was in occupation of a tenement of small premises within the meaning of Bombay Rent (War Restrictions) Act, of 1918. Notice of ejectment was given to him by the landlord. He had made default in payment of rent for three months prior to the notice and had been very irregular in the payment of rent even before that. He failed to pay rent even when demands were made every month by the landlord's mehta on the tenant's premises. His conduct in general showed that he was bent on harassing the landlord. He subsequently tendered the overdue rent and paid the same in the Court.

Held, that the conduct of the tenant was satisfactory cause within the meaning of S. 9 (2). His subsequent tender or payment in Court was of no avail and it was not competent for any Court to condone his failure to pay rent either under S. 114, T. P. Act, or under any other Act : A. I. R. 1923 Bom. 387 and *Brewer* v. *Jacobs*, (1923) 1 K. B. 528, Rel. on. (*Rupchand Bilaram, A. J. C.*) ALLIBHOY ADAMJI *v.* GORDHANDAS JEENABHOY. **23 S. L. R. 29 = 111 I. C. 530 = A. I. R. 1929 Sind 13.**

S. 9—Statutory Tenant.

——*Statutory tenant must pay standard rent if he holds over after notice of ejectment.*

A tenant holding over after notice to quit, by the landlord and remaining in possession under S. 9 of the Bombay Rent (War Restrictions) Act is liable to pay the standard rent to the full extent allowable by the Act. (*Macleod, C. J. and Crump, J.*) KALIANMAL TILLOCKCHAND *v.* DHARAMSEY JETHA. **26 Bom. L. R. 141 = 80 I. C. 253 = A. I. R. 1924 Bom. 330.**

——*Object is to prevent statutory tenant from making profit out of statutory tenancy.*

The first part of the section refers to the act of a tenant whose lease has terminated, and therefore the sub-letting must have occurred after the expiry of the lease. In the second part of the sub-section the term of the lease must be fixed before the sub-letting. The object of the sub-section is to prevent a statutory tenancy being used as a source of profit by a tenant who does not require the premises for his own occupation. The first part refers to a tenant who holds over under S. 9 (1), and the second part to a tenant who sub-lets beyond his term in expectation of a statutory tenancy. (*Pratt, J.*) MADHAVJI VIRJI *v.* LAKSHMIDAS MULJI. **25 Bom. L. R. 1178 = 48 Bom. 257 = 81 I. C. 843 = A. I. R. 1924 Bom. 99.**

S. 10—Decree.

——*Decree by Presidency Small Cause Court for possession passed before coming into force of the Act—Order, staying execution till further order, is within jurisdiction—But Court must not take into account the fact that decree-holder prior to coming into force of Act did not give reasons for possession.*

An order staying execution, till further order, of a decree passed by the Presidency Small Causes Court prior to the coming into force of the Act, is not without jurisdiction. But before the Bombay Rent Act came into force, there was no necessity for a landlord to give any reason at all why he required the premises, so that is not a matter which a Court executing, after the coming into force of the Act, a decree for possession passed before, ought to take into consideration in the slightest degree. The only question which the Court has to consider is whether at the time the landlord seeks to execute the decree he reasonably requires the premises for his own use. (*Macleod, C. J. and Fawcett, J.*) BHAGWANDAS MAGANLAL *v.* KAIKHUSHRU ADURJI. **45 Bom. 928 = 23 Bom. L. R. 287 = 61 I. C. 273 = A. I. R. 1921 Bom. 212.**

S. 10—Possession.

——*Presidency Small Causes Courts Act, S. 43—Bombay Rent Act (II of 1918)—Order for possession cannot be varied by the Small Causes Court.*

The Small Causes Court has no jurisdiction to alter or amend the terms of a decree or order for possession once it has been passed under Chapter VII of the Presidency Small Causes Courts Act. There is nothing in the Rent Act (II of 1918) which gives the Small Causes Court any power to alter orders for possession made in due course. The Court may fix the time for giving possession at a considerable interval from the date of decree. But once the time is fixed, the plaintiff is entitled to the benefit of that order. (*Macleod, C. J. and Shah, J.*) JAMSHEDJI HORMASJI *v.* GORDHANDAS GOCULDAS. **45 Bom. 1048 = 62 I. C. 45 = 23 Bom. L. R. 442 = A. I. R. 1921 Bom. 201.**

S. 10-A.—Bar to application.

——*Date of bringing motion in Court is the date of application.*

The date on which the copy of the notice of motion is lodged with the Prothonotary should not be taken as the date of the application. The date of the application is the date on which the motion is brought on in Court. 31 C. 150 Foll. (*Pratt, J.*) NAZARALLY *v.* V. V. KANEMAR VENKAPIYA. **25 Bom. L. R. 13 = 85 I. C. 432 = A. I. R. 1924 Bom. 289.**

——*Notice of motion filed within six months—Application coming before Court after six months—Application is not barred.*

When an application is to be made to the Court, it commences to be made when a notice of motion is first in the proper office of the Court. 10 Ch. 92, Foll. (*Macleod C. J. and Crump, J.*) V. V. K. VENKAPAIYA *v.* NAZERALLY TYABALLY. **47 Bom. 764 = 25 Bom. L. R. 484 = 86 I. C. 440 = A. I. R. 1924 Bom. 36.**

S. 10-A—Procedure.

——*Defendant applying for restoration and becoming successful on merits—Act expiring in the meantime before order was passed in his favour—Proceedings* ipso facto *terminate and defendant cannot succeed.*

Plaintiffs filed a suit on June 14, 1923 to evict defendants on the ground that they had given them notice to quit as the plaintiffs wanted the premises for their own use and requirements. On the faith of this requisition the defendants agreed to vacate under a consent decree passed on August 24, 1923, by which they agreed to give possession by January 31, 1924. On August 20, 1924, defendants took out a notice of motion asking the Court to pass an order not only for the restoration of the premises to the defendants, but also for damages on the ground that the requisition on which they were evicted was *mala fide*. It was found that the requisition on which the plaint proceeded was a false requisition, and the occupation of the plaintiffs was a pretence. It was not, therefore, *bona fide* and in the ordinary circumstances the defendants would have been entitled on the notice of motion to an order for restoration, and also for an order for payment of compensation. The Bombay Rent (War Restrictions) Act (No. II of 1918) with reference to business premises however expired before any order was actually passed.

Held, that the defendants' right to apply to the Court for restoration, and for payment of compensation did not survive the expiration of the Act. If proceedings taken under a temporary statute are not terminated before the period of statute expires, then on the expiration of the statute the proceedings *ipso facto* are determined. (*Macleod, C. J. and Coyajee, J.*) R. K. MODY & CO. *v.* MAHOMED BHAI ABDOOL HUSSAIN & CO. **87 I.C. 793 = 49 Bom. 724 = 27 Bom. L. R. 595 = A. I. R. 1925 Bom. 378.**

S. 13—Standard rent.

——*Finding as to standard rent is not judgment* in rem.

The finding of a Judge as to what the standard rent of particular premises is, cannot be called a judgment *in rem.* The fixing of the standard rent is a matter to be decided between the parties (*Kennedy, J. C. and Rupchand Bilaram, A.J.C.*) L. T. PINTO *v.* N.R. SETHNA. **91 I. C. 97 = A. I. R. 1926 Sind 120.**

——*House held under lease—Part of premises let out by lessee—Rent of part sub-let forms basis of standard rent.*

Where a person takes on lease for a certain sum an entire building from its owner and lets out portions of it to different tenants, the "standard rent" for the portion so let out is to be fixed on the basis of the amount at which it was let and not on the basis of the amount at which the building was taken on lease. S. 13 (*a*) of the Act contemplates a case where there is no letting of the part at the period at which the basic rent has to be determined but the whole is let at that period and the basic rent or standard rent of the part has to be ascertained with reference to the letting of that whole. (*Pratt, J.*) DHANRAJGIRJI NARSINGIRJI *v.* W. G. WARD. **49 Bom. 357 = 88 I. C. 886 = 27 Bom. L. R. 877 = A. I. R. 1925 Bom. 400.**

BOMBAY RENT (WAR RESTRICTIONS, No. 2) Act (VII OF 1918).

Ss. 4 (a) and 15—Controller's decision.

——*Question whether premises are small or big—Controller's decision is final unless varied by Committee.*

S. 4. paragraph (*a*), gives complete powers to the Controller to determine whether any premises are or are not small premises. If the landlord or the tenant objects to any finding of the Controller under Section 4 (*a*), he has the power to appeal within 14 days to the Committee. But the order of the Controller shall be effective in all respects unless and until so varied by the Committee or unless it is clearly without jurisdiction. (*Kennedy, J. C. and Aston, A. J. C.*) ISSAJI IBRAHIMJI *v.* SHIVRAM JADUVA. **16 S. L. R. 158 = 83 I. C. 335 = A. I. R. 1921 Sind 79.**

S. 4, cl. 6 and (b)—Standard rent.

——*No alteration in, can be made in the absence of change of conditions.*

Clause 6 of S. 4 must be read with clause (*b*) of the same section and when so read it is perfectly clear that an alteration in the standard rent cannot be made by the Controller unless there is a change of conditions in the premises that are leased. (*Kincaid, J. C. and Raymond, A. J. C.*) VELJI HIRJI *v.* CHELLARAM COOVERJI. **17 S. L. R. 312 = 73 I. C. 319 = A. I. R. 1923 Sind 15.**

S. 17—Certificate.

——*Premises at monthly rent of Rs. 17—Controller's certificate not in existence—Suit for ejectment—Plaintiff must apply and annex a certificate under S.* 4 (1) (*a*) *and* (*b*).

In a suit for ejectment from premises having monthly rent not exceeding Rs. 30 the plaintiff must annex to the plaint a copy of the order after making an application to the Controller to determine whether the premises are or are not small premises or to fix their standard rent, under S. 4 (1) (*a*) and (*b*). It is no valid defence that there was no order of the Controller in existence. (*Patkar and Baker, JJ.*) GOPALJI UMERSEY *v.* DEVJI NARANJI. **53 Bom. 432 = 118 I.C. 545 = 31 Bom. L. R. 387 = A. I. R. 1929 Bom. 220.**

S. 17—Irregularity.

——*Objection under S. 17 amounts to material irregularity though not want of jurisdiction.*

The objection based on S. 17 not affixing to the plaint a certificate under S. 4 (1) (*a*) and (*b*) though does not amount to want of jurisdiction in the Small Cause Court it amounts to material irregularity in the exercise of its jurisdiction. (*Patkar and Baker, JJ.*) GOPALJI UMERSEY *v.* DEVJI NARANJI. **53 Bom. 432 = 118 I. C. 545 = 31 Bom. L. R. 387 = A. I. R. 1929 Bom. 220.**

BOMBAY REVENUE JURISDICTION ACT (X OF 1876).

S. 4—Bar to suit.

——*A suit for refund of contribution under Act III of* 1874 *is barred unless exempted by Act XI of* 1852—*Bombay Hereditary Offices Act* (*III of* 1874)—*Bombay Titles to Rent-Free Estates Act* (*XI of* 1852).

Land ravenue in S. 3 is defined as including "any cess or rate authorized by Government under the provision of any law for the time being then in force," and the suit for a refund of the contribution levied under Act III of 1874 would, therefore, be barred unless exemption is claimed by virtue of an adjudication under Act XI of 1852, which declares the particular property to be exempt. (*Sir John Wallis.*) LAXMAN RAO *v.* SHRINIVASA. **51 Bom. 830 = 54 I.A. 380 = 29 Bom. L. R. 1484 = 46 C. L. J. 393 = 39 M. L. T. 527 = 105 I. C. 694 = A. I.R. 1927 P. C. 217 = 53 M. L. J. 475 (P.C.).**

——*Order by Revenue Officer that a person is not vatandar—Suit for declaration that the order is bad is barred even against Government.*

When an order is made on a specific decision by a Revenue Officer that a person is not a vatandar, a person seeking to obtain a declaration from a Civil Court that the decision is bad certainly seeks to avoid that order and so is barred by S. 4 (*a*) (3), and if the suit seeks relief against Government relating to vatan land it falls within the first paragraph of that clause; F. A. No. 269 of 1918, Appr. (*Macleod, C. J. and Coyajee, J.*) BASLINGAPPA GOUDA *v.* SECRETARY OF STATE. **28 Bom. L. R. 651 = 95 I. C. 1008 = A. I. R. 1926 Bom. 417.**

S. 4 (a)—Commutation of Vatan Services.

——*Order of commutation of vatan services passed without observing Bombay Hereditary Offices Act, S.* 73 —*Suit to set aside the order lies.*

Where a Collector orders, at the instance of the widow of the last vatandar, commutation of kulkarniki services and the procedure prescribed by the Bombay Hereditary Offices Act, S. 73 is not observed by the Collector while passing the order, the order is *ultra vires.* A suit in a Civil Court to set aside the order is not barred by the provisions of the Bombay Revenue Jurisdiction Act (X of 1876), S. 4 (*a*). (*Macleod, C. J. and Crump, J.*) BHIKAJI LAXMAN *v.* THE SECRETARY OF STATE FOR INDIA. **92 I. C. 110 = 49 Bom. 554 = 27 Bom. L. R. 463 = A. I. R. 1925 Bom. 365.**

S. 4 (f)—Compensation.

——*Order for compensation for additional police by the District Magistrate not within the section.*

The section refers to cess or rate authorised by Government and not to cess or rate authorised by the District Magistrate with the previous sanction of the Commissioner. The provision cannot apply where the legality of the order of the Government is questioned. It would apply to a cess or rate which is authorised, that is legally authorised, by the Government. (*Shah, Ag. C. J. and Kemp, J.*) BHAGCHAND DAGADUSHA *v.* SECRETARY OF STATE FOR INDIA.

26 Bom. L. R. 1 = 48 Bom. 87 = 90 I. C. 13 = A. I. R. 1924 Bom. 1.

S. 4—Construction.

——*Section must be strictly construed—Collector refusing to declare alienation null and void—Jurisdiction of Civil Court to decide that question is not barred.*

S. 4 which ousts the jurisdiction of the Civil Courts in particular cases, should be very strictly construed, and when the Collector on an application for a declaration that an alienation is null and void refuses to make a declaration to that effect, there is no such order against the applicant which prevents his going to a Civil Court for the determination of the question whether or not the alienation is binding on him, and therefore it is open to him to ask the Courts to decide that question, and the courts would have jurisdiction to decide it. (*Macleod, C. J., Shah and Hayward, JJ.*) DATTATRAYA KESHAV DESHPANDE *v.* TUKARAM RAGHU CHORAGE. **45 Bom. 1141 = 61 I. C. 572 = 23 Bom. L. R. 376 = A. I. R. 1921 Bom. 17 (F. B.).**

S. 4—Jurisdiction.

——*Bombay Hereditary Offices Act, (III of 1874) S. 36, Cl. 3—Declaration of status of "watandar" and of nearest heirship can be granted by Civil Court.*

A Civil Court has jurisdiction to try a suit for declaration that the plaintiff has a right to the status of a " vatandar " and that he is the nearest heir of the deceased " vatandar." Such a suit not being barred by S. 4, Bombay Revenue Jurisdiction Act. 8 Bom. 25 ; 18 Bom. 516 ; (1888) P. J. 224 ; (1896) P. J. 666 ; 34 Bom. 101 ; 40 Bom. 55, Foll. and A. I. R. 1927, P. C 17, Expl. (*Patkar and Wild, JJ.*) HANMANT RAMCHANDRA KULKARNI *v.* SECRETARY OF STATE.

54 Bom. 125 = 32 Bom. L. R. 155 = A. I. R. 1930 Bom. 254.

S. 4 (b)—Objection.

——*Objection under must be one reaching them directly.*

An objection to come within either of the two heads of clause (*b*) of S. 4 must be an objection which reaches them directly, *i.e.*, an objection to them *per se* which admits the liability to pay land revenue on the part of the objector but quarrels with its amount or incidence or the validity and effect of the notification of survey settlement as by themselves objectionable, not because some other right affects them or makes them inapplicable to this particular case. 28 Bom. 74, Foll. (*Shah, Ag. C.J., and Pratt, J.*) DAMODAR MAHADEO BHONDE *v.* KASHINATH SADASIV. **76 I. C. 897 = 24 Bom. L. R. 1040 = A. I. R. 1923 Bom. 79.**

S. 4—Suit—Maintainability of.

——*Claim to property as " vatandar " decided by Government or its officer—Suit to set aside such order is not maintainable.*

A suit to set aside an order passed by Government or by a duly authorised officer in its behalf, relating to a claim to a property appertaining to the office of a " vatandar" is barred by S. 4 of the Act. (*Patkar and Wild, JJ.*) HANUMANT RAMCHANDRA KULKARNI *v.* SECRETARY OF STATE. **54 Bom. 125 = 32 Bom. L. R. 155 = A. I. R 1930 Bom. 254.**

——*Buffalo attached in execution of decree in assistance suit—Attachment raised on pledgee's objection—Suit against pledgee for damages for fraudulently inducing mamlatdar to raise attachment and thus preventing realization of rent decree does not lie—Tort.*

Mamlatdar passed a decree in *R*'s favour in an assistance suit for rent. In the course of the execution proceedings under that decree *R* got attached a buffalo belonging to *G*. On this *S* applied to the mamlatdar to raise the attachment on the ground that the buffalo had been pledged to him, and the mamlatdar accepting his allegation did so. *R* sued for damages alleging that *S* fraudulently put forward a claim to the buffalo and thus prevented *R* from realizing his decree,

Held, (per *Marten, C. J.*)—No action in tort to obtain damages for *S's* fraud, in inducing the mamlatdar to decide the attachment question in his favour, would lie, the result of the suit substantially being to re-hear the decision of the mamlatdar on the very point as to whether the buffalo was pledged to *S*.

Held, (per *Murphy, J.*).—The case arose out of the execution proceedings in the assistance suit and was barred by S. 4 (*c*). (*Marten, C. J., and Murphy, J.*) SADASHIV LAKSHMAN *v.* RADHABAI VISHNU.

31 Bom. L. R. 504 = 119 I. C 798 = A. I. R. 1929 Bom. 267.

——*Suit for declaration that suit is Jangam is barred but one for declaration that Collector has no power to levy rent in excess of full assessment is saved by S. 5.*

The British Government continued certain lands by a Sanad " as the service emoluments appertaining to the office of Jangam" to an ancestor of defendants 2 and 3. But the Swami of Hiremath at Haveri remained in possession since 1854. Plaintiff was the successor-in-title of this Swami. At the time of the issue of Sanad in 1868 the full assessment was Rs. 90. At the revision Survey in 1876 it was raised to Rs. 129 and in 1909 to Rs. 145-8-0. The Collector on the application of defendants 2 and 3 in 1915 levied full economical rent and recovered it from plaintiff, who, in 1918, sued for a declaration that he was a Jangam of Hiremath and for an injunction to restrain the Secretary of State (defendant 1) from recovering full rent from plaintiff and paying to defendants 2 and 3. *Held* (1) that the plaintiff was entitled to an injunction restraining defendant 1 from recovering any rent in excess of the full assessment : (2) that the plaintiff's claim that he was Jangam was barred by S. 4 ; and (3) that the claim of the plaintiff for declaring that the order of the Collector was *ultra vires* even if it fell under S. 4 was saved by S. 5 (*a*) (*Shah and Kemp, JJ.*) PATDAYA MUPPAYYA *v.* SECRETARY OF STATE. **48 Bom. 61 = 25 Bom. L. R. 1160 = 82 I. C. 577 = A. I. R. 1924 Bom. 273.**

S. 4—Vatan Register.

——*S. 4 precludes a Court from entertaining a claim to cancel vatan register.*

The words of S. 4 are wide enough to preclude the Courts from entertaining any claim to the vatan offices in opposition to the claim of the hereditary officers recognized or appointed under the Act, and also any claim for the cancellation of the vatan register. (*Sir John Wallis.*) LAXMAN RAO *v.* SHRINIVAS.

51 Bom. 830 = 54 I. A. 380 = 29 Bom. L. R. 1484 = 46 C. L. J. 393 = 39 M. L. T. 527 = 105 I. C. 694 = A. I. R. 1927 P. C. 217 = 53 M. L. J. 475 (P. C.).

S. 11—Bar to Suit.

——*Collector's refusal to grant* sanad—*No appeal preferred under Land Rev. Code—Suit is barred.*

S. 11 clearly bars any suit on account of the Collector's refusal to grant the plaintiff a *sanad*, as the plaintiff has to prove, previously to filing the suit, that he had presented all such appeals allowed by the law for the time being in force, as within the period of limitation allowed for bringing such suit it was possible to present. (*Macleod, C.J. and Crump, J.*) AMBARAM KUBERDAS *v.* SECRETARY OF STATE. **74 I. C. 196 = A. I. R. 1923 Bom. 416.**

——*Notice of demand by Mamlatdar—Suit for declaration of rent-free rights is not barred by failure to appeal against the notice.*

Where the plaintiffs held their land free of rent, and they were all of a sudden served by the Mamlatdar with a notice of demand to pay assessment and the plaintiffs filed a suit for a declaration that they were entitled to hold their land rent-free :—

Held, the suit is not barred under S. 11 (*Macleod, C. J. and Shah, J.*) NATHURAM HIRALAL THAKOR *v.* SECRETARY OF STATE FOR INDIA. **67 I. C. 842 = 24 Bom. L. R. 402 = 46 Bom. 811 = A. I. R. 1922 Bom. 274.**

S. 11—Suit—Maintainability of.

——*Order by Collector to remove encroachment—No appeal preferred—Suit to set aside is not maintainable.*

A person against whom an order was passed by the Collector to remove an alleged encroachment and who preferred no appeal against the order within 2 months thereof is barred under S. 11 of the Act from afterwards suing in the Civil Court, to get the order set aside. (*Macleod, C. J. and Heaton, J.*) DAYAL KUSHAL *v.* SECRETARY OF STATE. **59 I. C. 122 = 22 Bom. L. R. 1089.**

Ss. 12 and 4—Claim against Government.

——*Claim against Government jurisdiction as to which is excluded by S. 4.—Claim is referable to the High Court.*

A dispute arose between Shri Bala Maharaj, as claimant to the lands, the title to which was in controversy and the first respondent, Shri Jagannath Maharaj, as to which of them was the validly adopted son of the late Baba Maharaj, the original grantor. Jagannath, who was then a minor, brought a suit in the Court of the First Class Subordinate Judge of Poona against Bala, who claimed to be the properly adopted son, to establish his own title. The special purpose of the suit was to have it determined that Jagannath had been validly adopted by Baba's widow, and that it was consequently impossible for her to make, as she had endeavoured to do, a second adoption of Bala less than two months later. A point relied on by the latter in his written statement was that the approval of His Highness the Maharajah of Kolhapur was necessary to such an adoption and that such approval not having been given, the earlier adoption was void. In July, 1906 the Subordinate Judge decided in favour of Jagannath, holding that he had been validly adopted as the son of Baba. It was held, as consequence, that no title or interest in the property of Baba had passed to Bala, and he was restrained by injunction from interfering with Baba's property. The High Court at Bombay reversed this but the Privy Council, differing, restored the judgment of the Subordinate Judge. To these proceedings the Maharajah of Kolhapur, who was no party to them, finally took exception, and he and Bala made representations to the Government of Bombay to the effect that, as the adoption of Jagannath had not received the approval of His Highness, the adoption could have conferred no title to the property of Baba, and that it must go to Bala, whose

adoption the Maharajah had approved. The Bombay Government thereupon referred the point raised by this claim to the High Court under S. 12 of the Bombay Revenue Jurisdiction Act of 1876. On the contention that the Government had no power to refer the question to the High Court.

Held, the Maharajah of Kolhapur had himself a claim coming within the language of the Act. He was seeking to have it declared that the lands in question were not subject to the Summary Settlement and should therefore go to Bala, whose adoption he had sanctioned. There was accordingly a claim against the Government, jurisdiction as to which under the Act of 1876 was excluded by S. 4, this claim being that the lands were held under treaty or as *Saranjam* or on other political tenure and as the Maharajah's position and rights on the question of adoption were not affected by the result of the proceedings which were disposed of by the decision of the Privy Council, for to these proceedings he had not been a party, the real question is whether power to answer the question referred to by the Government did not come to the High Court because the case was one of the cases excluded by S. 4. The claim in question was one of those excluded by S. 4 and was therefore referable to the High Court. (*Viscount Haldane.*) MAHARAJAH OF KOLHAPUR *v.* BALAMAHARAJ. **28 C. W. N. 906 = 1923 M.W. N. 638 = 48 Bom. 1 = 50 I. A. 308 = 26 Bom. L. R. 252 = 33 M. L. T. 378 = 77 I. C. 100 = A. I. R. 1923 P. C. 194.**

S. 12—Jurisdiction.

——*Matter that might not be tried by Civil Court before passing of Act—Reference by Government—High Court has jurisdiction.*

The High Court has jurisdiction to hear the matter referred to it by the Government although the matter may be such that before the passing of the Act it could not have been tried or investigated by a Civil Court. (*Macleod, C. J., Pratt and Fawcett, JJ.*) VASUDEO HARIHAR PANDIT, *In re.* **45 Bom. 463 = 23 Bom. L. R. 161 = 61 I. C. 146 = A.I.R. 1921 Bom. 107.**

——*S. 12 gives jurisdiction according to what rules cost of reference should be taxed—Meaning of 'in each case.'*

The last paragraph of S. 12 gives the High Court the jurisdiction not only to say which of the parties should bear the costs of the reference, but also according to what rules the costs of the reference should be taxed and the words 'in each case' imply the jurisdiction of the High Court to give special directions in each case. (*Macleod, C. J., Pratt and Fawcett, JJ.*) JAGANNATH VASUDEO, *In re.* **45 Bom. 1177 = 23 Bom. L. R. 189 = 61 I. C. 271 = A. I. R. 1921 Bom. 71.**

BOMBAY SALT ACT (II OF 1890).

Ss. 11 and 47—Lease.

——*Condition, not to sub-lease without written permission—Sub-lease without permission is void—Contract Act, S. 23.*

The lessee, from the Government, of Salt pans on condition not to sub-let them without written permission cannot do so without such permission, and the sub-lease against the condition of the license is unenforceable at law. *Ismalji Yusufali* v. *Raghunath Lachiram*, 33 Bom. 636, Followed. (*Macleod, C. J. and Shah, J.*) RABIABIBI *v.* GANGADHAR VISHNU PURANIK. **24 Bom. L. R. 111 = 66 I. C. 393 = 46 Bom. 651 = A. I. R. 1922 Bom. 78.**

BOMBAY SALT ACT (1890), S. 11.

S. 11—Salt—Manufacture of.

——*Licensee admitting partners but manufacturing salt himself cannot be said to have contravened the provision against alienating benefits of the license—Contract Act, S.* 23.

A licensee of salt manufacture cannot be said to contravene the terms of his license whereby he is prohibited from alienating the interest, simply because he admits members of his family and others as partners, who, however, do not actually take part in the manufacture, nor is there any document directly transferring the right of manufacture to such partners. (*Viscount Cave.*) GORDHANDAS KESSOWJI *v.* CHAMPSEY DOSSA. **A. I. R. 1921 P. C. 137.**

BOMBAY STOCK EXCHANGE RULES.

Interpretation.

——*Rule* (*c*) *cannot be read as an express stipulation within S.* 121, *Contract Act.*

Rule (*c*) of the Bombay Stock Exchange cannot be read as an express stipulation in the sense of S. 121 because it does not say what S. 121 provides must be said and the rule has nothing to do with the perfection of contracts or the passing of property. It is for quite another purpose. (*Viscount Dunedin.*) MANECKJI PESTONJI BHARUCHA *v.* WADILAL SARABHAI & CO. **50 Bom. 360 = 53 I.A. 92 = 24 A. L. J. 657 = 30 C. W. N. 890 = 28 Bom. L. R. 777 = 43 C. L. J. 508 = 94 I. C. 824 = 1926 M. W. N. 499 = A. I. R. 1926 P. C. 38 = 51 M. L. J. 1. (P. C.)**

BOMBAY SUMMARY SETTLEMENT ACT (II OF 1863).

Summary Settlement.

——The British Government granted by a Sanad some villages in the Taluqs Chikodi and Manowlee as "Inam Dharmadaya" to one *B* to be enjoyed from son to grandson &c., from generation to generation. Afterwards the British Government ceded the Talukas of Chikodi and Manowlee to the Maharajah of Kolhapur. In 1821 the Maharaja granted some more villages in the said Talukas to *B*. In 1826, a treaty was concluded between the British Government and the Maharaja and one of the articles of that treaty provided that the Maharaja of Kolhapur promised to continue to *B* his lands and rights, and the British Government guaranteed enjoyment of those villages to the grantee for life. The Maharaja did not keep his promise not to molest *B* and the British Government made a further treaty in 1827 with the Maharaja, which provided that the latter should give back to the former the said Talukas in the same state in which he received them ; and that as the Maharajah had never ceased to annoy and distress *B* by seizing his villages and other property, it was thought necessary to extend the guarantee of the British Government to *B*'s descendants and the Maharajah accordingly engaged never to molest them. On the introduction of the Summary Settlement in 1863 the Government was of opinion that no *prima facie* case had been made out for excluding *B*'s lands from the benefit of the Summary Settlement on the ground of their being held on political tenure, and therefore the summary settlement was applied to his lands with his consent. On the question whether the lands so granted were excepted from the provisions of the Bombay Summary Settlement Act, 1863,

Held, that the lands in question were not held under a treaty at the time of Summary Settlement and as the grant was described in the Sanad as Dharmadaya Inam, and there was nothing to show that it was a Jaghir or held under political tenure, the application of

the Summary Settlement to these lands was valid and legal. (*Macleod, C. J., Pratt and Fawcett, JJ.*) VASUDEO HARIHAR PANDIT, *In re.* **45 Bom. 463 = 23 Bom. L. R. 161 = 61 I.C. 146 = A. I. R. 1921 Bom. 107.**

Ss. 4 and 16-B—Sharakati inam.

——*Sanad issued under Ss.* 4 *and* 16-*B—Division of village revenue between inamdar and Government in certain proportion—Inamdar cannot exclusively claim income from waste pasture land in the village.*

The plaintiff was the Inamdar of a village held as a sharakati inam. This village comprised two survey numbers described as waste pasture land. Plaintiff sued the Secretary of State for declaration that these numbers were the properties of the plaintiff and not liable to a contribution to Government in respect of the income of these lands. There was a settlement with regard to this inam village after the decision of the Inam Commissioner. The Inam Commissioner decreed that only the jahagir ammal of the mauja calculated at Rs. 55-11-0 per cent. of the net revenue of the village, after deducting the rights of hakdars and ancient inamdars and authorized village expenses, to be continued in inam, and that the remaining ammals now held by the claimant were to be resumed as khalsa. A sanad was issued under Ss. 4 and 16-B of Bombay Act II of 1863 in 1893. The first condition of the sanad was that "the said holders...shall pay to the same a fixed sum of Rs. 22-14-0 as nazarana in addition to any judi or other tax heretofore payable." It was not shown that these survey numbers were held by the plaintiff otherwise than as Inamdar. They were entered as "Government waste" and in the record-of-rights these lands were not entered in the name of the plaintiff but were described as forming part of kuran. According to the decision of the Inam Commissioner, the plaintiff was entitled to Rs. 55-11-0 per cent. of the revenue of the village and the Government were entitled to the remaining Rs. 44-5-0 per cent.

Held, that plaintiff's rights to the two survey numbers are restricted to his rights as Inamdar. The decision of the Inam Commissioner was final. The sanad was issued under S. 4 of Bombay Act II of 1863, and the amount of judi mentioned as being payable to Government was not a fixed amount. The decision of the Inam Commissioner was not in any way modified by the sanad which had been granted to the plaintiff in the year 1863 and the plaintiff was not entitled to exclude Government from participation in the income of these numbers. (*Fawcett and Patkar, JJ.*) GANGADHAR BALWANT *v.* COLLECTOR OF NASIK. **29 Bom. L. R. 909 = 103 I. C. 249 = A. I. R. 1927 Bom. 462.**

S. 16—Inam.

——*It is for Government to determine whether particular grant is inam or only saranjam—Bombay Act VII of* 1863, *S.* 32—*Grant—Inam.*

The mere use of wide expressions such as the grant of land "for ever" or "from generation to generation" does not prevent the grant being one of saranjam. Nor again is the use of the word "inam" instead of "saranjam" conclusive. It is for Government to determine in a particular case whether a grant is one of saranjam only. (*Fawcett, Ag. C. J. and Murphy, J*). SAYAJI RAO GAIKWAR *v.* MADHAO RAO RAGHUNATH RAO. **53 Bom. 12 = 30 Bom. L. R. 1463 = 115 I. C. 369 = A. I. R. 1929 Bom. 14.**

S. 16—Inam Dharmadaya.

——*Inam grants—Inam Dharmadaya—Determination of the nature of tenure is one for Government.*

BOMBAY SUMMARY SETTLEMENT ACT (1863), S. 2.

Where the grant made was *Inam Dharmadaya* and was to be hereditary : *Held* the signification of such a grant is that it was made on grounds of religion, and not political grounds. The mere fact that in occasional correspondence the grant is referred to as "*jagir*" or "*saranjam*," *i.e.*, political, cannot derogate from the effect of the language of the grant itself. The question whether the tenure was political was one which was for determination by the Government under the provisions of the interpretation S. 16 of the Summary Settlement Act (II of 1863) and that, by treating the title as one to which the Act applied, the Government must determine that the tenure was not political. (*Viscount Haldane.*) THE MAHARAJA OF KOLHAPUR *v.* SHRI BALA MAHARAJ. **1923 M. W. N. 638 = 48 Bom. 1 = 50 I. A. 308 = 26 Bom. L. R. 252 = 33 M. L. T. 378 = 28 C. W. N. 906 = 77 I. C. 100 = A. I. R. 1923 P. C. 194.**

——(VII OF 1863).

S. 2—Sanad—Validity of.

——*Absence of inamdar's signature on sanad does not affect the fact that sanad has been issued and acted upon.*

What is contemplated under S. 2 is the issue of a sanad as the final authorization of the settlement, and where there has been such an issue, the mere fact that there are no signatures of the inamdars on the sanad does not affect the fact that sanads have been issued and have been acted upon. (*Fawcett and Madgavkar, JJ.*) SECRETARY OF STATE *v.* INDOORAI BHAURAI. **50 Bom. 698 = 28 Bom. L. R. 1308 = 98 I. C. 933 = A.I.R. 1927 Bom. 40.**

S. 2 (3)—Saranjam.

——*Saranjamdar has no absolute estate—Act XI of* 1852, *Sch. B, R.* 10.

The Saranjamdar under a Saranjam held on terms of the nature mentioned in R. 10 of Sch. B to Act 11 of 1852 or Cl. 3 (2) of S. 2 of Bombay Act VII of 1863 has not an absolute estate . 45 Bom. 694, Dissented from. (Case-law reviewed.) (*Fawcett and Madgavkar, JJ.*) MADHAV RAO *v.* IMAM BAPU. **50 Bom. 195 = 94 I. C. 737 = 28 Bom. L. R. 433 = A.I.R. 1926 Bom. 316.**

S. 7—Bar to suit.

——*Property described as private in sanad—Suit to establish it as temple property is not barred.*

Where certain temple lands in the possession of the temple servants (defendants) were described as their private property (jat-Inam) in a Sanad issued by Government in 1865 under the provisions of the Summary Settlement Act, 1863.

Held, that under the proviso to S. 7 of the Summary Settlement Act, 1863 the Sanad granted to the defendants (the temple servants) did not negative the right of the plaintiff to establish if he could, that the lands were really Devasthanam lands and not the private property of the defendants. (*Shah, Ag. C. J. and Crump, J.*) VITHAL DHONDJI DEVLI *v.* SURYAJI RAMCHANDRA NAIK. **24 Bom. L. R. 902 = 75 I. C. 617 = A. I. R. 1922 Bom. 438.**

S. 7—Cause of Action.

——*Limitation Act, Art.* 120—*Record of land as 'private' land of temple servants—Subsequent alienation by servant—Cause of action for declaratory suit is the alienation and not the grant of Sanad.*

The temple lands in possession of the temple servants were recorded in the Sanad under Summary Settlements Act, S. 7 as their private lands (Jat-Inam) and one of the servants alienated some portion of the lands in 1903 but the vendee did not take possession till 1916. Plaintiff sued on behalf of the managing committee of Gaukars for a declaration that the lands belonged to the Devasthan. *Held* the cause of action arose within the meaning of Art. 120 only when the defendant attempted to alienate the lands and not by the mere grant of Sanad. But the article did not apply in the case as plaintiff claimed possession. (*Shah, Ag. C. J. and Crump, J.*) VITHAL DHONDJI DEVLI *v.* SURYAJI RAMCHANDRA NAIK. **24 Bom. L. R. 902 = 75 I. C. 617 = A. I. R. 1922 Bom. 438.**

BOMBAY SURVEY AND SETTLEMENT ACT (1865), S. 37.

S. 32—Inam.

——*It is for Government to determine whether particular grant is inam or only saranjam.*

The mere use of wide expressions such as the grant of land "for ever" or "from generation to generation" does not prevent the grant being one of saranjam. Nor again is the use of the word "inam" instead of "saranjam" conclusive. It is for Government to determine in a particular case whether a grant is one of saranjam only. (*Fawcett, Ag. C. J. and Murphy, J.*) SAYAJI RAO, GAIKWAR OF BARODA *v.* MADHAVRAO RAGHUNATHRAO DHAVALE. **30 Bom. L.R. 1463 = 53 Bom. 12 = 115 I.C. 369 = A. I. R. 1929 Bom. 14.**

BOMBAY SURVEY AND SETTLEMENT ACT (I OF 1865).

Ss. 37 and 38—Khot.

——*Terms of Kabuliat to Government must conform to custom except as altered by.*

A Khot's intetest in the khoti village is limited, not absolute. He possesses in some measure a proprietary right. He is an occupant with all rights and liabilities affecting such a status. The Khot has to secure to Government the payment of the village revenue while the village lands which he has to manage in accordance with the restrictions mentioned in the *kabuliat* fall under three distinct items *viz.*—(1) Dharekari lands the tenants of which have a transferable and heritable right paying Dhara alone to the Khot; (2) Khot nisbat lands which are in the hands of permanent occupancy tenants or tenants with less permanent right paying Fayda to the Khot and the Government assessment and (3) Khoti Khasgi lands, private lands in the possession of the Khot of which he can make such use as he pleases. With regard to Khot nisbat lands the right of the Khot to exact rent or Fayda in addition to the assessment is limited by the Kabuliat which is in accordance with the decision of the Government Officer fixing the demand of the Khot on his tenants under S. 38, Bombay Act I of 1865. Khots in the district of Kolaba are hereditary farmers of the revenue and are entitled to hold their villages as Khoti on their entering every year into the customary Kabuliats. If the Government wish to impose upon the Khot a new form of Kabuliat they must not infringe the customary rights of the Khots except as altered by S. 38 of Bombay Act I of 1865. A Khot of a village in the Kolaba District, at first used to pass annual Kabuliats to Government in the form which was then in use. Government offered, in 1915-16 to the plaintiff, a Kabuliat in another form which contained several new clauses. Clause 6 empowered a permanent tenant of Khot nisbat land to compel the Khot either to consent to a transfer or to take up the land himself. Clause 8 required the Khot to keep the land at the disposal of a Dharekari who had deserted. Clause 21 worded ambiguously. As the Khot objected to pass the Kabuliat in the new form the Government attached the Khoti village.

Held, that the Khot was justified in refusing to sign a Kabuliat which contained any one of such objection-

BOMBAY TITLES TO RENT-FREE ESTATES ACT (1852).

able clauses, *viz.*, 6 and 8 which were in infringement of the customary right of the Khot and that the attachment of the village for refusing such a Kabuliat was, therefore, illegal and the Khot was entitled to mesne profits and damages, (*Macleod, C. J. and Shah, J.*) GANPATI GOPAL RISBUD *v.* SECRETARY OF STATE. **48 Bom. 599 = 26 Bom. L. R. 754 = 83 I. C. 370 = A. I. R. 1925 Bom. 44.**

BOMBAY TITLES TO RENT-FREE ESTATES ACT (XI OF 1852).

Contribution.

——*Bombay Revenue Jurisdiction Act* (*X of* 1876), *S.* 4—*A suit for refund of contribution under Act III of* 1874 *is barred unless exempted by Act XI of* 1852.

Land revenue in S. 3 is defined as including " any cess or rate authorized by Government under the provision of any law for the time being then in force," and the suit for a refund of the contribution levied under Act III of 1874 would, therefore, be barred unless exemption is claimed by virtue of an adjudication under Act XI of 1852, which declares the particular property to be exempt. (*Sir John Wallis.*) LAXMANRAO MADHAVRAO JAHAGIRDAR *v.* SHRINIWAS LINGO NADGIR. **54 I. A. 380 = 51 Bom. 830 = 29 Bom. L. R. 1484 = 46 C. L. J. 393 = 39 M. L. T. 527 = 105 I. C. 694 = A.I.R. 1927 P.C. 217 (223) = 53 M. L. J. 475 (P.C.)**

Sch. B, R. 8.

——*Power of Government.*

Under proviso. 5 of rule 8, the Government can regulate by rules the question of emoluments pertaining to service performed for the State. But it cannot frame rules for resumption of grants given as emoluments of any hereditary office such as Kazis, Village Joshis, etc. Unless such powers can be found in any statutory provision or a rule having the same force, the Collector cannot disturb the possession of any third parties who may have acquired rights to lands appertaining to such office. (*Shah and Kemp, JJ.*) PATDAYA MUPPAYYA *v.* SECRETARY OF STATE. **48 Bom. 61 = 25 Bom. L. R. 1160 = 82 I. C. 577 = A. I. R. 1924 Bom. 273 (b).**

Sch. B, R. 10—Saranjam.

——*Saranjamdar has no absolute estate.*

The Saranjamdar under a Saranjam held on terms of the nature mentioned in R. 10 of Sch. B to Act XI of 1852 or Cl. 3 (2) of S. 2 of Bombay Act VII of 1863 has not an absolute estate. 45 Bom. 694, Dissented from. (Case-law reviewed.) (*Fawcett and Madgavkar, JJ.*) MADHAV RAO *v.* IMAM BAPU. **50 Bom. 195 = 28 Bom. L. R. 433 = 94 I. C. 737 = A. I. R. 1926 Bom. 316 (b) (320).**

BOMBAY VILLAGE POLICE ACT (VIII OF 1867).

S. 3—Pagis.

——*District Magistrate can appoint* pagis *nominated by Talukdar—Recovery of share in salaries can be had from* Jivaidar *under Contract Act, S.* 69.

Plaintiff as Talukdar owned half revenues while the defendants were entitled as *Jivaidars* to a half share of the revenues of a village. The District Magistrate called upon the defendants to appoint two *pagis* for the villages and as they failed, he appointed the *pagis* nominated by the plaintiff. The wages of the *pagis* were paid by the plaintiff alone.

Held, (1) that the *pagis* were validly appointed by the District Magistrate under S. 3; and (2) that the pay of the *pagis* was a charge on the revenues of the village and the plaintiff had a right of reimbursement under S. 69 of the Contract Act. (*Pratt and Fawcett, JJ.*) ACHAL SINGH KESRI SINGH *v.* DOLAT SINGH SURAJMALJI. **26 Bom. L. R. 678 = 83 I. C. 30 = A. I. R. 1924 Bom. 471 (a).**

BOMBAY WAGERS ACT (1865), S. 1.

BOMBAY WAGERS ACT (III OF 1865).

S. 1—Wager.

——*Contract Act, S.* 30—*Agreement to pay differences—Settlement by cross contract—Agreement is of wagering nature within Bombay Act III of* 1865, *Sec.* 1, *though not under Contract Act, S.* 30.

A contract for forward delivery wherein neither party intends to give or take delivery and differences only are to be paid or received according to the market rate on the due date, and which is settled by a cross-contract is a wagering contract within S. 1 of Bombay Act III of 1865, though not under S. 30 of the Contract Act. (*Macleod, C. J. and Coyajee, J.*) JIVANCHAND GAMBHIRMAL *v.* LAXMINARAYAN GANESHRAM. **49 Bom. 689 = 89 I. C. 885 = 27 Bom. L. R. 941 = A. I. R. 1925 Bom. 511 (512).**

——*Contract Act, S.* 30—Pakka Adatias—*Transactions entered into by* Pakka Adatias *on behalf of their constituents—Intention to pay differences only*—Pakka Adatias *cannot recover from constituents losses incurred.*

If the contract between *Pakka adatias* and their constituents is a contract of employment, such a contract can never by its very nature come within the definition of a wagering contract and the *Pakka Adatia* must win unless the constituents bring the contract within the provisions of Bombay Act III of 1865. (42 Bom. 373, P. C. Ref.). The proper issues in the case would be (1) If, the contract between the parties was one of employment for reward was it knowingly made to further or assist the entering into of agreements by way of gaming or wagering ? (2). If the contract between the parties was as between principal and principal was it by way of wagering or gaming? In a suit by *Pakka adatias* against their constituents in order to win on the first issue the defendants must prove that there was an understanding between them and plaintiffs: (1) that they were not only speculating but gambling, (2) that if they ordered the plaintiffs to buy cotton, they would never call upon them to deliver it, and if they ordered them to sell, they would never themselves deliver it, (3) that, if the plaintiffs incurred losses in carrying out their orders, they could indemnify them and (4) that even if the plaintiffs did not contract with third parties in pursuance of their orders, differences would be received and paid exactly as if they had. Incidentally it might be arranged that plaintiffs should only enter into wagering contracts with third parties, and that would be sufficient to vitiate the contract of employment, though it might not be possible to prove that those third parties with whom the plaintiffs contracted were also wagering. On the second issue the defendants would have to prove that there was a common intention only to pay differences. 42 Bom. 373 (P.C.), Dist.; 30 Bom. 205; *Thacker* v. *Hardy*, (1878) 4 Q. B. D. 685, *In re Gieve*, (1899) 1 Q. B. 794; *The Universal Stock Exchange* v. *Strachan*, (1896) A. C. 166, Discussed.

Per *Macleod, C. J.*—The only difference between the relationship of a *pakka adatia* and his constituent on the one hand, and that of a broker personally liable on the contracts he enters into on orders received and his client on the other, is that in the latter case the broker enters into the contract as agent for the client, he himself also being personally liable to the person with whom he contracts, while the *adatia* does not make the contracts with third parties as agent, but as principal, the

BONA FIDE PURCHASER.

constituent having no right to be brought into contact with the third parties. (*Macleod, C. J. and Fawcett, J.*) MANILAL RAGHUNATH *v.* RADHAKISSON RAMJIWAN. **45 Bom. 386 = 62 I. C. 361 = A. I. R. 1921 Bom. 238.**

BONA FIDE PURCHASER.
See (1) SPECIFIC RELIEF ACT, S. 27.
(2) T. P. ACT, SS. 41 and 53, ETC.

BONA FIDES—*See* CR. P. CODE, S. 133.

BOND—*See* CONTRACT ACT, S. 146.

BOOKS OF ACCOUNT—*See* EVIDENCE ACT, S. 34.

BOUNDARIES.

Dispute as to.

———The principle of proving the affirmative is applicable where the boundary line which is the subject of dispute runs through waste lands which have been the subject of definite possession. (*Chatterjee and Panton, JJ.*) RADHA KRISHNA DAS *v.* MATIAR RAHAMAN. **65 I. C. 743 (Cal.).**

———*Miscalculation in Revenue-Returns cannot defeat title.*

If in fact the boundaries include an area greater than that referred to in revenue return, such a miscalculation or misrepresentation cannot defeat the title to the estate. (*Mukerji and Buckland, JJ.*) SECRETARY OF STATE *v.* WAYED ALI. **65 I. C. 866 = 34 C. L. J. 141.**

BRAHMOTTAR—*See* GRANT.

BREACH OF CONTRACT:
See (1) CONTRACT ACT, S. 73.
(2) DAMAGES.
(3) WORKMAN'S BREACH OF CONTRACT ACT.

BREACH OF THE PEACE—*See* CR. P. CODE, SS. 106, 123, 145.

BREACH OF TRUST;
See (1) C. P. CODE, S. 92.
(2) HINDU LAW, RELIGIOUS ENDOWMENT.
(3) PENAL CODE, S. 403, ETC.
(4) TRUST.
(5) TRUSTS ACT, S. 23.

BRIBE.—*See* PENAL CODE, S. 161, ETC.

BRITISH COLUMBIA FOREST ACT (1924).

S. 58—Tax.

———*S. 58 is* ultra vires, *tax imposed by it being beyond competence of Provincial Legislature.*

The timber tax levied under S. 58 being an export tax falling within the category of duties of customs and excise, and as such, as well as by reason of its inherent nature as an indirect tax, cannot competently be imposed by the Provincial Legislature. (*Lord Macmillan.*) ATTORNEY-GENERAL OF BRITISH COLUMBIA *v.* MCDONALD MURPHY LUMBER CO., LTD. **A. I. R. 1930 P. C. 173.**

BRITISH INDIA, ABSENCE FROM.

See LIMITATION ACT, S. 13.

BRITISH NORTH AMERICA ACT (1867), S. 24—Interpretation.

———*Persons—Meaning.*

"Person" includes females. Women are eligible to be summoned to become members of the Senate of Canada. (*Lord Chancellor.*) HENRIETTA MUIR EDWARDS *v.* ATTORNEY-GENERAL OF CANADA. **31 M. L. W. 601 = 126 I.C. 88 = A. I. R. 1930 P. C. 120 = 58 M. L. J. 300.**

BRITISH NORTH AMERICA ACT (1867), S. 91.

Ss. 90 and 56—Conflict of laws.

———*Provincial Legislation, disallowance of—Private rights completely constituted cannot be affected by disallowance—Crown grant under Vancouver Island Settlers Rights Act* (1904) *read with Amending Act of* 1917*—Grant remaining unregistered at date of disallowance but grantee entitled to registration at that date—Disallowance of Amending Act of* 1917 *cannot affect grantee's title—Conflict of laws.*

The language of Ss. 56 and 90 of the British North America Act of 1867 itself discloses with sufficient clearness an intention that as to private rights completely constituted and founded upon transactions entirely past and closed, the disallowance of a provincial statute shall be inoperative. It is important in construing such a provision to consider the probable tendency of any proposed construction in relation to its effect upon the working of the constitutional system set up by the British North America Act. If private rights that have been finally constituted under Provincial Legislation are swept away by disallowance—which may take place at any time up to the expiration of a year after the enactment of the legislation—the Provincial legislation may become the subject of a considerable degree of doubt as to its ultimate operation and effect. This uncertainty would be much limited in its practical incidence by recognized constitutional conventions restricting the classes of cases in which disallowance is permissible; but, in point of law the authority is unrestricted, and under conceivable conditions the uncertainty touching the fate of Provincial enactments might be productive of some degree of general inconvenience. Another objection lies in the probability that the Dominion Government when considering the advisability of disallowing a Provincial enactment in circumstances making the exercise of the power proper and desirable on general grounds would be faced at times with the certainty that in many cases that Government would encounter embarrassments (otherwise not likely to arise) by reason of apprehensions as to the consequences of its action upon the rights and interests of private individuals. Under the Vancouver Island Settlers Rights Act of 1904 read with the Amending Act of 1917, a Crown grant was made in favour of *A.* The registration of the grant was stayed in consequence of a *lis pendens* having been filed in certain actions which were not well founded. At this stage the Amending Act of 1917 was disallowed by the Governor-General in Council.

Held, that the actions in which the *lis pendens* was filed being not well founded, *A* had when he applied for registration a completely constituted right to register his title and that such a right is one of the class of rights intended to be protected by S. 56 of the British North America Act. Therefore notwithstanding that at the time of the disallowance of the Amending Act of 1917, the grant was not registered. *A*'s right to the land could not be extinguished by the disallowance of the Act of 1917. (*Mr. Justice Duff.*) WILSON *v.* ESQUIMALT AND NANAIMO RAILWAY COMPANY. **A. I.R. 1921 P. C. 234.**

Ss. 91 and 92—Interpretation.

———*Board of Commerce Act* (1919) *and Combines and Fair Prices Act,* 1919, *are* ultra vires *of the Canadian Parliament—Principles discussed.*

The jurisdiction attempted to be conferred on the Board of Commerce by the Board of Commerce Act (1919) and Combines and Fair Profits Act (1919) is *ultra vires.* Legislation setting up a Board of Commerce with such powers is beyond the powers conferred by S. 91. Circumstances are conceivable, such as those of war or famine when the peace, order and good Government of the Dominion might be imperilled under conditions so exceptional that they require legislation of a character in reality beyond anything provided for by enumerated heads in either S. 92 or S. 91 itself. Throughout the provisions of the British North America Act there is apparent the recognition that subjects which would normally belong exclusively to a specifically assigned class of subjects may, under different circumstances and in another aspect, assume a further significance. Such an aspect may conceivably become of paramount importance, and of dimensions that give rise to other aspects. But the recognition of this principle as relevant can be justified only after scrutiny sufficient to render it clear that the circumstances are abnormal. But in the case of the Board of Commerce Act of 1919 and the Combines and Fair Prices Act of 1919 the standard of necessity referred to has not been reached and attainment of the end sought is not practicable, in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the Provincial Legislatures. It may well be within the powers of the Dominion Parliament to call, for example, for statistical and other information which may be valuable for guidance in questions affecting Canada as a whole. Such information may be required before any power to regulate trade and commerce can be properly exercised, but even this consideration affords no justification for interpreting the words of S. 91, sub-S. 2 in a fashion which would make them confer capacity to regulate particular trades and business. (*Viscount Haldane.*) *In re* THE BOARD OF COMMERCE.

A. I. R. 1921 P. C. 205.

Ss. 91 and 92—Ultra vires.

——*British Columbia Summary Convictions Act of* 1915 *is not* ultra vires.

Reading Ss. 91 and 92 together, the Summary Convictions Act of 1915, of British Columbia was within the competence of the Legislature of British Columbia. *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, (1896) A. C. 348; *Toronto Railway Co.* v. *Toronto City*, (1920) A. C. 426, 452, Foll. (*Viscount Birkenhead, L. C.*) CANADIAN PACIFIC WINE CO. *v.* TULEY. **A. I. R. 1921 P. C. 179.**

S. 101—Interpretation.

——*S.* 101 *cannot be read as enabling Parliament of Canada to trench on provincial rights.*

S. 101 of the British North America Act which enables the Parliament of Canada notwithstanding anything in the Act to provide for the better administration of the laws of Canada, cannot be read as enabling that Parliament to trench on provincial rights, such as the powers over property and Civil Rights in the Provinces exclusively conferred on the Legislatures. Full significance can be attached to the words in question without reading them as implying such capacity on the part of the Dominion Parliament. It is essential in such cases that the new judicial establishment should be a means to some end competent to the latter. (*Viscount Haldane.*) *In re* THE BOARD OF COMMERCE.

A. I. R. 1921 P. C. 205.

BRITISH PROTECTORATE.

Interpretation.

——Protected country is not British Dominion but Crown controls all its foreign relations—Protected State is semi-sovereign—Protected State in South Africa—Act of State. (*Viscount Haldane.*) SOBHUZA II *v.* MILLER. **30 C. W. N. 961 = 99 I. C. 265 = A. I. R. 1926 P. C. 131.**

BROACH AND KAIRA INCUMBERED ESTATES ACT (BOM. XXI OF 1881).

S. 28—Disability.

——*Estate taken under management—Disability continues even in the case of successor of the Thakur.*

The disability contained in S. 28 applies not only to the Thakur during whose lifetime the estate was taken under management, but it extends to his successor also, who, however, is allowed to incur unsecured debts. (*Marten and Fawcett, JJ.*) GOWRISHANKAR BHAISHANKAR THAKOR *v.* MADHAVSINGJI JESINGJI.

27 Bom. L. R. 88 = 86 I. C. 28 = A. I. R. 1925 Bom. 175.

BROKER—*See* CONTRACT ACT, S. 182, *Et. Seq.*

BUDDHIST LAW—Burmese.

Adoption.
Applicability.
Divorce.
Ecclesiastical Jurisdiction.
Ecclesiastical Law.
Gift.
Husband and Wife.
Joint Property.
Marriage.
Minor.
Partition.
Pre-emption.
Succession.
Texts.
Will.
Miscellaneous.

Adoption.

——A Burmese Buddhist monk cannot adopt. (*Rutledge, C. J. and Brown, J.*) MA ON KYI *v.* MA THAUNG MAY. **120 I. C. 663 = A. I. R. 1929 Rang. 173.**

——A mutual adoption by persons who have no bond either by relationship or in any other way is impossible. (*Rutledge, C. J. and Brown, J.*) MA ON KYI *v.* MA THAUNG MAY. **120 I. C. 663 = A. I. R. 1929 Rang. 173.**

——*Keittima adoption—Ceremonies—Course of conduct—Proof.*

Adoptive father having already natural son—Adoptee (plaintiff) not treated as natural children were treated—Plaintiff described as son in adoptive father's will but not given equal share with natural sons—Father giving plaintiff power-of-attorney describing him as son—Power-of-attorney less extensive than one given to natural son—Plaintiff described as son in inscription on tablet in ordination hall built by adoptive father and in tombstone of adoptive parents—Natural son married to plaintiff's niece which would be impossible if they were brothers—Plaintiff had not status of keittima son but was merely fondling—Description as son in inscription and tombstone did not prove his right to inherit.

Neither ceremony nor written document is necessary to constitute a keittima adoption; and fact of adoption can be inferred from a course of conduct which is inconsistent with any other supposition, but there must be proof of the publicity given to the relationship.

Held, that under these circumstances plaintiff could not be said to have proved that he was adopted by the adoptive father with the intention that he should be an heir to his estate and that he had the status of a keittima son. Description as son in the inscription and on tombstone did not prove his right to inherit. He was, therefore, only a fondling and no better. (*Pratt, O. C. J. and Cunliffe, J.*) CHAN PYU *v.* SAW SIN. **6 Rang. 623 = 114 I. C. 513 = A. I. R. 1929 Rang. 22.**

——*No formal ceremony is necessary—For inferring adoption from course of conduct, publicity or notoriety of relationship is the test.*

According to the law of Burma, no formal ceremony is necessary to constitute adoption. The fact of adoption may be inferred from a course of conduct inconsistent with any other supposition, but in that case the publicity or notoriety of the relationship must be satisfactorily proved. 36 Cal. 978 (P. C.), Foll. (*Sir Lancelot Sanderson.*) MAUNG BA PE *v.* MAUNG SHEW BA. **6 Rang. 520 = 28 M. L. W. 129 = 48 C. L. J. 177 = 33 C. W. N. 70 = 110 I. C. 306 = A. I. R. 1928 P. C. 197 = 55 M. L J. 95.**

——*Child can be disinherited only by giving it away in adoption.*

There is no provision in the Dhammathats enabling parents to disinherit their children, except by giving them away in adoption to another. A son, who has not been disinherited by his mother, is entitled to maintain a suit for partition of his mother's property. (*Das and Doyle, JJ.*) MAUNG BA THWIN *v.* MAUNG PO HTI. **6 Rang. 510 = 113 I. C. 804 = A. I. R. 1928 Rang. 289.**

——*C. P. Code, O. 6, R. 17—Allowing amendment in appeal is a matter of discretion which is to be exercised regarding all facts—Plaintiff claiming as keittima son cannot be allowed to claim as Apathitta by amendment.*

The plaintiff must be confined to the case that he sets up in his pleading, or to a case which is consistent with those pleadings. Though the right of amendment has been largely increased in the new Code—and amendment is now much more freely granted—it remains a matter for discretion, and that discretion must be exercised with regard to all the facts and circumstances of the case. The causes of action, on which the claims to be a keittima or an apathitta son are based, are widely different. Different considerations govern the question of these two distinct forms of adoption. The plaintiff who has deliberately chosen his line of attack should not be allowed to alter his claim to one of a different character. A plaintiff who sued as a keittima son but made no alternative claim as an apathitta, cannot be allowed to make the alternative claim for a first time in appeal. A. I. R. 1925 Rang. 178, Dist. (*Robinson, C. J. and Maung Ba, J.*) MAUNG BA THEIN *v.* MA THAN MYINT. **3 Rang. 483 = 92 I. C. 253 = A. I. R. 1926 Rang. 49.**

——*Adoption is a contract and so a minor cannot adopt.*

To be able to adopt a person must be of age, and able to contract. Adoption is a contract under which a person takes another with certain objects, and confers certain rights; and so a minor is not legally empowered to adopt any person. (*Das, J.*) MAUNG MYA DIN *v.* MAUNG YE GYI. **4 Bur. L. J. 136 = 92 I. C. 719 = A. I. R. 1925 Rang. 350.**

——*Keittima adoption—Apathitta adoption—Surrounding circumstances—Relationship of parties—Amendment of plaint—Alternative claim.*

Among the Burmese, the keittima and the Apathitta forms of adoption are quite distinct. The former is an adoption with a view to inherit and the latter merely for bringing up the child out of pity. The Burmese expression for the English word "adopted" does not clearly give the idea of adoption as one's own child. The expression is used in connection both with the keittima form of adoption and the apathitta form. Therefore, the use of the expression by an alleged adopter without the necessary amplifying words is not a sufficient proof of a keittima adoption. The treatment of a niece by his alleged adoptive father somewhat like a daughter does not raise any presumption of an adoption with a view to inherit, especially when she is an orphan child. If the parties were strangers the fact would be very important. A plaint based on a keittima adoption cannot be amended in appeal by an alternative claim of an apathitta adoption, as the two forms of adoption are entirely different. *Maung Tha So* v. *Lu Pe*, 41 Ind. Cas. 749, 11 Bur. L. T. 246, Referred to. (*Maung Kin, Offg. C. J. and Rigg, J.*) SHWE KIN *v.* MAUNG SIN. **10 L. B. R. 376 = 87 I. C. 673**

——*Keittima adoption—No special ceremonies necessary but publicity and notoriety are essential.*

There is no special ceremony in Burmese adoption, but the adoption must be a matter of publicity and notoriety. It is strong evidence of such publicity and notoriety that the adoptee lived continuously in the house of adopter from her babyhood for twelve or thirteen years, and that he was entered on the register of the school as her parent, and paid the school fees. (*Lord Parmoor.*) MA THAN THAN *v.* MA PWA THIT. **1 Rang. 451 = 77 I. C. 63 = 2 Bur. L. J. 260 = 33 M. L. T. 361 = 29 C. W. N. 610 = 1923 M. W. N. 711 = A. I. R. 1923 P. C. 156 = 46 M. L. J. 334 (P. C.).**

——*Ceremonies—Act of* Shinbyuing *though* prima facie *evidence of adoption is not always a clear indication of it.*

Though the act of *Shinbyuing* is, in some cases, *prima facie* evidence that the donor of the feast regarded the novice as his son, it is by no means a clear indication in every instance that anything more than a charitable intent, sometimes coupled with a love of display, was in the donor's mind. Where several boys are *Shinbyued* at the same time, and none of them is a natural born son, no presumption in favour of adoption can properly arise in the absence of a direct and public declaration of relationship or about the time of the ceremony. (*Robinson, C. J. and May Oung, J.*) MAUNG PO KAN *v.* DAW AT. **1 Rang. 102 = 87 I. C. 686 = A. I. R. 1923 Rang. 189.**

——*Manukye* Dhammathat—*Intention to adopt can be gathered from conduct.*

The Manukye *Dhammathat* requires that a *keittima* son or daughter should have been adopted with the intention, publicly signified, of taking the adoptee as a son or daughter who will inherit. This intention may have been expressed at the time of the taking or later, or may be inferred from a long course of conduct making such intention public. (*Robinson, C. J. and May Oung, J.*) MAUNG PO KAN *v.* DAW AT. **1 Rang. 102 = 87 I. C. 686 = A. I. R. 1923 Rang. 189.**

——Keittima *adopted son entering priesthood loses rights of inheritance in adoptive family but when he resumes his old position in the family and his adoptive parents indicate their intention that he should be their* keittima *adopted son, his rights are not affected by the intervening years and his priesthood.*

On entering the priesthood, a *keittima* adopted son must be held to have severed himself from all rights to inherit and from all family ties. On his re-entering civil life, he would not *ipso facto* be entitled to resume the position and rights he might have been possessed of before. It is open to his adoptive parents to take him back and to again adopt him as their *keittima* son but that they did so must be proved. The same degree of proof would not be necessary in all cases, and it would depend on the facts and circumstances of each case whether a re-adoption had taken place or not. Where the adopted son resumes his former position in the family in its entirety and his adoptive parents mean him to do so and he agrees, the years spent by him in the monastery cannot affect his rights of inheritance. (*Robinson, C.J. and Duckworth, J.*) MA NYUN SEIN *v.* MAUNG CHAND MYA. **11 L. B. R. 124= 66 I.C. 573=A.I.R. 1921 L.B. 87.**

Applicability.

———*Mere fact that Chinese Buddhist observes certain observances of Burmese Buddhist does not show that he has abandoned his form of Buddhism.*

The fact that a Chinese Buddhist who is a Mahayanist or a Buddhist of the board school observes certain of the observances of the narrow school to which Burmese Buddhists belong, does not go far towards showing that he has abandoned his own form of Buddhism and has adopted the narrower form which is followed by the Burmese. 8 Rang. 57, Ref. to. (*Heald, Ag. C.J. and Sen, J.*) MA E KYEE *v.* TAN CHONG KEE. **A.I.R. 1930 Rang. 192.**

———*Succession to an Ayo—Burmese Buddhist Law applies.*

The principles of Burmese Buddhist Law are to be applied in determining who is the nearest rightful female heir to succeed to an "Ayo" in the absence of an undisputed and ancient custom to the contrary. (*Maung Ba and Brown JJ.*) MA KHIN OH *v.* MA KHIN GALE. **8 Rang. 17=A.I.R. 1930 Rang. 148.**

———*Succession Act should govern succession to estate of Chinese Buddhist except where he adopts Burmese form of Buddhism—Chinese customary law should also not be applied—Succession Act, S. 29—(*Per *Otter, J., contra.)*

Per *Full Bench.*—Unless it is proved that a Chinese Buddhist born in China, who was domiciled and died in Burma, had abandoned his Chinese Buddhist religion and had adopted Burmese Buddhism, Burmese Buddhist Law does not govern the succession to his estate. The Chinese Customary Law also cannot be held to apply to it. The succession to his estate should be governed by Succession Act. Case-law discussed.

Per *Otter, J.*—Chinese Customary Law governs the succession to the estate of a Chinese Buddhist. (*Heald, Offg. C.J., Chari, Maung Ba, Otter and Brown, JJ.*) PHAN TIYOK *v.* JIM KYIN KANK. **8 Rang. 57=A.I.R. 1930 Rang. 81 (F.B.).**

Divorce—Adultery.

———*Mere adultery by husband is not by itself sufficient to entitle wife to divorce.*

Ordinary grounds for divorce are adultery and cruelty on the part of the husband and adultery on the part of the wife; and mere adultery on the part of the husband is not by itself a sufficient ground to entitle the wife to divorce. 5 L.B.R. 87, Rel. on; 9 L.B.R. 191, Ref. (*Heald and Otter, JJ.*) MA THEIN NWE *v.* MAUNG KHA. **7 Rang. 451=120 I.C. 137= A.I.R. 1929 Rang. 307.**

———Marriage subsists unless dissolved by Court or by mutual consent in presence of elders or by desertion for certain period—Dismissal of wife for adultery cannot constitute divorce—Partition following upon divorce by mutual consent cannot be objected to on ground of misconduct. (*Heald, J.*) MA ME HLA *v.* MAUNG PO THON. **7 Rang. 98=117 I. C. 253= A.I.R. 1929 Rang. 196.**

Divorce—Claim for.

———A divorce is not permissible at the will and pleasure of one party to a Burmese Buddhist marriage without proof of a matrimonial offence. Consequently a suit for restitution of conjugal rights in respect of parties to a Burmese Buddhist marriage is competent. Two persons lived as husband and wife for about 11 years and had children. After that period the husband left the place and lived with another woman whom he had made his lesser wife.

Held, that the wife had reasonable cause for not returning to her husband and no decree for restitution of conjugal rights could be passed at the instance of the husband. A. I. R. 1924 Rang. 182; 2 U. B. R. 5 and A. I. R. 1929 Rang. 307, Rel. on; 2 U. B. R. 3; 11 L. B. R. 385 and 38 Cal. 629 (P. C.), Ref. (*Page, C. J. and Das, J.*) MAUNG KYWE *v.* MA KYIN. **A. I. R. 1930 Rang. 291 at 294.**

———Where a Burmese Buddhist man slaps his wife though once and co-habits with another woman and gets a child from her, the wife is entitled to divorce. (*Heald, J.*) MAUNG NGWE SAN *v.* MA GYI. **117 I.C. 64= A.I.R. 1929 Rang. 64.**

———*Wife is entitled to divorce on giving up claim to joint property.*

The wife is entitled to a divorce on payment of the costs of the suit and foregoing all claim to the joint property of the marriage, irrespective of the fact, whether there is cruelty on the part of the husband. (*Pratt, J.*) MA THEIN MYA *v.* MG. TUN HLA. **11 L.B.R. 385=69 I.C. 980=1 Bur. L.J. 127= A.I.R. 1923 Rang. 86**

Divorce—Consent.

———*Husband taking lesser wife—First wife's not objecting for two and a half months does not amount to consent.*

Where a husband took lesser wife and the first wife did not object for two and a half months and subsequently sued for divorce,

Held, that her silence for two and a half months did not amount to consent. (*Heald, J.*) MAUNG BA THAUNG *v.* MA ON HMYIN. **6 Bur. L.J. 22= 102 I.C. 473=A. I. R. 1927 Rang. 112.**

Divorce—Cruelty.

———Cruelty and physical violence are quite distinct. The essence of cruelty does not consist in violence. It consists in being indifferent to, delighting in another's pain and so it really depends on the state of the mind of the person inflicting pain rather than the actual infliction of pain. (*Baguley, J.*) MAUNG KYWE *v.* MA THEIN TIN. **7 Rang. 790=121 I.C. 809= A.I.R. 1930 Rang. 56.**

———A single assault by a husband on the wife which is provoked by the wife is not a sufficient ground for the granting of a divorce to a wife on any terms, when the character and habits of the husband are not of a nature to suggest any likelihood of a repetition of the offence. It is true that a divorce as by mutual consent may be granted for a single act of cruelty but a single act of violence without any likelihood of its being repeated is not necessarily an act of cruelty. A.I.R. 1921 U. B. 2 and 7 L.B.R. 79, Appr.; (1897-1901) 2 U. B. R. 28; (1902-1903) 2 U. B. R. 6, Expl. and Dist. (*Baguley, J.*) MAUNG KYWE *v.* MA THEIN TIN. **7 Rang. 790=121 I.C. 809= A.I.R. 1930 Rang. 56.**

———*Desertion of and failure to maintain wife for over 12 years, constitute divorce.*

Per *Robinson, C.J., and Maung Kin, J.*—But even if the evidence had not been sufficient to establish a divorce by deed there is the admitted fact that appellant's husband had deserted his wife for twelve years before her death, and that he had failed to maintain her during that period. This fact alone would be sufficient to constitute a divorce under the Burmese Buddhist

Law. 3 L.B.R. 175, Ref. (*Robinson, C.J. and Maung Kin, J.*) MAUNG SHWE SA *v.* MA MO. **1 Bur. L.J. 24 = 105 I.C. 269 = A. I. R. 1922 L. B. 28.**

———*Chastisement by husband is sufficient ground.*

If a husband is guilty of a single act of misconduct, the wife is not bound to give her husband another chance; she can insist on her claim to divorce at once. Whatever may have been the ancient customs of society or even the rules of Buddhist law in a former state of society the right of a husband to chastise his wife does not now exist and will not be recognised by British Courts of Justice. The wife may submit to ill-treatment and condone it, but if she chooses to come into Court and asks for protection against personal violence, she is entitled to such protection and must in every case receive it. Case-law referred. (*Saunders, J.C.*) MA SAT *v.* MAUNG NYI BU. **4 U.B.R. 68 = 64 I.C. 957 = A.I.R. 1921 U.B. 2.**

Divorce—Disposal of children.

———*Agreement about disposal of children, not against natural justice, is binding on the children—Child allotted to one of the parents—Subsequent demand by him of estate of abandoning parent—Child must prove that filial relations were resumed.*

Where the couple divorcing have come to an agreement as to the disposal of the children, not opposed to the principles of natural justice, the children are bound thereby; and where, therefore, a child by agreement or acquiescence of the parents at the time of the divorce is allotted to one or other of the separating parties, the child must be regarded in law as having severed filial relations with the other, and where that child sets up a subsequent claim to the estate of the parent who abandoned the child to the care of the other at the time of divorce, the onus is on the child to show that filial relations have been resumed. Case-law discussed. (*Das and Doyle, JJ.*) MAUNG BA THWIN *v.* MAING PO HTI. **6 Rang. 510 = 113 I. C. 804 = A. I. R. 1928 Rang. 289.**

Divorce—Law as to.

———The Burmese law in the case of divorce is to be determined by the Manugye or Dammathat of the Laws of Menoo, with such assistance as may be derived where necessary from the other Dammathats. A. I. R. 1914 P.C. 97. (*Sir John Wallis.*) MA SAW KIN *v.* MAUNG TUN AUNG GYAW. **55 I. A. 38 = 6 Rang. 79 = 32 C. W. N. 429 = 4 O. W. N. 443 = 108 I. C. 345 = 47 C. L. J. 577 = 27 M. L. W. 830 = A. I. R. 1928 P.C. 8 = 54 M. L. J. 468.**

———There is no right of divorce at the mere caprice of either party to a Burmese Buddhist marriage against the will of the other party and without proof of misconduct or default on the part of the other party. 11 L.B.R. 385; 2 U.B.R.B. 4 Div. 3; 2 U.B.R. Diss. (*Heald and Lentaigne, JJ.*) MA HMON *v.* MAUNG TIN KANK. **1 Rang. 722 = 79 I. C. 705 = A.I.R. 1924 Rang. 182.**

———Under the Burmese Buddhist Law, suits for divorce should be framed and tried in one or other of the three kinds of divorce, or in the others in the alternative, and the question of status or existence of the properties to be partitioned, should be left to a later suit. (*Heald, A.J.C.*) MAUNG NGA *v.* MA PYU. **59 I. C. 1005 = (1920) 3 U. B. R. 251.**

Divorce—Object.

———A divorce is given not to punish a husband for an assault, that is provided for by the criminal law, but to enable the wife to free herself from a bond which becomes intolerable. (*Baguley, J.*) MAUNG KYWE *v.* MA THIN TIN. **7 Rang. 790 = 121 I. C. 809 = A. I. R. 1930 Rang. 56.**

Divorce—Onus.

———*Onus of proving divorce is on person alleging it—Person having several wives putting part of his property in the name of one—No presumption arises that others are divorced.*

Marriage even in Burma is ordinarily a permanent bond, which subsists until it is actually broken, and the burden of proving that it has been broken is obviously on the person alleging it. Where a man has a considerable amount of property and several wives, the fact that he puts part of his property into the name of one wife does not on the face of it go far towards showing that the other wives have been divorced. (*Heald and Lentaigne, JJ.*) MA LUN ME *v.* MA KIN. **2 Bur. L. J. 67 = 74 I. C. 1037 = A. I. R. 1923 Rang. 155.**

Divorce—Right to re-marry.

———*Unless both desertion and failure to provide maintenance are established no right to re-marry arises.*

Although there is much difference of opinion in Burma on the question whether, when the husband or wife has left the home, the marriage is put an end to by the fact of the husband's omitting to send the wife anything for three years or one year, as the case may be, or whether there must be some further act of volition showing an intention to determine the marriage relation, such as re-marriage or a suit for divorce, yet it is clear that unless both the conditions, *viz.*, desertion on the one side or the other and failure on the part of the husband to provide the wife with any maintenance for the specified period of one or three years as the case may be, are satisfied, the text gives the wife no right to re marriage, and the marriage tie must be considered as subsisting. (*Sir John Wallis.*) MA SAW KIN *v.* MAUNG TUN AUNG GYAW. **55 I. A. 38 = 6 Rang. 79 = 32 C. W. N. 429 = 4 O. W. N. 443 = 108 I. C. 345 = 47 C. L. J. 577 = 27 M. L. W. 830 = A. I. R. 1928 P.C. 8 = 54 M. L. J. 468 (P.C.).**

Divorce—Title to property.

———*Wife deserted and hence obtaining divorce—She cannot get husband's whole property.*

The proposition that where the husband deserts his wife, who subsequently sues for divorce and succeeds, the wife is entitled to divorce with possession of all the husband's interest in the property, is in itself a startling proposition and cannot be accepted, and there is no case known in which even a claim based on such a proposition has been made. There is no text in the Dhammathats or in Burmese Buddhist law books to support it nor is there any case-law on the subject. (*Sir Lancelot Sanderson.*) MAUNG PO NYUN *v.* MA SAW TIN. **54 I. A. 403 = 5 Rang. 841 = 46 C. L. J. 406 = 32 C. W. N. 173 = 39 M L. T. 492 = 6 Bur. L. J. 231 = 106 I. C. 17 = A. I. R. 1927 P.C. 234 = 53 M. L. J. 425 (P.C.).**

———*Wife granted one-third of husband's property on divorce—Decree was upheld by Privy Council.*

Where it was found that the marriage of defendant (husband) with the plaintiff (wife) was brought about by misrepresentation, that the plaintiff was an entirely innocent party, that the facts relating to the desertion were of an aggravated nature and quite unjustifiable, and the Courts in India granted her a third share in the property given to the husband by his mother:

Held, that the decree appealed from cannot be said to be unreasonable or contrary to justice, equity and good conscience. A. I. R. 1925 Rang. 242, Affirmed (*Sir Lancelot Sanderson.*) MAUNG PO NYUN *v.* MA SAW TIN. **54 I. A. 403=5 Rang. 841=46 C. L. J. 406=32 C. W. N. 173=39 M. L. T. 492=6 Bur. L. J. 231=106 I. C. 17=A. I. R. 1927 P. C. 234=53 M. L. J. 425 (P.C.).**

———*Divorce by desertion—Party wishing to divorce must relinquish all the property.*

Essentially the case of a divorce by desertion is the same as the case of a divorce at the instance of one party against the wish of the other, and therefore, in the absence of an express provision to the contrary, the rule that the party wishing to divorce must relinquish all the property should be followed in the case of divorce by desertion. A.I.R. 1925 Rang. 242, Foll. (*Rutledge, C. J. and Carr, J.*) MA KIN *v.* MAUNG PO SEIN. **6 Rang. 1=109 I. C. 456=A. I. R. 1928 Rang. 125.**

———*Divorce by desertion by husband having two wives—Deserted wife takes one-fourth share.*

In the case of a divorce by desertion by the husband having two wives, the deserted wife is entitled to one-fourth share in the property. A. I. R. 1925 Rang. 329 (F.B.), Foll.; A.I.R. 1925 Rang. 242, Diss. from. [This last mentioned case is affirmed by A.I.R. 1927 P.C. 234—Ed.] (*Rutledge, C.J. and Carr, J.*) MA KIN *v.* MAUNG PO SEIN. **6 Rang. 1=109 I. C. 456=A. I. R. 1928 Rang. 125.**

———*Husband marrying second wife, falsely representing he had divorced first wife—Then deserting second wife and living with first wife—Second wife is entitled to divorce and partition and two-thirds of husband's property at partition.*

A wife separated from her husband. The husband then falsely representing that he had divorced the first wife married a second wife. Afterwards he deserted the second wife and lived with the first wife.

Held, that the second wife was not a lesser wife, that she was entitled to sue for divorce and partition on the ground of desertion and that she was entitled at such partition to two-thirds of the husband's property. (*Heald and Chari, JJ.*) MAUNG PO NYUN *v.* MA SAW TIN. **3 Rang. 160=4 Bur. L. J. 42=88 I. C. 402=A. I. R. 1925 Rang. 242.**

———*Spinster marrying a widower—Wife bringing no* payin *to marriage—Divorce by mutual consent without fault—Wife is entitled to share in* payin *property.*

In the case where the wife is a spinster but the husband had been previously married, where the husband brings *payin* to the marriage and the wife nothing and where they separate on divorce by mutual consent without any fault on either side the rule to be applied is the rule laid down for the case where neither party had been married before and separate by mutual consent without fault, and where the relation of *nissaya* and *nissita* exists. Case-law discussed. (*Robinson, C. J. and Heald, J.*) MA NGWE HNIT *v.* MAUNG PO HMU. **11 L. B. R. 52=64 I. C. 806=A. I. R. 1921 L. B. 2.**

Ecclesiastical Jurisdiction.

———*Rangoon Small Cause Courts Act* (7 *of* 1920), *Ss.* 12, 13 *and* 14.

Where a presiding pongyi has permitted another pongyi to reside in his kyaung and where the permission to reside has been determined the former is competent to evict the latter and the suit to evict can be tried by the Rangoon Small Cause Court. A.I.R. 1930 Rang. 29; (1892-1896) 2 U.B.R. 78; (1910-1913) 1 U.B.R. 183 and (1897-1901) 2 U.B.R. 45, Dist.; (1892-1896) 2 U.B.R. 72 and (1908) 2 U.B.R. 1, Rel. on. (*Otter, J.*) U PANNAWA *v.* SAYADAW U AINDAKA. **A.I.R. 1930 Rang. 199.**

———*C. P. Code, S. 9—Dispute in Upper Burma involving ecclesiastical matter within competence of Buddhist ecclesiastical authorities—Civil Courts have no jurisdiction.*

In a suit, the nature and extent of the rights of the monks to use and occupy monastic lands which is religious property invokes a dispute regarding ecclesiastical matter within the competence of the Buddhist ecclesiastical authorities to decide, consequently, the Civil Courts in Upper Burma have no jurisdiction to entertain the dispute. (1897-01) 2 U.B.R. 42; (1892-96) 2 U.B.R. 59 and (1892-96) 2 U.B.R. 72, Ref.; (1902-03) 2 U.B.R. Buddhist Law, Ecclesiastical P. 1, Rel. on. (*Mya Bu and Baguley, JJ.*) U AHSAYA *v.* U PYINNYA. **6 Rang. 783=114 I.C. 540=A.I.R. 1929 Rang. 77.**

Ecclesiastical Law.

———*Monk—Presiding monk of "Catudissa Sanghika" monastery has same powers as any other presiding monk.*

The monk presiding over a "Catudissa Sanghika" monastery has exactly the same powers of control and management of his monastery and its precincts as the monk who presides over any other monastery. (*Heald, J.*) U THAWBITA *v.* U KANDULA. **A. I. R. 1930 Rang. 160.**

———*Once kyaung is built and offered to pongyi, it becomes extra commercium.*

A kyaung cannot be regarded like an ordinary piece of immovable property which can be occupied by a layman, bought, sold or otherwise treated like an ordinary commercial property. Once a kyaung has been built and offered to a pongyi it becomes extra commercium. (*Baguley, J.*) U ADHEIKSA *v.* MA SAN ME. **7 Rang. 617=121 I. C. 787=A.I.R. 1930 Rang. 29.**

———*Layman cannot evict presiding pongyi in ordinary state of affairs.*

When a pongyi is installed in a kyaung and he is shown to have remained in that kyaung for a period of many years, the layman who claims the right to turn him out has got to prove that right very strictly. A kyaungtaga, when he places a pongyi in charge of a kyaung and refers to him as the presiding pongyi of that kyaung, in the vast majority of cases would have dedicated the kyaung to that pongyi, and any kyaungtaga, who asserts the contrary has got to prove it, and has got to prove that the pongyi was merely his watchman or care-taker. (*Baguley J.*) U AHDEIKSA *v.* MA SAN ME. **7 Rang. 617=121 I.C. 787=A.I.R. 1930 Rang. 29.**

———*According to Manukya* payin *includes property acquired during two marriages.*

According to Manukya *payin* is not restricted to the property acquired during the first marriage but also includes the property during the two marriages. (*Heald and Maung Ba, JJ.*) MA SAI DA *v.* MA NWE. **7 Rang. 578=121 I.C. 774=A. I. R. 1929 Rang. 253.**

———*Contract Act, S. 23—Agreement by a Buddhist monk to purchase property is void.*

An agreement to purchase a house by a Buddhist monk for himself is void, the transaction being opened to his personal law, Vinaya and hence immoral. 2 U. B.R. 54; 9 L.B.R. 220 and 1 U.B.R. 183, Foll. (*Maung Ba, J.*) U TEZA *v.* MA E GWE. **5 Rang. 626=106 I. C. 201=A. I. R. 1928 Rang. 3.**

———Pongyi *must teach or meditate—If he does not he cannot live on charity.*

According to Burman Buddhist ideas he who dons the yellow robe has one of two duties to perform:—(1) To practise austerities and meditation in order to work out his own salvation ; or (2) to learn the sacred scriptures and to impart the knowledge to others. Those who follow the first are known as Patibatti Sangha and those who adopt the second as Pariyatti Sangha. When a Pongyi belongs neither to the Pariyatti nor to the Patibatti, he is no longer entitled to live on the offering of the laity, nor to receive respect from them. He has no *raison d'etre*. A Pongyi in attempting to oppose the orders of the executive not only breaks his own personal law, but sets an example to the laity. (*Rutledge and Maung Gyi, JJ.*) MAUNG TOK *v.* EMPEROR.

26 Cr. L.J. 1622 = 3 Rang. 352 = 90 I.C. 918 = A.I.R. 1925 Rang. 354.

——Poggalika *gift of Kyaung entitles the donee to sue for its possession even if* Kyaung *is Sanghikai property—Presiding monk can be ousted only by the body of the Sangha.*

Where a *kyaung* is dedicated to the plaintiff as his *poggalika* property and has been in his continuous possession for a long term of years he can recover its possession if he is ousted. Even if the *kyaung* be separate property, the plaintiff, if he has been all along the presiding *pongyi* can recover possession and can be ousted only by the body of Sangha. (*Robinson and Maung Gyi, JJ.*) U WATHUWA *v.* MAUNG PO HTI.

3 Rang. 193 = 89 I. C. 589 = A.I.R. 1925 Rang. 307.

——A *pongyi* may own a *kyauni* as his *poggalika* property and he can in his lifetime validly transfer it by gift. (1910 13) 1 U.B.R. 183 ; A.I.R. 1924 Rang. 141, Diss. (*Lentaigne and Carr, JJ.*) U PANDAWUN *v.* U SANDIMA. **2 Rang. 131 = 83 I. C. 557 = A.I.R. 1924 Rang. 309.**

——*Ecclesiastical law—Monk can validly make a gift without delivery of possession—Gift to a monk reserves no right in the donor.*

There is nothing in the ecclesiastical rules to the effect that delivery of possession must actually accompany the declaration of the gift by a monk to take its full effect or that without a formal delivery of possession a gift of immoveable property does not take effect. Where such a gift is made by registered deed, it is valid in other respects also. Where the transferors transferred the land "Alyapyat" that is to say, without any reservation, or absolutely, to a monk for his proper requirements, namely, food, raiment, shelter (Kyaung) and medicine, and in the form of "navakamma" that is to say "future requirements",

Held, that this kind of gift is allowed by the ecclesiastical rules as perfectly valid and there is no right of reversion left in the transferor after the death of the monk. (*Po Han, J.*) MA SE *v.* U LUN.

2 Bur. L. J. 266 = 83 I. C. 329 = A. I. R. 1924 Rang. 201.

——*Monkhood is civil death and property lost must be re-acquired.*

By becoming a monk a Burmese Buddhist divests himself of all earthly ties of relationship and property and dies a civil death. His wife, even if not divorced, can after seven days marry again. II U.B.R. (1897-1901) 54 ; 9 L.B.R. 220 (F.B.), Foll. When he gives up the monastic life he cannot *ipso facto* recover his property, and reconciliation with his divorced wife would not affect the question. It would be necessary that the property should be returned to him in some overt manner, either by conveyance or gift from those who would be legally in possession thereof, or by his resuming his property from them in some legal and valid fashion. 11 L. B. R. 124, Appr. (*Duckworth, J.*) MA SHEW THE *v.* MAUNG KAN. **1 Rang. 430 = 76I. C. 672 = A.I.R. 1924 Rang. 101.**

——Saduthanthaka property is property belonging jointly to four *pongyis* among whom the title passes by survivorship until the last survivor gets the whole property. On the death of one member, however, the survivors can admit a new member in his place in the joint ownership group. (*Twomey, C. J. and Robinson, J.*) U NANDIYA *v.* U KAW WIDA.

13 Bur. L. T. 147 = 61 I. C. 778 = 10 L. B. R. 258.

Gift.

——*If Burmese Buddhist directs one of co-heirs to discharge his liabilities which are a great deal less than value of his property, transaction is to be regarded as gift of excess of property over debt and principle of part performance does not apply to such case — Part performance.*

When a Burmese Buddhist directs one of the heirs to discharge his liabilities which are a good deal less than the value of his properties, and take over his properties, the transaction is equivalent to a gift of the excess of the property over the debt, or a will of that excess, it may be a death-bed gift of that excess. The principle, therefore, of part performance which applies to a purchaser of the property for consideration has no application to such a case and if such heir discharges the liabilities by selling a portion of the property, he holds the other property on behalf of other heirs. (*Chari, J.*) MAUNG THU *v.* MAUNG SHWE HLA.

A. I. R. 1929 Rang. 272.

——Death-bed gift is not within competence of Burmese Buddhist. (*Brown and Chari, JJ.*) MA PWA SEIN *v.* MAUNG BA SAW. **A. I. R. 1929 Rang. 243.**

——*Gift by sister without joining her husband — Validity is doubtful.*

Whether as a release or as a gift, it is very doubtful if a Burmese woman can without being joined by her husband, transfer her interest to her sister or relinquish the same in her favour. (*Brown and Chari, JJ.*) MA PWA SEIN *v.* MAUNG BA SAW.

A. I. R. 1929 Rang. 243.

——*Gift of marriage joint property by husband without wife's consent is wholly void.*

A deed of gift executed by a Burmese Buddhist husband without his wife's consent, express or implied, with reference to lands forming part of the joint property of the marriage is not valid even to the extent of his interest in the property, but is wholly void. 3 L.B.R. 66; (1893-1909) L.B.R. 403, held overruled ; A. I. R. 1927 Rang. 209; A.I.R. 1927 Rang. 274, Rel. on. (*Rutledge, C.J., Pratt, Otter, Maung Ba, Brown, Heald and Mya Bu, JJ.*) U PO O *v.* MA TOK GYI. **7 Rang. 374 = 118 I. C. 409 = A. I. R. 1929 Rang. 129 (F. B.).**

——*Squatter land—Oral gift by Methila to a monk—Subsequent oral gift by him to another—Transfer is invalid as private trust or gift.*

Where a *Methila* or female lay devotee made an oral gift of certain squatter land and private *zayat* to a monk after she had renounced her vows and married, and the donee made an oral gift of the same to another who pulled down the private *zayat* and erected a new building and lived there,

Held, that the property was not religious property and that the original transfer failed as a gift and as a private trust for want of a registered deed ; but had the property been of a religious nature the question of a trust might conceivably arise. (*Heald and May Oung, JJ.*) MG. PO THET *v.* MG. MIN DIN. **2 Bur. L.J. 7 = 80 I.C. 255 = A. I. R. 1924 Rang. 260.**

——*Ecclesiastical—Gift by monk is invalid.*

A gift by a monk whether to a layman or to another monk, of a monastery or of a site for a monastery, whether it has been dedicated to him personally or not, is invalid. U.B.R. (1910-13) 183, Foll. (*MacGregor, J.*) U MEDA *v.* U SANDIMA. **1 Rang. 494= 76 I. C. 807=A. I. R. 1924 Rang. 141.**

——*Gift affecting inheritance is invalid.*

It is not open to a Burman Buddhist to make a will or a gift that would have the effect of disposing of his property after his death, contrary to the terms of Buddhist Law as to inheritance. (*Robinson, C.J. and Beasley, J.*) MA THIN MYAUNG *v.* MAUNG GYI. **1 Rang. 351=75 I. C. 166=A. I. R. 1924 Rang. 13.**

——*Gift by grandparent to grandchild—Nature of.*

Under Buddhist Law, an actual delivery of possession is necessary to validate a gift. But a gift by a grandparent to a grandchild is an exception to the rule and is valid without delivery of possession. Such a gift is merely contingent and the property remains absolutely under the disposal of the donor till his death, the intention of such a gift being that grandchildren, being younger, might fare badly in competition with their elder uncles and aunts and that they shall receive such share of the inheritance as the grandparents consider fair. (*Heald, A.C.J.*) MA ME I *v.* MAUNG LANK HUYA. **(1920) 3 U. B. R. 228=59 I. C. 999.**

Husband and wife.

——*Sale by wife while husband in jail for meeting expenses incurred in matters of mutual interest binds husband.*

A sale by a Burmese Buddhist wife of family land for meeting the expenses in defending her husband involved in a criminal charge, and for payment of license fees due by the husband in respect of a fishery, while the husband is undergoing a term of imprisonment in jail, binds the husband's interest also, since the sale was brought about to meet the expenses incurred in matters of mutual interest. A.I.R. 1929 Rang. 112, Reversed; A.I.R. 1927 Rang. 209, Rel. on; (1872-92) L.B.R. 578 and A.I.R. 1929 Rang. 129, Ref. (*Mya Bu and Heald, JJ.*) U MIN DIN *v.* MAUNG SHWE HTA. **A. I. R. 1930 Rang. 211.**

——*Though salary of husband may be joint property of husband and wife, wife cannot claim any definite share in the same.*

Though the salary of the husband may be the joint property of himself and wife, still wife is not entitled to any definite share of the salary. All that she is entitled to is to be maintained out of his salary. (*Das, J.*) MAUNG KUN *v.* MA KYAW SHIN. **A. I. R. 1930 Rang. 147.**

——The fact that the money borrowed on a promissory note purports to have been taken for the husband and his sister is no sufficient reason for not drawing ordinary presumption that the husband in executing the promissory note was acting on behalf of his wife as well as himself. (*Brown and Chari, JJ.*) MAUNG SHWE HTEIN *v.* MALON MA GALE. **7 Rang. 558= 120 I. C. 910=A. I. R. 1929 Rang. 310.**

——*Burmese Buddhist husband and wife are partners, and so Buddhist wife can sue in respect of partnership asset in her capacity as surviving partner—Contract Act, S. 45.*

A Burmese Buddhist husband and wife are regarded as partners and as such a Buddhist wife can maintain suit in respect of a partnership asset in her capacity as surviving partner without any reference to her succession to the interest of her husband in the asset or debt due to them jointly. A.I.R. 1927 Rang. 209 and 4 L. B. R. 99, Rel. on; 2 U.B.R. 204, not Foll. (*Chari, J.*) DAW YWET *v.* KO THAT HLUT. **7 Rang. 806= 121 I. C. 807=A. I. R. 1929 Rang. 306.**

——*Husband and wife are liable for debts contracted during coverture but decree passed against one after divorce cannot bind other unless made party to it.*

So long as a Burmese Buddhist couple remains as husband and wife, a decree passed against the husband alone or the wife alone during the coverture may be held to be binding on both, on analogy of a partnership, but after divorce the right of the husband or the wife to represent the other in a suit has terminated and though the original debt may be binding on both, a decree against one without making the other a party cannot be binding on the person who has not been made a party. A decree passed against the husband is held to bind a wife so as to enable the decree-holder to proceed against the joint property on a presumption that the husband in effect represented the wife in the suit. Such a presumption can be made only when the husband could represent wife in the suit. If his authority to represent the wife has determined, as by divorce, no such presumption can be made and the wife can be bound by decree only when she is actually a party in a suit. (*Chari, J.*) MAUNG SAN *v.* MAKHA. **A. I. R. 1929 Rang. 223.**

——*Burmese wife transferring property inherited from parents by contract of sale under such circumstances as to raise strong presumption that she was acting on behalf of marriage partnership—Such transfer is binding both on husband and wife though husband is not active party.*

Where a person obtained possession under a contract of sale made by a Burmese wife of property inherited from her parents and she disposed of the property under such circumstances as to raise a strong presumption that she was acting on behalf of the marriage partnership, the transfer is a good transfer binding both husband and wife, though the husband may not be an active party to the transfer. A.I.R. 1927 Rang. 209, Rel. on. (*Brown, J.*) MAUNG AUNG BAN *v.* MAUNG NGE. **A. I. R. 1929 Rang. 213.**

——*Neither can alienate joint property without other's consent.*

In the case of Burmese Buddhists so long as marriage subsists the husband or wife cannot alienate their joint property without the consent of the other. (1891) S. J. 578 and A.I.R. 1927 Rang. 209, Foll. (*Maung Ba, J.*) MAUNG SHWE HTA *v.* MAUNG AN. **118 I. C. 127= A. I. R. 1929 Rang. 112.**

——*Husband and wife are partners in business of marriage and acquisitions of either are partnership property.*

It is part of the Burmese Buddhist law of marriage that husband and wife are partners in practically all the business of the marriage and that the acquisitions of either or both are partnership property. Such a partnership is dissolved by divorce, and a partition of the partnership property follows as a matter of course and would have legal effect without any registered conveyance of the property from the partnership to the individual partners. But every partner is liable for all debts and obligations incurred while he is a partner in the usual course of business and the dissolution of the partnership would not affect his liability. The property of the partnership whether before or after dissolution of the partnership would be liable for the partnership debts. (*Heald and Cunliffe, JJ.*) V. R. M. A. L. CHETTYAR FIRM *v.* MAN HAN. **5 Rang. 443=105 I.C. 244=A.I.R. 1927 Rang. 299.**

——*Interest of a Buddhist couple in marriage property is indeterminate and variable according to contingencies—It is not saleable property within C. P. Code, S. 60.*

The interests of the parties to the marriage in the property of the marriage are not only impartible, but are also indeterminate. They can be determined only on divorce or on the death of one party. The shares taken by the parties on divorce vary according to the nature of the divorce. The interest of either party, whether at death or divorce, is not in any particular item of property, but is an interest in the estate as a whole, including liabilities as well as assets so that if the liabilities equal or exceed the assets, the interest may be nil or even a minus quantity. Such an impartible and indeterminate interest, depending on and varying according to certain contingencies, is not saleable property within the meaning of S. 60, C. P. Code. (*Heald and Chari, JJ.*) MA PAING *v.* MAUNG SHWE HPAN.
5 Rang. 478 = 104 I. C. 516 = A. I. R. 1927 Rang. 274.

——*Mya-nge does not definitely mean lesser wife.*

The term Mya-nge does not necessarily mean a lesser wife. It is often used as an abuse. Where a claim is put forward by a lesser wife or by one claiming through her it must be proved that the relationship of husband and wife actually subsisted. (*Heald and May Oung, JJ.*) H. MAHOMED AHMIN *v.* MA KYAN.
3 Bur. L.J. 108 = 97 I. C. 72 = A. I. R. 1925 Rang. 41.

——*Decree against husband does not affect wife's share in the joint property.*

A loan was taken by the husband alone on a pro-note for the benefit of himself and his wife. The suit was brought against the husband alone, and the wife was not made a party to the suit. *Held*, that the decree in the suit does not bind her share of the joint property, especially when there was nothing to show that the husband was agent of the wife. 2 U.B.R. (1892-96) 45, 11 B. L. R. 278, Foll.; 7 L.B.R. 135, 10 L. B. R. 3, Ref. (*Duckworth, J.*) SAW HLA AUNG *v.* MA MA NYO. **1 Rang. 555 = 77 I. C. 402 = A. I. R. 1924 Rang. 165.**

——*Divorce—Division of property—Property inherited by wife during marriage—Husband takes only a third share.*

The rule as to equal division upon divorce applies only to property conjointly acquired after marriage. In property inherited by wife during marriage the husband takes only a third share. P.J.L.B. 403 and 11 U.B.R. (1902-03) Bud. Law, Divorce 1, Rel. on. (*Robinson, C. J. and MacGregor, J.*) MAUNG SHWA THA *v.* MA WAING. **11 L. B. R. 48 = 70 I. C. 562 = A. I. R. 1921 L. B. 46.**

——The question of acquiescence by the wife in a mortgage of joint property executed by her husband, depends upon the circumstances of the case. The wife's consent may be presumed, where the circumstances are such as to show that the husband is acting as the wife's agent and the husband ostensibly with the wife's assent manages the family business. (*Twomey, C. J. and Robinson, J.*) MA HLAING *v.* P. R. A. R. CHETTY.
13 Bur. L. T. 129 = 61 I. C. 701 = 10 L. B. R. 267.

Joint property.

——*Land transferred by mother to daughter and her husband as their share of inheritance is their joint lettetpwa property though daughter's claim to land has not become due at time of transfer.*

It is not that the land transferred by a mother to a daughter and her husband as their share of inheritance at the time when the mother is the sole heir to it can only be regarded as gift simply because daughter's claim has not become due. It can still be regarded as the inheritance of the daughter which becomes the joint

lettetpwa of herself and her husband. (*Das, J.*) MAUNG KE *v.* MAUNG SEIN KHO.
A. I. R. 1930 Rang. 176.

——*Lettetpwa property of couple how to be divided illustrated.*

If a husband and wife each brings a child by previous marriage and there is also a child to them both and if the wife dies, of their joint lettetpwa property eight portions should be made of which five portions should go to the husband, two should go to the son of both and one should go to the atet sons. A. I. R. 1925 Rang. 120, Ref. (*Das, J.*) MAUNG KE *v.* MAUNG SEIN KHO.
A.I R. 1930 Rang. 176.

——*Burman left behind widow and son—Nephew of widow brought up as family member—Properties purchased jointly in son's and nephew's names—Pro-notes from debtors taken in joint names—Nephew not paid for his services in family business—No accounts shown, showing debit or credit of particular transactions—Joint interest and joint right held to be created.*

U, a Burman, died leaving a widow *D* and a son *L*. *H*, a nephew of *D*, was brought up by *D* as a foster son and by *L* as foster brother. He was educated, married and maintained at the family expense and took a prominent part in the family business. *L* carried on the family money lending business. *H*, on attaining majority, was initiated in the business. Properties were purchased in the joint names of *L* and *H*. Some promissory notes from the debtors were also taken in the joint names. No account books were produced showing how each particular transaction was debited or credited. There were a number of memoranda in *H's* handwriting showing settlements of accounts. There was no proof that *H* was paid for his services. He merely lived with the family in a separate house provided by the family and was supported by it. After death of *H* and *L* disputes arose between their heirs.

Held, that under the circumstances the intention of *L* and *H* was to express a joint interest and joint right. (*Sir George Lowndes.*) MA MYA *v.* MA ME KYIN.
7 Rang. 388 = 117 I. C. 29 = 50 C. L. J. 192 = 1929 M. W. N. 682 = 34 C. W. N. 117 = A. I. R. 1929 P. C. 246.

——*Agreement by husband to convey land jointly belonging to him and his wife—Consent of wife not obtained—Claim for specific performance cannot succeed—Specific Relief Act, S. 28.*

If a Burmese Buddhist agrees to convey land jointly belonging to him and his wife without obtaining her consent, suit for specific performance of such agreement cannot be obtained as the husband is not competent to alienate land without obtaining wife's consent. (*Heald, Offg. C.J. and Chari, J.*) U OH *v.* U. SHWE THAUNG.
A. I. R. 1929 Rang. 285.

——*Children of first marriage taking share of inheritance on second marriage cannot inherit property inherited by father after their mother's death and before or after second marriage.*

The children of the first marriage who have already taken their share of inheritance on the occasion of the second marriage have no claim to inheritance in respect of property inherited by their father after the death of their mother and before the second marriage; nor can they have any share in respect of the property inherited by their father after the second marriage which becomes the lettetpwa property of that marriage. A. I. R. 1924 P. C. 88, Rel. on; A. I. R. 1926 Rang. 23, Expl. and Dist. (*Heald and Mya Bu, JJ.* and subsequently *Heald and Otter, JJ.*) MA ON THIN *v.* MA NGWE YIN.
7 Rang. 398 = 120 I. C. 666 = A. I. R. 1929 Rang. 265.

——*Share of step-grandchildren in the jointly acquired lettetpwa property of their grandfather and step-grandmother is one-fifth.*

The step-grandchildren are jointly entitled to their parent's interest (which is one-fifth) in the jointly acquired lettetpwa property of their grandfather and step-grandmother, where their mother had predeceased the step-grandmother. Rang. C. R. 9 of 1927 and A. I. R. 1925 Rang. 80, Rel. on. (*Carr, J.*) MAUNG AUNG THIN *v.* MA NGWE U. **6 Rang. 355 = 113 I. C. 142 = A. I. R. 1928 Rang. 139.**

——Husband can sue for moneys entrusted by him without joining his wife. (*Das, J.*) MAUNG E. MAUNG *v.* MA CHIT MAY. **A.I.R. 1930 Rang. 295 (a) at 296.**

——The husband brought a piece of land as the payin to the marriage. The property was situate at the place where the couple resided. After the death of his first wife, he married a second wife and continued to live at the same place for a long time. Then he changed his place of residence. He retained the land for several years and then sold it and immediately purchased another land in a nearer village for convenience of enjoyment.

Held, that the land did not become lettetpwa but retained its character as payin. A. I. R. 1921 L. B. 46, Appr. (*Maung Ba, J.*) MAUNG SAN DUN *v.* MA LOK. **6 Bur. L. J. 219 = 105 I. C. 470 = A.I.R. 1927 Rang. 318.**

——*Property of marriage is liable for partnership debts, even after separation of shares.*

Ordinarily a decree against either husband or wife, who are subject to the Burmese Buddhist law of marriage and are consequently partners, can be executed against any part of the partnership property, that is the property of the marriage. A. I. R. 1927 Rang. 209 (F.B.), Foll.; A.I.R. 1926 Rang. 172, Reversed. (*Heald and Cunliffe, JJ.*) Y. R. M. A. L. CHETTYAR FIRM *v.* MAN HAN. **5 Rang. 443 = 105 I.C. 244 = A.I.R. 1927 Rang. 299.**

——*Property of marriage is impartible—Business debts incurred by husband as manager—Decree against him is executable against whole of marriage property.*

The property of the marriage of a Burmese Buddhist husband and wife is not partible so long as the marriage subsists: and where the husband manages the business of the family, a decree against the husband can be executed against the whole of the property including the wife's interests in such property. (*Heald and Chari, JJ.*) MA PAING *v.* MAUNG SHWE HPAN. **5 Rang. 478 = 104 I. C. 516 = A.I.R. 1927 Rang. 274.**

——*Payin property brought by husband to the marriage is available to satisfy a decree against him for debt incurred in business while living with wife during the subsistence of the marriage—Jointly acquired lettetpwa property also can be so sold.*

In respect of the property of the marriage whether that property be the payin property of either party or lettetpwa property of the marriage, a Burmese Buddhist husband and wife are partners, and all the property of the marriage, whether payin or lettetpwa, is partnership property. In Burmese Buddhist Law the partnership between husband and wife is dissolved only by death or divorce, and neither partner is entitled to separate possession of any share of the partnership property or of the profits of the partnership until the partnership is dissolved by the death of one partner or by divorce. Either husband or wife or both may represent the partnership in dealing with their persons. There is a presumption that debts contracted by either partner bind the partnership and are recoverable out of the partnership property. There is a presumption that a suit brought against either of the partners is a suit against the partnership and that in such a suit a partner who is not joined as a party to the suit is represented by the partner who is joined as a party. A decree against either partner can ordinarily be executed against any partnership property. Therefore where property which was payin property brought by a Burmese Buddhist husband to the marriage is during the subsistence of the marriage sold in execution of a decree against him for a debt incurred by him in a business carried on by him while he was living with the wife, no question of the separate interests or shares of husband and wife in such property ordinarily arises, because payin property is property of the marriage and the whole of the property of the marriage is ordinarily available for the satisfaction of debts incurred by either husband or wife Where the property is jointly acquired lettetpwa property no such question ordinarily arises for a similar reason. A decree against a Burmese Buddhist husband or wife can ordinarily be executed against the property of the marriage, whether payin or lettetpwa, to the extent of so much of such property as is necessary to satisfy the decree. Case-Law fully discussed. 10 L. B. R. 36 (F.B.) and 3 Rang. 322 = A. I. R. 1925 Rang. 329 = 94 I. C. 797, Overruled. (*Rutledge, C.J. Heald, Chari, Maung Ba and Doyle, JJ.*) MA PAING *v.* MAUNG SHWE HPAW. **5 Rang. 296 = 103 I. C. 568 = 6 Bur. L J. 166 = A.I.R. 1927 Rang. 209 (232) (F.B.).**

——*Execution—Decree binding—Joint business by Buddhist husband and wife—Part of joint property in the name of husband only—Husband mortgaging it—Decree in the mortgage suit against husband was held binding on wife also.*

Where a Buddhist husband and wife carried on a ginning business and part of the joint property was in the name of the husband only and he mortgaged it and the mortgagee brought a suit in which the property was brought to sale without impleading the wife,

Held, that the husband was not only the managing partner, but also the benamidar of the wife in respect of any interest she may have had in the mortgaged property and that she was bound by the decree passed against the husband. 10 L. B. R. 36 (F. B.), Dist. (*Heald and Chari, JJ.*) M. E. MYA *v.* JAPAN COTTON TRADING CO. **5 Bur. L. J. 218 = 101 I. C. 354 = A. I. R. 1927 Rang. 119.**

——*Claim of an eldest son to one-fourth share on the re-marriage of the parent is not a claim as orasa son but an entirely different one.*

The claim which an eldest son has to one-quarter share on the re-marriage of his father is not a claim as orasa son arising on the death of a parent; but it is an entirely different claim of the eldest son to a quarter share on the re-marriage of the surviving parent. (Case-law discussed.) (*Lentaigne, J.*) MA E MYA *v.* U PE LAY. **3 Rang. 281 = 90 I. C. 958 = A. I. R. 1926 Rang. 65.**

——*Re-marriage of the father of the orasa son gives the son a right to one-fourth share, though his mother's death does not give.*

Though an orasa son cannot claim a one-fourth share of the property jointly acquired by his parents merely by reason of his mother's death, the re-marriage of his father gives him a right to claim the one-fourth share which he would not have if his father did not re-marry. 1 L. B. R. 23; 11 L. B. R. 199, Foll. (*Lentaigne, J.*) MA E MYA *v.* U PE LAY. **3 Rang. 281 = 90 I. C. 958 = A. I. R. 1926 Rang. 65.**

——*Right of an eldest son to claim one-fourth share on the re-marriage of his father is vested and definite right and devolves on his heirs and legal representatives*

The claim which an eldest son has on the re-marriage of his father to one-quarter share is a vested interest and right and therefore such vested interest and right must devolve on the heirs and legal representatives of the holder of the vested interest or definite right to the one-fourth share. (*Lentaigne, J.*) MA E MYA *v.* U PE LAY. **3 Rang. 281 = 90 I. C. 958 = A. I. R. 1926 Rang. 65.**

——Eindounggyi *with two wives—Property inherited by husband after second marriage is* lettetpwa—*Share of each of two wives in such property is one-sixth —Such share is not liable for husband's debts—Rule for couples previously unmarried applies to marriage between an* eindounggyi *and previously married husband or wife.*

Where a Burman Buddhist *eindounggyi* having two wives, inherits after the second marriage immovable property from his father, the property is *lettetpwa* of the marriages and is joint property of the husband and wives and not *thinthi* or the separate property of the husband. The share of the two wives jointly is one-third and since they are of equal status the share of each is one-sixth. Each wife acquires a vested interest in one-sixth of the property from the date on which it is inherited and such interest is not liable for all or any part of the debts incurred by the deceased husband alone. [*Maung Shwe Ngon* v. *Ma Mi Dwe*, S. J. 110 Dissented from.] The rule for partition on divorce by mutual consent where neither party was at fault between an *eindounggyi* and a husband or wife who had not been previously married is the rule which applies where neither party had been married before. (Text and Case-law discussed.) (*Robinson, C. J. Carr and Maung Gyi, JJ.*) C. T. P. V. CHETTY *v.* MAUNG THA HLAING. **3 Rang. 322 = 94 I. C. 797 = A. I. R. 1925 Rang. 329 (F.B.).**

——*On partition at father's re-marriage, children cease to have claim on share of father at partition or to lettetpwa of his marriage with their step-mother.*

After a partition by a parent on second marriage, the children of the first marriage have no further claim on the property taken to the second marriage by that parent, any how in regard to such property as was made the subject of that partition. The children of the first marriage are debarred, by the fact of the partition, from sharing, after the decease of their father, in the lettetpwa of his marriage with the step-mother. 9 B. L. T. 97 Foll. (*Duckworth and P. Han, JJ.*) MA JOKE *v.* MA U LE. **1 Rang. 487 = 76 I. C. 838 = A. I. R. 1924 Rang. 71.**

——*Children of first marriage take property brought by parents to the second marriage, if there is joint property of the second marriage.*

So long as a Burman Buddhist husband and wife are alive, their property from whatever source derived, forms one estate, in which all members of the family have an interest but which is under the control of husband and wife. If one of the couple dies and the surviving partner marries again, the property is ordinarily treated as the property of the second marriage during the continuance of that marriage and forms one estate together with property acquired during the second marriage. It is only on the death of the surviving spouse of the first marriage that the manner in which the property is acquired becomes important. The rules laid down in S. 229 of Vol. I of the Ex-kinwan-Mingyi's Digest provide for the partition of what is treated as one estate in such an eventuality. Similarly when, after the death of the common spouse, the surviving widow or widower retains the property still in tact and no partition takes place, the Dhammathats appear to contemplate the estate as still one estate only; it is only when claim to partition is made, the importance of the manner in which the property is acquired arises. It appears therefore that although under the rules set forth in S. 238, the children of the first marriage obtain the whole of the property of the first marriage and no share in the rest of the property, they are still suing for partition of an estate. If there is joint property of the last marriage, the children of the first marriage each takes the property brought by their parents to the subsequent marriage. (*Brown, A. J. C.*) MOUNG LU GALE *v.* MAUNG LU PO. **4 U. B. R. 140 = 1 Bur. L.J. 267 = 77 I. C. 53 = A. I. R. 1923 Rang. 110.**

——*Ancestral property—No presumption as to jointness exists.*

Buddhist law does not say that ancestral land must be presumed to remain undivided until the contrary is proved. There is no such presumption in Buddhist law. No general rule can be laid down as to the burden of proving jointness or separation without regard to the facts and circumstances of each particular case. (*Maung Kin, J.*) MAUNG SHWE LA *v.* MA KYWE. **1 Bur. L. J. 174 = 74 I. C. 9 = A. I. R. 1923 Rang. 92.**

——*Divorce— Division of property—*Payin *does not become* lettetpwa *simply because it has changed its form during marriage.*

On a partition of property on a divorce by mutual consent *Payin* property will go to the party who brought it to the marriage and this rule is still to apply even though the property may have been changed in form provided it has not been merged entirely in the jointly acquired property and so changed its character. Change of form does not affect the rule so long as the *payin* can be identified, although the profits arising from such changed property may be *lettetpwa*. (*Robinson, C.J. and MacGregor, J.*) MAUNG SHAWE THA *v.* MA WAING. **11 L. B. R. 48 = 70 I. C. 562 = A.I.R. 1921 L.B. 46.**

Marriage.

——*Consent of parties is essential to constitute legal marriage.*

To constitute a marriage under the Burmese Buddhist Law no special ceremony is necessary. But the essential requirement is the consent of parties. *P* in a suit for restitution of conjugal rights against *T* brought evidence to the effect that his parents negotiated with the parents of *T* for the marriage and had given them certain presents. A marriage ceremony took place without the presence of *P* and *T* according to the custom of the locality. *T* never received *P* afterwards and repudiated the marriage on the same day.

Held, that in the circumstances of the case no consent could be presumed and the marriage could not be regarded as legally binding. (*Brown, J.*) MA THEIN TIN *v.* MAUNG PO THON. **A. I. R. 1930 Rang. 210.**

——*Husband's misconduct disentitles him to decree for restitution of conjugal rights.*

If a Burmese Buddhist husband misconducts himself with his wife and treats her extremely badly the case is not in which restitution of conjugal rights can be ordered to him. (1909) U. B. R. 1st Qr. Buddhist Law 1; (1904) U. B. R. 4th Qr. Buddhist Law 5, Ref. (*Heald and Otter, JJ.*) MA THEIN NWE *v.* MAUNG KHA. **7 Rang. 451 = 120 I. C. 137 = A. I. R. 1929 Rang. 307.**

——*A youth can contract a valid marriage at any time after he is physically competent for marriage.*

There is nothing in Burmese Buddhist law which prevents a youth from contracting a valid marriage at any time after he is physically competent for marriage. 3 U. B. R. 75 and A. I. R 1925 Rang. 280, Foll.

A Buddhist wife sued her husband for divorce on the ground that he had deserted her and had married another wife, and for partition of property on the basis of a divorce as by mutual consent. The husband contended that there was no valid marriage between him and the wife because he was only about 16 years of age when he went through the ceremony of marriage with her. He admitted that there was co-habitation and a child of the union.

Held, that the marriage was valid and there was no basis for the suggestion that the marriage was invalid because the husband was too young to contract a valid marriage. (*Heald and Maung Ba, JJ.*) MAUNG THEIN MAUNG *v.* MA SAW. **6 Rang. 340 = 111 I. C. 474 = A. I. R. 1928 Rang. 209.**

———*Desertion by husband for three years—Marriage is automatically dissolved.*

When a Burmese Buddhist husband deserts his wife and for three years, neither contributes to her maintenance nor has any communication with her, the marriage is automatically dissolved on the expiration of three years from the date of desertion and no further and expressed act of volition on the part of one party to the marriage is necessary to effect such dissolution. 3 L.B.R. 175 (F. B.), Overruled. (Case-law reviewed). (*Rutledge, C. J., Brown, Carr, Maung Ba and Mya Bu, JJ.*) MA NYUN *v.* MG SAN THIN. **5 Rang. 537 = 6 Bur. L. J. 125 = 105 I. C. 399 = A. I. R. 1927 Rang. 294 (F.B.).**

———*Union between Burmese woman and a Hindu following Buddhist faith for 25 years is legal marriage and the husband is entitled to the custody of the children of the union.*

Where a union was formed between a Burmese Buddhist woman and a Hindu who followed the Buddhist faith for 25 years, and there was no evidence to show that he was at any time a Hindu of the four recognized castes, the tenets of which might have rendered a valid union between them impossible.

Held, that the union is a legal marriage and the husband is entitled to the custody of the children of the union. (*Heald and Mya Bu, JJ.*) MA KYAW *v.* C. R. BISWAS. **6 Bur. L. J. 158 = 104 I. C. 348 = A. I. R. 1927 Rang. 280.**

———*Chinaman marrying Burmese Buddhist woman—Burmese law applies unless special custom, not working injustice on the woman, is proved—Burma Laws Act* (1898), *S.* 13 (1).

The Burmese Buddhist law regarding marriage is *prima facie* applicable to Chinese Buddhists as the *lex loci contractu*; and to escape from the application of Burmese Buddhist law regarding marriage a Chinese Buddhist must prove that he is subject to a custom having the force of law in Burma and that that custom is opposed to the provisions of Burmese Buddhist law applicable to the case; and in case the matter in issue is the marriage of a Buddhist Chinaman with a Burmese Buddhist woman he must show that the application of the custom having the force of law will not work injustice to the Burmese Buddhist woman. Cases considered. (*Rutledge, C. J. Das, Maung Ba and Brown, JJ.*) *In re* MA YIN MYA *v.* TAN YAUK PU. **5 Rang. 406 = 6 Bur. L. J. 135 = 104 I. C. 478 = A. I. R. 1927 Rang. 265 (270) (F.B.).**

———*Pratt, J.*—No ceremony is necessary under the Buddhist law for validating a marriage. (*Pratt and Mya Bu, JJ.*) MA TIN U *v.* MA MA THAN. **5 Rang. 359 = 105 I. C. 45 = A. I. R. 1927 Rang. 250.**

———To constitute a valid marriage elopement with the intention of marrying and consummation of the marriage is sufficient. (*Doyle, J.*) MA E SEIN *v.* MAUNG HLA MIN. **4 Bur. L. J. 258 = 27 Cr. L. J. 725 = 95 I. C. 53 = A. I. R. 1926 Rang. 88.**

———*Marriage can validly be contracted by a youth of* 16.

A Burmese youth of over 16 years of age can contract a valid marriage. (*Doyle, J.*) M. E. SEIN *v.* MG. HLA MIN. **4 Bur. L. J. 258 = 27 Cr. L. J. 725 = 95 I. C. 53 = A I. R. 1926 Rang. 88.**

———*Cr. P. Code, S.* 488—*Claim for maintenance —Law to be applied for proving marriage between Burmese woman and half caste Chinese is Chinese Customary Law.*

Chinese Customary law is the law to be applied in determining the question whether a Burmese woman is the wife of a Chinese half caste who claims to be a Confucian, so that she can claim maintenance under S. 488. The Court may, in certain cases, allow the presumption of marriage from long co-habitation with habit and repute to prevail. (*Maung Ba, J.*) MA U *v.* MG. KYIN HTAT. **4 Bur. L. J. 255 = 94 I. C. 608 = 27 Cr. L. J. 656 = A. I. R. 1926 Rang. 82.**

———*Girl below* 20 *years cannot validly contract without guardian's consent.*

Under Burmese Buddhist law, no minor girl under the age twenty can contract a valid marriage without the consent or against the will of her parents or guardian, or the relations under whose protection she is living. (*Robinson, C. J., Maung Gyi and Brown, JJ.*) MA E SEIN *v.* MG. HLA MIN. **26 Cr. L. J. 1613 = 4 Bur. L. J. 123 = 3 Rang. 455 = 90 I. C. 717 = A. I. R. 1925 Rang. 280 (F. B.).**

———*Polygamy—Absence of ceremonies—Long union may raise presumption.*

Among Burman Buddhists polygamy is undoubtedly lawful and a Burman Buddhist may have, at the same time, two or more wives who are on an equal footing. There can be no doubt that, under Burmese Buddhist law, although there may not be sufficient evidence of an actual giving and taking in marriage—since, no ceremony of any kind is essential for the purposes of lawful wedlock—the conduct of the parties, subsequent to their coming together, may raise a strong presumption of marriage, especially when the union has lasted for a long period. (*Heald and May Oung, JJ.*) MAUNG THA DUN *v.* MA THEIN YIN. **1 Rang. 1 = 73 I. C. 1044 = A. I. R. 1924 Rang. 37.**

———*Shan Buddhists in Burma—Presumption of, rests on habit and repute of the parties.*

The personal law of Shan Buddhists, resident in Burma, does not appear to be in any way different from that of Burman Buddhist and the ordinary Buddhist Law applies. Shan notions concerning sexual relationship are extremely lax and the term "Ma Ya" (wife) is indiscriminately applied to women kept as mere concubines as well as those properly married. The presumption of marriage arising from co-habitation must rest on habit and repute and when proof of marriage depends wholly on habit and repute, the conduct of the parties concerned is of great importance. The alleged husband must be shown to have treated the alleged wife in a way which clearly and unmistakably reveals his intention to confer on her the required status and the alleged wife must be shown to have acted all along in such a manner that it would be patent that she asserted that status. (*Heald and May Oung, JJ.*) MA SHWE YIN *v.* MAUNG BA TIN. **1 Rang. 343 = 76 I. C. 620 = 2 Bur. L. J. 114 = A. I. R. 1923 Rang. 218.**

———*Co-habitation raises presumption of marriage.*

Co-habitation over a period of years, where there is no impediment to marriage, raises a presumption of marriage. (*Heald and Lentaigne, JJ.*) MAUNG PO

BUDDHIST LAW—Burmese—Marriage.

MOUNG *v.* MAY PYIT YA. **1 Rang. 161= 2 Bur. L. J. 79=74 I. C. 933= A. I. R. 1923 Rang. 180.**

——*Marriage by minor girl—Consent of guardian is not necessary.*

The marriage of a minor girl does not require the consent of her guardian for its validity and on her death the husband will be entitled to succeed to her share. 1 L. B. R. 297, Foll.; 1 U. B. R. (1902-03) Cr.—Penal Code 15, Ref. (*Maung Kin, J.*) MOUNG SEN TUN *v.* MOUNG SEN NYOM. **1 Bur. L. J. 144= 81 I. C. 32=A. I. R. 1923 Rang. 76.**

——The law of the place where a marriage is contracted determines the validity of a marriage. (*Robinson, J.*) MA TWE *v.* LWE HAIN. **13 Bur. L. T 105= 59 I. C. 555=22 Cr. L. J. 123.**

——*Consent obtained by pressure, if free.*

There must be free consent of the parties for valid marriage under the Buddhist Law, and a consent reluctantly given under pressure is not such free consent as is required by that law. (*Robinson, J.*) MA TWE *v.* LWE HAIN. **13 Bur. L. T. 105 =59 I. C. 555= 22 Cr. L. J. 123.**

Minor.

——A mother's sister is a preferential guardian to a putative father or step-father when the estate belonged to the minor's deceased father. (*Heald, Offg. C.J. and Mya Bu, J.*) MA ZAW MAY *v.* MAUNG BA U. **A.I. R. 1929 Rang. 284.**

——*Guardian appointed by Court—Natural guardian may dispose of the immovable property of the minor if the circumstances are so clear that he is acting in the interests of the minors.*

It cannot be said that in no circumstances can a Burman Buddhist, being a natural guardian, validly dispose of the immovable property of his children for whom the guardian has been appointed by the Court. Circumstances may exist which make it so clear that he is acting in the interests of the minor that a transfer by him may be upheld. (*Brown, J.*) A. R. V. CHETTYAR FIRM *v.* MAUNG HLA GYI. **6 Rang. 329= 111 I. C. 469=A. I. R. 1928 Rang. 199.**

Partition.

——Kanitha children can sue for partition after the death of one parent on the remarriage of the surviving parent. A.I.R. 1926 Rang. 211 and 2 L. B. R. 255, Rel. on; A. I. R. 1921 L. B. 68, Cons.; 2 U. B. R. 46, not Foll.: A. I. R. 1914 P.C. 97, Ref. (*Rutledge, C. J. and Brown, J.*) MA THEN *v.* MA MYA. **7 Rang. 193= 118 I. C. 124=A. I. R. 1929 Rang. 218.**

——*Right of kanitha child to claim partition after death of one parent on the re-marriage of survivor can be claimed by keiktima child.*

A keiktima child is in all ordinary circumstances entitled to equal partition of inheritance with the natural children. That being so, the right of kanitha child to claim partition after the death of one parent on the remarriage of the survivor can be claimed by a keiktima child. A. I. R. 1926 Rang. 148, Rel. on. (*Rutledge, C. J. and Brown, J.*) MA THEIN *v.* MA MYA. **7 Rang. 193=118 I. C. 124= A. I. R. 1929 Rang. 218.**

——*Father re-marrying—Children entitled to half estate by partition.*

Where a widower re marries his children by the first wife at once acquire a right to partition of the estate, and the share of the children collectively is one half, while the father takes one half. A. I. R. 1926 Rang. 211, Foll. (*Rutledge, C. J. and Carr, J.*) MA SHWE YU *v.* MA KIN NYUN. **7 Rang. 240= 118 I. C. 630=A. I. R. 1929 Rang. 155.**

BUDDHIST LAW—Burmese—Partition.

——*Death of either parent, surviving parent remarrying—Children are entitled to partition of property at the time of re-marriage.*

When, after the death of one parent, the surviving parent re-marries the children of the first marriage are entitled to partition of the estate held by surviving parent at the time of re-marriage, unless of course there has already been a partition between the surviving parent and the children. A. I. R. 1926 Rang. 23; A. I. R. 1924 P. C. 88, Rel. on; 8 L. B. R. 501; A. I. R. 1927 Rang. 143, Doubted. (*Rutledge, C. J. and Carr. J.*) MA SHWE YU *v.* MA KIN NYUN. **7 Rang. 240=118 I. C. 630= A. I. R. 1929 Rang. 155.**

——*Step-children have right of partition on three occasions and fresh cause of action arises every time*

The first right that the children have after the death of one parent, when the surviving parent re-marries, is to claim a partition immediately. Where there has been such a partition on marriage, the children of the first marriage have no further claim to inherit against their step-parent or, after the death of their step-parent, against the direct descendants of that step-parent; secondly, if the children of the first marriage have not made a claim on the re-marriage of their parent they have a right to claim a share on the death of their parent from the surviving step-parent, whether there are or are not children by the second marriage; and thirdly, if the children of the first mariage have not made any claim on either of the two occasions above mentioned, they have a further right to partition on the death of the step-parent. In view of the fact that there are three different rules for partition: first on the marriage of the surviving parent; secondly; on the death of the surviving parent after re-marriage, and thirdly, after the death of the step-parent; it must be held that in each of these cases there is a fresh cause of action arising either from the re-marriage or from the death in question. A. I. R. 1926 Rang. 211; A. I. R. 1924 Rang. 71; A. I. R. 1925 Rang. 184; A. I. R. 1924 P. C. 88 and A. I. R. 1925 Rang. 340 (F. B.). Rel. on; 9 L. B. R. 176, Diss. from. (*Carr, J.*) MAUNG AUNG THIN *v.* MA NGWE U. **6 Rang. 355= 113 I. C. 142=A. I. R. 1928 Rang. 139.**

——*Grand-children by orasa child are not entitled to partition against their grand-father on his re-marriage.*

After the re-marriage of their grand-father on the death of grand-mother, out-of-time grand-children by the orasa child are not entitled to claim a partition against their grand-father. (*Carr and Mya Bu, JJ.*) MA AH PU *v.* U. PO LAI. **5 Bur. L. J. 203= 100 I. C. 323=A. I. R. 1927 Rang. 111.**

——*What is regarded for partition is family and not individual and all members are entitled to partition.*

What the Burmese Buddhist Law regards in its rules for partition is the family rather than the individual and so long as the family subsists, all who are members of it are regarded as being entitled to partition of its property on its dissolution. (*Heald and Chari, JJ.*) MAUNG PO SAN *v.* MAUNG PO THET. **3 Rang. 438= 91 I. C. 653=A. I. R. 1926 Rang. 23.**

——The grand-children take one-fourth of the share of their deceased parent. As an example of the application of this rule, in the case of two children one of whom has predeceased the parents, his share would have been one-half had he been alive. His children therefore take one-eighth and the remaining seven-eighths go to the surviving child. (*Carr, J.*) MAUNG SHWE YE *v.* MAUNG PO MYA. **3 Rang. 464 = 91 I. C. 684 = A. I. R. 1926 Rang. 4.**

——*Second marriage by father—Settlement and partition are usual to be made in favour of children by first marriage.*

Amongst Burmese Buddhists when the mother dies and the father marries again, it is usual to make a family partition and settle the children of the first marriage. It is most unusual for a father, when he re-marries merely to make gifts, and still more unusual to include in those gifts of the bulk of his landed property. (*Duckworth and Pratt, JJ.*) MG. PO LUN *v.* MA E MAI. **1 Bur. L. J. 111 = 74 I. C. 47 = A. I. R. 1923 Rang. 57.**

Pre-emption.

——*Offer to co-heir may precede that to stranger—Necessary conditions—If conditions are satisfied no second offer is necessary.*

The offer to the co-heirs may precede that to a stranger, but must all form part of one and the same transaction and be of the same or a smaller price than that at which it is offered to the stranger, and if these conditions are carried out there is no necessity for a second offer to the heirs when they have once refused to buy. (*Young, J.*) MAUNG MAUNG *v.* MAUNG SHWE GOE. **2 Rang. 678 = 85 I. C. 295 = A. I. R. 1925 Rang. 194.**

——*Property left by deceased husband—Sale by widow—Younger son cannot pre-empt.*

A younger son is not a co-heir, with his mother, to his deceased father's estate. So he has no right of pre-emption in respect of property left by his father. (*Duckworth, J.*) MAUNG SAN TIN *v.* MA PHET PU. **2 Rang. 659 = 85 I. C. 284 = A. I. R. 1925 Rang. 192.**

——*Property jointly acquired by husband and wife—Sale by husband after wife's death—Sons of the marriage and wife's sons by first husband can pre-empt.*

Where a widow with two sons by first husband married a second husband by whom she got two sons and during coverture the husband and wife acquire land jointly and where on the wife's death, the husband married again and thereafter sold the land, *Held* the four sons of the deceased are entitled to pre-emption—4 L. B. R. 128; 8 L. B. R. 466. May Oung's Leading Cases 157 and 3 B. L. J. 21—Referred to. (*Young and Carr, JJ.*) MAUNG PO THAUNG *v.* MAUNG E PE. **3 Bur. L. J. 240 = 2 Rang. 529 = 84 I.C. 465 = A. I. R. 1925 Rang. 85.**

——*Right of pre-emption can be enforced only with reference to sale effected by a co-heir—A younger son can't pre-empt sale by his mother of property owned before her husband's death by him and her.*

The right of pre-emption can be enforced only against the persons or the person who inherited the land jointly with the claimants. It is only amongst the co-heirs (amwesaing or amwesabet) that the right can exist, that is to say, persons on whom an estate has devolved. The term includes only those who have inherited the property jointly from a common ancestor, as for instance, the children of a deceased person. Where the properties originally belonged to a husband and wife and the husband died leaving his wife and children, and the wife sold some of the properties.

Held, that the younger son could not pre-empt the sale as the wife had absolute right subject to certain claims by the eldest son and the eldest daughter, to the property and as she and her children were not co-heirs: 4 L.B.R. 128, Dist. (*Duckworth, J.*) MAUNG BA CHO *v.* MAUNG SAN TIN. **2 Rang. 437 = 84 I. C. 287 = A. I. R. 1925 Rang. 63.**

——*Law of pre-emption applies to sales of undivided property before partition.*

Among Buddhists the law of Pre-emption applies to a sale by a co-heir of his share in undivided ancestral estate. The decision in 8 L. B. R. 468 does not alter the rule laid down in 4 L. B. R. 128 to that effect 8 L. B. R. 466 referred and explained. (*Young, J.*) MAUNG PO GYI *v.* MAUNG PO SAING. **2 Bur. L. J. 21 = 80 I. C. 259 = A. I. R. 1924 Rang. 266.**

Succession.

Disinheritance.
Heirs.
Orasa.
Per capita or per stirpes.
Preference amongst heirs.
Rules of.
Shares.
Miscellaneous.

Succession—Disinheritance.

——Where a daughter is born, after her mother and father divorced, but where the father takes back his daughter at the age of five, when her mother remarried, it is strong evidence that filial relationship had never been severed and the daughter is not disqualified from inheriting. A.I.R. 1928 Rang. 289, Rel. on. (*Doyle, J.*) PO HTE MAUNG *v.* MA BWIN. **A. I. R. 1930 Rang. 264.**

——*Daughter of separated couple not maintaining filial relationship with father is not to be excluded from inheritance to father in absence of widow or other children.*

The daughter of a separated couple who does not maintain filial relationship with her father is not excluded from inheritance in the absence of any widow or other children entitled to inherit. In such a case where the father has been living with her brother till his death the daughter is entitled to one-half share and the brother to the other half in the estate of the deceased. 2 U.B.R. 15, Rel. on. (*Cunliffe and Carr, JJ.*) MA SAW MAY *v.* MAUNG HTU THA. **A. I. R. 1930 Rang. 161.**

——*Serious quarrel between father and child and use of unfitting abusive language by latter to former—Afterwards total absence of filial relationship between them—Child loses right to inherit father.*

Where a serious quarrel takes place between a child and father a few years before latter's death in which the former behaves in such a way as if he was going to use weapons against the father and abuses him in the manner most unbecoming to a child and where afterwards there is a total absence of filial relationship, the child loses the right to inherit to its father. (*Cunliffe and Carr, JJ.*) MA NGWE BWIN *v.* KO PO WIN. **A. I. R. 1930 Rang. 146.**

——*Inimical conduct sufficient to disinherit, explained.*

The plaintiff *S* was the adopted grandson of a Burmese lady *K*. In 1911 *S* went to live with his wife's parents with the consent and approval of *K*. In 1912 *K* and *S*'s father *P* quarrelled and criminal proceedings against *K* were taken by *P*. *S* did not take part in the proceedings beyond attending Court. Subsequently *K* filed a civil suit against *P* and *S*. Here too *S* took no part except that he filed a written statement probably at *P*'s instructions. *K* entertained no ill-feelings against *S* though *S* was dragged into litigation on legal advice. *K* who was living with her sister, fell ill, *S* occasionally visiting her. *S* went and actually stayed with *K* for the night before *K* died and *S* did take a part, not unimportant, in *K*'s funeral ceremonies.

Held, that *S* was not guilty of any unfilial or inimical conduct which would deprive him of his right of inheriting *K*. (*Sir Lancelot Sanderson.*) MAUNG BA PE *v.* MAUNG SHEW BA. **6 Rang. 520 = 28 M. L. W. 129 = 48 C. L. J. 177 = 33 C.W.N. 70 = 110 I. C. 306 = A I. R. 1928 P. C. 197 = 55 M. L. J. 95 (P. C.).**

———*Divorce of parents does not* per se *extinguish rights of inheritance of children—Continuance or discontinuance of filial relations is the deciding factor.*

Where there is a divorce the children ordinarily go with one or other of the parents and lose the right to inherit from the parent with whom they cease to live unless they maintain or resume filial relations with that parent.

A divorce of the parents does not *per se* extinguish the rights of inheritance of their children. It is a question of continuance or discontinuance of filial relations after the divorce which is the deciding factor in all such cases. (Case law considered). (*Pratt and Mya Bu, JJ.*) MA TIN U *v.* MA MA THAN. **5 Rang. 359 = 105 I.C. 45 = A. I. R. 1927 Rang. 250.**

———*Adopted son living apart does not lose right to succession unless filial relationship is severed.*

An adopted son will not lose his right to inheritance merely by living apart from his parents unless severance of filial relationship is proved. (*Maung Ba, J.*) MAUNG SAN U *v.* MA PYAW GYI. **6 Bur. L. J. 10 = 100 I. C. 1007 = A. I. R. 1927 Rang. 195.**

———*Child taken away on divorce by one of the spouses is not an heir unless filial relationship is resumed between his parents—Step-child must prove such resumption.*

A child taken away by one of its parents on divorce loses the rights of inheritance as a member of the family of the other parent unless there has been maintenance or revival of filial relationship between it and the latter: (1872-92) S. J. 184; 2 U. B. R. 194; 2 U. B. R. 159 and 2 U. B. R. 116 and 10 L. B. R. 107, Foll.: A. I. R. 1925 P. C. 29, Dist.

A child who goes away or remains behind with one of parents on their divorce must necessarily show that, in spite of severance, filial relations between it and the other parent have not been broken off or have been resumed so as to be entitled to inherit in the latter's estate: 4 L. B. R. 272; 5 L. B. R. 133 and 6 L. B. R. 167, Rel. on. (*Mya Bu, J.*) MA SHWE YOU *v.* MA WAING. **4 Rang. 412 = 5 Bur. L. J. 193 = 99 I. C. 387 = A. I. R. 1927 Rang. 41.**

———*Grand-children's right is not defeated by separate living.*

The requirement that the grand-children should live with the grand parents in order that they should be entitled to inherit at all is now obsolete. (*Young and Carr, JJ.*) MA NAN SHWE *v.* MA SEIN. **2 Rang. 514 = 84 I. C. 918 = A. I. R. 1925 Rang. 80.**

———*Inferior wife living separate has no right to inherit to her husband.*

A wife of inferior status or ordinary concubine is entitled to three shares out of seven shares and a half, that is, to two-fifths, of the husband's estate but this applies to the case of wives living together with the husband. Where the wife of an inferier status lives apart, she is allowed to retain only such property as was in her actual possession but has no right of inheritance. (*Heald and May Oung, JJ.*) MA THEIN YIN *v.* MAUNG THA DUN. **2 Bur. L. J. 292 = 2 Rang. 62 = 79 I. C 501 = A. I. R. 1924 Rang. 105.**

———*Child of divorced wife living some time with mother and some time with father—No rupture of filial affection—Child is entitled to inherit.*

There is no provision in the Dhammathats enabling a father to disinherit his child except by giving him away in adoption to another, though a child who behaves as an enemy towards his parents is debarred from inheriting. A child who merely at his father's request lives separately from him is not included amongst the six classes of children who are not entitled to inherit. The Buddhist Code does not give any meritorious value to mere living together or make the opposite state of things a reason for exclusion, and there must be filial neglect to exclude. But if a child on the divorce of his mother accompanied by partition of property goes to live with her and ceases to be a member of his father's household he is debarred from inheriting from his father.

The plaintiff after her mother's divorce lived for a short time with her father and then went and lived with her sister. Later she returned and lived with her father and was doing so when he married his last wife. She continued to live with her father and her step-mother for sometime and then was sent by her father to live with her mother and she continued to live with her mother until her father's death, but during that time she paid two or three visits to her father.

Held, she was entitled to inherit. (*MacCall, J.*) MA NGWE KIN *v.* MA HME. **1 Rang. 42 = 74 I. C. 100 = A. I. R. 1923 Rang 206.**

———*Wife living apart for 8 years but not guilty of any misconduct—She is entitled to Letters of Administration in preference to grand-son—Prob. and Administration Act, S. 23.*

It is obvious that the broad propositions laid down in the Dhammathats can only be received with considerable qualifications and with due regard to modern customs and modes of thought. They cannot be argued as laying down strict rules of law without regard to particular circumstances. Where the wife left her husband's house, not of her own free will and lived in a house opposite that of husband's but continued to be dutiful towards her husband and there was no misconduct on her part entitling the husband to a divorce.

Held, it is quite impossible to say the wife had been guilty of any misconduct of such a nature as to disqualify her from inheriting her husband's estate. As the widow of the deceased, she had a better claim than the grand-son to Letters of Administration. (*Robinson, C. J. and Pratt, J.*) MAUNG MAUNG TIN *v.* MA HLA U——. **2 Bur. L. J. 58 = 75 I.C. 200 = A. I. R. 1923 Rang. 150.**

———*Separate residence of child does not show breach of filial relationship.*

Mere separate residence does not by itself now-a-days prove or even set up an inference of a breach of filial relations such as would deprive a child of his rights of inheritance. (*Pratt and Duckworth, JJ.*) KHOO HAUNG SEIN. *v.* KHOO. PEING HEO. **1 Bur. L.J. 56 = 70 I.C. 855 = A.I.R. 1922 L.B. 29.**

———*A single act of disobedience by an adult to her mother's whim, with no acts of enmity, will not disentitle her to inherit to her mother—A* Thwanokta *son is a dogson, incorrigible and at enmity.*

The plaintiff entered into a second marriage with a servant of her mother's household. On her mother's death she sued for her mother's estate and was opposed by her own children. It was contended that, her second marriage, being in defiance of her mother's wishes, in consequence of which there had been a complete breach, which had never been healed between her and her mother, she was debarred from inheritance,

Held, the texts which debar an incorrigibly disobedient child from inheriting refer to a child living with his parents and still subject to their authority and not to an adult child like the plaintiff respondent who had been married and had children of her own. Though by marrying plaintiff defied her mother's wishes, her marriage cannot be regarded as an act of disobedience, as she was under no obligation to obey.

A single act of disobedience, however gross, does not disqualify from inheritance, unless the act is an act of positive enmity. Both, the child who behaves like an enemy by abusing and assaulting his parents or otherwise, and the child who, without behaving like an enemy is incorrigibly disobedient, are debarred from inheriting (2 U. B. R. 1897-01, p. 169 ref.) (*McCall, A. J. C.*) MAUNG NYI MAUNG *v.* MA. NU **4 L. B. R. 104 = 1 Bur. L. J. 78 = 70 I. C. 904 = A. I. R. 1922 U. B. 12.**

Succession—Heirs.

——*Lunatic getting property not in partition but by inheritance—Persons taking care of lunatic do not take that property after his death.*

The rule that relatives who supported a lunatic child shall take its share, after its death does not apply where the share of the deceased child was not set aside on the death of the parents but was inherited by it. The principle laid down in the Manugye 10, 36, cannot be extended to cover all cases in which relatives take care of lunatics: A. I. R. 1925 Rang. 34, Expl. and Dist. (*Pratt, Offg. C. J. and Cunliffe, J.*) KO. SAN DWE *v.* MA MYEIN HLA. **6 Rang. 485 = 113 I. C. 808 = A. I. R. 1928 Rang. 300.**

——*Children by first marriage can sue for share after the death of both their parent and step-parent.*

S. 237 of Vol. I of Kinwun Mingyi's Digest which deals with partition between half-brothers and half-sisters is applicable to all cases and it is immaterial which parent dies first, and a step-child has a right to elect whether he would claim his share at once on the death of his own parent or whether he would defer his claim till the death of his step-parent also and claim the benefit of S. 237.

A Burman Buddhist died leaving surviving him children by his first wife and also the second wife and children by her. The second wife died subsequently and since her death one of the children of the first marriage put forward a claim for partition of the inheritance. The other child had already obtained a decree for its share under the rule applicable to a case when the step-parent was still living. There was no property brought by either the husband or the wife, but there was only jointly acquired property to be divided.

Held, that the children of the first marriage were entitled to one-third of the property acquired during the second marriage, and as one of the two children had already obtained a decree for its share when the step-parent was still living, the share of the other child would be one-half of one-third, *i.e.*, one-sixth: A. I. R. 1923 Rang. 110 and A. I. R. 1926 Rang. 23, Appr.: 9 L.B.R. 176, not Appr.: A. I. R. 1916 P. C. 145, Expl.; A. I. R. 1926 Rang. 65, Diss. from. (*Rutledge, C.J., Maung Ba, Heald, Carr, and Brown, JJ.*) MAUNG PO AUNG *v.* MAUNG KHA, **6 Rang. 427 = 112 I.C. 413 = A.I.R. 1928 Rang. 225 (F.B.).**

——*Congenital idiots are entitled to full share of inheritance.*

A child who is physically or mentally incompetent or defective, for instance a congenital idiot, is entitled to his full share of inheritance from its parents. (*Carr and Cunliffe, JJ.*) MAUNG PAN GYAW *v.* MA BEIN. **6 Rang. 128 = 110 I. C. 729 = A. I. R. 1928 Rang. 130.**

——*Co-wives—Senior wife inheriting—Junior gets no interest in the property.*

When a husband, who has a senior and a junior wife, dies, the junior wife will not be entitled to inherit a portion of the property inherited after marriage by the senior wife from her parents: A. I. R. 1925 Rang. 329, (F.B.), Dist. (*Pratt, J.*) MA GUN BON *v.* MA ME MI. **5 Rang. 448 = 105 I. C. 247 = A. I. R. 1927 Rang. 277.**

——*Daughter not taken by her mother with her at the time of her re-marriage but living with her maternal grand-mother—She not living with her father also, but father making monetary presents at the time of occasional visits to him—Daughter is entitled to inherit her father.*

Plaintiff's mother left her husband voluntarily taking her infant child with her. There was no formal divorce. At the time of contracting a second marriage, she did not take her daughter, the plaintiff, with her into her second husband's house. Plaintiff lived with her maternal grand-mother who was plaintiff's father's mother's cousin. Plaintiff used occasionally to visit her father who used to give her small monetary presents.

Held, that mere living apart under the circumstances cannot be considered unfilial conduct on the part of the minor plaintiff and that plaintiff did maintain filial relations with her father and was entitled to inherit his estate. (*Pratt and Mya Bu, JJ.*) MA TIN U *v.* MA MA THAN. **5 Rang. 359 = 105 I.C. 45 = A.I.R. 1927 Rang. 250.**

——It is only in respect of property acquired during the course of the marriage between her mother and the father, that a daughter can acquire interest in her father's property according to Burmese Buddhist Law. (*Otter, J.*) MAUNG KYAW ZA *v.* U. DE BI. **5 Rang. 125 = 6 Bur. L. J. 55 = 101 I.C. 634 = A.I.R. 1927 Rang. 143.**

——Under the Burmese law the surviving husband of a person who ex-hypothesi is the then surviving daughter is treated as one of the heirs of the father. (*Viscount Dunedin.*) MAUNG KI OH *v.* MA THET PON. **4 Rang. 513 = 1926 M. W. N. 489 = 94 I. C. 916 = 3 O. W. N. 735 = A. I. R. 1926 P.C. 29 (P.C.).**

——*Step-child of an inferior wife living separate is not entitled to succeed to step-parent.*

The provisions of the Burmese Buddhist Law as to step-children's inheriting from step-parents do not apply where the so-called step-child is the child of an inferior wife with whom the husband lived while still married to the superior wife, and where the step-child could not possibly be regarded as having belonged to the family of the so-called step-parent. (*Heald and Rutledge, JJ.*) MA CHO GALE *v.* MA NAN CHAW. **3 Rang. 521 = 93 I. C. 87 = A. I. R. 1926 Rang. 69.**

——*Pongyi's renouncing religious vows does not revive his right to succession.*

A *Pongyi* or a *rahan* at the time of the death of any of his relations cannot inherit from any of the relations even if he subsequently renounces his religious vows. This rule is founded on the assumption that by becoming a *pongyi* or *rahan* the person is (completely severed from his family as is quite unconnected with them) as if he were dead or adopted into another family.

Thus a person succeeding at the death of another person cannot be divested of the estate by a nearer person who was a *pongyi* or *rahan* renouncing his religious vows, sometime after the death of the person. (*Brown, J.C.*) MAUNG NI *v.* MAUNG THET SHE.
4 U. B. R. 159 = 76 I. C. 161 = A.I.R. 1925 Rang. 150.

———*The share of diseased married person devolves upon death of such person on the relation who was maintaining him or her during lifetime.*

The share of a married person who was severely diseased devolves upon his or her death, on the relation who was maintaining the person during his or her lifetime. (*Duckworth, J.*) MA SAW WIN *v.* MAUNG GYI. **2 Rang. 328 = 84 I. C. 966 = A. I. R. 1925 Rang. 34.**

———*Children by first marriage have no share after partition.*

If after the death of the husband, the wife partitions the property with her children and marries again taking her share with her on her death the children of her former marriage cannot claim from their stepfather any property which she took to the second marriage; because they have already obtained their shares.

The same rule applies when, after the death of the wife, the husband marries again after having given the children their respective shares. U. Gaung's Digest of Buddhist Law, p. 273, Ref. (*Mr. Ameer Ali.*) MA THAUNG *v.* MA THAN. **51 I. A. 1 = 80 I. C 1031 = 19 M.L.W. 477 = 51 Cal. 374 = 1924 M. W. N. 662 = 3 Bur. L.J. 333 = 29 C. W. N. 559 = 5 Rang. 175 = A. I. R. 1924 P. C. 88 = 46 M. L. J. 618 (P. C.)**

———*Inferior wife, must prove her rights.*

A husband may enter into and maintain conjugal relations with a person whose position falls short of that of his first or chief wife. But such second wife must, before she can succeed to her husband's estate, show that her connection with the deceased was such that she may be said to have been endowed with proprietary, as well as personal rights; and the proof required of her is more strict where she had prior knowledge of the existence of the first wife and lived separately from, and unknown to her. (*Heald and May Oung, JJ.*) MAUNG THA DUN *v.* MA THEIN YIN. **1 Rang. 1 = 73 I. C. 1044 = A. I. R. 1924 Rang. 37.**

———*Heir need not be of the same nationality or religion, a Chinese-Buddhist heir is not improper.*

Burmese Buddhist Law applies even though the parties on one side are not Burmese Buddhist, and the mere fact that an heir or heirs is not of exactly the same religion or nationality is therefore immaterial. There is no pvovision, which excludes the descendants or others who would ordinarily be entitled to rank as heirs of a Burmese Buddhist from inheritance on the ground of difference in nationality or religion. (*Pratt and Duckworth, JJ.*) KHOO HAING SEIN *v.* KHOO SEING HEO. **1 Bur. L.J. 56 = 70 I.C. 855 = A. I. R. 1922 L. B. 29.**

———*Property inherited by one of many wives during marriage descends to children of that wife only.*

Where a husband has had more wives than one, property inherited by one of those wives during marriage, if still in existence at the death of the husband and the wife, descends to the children by that wife, and the children by other wives can lay no claim to succeed to it. (*Brown, A. J. C.*) MA KHIN *v.* KIN KIN.
4 U. B. R. 11 = 63 I.C. 814 = A. I. R. 1921 U. B. 23.

Succession—Orasa.

———*Orasa son taking his share on father's death—He cannot inherit in remainder on death of surviving parent when she leaves children.*

Where there is a child of the family surviving the last dying spouse, the orasa who has taken a quarter share of the parental estate from the surviving parent on the death of the parent of the same sex does not retain any right to a further share in the partition of the remainder of the estate on the death of the surviving parent; 1 L. B. R. 50, Affirmed; 8 L. B. R. 501; A. I. R. 1924 Rang. 71 and A. I. R. 1926 Rang. 23. Ref. (*Heald and Mya Bu, JJ.*) MAUNG PO MYA *v.* MA HLA.
7 Rang. 409 = 120 I.C. 670 = A. I. R. 1929 Rang. 282.

———Right of an orasa son to a one-fourth share in the property of his parents is not affected even by the death of the surviving parents; A. I. R. 1924 Rang. 323, Relied on. (*Heald and Mya Bu, JJ.*) MA KYN *v.* MAUNG SHWE KYA. **6 Rang. 318 = 112 I.C. 233 = A. I. R. 1928 Rang. 258.**

———*Orasa son—Right to claim one-fourth devolves on his heirs.*

If the orasa son dies without having claimed his one-fourth share, such share devolves on his heirs and legal representatives: A. I. R. 1926 Rang. 65, Foll. (*Heald and Mya Bu, JJ.*) MA KYA *v.* MAUNG SHWE KYA.
6 Rang. 318 = 112 I.C. 233 = A. I. R. 1928 Rang. 258.

———*Kittima adopted son cannot claim quarter share.*

A kittima adopted son is not entitled to claim from an adoptive mother on the death of the adoptive father the auratha sons quarter share of the estate of the adoptive parents. (*Rutledge, C.J. Heald, Carr, Maung Ba Gyi and Chari, JJ.*) MAUNG PO AN *v.* MA DWE.
4 Rang. 184 = 5 Bur. L. J. 122 = 98 I. C. 621 = A. I. R. 1926 Rang. 148 (F. B.).

———*Eldest adopted child can claim as orasa.*

In the absence of natural children, a kittima child, if it be the eldest of adopted ones, has a right to claim immediate partition with its adoptive mother in respect of a fourth share in the joint estate of her adoptive parents: A. I. R. 1924 P.C. 238 = 2 Rang. 693: Foll. (*Rutledge, C.J. and Maung Ba, J.*) MA THEIN *v.* MA MYA. **5 Bur. L. J. 70 = 98 I. C. 565 = A. I. R. 1926 Rang. 146.**

———*Even if the* orasa *has not taken share on the death of surviving parent, he is entitled against step-children to take one half share in the jointly acquired property of the step-parent.*

Where the *auratha* son has not taken a share either on the re-marriage or on the death of the surviving parent he is regarded by Burmese Buddhist Law as being entitled to share in the estate of the step-parent, and in such part of that estate as can be regarded as jointly acquired property of the marriage of the parent an step-parent; his share as against his parent's step-children is one-half. (*Heald and Chari, JJ.*) MAUNG PO SAN *v.* MAUNG PO THET. **3 Rang. 438 = 91 I. C. 653 = A. I. R. 1926 Rang. 23.**

———*Even if the* Orasa *takes his share on the death of his parent, he is entitled to share on death or remarriage of the surviving parent.* (Obiter.)

Even if the *auratha* has taken his share on the death of a parent or on the re-marriage of the surviving parent, he is still entitled to claim a share on the death of the surviving parent or on the death of the step-parent unless separation is proved or is to be presumed. (*Heald and Chari, JJ.*) MAUNG PO SAN *v.* MAUNG PO THET. **3 Rang. 438 = 91 I. C. 653 = A. I. R. 1926 Rang. 23.**

———Orasa *son, doctrine of—Minor of* 11 *years cannot attain* Orasa *status.*

The eldest son if competent, is the representative of his father and in that capacity is entitled to one-fourth of the inheritance on the death of his father. By "competent" is implied, of an age to take his father's place. The whole doctrine of the *Orasa* son is based on his being in a position to take his father's place. A minor son of 11 years of age cannot be said to have attained the status of an *Orasa* son. (*Pratt J.*) U. TUN GYWE *v.* KO KO GYI. **94 I. C. 531 = 4 Bur. L.J. 67 = A. I. R. 1925 Rang. 245.**

———*Younger child though eldest son has no* Orasa *status.*

A younger child, although the eldest son, does not acquire the status of *Orasa* and does not become entitled to the privileged position allotted to the eldest or first born son. (*Mr. Ameer Ali.*) KIRKWOOD *v.* MAUNG SIN. **84 I. C. 567 = 2 Rang. 693 = 51 I. A. 334 = 3 Bur. L.J. 304 = 29 C. W. N. 653 = A. I. R. 1924 P. C. 238 = 48 M.L.J. 1 (P. C.).**

———*Orasa son can demand partition within* 12 *years of one-fourth joint property on death of father.*

On the death of the father one-fourth of the joint estate vests immediately in the *Orasa* son. He is not bound to demand partition but may do so at any time within the statutory period of limitation and within that period the mother has no power of disposal of this one-fourth share. Within that period that share is not liable to attachment under a decree against the mother. (*Lentaigne and Carr, JJ.*) V. T. ARUNACHELLAM CHETTY *v.* MAUNG SAN NGWE. **83 I. C. 550 = 2 Rang. 168 = A. I. R. 1924 Rang. 323.**

———*Separate residence does not disentitle child to succeed.*

The appellant, the eldest daughter, at the time of her mother's death, had been married for 27 years. During the first two years of her married life she continued to live with her parents; she then moved to a house nearby and lived there for 20 years; finally she went to reside at another village, and a year later her mother died.

Held, that the appellant was not disentitled to her share as *orasa* by reason only of the facts that she lived separately from her father and that she never assumed the duties of her deceased mother in the family. A.I.R. 1921 L. B. 95 (F.B.) (*May Oung, J.*) MA HLA U. *v.* MAUNG SHWE YIN. **1 Rang. 370 = 76 I. C. 814 = 2 Bur.L. J. 138 = A. I. R. 1923 Rang. 271.**

———*Rights of children—Any child can acquire rights of orasa—Rights where eldest child is daughter discussed—Children of orasa, rights of, discussed.*

Per *Robinson, C. J., Maung Kin, Heald* and *Duckworth, JJ.*—In a family consisting of both sons and daughters, any child can acquire the full status of Orasa prior to the death of either parent. If in such a family where the eldest child is a daughter, no son can become Orasa. In such a family the question which child is the Orasa, can be decided before the death of either parent. There cannot be in such family two Orasas. Sons are always to be preferred to daughters as Orasas unless the son is the eldest born. The eldest born son is the Orasa. If he predeceased his parents, his children will have a right to preferential treatment. If the eldest born son dies before he became competent to take his father's place, a younger son, being fully qualified, may become *Orasa*, and, if that son predeceases his parents, his children will have a right to the same preferential treatment. But, if the eldest-born child is a daughter and predeceases her parents after she becomes competent to take her mother's place, her children will have a right to the same preferential treatment. It is doubtful whether another daughter younger than a son can ever take the place of the eldest-born daughter who is not competent, or dies before she became able to take her mother's place. The eldest child being a daughter can claim on the death of her mother a quarter share as *Orasa*, and, if she then dies before her father without having got the share, her children will have a right to preferential treatment contemplated and, if she dies after her father but before she has claimed her distributive share in the estate, her right of inheritance will devolve upon her children. The same would be the case of the issue of any other child who dies after its right of inheritance became vested in it. If the eldest born, though it might have claimed the quarter share from the surviving parent, did not and survived that parent, then the child will no longer be entitled to claim the quarter share but will have to share with the other children and may in that case get more or less than the quarter share it might have claimed.

Per *Pratt, J.*—In a family consisting of both sons and daughters a child can attain the full status of *Orasa* prior to the death of its parents, in so far that, if he or she predeceases his parents, his or her children may be entitled to the preferential treatment. In such a family where the eldest child is a daughter, no son can become *Orasa* until his father dies, subject to the proviso that the eldest daughter attained her majority before her death. The question as to which is the *Orasa* can be decided, so far only as the right of representation is concerned. In such a family there cannot be two *Orasa* children in the sense of children whose offspring would, in the event of their parent's death, be entitled to claim an equal share with their younger uncles and aunts. But it is conceivable that where the *Orasa* eldest child was a daughter and the eldest son attained his majority before his father's death, he would on his father's death be entitled to rank as *Orasa* for the purpose of claiming one-fourth of the estate from his mother. It is to be noted that *Orasa* is here used in two distinct senses. Sons are not always preferred to daughters as *Orasa*. In such a family when the eldest child is a daughter there cannot be an *Orasa* son, who predeceasing his parents can transmit to his children a right of preferential treatment in the division of the estate, assuming that the eldest child attained majority and did not forfeit her status as *Orasa*. The eldest child, being a daughter, can transmit to her children a right to preferential treatment in the division of the estate, and on her mother predeceasing her father she can claim a quarter share as *Orasa*. *Maung San Dwe* v. *Ma Min Tha* (2) Cha Toon's L. C., Vol. 2, p. 207; 8 L. B. R. 113; 7 L. B. R. 27; 2 L. B. R. 292; 23 Bur. L. T. 6; 1 L. B. R. 198 Overruled. (1897-01)U. B. R. 66; Buddhist Law Inheritance. II; 5 Bur. L. T. 73; (1893-1900) L. B. R. 48 and (1893-1900) L. B. R. 585, Diss. from. Case-Law and Texts fully discussed. (*Robinson, C. J., Moung Kin, Pratt, Heald and Duckworth, JJ.*) MAUNG SIN *v.* MRS. KIRK WOOD. **68 I.C. 49 = 11 L. B. R 220 = A. I. R. 1921 L. B. 95 (F. B.).**

———*Property jointly acquired by his parents—Mother dying*—Auratha *son can claim one-fourth share in the property if the father re-married.*

Under the Burmese Buddhist Law, an *auratha* son can on his father's re-marriage after his mother's death, claim a one-fourth share of the property jointly acquired by his parents. But an *auratha* son cannot make that claim against his father merely by reason of his mother's death. (*Heald, J.*) MAUNG SHWE YWET *v.* MAUNG TUN SHEIN. **66 I. C. 538 = 11 L. B. R. 199 = A. I. R. 1921 L. B. 68.**

———*On father's death* Orasa *son becomes entitled to one-fourth share.*

The *Orasa* son becomes entitled on the death of his father to a definite one-fourth part of the estate. The estate comes into existence at his father's death and he is entitled to mesne profits on it. 38 I. C. 809 (P. C.), Ref. (*Robinson, C. J. and Heald, J.*) MAUNG PAN ON *v.* MAUNG TUN THA. **67 I. C. 769 = 11 L. B. R 292 = A. I. R. 1921 L. B. 49.**

Succession—Per Capita or Per Stirpes.

———The division of the deceased's estate between his nephews and nieces is to be *per capita* and not *per stirpes.* A. I. R. 1924 Rang. 73, A. I. R. 1928 Rang. 67 and A. I. R. 1930 Rang. 59, Rel. on. (*Cunliffe and Carr, JJ.*) MAUNG TIN *v.* MA YU. **A. I. R. 1930 Rang. 237.**

———*Heirs all related in the same degree to the propositus share equally, each in his own right.*

When the heirs are all related in the same degree to the propositus they inherit each in his own right and not by representation and therefore each shares equally with all the others. Where the deceased, a Burman Buddhist, left surviving him as his heirs the son of deceased paternal aunt, two children of a deceased maternal uncle and six children of another deceased maternal uncle.

Held, that the estate of the deceased must be divided among these nine persons *per capita* and that each of them is entitled to a one-ninth share; A. I. R. 1924 Rang. 73 (F.B.). Foll. (*Rutledge, C. J., and Carr, J.*) MAUNG BA GON *v.* MA PWA THIT. **5 Rang. 747 = 107 I. C. 167 = A. I. R. 1928 Rang. 67.**

———*Mode of distribution among heirs claiming through husband and wife is* per capita *and not* per stirpes.

It is in accordance with justice, equity and good conscience that where a married couple die under circumstances in which the relatives of both inherit the estate, the relatives of each should be regarded as inheriting half the estate and the mode of distribution is *per capita* and not *per stirpes.* (*Heald, J.*) MAUNG KYI HLAING *v.* MAUNG TUN HIN. **84 I. C. 279 = 3 Bur. L. J. 137 = A. I. R. 1924 Rang. 367.**

———*Succession is* per capita *among grand-children whose parents have predeceased grand parents.*

On the death of a Burmese Buddhist couple leaving grand-children born of different children who predeceased the couple, the grand children inherit *per capita* and not *per stirpes.* (*Robinson, C. J., May Oung and Beasley, JJ*) MAUNG PO THU DAU *v.* MAUNG PO THAN. **1 Rang. 316 = 83 I. C. 10 = A. I. R. 1924 Rang. 73 (F.B.).**

Succession—Preference amongst heirs—Brothers and nephews.

———*Half-blood sister or brother and full nephew or nieces are to be considered equally related for purposes of inheritance.*

Half-blood brother or sister and full nephew or nieces are to be considered equally related in blood. Thus where a person dies leaving behind a half-blood younger sister and brother as well as nephews and nieces, also of the person's full younger brother, each is entitled to equal share. 12 Bur. L. T. 103, *held* too wide. (*Brown and Maung, JJ.*) MA GALAY *v.* MA E. MYA. **8 Rang. 23 = A. I. R. 1930 Rang. 75.**

Succession—Preference amongst heirs—Children.

———*Children of second marriage are not heirs of the deceased father against their mother on the father's death.*

The ordinary rule of Burmese Buddhist Law is that the widow succeeds to her husband's estate to the exclusion of all her children (except the auratha if there is an auratha) and that so long as mother is alive and remains unmarried no child of hers (except the auratha) can claim any share of the property left by their father. Where a Burman Buddhist leaves him surviving his children by a former marriage and also his second wife and his children by her, the children of the second marriage do not upon his death become his heirs. 10 L. B. R. 10; 3 U.B.R. 272, Diss. (*Heald and Po Han, JJ.*) MA E HMYIN *v.* MAUNG BA MAUNG. **2 Rang. 123 = 83 I. C. 426 = A.I.R. 1924 Rang. 298.**

Succession—Preference amongst heirs—Daughter.

———A Burmese Buddhist woman left a son by her first marriage and the husband and a daughter of the second marriage and *lettetpwa* property.

Held, that the daughter had no right in presence of her father who along with the son of the first marriage was entitled to divide the property equally. (*Young and Carr, JJ.*) MAUNG PAW THIT *v.* MA E. YIN. **86 I. C. 496 = 3 Bur. L. J. 225 = 2 Rang. 521 = A. I. R. 1925 Rang. 120.**

Succession—Preference amongst heirs—Full Brother's Daughter.

———*Female holder of Ayo dying leaving full brother's daughter and half sister—Former is entitled to succeed in preference to latter.*

When a person dies leaving a full brother or sister, and a half brother or sister, the former is entitled to preference in matter of succession in view of the fact that former relationship is closer at least when the half blood have divided. Where the last female holder of an Ayo dies leaving a half sister and a daughter of a full brother, the latter is entitled to succeed to the Ayo in preference to the former. *Taung Mro* v. *Aung Nyun*, Second Appeal No. 123 of 1916 Held too wide; 10 B. L. R. 107, Rel. on. (*Maung Ba and Brown, JJ.*) MA KHIN OH *v.* MA KHIN GALE. **8 Rang. 17 = A. I. R. 1930 Rang. 148.**

Succession—Preference amongst heirs—Grand-children.

——Great-grand children are entirely excluded by children or grand-children from inheritance: A. I. R. 1926 Rang. 4, Rel. on. (*Carr, J.*) MAUNG AUNG THIN *v.* MA NGWE U. **6 Rang. 355 = 113 I. C. 142 = A. I. R. 1928 Rang. 139.**

Succession—Preference amongst heirs—Great grand Children.

———Great-grand children cannot inherit in competition with children or grand-children. (2 Chan Toon's L. C. 226 and 8 B. L. T. 51, Foll.) (*Carr, J.*) MAUNG SHWE YE *v.* MAUNG PO MYA. **3 Rang. 464 = 91 I. C. 684 = A. I. R. 1926 Rang. 4.**

Succession—Preference amongst heirs—Half brothers.

———*Half brothers and sisters succeed in preference to grand-parents.*

Half-brothers and sisters succeed in preference to grand-parents on the principle that inheritance shall not ascend. (*Pratt and Heald, JJ.*) MA GYI *v.* MA KHIN SAU. **11 L. B. R. 460 = 72 I. C. 4 = 1 Bur. L. J. 263 = A. I. R. 1923 Rang. 124.**

Succession—Preference amongst heirs—Mother.

———*Minor dying joint with his mother and sister—Mother inherits in preference to sister.*

On the death of a minor Burmese Buddhist, living jointly with his parent (mother) and sister, a parent (mother) is not debarred from inheriting his son's property by the fact that his sister (and her daughter) is alive. The rights of his mother in respect of any property belonging to him would have stood upon a different footing from any such rights had he attained his majority and separated himself from the parental roof. A. I. R. 1914 P. C. 97, Dist. 8 L. B. R. 197, Rel. on. (*Pratt and Otter, JJ.*) MA ON MYAING *v.* MA ME SAN. **7 Rang. 75 = 117 I. C. 589 = A. I. R. 1929 Rang. 148 (2).**

Succession—Preference amongst heirs—Mother's half Sister.

——*Mother's half sisters exclude father's cousin.*

Mother's half sisters exclude the father's cousin *i.e.*, daughter of a sister of the grandfather, in the matter of succession under Burmese Buddhist Law. (*Heald and Chari, JJ.*) MA KYAN *v.* MAUNG PO MYIT. **89 I. C. 447 = 3 Rang. 86 = A. I. R. 1925 Rang. 231.**

Succession—Preference amongst heirs—Nephews.

——*Nephews and nieces are preferred to uncles and aunts.*

When a Burman Buddhist has died leaving as his nearest relatives (1) nephews and nieces, the children of his brother; and (2) uncles and aunts, the brothers and sisters of his mother, the former class of relatives is entitled to inherit his estate to the exclusion of the latter. (*Rutledge, C. J., Carr and Maung Ba, JJ.*) MA TIN *v.* MA SHWE. **4 Rang. 27 = 5 Bur. L. J. 51 = 95 I. C. 918 = A. I. R. 1926 Rang. 113 (F. B.)**

Succession—Preference amongst heirs—Paternal Aunt.

——*Father's younger sister excludes mother's sister's son.*

The younger sister of the father of the propositus excludes the son of the sister of the mother of the propositus. 5 L. B. R. 70, 6 L. B. R. 164 and (1905) 2 U. B. R. Buddhist Law. 5 Ref. (*Heald and Chari, JJ.*) U PE GYI *v.* U PYO. **88 I. C. 657 = 4 Bur. L. J. 88 = 3 Rang. 271 = A. I. R. 1925 Rang. 235.**

Succession—Preference amongst heirs—Step-brothers.

——*Stepbrothers are preferred to the mother's sister of the deceased.*

Where a woman marries two persons, sons of her subsequent husband by a previous wife are entitled to inherit the estate of her deceased son by her previous husband in preference to her sister, even though they are not connected by blood with the deceased. (*Brown, A. J. C.*) MAUNG KYAW SEIN *v.* MA MIN YIN. **63 I. C. 841 = 4 U. B. R. 20 = A. I. R. 1921 U. B. 21.**

Succession—Preference amongst heirs—Step-children.

——*Step children exclude collaterals—Right to inherit when proved entitles the heir to property—He need not prove absence of breaking off of filial relations—Mere separate residence of minors and consequent non-conducting of funeral ceremonies does not divest right to inherit.*

Once it is determined that step-children are descendants they necessarily oust collaterals, for, by Buddhist law the property never ascends as long as it can descend. The point of view of the Buddhist law is based on the community of interest between husband and wife. So strong is the bond between them that in the absence of natural children the husband's or wife's children, as the case may be, rank as the children of the step parent in the matter of inheritance to the exclusion of collateral blood relations. Conduct can indeed operate as a disqualification of the right, but it is in no sense a necessary qualification to obtain the right. A man who has proved that he is an heir has not further to prove that he has not broken off filial relations. Mere separate residence or non-conducting of funeral ceremonies does not nowadays and by itself prove or even set up an inference of a breach of filial relations such as would deprive a child of his rights. 10 L. B. R. 396, Appl. (*Lord Dunedin.*) MAUNG DWE *v.* KHOO HAUNG. **84 I. C 899 = 3 Rang. 29 = 52 I. A. 73 = 29 C. W. N. 824 = 1925 M. W. N. 23 = 3 Bur. L. J. 340 = A. I. R. 1925 P. C. 29 = 47 M. L. J. 853 (P. C.).**

Succession—Preference amongst heirs—Step grand-children.

——Under the Burmese Buddhist Law a step-grandchild excludes a nephew from inheritance in respect of the estate of the step-grandmother and the fact that he had received from his step-grandmother the share of inheritance to which he became entitled on his grandfather's death does not debar him from being his step-grandmother's heir: 2 U. B. R. 66; A. I. R. 1925 P. C. 29; Rang. F. A. No. 106 of 1925, Rel. on; A.I.R. 1924 P. C. 88, Dist. (*Heald and Otter, JJ.*) MYA DIN *v.* MAUNG PAIK SAN. **7 Rang. 459 = 118 I. C. 404 = A.I.R. 1929 Rang. 137.**

——*Step-grandchildern exclude collaterals, but in inheriting undivided ancestral property, they share equally with collaterals.*

Step-grandchildren in the absence of real ones or heirs in the direct line exclude collaterals, except in regard to a share in undivided ancestral property which they share equally with collaterals. Step-grandchildren cannot be held to have forfeited their right to inherit their step-grandmother's estate, because they have already received their grandfather's estate. The real point of view of the Buddhist Law is undoubtedly based on the community of interest between husband and wife. So strong is the bond between them that in the absence of natural children husband's or wife's children as the case may be, rank as children of the step-parent in the matter of inheritance to the exclusion of collateral blood relations. 11 U. B. R. 1897-01 p. 66. Ref. 10 L. B. R. 396, Foll. (*Pratt and Duckworth, JJ.*) KHOO HAING SEIN *v.* KHOO PEING HEO. **1 Bur. L. J. 56 = 70 I. C. 855 = A.I.R. 1922 L. B. 29.**

Succession—Preference amongst heirs—Step-son.

——*Step-son entitled to succeed—Excludes parents of the step-mother and other collaterals.*

A step-son governed by the Burmese Buddhist Law can succeed as an heir to the separate property of his step-mother and excludes the parents of his step-mother as well as other collaterals. (*Robinson, A. C. J. and MacGregor, J.*) MAUNG SEIN THWE *v.* MA SHWE YI. **10 L. B. R. 396 = 64 I. C. 415 = 13 Bur. L. T. 216.**

Succession—Preference amongst heirs—Younger Brother

——*Younger brother or sister excludes elder brother or sister—But children by former do not exclude children by latter.*

A younger brother or sister of the deceased would exclude an elder brother or sister. But where no brother or sister of the deceased survives him, the children by the elder brother are not excluded by the children of the younger brother but each is entitled to equal share. A.I.R. 1928 Rang. 67 and A. I. R. 1924 Rang. 73 (F.B.), Rel. on.; (1892-96) 2 U. B. R. 189, held not good law. (*Chari and Brown, JJ.*) MA KIN *v.* MAUNG PO MYIT. **121 I. C. 808 = 7 Rang. 811 = A.I.R. 1930 Rang. 59.**

——Younger brothers and sisters exclude the elder brothers and sisters as heirs to a deceased brother or sister; S. J. L. B. 37; A. I. R. 1925 R. 231;

41 Cal. 887, Rel. on. (*Pratt and Otter, JJ.*) MG TUN *v.* MA CHIT. **4 Rang. 62 = 96 I. C. 370 = A.I.R. 1926 Rang. 142.**

Succession—Preference amongst heirs—Younger half brother.

———*Younger half brother and elder brother's son.*

A younger half-brother or half-sister excludes deceased's elder brother's son. (Civil S. A. No. 123 of 1916 of the Chief Court, Diss.) (*Heald, J.*) MAUNG KYI HLAING *v.* MAUNG TUN LIN. **84 I. C. 279 = 3 Bur. L. J. 137 = A. I R. 1924 Rang. 367.**

Succession—Preference amongst heirs—Widow.

———*Widow inherits in preference to son.*

Where a Burman dies leaving a widow and a son, all the property of the deceased devolves on the widow and the son takes no share during the widow's lifetime. (*Sir George Lowndes.*) MA MYA *v.* MA ME KYIN. **117 I. C. 29 = 7 Rang. 388 = 50 C. L. J. 192 = 1929 M. W. N. 682 = 34 C. W. N. 117 = A. I. R. 1929 P. C. 246.**

Succession—Rules of.

———*Doctrine of representation is not allowed—Partial representation allowed to grandchildren in competition with children is the only exception to the rule.*

Representation is not a principle of Buddhist Law. The basic rule is that the nearer heir excludes the more remote, and that the partial representation allowed to grandchildren in competition with children is merely an exception to that generul rule, and is the only exception to it. (A.I.R. 1924 Rang. 73, Discussed.) (*Carr, J.*) MAUNG SHWE YE *v.* MAUNG PO MYA. **3 Rang 464 = 91 I. C. 684 = A.I.R. 1926 Rang. 4.**

———*Children's right in parent's estate after re-marriage is not a vested one and their right will lapse if they fail to exercise it before the death of the parent.*

The right of the eldest son (*orasa* child) to claim a quarter share from his father on the latter's re-marriage after the mother's death is not a vested one. The same view would apply to the claim, if any, of the *Kanittha* children. There in nothing in the *Dhammathats* to justify the assumption that the children in such a case are bound to be content with a portion only of their parent's joint estate, as would be the case if their right were a vested one. They may elect to throw in their lot with the new benefit of any possible increase in the family fortune. Should they do so they would in any case be entitled to three-fourths of their own parent's *payin* as against the step parent and would also share in the after-acquired property. Their right being, however, not a vested one if they fail to exercise it before the death of that parent, the right lapses. (*May Oung J.*) MAUNG NO *v.* MAUNG PO THEIN. **76 I. C. 612 = 1 Rang. 363 = 2 Bur. L. J. 109 = A. I. R. 1923 Rang. 239.**

———There is no authority for the view that under the Burmese Buddhist Law, an eldest son can claim the usual one-fourth share of the joint property of his parents where his father survives and does not remarry. (*Robinson, J.*) U NI TA *v.* KO MAUNG. **64 I. C. 23 = 13 Bur. L. T. 207.**

Succession—Shares

———*In property taken to later marriage, child of earlier marriage as heir to father takes 3/4th share and in jointly acquired property of later marriage 1/8th.*

. In the property taken to the later marriage, the child of the earlier marriage as an heir to his father is entitled to three-quarters and the widow of the later marriage to a quarter and in the jointly acquired property of the later marriage the child of the earlier marriage takes a 1/8th share, and the widow of the later marriage a 7/8th share. A.I.R. 1929 Rang 253, Foll. (*Heald, Ag. C. J. and Otter, J.*) MA SAN NYUN *v.* MAUNG TINT. **A. I. R. 1930 Rang. 190.**

———*Person marrying second wife on death of first—But divorcing second and marrying third—He had children by first and third wives only—He had also divorced third wife—Suit after person's death by children by third wife against children by first wife for share in first wife's inherited property—Children by first wife are entitled to 3/4th and children by third to 1/4th share.*

If a person has more wives than one, property inheried by one of the wives during marriage, if still in existence at the death of the husband and wife, descends to the children by that wife and the children by the other wives can lay no claim to succeed to it. But this rule does not apply where a person marries wives in succession after death or divorce of his former wife. On the death of his first wife a person married a second wife. He divorced his second wife and married third. He had children by his first and third wives and no children by his second wife. He divorced the third wife also but her children lived with him. After the person's death the children by third wife sued children by first wife for a share in the inherited property of the first wife.

Held that the rule of partition to be applied was the ordinary rule applicable to partition between children of different wives and that the children by the first wife were entitled to 3/4th share and the childien by third wife to 1/4th share. A.I.R. 1921 U.B. 23, Ref. (*Maung Ba, J.*) MA HPAN *v.* MA NGWE SA. **7 Rang. 526 = 120 I. C. 901 = A. I. R. 1929 Rang. 343.**

———*Succession to payin property enunciated.*

Where a person after the death of his first wife inherits property and the property constitutes payin of the person when he marries second time, the child of the first marriage is entitled to three-fourths and the step-mother to one-fourth in such property : 4 L. B. R. 110. Expl. and Dist. (*Heald and Maung Ba, JJ.*) MA SAI DA *v.* MA NWE. **7 Rang. 578 = 121 I.C. 774 = A. I. R. 1929 Rang. 253.**

———*House where husband was living with the first wife as squatter burnt down—Husband obtaining lease of the site from Government during the existence of the second marriage—Land held to be the lettetpwa property and children by the first marriage held to be entitled only to one-eighth.*

A husband during the existence of the second marriage obtained a lease of land from Government and he was holding land under that lease until his death. Formerly he had a house on this land and he was living in it, but his house was burnt down. It was contended that although the lease was taken out by the husband during his coverture with the second wife, the property which he then obtained in the land was in fact the same as the property he had beforehand in the land although in another form and therefore it must be treated as his payin property.

Held that the rights subsisting in the land at the time of the hushand's death must be held to have been the lettetpwa property. and it must be presumed in the circumstances that the lease was obtained by the joint skill and industry of the husband and the second wife. The children by the first marriage were therefore entitled to one-eighth only of the site and not three-fourths. 2 L. B. R. 174, Rel. on, A.I.R. 1921 L. B. 46, Dist. (*Brown, J.*) MA PU. *v.* MAUNG NGO. **6 Rang. 234 = 111 I.C.17 = A. I. R. 1928 Rang. 236.**

——*Surviving parent remarrying—Eldest child takes quarter as* auratha—*Younger children take collectively a quarter.*

It should be taken as the rule of Burmese Buddhist Law not only that the eldest child, if he or she has not already taken a quarter share of the joint estate as *auratha* becomes entitled to a quarter share of that estate on the remarriage of the surviving parent, but also that the children, other than the eldest child, similarly become entitled to a quarter share in the joint estate on the remarriage of the surviving parent. (*Heald and Chari, JJ.*) MAUNG PO KIN *v.* MAUNG TUNYIN.
4 Rang. 207 = 98 I. C. 4 = A. I. R. 1926 Rang. 211.

——*Burman marrying more than once and dying leaving* Hnapazon *property—No issue of last marriage —Step children take* 1/6*th but only* 1/8*th if there is an issue of last marriage.*

Where a Burman Buddhist who has married more than once dies leaving *hnapazon* property of the last marriage the law of partition of that property between the pubbaka children and their step-parent is as follows: In a case where there is an issue of the last marriage the step-child or children collectively take 1/8th and the step-parent 7/8ths and that in a case where there is no issue of the last marriage the former take 1/6th and the latter 5/6th. S. J. 177 and 2 L. B. R. 174, Overruled. (*Rutledge, C.J. Brown and Maung Ba, JJ.*) MA NYEIN E *v.* MAUNG MAUNG. **3 Rang. 549 = 90 I.C. 341 = 4 Bur. L.J. 189 = A. I. R. 1925 Rang. 340 (F. B.).**

——*No natural or* kittima *child*—Appathitta *child takes half and relatives take half.*

Where there is no natural or *kittima* child the *appathitta* child takes half of the estate of the adoptive parent, and the other half goes to the relatives of the adoptive parent. (*Lentaigne, J.*) MAUNG YYI *v.* MAUNG AUNG PYO. **2 Rang. 661 = 85 I. C. 286 = A. I. R 1925 Rang. 178.**

——*Children and grandchildren, progeny of different marriage—Grandchildren take undiminished share.*

The general rule that in a division between children and grandchildren the latter take only one-fourth of the share to which their parent would have been entitled if alive, is not applicable when the children on the one hand and the grandchildren on the other are the offsprings of different marriages. (*Young and Carr, JJ.*) MA NAN SHWE *v.* MA SEIN. **2 Rang. 514 = 84 I. C. 918 = A. I. R. 1925 Rang. 80.**

——*Share of grandchild as against grandmother is half of payin and one-eighth of " lettetpwa ".*

In the estate of her deceased grandfather a grandchild gets, as against the step-grandmother, in the absence of issue of the second marriage, one-half of the " payin " and 1/8 of the " lettet-pwa." (*Robinson, C.J. and May Oung, J.*) MA HMUN *v.* MA NGWE THIN.
1 Rang. 34 = 74 I. C. 104 = A. I. R. 1923 Rang. 171.

——A son from second marriage is entitled to 1/8 (one-eighth) share in the *hnapazon* property of the first marriage. His share is independent of the share of his mother and can be sued for in her life-time. (*Swinhoe, J.*) MA EIN HLAING *v.* MA SHWA KIN.
63 I. C. 28 = (1920) 3 U.B R. 272.

——A step-child gets one-fourth in the property jointly acquired by his mother and step-father where there are no children of that marriage, nor any other children of the father by any other marriage, though the property is acquired during the continuance of the marriage or the step-father has married another wife. The step-child has no share in the property jointly acquired by the step-father along with another wife. (*Heald, A.J.C.*) MA NYEIN *v.* MA THA GAUNG.
60 I. C. 7 = (1920) 3 U.B.R. 237.

Succession—Miscellaneous.

——*S.* 308 *of Kinwun Mingyi's Digest applies on analogy to cases where division is to be between brothers and sisters of husband and nephews and nieces of wife.*

The rule in S. 308 of the Kinwun Mingyi's Digest contemplates in the absence of other nearer relatives a division between the brothers of the parents of the deceased couple. But the rule should be applied on analogy to a case where the division is to be between brothers and sisters of the husband and nephews and nieces of the wife. 8 L.B.R, 197, Foll. (*Cunliffe and Carr. JJ.*) MAUNG TIN *v.* MA YU.
A. I. R. 1930 Rang. 237.

——*Relatives of both husband and wife to whom rule in S.* 308 *of Kinwun Mingyi's Digest applies succeed to half interest possessed by each of them irrespective of nearness of relatives on one side as against those on other.*

The conception of the husband and wife as one person is a somewhat artificial one and is opposed to the general spirit of the Burmese Buddhist Law and the relatives of both the husband and of the wife to whom the rule given in S. 308 of Kinwun Mingyi's Digest is applicable should be regarded as succeeding to the half interest which each of them possesses in the estate irrespective of the nearness of the relatives on one side as against those on the other. 2 U.B.R. (1904-06) Buddhist Law Inheri, 7; and A.I.R. 1923 Rang. 136, Dist. (*Cunliffe and Carr, JJ.*) MAUNG TIN *v.* MA YU.
A. I. R. 1930 Rang. 237.

——*Mahomedan father of Buddhist son cannot obtain succession certificate in respect of son's property.*

The deceased was living in Burmese style among people, a large majority of whom were Burmese Buddhists. His mother was clearly of Burmese Buddhist birth and had a near connexion who was not merely a Burmese Buddhist but also a senior rahan. The deceased participated in acts of worship of such a Buddhist religious nature as would amount to apostasy.

Held, that until some process of reconversion was undergone he could not be considered a Mussalman, and therefore his father who was a Mahomedan was not entitled to obtain a succession certificate in respect of the property of the deceased. (*Rutledge, C.J. and Carr, J.*) ABDUL GAFFUR *v.* MA PWA SHIN.
5 Bur. L.J. 111 = 98 I. C. 155 = A. I.R. 1927 Rang. 31.

——*Agreement by father and son to enjoy property equally—Survivor to succeed excluding heirs—Agreement is invalid as defeating the law, and son's widow is not estopped from questioning the agreement—Evidence Act, S.* 115.

It is settled law that a Burman Buddhist cannot make a transfer of his property, which is intended to be operative only after his death. An agreement entered into by a father with his son that they would enjoy certain house and land equally and that the survivor was to succeed to the whole, to the entire exclusion of the heirs, is invalid as defeating the law of inheritance, but is valid as a disposition *inter vivos*, and upon the son's death his widow is entitled to the son's half-share. In such a case the son's widow is not estopped from questioning the validity of the agreement because of her acquiescence in that she did not claim during the father's life-time. (*Heald and Chari, JJ.*) MA MA GYI *v.* U CHIT PE.
5 Bur. L. J. 56 = 95 I. C. 879 = A. I. R. 1926 Rang 131

———*Limitation runs from propositus' death though plaintiffs' grandmother on whose joint ownership amount of share depends, predeceased propositus.*

Where the plaintiffs who are Burmans sue for their share in the estate left by their grand-father, the fact that the amount of their share may depend on the joint ownership of their grandmother does not affect the question of limitation and time runs only from the propositus' death though the grandmother has predeceased him. (*Young and Carr, JJ.*) MA NAIR SHWE *v.* MA SEIN. **2 Rang. 514 = 84 I. C. 918 = A. I. R. 1925 Rang. 80.**

———*Short interval between deaths of wife and husband—Period more than a month cannot be considered "short".*

Two months and fourteen days is too long a period to constitute a "short" interval so as to make the exceptional rule apply, namely, that relatives of both should succeed if it is uncertain whether the husband or wife died first or the interval between the deaths of both is short. (*Maung Kin and MacGregor, JJ.*) MA PWA OH *v.* MA LAY. **1 Bur. L.J. 253 = 11 L.B.R. 376 = A.I.R. 1923 Rang. 136.**

Texts.

———*Dhammathats are merely directory.*

Per *Otter, J.*—The Dhammathats can only be regarded as directory and not as statements of the law which are necessarily binding in law. (*Heald and Otter, JJ.*) MA THEIN NWE v. MAUNG KHA. **7 Rang. 451 = 120 I.C. 137 = A. I. R. 1929 Rang. 307.**

———Where Manugye is not ambiguous, other Dhammathats need not be referred to. A.I.R. 1914 P. C. 97, Foll. (*Heald and Mya Bu, JJ.*) MAUNG PO MYA *v.* MA HLA. **7 Rang. 409 = 120 I.C. 670 = A.I.R. 1929 Rang. 282.**

———Where Manukya is not ambiguous other Dhammathats need not be referred to. A.I.R. 1914 P. C. 97, Foll. (*Heald and Maung Ba, JJ.*) MA SAI DA *v.* MA NWE. **7 Rang. 578 = 121 I. C. 774 = A. I. R. 1929 Rang. 253.**

———*Law applicable.*

Maung Ba, J.—The Manugye holds a commanding position and where it is not ambiguous it should be followed. A.I.R. 1914 P. C. 97, Foll. (*Rutledge, C.J. Heald, Carr, Maung Ba and Brown, JJ.*) MAUNG PO AUNG *v.* MAUNG KHA. **6 Rang. 427 = 112 I. C. 413 = A. I. R. 1928 Rang. 225 (F.B.).**

———*Dhammathats—Collection of rules in accordance with custom and usages of Burmese.*

Burmese Buddhist law is stated to be contained in a series of books entitled Dhammathats, which have been composed from time to time by the expounders of that law ever since the thirteenth century, if not before. According to a distinguished Burmese jurist of the name of U. Gaung, it is a collection of rules which are in accordance with the custom and usage of the Burmese people. (*Lord Atkinson.*) KIRKWOOD *v.* MAUNG SIN. **30 C.W.N. 529 = 89 I.C. 773 = 5 Rang. 186 = 52 I.A. 265 = 6 L.R.P.C. 160 = A.I.R. 1925 P.C. 216 (P.C.).**

———*"The Manukye" can be relied on when not in conflict with equity, justice and the present feelings of the Burmans.*

The "Manukye" is now a safe and proper guide when not in conflict with justice or equity and the present feelings of the Burmans. (*Duckworth, J.*) MA SAW WIN *v.* MAUNG GYI. **2 Rang. 328 = 84 I. C. 966 = A. I. R. 1925 Rang. 34.**

———*Dhammathats—Interpretation.*

In interpreting the passages in the various Dhammathats, it is dangerous to lay down any general principle as being deduced therefrom and to apply that principle to circumstances entirely different from the circumstances to which the passages refer. (*Brown, A. J. C.*) MA KHIN *v.* KIN KIN. **4 U. B. R. 11 = 63 I. C. 814 = A. I. R. 1921 U. B. 23.**

Will.

———A Chinese Buddhist is entitled to make a will. A.I.R. 1925 P.C. 29, Foll. (*Heald, Ag. C.J. and Sen, J.*) MA E. KYEE *v.* TAN CHONG KEE. **A.I.R. 1930 Rang. 192.**

———*Document executed as gift or trust but really an attempt to evade ordinary law of inheritance is invalid being a will.*

Where a document by which certain property was transferred under the guise of a deed of gift or trust, but it was really an attempt to dispose of the owner's property after death in order to defeat the operation of the ordinary laws of inheritance :

Held, that the deed was invalid as being a will. A.I.R. 1924 Rang. 13, Foll. (*Pratt and Mya Bu, JJ.*) MAUNG THU KA *v.* U. THUNANDA. **5 Rang. 371 = 105 I. C. 51 = A. I. R. 1927 Rang. 271.**

———*Power to make will.*

A Burman Buddhist has no power to make a will (*Lentaigne and Carr, JJ.*) MA NU *v.* MA GUN. **2 Rang. 388 = 84 I.C. 385 = A.I.R. 1925 Rang. 8.**

Miscellaneous.

———*Thinghika property dedicated to rahans of Kyaungdaik is vested in head of monastery as trustees.*

Where thinghika property is dedicated to the rahans of kyaungdaik and, not to the whole monkhood throughout the world, the property is vested in the head or heads of the monastery as trustees. (*Rutledge, C.J. and Brown, J.*) U. PYINNA *v.* V. DIPA. **7 Rang. 245 = 118 I.C 609 = A.I.R. 1929 Rang. 372.**

———*Scheme giving power to trustees to settle or decide disputes relating to possession of kyaung—Power to appoint successor to head of kyaung vests in trustees.*

Where a scheme regarding land granted by Government for religious purposes is settled, giving to the trustees all powers of control to settle disputes relating to the possession of kyaungs and to decide who should be in possession of the same, then on the death of a monk holding the kyaungs, the trustees and trustees alone have the power to appoint his successor and that though ordinarily in making such appointment, they should consider whether the deceased occupant has nominated a successor who was his senior pupil and well qualified to teach the Buddhist scriptures, the trustees' choice is not narrowed down to such an individual, and they are justified in asking him to acknowledge the scheme settled for the management of the kyaungdaik and on his refusal to acknowledge it, are justified in appointing other monks to take possession of kyaung. (1892-1896) 2 U. B. R. 78 and (1892-1896) 2 U. B. R. 72, Ref. (*Rutledge, C.J. and Brown, J.*) U. PYINNA *v.* V. DIPA. **7 Rang. 245 = 118 I. C. 609 = A. I. R. 1929 Rang. 372.**

———*Eldest born daughter dying in infancy—Second child son dying at 40—He living separately from his parents with their consent and never failing them in any family crisis—He is entitled to status of orasa even though he does not live with his parents and does not actively assist them in their business.*

Where an eldest born daughter dies in infancy and the second child who is a son dies at the age of 40 and where he lives separately from his parents in accordance with their wishes and never fails them in any way in any family crisis, the mere fact of his not living with his parents and not having actively assisted in their business is no sufficient reason for depriving him of the status of Orasa. A.I.R. 1924 P.C. 238, Expl.; 2 L.B.R. 292 and A.I.R. 1923 Rang. 271, Rel. on.; 6 L.B.R. 77, Not Foll. (*Rutledge, C. J. and Brown. J.*) MA AYE YIN *v.* MA MI MI. **7 Rang. 569 = 121 I. C. 778 = A. I. R. 1929 Rang. 365.**

———N *few days before his death telling his children by first wife to give* K *his second wife certain property in lieu of her share*—K *consenting to this and accepting it few days after* N's *death—Property little more than nominal consideration—No specific performance of such contract can be ordered and doctrine of part performance also is inapplicable and* K *is not bound by such contract—Part performance—Specific Relief Act, S.* 28—*Contract Act, S.* 4.

N, 9 or 10 days before his death told his children by first wife to give certain property to his second wife *K* in lieu of her share in the estate. *K* expressed her consent to this and accepted the property from the children 2 or 3 days after *N*'s death allowing it to be understood that she would not make any further claim to the estate. The property that *K* received was a little more than a nominal consideration having regard to her share in the estate. The children relied on the release and contended that *K* was not entitled to claim anything.

Held, that *K*'s consent to the contract was largely influenced by her disturbed state of mind and could hardly be called free consent.

Held, further that the contract was so inequitable that no Court would pass a decree for specific performance thereof in favour of children, nor could the doctrine of part performance or any of the equities arising therefrom could be applied in their favour and *K* could not be bound by the contract. (*Brown and Chari, JJ.*) TAFUZZAL AHMAD *v.* MAUNG SHWE KYI. **A. I. R. 1929 Rang. 335.**

———*Admission by one heir—Evidence Act, S.* 18.

Admission by a person that one of the heirs has absolute right to the property to which the person along with others is an heir, cannot affect the other heirs. (*Chari, J.*) MAUNG THU *v.* MAUNG SHWE HLA. **A. I. R. 1929 Rang. 272.**

———*Person paying consideration but purchasing property in wife's or son's name has to show the object with which the property was purchased.*

A Burman husband or father purchasing property in the name of his wife or child does not stand in the position of a Hindu or Mahomedan in whose cases the law raises a presumption of benami. He has to show further with what particular object or motive he purchased the land before the Court can decide whether the property purchased was a benami transaction or not; Rang. First App. No. 36 of 1925 and A.I.R. 1926 P. C. 77, Rel. on; A.I.R. 1928 Rang. 220, Expl. - (*Chari, J.*) MA SA *v.* MA SEIN NU. **7 Rang. 751 = A. I. R. 1929 Rang. 257.**

———*Resemblance between Buddhist and Mahomedan law—No analogy between Buddhist law and Hindu law—There is no joint inheritance—Suit for due administration of estate only lies—Suit for partition does not lie.*

The estate of a deceased Burman Buddhist vests in the heirs on the death of the ancestor. Their position resembles that of the heirs of a deceased Mahomedan under Mahomedan law, and there is no analogy between their position and that of the co-parceners of a joint Hindu family under the Hindu law. The estate of the ancestor in the case of a Burman Buddhist vests in the heirs immediately on the death of the ancestor, but not collectively or jointly, and under Buddhist law each heir gets a definite fraction in every portion of the estate of the deceased ancestor. He cannot be deemed to be, with his co-heirs, a joint owner or joint tenant of the property nor is he entitled to joint possession of the property with them. Therefore, a Burmese Buddhist heir is not entitled to maintain a partition suit, in the strict sense of the word, and his suit must be one for division of inheritance, that is, a suit for the due administration of the estate of his ancestor. 15 C.W.N. 677; A.I. R. 1921 Bom. 424, A. I. R. 1924 Mad. 124; 28 I.C. 895; 2 U.B.R. (C.P.) 21 and 2 U.B.R. 229, Ref (*Chari, J.*) MAUNG BA TU *v.* MA THET SU. **5 Rang. 785 = 108 I. C. 809 = A. I. R. 1928 Rang. 73.**

———"*Custodian*"—"*Partition*"—*Meaning of.*

The Burmese word translated: "custodian" literally means the person in whose hands the estate was left, and that which is translated "partition" connotes merely the idea of division of separation. (*Chari, J.*) MAUNG BA TU *v.* MA THET SU. **5 Rang. 785 = 108 I. C. 809 = A. I. R. 1928 Rang. 73.**

———*C. P. Code, S.* 110—*Leave to appeal—Substantial question of law—Buddhist Law* (*Burmese*)—*Law as to rights of lesser wife living apart from her husband is in a settled state.*

The decisions of the Rangoon High Court following, as they do, successive decisions of the Highest Court in Upper Burma are consistent with the law as stated in the Manukye Dhammathat, Vol. X, S. 42 as regards the rights of an inferior or lesser wife when living apart from her husband and should be regarded as settling the law on the point and is not a substantial point of law. (*Rutledge, C.J. and Brown, J.*) MA THAN *v.* MA KYIN. **3 Rang. 656 = 94 I. C. 464 = A. I. R. 1926 Rang. 111.**

———*Deed—Construction—Conduct of parties is relevant to explain a deed capable of several meanings.*

The conduct of the parties to a contract reduced into writing may not vary or alter it, but their conduct may help to explain or elucidate a contract open to different meanings. *N* was a trader by profession and carried on in conjunction with his wife, *G* a profitable business in rice. Some months after *G's* death, which occurred in December 1904, *N* contemplated marrying again. Before the marriage was actually contracted, on the 11th May, 1905, he executed a document apparently a partnership deed which contained among other things:—(i) All the house sites, buildings, rice, paddy, ponies, gharries, gold and money, which have been in existence up to this date, will belong to the partnership; (ii) Either partner Ma E Yin or Ma Thaung, the daughters, will take charge of all the private properties belonging to partnership, such as jewellery, etc.

Held, that the document was more a record of a division of rights and interest rather than a deed of partnership and therefore the sons and daughters by former marriage had no share in the property acquired by *N* along with his second wife. (*Mr. Ameer Ali.*) MA THAUNG *v.* MA THAN. **29 C. W. N. 559 = 80 I. C. 1031 = 5 Rang. 175 = 51 I. A. 1 = 19 M. L. W. 477 = 51 Cal. 374 = 1924 M. W. N. 662 = 3 Bur. L. J. 333 = A. I. R. 1924 P. C. 88 = 46 M. L. J. 618 (P.C.).**

———*Award by Ecclesiastic authority—Dispute between a monk and a layman—Award binds only the parties.*

An ecclesiastical authority to whom a dispute relating to property between a layman and an ecclesiastic is referred, is in the same position as an ordinary arbitrator and therefore his award can affect only the parties to the reference. (*MacGregor, J.*) U MEDA *v.* U SANDIMA. **1 Rang. 494 = 76 I. C. 807 = A. I. R. 1924 Rang 141.**

———*T. P. Act, S. 123—Burmese Buddhist law regarding delivery is abrogated.*

Burmese Buddhist law requires possession to effectuate a gift, but, it is clear that, after S. 123 of the T. P. Act came into force, it is not necessary that a gift should be completed by delivery of possession. Hindu law also requires delivery of possession, but it has been held that the rule as to possession has been abrogated by S. 123. 15 Cal. 446 and 34 Cal. 853, Foll. (*Robinson, C. J. and Beasley, J.*) MA THIN MYAING *v.* MAING GYI. **1 Rang. 351 = 75 I. C. 166 = A. I. R. 1924 Rang 13.**

———*Relationship, evidence of—Evidence of general repute is good evidence.*

Plaintiff claimed to be the grand-daughter of the deceased. Her father had predeceased her grand-father and there were no other blood relations competent to give evidence as to her relation with the deceased.

Held, this is a case in which evidence of general repute is of considerable importance provided it is cogent. (*Robinson, C. J. and May Oung, J.*) MA HMUN *v.* MA NGWE THIN. **1 Rang. 34 = 74 I. C. 104 = A. I. R. 1923 Rang. 171.**

———(Chinese).

Adoption.

———*Burmese girl—Rights of adopted daughter.*

A Chinese Buddhist can adopt a Burmese girl and the latter will succeed to his properties in the absence of natural children or adopted son. But where she is a stranger, she will be excluded by the agnates of the deceased. (*Twomey, C. J. and Ormond, J.*) MA PWA *v.* MA YIN. **61 I. C. 684 = 13 Bur. L. T. 132.**

Applicability.

———*Father Chinese, and mother Burmese—Person asserting that son was Buddhist must establish the same.*

Where a person's father is of a pure Chinese blood and his mother a Burmese woman and he makes offerings of rice to images of Buddha in his own house, in view of the admitted nationality of the father of such person, party alleging that he was Burmese Buddhist must establish his contention. (*Heald, Ag. C. J. and Otter, J.*) MA SAN *v.* MA CHIT SU. **A. I. R. 1930 Rang. 218.**

———*Burmese wife of a Chinese Buddhist husband would be governed by Chinese Law if she adopted Chinese customs.*

Where a Burmese woman, married to a Chinese Buddhist, regarded herself throughout her life as a Chinese Buddhist and attached herself to the Chinese community even after her husband's death and the community also regarded her as one of them.

Held, succession to her estate would be governed by the Chinese Buddhist customary law. (*Heald and Lentaigne, JJ.*) MA SEIN *v.* MA PAU NYUN. **2 Rang. 94 = 80 I. C. 749 = A. I. R. 1924 Rang. 219.**

Custom.

———*Chinese Customary Law—Rights of wife in property acquired with joint funds of husband and wife.*

It is doubtful whether wife gets no rights in the property acquired with joint funds of the husband and wife after the marriage. (*Chari, J.*) MAN HAN *v.* R. M. A. L. FIRM. **4 Rang. 110 = 97 I. C. 876 = A. I. R. 1926 Rang. 172.**

Disposition of property.

———*Chinese domiciled in Burma have custom whereby they can dispose of property by will—They also have customary rules of inheritance which are in conflict with Burmese Buddhist law—These customs ought to govern Chinese Buddhists in Burma.*

A custom having the force of law is prevalent among Chinamen in Burma whereby they dispose of their property by will—a custom which is opposed to the provisions of the Burmese Buddhist Law. They also have customary rules of inheritance which are in conflict with those to be found in the Burmese Buddhists. It is these customs which should govern Chinese Buddhists in Burma. A. I. R. 1925 Rang. 29; 24 Mad. 650; Mr. Anwaruddin's case, (1917) 1 K. B. 649; *Chetti* v. *Chetti*, (1909) P. D. 87 and A. I. R. 1915 P. C. 86, Rel. on. (*Pratt, O. C. J. and Cunliffe, J.*) CHAN PYU *v.* SAW SIN. **6 Rang. 623 = 114 I. C. 513 = A. I. R. 1929 Rang. 22.**

Marriage.

———*Burmese law is* prima facie *applicable to Chinese Buddhists living in Burma, as being* lex loci contractus.

The Burmese Buddhist law regarding marriage is *prima facie* applicable to Chinese Buddhists as being the *lex loci contractus* and that in order to escape from the application of the Burmese Buddhist Law regarding marriage a Chinese Buddhist must prove that he is subject to a custom having the force of law in Burma and that that custom is opposed to the provisions of Burmese Buddhist law applicable to the case, and if the wife is a Burmese Buddhist woman, the Chinese husband must show further that the application of that custom will not work in justice to her. A. I. R. 1927 Rang. 265 (F.B.), Foll. (*Heald and Cunliffe, JJ.*) V. R. M. A. L. CHETTYAR FIRM *v.* MAN HAN. **5 Rang. 443 = 105 I. C. 244 = A. I. R. 1927 Rang. 299.**

———*Secondary wife or concubine is not member of the family, but her sons inherit in absence of sons by principal wife.*

By the Chinese Customary Law a Chinaman can have only one wife, though he may have concubines or secondary wives in addition, who also enjoy a recognized legal status, so that it would follow that whoever of the two was not the chief wife would be in the position of secondary wife or concubine. Though secondary wife would not be a member of his own family in the way that a principal wife would, still she has a recognized legal status, her sons inheriting the estate on failure of sons by the principal wife. (*Godfrey and Doyle, JJ.*) KYON HOE TSEE *v.* KYON WONG SIR. **5 Bur. L. J. 17 = 96 I. C. 762 = A. I. R. 1926 Rang. 90.**

———*Necessity of written contract is doubtful—Marriage may be presumed from long cohabitation and repute—Betrothal, receipt of presents by bride's family and handing over of the wife are the only essentials for valid marriage.*

Per *Godfrey, J.*—Whether a written contract is really one of the essentials of a valid marriage in addition to the six preliminary steps is doubtful. But in a case of repute and long cohabitation, where the six preliminary steps are proved, the written contract may be presumed.

Per *Doyle, J.*—Six preliminary steps are necessary to a first class marriage, which in ordinary practice are amalgamated into two. *Usus* is undoubtedly the commonest form amongst many of the lower classes and receives the sanction of the law when the *usus* can be proved by the litigants. The strictly ritualistic marriage is only performed in its complete integrity amongst the wealthier classes though fragments of it are frequently introduced into the lower marriage ceremonies. Though in all respectable families all these formalities are strictly observed, only two or at most three are really essential, *viz.*, betrothal as evidenced by the go-betweens or by written contract, the receipt by the bride's family of the presents which is the consideration and the handing over of the woman as wife. The only question in any subsequent dispute would be ; Was it the intention of the parties to constitute the relationship of husband and wife, and was the woman given and accepted as wife. The six steps would appear to be formalities which, if entered into, would be binding on any party who wished subsequently to repudiate marriage, but where consent and publicity are established, their absence could not be pleaded by third parties as invalidating the marriage. (*Godfrey and Doyle, JJ.*) KYON HOE TSEE *v.* KYON WONG SI. **5 Bur. L. J. 17 = 96 I. C. 762 = A. I. R. 1926 Rang. 90.**

Succession.

——*Chinaman dying leaving two sons and two daughters and their mother, Burmese lady—Mother dying after* 16 *years—One daughter claiming her share in her mother's estate—Mother contended to have died as Chinese Buddhist—Succession Act held applicable in that case—Daughter held entitled to her one-fourth share under Succession Act if mother was Chinese or under Burmese Buddhist Law if she died as Burmese Buddhist.*

One *C* a Chinaman died in 1902 leaving behind him two sons *P* and *D*, two daughters *S* and *N* and their mother *M*, a Burmese lady. *M* died in 1918. *S* then sued in 1919 to recover her share of *M's* estate. But her suit was dismissed as *M's* estate was held to have been governed by Chinese Customary Law. *N* subsequently brought a suit like that of *S* in 1927 for her share in *M's* estate. It was contended that *M* died as a Chinese Buddhist and hence did not inherit anything from her husband and that *M* was in possession from 1902 to 1918 on behalf of her two sons, and hence *N* was not entitled to any share.

Held, (1) whether *M* was a Burmese Buddhist or a Chinese Buddhist or Confucian, *N's* share under Burmese Buddhist Law was the same, that is one-fourth; (2) the argument that *M* was not entitled to inherit and was in possession on behalf of the two sons was based on the supposition that the Chinese Customary Law applied to *C's* estate, but in fact the Succession Act applied, and, therefore, even if the estate were *C's* estate the four children would still share equally in the property. A.I.R. 1930 Rang. 81 (F.B.), Considered and Applied. (*Heald, Ag. C.J. and Otter, J.*) MAUNG SEIN DONE *v.* MA PAU NYUN. **A. I. R. 1930 Rang. 222.**

——*Son of Chinaman from Burmese woman becoming Burmese in dress and habits—Chinese worship and funeral rites retained—Wife's name not included in conveyances—Chinese customs held to have been retained.*

A person who was the son of a Chinese father but of a Burmese mother became to some extent Burmese in his dress and habits, but as to his worship and funeral rites at all material times he was a Chinese Buddhist. He never included his wife's name in conveyances.

Held, the Chinese customs were retained. (*Heald, Ag. C. J. and Otter, J.*) MA SAN *v.* MA CHIT SU. **A. I. R. 1930 Rang. 218.**

——*Heirs must obtain letters of administration—Succession Act* (1925), *S.* 212.

Where the deceased is a Chinese Buddhist and not a Burmese Buddhist, the heirs of such a person must obtain letters of administration before a final decree in their favour can be given. A. I. R. 1930 Rang. 81, Rel. on. (*Heald, Ag. C. J. and Otter, J.*) MA SAU *v.* MA CHIT SU. **A. I. R. 1930 Rang. 218.**

——*Property acquired by woman after death of first husband goes to second husband—Estate of first husband goes to son by first husband in preference to daughter by second husband.*

According to the Chinese customary law, the rule of inheritance is that when a man dies his property, real and personal, is equally divided among all his sons, that daughters succeed only when there are no sons, and that the widow succeeds only where there are neither sons nor daughters. If there are sons or daughters, the widow has one right to administer the estate and to be maintained out of it and a claim on the estate for provision for her funeral, but the property vests not in her, but in the children. But the rule that the widow does not inherit has not hitherto been adopted in the Courts in this country. 8 L. B. R. 22, Expl. Where the Chinese widow marries a Burman husband, the property acquired by her, after her Chinese husband's death and before her second marriage goes, according to the customary law of Chinese Buddhists, to her second husband. (*Heald and Lentaigne, JJ.*) MAUNG PO MAUNG *v.* MAY PYIT YA. **1 Rang. 161 = 74 I. C. 933 = 2 Bur. L. J. 79 = A. I. R. 1923 Rang. 180.**

Widow.

——*Chinaman dying leaving children by Chinese wife and Burman widow—Widow administering estate for herself and the children—Mortgage by her for necessity is valid and binding on the estate.*

Where a Chinese Buddhist dies leaving behind children by Chinese wife and Burmese widow and the latter administers the estate of her deceased husband for herself and her children from the date of her husband's death and while so administering it executes a mortgage for necessity and the money is expended for the benefit of the estate, the mortgage is valid mortgage and is binding on the property comprised therein irrespective of the fact whether the widow has a right to share in the estate of her husband or whether her right is limited to maintenance of such estate and whether the Chinese customary law or ordinary law is applicable. (*Sir Lancelot Sanderson.*) BON KWI *v.* FIRM S. K. R. S. K. R. **1930 M. W. N. 149 = 31 M. L. W. 576 = 57 I. A. 38 = 8 Rang. 172 = 121 I. C. 233 = A. I. R. 1930 P. C. 26 = 58 M.L.J. 178 (P.C.).**

——*If there are children widow does not inherit.*

Under Chinese customary law, in cases where there are children, the widow takes no share in the deceased husband's estate. She has a claim for maintenance against the estate and possibly in certain cases certain other claims, but the estate belongs to the children. A.I.R. 1923 Rang. 180. (*Lentaigne and Heald, JJ.*) BON KWI *v.* MA KYE YAN. **2 Bur. L. J. 102 = 79 I. C. 244 = A. I. R. 1923 Rang. 236.**

——*Chinese widow marrying Burman—Nationality not altered.*

There is no authority for the suggestion that the mere fact of the marriage of a Chinese Buddhist widow with a Burman alters her nationality from Chinese to Burmese. (*Heald and Lentaigne, JJ.*) MAUNG PO MAUNG *v.* MAY PYIT YA. **1 Rang. 161 = 74 I. C. 933 = 2 Bur. L. J. 79 = A. I. R. 1923 Rang. 180.**

BUILDING.

See (1) CO-SHARER.
(2) LANDLORD AND TENANT.
(3) T. P. ACT, S. 51.

BUILDING.

———**Lease.** *See* LEASE.

———**Sites.** *See* MUNICIPAL ACTS.

BUILDING AND IMPROVING ON ANOTHER'S LAND—*See* ACQUIESCENCE.

BUNDELKHAND ALIENATION OF LAND ACT (U. P. II OF 1903).

Scope.

———*Act does not deal with alienations between members of same tribe.*

Per *Boys, J.*—There is good ground in the Act itself to justify a finding that the Act in no way deals with alienations, whether permanent or otherwise, between members of the same tribe. (*Walsh, Daniels and Boys, JJ.*) RAM SAHAI *v.* DEBI DIN. **49 All. 8 = 24 A. L. J. 945 = 97 I. C. 455 = A. I. R. 1926 All. 617. (F.B.).**

S. 2—Trees.

———Trees apart from land are not "land" within S. 2. 46 A. 631 Ref. (*Mukerji, J.*) PANCHAITI AKHARA *v.* BENI BAHADUR. **6 L. R. A. (Civ.) 277 = 87 I. C. 262 = A. I. R. 1925 All. 587.**

Ss. 3 and 16 (A)—Pre-emption.

———*Suit for pre-emption—Pre-emptor not member of same agricultural tribe as that of vendor of property but co-sharer in village—Vendee, member of same agricultural tribe as vendor but not co-sharer in village—The pre-emptor's right of pre-emption cannot be accepted and the vendee has legal right to property purchased—Agra Pre-emption Act (XI of 1922), S. 7.*

Certain persons claimed a right of pre-emption, of a property situated in a district of Bundelkhand, which was sold on the 22nd December, 1923, and the vendor and vendees were members of the same agricultural tribe but the vendees were not co-sharers in the village at all. The pre-emptors, on the other hand, were not members of the same agricultural tribe as the vendor, but were co-sharers not only in the mahal but in the very khata in which the share sold was situated. Before bringing their suit for pre-emption the pre-emptors did obtain the sanction of the Collector under the Bundelkhand Alienation of Land Act, S. 16 (A) as amended by Act IV of 1915. The pre-emptors based their claim mainly on the custom recorded in the wajib-ul-arz of the village and the vendees contested the suit on the ground that the pre-emptors had no right to maintain the suit and that they had no preferential right as against them.

Held, that a right of pre-emption is not the same thing as a right of purchase. It, therefore, follows that the sanction obtained by the pre-emptors to pre-empt the property cannot strictly be taken to be a sanction to purchase it. Moreover, as the pre-emptors are not of such a class as by right to be entitled to purchase the property, but they might, if they obtain the sanction of the Collector, become so entitled to purchase; their right is conditional, and so they are not absolutely entitled to purchase; their right is conditional, and so they are not "entitled to purchase" the property under the Bundelkhand Act within the meaning of S. 7, Agra Pre-emption Act.

Per *Sulaiman, J.*—It was obviously intended that in areas where the Agra Pre-emption Act applies, there can be no right of pre-emption except in accordance with the Act. The Pre-emption Act undoubtedly applies to Bundelkhand, and whatever right the present plaintiffs might have had independently of the Act, cannot now be enforced. They can only succeed if they are entitled under the Pre-emption Act to pre-empt. Although the

Act applies to them, and they would come within the classes of persons mentioned in S. 12, they are debarred from taking advantage of these provisions because S. 7 expressly prevents the Act from conferring any benefit on them. The result is that S. 3 takes away any right that they might have had independently of the Act, and S. 7 prevents the conferring on them of any right under the Act. Thus they have lost all right of pre-emption. (*Sulaiman and Ashworth, JJ.*) PHOOL CHAND *v.* RAM NATH. **50 All. 430 = 107 I. C. 570 = 26 A. L. J. 142 = A. I. R. 1928 All. 186.**

S. 3, Cl. 1 (a)—Sanction.

———*Ostensible alienee a member of agricultural tribe—No sanction of Collector necessary for alienation—Collector is not entitled to enquire into propriety of alienation.*

Where apparently the alienee is a member of the agricultural tribe as the alienor, or is a member of an agricultural tribe and is a resident of the district in which the land is situated, no sanction of the Collector is necessary, and the Collector has no power to enquire into the legality or propriety of the alienation. (*Boys and Sen, JJ.*) BHAGWATI PRASAD SINGH *v.* HARI HAR PRASAD SINGH. **26 A. L. J. 673 = 9 L. R. A. (Rev.) 200 = 115 I. C. 650 = A. I. R. 1928 All. 511.**

S. 3—Title.

———*A non-agriculturist benami purchaser acquires no title to the property.*

The person in whose favour a deed of sale has been executed, so long as he is an agriculturist, is the absolute owner of the property and no non-agriculturist benami purchaser acquires any title to such property. (*Boys and Sen, JJ.*) BHAGWATI PRASAD SINGH *v.* HARI HAR PRASAD SINGH. **26 A. L. J. 673 = 9 L.R.A. (Rev.) 200 = 115 I. C. 650 = A. I. R. 1928 All. 511.**

S. 4—Brahman.

———Brahmo Bhats are included in the term "Brahman." (*Mears, C. J. and Dalal, J.*) RAM PRASAD *v.* GORE LAL. **49 All. 887 = 25 A.L. J. 678 = 8 L. R. A. (Rev.) 187 = 101 I.C. 844 (1) = A. I. R. 1927 All. 486.**

S. 4—Scope.

———Per *Ashworth, J.*—An order under S. 4 allowing Local Government to determine what persons are to be deemed to be agriculturists must be deemed to have retrospective effect. (*Boys and Ashworth, JJ.*) KALIKA PRASAD *v.* AJUDHIA PRASAD. **51 All. 780 = 1929 A. L. J. 448 = 121 I. C. 211 = A. I. R. 1929 All. 421.**

Ss. 6, 17 and 22—Partition.

———*Collector making partition behind back of co-sharers, acts* ultra vires—*Civil Court has jurisdiction in such a case.*

If the Collector in granting a lease under Section 6 acts illegally and in excess of his powers, Section 22 will not have the effect of ousting the Civil Courts' jurisdiction to entertain a suit for declaration that the lease granted by the Collector was *ultra vires*. It is perfectly open to the Collector to transfer to the mortgagees the possession of the land actually in possession of the mortgagor. When the Collector makes in effect a partition of a *patti* behind the back of the other co-sharers for the benefit of mortgagees of one co-sharer, he acts in excess of his powers. (*Ryves and Daniels, JJ.*) PRAG NARAIN *v.* JWALA PRASAD. **45 All. 450 = 21 A. L. J. 335 = 74 I. C. 666 = 4 L. R. A. (Civ.) 197 = A.I.R. 1923 All. 458.**

Ss. 9 (1), 10 and 16—Applicability.

——*Application of Ss.* 10 *and* 16 *being restricted to those mortgages which are covered by Act, they cannot affect simple mortgage between members of same tribe which is excluded from S.* 9 (1).

Simple mortgage executed between members of the same tribe does not come within the scope of S. 9 (1) and as Ss. 10 and 16 of the Act cover only those mortgages which come within the general scope of the Act, they cannot affect such a simple mortgage. A. I. R. 1926 All. 617 (F. B.), Not Appr., but Foll. (*Boys and Ashworth, JJ.*) KALIKA PRASAD *v.* AJUDHIA PRASAD. **51 All. 780 = 1929 A. L. J. 448 = 121 I. C. 211 = A. I. R. 1929 All. 421.**

——*Mortgage between members of same tribe—S.* 9 *does not apply* : *Boys, J., differing.*

Section 9 does not apply to a simple mortgage between members of the same agricultural tribe : A. I. R. 1925 All. 253 and A. I. R. 1926 All. 136, Considered. (*Walsh, Daniels and Boys, JJ.*) RAM SAHAI *v.* DEBI DIN. **49 All. 8 = 24 A. L. J. 945 = 97 I. C. 455 = A. I. R. 1926 All. 617 (b) (F.B.).**

——*Applicable even after a decree is passed.*

There is nothing in the wording of the section to support the contention that the provisions of S. 9 have effect only before a decree is passed and not afterwards. S. A. No. 1457 of 1920, dated 18th July, 1922, Foll.

Obiter.—It is advisable that Original Courts, when they find that a mortgage has been made which is ordinarily enforceable but which covers property situated within Bundelkhand which cannot be sold, should take action under S. 9 (3) before passing the decree and not wait till the decree has been passed. (*Mears, C.J. and Sulaiman, J.*) BISHNATH SINGH *v.* BASDEO SINGH. **48 All. 67 = 23 A.L.J. 927 = 6 L.R. A. (Civ.) 453 = 88 I.C. 484 = A. I. R. 1926 All. 136.**

S. 9—Reference.

——*Reference is competent even after a decree is made absolute.*

A reference can be made under Section 9, Sub-Section (3) even after a decree has been made absolute. (42 All. 142, Dist.; S.A. 1457 of 1920, Ref.) (*Kanhaiya Lal, J.*) BISHNATH SINGH *v.* BASDEO SINGH. **6 L. R. A. (Civ.) 101 = 82 I.C. 1037 = A. I. R. 1925 All. 171.**

Ss. 16 and 29—Alienation.

——*Land belonging to a member of agricultural tribe cannot be sold in execution of any decree.*

S. 29 does not refer to a case where an agriculturist's debt has been settled by a loan from Government, but to a case where the property of an agriculturist is sold by public auction under the Bundelkhand Encumbered Estates Act and bought in by the Government. Under S. 16 no land belonging to an agriculturist shall be sold in execution of any decree of a Civil or Revenue Court. (*Ashworth, J.*) GIRWAR DAYAL *v.* NARAIN SINGH. **9 L. R. A. (Rev.) 130 = 116 I. C. 20 = A. I. R. 1928 All. 211.**

——*Trees apart from land can be sold.*

S. 16 of the Bundelkhand Land Alienation Act is no bar to the selling by the decree-holder, of the trees appertaining or belonging to the groves held by the grove-holder judgment-debtor. (*Mukerji, J.*) PANCHAITI AKHARA *v.* BENI BAHADUR. **6 L. R. A. (Civ.) 277 = 87 I.C. 262 = A. I. R. 1925 All. 587.**

S. 16—Attachment.

——*Agricultural land cannot be attached and decree transferred to Collector for realizing decretal amount even otherwise than by sale—C. P. Code, S.* 68.

Land belonging to a member of an agricultural tribe cannot be attached and sold in execution of a decree and therefore a decree cannot also be transferred to the Collector for realizing the decretal amount from such land otherwise than by sale. 42 All. 142, Ref. (*Kanhaiya Lal and Boys, JJ.*) JANGI LAL *v.* MATA BADAL SINGH. **48 All. 392 = 24 A.L.J. 397 = 93 I. C. 1020 = A. I. R. 1926 All. 339.**

S. 16—Mortgage.

——*Mortgage between members of same tribe—Mortgagee cannot have property sold but may be given foreclosure decree*: Per *F. B.* (*Boys, J. differing.*).

The plan of the Act is to control contracts of attempted alienation, which would have the effect of placing immoveable property permanently in the hands of persons not members of the agricultural tribe, and, therefore, where the mortgagee is also a member of the same tribe though he cannot bring the property to sale in execution, a remedy can be given to the mortgagee by providing for foreclosure.

Per *Boys, J.*—The mortgagee can be given a decree for sale. (*Walsh Daniels, and Boys, JJ.*) RAM SAHAI *v.* DEBI DIN. **49 All. 8 = 24 A. L. J. 945 = 97 I. C. 455 = A. I. R. 1926 All. 617 (A) (F. B.).**

——*Mortgage between members of same tribe—S.* 16 *does not apply*: (*Boys, J.*)

S. 16 has no bearing on temporary alienations between members of the same tribe, not on the ground that the Legislature did not mean to include such alienations, but because the Act taken as a whole indicates that such alienations are not within its scope and the Act must be given effect to as a whole. (*Walsh, Daniels and Boys, JJ.*) RAM SAHAI *v.* DEBI DIN. **49 All. 8 = 24 A. L. J. 945 = 97 I. C. 455 = A. I. R. 1926 All. 617 (F. B.).**

S. 16—Objection.

——So long as the property is not sold the judgment-debtors are entitled to claim the privilege to which they are entitled under the Act. (*Mears, C. J. and Dalal, J.*) RAM PRASAD *v.* GORE LAL. **49 All. 887 = 25 A. L. J. 678 = 101 I. C. 844 (1) = 8 L. R. A. (Rev.) 187 = A. I. R. 1927 All. 486 (b).**

S. 16—Scope.

Per *Boys, J.*—S. 16 is of retrospective effect. (*Boys and Ashworth, JJ.*) KALIKA PRASAD *v.* AJUDHIA PRASAD. **51 All. 780 = 1929 A. L. J. 448 = 121 I. C. 211 = A.I R. 1929 All. 421.**

S. 16-A—Pre-emption.

——Under S. 16-A no person can sue for pre-emption unless the transferor is not a member of an agricultural tribe or unless the pre-emptor belongs to the same agricultural tribe as the vendor. Where this is not the case previous sanction of the Collector is an indispensable requisite. (*Sulaiman, Ag.C.J. and Pullan, J.*) MURAT RAM JANKI BIRAJMAN *v.* GOREY LAL. **118 I. C. 233.**

S. 16-A—Sanction.

——*Sanction of Collector—Sanction does not create substantive right but is applicable only where previous right of pre-emption exists.*

Ashworth, J.—S. 16-A, only enables a Collector to sanction a suit for pre-emption where, but for the provisions contained in the earlier part of the section, the applicant for sanction has a right to pre-empt based on custom or contract. The sanction of the Collector does not create a substantive right, but is merely necessary for the otherwise existing substantive right to be exercised. (*Sulaiman and Ashworth, JJ.*) PHOOL CHAND *v.* RAM NATH. **50 All. 430 = 107 I. C. 570 = 26 A. L. J. 142 = A. I. R. 1928 All. 186.**

BUNDELKHAND ENCUMBERED ESTATES ACT (U. P. I OF 1903).

S. 10 (2)—Interpretation.

——*"Give" includes creating wakf.*

The word "give" in S. 10 (2), Encumbered Estates Act (Bundelkhand) 1 of 1903 is wide enough to cover a case of giving away property by way of wakf so far as property lies in the area, to which the Encumbered Estates Act applies. (*Kendall and Niamatullah, JJ.*) MT. MUSHARRAF BEGAM *v.* MT. SIKENDAR JEHAN BEGAM. **51 All. 40 = 26 A. L. J. 1180 = 111 I. C. 583 = A. I. R. 1928 All. 516.**

S. 12—Mortgage.

——*Some of several co-mortgagors released from debt —Effect is only to break the integrity of the mortgage so far as those proprietors are concerned.*

Where only some of several co-mortgagors apply and the provisions of the Act are applied to them, it is only the claim against the proprietors who have applied that is duly discharged, and not also the claim against those who have not applied. But the mortgagees also cannot claim the whole of the debt from those who have not applied, on the ground that they were jointly liable for the whole. The legal effect of the proceedings is that the integrity of the mortgage must be deemed to have been broken up by operation of law so far as the share in the joint debt of those who applied was concerned. The failure of the mortgagees to make any claim under the Act as against some of the mortgagors has the same effect in law as if they have accepted from these mortgagors their proportionate share of the mortgage-debt and freed their share from incumbrance, *i.e.*, it has the effect of partially breaking up the integrity of the mortgage debt. 16 A.L.J. 171 and 30 All. 141, Foll. But any one or some of the remaining mortgagors can redeem the whole of the unredeemed property. (*Sulaiman, J.*) MT. BETI BAI *v.* JANTYA SINGH. **6 L. R. A. (Civ.) 496 = 89 I. C. 574 = A. I. R. 1926 All. 136.**

S. 12—Validity.

——Where the person who was acting for plaintiff (a minor) as his next friend was also acting in the same proceedings as the agent of the opposite parties.

Held, that the proceedings were not regularly taken. (*Lindsay and Kanhaiya Lal, JJ.*) CHHIDDU *v.* DESRAJ. **21 A. L. J. 793 = 77 I. C. 753 = 5 L. R. A. (Civ.) 55 = A. I. R. 1924 All. 294.**

S. 13—Validity.

——*Bond for unauthorised mode of paying sum awarded by Special Judge is void.*

A bond by a disabled proprietor arranging an unauthorised mode of payment of the sum awarded by the Special Judge is void. 30 All. 38, Expl. (*Tudball and Sulaiman, JJ.*) BISHEN NATH *v.* PEAREY JU. **19 A. L. J. 645 = 63 I. C. 542 = A. I. R. 1921 All. 406.**

S. 18—Possession.

——*Possession can also be obtained otherwise than under S. 18.*

The remedy provided by S. 18 of the Act is not the exclusive remedy which a proprietor is entitled to have recourse to. That is a summary remedy provided, and it does not in any way take away the right of the proprietor to obtain possession in any other way allowed by law. (*Sulaiman, J.*) MT. BETI BAI *v.* JANTYA SINGH. **6 L. R. A. (Civ.) 496 = 89 I. C. 574 = A. I. R. 1926 All. 136.**

BUNDS.

See (1) ALLUVION AND DILUVION.
(2) RIPARIAN OWNERS.

BURMA ANTI-BOYCOTT ACT (1922), S. 9.

BURDEN OF PROOF. *See* EVIDENCE ACT, Ss. 101 TO 105.

BURIAL GROUND.

See (1) EASEMENTS ACT.
(2) MUNICIPAL ACTS.

BURMA ANTI-BOYCOTT ACT (V OF 1922).

S. 4—Essentials.

——Hanging out notice-boards that certain non-members of Thanga Thama Gyi Society are not recognised is an offence under S. 4 (*a*). (*Brown, J.*) U NANDIYA *alias* U. P. O. GAN AND U THUMANA *v.* EMPEROR. **3 Bur. L. J. 186 = 84 I. C. 450 = 26 Cr. L. J. 306 = A. I. R. 1924 Rang. 379.**

S. 4 (a)—Joint Trial.

——*Promoting commission of offence justifies joint trial—Actual instructions need not be proved—Acquittal of principal accused does not necessitate acquittal of all.*

Promoting by *A* and *B* of the commission of offence, *viz.*, the boycotting of the headman in pursuance of *C's* resolution at a meeting justifies joint trial. Even if the proposal by *A* was not proved, but the promotion of the boycott of which he was the alleged proposer, was proved against *A* and *B* the fact that all the three were tried together would not render the trial illegal or be a valid reason for acquitting *A* and *B* against whom a charge under S. 4 (*c*) was brought home. (*Pratt, J.*) EMPEROR *v.* NGA AUNG GYAW. **1 Rang. 604 = 2 Bur. L. J. 224 = 76 I. C. 830 = 25 Cr. L. J. 270 = A. I. R. 1924 Rang. 98.**

S. 6 (a)—Ex-communication.

——*Spurious ceremony not conducted in Thein—Excommunication for partly political purpose is not exempted under S. 7 (a).*

Where a village headman used abusive language towards certain monks who were preaching on Home Rule and kindred matters and had thereby run the risk of being ex-communicated and the first petitioner who was among the abused, proposed a boycott of the headman and called a meeting of monks and laymen together and purported to perform the rite of ex-communication,

Held, (1) The ex-communication was a spurious ceremony and not having been proclaimed in a Sima or Thein by a properly convened chapter and the procedure laid down in the Vinaya not having been strictly followed the benefit of S. 7 (*a*) could not be claimed. (2) It was necessary to prove that the boycott was proposed for *bona fide* religious purposes; where a motive other than religious is present the burden of establishing good faith lies heavily on the proposer. (3) The mere fact that the second petitioner allowed the use of his compound does not amount to abetment but having become cognizant of the proposal to boycott on the first day, and having continued to lend his house for the ceremony on the second day, he facilitated the commission of the offence and had intentionally aided the boycott under S. 107, Expl. 2, I.P.C. (4). That the sentence was rightly reduced from one year to three months by the Sessions Judge, as the complainant was shown to have been a tactless, irreverent and foul-mouthed individual, but no further reduction of sentence was granted in view of the fact that the petitioner had tried to give effect to his proposal by a spurious ceremony. (*May Oung, J.*) U TILOKA *v.* BA SEIN. **1 Rang. 629 = 2 Bur. L. J. 221 = 76 I. C. 719 = 25 Cr. L. J. 255 = A. I. R. 1924 Rang. 169.**

S. 9—Sanction.

——*Facts incorrectly set out in the sanction—Sanction is not invalid—Cr. P. Code, Ss.* 195 *and* 196.

The provisions in the Anti-Boycott Act requiring the authority of the Government for a prosecution under the Act correspond to those in S. 196, Code of Criminal Procedure, which is less stringent than S. 195. Strictly the "order" or "authority" required by S. 196 is not the same as the "sanction" referred to in S. 195 and the classes of the offences dealt with by the two sections are quite distinct. Moreover, in the latter section, there is no provision corresponding to sub-section (4) of the earlier section. The intention of the legislature was to ensure that no prosecution for an offence falling within S. 196 or under the Anti-Boycott Act should be launched except on a complaint authorised by the Government, and where this intention is given effect to it is immaterial whether or not all the facts on which the complaint was to be based were stated in the " authority" with meticulous precision. Indeed, it is doubtful if it is even necessary to set out any fact other than the alleged fact that the accused had committed an offence under a certain section of the Act. (*May Oung, J.*) NGA AUNG HMAU *v.* EMPEROR. **2 Bur. L. J. 196 = 76 I.C. 561 = 25 Cr.L.J. 193 = A.I.R. 1924 Rang. 65.**

BURMA CO-OPERATIVE SOCIETIES ACT (VI OF 1927).

S. 47 (2) (b)—Amendment.

———*Amendment suggested.*

Suggestion is made to the Local Government to provide for an appeal from the liquidator's order under S. 47 (2) (*b*) either to the Civil Court or if that is not expedient to the Registrar of the Co-operative Societies. (*Ormistone, J.*) U PO NYAN *v.* MAUNG KYAN. **118 I. C. 403 = A. I. R. 1929 Rang. 113.**

Ss. 47 (4) and 49—Jurisdiction.

———*Orders of Liquidator under S. 49 are final in absence of rules made under S. 50 (2) (s)—Liquidator purporting to act under S. 47 and issuing order to pay certain sums—It being alleged in some cases that debts were time-barred and in one much less sum was due —Civil Court has no jurisdiction.*

In the absence of rules made under S. 50 (2) (*s*), orders of a Liquidator under S. 49 are final and no appeal lies to the District Judge.

Where a certain Co-operative Society had been ordered to be wound up and a Liquidator appointed, purporting to act under S. 47, issued orders to pay certain sums, and it was alleged in some cases that the debts were time-barred and in one that much less sum was due, Civil Court has no jurisdiction, orders of the Liquidator being within the powers conferred upon him by the Act. 44 Bom. 582; 40 All. 89, Rel. on. (*Maung Ba, J.*) U THA ME *v.* PAUNGDE CO-OPERATIVE TOWN BANK. **120 I. C. 130 = A. I. R. 1929 Rang. 192.**

S. 47 (2) (b)—Revision.

———An order passed by a Civil Court, enforcing on application the order made by a liquidator under S. 47 (2) (*b*) is not revisable. (*Ormistone, J.*) U PO NYAN *v.* MAUNG KYAN. **118 I. C. 403 = A. I. R. 1929 Rang. 113.**

BURMA COURTS ACT (BURMA XI OF 1922).

Ss. 2 and 11—Appeal.

———*Suit for rent is not 'land suit' within S. 2 and no second appeal lies if value does not exceed Rs.* 500—*C. P. Code, S.* 102.

A suit for rent of land is not a "land suit" within the meaning of S. 2 and therefore if the value does not exceed Rs. 500 no second appeal lies under S. 11. 24 Cal. 449; 2 L. B. R. 124, Dist. 3 L. B. R. 90; 42 Cal. 638, Diss. and 23 Mad. 547, Foll. (*Heald and Rutledge, JJ.*) MA PAN *v.* MG. NE U. **3 Rang. 390 = 91 I. C. 639 = A. I. R. 1926 Rang. 19.**

S. 9 (1) (b)—Jurisdiction.

———*Increase of claim in appeal does not affect jurisdiction.*

Where the plaintiff had tentatively valued his suit for Rs. 3,100 and the Sub-divisional Court passed a decree for Rs. 2,128-2-9 and when the plaintiff appealed from the decree, claiming Rs. 11,000,

Held, that because the plaintiff chose in appeal to increase his claim that did not alter the course of appeal and that the appeal lay to the District Court only and not to the High Court. (*Robinson, C. J. and Brown, J.*) HARDAYAL *v.* RAM DOO. **2 Rang. 408 = 86 I. C. 568 = 3 Bur. L. J. 207 = A. I. R. 1924 Rang. 354.**

S. 11—Appeal.

———*C. P. Code, O.* 21, *R.* 92—*Order under—No second appeal lies—Provisions of S.* 104, *are not affected by S.* 11.

The provisions of S. 11, Burma Courts Act, do not affect those of S. 104, C. P. Code, and no second appeal lies from an order setting aside sale under O. 21, R. 92. (*Heald, J.*) MAUNG PE SEIN *v.* MA THIN MYA. **7 Rang. 37 = 117 I.C. 253 = A. I. R. 1929 Rang. 148.**

S. 26—Limitation.

———*Decree of Chief Court executed by High Court—Limitation for execution is governed not by Art.* 183 *but by Limitation Act, Art.* 182.

The object of S. 26 is simply and solely to provide for the execution of decrees of the Chief Court by the High Court, which succeeded it. It was not intended that a decree of the Chief Court should come under a different law of limitation simply because it was executed by the High Court. The article applicable therefore to such decrees is Art. 182 and not Art. 183. (*Pratt, Offg. C. J. and Cunliffe, J.*) ALIBHAI MOHAMED *v.* MOHAMED NOOR MAHOMED. **6 Rang. 566 = 114 I. C. 674 = A. I. R. 1928 Rang. 317.**

BURMA COURTS MANUAL.

Para. 307 (A) I—Receiver.

———*Provincial Insolvency Act* (5 *of* 1920), *S.* 56 (2) (*b*)—*No commission on realization by sale of mortgage money.*

In Burma the receiver is not entitled to commission on the amount of the mortgage money realized by the sale of the mortgaged property. A. I. R. 1928 Rang. 23, Foll. (*Heald and Mya Bu, JJ.*) K. P. S. P. P. L. FIRM *v.* C. A. P. C. FIRM. **7 Rang. 126 = 117 I. C. 582 = A. I. R. 1929 Rang. 168.**

BURMA CRIMINAL LAW AMENDMENT (CONDITIONALLY RELEASED PRISONERS) ACT (III OF 1928).

S. 2—Interpretation.

———*Penal provision has no retrospective effect—Interpretation of statutes.*

Section 2 has no retrospective effect. On the ordinary principles of penal legislation a penal provision does not have retrospective effect. (*Carr, J.*) NGA PO NGWE *v.* EMPEROR. **7 Rang. 355 = 120 I. C. 692 = 1929 Cr. C. 446 = 31 Cr. L. J. 174 = A. I. R. 1929 Rang. 278.**

S. 2—Sentence—Legality of.

———*Penal Code, S.* 227—*Magistrate sentencing person, convicted under S.* 227, *Penal Code, and S.* 2, *Burma Act, for period in excess of his powers—Such sentence is illegal.*

There is nothing in either S. 227, Penal Code or S. 2. Burma Act to empower any Magistrate to pass a sentence in excess of that which he is empowered under the Cr. P. Code, to pass. Thus if a Magistrate sentences a person, convicted under S. 227 of the Code, and under S. 2, Burma Act, for a period which is in excess of his power, the sentence is illegal. (*Carr, J.*) NGA MYA *v.* EMPEROR. **7 Rang. 358 = 120 I.C. 693 = 1929 Cr. C. 464 = 31 Cr. L.J. 175 = A. I. R. 1929 Rang. 279.**

BURMA ELECTORAL RULES.

Rr. 36 and 48—Election Commissioners.

———*Specific Relief Act, S. 45—High Court has jurisdiction to enforce them to do certain act but not unless their decision in election matters is perverse or unreasonable.*

The commissioners appointed to decide election petitions with their place of sitting in Rangoon are persons holding a public office of a temporary nature and therefore the High Court, has jurisdiction to enforce them to do a certain act, if it affects property, franchise or personal right of any person, and if it is clearly incumbent on the commissioners. Under the rules the commissioners are the sole authority to interpret any question arising on the construction of the rules and these rules do not give any other authority, the power to question that decision. Neither do the rules nor any general provision of law give the High Court, either by way of revision or appeal, any power to review that decision. It is not for the High Court to decide whether the commissioners' ruling on a particular question was right or wrong, unless it is so wrong and so perverse as to amount to a refusal to exercise a jurisdiction clearly given by the rules.

Where therefore the commissioners decided that a party substituted in place of a returned candidate whose election was challenged by an unsuccessful candidate cannot show that he himself used corrupt practices.

Held, that the High Court could not interfere, A. I. R. 1924 Cal. 761, Appr. (*Rutledge, C. J. and Brown, J.*) U PO THIN *v.* BURJORJEE. **5 Rang. 504 = 105 I. C. 428 = 6 Bur. L. J. 240 = A. I. R. 1927 Rang. 324.**

R. 45—Interpretation.

———*Commissioners recommending a candidate's election void and also costs against him—Governor by notification setting aside election but making no order as to costs—Omission as to costs subsequently supplied by another notification—Subsequent notification is in continuation of the first and is* intra vires.

The Special Tribunal constituted to hear a petition recommended that the election of *G* be declared void. They also recommended costs against him. On receipt of that report, the Governor set aside the election but made no direction as regards costs. The Governor subsequently supplied the omission by issuing a fresh notification directing that *G* should pay the costs as recommended by the Commissioners in the original report.

Held, that the omission in the first notification regarding costs was due to an oversight. The subsequent notification is in effect a continuation of the first and the two should be considered as constituting one order passed in accordance with the report. The second notification was therefore *intra vires.* (*Carr and Mg. Ba, JJ.*) U MAUNG GYEE *v.* U BA LIN. **117 I. C. 57 = A. I. R. 1928 Rang. 293.**

BURMA EXCISE ACT (BUR. ACT V OF 1917).

Conviction.

———*Conviction of accused caught in the same sampan where were found 9 bundles containing four bottles each of liquor was held bad.*

The accused were all caught in one sampan, and in the sampan were found thirty-six quarts of *kazaw ye* in nine bundles of four bottles each. Conviction of them all, on the ground that they were in joint possession of thirty-six quarts was held bad. 8 L.B.R. 464, Dist. (*Bagnley, J.*) APPAYA *v.* EMPEROR. **26 Cr. L. J. 327 = 84 I. C. 551 = 3 Bur. L. J. 255 = 2 Rang. 657 = A.I.R. 1925 Rang. 135.**

Ss. 12 (c) and 30 (d)—Offence under.

———*Possession of yeast balls is punishable.*

Yeast balls are not excisable articles but as they are materials for the manufacture of an excisable article, namely, liquor, the possession of them is prohibited by S. 12 (*c*) and made punishable under S. 30 (*d*) of the Act. (*Maung Kin, J.*) NAU MA MYA *v.* EMPEROR. **11 L.B.R. 136 = 66 I.C. 665 = A.I.R. 1921 L.B. 81.**

S. 30 (a)—Conviction.

———*Person cannot be convicted for possession of less than one quart of country spirit or country alcoholic liquor other than spirit.*

A person cannot be convicted under S. 30 (*a*) for mere possession of less than one quart of country spirit or country alcoholic liquor other than spirit, the quantity being within the limits for possession prescribed for either of the kinds of liquor in the Excise Department Notification No. 61 of 14th June, 1928. (*Heald, J.*) EMPEROR *v.* NGA PO SEIK. **7 Rang. 316 = 30 Cr. L. J. 990 = 119 I.C. 223 = 1929 Cr. C. 451 = A. I. R. 1929 Rang. 256.**

S. 30 (a)—"Country liquor."

———*"Country liquor" explained—Particular kind must be specified.*

"Country liquor" is a generic term which can be equally applied to tari, country spirit, and country alcoholic liquor other than spirit, *i.e.*, country fermented liquor. In excise cases, it is always necessary to distinguish between these different kinds of country liquor and specify which particular kind is involved in the case, as the quantities of each of these different kinds of alcoholic liquor which may be possessed without a license differ. (*Heald, J.*) EMPEROR *v.* NGA PO SEIK. **7 Rang. 316 = 30 Cr. L.J. 990 = 119 I.C. 223 = 1929 Cr. C. 451 = A. I. R. 1929 Rang. 256.**

Ss. 30 (a) and 16 (3)—Offence under.

———Bona-fide *private consumption proved—Accused are not liable for any offence.*

Applicant was manager of a Chinese store; the firm employed 25 or 30 men; and the 3 cases of Chinese wine were sent quite openly as such from Rangoon, just before the New Year. Kin Woon, one of the proprietors of the firm, was a Roman Catholic and observed the New Year and the anniversary of the election of Dr. Sun Yet Sen as President.

Held, in these circumstances the liquor, 48 quarts which does not seem excessive, was intended for the *bona fide* private consumption of the firm and its employees at the New Year.

Held, further, the evidence ought to have been recorded in manner provided for summary trials with appealable sentence. (*MacGregor, J.*) CHOO KHIN *v.* EMPEROR. **1 Bur. L. J. 105 = 83 I. C. 522 = 26 Cr. L. J. 42 = A. I. R. 1923 Rang. 41.**

Ss. 30 (a) and 37—Procedure.

———*Alteration of offence under S. 30 (a) to one under S. 37—Cr. P. Code, S. 227.*

An illegal conviction under S. 30 (*a*) cannot be altered to a conviction under S. 37 if the accused is not called upon to answer a charge under the latter section.

(*Heald, J.*) EMPEROR *v.* NGA PO SEIK.
7 Rang. 316=30 Cr. L. J. 990=119 I.C. 223=1929 Cr. C. 451=A.I.R. 1929 Rang. 256

Ss. 30 and 5—Proof.

——To prove an offence under the Act it is necessary to show that the place of possession or sale of tari is within five miles of a licensed tari shop. (*Carr, J.*) EMPEROR *v.* AUNG SHAN.
7 Rang. 3=117 I. C. 254=30 Cr. L.J. 752=A.I.R. 1929 Rang. 120.

Ss. 37 and 44—Conviction.

——*Possession of excisable article not satisfactorily accounted for though quantity is within limit allowed—Accused is guilty.*

Any person who is unable to account satisfactorily for his possession of an excisable article is liable to punishment under S. 37 although the quantity in his possession may be within the limit allowed for possession. (*Maung Kin, J.*) NGA HAN KYI *v.* EMPEROR.
11 L.B.R. 134=66 I.C. 514=A.I.R. 1921 L.B. 94.

S. 37—Proof.

——*Proof of offence under—Guilty knowledge must be proved.*

In order to establish an offence under S. 37 it is necessary that the guilty knowledge or belief, which is an essential ingredient of the offence should be included in the particulars of the offence stated to the accused and proved at the trial. (*Heald, J.*) EMPEROR *v.* NGA PO SEIK. **7 Rang. 316=30 Cr. L.J. 990=119 I.C. 223=1929 Cr. C. 451=A.I.R. 1929 Rang. 256.**

Ss. 53, 54, 55 and 56—Admission.

——*Excise officer is not police-officer and admission to him is admissible—Evidence Act, S.* 25.

Although under Burma Excise Act (V of 1917) an Excise Officer has power of arrest, search and granting bail he is not a police-officer and an admission made to him is admissible in evidence. (1907-9) U. B. R. 1. *Held* no longer good law. (*Baguley, J.*) MAUNG SAN MYIN *v.* EMPEROR. **7 Rang. 771=121 I.C. 715=31 Cr. L.J. 303=A.I.R. 1930 Rang. 49.**

S. 64-A—Applicability.

——*Burma Habitual Offenders' Restriction Act* (*Burma Act II of* 1919)—*Applicability.*

The Habitual Offenders' Restriction Act should not be applied to persons against whom action is taken under S. 64-A of the Excise Act. A.I.R. 1926 Rang. 182, Foll. (*Heald, J.*) NGA PA *v.* KING-EMPEROR.
4 Rang. 455=99 I.C. 349=28 Cr. L.J. 141=A.I.R. 1927 Rang. 98.

BURMA EXPULSION OF OFFENDERS' ACT (I OF 1926).

S. 2-B, (3) and (4)—Scope.

——*Under S. 2-B,* (3) *and* (4), *person may become offender not by reason of conviction of offence.*

Under S. 2-B, (3) and (4) a person may become an offender not by reason of conviction of an offence, for it is well recognised law that orders under S. 118, Cr. P. Code, or under S. 7, Burma Habitual Offenders Restriction Act are not convictions of offences. (*Carr, J.*) EMPEROR *v.* NGA PO SEIN GYI.
7 Rang. 266=119 I. C. 213=30 Cr. L.J. 990=1929 Cr. C. 450=A.I.R. 1929 Rang. 254.

S. 4 (1)—Applicability.

——*Wording of S.* 4 (1) *restricts its application to offender under S. 2-B* (1) *and* (2).

Wording of S. 4 (1) restricts the application of the section to persons who are offenders under S. 2-B (1) and (2) and the section can have no application to a person who is an offender under S. 2-B (3) and (4). (*Carr, J.*) EMPEROR *v.* NGA PO SEIN GYI.
7 Rang. 266=30 Cr. L.J. 990=119 I.C. 213=1929 Cr. C. 450=A.I.R. 1929 Rang. 254.

S. 4—Jurisdiction.

——*Neither District Magistrate nor High Court has jurisdiction to deal with person against whom order of restriction is passed under Burma Habitual Offenders' Restriction Act, S.* 7.

Although a person against whom an order of restriction is passed under S. 7 is an offender and is liable under S. 3 to be expelled, the Act provides no machinery for the enforcement of the liability and so neither the District Magistrate nor the High Court has any jurisdiction to deal with the matter under S. 4. (*Carr, J.*) EMPEROR *v.* NGA PO SEIN GYI.
7 Rang. 266=30 Cr. L .J. 990=119 I.C. 213=1929 Cr. C- 450=A.I.R. 1929 Rang- 254.

BURMA FERRIES ACT (II OF 1898).

S. 15 (as substituted by Amendment Act II of 1916)—Offence under.

——*Both points must be within limits for an offence under S.* 25 *or S.* 27.

Accused conveyed paddy from Taungmint-byaung, a point outside the ferry limits, to Kamyawgin, a point within the ferry limits.

Held that on a proper construction of S. 15, if one of the two points, either departure or arrival, is outside two miles from the limits of a ferry, there can be no offence either under S. 25 or S. 27. In other words, both these points must be within the two miles limit. (*Duckworth, J.*) MAUNG THA GYAN *v.* EMPEROR.
1 Rang. 313=76 I.C. 646=2 Bur. L. J. 125=25 Cr. L.J. 214=A. I. R. 1923 Rang. 161.

BURMA FOREST ACT (IV OF 1902).

S. 25—Selling timber.

——*Selling a house built with timber is not selling timber and is not an offence.*

The accused had some timber made over to him by one *P*. He also had some round logs of unreserved kinds, made over to him and in 1920 he got a saw pit license to enable him to cut up these logs. With the timber so obtained he built a house in 1920. In 1922 he sold that house to one *T*, whereupon the Forest authorities came down upon him, and after he had refused to pay the fine asked for by them, he was prosecuted and convicted.

Held, that no offence was committed. (*MacGregor, J.*) NGA PO MYIT *v.* KING-EMPEROR.
2 Bur. L, J. 12=81 I. C. 75=25 Cr. L. J. 587=A. I. R. 1923 Rang. 143

S. 64 (1)—Applicability.

——Section 64 only applies to cases in which any person is convicted of a forest offence. (*Baguley, J.*) MAUNG PO MAUNG *v.* EMPEROR.
26 Cr. L.J. 322=84 I.C. 546=3 Bur. L.J. 257=A.I.R. 1925 Rang. 100.

R. 65—Contravention.

——A contractor who removes fire-wood without paying royalty to the licensee commits an offence under R. 65, notwithstanding the fact that there is a dispute about the amount of royalty. (*Heald, J.*) U THA *v* MG. TUN PRU. **3 Bur. L.J. 198=84 I.C. 352=26 Cr. L. J. 288=A.I.R. 1924 Rang. 382.**

R. 88 (2) (iii)—Liability of Master.

——*Use of hammer mark by servant of licensee in contravention of rule* 88 *creates liability of master for conviction.*

BURMA GAMBLING ACT (1899), S. 3.

Any use of the marking hammer by a licensee or by his servant in contravention of any rule under the Forest Act, renders the licensee liable to punishment either under the terms of the old license form No. 20 or new form No. 26, between which there is no difference in this respect. Impressing the property mark on timber other than in accordance with the rules and the license and any illegitimate use of the hammer mark is punishable. Licensee can be held criminally liable for his servant's breaches of the forest rules though it is not established that he had in some way authorised those breaches. (9 L. B. R. 112, Foll.) (*Heald, J.*) MG TWE BWA *v.* EMPEROR. **2 Bur. L. J. 214 = 76 I. C. 867 = 25 Cr. L. J. 275 = A. I. R. 1924 Rang. 171.**

BURMA GAMBLING ACT (I OF 1899).

S. 3 (1)—Gaming-House.

———A house where instruments of gaming are kept for the profit of the owner of that house, is a common gaming-house. (*Otter, J.*) NGA NGWE KYI *v.* EMPEROR. **5 Bur. L. J. 230 = 101 I. C. 659 = 8 A. I. Cr. R. 142 = 28 Cr. L. J. 483.**

Ss. 3 (2), 11 and 12—"Gonnyin."

———"Gonnyin" is a game of pure skill. The fact that the ground was somewhat sloping cannot appreciably alter the nature of the game. (*Brown, J.*) MG. PAW KYAN ZAN MG. YIN AND SU KIN *v.* EMPEROR. **3 Bur. L. J. 166 = 86 I. C. 961 = 26 Cr. L. J. 897 = A. I. R. 1924 Rang. 378.**

S. 3, sub S. (2)—Machauk.

———*Machauk, game of, is excepted under S. 3 (2).*

The game of 'Machauk' or 'Sparrow' is one of those excepted under sub-section (2) of section 3. (*May Oung, J.*) AH SHEIN *v.* KING-EMPEROR. **1 Rang. 303 = 76 I. C. 396 = 25 Cr. L. J. 172 = A. I. R 1923 Rang. 214.**

Ss. 11 and 12—Sentence.

———*Daing should be punished much more heavily than ordinary gambler.*

A comparison of the maximum fines and the maximum sentences of imprisonment under Ss. 11 and 12 clearly shows that the daing under ordinary circumstances should be punished very much more heavily than the ordinary gambler. It is the Daing who makes opportunities for other people to commit offences under S. 11 and not *vice versa.* (*Baguley, J.*) EMPEROR *v.* JAN MAISTRY. **6 Rang. 655 = 117 I. C. 60 = 30 Cr. L. J. 709 = A. I. R. 1929 Rang. 30.**

S. 12—Conviction.

———*Receipt of money from a winner on a single occasion is not enough for conviction.*

The mere receipt of a sum of money from one of the players or from the winner on a single occasion would not be sufficient to prove an offence under Section 12 without evidence of other incriminating circumstances. (*Lentaigne, J.*) NGA SAN DUN *v.* KING-EMPEROR. **2 Bur. L. J. 8 = 75 I. C. 357 = 24 Cr. L. J. 933 = A. I. R. 1923 Rang. 144.**

S. 12—Gaming House.

———*Knowingly permitting house to be used as common gaming house—Evidence of knowledge is necessary.*

In order to justify a conviction under S. 12 there must be actual evidence of knowledge on the part of the accused and this knowledge cannot be presumed from the mere fact that the place had been kept as a common gaming-house for a month. (*May Oung, J.*) AH LIN *v.* KING-EMPEROR. **2 Bur. L. J. 5 = 75 I. C. 71 = 24 Cr. L. J. 871 = A. I. R. 1923 Rang. 141.**

BURMA HABITUAL OFFENDERS' RESTRICTION ACT (1919).

S. 16—Applicability.

———*Burma Habitual Offenders Restriction Act, S.* 3 (1).

Section 3 (1) of the Habitual Offenders' Restriction Act does not apply to a case arising under S. 17 of the Burma Gambling Act: A. I. R. 1926 Rang. 182, Rel. on. (*Otter, J.*) NGA PAN E *v.* KING-EMPEROR. **5 Bur. L. J. 228 = 101 I.C. 666 = 28 Cr. L. J. 490 = 8 A. I. Cr. R. 138 = A.I. R. 1927 Rang. 122.**

S. 17—Scope.

———*Burma Habitual Offenders' Restriction Act, S.* 18 (1).

The Habitual Offenders' Restriction Act does not apply to persons proceeded against under S. 17, Gambling Act, A. I. R. 1926 Rang. 182 and A. I. R. 1927 Rang. 98, Rel. on. (*Baguley, J.*) EMPEROR *v.* MAUNG PO SEIN. **7 Rang. 1 = 117 I. C. 255 = 30 Cr. L. J. 755 = 1929 Cr. C. 60 = A. I. R. 1929 Rang. 147.**

BURMA GENERAL CLAUSES ACT (I OF 1898).

Immoveable property.

———*Provincial Small Cause Courts Act, Art.* 4—*Growing palm tree is immoveable property.*

The definition of immoveable property given in the Burma General Clauses Act applies to the Provincial Small Cause Courts Act and as growing palm tree is immoveable property for the purposes of the former Act, it is also immoveable property for the purposes of the latter Act: 24 Bom. 31; 23 All. 291; A. I. R. 1927 Pat. 1; A. I. R. 1928 Pat. 652; 38 Mad. 883; A. I. R. 1927 Rang. 94, Cons. and Dist.; 19 Bom. 207; 3 M.H.C. 237, Con. (*Heald and Maung Ba, JJ.*) MA MON THA *v.* MA SAN. **7 Rang. 706 = 120 I. C. 689 = A. I. R. 1929 Rang. 200.**

BURMA GHEE ADULTERATION ACT (VI OF 1927).

S. 10 (5)—Adulteration.

———*Whether ghee is to be deemed adulterated or not is question of law—Chemical Examiner is simply to submit result of his analysis and Court is to draw inference therefrom.*

Whether the ghee is to be deemed adulterated or not is question of law and it is not a matter on which the chemical examiner should be required to express an opinion. What he has to do is to state the results of his analysis and leave the Court to determine whether on those results the offence charged is proved or not. (*Carr, J.*) NARINJAN DAS *v.* EMPEROR. **A. I. R. 1930 Rang. 51.**

S. 11—Procedure.

———*Cr. P. Code, S.* 190—*Complaint charging two people in alternative cannot be accepted—Sanction to prosecute such people is wrong.*

It is wrong that any Court should accept a complaint which charges two people in the alternative and it is also wrong that an order sanctioning such a prosecution in the alternative should be passed. (*Carr, J.*) NARINJAN DAS *v.* EMPEROR. **A. I. R. 1930 Rang. 51.**

BURMA HABITUAL OFFENDERS' RESTRICTION ACT (BUR. ACT II OF 1919).

Applicability.

———*Burma Excise Act (V of 1917), S. 64-A.*

The Habitual Offenders' Restriction Act should not be applied to persons against whom action is taken under S. 64-A of the Excise Act: A.I.R. 1926 Rang. 182, Foll. (*Heald, J.*) NGA PA *v.* KING-EMPEROR. **4 Rang. 455 = 28 Cr. L. J. 141 = 99 I. C. 349 = A. I. R. 1927 Rang. 98.**

———*The Act does not justify the restriction of the accused to a particular local area for the purpose of preventing him from going to his place of residence and business where he worries some of the residents of that place.*

Where the accused does not go out of the local area in which he lives for the purpose of committing breaches of the peace in other local areas, but merely he worries certain people in the local area in which he lives, because he is a bully and where the only possible object in the order restricting the accused to a particular area seems to be to deport him from a certain other place which is his place of residence and business because he has made himself objectionable to certain residents of that place, and where no useful public purpose would be served by an order expressly prohibiting him from moving into other areas where he would not be likely to do any harm, or by such operation of such an order in presumably curtailing his means of livelihood it is open to question whether this is the class of cases to which the Burma Habitual Offenders' Restriction Act, 1919, is intended to apply. (*Lentaigne, J.*) PARSODAN *v.* EMPEROR. **26 Cr. L. J. 417 = 85 I. C. 33 =**
2 Rang. 524 = A. I. R. 1925 Rang. 69.

Procedure.

———*Usual rules of procedure and evidence apply except modifications suggested by Cr. P. Code, S. 117 (4).*

The idea that in cases under this Act the ordinary rules of Criminal Procedure and of evidence are abrogated, is entirely erroneous. In proceedings under the Act it is not everything that may be proved by evidence of general repute. The ordinary rules of evidence apply with such modification only as is made by S. 117 (4) of the Code of Criminal Procedure which is made applicable to the Habitual Offenders' Restriction Act by S. 4 of that Act. (*Carr, J.*) SAN DUN *v.* EMPEROR.
26 Cr. L. J. 395 = 84 I. C. 939 = 2 Rang. 641 =
A. I. R. 1925 Rang. 112.

S. 3 (1)—Applicability.

———*Burma Gambling Act (Burma Act XVII of 1899), S. 17.*

S. 3 (1) of the Habitual Offenders' Restriction Act does not apply to a case arising under S. 17 of the Burma Gambling Act. A. I. R. 1926 Rang 182, Rel. on. (*Otter, J.*) NGA PAN E *v.* EMPEROR.
5 Bur. L J. 228 = 101 I. C. 666 =
28 Cr. L. J. 490 = 8 A. I. Cr. R. 138 =
A. I. R. 1927 Rang. 122.

Ss. 3, 7 and 18—Restriction.

———*Order of restriction under—When may be passed.*

The Act makes no provision for taking a bond and for demanding sureties. It merely provides for an order of restriction. The order cannot be passed except in those cases in which the Magistrate could have acted under S. 110 of the Cr. P. Code and unless the person restricted has adequate means of earning his livelihood in that area. Violation of such an order is punishable under S. 18 of the Act. (*Robinson, J.*) EMPEROR *v.* PO MYA. **13 Bur. L. T. 155 = 10 L. B. R. 274 =**
61 I. C. 1005 = 22 Cr. L. J. 477 (Rang.).

S. 4, Proviso (a)—Restriction.

———*Term during which the proposed restriction is intended to last must be stated in the preliminary order required under S. 112 of the Cr. P. Code.*

Proviso (*a*) to S. 4 makes it essential that the preliminary order required under S. 112 of the Code of Criminal Procedure shall set forth the substance of the information received and shall state the term during which the order of restriction shall be in force. If the additional requirement as to the term during which a proposed restriction is intended to be in force, is not specified in such preliminary order, no order under S. 7 of the Act should be passed. (*Lentaigne, J.*) PARSODAN *v.* EMPEROR. **26 Cr. L. J. 417 =**
85 I. C. 33 = 2 Rang 524 =
A. I. R. 1925 Rang. 69.

S. 7—Evidence.

———*General repute—Evidence of policemen and headmen is not insufficient—Cr. P. Code, S. 110.*

The rule, that in order to satisfy himself that an accused's general repute is that of an habitual offender of one of the types mentioned, a Magistrate should require more evidence than that of policemen and village authorities, is not a rule of law and a Magistrate must, in each case, weigh the evidence and decide as to its sufficiency. 2 L. B. R 166, Ref. & Expl. (*May Oung, J.*) NGA PAN YIN *v.* EMPEROR.
1 Rang. 447 = 2 Bur. L. J. 153 = 76 I. C. 709 =
25 Cr. L. J. 245 = A. I. R. 1924 Rang. 22.

S. 7 (a)—Illegality.

———*Surety bond under S. 118, Cr. P. Code, Double order under both Act is illegal.*

Where a bond has been executed by an offender, with sureties, under S. 118, Cr. P. Code, it is illegal to pass an order against him under the Habitual Offenders' Restriction Act. (*MacGregor, J.*) PAN ZYAN *v.* KING EMPEROR. **1 Bur. L.J. 257 = 73 I. C. 975 =**
24 Cr. L. J. 735 = A. I. R 1923 Rang. 134.

S. 7—Irregularity.

———*Omission to state the period of restriction in the preliminary order as required by S. 4, Proviso (a)—Omission is an irregularity curable by S. 537, Cr. P. Code.*

Omission to state the period of restriction in the preliminary order does not render the whole proceeding void. [2 R. 524, Dist.] It is only an irregularity curable by Upper Burma Criminal Justice Reg., Chap. XV. (*Carr, J.*) MAUNG THWE *v.* EMPEROR.
26 Cr. L. J. 1391 = 89 I. C. 527 = 3 Rang. 74 =
A. I. R. 1925 Rang. 214.

S. 7—Jurisdiction.

———*Burma Expulsion of Offenders Act, S. 4—Neither District Magistrate nor High Court has jurisdiction to deal with person against whom order of restriction is passed under S. 7.*

Although a person against whom an order of restriction is passed under S. 7 is an offender and is liable under S. 3 to be expelled, the Act provides no machinery for the enforcement of the liability and so neither the District Magistrate nor the High Court has any jurisdiction to deal with the matter under S. 4. (*Carr, J.*) EMPEROR *v.* NGA PO SEIN GYI.
7 Rang. 266 = 119 I. C. 213 = 30 Cr. L. J. 990 =
1929 Cr.C. 450 = A. I. R. 1929 Rang. 254.

S. 7—Procedure.

———*Procedure laid down in Cr. P. Code, S. 117, with necessary modifications and additions must be followed in taking preventive action.*

The same procedure as is laid down in the Cr. P. Code, S. 117, with necessary modifications and additions, must be followed where it is intended to take preventive action under S. 7 of the Burma Habitual Offenders' Restriction Act (1919). (*Lentaigne, J.*) PARSODAN *v.* EMPEROR. **2 Rang. 524 =**
26 Cr. L. J. 417 = 85 I. C. 33 =
A.I.R. 1925 Rang. 69.

S. 7—Restriction.

——*Burma Opium Law Amendment Act (Burma Act VII of* 1909). *S.* 3—*Person placed on security under, cannot be proceeded against under S.* 110, *Cr. P. Code.*

A person who earns his living in whole or in part by unlawful sale of opium, can be placed on security under S. 3, but an order of restriction cannot be passed under S. 7 on those grounds. 2 Rang. 61, Dissented from. (*Carr and Duckworth, JJ.*) EMPEROR *v.* NGA KYAN HLA. **4 Rang. 123 = 98 I. C. 714 = 5 Bur. L. J. 78 = 27 Cr. L. J. 1402 = A. I. R. 1926 Rang. 182.**

——*No power to call for security bond or to order person to make two reports to Police and to village headman exists.*

There is no provision for ordering execution of a security bond under the Act. Where such offender is restricted to another village than his own, it must be proved that he will be able to earn his livelihood at that village. A double report both to the Headman and the Police is not called for under the Act. 10 L. B. R. 274, Foll. (*Duckworth, J.*) KING-EMPEROR *v.* NGA KALA. **1 Bur. L. J. 36 = 73 I. C. 157 = 24 Cr. L. J. 541 = A. I. R. 1923 Rang. 68.**

S. 9—Conviction.

——*To be old offender is not a sufficient ground for conviction.*

The mere fact that the accused is "an old offender" is not a ground on which a restriction order can be passed under S. 9. (*Carr, J.*) NGA PO THAN *v.* EMPEROR. **26 Cr. L J. 1344 = 89 I. C. 320 = 3 Rang. 156 = A. I. R. 1925 Rang. 277.**

S. 9—Illegality.

——*Addition of term to sentence under S.* 18 *is not authorised.*

S. 9 does not authorize the addition of a term of restriction to the sentence in the case of a conviction under S. 18. (*Carr, J.*) NGA THA BAY *v.* EMPEROR. **26 Cr. L. J. 1359 = 89 I. C. 399 = 3 Rang. 167 = A. I. R. 1925 Rang. 279.**

Ss. 10 and 2—Illegality.

——*Police Department Notification No.* 280, *dated* 17*th November*, 1919, *Rr.* 3, 5 *and* 6—*Order confining person to his own house at night is illegal—Accused must be able to earn his livelihood within area of restriction.*

An order confining a man to the four corners of his own house at night is not a proper order under the provisions of the Act. The narrowest limits of restriction should be the village of the man concerned or the limits of the village to which he is restricted, as the case may be. If in order to obtain leave from the Police Station Office the person would have to leave his village tract, and thereby offend against the order this is contrary to the spirit of R. 5 of the Notification. The Magistrate must satisfy himself that the accused is able to earn his livelihood within the area of restriction. (*Duckworth, J.*) NGA BA SEIN *v.* KING-EMPEROR. **11 L. B. R. 383 = 73 I. C. 175 = 1 Bur. L. J. 177 = 24 Cr. L. J. 559 = A. I. R. 1923 Rang. 102.**

S. 13—Illegality.

——*Section cannot be relied on as justifying a Sub-Divisional Magistrate in not complying with the provisions of S.* 4, *Pro.* (*a*) *of the Act, when taking preventive action against a person under S.* 7 *of the Act.*

Where a Sub-Divisional Magistrate takes preventive action against a person under S. 7 of the Act without complying with the provisions of S. 4, Pro. (*a*). S. 12 of the Act, 1919, cannot be relied on as justifying the special procedure of the case, because the District

Magistrate is the only Magistrate empowered under that section and even the District Magistrate cannot intervene in a case unless there has been a proper preliminary order and unless the Sub-Divisional Magistrate has also previously passed his order under S. 118 of the Cr. P. Code. In such a case, it would be the duty of the District Magistrate to have some good reason for the change over to the Burma Habitual Offenders' Restriction Act, 1919; and Rule 12 of the Rules framed under that Act indicates the class of reasons which would justify such a change. (*Lentaigne, J.*) PARSODAN *v.* EMPEROR. **26 Cr. L. J. 417 = 85 I.C. 33 = 2 Rang. 524 = A. I. R. 1925 Rang. 69.**

S. 18 (1)—Applicability.

——The Habitual Offenders' Restriction Act does not apply to persons proceeded against under S. 17, Gambling Act. A. I. R. 1926 Rang. 182 and A. I. R. 1927 Rang. 98, Rel. on. The facts are clear from the following report of the District Magistrate of Prome. (*Baguley, J.*) EMPEROR *v.* MAUNG PO SEIN. **7 Rang. 1 = 117 I.C. 255 = 30 Cr. L.J. 755 = 1929 Cr. C. 60 = A I. R. 1929 Rang. 147.**

S. 18 (2)—Interpretation.

——*Accused absent from the tract—Exclusion of that period is not allowed.*

S. 18 (2) provides only that a period of imprisonment under S. 18 (1) is to be excluded in computing the period for which the order of restriction shall remain in force. It does not allow of the exclusion of any period during which the accused has been absent from his tract in contravention of the order or of any period during which he has been under trial. (*Carr, J.*) NGA THA BAY *v.* EMPEROR. **26 Cr. L. J. 1359 = 89 I. C. 399 = 3 Rang. 167 = A.I.R. 1925 Rang. 279.**

BURMA LAND AND REVENUE ACT (II OF 1876).

Alienation.

——*Alienation of land leased from Government.*

Where land is leased from the Government, in the absence of any provisions for forfeiture and re-entry, the transfer or legacy of the grant is not void. The transferee or legatee may perhaps be ejected by the Government; but it does not follow that the transferee or legatee acquires no title to the land. (*Dawson-Miller, C. J. Mullick and Foster, JJ.*) HARIHAR PRASAD *v.* KESHO PRASAD. **5 P.L.T. Sup. 1 = 93 I.C. 454 = A.I.R. 1925 Pat. 68 (92) (F.B.).**

S. 19, Rr. 51 and 52—Jurisdiction.

——*Squatter tenure — Civil Courts can determine possessory title subject to Revenue Officers' rights under Rr.* 51 *and* 52.

Certain persons were deprived by mistake by the Government, of the possession of a certain land for non-payment of revenue. The land remained vacant for some years. It was then occupied by some others. The previous occupants applied to the revenue authorities for the return of the land and under orders received in response to their application entered the land. The dispossessed parties did not resist but gave up possession peacefully. Then they appealed to the Civil Court.

Held, that they had a possessory title but that possessory title ceased on their acquiescing in the orders of the Revenue authorities and had no title of any sort and that therefore though the Civil Courts have jurisdiction to entertain disputes between private persons as to the right to occupy land over which no landlord's rights have been acquired, yet they could not interfere in this case. (*Young and Brown, JJ.*) PO CHO *v.* SAN BWIN. **4 Bur. L. J. 15 = 86 I.C. 531 = 3 Rang. 171 = A.I.R. 1925 Rang. 203.**

S. 19—Right to sue.

———*A squatter cannot file a suit for ejectment with regard to land held by him after he has received a notice from the revenue authorities to quit.*

A person who has been in possession of land as a squatter cannot file a suit for ejectment with regard to that land after he has received a notice from the revenue authorities duly empowered under S. 19 to quit. 8 L.B.R. 227 ; 24 All. 157 ; A. I. R. 1925 Rang. 203, Dist. (*Brown, J.*) MAUNG AUNG PYI *v.* AUNG MO. **6 Rang. 214 = 110 I.C. 636 = A.I.R. 1928 Rang. 188.**

———*Rules by Local Government, Ch. 9, R. 52 (1)—Person ejected from State waste land has no right to sue in Civil Court for declaration of title.*

A person who has been ejected from State waste land by a Revenue Officer under R. 52 has no title to the land so as to base a claim in a Civil Court. (*Heald and Cunliffe, JJ.*) MAUNG PO SEIN *v.* MAUNG SHWE HPWE **6 Bur. L. J. 100 = 104 I.C. 365 = A.I.R. 1927 Rang. 236.**

S. 45—Protection order.

———*Provincial Insolvency Act, S. 31 — Protection order—Person under arrest by order under S. 45 of Burma Land and Revenue Act, gets no advantage of protection order.*

Though S. 31 applies to debts due to the Crown, nevertheless in view of the fact that even an order of discharge does not release the Insolvent from such debts, it would be improper for the Insolvency Court, which under S. 31 has a discretion, to make a protection order which would apply to such debts. A person under arrest by order under S. 45, Burma Land and Revenue Act, but illegally released by an Insolvency Court, gets no advantage of protection order. 1 Bom. 7 In re *Smith*, (1876); 2 Ex. Div. 47, Ref. (*Heald and Mya Bu, JJ.*) COLLECTOR OF AKYAB *v.* PAW TUN U. **5 Rang. 806 = 109 I.C. 145 = A.I.R. 1928 Rang. 81.**

S. 46—Applicability.

———*Chari, J.*—A purchaser at a sale for arrears of municipal taxes payable to the Corporation of Rangoon does not take the property free of encumbrances in all cases. S. 46, Burma Land and Revenue Act, can only apply where the dues to the municipality are in the nature of the land revenue or land rate in lieu of capitation tax. (*Heald and Mya Bu, JJ.*) MOHAMED SALAY *v.* CHETTYAR FIRM. **5 Rang. 458 = 105 I.C. 258 = A. I. R. 1927 Rang. 289.**

Ss. 46, 47 and 48—Property Taxes.

———*Rangoon City Municipal Act, S. 80—So far as "property taxes" are concerned recovery of arrears can be directed in manner prescribed by Ss. 46 and 47 —To a sale under Ss. 46 and 47, S. 48 applies unless a purchaser colludes with defaulter.*

Chari, J.—So far as "property-taxes" as defined in S. 80, City of Rangoon Municipal Act, are concerned, it is open to the properly authorized officer of the municipality to direct the recovery of arrears in the manner prescribed by Ss. 46 and 47, Burma Land and Revenue Act, and to a sale held under these sections the provisions of S. 48 of the Act will apply unless the purchaser and the defaulter collude. 5 Bur. L. T. 108, Expl. (*Heald and Mya Bu, JJ.*) MOHAMED SALAY *v.* CHETTYAR FIRM. **5 Rang. 458 = 105 I.C. 258 = A. I. R. 1927 Rang. 289.**

S. 47—Alienation.

———*Rangoon Municipal Act (6 of 1922), S. 192—Mortgage not notified to corporation—Property sold for default in payment of property tax — Purchaser even after institution of suit on mortgage gets it free from mortgage—Lis pendens does not apply—Transfer of Property Act, S. 52.*

A mortgagee who had given no notice of his mortgage to the municipal corporation filed a suit on his mortgage. In the meanwhile the property was sold under Burma Land and Revenue Act, S. 47, by the corporation after due notice to the mortgagor, for non-payment of property taxes. Mortgagee joined the auction-purchaser as defendant.

Held, that the property was sold free from the mortgage because the tax in respect of which the default was made was a property tax and the corporation were entitled to put into force the summary method given in the Lower Burma Land and Revenue Act against the immovable property itself, which was quite independent of any remedy against the defaulter personally. A. I. R. 1927 Rang. 289, Appr.

Held, further, that the doctrine of *lis pendens* does not apply to this case at all, as it would indeed be a dangerous extension of the doctrine to hold that neither Government nor a local body could recover its taxes or rates from a defaulter so long as a law suit was pending between the defaulter and some of his other creditors. (*Rutledge, C.J. and Brown, J.*) ABDUR RAUF CHOWDRY *v.* N.P.L.S.P. CHETTYAR FIRM. **7 Rang. 113 = 117 I. C. 575 = A I. R. 1929 Rang. 175.**

S. 56—Jurisdiction.

———*Only claims against Government are cognizable by Revenue Courts—Claims between rival proprietors or cultivators are cognizable by Civil Court.*

The claims and disputes referred to in the Lower Burma Land and Revenue Act (II of 1876), over which the Civil Courts have no jurisdiction but which are under the sole jurisdiction of the Revenue Courts, relate only to claims against Government and not to disputes between rival proprietors or cultivators. (*Dawson-Miller, C.J., Mullick and Foster, JJ.*) HARIHAR PRASAD *v.* KESHO PRASAD. **5 P.L.T. Sup. 1 = 93 I.C 454 = A I.R. 1925 Pat. 68 (84) (F.B.).**

———*Sale—Fraud—Civil Court has jurisdiction to declare sale fraudulent and not binding on plaintiff.*

A Civil Court has jurisdiction to make a declaration that a revenue sale is fraudulent and did not convey plaintiff's interest in the property. The sale has the appearance of a sale for arrears of revenue but is, in its essence, a private alienation. A co-owner of land cannot be allowed to use the machinery of the Revenue Sale Law to defraud other co-owners and if he does so the Civil Courts are competent to declare that the result of his conduct is not to place a fraudulent purchaser in a better position than a buyer at a private sale. (*Pratt, J.*) MA ZA *v.* MA MI. **11 L.B.R. 313 = 67 I.C. 636 = A.I.R. 1923 Rang. 17 at 18.**

R. 69—Illegality.

———*Planting of rubber trees on waste land—Subsequent notification as grazing ground—Order for removal of trees and conviction under rule 69 are illegal.*

The petitioner planted rubber trees on State waste land pending his application for a grant in anticipation and paid assessment thereon. The grant was refused and the land notified as a grazing ground whereupon petitioner applied for refund of the revenue paid by him. The Deputy Commissioner passed an order that the petitioner do vacate the land and remove the rubber trees and the revenue paid would be refunded when petitioner vacated. Petitioner failed to remove the trees and was prosecuted under R. 69 and fined for occupying a finally demarcated grazing ground and

BURMA LAND AND REVENUE ACT (1876), R. 69.

convicted on his admission that the rubber trees planted by him were still on the land.

Held, that R. 69 did not empower the revenue authorities to order petitioner to remove the trees he had planted and the mere fact that the trees remained on the ground did not constitute occupation of the grazing ground, and that the Magistrate's order that the rubber trees must be cut down, root and branch, within a month was without jurisdiction and must be set aside. (*Heald, J.*) MAUNG PE *v.* EMPEROR.

3 Bur. L. J. 73 = 25 Cr. L. J. 1264 = 82 I. C. 272 = A. I. R. 1924 Rang. 289.

R. 69—Procedure.

———*Use of grazing ground for purposes other than grazing—Proof as to the ground demarcated and marked with boundary posts must be strict—Procedure indicated.*

It is essential in all prosecutions under R. 69, that there should be evidence not only that the grazing ground has been allotted but also that it has been finally demarcated; that is that the boundaries have been clearly marked with permanent posts or visible marks of some kind, so that there is no room for mistake as to the limits of the grazing ground.

The proper procedure in such cases is for the Land Records Officer to file in each case along with his complaint or report a map showing the relevant boundaries of the grazing ground with the demarcation marks and the area alleged to be occupied by the accused within the grazing ground, and for the Court to take evidence that the grazing ground has been allotted and demarcated and that the alleged trespass has been committed. The evidence of the Land Records Officer on all these points is of course important, as would be also that of the village headman. (*Heald, J.*) MAUNG THA E *v.* KING-EMPEROR. **5 Bur. L. J. 177 = 99 I. C. 595 = 28 Cr. L. J. 163 = 7 A. I. Cr. R. 264 = A. I. R. 1927 Rang. 59.**

R. 107-G—Liability.

———*Brickmaking—Digging clay without license—Owner of land—Supply of labour—Liability for.*

The accused contracted to dig clay and supply labour to another person for the purpose of making bricks without a license. Bricks were actually made without a license. *Held*, that the owner of the field who engaged the contractors was liable but that the accused were not guilty under R. 107-G of the Lower Burma Land and Revenue Act. (*Heald, J.*) KABUDIN *v.* EMPEROR.

3 Bur. L. J. 145 = 84 I. C. 329 (1) = 26 Cr. L. J. 265 (Rang.).

BURMA LAWS ACT (XIII OF 1898).

S. 13 (3)—Applicability.

———*Chinese Customary Law—Applicability to Buddhists.*

Chinese Customary Law in the case of Chinese Buddhists cannot be considered to be according to justice, equity and good conscience. (*Chari, J.*) MAN HON *v.* R. M. A. L. FIRM. **4 Rang. 110 = 97 I. C. 876 = A. I. R. 1926 Rang. 172.**

S. 13 (1)—Interpretation.

———*Chinese Buddhists are not Buddhists—Succession Act, S. 29.*

Per *Full Bench.*—Chinese Buddhists are not Buddhists within the meaning of S. 13 (1) of Burma Laws Act, and of the exceptions to S. 29, Successions Act. (*Maung Ba and Otter, JJ.*, Contra.) (*Heald, Offg. C. J. Chari, Maung Ba, Otter and Brown, JJ.*) PHAN TIYOK *v.* LIM KYIN KAUK. **8 Rang. 57 = A. I. R. 1930 Rang. 81 at (105) (F.B.).**

BURMA LAWS ACT (1898), S. 13.

———*Buddhist Law—"Laws" defined—Rules of conduct in Vinaya cannot be law except when enforced by Burma Laws Act, S. 13 (1)—Sale is not a question regarding any religious usage—Buddhist monk is not disqualified from contracting within Contract Act, S. 11.*

Per *Full Bench.*—The definition of the word "laws" in its juridical sense is that "laws" are rules of civil conduct enforced by the State. From this it follows that the rules of conduct as laid in Vinaya for the guidance of Buddhist monks cannot be deemed to be "laws" unless they are enforced by the State. According to S. 13 (1), Burma Laws Act, they are not enforced by the State except in cases in which questions regarding any religious usage or institution arise. A sale being a pure matter of contract is not "a question regarding any religious usage or institution." A Buddhist monk, therefore, is not disqualified from contracting by law within the meaning of S. 11, Contract Act. (1915) 2 U B. R. 61; 29 I. C. 613 and 5 Rang. 626 = A. I. R. 1928 Rang. 3 = 106 I. C. 201, Overruled. (*Heald, Offg. C. J., Chari Mya Bu, Ormistone, and Das, JJ.*, on equal division between *Rutledge, C.J. Maung Ba, Brown and Carr, JJ.*) U PYINNYA *v.* MAUNG LAW. **7 Rang. 677 = 121 I. C. 705 = A.I. R. 1929 Rang. 354 (a) (F.B.).**

———*Buddhist Law means not Buddhist law prevalent in Burma but law applicable to Buddhist parties—Chinaman residing in Burma is not, therefore, debarred from disposing of property by will.*

The Dhammathat is not an exclusive *lex loci* and the expression "Buddhist Law" is not limited to the Buddhist Law prevalent in Burma. The expression "Buddhist Law" in S. 13 (1) means the law applicable to the Buddhist parties in the case. And although it has been held with regard to the law of marriage, that Buddhist law means Buddhist law prevailing in Burma, and the ruling is binding, yet it cannot be extended to the Law of Inheritance. A Chinaman domiciled in Burma, therefore, can dispose of his property by will, although such disposition is contrary to Burmese Buddhist Law, because it is the Chinese customary law which governs the succession to the estate of a Chinaman domiciled in Burma. (1881) L. B. R 135; 2 L. B. R. 95; 10 L. B. R. 159; A. I. R. 1923 Rang. 180; A.I.R. 1924 Rang. 219 and A. I. R. 1926 Rang. 172, Appr.; Rutledge, C. J., in A. I. R. 1927 Rang. 265, Doubted. (*Pratt, Offg. C. J. and Cunliffe, J.*) CHAN PYU *v.* SAW SIN. **6 Rang. 623 = 114 I. C. 513 = A. I. R. 1929 Rang. 22.**

S. 13 (1)—Marriage.

———*Buddhist Law (Burmese)—Marriage—Chinaman marrying Burmese Buddhist woman—Burmese law applies unless special custom, not working injustice on the woman, is proved.*

The Burmese Buddhist law regarding marriage is *prima facie* applicable to Chinese Buddhists as the *lex loci contractu*; and to escape from the application of Burmese Buddhist law regarding marriage a Chinese Buddhist must prove that he is subject to a custom having the force of law in Burma and that that custom is opposed to the provisions of Burmese Buddhist law applicable to the case; and in case the matter in issue is the marriage of a Buddhist Chinaman with a Burmese Buddhist woman he must show that the application of the custom having the force of law will not work injustice to the Burmese Buddhist woman. Cases considered. (*Rutledge, C. J., Das, Maung Ba and Brown, JJ.*) *In re* MA YIN MYA. **6 Bur. L. J. 135 = 104 I. C. 478 = 5 Rang. 406 = A. I. R. 1927 Rang. 265 (F.B.).**

BURMA LAWS ACT (1898), S. 13.

——*Suits for breach of contract of marriage involve questions of marriage—Appeal—L. B. Courts Act, S.* 30 *applies.*

Suits for breach of promise of marriage between Burmese Buddhists are suits involving questions regarding marriage and appeals in such suits would lie under S. 30 of the Lower Burma Courts Act, and not merely under S. 100, C. P. Code. (*Robinson, C.J., Maung Kin and Heald, JJ.*) MAUNG GALE *v.* MA HLA YIN. **11 L. B. R. 99 = 65 I. C. 411 = A. I. R. 1922 L. B. 6 (F.B.).**

S. 13—Migration.

——*Hindu Law*—Kalais *sect in Burma are not Hindus within the meaning of Indian Succession Act* (*X of* 1865), *S.* 186 *and Burma Laws Act* (*XIII of* 1898), *S.* 13—*Migration to a different country—Presumption is that the Law of that country is accepted.*

In the case of a sect at a distance from Hindu centres, such as '*Kalais*' in Burma, to which the deceased belonged, where the surroundings are Burman and Buddhist and the mode of life is different from that of the Hindu communities in India proper, popularly known as such, it is easier to determine it as being outside Hinduism than it is in the case of an isolated individual who has merely lapsed into unorthodox practices. It is obvious that few influences can be more patent in producing new communities of this separate kind than the combined operation of migration, intermarriage and new occupations. When these influences have operated for sufficiently long, a different community, with its peculiar religion and usages, may well result and be so outside Hinduism in the proper meaning of the word. To the members of such a community the expression "Hindu" in the Indian Succession Act and the Burma Laws Act would be not applicable. 9 M. I. A. 199, Dist.; 31 Cal. 11 (P. C.); 33 M. 342, Ref. to; A. I. R. 1915 P. C. 86, Ref. to. In a case of migration of a sect from India to East Africa, their Lordships laid down that where a Hindu family migrates from one part of India to another, *prima facie* they carry with them their personal law, and if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted; but where such a family emigrate to another country and having earlier become themselves Muhammadans, settle among Muhammadans, the presumption that they have accepted the law of the people whom they have joined, should be made. All that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environment. It was observed that the analogy is that of a change of domicile on settling in a new country, rather than the analogy of a change of custom on migration within India. If a twice born Hindu migrates across the sea to Burma and marries a Burmese woman, that in itself may not necessarily deprive him of his Hindu status in the eye of the law. But, if he has descendants who have been born and have always lived in Burma, and who have intermarried with its people, then, even though they may form a community of their own which inherits many traces of Hindu usage, if the usages and religion are of a character so divergent from Hinduism as those of this community are, the community cannot be regarded as Hindu, *Kalais* acquired a non-Hindu status of their own of this kind. (*Viscount Haldane.*) MA YAIT *v.* MAUNG CHIT MAUNG. **48 I. A. 553 = 30 M. L. T. (P.C.) 126 = 66 I. C. 609 = 46 Cal. 310 = 1 Bur. L. J. 15 = 11 L. B. R. 155 = A. I. R. 1922 P. C. 197 = 42 M. L. J. 193.**

BURMA (LOWER) TOWN AND VILLAGE LANDS ACT (1898), S. 29.

S. 13 (1)—Pre-emption.

——*Muhammadan Law of pre-emption applies to Burma.*

The right of pre-emption in Muhammadan law between co-sharers exists in Burma under S. 13 (1). (1919) 3 U. B. R. 154, Appl.; 6 M. H. C. 26, Dist. (*Rutledge and Heald, JJ.*) EBRAHIM *v.* P. M. SAYED KHAN. **4 Rang. 13 = 4 Bur. L. J. 267 = 95 I. C. 83 = A. I. R. 1926 Rang. 79.**

BURMA (LOWER) COURTS ACT (IMPERIAL ACT VI OF 1900).

Jurisdiction.

——*Burma Military Police Act, S.* 6 (b) *Offence under in Rangoon is triable only by Chief Court and not by Adjutant.*

A sepoy of the Rangoon Military Police Battalion was tried for assaulting a senior officer with a "Kukri" before the Adjutant of that Battalion and convicted and sentenced to two years under S. 6 (*b*) of Burma Military Police Act.

Held, that under the provisions of the Lower Burma Courts Act of 1900 such offences would be triable by the Chief Court. Therefore the Adjutant in trying the case to the finish did so without jurisdiction and his proceedings were void. (*Maung Kin, J.*) EMPEROR *v.* RAMBAHADUR RAI. **25 Cr. L. J. 623 = 2 Bur. L. J. 21 = 81 I. C. 111 = A. I. R. 1923 Rang. 139.**

S. 30—Appeal.

——*Whole case is re-opened but concurrent findings of fact will not be lightly disturbed.*

If the decree is varied or reversed, the appeal will lie, and to that extent the whole case is re-opened, but the Court will not interfere with concurrent findings of pure matters of fact, unless very good grounds for that interference are made out. (*Robinson, C.J. and Duckworth, J.*) C. R. M. CHETTY FIRM *v.* K. M. M. A. K. MUTHU MAHOMED. **11 L. B. R. 178 = 66 I. C. 500 = A. I. R. 1921 L. B. 60.**

S. 30—Marriage.

——*Burma Laws Act* (*XIII of* 1898), *S.* 13—*Marriage—Suits for breach of contract of marriage involve questions of marriage—Appeal—Applies.*

Suits for breach of promise of marriage between Burmese Buddhists are suits involving questions regarding marriage and appeals in such suits would lie under S. 30 of the Lower Burma Courts Act, and not merely under S. 100, C. P. Code. (*Robinson, C. J., Maung Kin and Heald, JJ.*) MAUNG GALE *v.* MA HLA YIN. **11 L. B. R. 99 = 65 I.C. 411 = A. I. R. 1922 L.B. 6.**

BURMA (LOWER) TOWN AND VILLAGE LANDS ACT (BUR. ACT IV OF 1898).

Ss. 29 and 34—Transfer.

——Transfer of Property Act, S. 41—*K*, lessee of Government land, transferring lease to *N* by registered deed—*N* not getting his name entered in rolls as transferee and not taking steps to obtain possession and further allowing document of lease to remain in *K's* possession—*N* acts negligently and *K's* position as ostensible owner must be implied from his neglect and it being *N's* duty to see to mutation of names he cannot throw blame on registering or revenue officers—*K* then surrendering lease of land to Government and instead receiving new leases of house sites into which part of land covered by original lease was divided and transferring lease of one house site to *M*—In suit brought by *N* on the strength of transfer of original lease for possession of house site, if *M* looks merely at lease issued by Government and at his transferrer's possession of land, he is entitled to rights under S. 41. (*Heald and Mya Bu, JJ.*) P. L. T. A. R. CHETTYAR FIRM *v.* MAUNG KYAING. **7 Rang. 276 = 119 I. C. 217 = A. I. R. 1929 Rang. 333.**

BURMA (LOWER) VILLAGE ACT (IMPERIAL ACT III OF 1889).

Police-Officer.

———*Evidence Act* (*Act I of* 1872), *S.* 25—*Village headman is not a "Police Officer" though invested with power of arrest.*

The mere bestowal on a village headman of some powers of arrest as are given to a police officer does not make him a police officer any more than it makes a Magistrate a police officer. A confession, therefore, made to him is not inadmissible in evidence, but the weight to be attached to such confession will depend on the circumstances of the case and the part he has taken in the elucidation of the crime. 1 L. B. R. 65, Affirmed. (*Young, Offg. C.J., Heald and May Oung, JJ.*) NGA MYIN *v.* KING-EMPEROR. **2 Rang. 31 = 81 I. C. 540 = 3 Bur. L. J. 11 = 25 Cr. L. J. 924 = A. I. R. 1924 Rang. 245 (F.B.).**

BURMA MILITARY POLICE ACT (IMPERIAL ACT XV OF 1887).

S. 6 (b)—Jurisdiction.

———*Offence under, in Rangoon is triable only by Chief Court and not by Adjutant—Lower Burma Courts Act* (1900).

A sepoy of the Rangoon Military Police Battalion was tried for assaulting a senior officer with a "Kukri" before the Adjutant of that Battalion and convicted and sentenced to two years under S. 6 (*b*) of Burma Military Police Act.

Held, that under the provisions of the Lower Burma Courts Act of 1900 such offences would be triable by the Chief Court. Therefore, the Adjutant in trying the case to the finish did so without jurisdiction and his proceedings were void. (*Maung Kin, J.*) KING-EMPEROR *v.* RAMBAHADUR RAI. **2 Bur. L. J. 21 = 81 I. C. 111 = 25 Cr. L. J. 623 = A. I. R. 1923 Rang. 139.**

BURMA MOTOR VEHICLES RULES, R. 16.

Negligence.

———*To pass tram-car on right hand side is* prima facie *negligent.*

Except for reasonable cause a tram-car must be passed on the left side: the proviso in R. 16 merely allows a special exception to the general rule. To pass it, therefore, on the right side is *prima facie* negligent since the sudden appearance of a vehicle from behind a tram-car on the unexpected side is a fruitful source of accidents. (*Doyle, J.*) AHMED *v.* KING-EMPEROR. **6 Bur. L. J. 76 = 101 I. C. 660 = 28 Cr. L. J. 484 = A. I. R. 1927 Rang. 149.**

R. 26 (3)—Negligence.

———*Motor Vehicles Act* (*VIII of* 1914), *S.* 16.

Owner of a motor-car is not criminally liable for negligence of the driver in driving the car without properly illuminated rear light, if the owner has made provision for such illumination. 36 C. 415 and 45 C. 430, Dist. (*May Oung, J.*) MAHOMED SURTY *v.* KING-EMPEROR. **1 Rang. 600 = 76 I. C. 564 = 2 Bur. L. J. 201 = 25 Cr. L. J. 196 = A. I. R. 1924 Rang. 63.**

BURMA MUNICIPAL ACT (III OF 1898).

S. 42-A—Sale.

———*Commitee is not empowered to withhold permit to sell, for default in executing license*

In considering the operation of S. 42-A the question of price of work is relevant. Where the municipality called upon the plaintiff to produce stamp paper to execute the lease of license, and the plaintiff did not take any notice of it his reason being that he had already acquired the right of the license or lease for five or four months before that, *held*, that no bye-law or other authority can be shown which empowers the defendant Municipal Committee to cancel the license simply because the licensee commits default in producing stamp paper, or to issue a notice to the licensee the effect of which was stopping the exercise of the right for two days. (*Po Han, J.*) SAN YEIK *v.* THE MUNICIPAL COMMITTEE, PEGU. **2 Bur. L.J. 231 = 77 I.C. 864 = A. I. R. 1924 Rang. 132.**

S. 51 (8)—Jurisdiction.

———*Notification of levy of tax published—Civil Court cannot question legality of—Jurisdiction.*

A public notification under the Burma Municipal Act that a tax has been imposed is conclusive evidence that it has been imposed in accordance with law and a Civil Court is debarred from enquiring whether the tax has been legally imposed. (*Pratt, J.*) CHAN HTOM AUNG *v.* AKYAB MUNICIPALITY. **1 Bur. L.J. 145 = 74 I. C. 34 = A. I. R. 1923 Rang. 75.**

S. 63—Injunction.

———*Suit does not lie.*

A suit for injunction to restrain the Municipality from imposing and collecting a tax is not maintainable. But the assessee has the right to object to the assessment before a sub-committee and an appeal from its decision to the proper authority. He may also claim a reference to the Chief Court. *Municipal Committee* v. *Gurthi Lengayya*, S. J. 405, Ref. to. (*Pratt, J.*) CHAN HTOON AUNG *v.* AKYAB MUNICIPALITY. **1 Bur. L. J. 145 = 74 I. C. 34 = A. I. R. 1923 Rang. 75.**

Ss. 92 (4) and 180—Building.

———*Notice under—Whether wall is a "building" depends upon mischief aimed at by the Act.*

There is no definition of the word "building" in the Act or the bye-laws thereunder and the question must therefore be decided with reference to the mischief aimed at by the Act. The erection of a mere fence or boundary wall is not an offence under the Burma Municipal Act. But where such a wall is built so as to enable the occupier of the main house to use the enclosed area as part of his habitation and not merely as a boundary or fence it comes within the definition of a "building" and disobedience to an order or direction to dismantle the same is an offence under the Act. (*Maung Kin, J.*) KALOO KHAN *v.* M. A. RAHIM. **1 Bur. L. J. 102 = 24 Cr. L. J. 732 = 73 I. C. 972 = A. I. R. 1923 Rang. 65.**

S. 98—Night soil.

———The words night-soil, refuse, rubbish and offensive matter in S. 98 (2) of the Burma Municipal Act include night-soil. S. 98 (2) of the Act imposes on the Municipal Committee an imperative duty of providing sites and places for the deposit of night-soil. (*Twomey, C. J. and Young, J.* On appeal from *Robinson, J.*) RANGOON MUNICIPALITY *v.* BURMA RAILWAYS CO., LTD. **13 Bur. L. T. 62 and 136 = 59 I. C. 823 = 10 L.B.R. 203 (Rang).**

S. 98—Nuisance.

———*Duty of municipality to remove night-soil is not imperative—Nuisance by Municipality can be restrained by injunction.*

Per *Twomey, C. J.* and *Young, J.*, contra.—S. 98 of the Act does not impose an imperative duty on the Municipality to remove and dispose of night-soil.

Per *Curiam.*—If a nuisance is committed by the Municipality in the act of removing or disposing of night-soil it can be restrained by injunction from doing so. (*Twomey, C. J.* and *Young, J.*) RANGOON MUNICIPAL COMMITTEE *v.* BURMA RAILWAYS CO., LTD. **10 L. B. R. 203 = 59 I. C. 823 = 13 Bur. L. T. 62 and 136 (Rang.).**

S. 142 (d)—Bye-laws.

———*Bye-laws for lodging houses are not* ultra vires.

A bye-law of a municipality requiring lodging house keepers to pay a licence fee reckoned on the maximum number of lodgers authorised is neither illegal nor *ultra vires.* (*Robinson, J.*) P.S. PILLAI *v.* MOULMEIN MUNICIPALITY. **13 Bur. L. T. 107 = 59 I. C. 545 = 22 Cr. L. J. 113.**

S. 142—Bye-law No. 5—S. 2 (6)—Construction.

———*To attract the application of the bye-law, some part of the building must be used in common.*

If a building is divided into separate and independent dwellings or tenements and those dwellings or tenements are such that the occupants of them do not to any extent use or occupy the building as a whole in common then even if separate tenements or some of them are actually used as lodging house, the building as a whole does not thereby become a lodging house and only those separate and independent tenements which are used as lodging houses need to be registered and licensed. Note to S. 2 says that the buildings commonly called "tenement lodging houses" should be brought within the operation of the lodging house rules if they have kitchens, privies or other conveniences in common, that is, if the building as a whole is occupied to any extent in common by the tenants of the separate tenement. but that they do not come within the operation of the lodging house rules if each tenement is entirely independent and provided with its own kitchen and privy, that is, if the building as a whole is not occupied to any extent in common by the tenants of the separate tenements. If a building as a whole is let in lodgings or otherwise occupied to any extent in common by members of more than one family then it is a lodging house and is subject to the bye-laws. If there is no such common occupation of the building as a whole but there is such common occupation of a particular part of it then that particular part is a lodging house but the building as a whole is not a lodging house. If neither the building as a whole nor any part of it separately is occupied to any extent in common by members of more than one family, neither the building nor any part of it is a lodging house. (*Heald, J.*) EMPEROR *v.* P. D. SETH. **2 Bur. L. J. 298 = 25 Cr. L. J. 1136 = 81 I. C. 960 = A. I. R. 1924 Rang. 109.**

S. 146—Injunction.

———General provisions do not take away right to injunctions. (*Robinson, J.*) RANGOON MUNICIPALITY *v.* BURMA RAILWAYS CO., LTD. **13 Bur. L. T. 62 and 136 = 59 I. C. 823 = 10 L. B. R. 203.**

BURMA OIL FIELDS ACT (I OF 1918).

S. 2—Oil.

———*Grant—Construction—"Oil" does not include "gas".*

Where by a grant by Government, dated 25th April 1912, the Secretary of State for India in Council granted to the respondents the right to win and get earth-oil from a certain well site and to dispose of all earth-oil to be gotten therefrom on certain conditions.

Held, that the grantee did not by his grant obtain any right to win, get or dispose of gas.

Held, further, that the ownership of natural gases, so far as they are capable of ownership, remained with Government and did not pass either in 1912 or in 1919 by the rules under Burma Oil Fields Act (1918) to the grantee. (*Rutledge, C.J. and Brown, J.*) BURMA OIL CO., LTD. *v.* U PO NAING. **5 Rang. 133 = 102 I.C. 830 = A. I. R. 1927 Rang. 201.**

S. 13—Mortgage.

———*Mortgagee not holding certificate on date of mortgage—Mortgage is not void* ab initio.

There is no legal basis for the suggestion that a mortgage made in favour of a mortgagee who did not hold a certificate of approval, as required by rules in respect of grant to win earth-oil, at the time when the mortgage was made, is void *ab initio.* (*Heald and Maung Ba, JJ.*) MAUNG YE *v.* M. A. S. FIRM. **6 Rang. 423 = 111 I.C. 105 = A.I.R. 1928 Rang. 136.**

BURMA OPIUM LAW AMENDMENT ACT (BURMA ACT VII OF 1909).

S. 3—Interpretation.

———*Cr. P. Code, S.* 110.

The effect of S. 3, Burma Opium Law Amendment Act, is to introduce an additional ground on which S. 110 of the Code can be applied. (*May Oung, J.*) KING-EMPEROR *v.* NGA KYAUNG. **2 Rang. 61 = 81 I. C. 546 = 3 Bur. L. J. 17 = 25 Cr. L. J. 930 = A.I.R. 1924 Rang. 244.**

S. 3—Procedure.

———*Person placed on security under, cannot be proceeded against under S.* 110, *Cr. P. Code—Burma Habitual Offenders' Restriction Act* (*Burma Act* II *of* 1919), *S.* 7.

A person who earns his living in whole or in part by unlawful sale of opium, can be placed on security under S. 3, but an order of restriction cannot be passed under S. 7 on those grounds. 2 Rang. 61, Diss. from. (*Carr and Duckworth, JJ.*) EMPEROR *v.* NGA KYAW HLA. **4 Rang. 123 = 5 Bur. L.J 78 = 27 Cr. L.J. 1402 = 98 I. C. 714 = A. I. R. 1926 Rang. 182.**

BURMA PROCESS FEES ACT (I OF 1910).

Procedure.

———*Cr. P. Code. Ss.* 252 *and* 257—*Non-cognizable warrant case—Process-fees not paid—Court is not bound to summon witnesses.*

In a non-cognizable warrant case the Court is not bound to summon witnesses for the prosecution or the defence under Ss. 252 and 257 if the party at whose instance or in whose interest the process is issued does not pay process fees as required by Rr. 17 and 18 of the Process Fees Rules made under the Burma Process Fees Act, 1910. Ss. 252, 256 and 257 of the Code must be read as subject to the rules made under the Burma Process Fees Act, 1910. 16 Mad. 234, Dist.; A. I. R. 1926 Rang. 13. Overruled. (*Rutledge, C. J., Carr and Chari, JJ.*) EMPEROR *v.* THA SHWE. **4 Rang. 146 = 98 I. C. 708 = 5 Bur. L. J. 90 = 27 Cr. L. J. 1396 = A. I. R. 1926 Rang. 164 (F.B.).**

BURMA REGISTRATION MANUAL.

Applicability.

———*Direction does not apply to document which is a lease only within wider definition of Registration Act.*

Direction 46 (*d*) (*i*) of the Registration Directions does not apply in respect of a document which is not strictly speaking a lease at all, but is a lease within the

wider definition in the Registration Act. (*Carr, J.*) U Tha Nyo *v.* Mg. Kyaw Tha.
4 Bur. L. J. 99 = 90 I. C. 693 = 3 Rang. 379 = A. I. R. 1925 Rang. 273.

BURMA REGISTRATION OF BUSINESS NAMES ACT (VIII OF 1920).

S. 3 (b) and S. 5 (1)—Applicability.

———One Maung Tha was carrying on money-lending business in his own name—After his death his widow carried on same business under old name with "and Co." added—A mortgage was entered in business name —Registration was effected but widow's children shown as partners when they were not—Suit on mortgage by widow—Case falls under S. 3 (*b*) and as plaintiff widow was under disability provided in S. 5 (1) her suit must fail. *Held also*, that she might bring fresh suit after registering in accordance with the Act. (*Otter, J.*) Maung Tha Nyo & Co. *v.* Ma Un Ma Pru.
7 Rang. 296 = 119 I. C. 742 = A.I.R. 1929 Rang. 260.

S. 3—Proviso—Interpretation.

———*Proviso refers to S. 3 (c).*

The proviso refers back to S. 3 (*c*) for in it is found the only reference to a change or addition to a name. (*Otter, J.*) Maung Tha Nyo & Co. *v.* Ma Un Ma Pru. **7 Rang. 296 = 119 I. C. 742 = A. I. R. 1929 Rang. 260.**

BURMA RURAL SELF-GOVERNMENT ACT (IV OF 1921).

S. 12—Bye-laws.

———*Abetment of breach of bye-laws is not offence under Penal Code, S. 109.*

The abetment of a breach of the bye-laws framed by a District Council under the authority of the Burma Rural Self-Government Act is not punishable under S. 109, I. P. C., as it is not an abetment of an offence within the meaning of that section. 23 P. R. 1894 Cr., Rel. on. (*Mya Bu, J.*) Ma Khwet Kyi *v.* Emperor.
6 Rang. 791 = 30 Cr. L. J. 509 = 115 I. C. 664 = 12 A.I. Cr. R. 307 = A.I.R. 1929 Rang. 75.

Ss. 28 (1) (c) and 52—Revision.

———*Court interpreting words "on roads or streets within half mile of public or private market" in Ss. 28 and 52 as not necessarily meaning edge of either side of or part of roads or streets—High Court will interfere in revision—C. P. Code, S. 115.*

Where the Court interpreted the words "on roads or streets within half a mile of a public or private market" appearing in Ss. 28 and 52 as not necessarily meaning the edge of either side of, or part of roads or streets, the error of the Court is more than an error in law for he has overlooked the canon of interpretation that any statutory provision in the nature of a taxation clause should be interpreted literally in favour of the subject and so the High Court will interfere in revision. (*Brown, J.*) U San Win *v.* U Yan Nyein.
120 I. C. 698 = A. I. R. 1929 Rang. 210.

S. 28 (1) (c)—Scope.

———The District Council has no power to give authority to a lessee to collect fees which are not authorised by legislative authority. (*Brown, J.*) U San Win *v.* U Yan Nyein. **120 I. C. 698 = A. I. R. 1929 Rang. 210.**

Rr. 34, 36 and 39—Revision.

———*District Judge acting under R. 34, or Assistant Judge nominated by him to hear petition challenging election is* persona designata *and no revision lies to High Court against their order.*

The provisions of R. 36 which enables the District Judge to delegate his power to an Assistant Judge and the direction that petition challenging an election shall be tried in open Court do not show that the District Court through the District Judge functions in the disposal of the application. The words "in open Court" in R. 34 mean only that the matter should not be disposed of in camera. Therefore the District Judge functioning under R. 34 is a *persona designata* and an Assistant Judge who is directed by him to dispose of the petition is also a *persona designata* and so no revision lies to the High Court against their order. A.I.R. 1926 Rang. 25 (F.B.) and A. I. R. 1927 Mad. 93, Rel. on. (*Chari, J.*) U San Hmway *v.* U Ohn Pe.
A.I.R. 1929 Rang. 352.

BURMA SALT ACT (II OF 1917).

Ss. 9 (c) and 14—Rules under Rr. 41 and 42—Scope.

———Rules 41 and 42 under the Salt Act by implication make the removal of salt without a pass illegal. (*Chari, J.*) Nga Yok O *v.* King-Emperor.
5 Bur. L. J. 220 = 101 I. C. 496 = 28 Cr. L. J. 464 = A. I. R. 1927 Rang. 120.

BURMA TOWNS ACT (III OF 1907).

S. 7—Headman.

———To provide coolies to take out a Deputy Commissioner's letters from his headquarters does not form a part of the ordinary duty of a ward headman. (*Heald, A. J. C.*) Emperor *v.* Nga Po Sin.
(1920) 3 U. B. R. 234 = 60 I. C. 63 = 22 Cr. L. J. 207 (Rang.).

S. 9(2)—Headman.

———*Refusal to convey letters not illegal—Ordinary duties of headman.*

If a person residing within a ward is requested by the headman to convey letters to the Deputy Commissioner's camp and he fails, he is not guilty under S. 9 (2) as to provide coolies to convey such letters is not a part of the ordinary duty of the headman. (*Heald, A. J. C.*) Emperor *v.* Nga Po Sin. **(1920) 3 U. B. R. 234 = 60 I. C. 63 = 22 Cr. L. J. 207.**

BURMA (UPPER) CRIMINAL JUSTICE REGULATION (V OF 1892).

S. 15—Interference by the Judicial Commissioner.

———Under S. 15, the Judicial Commissioner will not interfere with the order of a District Magistrate though procedure is irregular unless it has caused failure of justice. (*Heald, A. J. C.*) Nga San Dun *v.* Emperor. **22 Cr. L. J. 309 = 60 I. C. 997 = (1920) 3 U. B. R. 270.**

BURMA (UPPER) LAND AND REVENUE REGULATION (III OF 1889).

Allotment.

———*Mere allotment of waste land does not confer title.*

The mere "allotment" of State waste land without actual possession ten years ago gives no right which can be enforced in a Civil Court against the persons actually in possession. (*Brown, A. J. C.*) Ma Ngwe Pyu *v.* Maung Pon Saing. **4 U. B. R. 128 = 84 I. C. 533 = A. I. R. 1923 Rang. 117.**

S. 25 (d)—Jurisdiction.

———*Collector cannot decide a dispute relating to State land between rival claimants.*

The Revenue Regulation does not authorise Revenue Officers to decide a dispute between rival claimants to State land, except within one year of a declaration that a land is State land. (1916) 2 U. B. R. 151, Rel. (*Pratt, J.*) MAUNG KYANK PU *v.* MAUNG PO. **3 Rang. 147 = 89 I. C. 303 = A. I. R. 1925 Rang. 263 (b).**

BURMA (UPPER) OIL FIELDS REGULATION (VI OF 1910).

S. 2—Construction.

———*Grant—Construction—"Oil" does not include "gas."*

Where by a grant by Government, dated 25th April 1912, the Secretary of State for India in Council granted to the respondents the right to win and get earth-oil from a certain well site and to dispose of all earth-oil to be gotten therefrom on certain conditions:

Held, that the grantee did not by his grant obtain any right to win, get or dispose of gas.

Held, further, that the ownership of natural gases, so far as they are capable of ownership, remained with Government and did not pass either in 1912 or in 1919 by the rules under Burma Oil Fields Act (1918) to the grantee. (*Rutledge, C. J. and Brown, J.*) BURMA OIL CO., LTD. *v.* U. PO NAING. **5 Rang. 133 = 102 I. C. 830 = A. I. R. 1927 Rang. 201.**

BURMA (UPPER) REGISTRATION REGULATION (II OF 1897).

Ss. 4 and 6—Registration.

———Documents which are complete without signature according to Burmese custom, are 'executed' within S. 4 and must be registered if they fall within that section. Without registration they are not admissible in evidence according to S. 6. (*Heald, A.J.C.*) MA SAT PU *v.* MA SIN. **(1920) 3 U. B. R. 258 = 60 I. C. 16.**

Rule 5—Registration.

———*Registration Act, S. 35—Signature of person presenting is not necessary and superfluous signature of alleged agent indicating his presenting the document contrary to the Registrar's endorsement is inoperative—Omission to state the fact of liability or refusal of executant to appear does not affect validity of registration.*

Where the writing at the foot of the document showed that the person who presented the document was only an agent and was directly opposed to the official statement signed by the Registering Officer that the document was presented for registration by the mortgagee.

Held, there is no provision in the Regulation or the Rules that requires the signature of the person presenting the document for registration. The correctness of this official endorsement is to be presumed and the signature for which there was no legal sanction, cannot operate to contradict it.

Where any party to a document is unable or refuses to appear, rule 5 requires a note of the circumstances to be made, but the omission is one for which the person presenting the document cannot be held responsible: it is at most a defect in procedure which did not vitiate the registration made as it was on a proper presentation. (*Sir Lawrence Jenkins.*) BAIJNATH SINGH *v.* JAMAL BROS. & CO., LTD. **51 I. A. 18 = 22 A. L. J. 42 = 79 I. C. 940 = 19 M. L. W. 345 = 1924 M. W. N. 196 = 34 M. L. T. 50 = 51 Cal. 354 = 2 Rang. 99 = 5 L. R. P. C. 73 = 28 C.W. N. 1029 = A. I. R. 1924 P. C. 48.**

BURMA (UPPER) RUBY REGULATION (XII OF 1887).

S. 8—Application of.

———When an offence under S. 6 has been committed, S. 8 should be applied even though the purchaser of the stone might have acted *bona fide.* (*Duckworth, J.*) MAUNG PO LON *v.* EMPEROR. **26 Cr. L. J. 289 = 84 I. C. 433 = 3 Bur. L. J. 168 = 2 Rang. 321 = A. I. R. 1925 Rang. 12.**

BURMA VACCINATION LAW (AMENDMENT) ACT (I of 1909).

S. 4 and S. 13—Vaccination.

———*Child above six months—Parent refusing to allow child to be vaccinated—Conviction under S. 13 is unsustainable—Procedure must be followed as laid down in Vaccination Act (XIII of 1880), Ss. 17, 18 and 22.*

In Burma Act I of 1909, S. 4 is the only provision under which vaccination of a child can be ordered and that section applies only if the child is under six months of age and had been exposed to infection. There is nothing in Burma Act I of 1909 to authorize any officer to require the parent of a child over six months of age to have it vaccinated. In such cases S. 9, Vaccination Act (XIII of 1880), would apply and then the procedure prescribed in Ss. 17, 18 and 22 must be followed. Conviction of a person under S. 13 (1), Burma Vaccination Act, for refusing to allow his child to be vaccinated cannot be sustained. (*Carr, J.*) EMPEROR *v.* MAUNG BA WIN. **7 Rang. 14 = 117 I. C. 246 = 30 Cr. L. J. 750 = 1929 Cr. C. 58 = A. I. R. 1929 Rang. 150.**

BURMA VILLAGE ACT (VI OF 1907.)

Police Officer.

———*Evidence Act, S. 25—Village headman is not a police officer though invested with power of arrest.*

The mere bestowal on a village headman of some powers of arrest as are given to a police officer, does not make him a police officer any more than it makes a Magistrate a police officer. A confession therefore made to him is not inadmissible in evidence but the weight to be attached to such confession will depend on the circumstances of the case and the part he has taken in the elucidation of the crime. 1 L. B. R. 65, Affirmed. (*Young, Offg. C. J., Heald and May Oung, JJ.*) NGA MYIN *v.* EMPEROR. **2 Rang. 31 = 81 I. C. 540 = 3 Bur. L. J. 11 = 25 Cr. L. J 924 = A. I. R. 1924 Rang. 245 (F. B.).**

S. 12—Disobedience.

———*Disobedience of Thugy's order to reap for revenue purposes is an offence.*

The reaping and measuring of paddy for the purpose of revenue assessment, is a public duty within the meaning of S. 12, and it is an offence under the Act for a villager to refuse to comply with a requisition of the Headman to assist him in such work. (*Duckworth, J.*) PAN BU *v.* EMPEROR. **11 L. B. R. 412 = 77 I. C. 419 = 1 Bur. L. J. 150 = 25 Cr. L. J. 371 = A. I. R. 1923 Rang. 81.**

S. 19—Disobedience.

———*Disobedience of order to remove to another site is no offence.*

Refusing to obey an order given to the accused by the headman to remove to another site, which had been provided for them is not an offence under S. 19. (*MacColl, A. J. C.*) EMPEROR *v.* NGA SEIN. **4 U. B. R. 127 = 76 I. C. 1039 = 25 Cr. L. J. 319 = A. I. R. 1923 Rang. 132.**

S. 20-A—Receiving in pawn.

———*Rules under—Receiving an article in pawn without a license is not offence.*

S. 20-A and the rules under it do not create any such offence as that of receiving an article in pawn without a license. What they do make punishable is the carrying on of the business of a pawn-broker.

BURMA VILLAGE ACT (1907), S. 21.

(*Carr, J.*) EMPEROR *v.* MUTU ALAGI.
6 Rang. 108 = 10 A. I. Cr. R. 400 = 110 I. C. 102 = 29 Cr. L. J. 646 = A. I. R. 1928 Rang. 158.

S. 21 (1) (a)—Offence under.

——The word "*Pwe*" as used in the Burma Village Act means only "*anyein pwes*" performed for profit, or by travelling troupes who tour for the purpose of performing such *pwes*, and does not include the other performances to which the term is loosely applied in the Burmese language. (*Maung Kin, J.*) EMPEROR *v.* MA LE. **13 Bur. L. T. 243 = 63 I. C. 865 = 22 Cr. L. J. 705.**

S. 21-A—Pwe.

——*Pwe includes performance for public entertainment—Entertainment at an Ahlu comes within the section and holding Ahlu without permit is an offence.*

Pwe ordinarily includes a theatrical or dramatic performance held for public entertainment whether on public or private property. The object of requiring a permit is to ensure that the authorities get timely notice to arrange for precautionary measures. Where performance was for public entertainment at an *ahlu* and the authorities had not been given any notice and a robbery took place,

Held, that though the troupe was composed of local amateurs the offence was committed under the section. (*Maung Ba, J.*) EMPEROR *v.* NGA THAN GYAUNG.
27 Cr. L. J. 342 = 92 I. C. 854 = 4 Bur. L. J. 145 = 3 Rang. 514 = A. I. R. 1925 Rang. 375.

S. 23—Revision.

——*Deputy Commissioner as such cannot revise order of conviction for an offence under the Act or rules thereunder.*

The conviction and sentence of a person for an offence made punishable by the Act or rules made under it is not "an order made under this Act." Nor is a Magistrate, when exercising his jurisdiction as such, "an authority subordinate to the Deputy Commissioner" and therefore an order of conviction for such an offence cannot be revised by the Deputy Commissioner as such. (*Carr, J.*) EMPEROR *v.* MUTU ALAGI.
6 Rang. 108 = 10 A. I. Cr. R. 400 = 110 I. C. 102 = 29 Cr. L. J. 646 = A. I. R. 1928 Rang. 158.

——*Order of Deputy Commissioner, if wrong, can be set aside by High Court (Obiter).*

It is the duty of the High Court, and within its powers, on the matter being brought to its notice, to declare that an order of the Deputy Commissioner, even though he is not a criminal Court, is of no effect, if it is wrong. (*Carr, J.*) EMPEROR *v.* MUTU ALAGI. **6 Rang. 108 = 10 A. I. Cr. R. 400 = 110 I. C. 102 = 29 Cr. L. J. 646 = A. I. R. 1928 Rang. 158.**

S. 28—Procedure.

——*Offence within the Act must be prosecuted under the authority of Deputy Commissioner but not other offences.*

A village headman is protected by S. 28 of the Village Act to this extent that he cannot be prosecuted for an act or omission punishable under S. 10 of the Act or for an abuse of his power similarly punishable, even though such act or omission or such abuse of power is punishable under the Indian Penal Code or some other law, unless the prosecution is instituted by order of or under authority from, the Deputy Commissioner. The village headman has no power to cause hurt to or insult another person and there appears to be no reason why a Magistrate should not enquire into the charges brought against the headman under Ss. 323 and 504 of the Indian Penal Code. 1 L. B. R. 336, Foll. (*Saunders, J. C.*) NGA TUN LIN *v.* KING-EMPEROR. **4 U. B. R. 101 = 73 I. C. 325 = 1 Bur. L. J. 245 = 24 Cr. L. J. 581 = A. I. R. 1923 Rang. 27.**

CALCUTTA HIGH COURT RULES AND CIRCULAR ORDERS.

S. 28—Scope.

——*Does not apply where Magistrate takes cognizance of offence of his own motion under Cr. P. Code, S.* 190 (1) (*c*).

The terms of S. 28, Burma Village Act, must be strictly construed. The section applies only to the entertainment of a complaint and does not impose any restriction upon the prosecution of a headman if the prosecution is instituted otherwise than on complaint. It does not, therefore, apply to a case in which a Magistrate of his own motion takes cognizance of an offence under the provisions of S. 190 (1) (*c*), Cr. P. Code. (*Carr, J.*) EMPEROR *v.* NGA PO WIN.
8 Rang. 246 = 125 I. C. 360 = A. I. R. 1930 Rang. 253.

BUTTWARA PROCEEDINGS — *See* EVIDENCE ACT, S. 35.

BYE-BIL-WAFA.

See (1) MORTGAGE.
(2) T. P. ACT, S. 58 (*c*).

CALCUTTA CORPORATION PROVIDENT FUNDS RULES.

—R. 19—Interpretation and Scope.

——*Provident Funds Act (IX of* 1897), *S.* 3, *Cl.* (*b*) —*Cl.* (*b*) *takes affect in absence of any special rule of a particular fund—Special rule providing payment to the legal representative—Payment to uncle as* de facto *guardian was held not to be valid discharge.*

The provision in cl. (*b*) that the manager may pay the money to any person entitled to receive it, is intended not to defeat the rules of any Fund; but to take effect only in those cases where the rules of a particular Fund do not tell the manager what person is the proper person to be paid. The intention of the Act was that particular funds might make simple and clear rules which they could easily administer and if the rules did not apply to any particular case, the officer or the manager should not necessarily at his peril find out the proper legal representative. But the intention of the Act has been defeated by the character of R. 19 itself which assumes the duty of finding out the proper legal representative. Where the manager of the Provident Fund paid the deposit money in the credit of the deceased to his brother as a guardian of the deceased's son producing a certificate from an Honorary Magistrate that he was his nephew's guardian.

Held, that the payment to the uncle is not a good discharge and the claim of the nephew should be decreed. A.I.R. 1928 Cal. 542, Affirmed. (*Rankin, C. J. and C. C. Ghose, J.*) CORPORATION OF CALCUTTA *v.* ASOKA KUMAR DE.
32 C. W. N. 515 = 113 I. C. 166 = 55 Cal. 1231 = A. I. R. 1928 Cal. 743

—R. 19—Meaning.

——The manager should pay the deposit money to the person entitled to receive it as a matter of testate or intestate succession. A. I. R. 1928 Cal. 542, Affirmed. (*Rankin, C. J. and C. C. Ghose, J.*) CORPORATION OF CALCUTTA *v.* ASOKE KUMAR DE.
55 Cal. 1231 = 32 C. W. N. 515 = 113 I. C. 166 = A. I. R. 1928 Cal. 743.

CALCUTTA HIGH COURT RULES AND CIRCULAR ORDERS.

—Ch. 1, p. 31, R. 93—Nature of rule.

——R. 93, P. 31, Ch. 1 of the Calcutta High Court's General Rules and Circular Orders, as amended, has the force of law. (*C. C. Ghose and Jack, JJ.*) EMPEROR *v.* AHMED SHEIKH. **56 Cal. 460 = 113 I. C. 572 = 30 Cr. L. J. 199 = 12 A. I. Cr. R. 58 = 48 C. L. J. 288 = 33 C. W. N. 174 = A. I. R. 1928 Cal. 815.**

—Ch. 1—Removal of property.

——*C. P. Code, O. 21, R. 43—Removal of property is illegal.*

Removal by attaching officer of property attached is illegal. (*C. C. Ghose and Jack, JJ.*) EMPEROR *v.* AHMED SHEIKH. **48 C. L. J. 288 = 113 I. C. 572 = 33 C. W. N. 174 = 56 Cal. 460 = 30 Cr. L. J. 199 = 12 A. I. Cr. R. 58 = A. I. R. 1928 Cal. 815.**

—Ch. 2—Uncontested proceedings.

——*Guardians and Wards Act.*

In uncontested proceedings an order appointing a guardian under the Guardians and Wards Act on the affidavits of the parties is not *ultra vires.* (*Suhrawardy and Graham, JJ.*) KAMINI MAYI DEBI *v.* BHUSAN CHANDRA GHOSE. **44 C. L. J. 40 = 97 I. C. 692 = A. I. R. 1926 Cal. 1193.**

Appellate Side.

—Registrar's powers.

——*Registrar can admit appeal out of time even though full court-fees are not paid within time.*

Under the rules and the customs of the Court the Registrar has the power to admit an appeal out of time, even though full Court-fees are not put in within the period of limitation. (*Suhrawardy and Dueal, JJ.*) SEDDIK AHMED KERANI *v.* AZIZAR RAHMAN. **44 C. L. J. 557 = 99 I. C. 901 = A. I. R. 1927 Cal. 238.**

—Chapter 2—Effect—Jurisdiction.

——The effect of cl. (3) of Schedule to R. 1, Chapter II of the Calcutta High Court, Rules, Appellate Side, is that the original value of the suit out of which the application arises must not be above Rs. 1,000. Execution proceedings are clearly proceedings arising out of a suit and a single judge of the High Court cannot issue a rule where the valuation in the suit is more than Rs. 1,000. (*Cuming, J.*) MAHITOSH DUTT *v.* RAI SATIS CHANDRA CHAUDHURI. **34 C. W. N. 876.**

—Chapter 2—Scope.

——The effect of cl. (3) of Schedule to R. 1, Chapter II of the Calcutta High Court, Appellate Sides Rules is to prohibit a single judge of the High Court from issuing a rule in a suit which is of the value of above Rs. 1,000. For this purpose execution proceedings are proceedings arising out of a suit. (*Cuming, J.*) MAHITTOSH DUTT *v.* RAI SATIS CHANDRA CHAUDHURI. **34 C. W. N. 876.**

—Ch. 7—Applicability.

——Rule 1, and not Rr. 2 and 3, applies to appeals from orders in appeal under Presidency Towns Insolvency Act, S. 8. (*Rankin, C. J., C. C. Ghose, Suhrawardy, B. B. Ghose and Mukerji, JJ.*) SARAT KUMAR ROY *v.* NABIN CHANDRA. **56 Cal. 667 = 115 I. C. 39 = 33 C. W. N. 21 = A. I. R. 1928 Cal. 786.**

—Ch. 9—Applicability.

——*R. 50 and Note 1 to R. 50 apply to all appeals from appellate decrees—R. 52 does not make any alteration as to contents of paper-book to which R. 50 relates.*

Note 1 of R. 50 of Ch. 9 of the Appellate Side Rules of the Calcutta High Court and R. 50 apply to all appeals from appellate decrees whether or not exceeding Rs. 50 in value. Rule 52 does not make any alteration as to the contents of the paper-book to which R. 50 relates. It only modifies the previous R. 51 which requires printed copies of the paper-book to be prepared by the Registrar at the cost of the appellant. In the case of appeals referred to in R. 52 no printed paper-book is prepared, but instead of that, typed copies of the paper-book are prepared without any charge being levied from the parties, but the contents of the paper-book remain the same in both classes of appeals. (*Newbould, J.*) ABDUL KARIM CHOWDHURY *v.* PROSANNA KUMAR NATH. **85 I. C. 770 = A. I. R. 1925 Cal. 1116.**

Insolvency Rules.

—R. 17—Ex-parte order.

——*Presidency Towns Insolvency Act, S. 36 (1)—Order for examination can be* ex parte.

An order under S. 36 (1) for examination of persons thereunder can be made *ex parte.* 44 Cal. 286, Foll. (*Sanderson, C.J. and Richardson, J.*) RAI SUKHLAL KARNANI BAHADUR *v.* OFFICIAL ASSIGNEE OF CALCUTTA. **48 Cal. 1089 = 66 I. C. 715 = 25 C. W. N. 750 = A. I. R. 1921 Cal. 58.**

—R. 74—Interpretation.

——*Order of adjudication is not discretionary.*

R. 74 of the Rules of High Court appears to contemplate that if the petition is in form in the sense that the Court has jurisdiction and the conditions prescribed by the Act have been fulfilled the order shall go as a matter of course. (*Buckland, J.*) GOPALDAS AURORA, *In re.* **30 C. W. N. 173 = 94 I. C. 793 = A.I. R. 1926 Cal. 640.**

—R. 128—Admission of debt.

——*Admission of a debt in the composition deed is not sufficient proof.*

The mere fact that the sum is payable under the composition and is stated therein to be payable does not of itself forego the need for proof of debt required by R. 128. (*Buckland, J.*) KANHAYA LAL SEWBUX, *In the matter of.* **53 Cal. 448 = 29 C. W. N. 1019 = 90 I. C. 449 = A. I. R. 1926 Cal. 176.**

—R. 178—Sale of charged property.

——Sale by assignee of charged property—Assignee is not entitled for commission on sale proceeds. (*Rankin, C. J. and Mukerji, J.*) OFFICIAL ASSIGNEE, CALCUTTA *v.* RAM RATAN DAS. **54 Cal. 317 = 102 I. C. 539 = A.I. R. 1927 Cal. 529.**

Original Side.

—Applicability.

——*Originating summons—Claim by creditor of estate—Decision as to—Proper course is suit and not summons.*

The procedure by originating summons is not applicable to a contentious matter of the nature of a claim by a creditor to recover from the estate of the deceased whose estate is under administration. The procedure would be by suit. (*Greaves, J.*) MITCHELL *v.* MC NEILL & CO. **31 C. W. N. 630 = 103 I. C. 120 (2) = A. I. R. 1927 Cal. 518.**

—Negligence.

——O. 9. R. 13, C. P. Code, is applied by analogy—But R. 13, does not prevent Court in case of negligence from restoring suit on proper terms. A. I. R. 1928 Cal. 772, Appl. (*Pearson, J.*) RAMJAN ALI *v.* ABDUL GAFFUR. **32 C. W. N. 411 = 116 I. C. 633 = A. I R. 1928 Cal. 864.**

—Variation of orders.

——*Practice and procedure indicated.*

When a draft form of an order is settled, it is the duty of the Registrar at once to pass and enter the order in the register. Any party who desires to object to the terms of it as settled, should intimate to the Registrar that he intends to give a notice of motion to vary the order. He must state what variation he desires and then he must move the Court to have the variation made. (*Costello, J.*) MULCHAND JHOOMAR *v.* G. R. MARTINDALE. **32 C.W.N. 854 = A I.R. 1928 Cal. 756.**

———*Court may vary its own order settled, passed and entered by the Registrar.*

The Court has jurisdiction over its own records, and if it finds that the order as passed and entered contains an adjudication upon that which the Court in fact has never adjudicated upon, it has jurisdiction which it will in a proper case exercise to correct its records in accordance with the order really pronounced. *In re* Swire: Mellor *v.* Swire, (1885) 30 Ch. D. 239, Foll. (*Costello, J.*) MULCHAND JHOOMAR *v.* G. R. MARTINDALE. **32 C. W. N. 854 = A. I. R. 1928 Cal. 756.**

—R. 32—Judge's discretion.

———*R. 32 does not control Judge's jurisdiction and discretion.*

A Judge of the High Court has jurisdiction to hear an application under R. 32 as to Taxation of Counsel's fees. The proviso in R. 32 does not control the jurisdiction and discretion of the Court or a Judge. Even assuming that R. 6 must be taken to refer to Counsel's fees, although such fees are not specifically mentioned therein, the rule is a direction to the Taxing Officer only and does not limit or control the jurisdiction of the Court or a Judge, given by R. 32. (*Sanderson, C. J. and Richardson, J.*) SAILENDRA MOHAN DUTT *v.* DHARANI MOHAN ROY. **26 C. W. N. 870 = 69 I. C. 823 = 49 Cal. 618 = A. I. R. 1922 Cal. 402.**

—R. 178—Applicability.

———*Commission on sale for which provisions of Schedule 2 are not availed of, cannot be allowed to Official Assignee.*

R instituted a suit against one *D* for the purpose of enforcing a deed of hypothecation executed by him in favour of the plaintiff. As at the time of the institution of the suit it was not known that *D* had been adjudicated an insolvent, an application was made for the Official Assignee to be brought on the record and the Official Assignee was brought on the record. Thereafter a question of priority was raised between *R* and one *N* and ultimately it was agreed between them that whatever moneys were realized by sale of the stock-in-trade of *D* would be divided between *R* and *N* in the proportion of 1 and 2. Thereafter an arrangement was arrived at by which the Official Assignee was to sell the stock-in-trade through one *M*. The Official Assignee claimed his commission.

Held, that as the parties did not avail themselves of the provisions of the 2nd schedule of the Insolvency Act for the purpose of realizing their security, they not having availed themselves of the machinery provided by the Insolvency Act, cannot be charged with the commission. (*C. C. Ghose, J.*) RAMRATANDAS BAGRI *v.* DWIJENDRA NATH SEN. **43 C. L. J. 580 = 97 I. C. 294 = A. I. R. 1926 Cal. 1033.**

—Ch. 2—Vakil in criminal appeal.

———*Criminal appeal from original side—Question whether a vakil can act is not concluded by Cr. P. Code, but by the rules of the High Court—Cr. P. Code, Ss.* 340 *and* 449.

The question whether a vakil can act for a party in a criminal appeal from the Original Side of a High Court depends upon the rules of that Court and is not concluded by anything in the Cr. P. Code. (*Rankin, C. J. and Chotzner, J.*) SATYA NARAIN *v.* EMPEROR. **55 Cal. 858 = 32 C. W. N. 319 = 29 Cr. L. J. 1022 = 112 I. C. 350 = A. I. R. 1928 Cal 675.**

———*Criminal appeal from original side—A vakil cannot act unless a question of Hindu or Mahomedan law is involved.*

A vakil cannot act in an appeal from a trial held on the original side before a Judge and a jury at the High Court Sessions, unless in such appeal a question of Hindu or Mahomedan law or usage should arise. (*Rankin, C. J. and Chotzner, J.*) SATYA NARAIN MAHTO *v.* EMPEROR. **55 Cal. 858 = 32 C. W. N. 319 = 29 Cr. L. J. 1022 = 112 I. C. 350 = A. I. R. 1928 Cal. 675.**

—Ch. 4—Applicability.

———*Public Officer should be allowed to inspect and take notes, but not copies, of depositions made by person under Companies Act, S.* 195.

In the interests of the administration of criminal justice, Courts should allow a public officer charged with the investigation of criminal offences, such as the Deputy Superintendent of Police, to inspect the depositions of a person, who is believed to be involved in a criminal offence, made under S. 195, Companies Act, and to inform himself of anything that may come to light on such inspection. He cannot, however, take copies of the depositions but only notes of them. *Haddock's Case*, (1902) 2 Ch. 73 and In re *Grey's Brewery Company*, 25 Ch. D. 400, *App.*; In re *Imperial Continental Water Corporation*. 33 Ch. D. 314, Dist, (*Buckland, J.*) *In re* REGENT PARK SYNDICATE, LTD. **57 Cal. 424 = A. I. R. 1930 Cal. 521**

—Ch. 7—Method of Service.

———*C. P. Code, O.* 30, *Rr.* 3 *and* 5—*Service by registered post must be on a partner or person having control over business—Rule must be applied so as to comply with O.* 30, *R.* 3.

Under O.30, R. 3, the only way in which such writ can be served is by serving it either upon a partner or by serving it at the principal place at which the partnership business is carried on in British India on a person having at the time of service the control or management of the partnership business. If Rule 11 of Chapter VIII of the High Court Rules is applied, and the notice sent by registered post it is necessary that it should be so applied as to comply with O. 30, R. 3, that is to say, the registered letter should be addressed to some particular person alleged to be a partner or to have control over the partnership business. (*Rankin, J.*) HARJIBANDAS GORDHANDAS *v.* BHAGWANDAS PURSRAM. **49 Cal. 394 = 69 I.C. 236 = A. I. R. 1922 Cal. 390.**

—Ch. 7—Suit by Corporation.

———*C. P. Code, O.* 29, *R.* 1—*Suit by corporation—Person signing must prove by affidavit that he is authorized to do so— C. P. Code, O.* 6, *R.* 15.

It is necessary in the case of a pleading filed on behalf of a corporation to establish by an affidavit that the person signing it is duly authorized to do so. 22 Cal. 268, Dist.; A. I. R. 1927 Cal. 773, Appl. (*Buckland, J.*) INTERNATIONAL CONTINENTAL CAOUTCHOUE COMPAGNIE *v.* MEHTA & CO. **31 C. W. N. 1030 = 105 I. C. 568 = A. I. R. 1927 Cal. 780.**

—Ch. 7—Verification of Plaint.

———*Plaint verified by a person other than the plaintiff or his agent—His authority to verify must be proved by affidavit—C. P. Code, O.* 6, *R.* 15.

Where a plaint is signed by constituted Attorney of the plaintiff, which mentions the name of another person as being able to depose to the fact of the case and is verified in the usual form by that person, it must be proved by an affidavit that he is so authorised to verify. *Martin & Co.* v. *Abdul Rahim*, Suit No. 1582 of

1925, Diss. from, (*Buckland, J.*) MANINDRA CHANDRA *v.* VELJI MULJI. **31 C. W. N. 1031 (n) = 105 I. C. 564 = A. I. R. 1927 Cal. 773.**

—Ch. 10—Absence of Notice.

——–Absence of notice justifies setting aside the *ex-parte* decree. (*Costello, J.*) RAMESWAR PROSAD *v.* RAMAPADA GHOSE. **32 C. W. N. 684 = 55 Cal. 1292 = 115 I. C. 85 = A. I. R. 1929 Cal. 63.**

—Ch. 10—Powers of Judge.

———Jurisdiction comes to an end once the order is completed. The principle that where an order has not been perfected the Judge has power to reconsidar the matter applies to an order of dismissal for default under Rule 36. (*Buckland, J.*) SARUPCHAND HUKAMCHAND *v.* MADHORAM RAGHUMALL. **28 C.W.N. 755 = 83 I.C. 128 = A. I. R. 1925 Cal. 83.**

—Ch. 10—Rule not ultra vires.

———R. 36, Ch. X of the Original Side Rules is not *ultra vires* and Court has jurisdiction to dismiss the suit for default, when it appears in the " special " list under that Rule. (*Sanderson, C. J. and Walmsley, J.*) UDOY CHAND PANNA LAL *v.* KHETSI DAS TILOKCHAND. **51 Cal. 905 = 28 C. W. N. 916 = 81 I. C. 1048 = A. I. R. 1924 Cal. 1025**

—Ch. 13—Form of affidavits.

———*Affidavits must be strictly according to the form —Mere reference to plaint is not sufficient.*

The affidavits in relation to summons under Ch. 13-A should be sufficient and in proper form. It does not suffice to refer to the plaint and say that the statements contained in it are true. (*Sanderson, C. J. and Rankin, J.*) MEGHJEE MANSING *v.* KALOORAM LACHMINARAIN. **53 Cal. 776 = 30 C. W. N. 706 = 96 I. C. 182 = A. I. R. 1926 Cal. 842.**

—Ch. 13—Applicability.

———*Question whether upon true construction of lease plaintiff can assign remainder of term to a certain limited company without defendant's consent and whether defendant should not pay the costs of the proceedings—Originating summons is correct procedure.*

An originating summons was taken out by the plaintiff for the determination of the question whether upon the true construction of the Indenture of lease mentioned in the plaint and in the circumstances mentioned in the plaint, the plaintiff is entitled to assign the remainder of the term under the said lease, without the consent of the defendant, and whether the defendant should not pay the costs of and incidental to these proceedings.

Held, that the procedure adopted by the plaintiff was entirely correct, R. S. C. of England Order 50 IV. a, R. 1 and the cases thereunder referred to. (*Ghose, J.*) E.H. DUCASSE *v.* E.M.D. COHEN. **48 Cal. 176 = 60 I. C. 105 = A. I. R. 1921 Cal. 99.**

—Ch. 13—Leave to cross-examine.

———*Leave to cross examine deponents was granted.*

An order was taken out in originating summons upon the executrix under a will calling upon her to treat the plaintiff as secured creditor. The objection was that a suit is necessary for the purpose. It was agreed that the matter should be set down for deponent's cross-examinnation.

Held, that the case should be set down for cross-examination. (*Costello, J*) JOHN CARAPIET GALSTAUN *v.* DIANA SARKIES. **54 Cal. 1075 = 109 I. C. 380 = A. I. R. 1928 Cal. 177 (1).**

—Ch. 13—Main claim denied.

———*Plaintiff's main claim denied— Unconditional leave to defend should be given—Security should not be ordered.*

Where there is a specific denial with respect to plaintiff's claim, the proper order is to give an unconditional leave to defend. It is entirely a wrong practice under Ch. 13-A for a Judge to order security merely because looking at the statement on either side he rather thinks that the plaintiff has a better prospect of success than the defendant. An order for the sale of the securities is entirely without jurisdiction under Ch. 13-A. (*Sanderson, C. J. and Rankin, J.*) RADH KISSEN *v.* THAKURSI DAS. **53 Cal. 412 = 30 C. W. N. 228 = 93 I. C. 60 = A. I. R. 1926 Cal. 713.**

—Ch. 13—Scope.

———Where defendant's attorney gave the plaintiff another opportunity by again entering appearance after defendant had already appeared in person, the period of 10 days runs from the date of the later appearance. (*Sanderson, C. J. and Buckland, J.*) CHATTU LAL *v.* MARWARI COMMERCIAL BANK, LTD. **30 C. W. N. 298 = 96 I.C. 839 = A.I.R. 1926 Cal. 668.**

—Ch. 14—Rights of defendant.

———*Except for purposes of defence, defendant in contempt cannot claim benefit of Court's procedure—Extent of right is matter for discretion—Party is entitled to resist proceedings.*

A defendant in contempt cannot claim as of right the benefit of the procedure of the Court except for the sole purpose of defending himself and how far these rights extend is a matter for the discretion of the Court. Though the party cannot himself come into Court to take any advantage of the proceedings in the cause, yet he is entitled to appear and resist any proceedings against him. *Hewitt* v. *McCartney*, (1807) 13 Ves. 560 and *King* v. *Bryant*, (1838) 3 Myl. & Cr. 191, Foll.; *Gordon* v. *Gordon*, (1904) P. 163, Expl. (*Remfrey, J.*) SUDHIR CHANDRA *v.* RASESWARI CHAUDHURANI. **55 Cal. 1110 = 115 I. C. 189 = A. I. R. 1929 Cal. 117.**

—Ch 16—Principle.

———*Requisition to draw up decree.*

The principle enunciated in 49 I. A. 307 = A. I. R. 1922 P. C. 352 = 43 M.L.J. 765 is equally applicable to the filing of a requisition to draw up a decree or order under Rule 27, Ch. 16 of the High Court Rules. (*Sanderson, C. J. and Buckland, J.*) GOBIND LAL DUTT *v.* OFFICIAL ASSIGNEE OF CALCUTTA. **29 C. W. N. 163 = 92 I. C. 563 = A. I. R. 1925 Cal. 291.**

—Ch. 27—Applicability.

———*C. P. Code., O. 21, R. 86—O. 21, R. 86 does not apply where High Court has made rules in exercise of original civil jurisdiction.*

The provisions of O. 21, R. 86 do not apply where a High Court has made rules regulating its own procedure in the exercise of its original civil jurisdiction which are not inconsistent with the Letters Patent. Rules for the conduct of sales by Registrar are contained in Ch. 27, Calcutta High Court Rules. O. 21, R. 86 does not therefore apply to such sales. A. I. R. 1921 Cal. 169, Dist. (*Lort Williams, J.*) GOWAL DAS SIDANY *v.* LUCHMI CHAND JHAWAR. **57 Cal. 106 = A.I.R. 1930 Cal. 324.**

—Ch. 27—Conditions in sale.

———*Conditions in sale by Registrar same as those in ordinary contract by vendor and purchaser for sale of land—Decree-holder choosing to rescind the contract on failure by purchaser to pay balance is entitled to forfeit deposit—Contract Act, S. 78—Specific Relief Act, S. 18.*

The conditions in a Registrar's sale with regard to deposit and re-sale are conditions which are usually found in an ordinary vendor and purchaser's contract for sale of land and in such case ordinary rules of English Law followed in India should be applied. If the vendor on default by the purchaser chooses to treat the contract as rescinded, the deposit is forfeited. If he chooses to treat it as subsisting he must give credit for the deposit in case of deficiency in re-sale. A decree was passed in a suit for recovery of money in a deed of charge and the property was put to sale by the Registrar. The highest bidder deposited a sum in terms of the conditions of the sale but subsequently failed to pay the balance of the purchase money. The decree-holder made an application for an order that the deposit be forfeited stating that he had decided to rescind the contract.

Held, that the decree-holder having decided to treat the contract as rescinded was entitled to forfeit the deposit. 38 Mad. 178 ; 38 Mad. 801 and English Cases Ref. (*Lord Williams.*) GOWAL DAS *v.* LUCHMI CHAND. **57 Cal. 106 = A. I. R. 1930 Cal. 324.**

—Ch. 27—Rights of purchaser.

———*Sale held under Ch. 27—Attachment subsisting prior to mortgage suit—Purchaser in execution of mortgage decree knowing of such attachment only after purchase—Purchaser can have sale set aside—C. P. Code, O.* 21, *R.* 91.

Where a sale is held under Ch. 27 and not under C. P. Code if there is an attachment subsisting from before a mortgage suit, the purchaser in execution of decree obtained in such suit is entitled to reject the title, have the sale set aside and have his deposit returned if the fact of attachment is disclosed to him only after-purchase. A. I. R. 1921 Cal. 554, and 14 Cal. 18, Ref. (*Pearson, J.*) MOHUN LAL *v.* NANIBALA DABEE.

33 C. W. N. 177 = 118 I. C. 887 = A. I. R. 1929 Cal. 207.

—Ch. 34—Applicability.

———*Rule under C. P. Code, S.* 115, *discharged—Fee to only one Counsel is allowable.*

Under R. 7, only the fee to one Counsel should be allowed on taxation against the discharge of rule obtained under C. P. Code, S. 115. (*Greaves, J.*) SARAT CHANDRA *v.* BIRAJ MOHAN. **25 C. W. N. 826 = 68 I. C. 451 = A. I. R. 1921 Cal. 77.**

—Ch. 35—Scope.

———*Caveator besides asking executor to prove will also alleging undue influence and forgery—Matter not come within R.* 29*—Caveator liable for costs.*

If a caveator merely intends to require the executor to prove the will in solemn form he must not at the same time set up a defence of undue influence or fraud or any matter of that character. The widow applied for probate of the will. The caveator besides entering a caveat filed an affidavit alleging that the deceased at the time he made the will and up to the time of his death was a man of weak intellect with very imperfect knowledge of English, that the will was procured by the widow by undue influence and that the will was not genuine but was in effect a forgery. In the last paragraph of his affidavit the caveator prayed that the will should be proved in solemn form and for liberty to cross-examine the witnesses produced in support of the will.

Held, that as R. 29 contained the word "merely" the last paragraph of the affidavit was not sufficient to bring the matter within the terms of R.29. The caveator pleading undue influence was liable for costs. *Calcutta Suit No.* 4 *of* 1928, *Foll.*; *Ireland* v. *Rendall*, (1866) 1 P. and D. 194 ; *Cleare* v. *Cleare*, (1869) 1 P. and D. 655, Rel. on. (*Costello, J.*) SANTASILA DASI *v.* NARENDRA NATH. **56 Cal. 55 = A. I. R. 1929 Cal. 290.**

—Ch. 36—Applicability.

———*Appeal from dismissal of revision—Appeal dismissed—Fees of only one Counsel should be allowed—No refresher should be allowed.*

Having regard to the provisions of Ch. 36, R. 57 (*a*), if an appeal were to lie, only fees of one Counsel would be allowable on taxation unless the Court orders otherwise. Similarly, no refresher should be allowed. (*Greaves J.*) SARAT CHANDRA *v.* BIRAJ MOHAN.

25 C. W. N. 826 = 68 I.C. 451 = A. I. R. 1921 Cal. 77.

———*Attorney promising to give time to client—No dispute as to bargain—R.* 69 *is not inapplicable.*

Unless the special bargain, under which, at the client's request, the attorney gives him time for payment, is a matter of dispute, the rule is in no way inapplicable. The test is whether there are in the end any questions requiring to be elucidated in a suit. If not, the only other condition is that the application shall be one for payment of the amount of a taxed bill of costs. (*Rankin, J.*) NARENDRA LAL *v.* TARUBALA DASSI.

48 Cal. 817 = 25 C. W. N. 800 = 66 I. C. 209 = A. I. R. 1921 Cal. 67.

———*Limitation Act, Arts.* 84 *and* 181*—Neither article applies to an application under R.* 69*—Courts have discretion in dealing with the question of time in such applications.*

On the question of time, Court has discretion to be exercised upon the well known lines and in the well-established manner on the particular facts of each case. In exercising the discretion Courts are not bound by the analogy of Art. 84. (*Rankin, J.*) NARENDRA LAL *v.* TARUBALA DASSI. **48 Cal. 817 = 25 C.W.N. 800 = 66 I. C. 209 = A. I. R. 1921 Cal. 67.**

—Ch. 36—Claim settled before decree.

———*Attachment before judgment—Suit claim settled before decree—Sheriff is not entitled to poundage—Sheriff's right to poundage is not common law right.*

A claim to poundage by a Sheriff must be made under the express terms of a statute rule or order. He has no common law right to reward for executing a writ. [*Woodgate* v. *Knatchbull* (1787) 2 T.R. 148 at page 1541 and *Graham* v. *Grill*, (1814) 2 M. & S. 294, Foll.] In the Calcutta High Court poundage is a charge authorised by the 22nd item of Rule 77 of Ch. 36 of the Rules of Court. The words in the 2nd part of this provision refer to that claim which, but for the satisfaction, compromise or settlement, would, presumably, have resulted in a sum of money being levied by the Sheriff in execution. The rule does not give the Sheriff a commission upon the settlement of every man's claim made in a suit.

Where there is no decree and no execution of a decree the fact that the defendant has been compelled in effect to give security in case the plaintiff's claim turns out to be well founded, does not necessarily mean that virtually or in truth the Sheriff has collected whatsoever the plaintiff may get on a settlement. The terms of Rule 77 of Ch. 36 do not mean that in such a case the Sheriff is in the same position as if execution of a decree had been in progress. Hence where there is an attachment before judgment and subsequently before a decree is passed, the plaintiff's claim is settled, the Sheriff is not entitled to any poundage. *Alchin* v. *Wells.* (1793) 5 T. R. 470 and *Mortimore* v. *Cragg*, (1878) 3 C. P. D. 216, Ref. (*Rankin, J.*) A. D. PICKFORD. *v.* JANOKI NATH. **26 C.W. N. 673 = 70 I. C. 488 = A. I. R. 1921 Cal. 763.**

Relating to Practice and Procedure in District Courts.

—Ch. 1—Case taken on holiday.

———*Ch.* 1, *R.* 2*—Holiday fixed by consent of parties for examining defendants' witnesses—Plaintiff's pleader absent—Case adjourned to next day, also holiday, without consent of parties—Plaintiff's pleader absent—Witnesses not cross-examined—Suit dismissed—Procedure was irregular and case must be re-tried.*

CALCUTTA IMPROVEMENT ACT (BEN. ACT (1911), S. 54.

With the consent of both the parties a civil Court holiday was fixed for the examination of the witnesses to be produced by the defendant. On that date, the plaintiff could not bring any pleader to cross-examine the witnesses. The Court thereupon adjourned the suit till the next day, which was also a close holiday. The plaintiff, however, could not bring any pleader on that day also and two witnesses were examined on that day but were not cross-examined by the pleader for the plaintiff nor by the plaintiff himself. In these circumstances, the suit was ultimately dismissed.

Held, that there was no consent by either party to the adjournment of the case till the next day which also was a close holiday. The proceedings of the trial Court were irregular and this irregularity has prejudiced the plaintiff and the case should be remitted to the Court of first instance to be re-tried 9 All. 366; 30 All. 136; *Bennet* v. *Porter*, (1832) 2 Cr. & J. 622 and *Andrews* v. *Elliott*, (1855) 6 El. & Bl. 338, Ref. (*Mookerjee, A. C. J. and Fletcher, J.*) LAMBO NATH *v.* SARUNATHA DATTA. **25 C.W.N. 330 = 61 I.C. 775 = A.I.R. 1921 Cal. 184.**

CALCUTTA IMPROVEMENT ACT (BEN. ACT V OF 1911).

———*See also* LAND ACQUISITION ACT.

- -S. 54—Scope.

———*S. 54 (1) does not apply to land affected by scheme but included for recoupment only.*

The provisions of S. 54 (1) do not apply to land which is affected by the execution of scheme and which is included for the purpose of recoupment only. The Court ought to give the material words in S. 54 (1) their natural meaning; and if their natural meaning is applied to these words, they do not comprise lands which have been included by the Improvement Trust in the scheme, not because they are required for the execution of the scheme but because in their opinion they are 'affected by execution of the scheme' and are included for the purpose of recoupment only. The provisions of S. 62 (5) are not inconsistent with this construction. (*Sanderson, C. J. and Richardson, J.*) CORPORATION OF CALCUTTA *v.* THE CALCUTTA IMPROVEMENT TRUST. **50 Cal. 531 = 75 I. C. 346 = A. I. R. 1924 Cal. 85.**

CALCUTTA IMPROVEMENT (APPEALS) ACT (IMPERIAL ACT XVIII OF 1911).

—S. 3—Appeal against decision.

———*Appeal lies against decision determining the principal of compensation.*

Where the matter in dispute related to the determination of the exact principle upon which prospects and possibilities of future development should be taken into account in determining the compensation to be paid for property compulsorily acquired, *held*, appeal lay to High Court. (*Mookerjee and Rankin, JJ.*) MANMATHA NATH MULLIK *v.* SECRETARY OF STATE. **28 C. W. N. 461 = 83 I. C. 442 = A. I. R. 1924 Cal. 574.**

—S. 5—Scope.

———*Pecuniary jurisdiction of Chief Judge of Small Cause Court is not limited by S.* 5.

S. 5 does not in any way limit the pecuniary jurisdiction of the Chief Judge of the Small Cause Court of Calcutta and his jurisdiction to execute any order of the Court is not limited to an order which may come within his pecuniary jurisdiction. (*Cuming and B. B. Ghose, JJ.*) NANDALAL *v.* NRITYAKALI DEVI. **31 C. W. N. 142 = 94 I. C. 170 = A. I. R. 1926 Cal. 853.**

CALCUTTA MUNICIPAL ACT (1899), S. 141.

CALCUTTA IMPROVEMENT TRIBUNAL.

—President's powers.

———*President can make an order as to costs and to execute the same.*

The President of the Calcutta Improvement Tribunal is a Civil Court having power to make an order for costs and an inherent power to execute such order for costs made by him. (*Chatterji and Chotzner, JJ.*) BATA KRISHNA *v.* K. ROY. **26 C. W. N. 30 = 65 I. C. 177 = A. I. R. 1921 Cal. 413.**

CALCUTTA MUNICIPAL ACT (III OF 1899).

—Acquisitions for others.

———*Powers of compulsory land acquisition should not be exercised to enable another body to acquire land.*

It was never the policy of the Calcutta Municipal Act that the special powers given to the Corporation for acquiring land for certain purposes named in the Act were to be used to enable another body to acquire land through the medium of ths Corporation, however estimable the purpose. (*Graves, J.*) MANICK CHAND *v.* CORPORATION OF CALCUTTA. **48 Cal. 916 = A. I. R. 1921 Cal. 159.**

—S. 14—Acquisition for Dharmashala.

———*Acquisition of land for* Dharmashala *is in Municipality's discretion.*

The Act, by section 14 and section 556, has expressly placed the discretion not with the Board or with a Court of Law, but with the Municipality itself. Where the Municipality wanted to acquire land for *Dharmashala* near Kali's temple as well as for widening the road, *Held* that what Municipality had to consider was not the religious beliefs and purposes of those assembling in large numbers but what was the situation of the City in respect to this assemblage and to the citizens at large in view of the general questions of public convenience, proper sanitation and the prevention of danger and disease. Any enlightened Municipality would carefully attend to these questions and endeavour to avoid the evils referred to. This is not to be ruled out by a consideration as to the particular form of belief or practice of those who would primarily benefit by the improvements made. (*Lord Shaw.*) AMULEYA CHANDRA BANERJI *v.* CORPORATION OF CALCUTTA. **69 I. C. 114 = 16 Mad. L. W. 673 = 31 Mad. L. T. 155 = 49 I. A. 255 = 49 Cal. 838 = 27 C. W. N. 125 = 21 A. L. J. 27 = 37 C. L. J. 67 = A. I. R. 1922 P. C. 333 = 43 M. L. J. 634.**

—S. 127—Interpretation.

-———*Functions of executive officer under those section are adminiserative.*

In performing the functions prescribed under Ss. 127 to 140, the executive officer is acting in an administrative and not in a judicial capactity. (*Page and Graham, JJ.*) CORPORATION OF CALCUTTA *v.* SHEIKH KEAMUDDIN. **55 Cal. 228 = 46 C. L. J. 260 = 31 C. W. N. 1040 = 103 I. C. 533 = A. I. R. 1927 Cal. 802.**

—S. 141—Burden of proof.

———*Appeal to Small Causes Court—Onus is on assessee to prove executive officer's valuation to be either excessive or wrong.*

In an appeal under S. 141 from the decision of the executive officer to the Small Cause Court, the assessee has to satisfy the Court that the valuation at which the executive officer has arrived was either excessive or wrong. (*Page and Graham, JJ.*) CORPORATION OF CALCUTTA *v.* SHAIKH KEAMUDDIN. **55 Cal. 228 = 46 C. L. J. 260 = 31 C. W. N. 1040 = 103 I. C. 533 = A. I. R. 1927 Cal. 802.**

—S. 142—Powers of High Court.

———*Appeal to High Court under S.* 142 *is not a second appeal within C. P. Code, S.* 100.

An appeal to the High Court under S. 142 (3), Calcutta Municipal Act, is not a second appeal within the ambit of S. 100, C.P. Code, and in such an appeal it is open to the High Court to reconsider the findings of fact arrived at by the Court of Small Causes.

Page, J.—The appeal to the High Court under S. 142 is not preferred under the Code of Civil Procedure but pursuant to the special jurisdiction conferred upon the Court of Small Causes and the High Court under the Calcutta Municipal Act. (*Page and Graham, JJ.*) CORPORATION OF CALCUTTA *v.* SHAIKH KEAMUDDIN.
55 Cal. 228 = 31 C. W. N. 1040 =
46 C.L.J. 260 = 103 I. C. 533 =
A. I. R. 1927 Cal. 802.

—S. 198—Applicability.

———*Person in Calcutta tendering for goods to be supplied to the Howrah Municipality—Sale of goods to the Municipality in pursuance of the tender—Such person cannot be held to be carrying on business in Howrah and so cannot be prosecuted for not having a license.*

A person who carried on business in Calcutta tendered for certain goods to be supplied to the Municipality of Howrah. His tender was accepted and, in pursuance of the contract between the parties, the person sold goods from time to time to the Howrah Municipality. The Howrah Municipality asked him to take out a license and prosecuted him for his failure to do so.

Held, that the person could not be said by any stretch of language to be one who carried on business in Howrah and, therefore, the prosecution could not stand. (*C. C. Ghose and Jack, JJ.*) S. N. BANERJEE *v.* BENGAL PAINT AND VARNISH CO. **48 C. L. J. 54 =**
10 A. I. Cr. R. 565 = 29 Cr. L. J. 786 = 111 I.C. 114 =
A. I. R. 1928 Cal. 531.

—S. 228—Interpretation.

———*Rate assessed on building and land—S.* 228 *applies.*

The expression building or land in S. 228, includes the case of a rate assessed on a building *and* land and such an arrear of rate becomes a charge on the land and house. (*Suhrawardy and Cuming, JJ.*) NAYAN MANJURI DASI *v.* CHAIRMAN, HAWRAH MUNICIPALITY. **87 I. C. 229 = A. I. R. 1925 Cal. 1067.**

—S. 341—Sheets of tin.

———*Sheets of tin, attached to shop by hinges and supported by props, forming verandah are not fixtures.*

Sheets of tin, attached by their side to the shop by hinges and supported at the other end by props thus forming a verandah over the street and when the props are taken away the sheets hang down straight, cannot be considered as fixtures and therefore notice under S. 341 is not necessary. (*Chatterjea and Cuming, JJ.*) NARAYAN KISSEN *v.* CORPORATION OF CALCUTTA.
48 Cal. 602 = 33 C. L. J. 377 = 22 Cr. L. J. 619 =
63 I. C. 155 = A.I R. 1921 Cal. 385.

—S. 408—No waiver of notice.

———*Notice under S.* 408 *not waived by taking action under S.* 409.

Non-compliance with a requisition under S. 408 imposes a liability on the owner. If the requisite improvements are carried out by the General Committee under S. 409, the default on the part of the owner vanishes; but till the work has been completed, the default remains, entire or partial, and the liability of the owner to be prosecuted still continues in operation. (*Mookerjee and Rankin, JJ.*) THE CORPORATION OF CALCUTTA *v.* BIJOY KUMAR. **77 I C. 529 =**
50 Cal. 813 = 27 C. W. N. 787 = 38 C. L. J. 360 =
A. I. R. 1924 Cal. 334.

—S. 449—Procedure under new act.

———Procedure under S. 363 of the Act of 1923 cannot be applied to provisions of S. 449 of the old Act. It is quite impossible to carry out the provisions of S. 449 of the old Act by means of the procedure set forth in S. 363 of the new Act A. I. R. 1925 Cal. 1251, Dist. (*Rankin and Duval, JJ.*) SATISH CHANDRA BOSE *v.* CORPORATION OF CALCUTTA. **53 Cal. 974 =**
44 C. L. J. 37 = 27 Cr. L. J. 1146 = 97 I. C. 666 =
A. I. R. 1926 Cal. 1138.

—S. 556—Acquisition for Dharmashala.

———*Acquisition of land for* Dharmashala *is in Municipality's discretion.*

The Act, by S. 14 and S. 556, has expressly placed the discretion not with the Board or with a Court of Law, but with the Municipality itself. Where the Municipality wanted to acquire land for *Dharmashala* near Kali's temple as well as for widening the road. *Held*, that what Municipality had to consider was not the religious beliefs and purposes of those assembling in large numbers but what was the situation of the City in respect to this assemblage and to the citizens at large in view of the general questions of public convenience, proper sanitation and the prevention of danger and disease. Any enlightened Municipality would carefully attend to these questions and endeavour to avoid the evils referred to. This is not to be ruled out by a consideration as to the particular form of belief or practice of those who would primarily benefit by the improvements made. (*Lord Shaw.*) AMULYA CHANDRA BANERJEE *v.* CORPORATION OF CALCUTTA. **69 I. C. 114 =**
16 M. L. W. 673 = 31 M. L. T. 155 =
49 I. A. 255 = 49 Cal. 838 = 27 C. W. N. 125 =
21 A. L. J. 27 = 37 C. L. J. 67 =
A. I. R. 1922 P. C. 333 = 43 M. L. J. 634.

– S. 557– Applicability.

———*Presumption under S.* 557 *applies to acquisition of entire holding*—18 *times annual value was assessed owing to similar decision in a similar case.*

The presumption under S. 557, Cl. (*d*) applies only when the entire holding is acquired and not when a small portion is acquired and the rent is re-valued for the purposes of assessment. However, in view of S. 151 and the presumption that official acts are properly performed the annual value of the property acquired is the difference between the two annual values assessed by the Municipality. But where the presumption under S. 557 does not apply the value to be assessed is at 18 times the annual value in view of the same number of year's purchase being allowed in a similar case. (*Newbould and Ghose, JJ.*) MAHENDRA NATH SRIMANI *v.* SECRETARY OF STATE. **81 I. C. 1004 =**
28 C. W. N. 779 = A. I. R. 1925 Cal. 65.

—S. 559 —Applicability.

———*Bye-law* 10 *framed under Cl.* (18) *is not superseded by R.* 24 *framed by Local Government under S.* 11 (2), *cls.* (*f*) *and* (*i*) *of Motor Vehicles Act*, 1914.

Bye-law No. 10 framed under cl. (18) of S. 559 of the Calcutta Municipal Act was not superseded by implication when R. 24 was framed by the Local Government under S. 11. Sub. S. (2), cls. (*f*) and (*i*) of the Indian Motor Vehicles Act, 1914. (*Mookerjee, A. C. J. and Fletcher, J.*) INDIAN MOTOR TAXI CAB CO. *v.* CORPORATION OF CALCUTTA. **33 C. L. J. 19 =**
25 C. W. N. 21 = 22 Cr. L. J. 401 = 61 I. C. 641 =
A. I. R. 1921 Cal. 107.

—S. 559—Interpretation.

———The term "carriage" includes a motor car. (*Mookerjee, A. C. J. and Fletcher, J.*) INDIAN MOTOR TAXI CAB CO. *v.* CORPORATION OF CALCUTTA.

33 C. L. J. 19 = 25 C. W. N. 21 = 22 Cr. L. J. 401 = 61 I. C. 641 = A. I. R. 1921 Cal. 107.

—S. 622—Interpretation.

———*Non-compliance with requisition for carrying out improvements—Obstruction by some tenants—Onus not completely absolved.*

It would be unreasonable to construe S. 622 (3) in the sense that an owner, who has not complied with a requisition at all is discharged from liability, merely because the occupier of a portion of the land has rendered compliance impracticable only in part. Upon a fair interpretation of S. 622, it appears that the owner is discharged from liability only to the extent that compliance is rendered impossible by the conduct of the occupier. (*Mookerjee and Rankin, JJ.*) THE CORPORATION OF CALCUTTA *v.* BIJOY KUMAR. **50 Cal. 813 = 77 I. C. 529 = 38 C. L. J. 360 = 27 C. W. N. 787 = A. I. R. 1924 Cal. 334.**

—S. 631—Limitation.

———*Limitation runs from the date of first commission of offence.*

The period of Limitation under S. 631 begins to run from the date of the first commission of the offence, the date when the obstruction or projection was first placed over the street. (*Chatterjea and Cuming, JJ.*) NARAYAN KISSEN *v.* CORPORATION OF CALCUTTA. **48 Cal. 602 = 33 C. L. J. 377 = 22 Cr. L. J. 619 = 63 I. C. 155 = A. I. R. 1921 Cal. 385.**

———The applicant was prosecuted on a complaint, dated 11—5—1920; the complaint alleged that the accused had about 5—9—1919 committed an offence under Ss. 574 and 466 of the Calcutta Municipal Act by keeping and using an unlicensed workshop for munufacturing articles of iron for purposes of trade. *Held.* that the complaint was time-barred under S. 631. (*Newbould and Suhrawardy, JJ.*) N. K. SARKAR *v.* HOWRAH MUNICIPALITY. **22 Cr. L. J. 559 = 62 I. C. 575 (C).**

—S. 637—Applicability.

———*Section could not by itself include any area in Calcutta town.*

Mallik, J.—S. 637 provided for the inclusion of areas within the limits of the Calcutta Municipality. It could not, taken by itself, include any area within the town of Calcutta. Such an inclusion could be made only under Act I of 1907. (*Cuming and Mallik, JJ.*) SHIBA KALI KUMAR *v.* CHUNI LAL. **31 C. W. N. 1007 = 103 I. C. 674 = A. I. R. 1927 Cal. 748.**

———(III OF 1923).

—Nature of proceedings.

———*Proceedings by Municipal Magistrate are not criminal.*

The Act has invested Municipal Magistrates with power to deal with certain proceedings under the Act which are not criminal proceedings. One of such powers is to order demolition of unauthorised structures. (*Suhrawardy and Cammiade, JJ.*) KRISHAN DAYAL *v.* CORPORATION OF CALCUTTA. **54 Cal. 532 = 31 C. W. N. 506 = 101 I. C. 183 = 45 C. L. J. 469 = 28 Cr. L. J. 407 = 8 A. I. Cr. R. 35 = A. I. R. 1927 Cal. 509.**

—S. 3—'New Building.'

———The test whether a building is new or not within the meaning of the Act has reference to the date of commencement of the Act. (*Rankin and Duval, JJ.*) SATISH CHANDRA *v.* CORPORATION OF CALCUTTA. **53 Cal. 974 = 44 C. L. J. 37 = 27 Cr. L. J. 1146 = 97 I. C. 666 = A. I. R. 1926 Cal. 1138.**

—S. 27—Applicability.

———*Time to receive deposit money extended by Corporation—Candidate paying his deposit money after three days but within extended time—His nomination is still rendered void.*

S. 27 is mandatory, and its plain sense is that within three days of the nomination the candidate must pay the deposit money, otherwise his nomination is rendered void. The last date fixed for the filing of the nomination papers was 27th Feb., 1927. As 27th Feb. was a Sunday, the Chief Executive Officer of the Corporation published a notice in the "Statesman" to the effect that 27th Feb. being Sunday, the deposit money of the candidates, ordinarily due on 1st March under S. 27 (3) of the Act, would be received up to 5 p. m. of 2nd March. *A*, a candidate for election, paid the deposit money on 2nd March. The scrutiny of the nominations was held on 3rd March. *A*'s nomination was accepted as a valid one and he was duly elected as Councillor for the Corporation.

Held, that his nomination was void. (*Gregory, J.*) A. B. MITCHELL *v.* J. C. DUTT. **55 Cal. 173 = 32 C. W. N. 264 = 109 I. C. 739 = A. I. R. 1928 Cal. 209.**

—S. 27—Improper acceptance.

———*Improper acceptance of a nomination is an admissible ground for the purposes of S. 46.*

Because the improper rejection of a nomination at the scrutiny, for any of the reasons contained in R. 15, is made a ground for disputing the election, it is not the reasonable and correct inference to be drawn from the words of the section that the improper acceptance of a nomination which had been rendered void is not an admissible ground for the purposes of S. 46. (*Gregory, J.*) A. B. MITCHELL *v.* J. C. DUTT. **55 Cal. 173 = 32 C. W. N. 264 = 109 I. C. 739 = A. I. R. 1928 Cal. 209.**

—S. 47—Applicability.

———*Corrupt practice—Connivance of candidate or agent in procuring application material—Connivance involves some degree of knowledge on their part—Section need not be construed strictly.*

A candidate and his agent had no reason to believe that there was any imposture at the time when voters came forward to apply for voting papers in the name of persons who were afterwards proved to be dead. When the rival candidate challenged their identity, the candidate merely stood by and the agent identified the voters.

Held, that there was no corrupt practice by either the candidate or his agent, whose connivance in procuring the application is material, and some degree of knowledge of the truth on their part must be proved in order to establish connivance. The section need not be construed strictly. (*Buckland, J.*) J. J. COHEN *v.* BIJUN BEHARI. **32 C. W. N. 1155 = 116 I. C. 145 = A. I. R. 1929 Cal. 137.**

—S. 127—Interpretation.

———*Annual value—Method of determination indicated—"Reasonably expected to let"—Meaning.*

Per *Mukerji and Roy, JJ.*—For purposes of determining the annual value under S. 127, the standard value upon which the rates have to be calculated is the value of the property to the owner which is to be measured, whether he occupies the property himself or lets it to a tenant, by the amount of rent per annum it would be worth to a hypothetical tenant. And to find out what a hypothetical tenant will give, such a tenant must not be taken who does not want the premises for the use for which they are built, but wants to use them for some other purpose, unless it can first be shown that they cannot be let for the purpose for which they are built. *The Queen* v. *London* and *North-Western Rail-*

way Company (1874) 9 Q. B. 134; *The Queen* v. *The School Board for London*; (1886) 17 Q. B. D. 738 and 10 Mad. 38, Rel. on. (*Rankin, C. J. Buckland and Cammiade, JJ.*) CORPORATION OF CALCUTTA *v.* ASHUTOSH DE. **31 C. W. N. 864 = 103 I. C. 683 = 46 C. L. J. 535 = A. I. R. 1927 Cal. 659.**

—S. 131—Burden of proof.

———*Onus is not on Corporation to prove increase in value of land.*

The onus is not on the Corporation, where the Corporation seek to increase the assessee's assessment, to show that the value of the land has increased; it is for the assessee to show that it has not increased. A. I. R. 1927 Cal. 802, Ref. (*Rankin, C. J. C. C. Ghosh and Buckland, JJ.*) CORPORATION OF CALCUTTA *v.* JALAJBASINI DEBI. **47 C. L. J. 315 = 32 C. W. N. 378 = 109 I. C. 618 = A. I. R. 1928 Cal. 450.**

—S. 131—Limit of increase.

———*Assessment cannot be increased above the standard rent under Calcutta Rent Act* (1920), *S.* 26.

Per *Rankin, C. J., Buckland and Cammiade, JJ., agreeing with Mukerji, J., Roy, J., dissenting.*—The Corporation of Calcutta, in assessing certain premises under S. 131, sub-S. (1) of the Calcutta Municipal Act, while the Calcutta Rent Act, 1920, is in force, are not competent to increase the assessment above the standard rent under S. 2, sub-S. (*f*), Cl. (*i*) of the Calcutta Rent Act, 1920. (*Rankin, C. J. Buckland and Cammiade, JJ.*) CORPORATION OF CALCUTTA *v.* ASHUTOSH DE. **31 C. W. N. 864 = 46 C. L. J. 535 = 103 I. C. 683 = A. I. R. 1927 Cal. 659.**

—S. 140—Order not award.

———*Land Acquisition Act* (1894), *S.* 12.

Cuming, J.—There is no analogy between the Land Acquisition Collector making an award and an executive officer of the Municipality passing orders under S. 140 as to assessment. 32 Cal. 605, Ref. (*Rankin, C. J., C. C. Ghose and Buckland, JJ.*) CORPORATION OF CALCUTTA *v.* JALAJBASINI DEBI. **47 C. L. J. 315 = 32 C. W. N. 378 = 109 I. C. 618 = A. I. R. 1928 Cal. 450.**

—S. 141—Interpretation.

———*Assessee not adducing evidence against assessment—Assessment should be confirmed.*

The appeal which is given to the Court of Small Causes by the Calcutta Municipal Act is really a proceeding by which an administrative act is challenged before a judicial tribunal. It is intended that it should not be treated as an ordinary appeal from civil Court, but is an occasion on which the party complaining must have an opportunity of adducing evidence if he wants, to show that the decision of which he complains is wrong. If, therefore, no evidence at all is adduced to show that the Chief Executive Officer's determination is wrong, it is the Judge's duty to dismiss the appeal and confirm the assessment. (*Rankin, C.J. C.C. Ghose and Buckland, JJ.*) CORPORATION OF CALCUTTA *v.* JALAJBASINI DEBI. **47 C. L. J. 315 = 32 C. W. N. 378 = 109 I. C. 618 = A. I. R 1928 Cal. 450.**

—S. 141—Recording Evidence.

———*Small Cause Judge should record evidence sufficient to enable appellate Court to decide whether decision of trial Court was right or wrong.*

As the law provides for an appeal from the decision of Small Cause Court Judge revising the valuation by the corporation for assessment of rent and taxes, it is incumbent upon the trial Judge in such a case to record the evidence in such way as to enable the appellate Court to come to its own decision whether the decision of the trial Judge is right or wrong: A. I. R. 1927 Cal. 659, Ref. (*B. B. Ghose and Bose, JJ.*) CORPORATION OF CALCUTTA *v.* MANIKLAL DE. **33 C. W. N. 1173 = A.I.R. 1930 Cal. 306.**

———*Appeal to Small Cause Court—Evidence should be recorded in full.*

Per *Mukerji, J.*—The law having provided for an appeal from the decision of the Small Cause Court Judge, it is desirable that the evidence should in such cases be recorded in full. (*Rankin, C. J. Buckland and Cammiade, JJ.*) BEHARI LAL SEN *v.* INDRA NARAYAN. **31 C. W. N. 864 = 103 I. C. 683 = 46 C. L. J. 535 = A. I. R. 1927 Cal. 659.**

—S. 142—Nature of appeal.

———*Appeal to High Court—Question of fact can be gone into—C. P. Code, S.* 100.

An appeal to the High Court under S. 142 (3) is not a second appeal as contemplated by S. 100, C. P. Code, and the appeal is not restricted to questions of law only (*Cuming, J., contra*); A. I. R. 1927 Cal. 802, Ref. (*Rankin, C. J. C. C. Ghosh and Buckland, JJ.*). CORPORATION OF CALCUTTA *v*, JALAJBASINI DEBI. **47 C. L. J. 315 = 32 C. W. N. 378 = 109 I. C. 618 = A. I. R. 1928 Cal. 450.**

—S. 175—Applicability.

———*Rr.* 12 *to* 14 *need not be resorted to where application for cancellation of notice is not disposed of—Magistrate must decide whether license is necessary—Mere issue of notice does not conclude the case.*

Where the accused was informed that his representation for the cancellation of the notice was receiving attention.

Held, that the accused was under no obligation whatsoever to avail himself of the provisions of Rr. 13 and 14 of Sch. 6.

Held, further that the Magistrate, apart from the question of the accused's availing himself or not of the provisions of Rr. 13 and 14 of Sch. 6, was bound to find if it was necessary for him to take out a license. (*C. C. Ghose and Duval, JJ.*) UMESHCHANDRA *v.* CORPORATION OF CALCUTTA. **43 C. L. J. 231 = 27 Cr. L. J. 549 = 93 I. C. 1045 = A. I. R. 1926 Cal. 614.**

—S. 175—Interpretation.

———*Even if person carries only passengers yet he is carrier within Sch.* 6, *item* 18.

Even if a person carries only passengers for hire yet he is a carrier within the meaning of Sch. 6, item 18, for any person who carries goods or passengers for hire or gratuitously by land or water is a carrier. (*Cuming, J.*) S. M. CHAUDHURY *v.* CORPORATION OF CALCUTTA. **34 C. W. N. 452 = A. I. R. 1930 Cal. 368.**

—S. 271—Interpretation.

———*Ss.* 271 *and* 278 (1) (b)—*Whether there is proper access to privy is question in which corporation is not interested and requisition for that purpose is not covered by S.* 278 (1) (b)—*It has to see only whether accommodation is sufficient and privy is in sanitary condition.*

The words "take such other order" must be construed *ejusdem generis* with the words preceding. Whether proper access is available to a privy by people living in a particular portion of a house is a question in which the corporation is not *prima facie* interested. The tenants having just grievance can take such steps for securing proper access as the law provides but the corporation is only entitled under the Municipal Act to see that privy is in a sanitary condition, and the privy accommodation is sufficient. A requisition by the corporation that proper access should be provided to a privy is

not, therefore, covered by S. 278 (1) (*b*). (*Suhrawardy, J.*) BISHNU PADA *v.* CORPORATION OF CALCUTTA.
51 C. L. J. 469 = A. I. R. 1930 Cal. 285.

—S. 271—Pendency of Suit for ejectment.

———*Pendency of suit for ejectment of tenant, or existence of injunction against owner of premises or mere application under S.* 527 *would not relieve owner from liability for conviction for non-compliance with notice under S.* 271 *but such proceedings cannot be ignored while considering what should be proper sentence for offence of non-compliance.*

The pendency of a suit in ejectment against the tenant or the existence of an injunction against the owner of the premises restraining him from taking possession of the premises or even the mere filing of an application under S. 527 would not be sufficient to relieve the owner from a liability for a conviction for non-compliance with a notice under S. 271 requiring him to erect privies connected with the premises. One cannot entirely overlook, however, the existence of such proceedings in considering the gravity of the offence and in determining the proper sentence. (*Mukerji, J.*) JUMAN SADAGAR *v.* CORPORATION OF CALCUTTA. **30 Cr. L. J. 1026 = 119 I. C. 369 = 1929 Cr. C. 172 = A. I. R. 1929 Cal. 490.**

—S. 299—Scope and Interpretation.

———*Interpretation and scope of—Inapplicablity of corresponding provisions of the Act of* 1899.

According to S. 299 of the Act a person may be served with notice for any alleged unlawful encroachment. The words " fixture attached to a building" should be construed as they stand and the structure complained of whether constructed either before or after the "building" is within the section. The corresponding provision of the Act of 1899 which required the building to be erected before the fixture does not govern the interpretation of the present Act. 23 C. W. N. 752, Ref. (*Pearson and Mallik, JJ.*) PURNA CHANDRA DUTT *v* CORPORATION OF CALCUTTA. **1929 Cr. C. 72 = A. I. R. 1929 Cal. 440.**

—S. 346—Refusal of notice.

———*Corporation cannot refuse notice under S*- 359—*Bustee owner prosecuted and fined under S.* 346 *is immaterial—Prosecution within six months of notice is not valid.*

It is obligatory on the Corporation to accept notice given to them under S. 359 and it is not open to them under the section to refuse to accept such a notice and the owner of the bustee giving the notice is entitled to six months' time, allowed by the section within which he is to effect the removal of all the huts standing on the land. It is immaterial whether the bustee owner had already been prosecuted and fined for neglect to carry out a requisition under S. 346; he is entitled to serve a notice under S. 359 on the Corporation and to get six months' time allowed under that section for the removal of all the huts on the land, but it is open to the Corporation if, on the expiry of the six months from the date of the notice, the huts had not been removed to revive once more the former proceedings under S. 346. The Corporation are clearly not entitled to prosecute the bustee owner within six months from the date of notice. (*Cuming and Gregory, JJ.*) BARADAPRASAD ROY *v.* CORPORATION OF CALCUTTA. **44 C. L. J. 579 = 99 I. C. 933 = 28 Cr. L. J. 197 = 7 A. I. Cr. R. 330 = A. I. R. 1927 Cal. 218.**

—S. 363—Administration of Oath.

———*Party to proceeding under, is not exempted from administration of oath under Cr. P. Code, S.* 342.

A party to a proceeding under S. 363 of the Calcutta Municipal Act relating to demolition of an unauthorised

structure is not an accused person and as such is not exempted from administration of oath under S. 342 of the Cr. P. Code, A. I. R. 1925 Cal. 1251, Expl. (*Suhrawardy and Cammiade, JJ.*) KISHEN DAYAL *v.* CORPORATION OF CALCUTTA. **54 Cal. 532 = 31 C.W. N. 506 = 101 I. C. 183 = 45 C. L. J. 469 = 28 Cr. L. J. 407 = 8 A. I. Cr. R. 35 = A. I. R. 1927 Cal. 509.**

—S. 363—Applicability.

———*Calcutta Municipal Act (III of* 1899 *B.C.), S.* 449– *Bengal General Clauses Act (I of* 1899 *B.C.), S.* 8—*Effect of saving—Demolition order for building built without sanction before the new Calcutta Municipal Act,* 1923—*Sanction by General Committee to proceed under S.* 449 *of the old Municipal Act, reaffirmed by the new Corporation—Demolition order is not valid.*

A prosecution had been sanctioned by the General Committee under S. 449 of the old Act (III B.C. of 1899) but the case was actually started under the new Act (III B.C. of 1923) by the new Corporation and notice upon the party was issued and an order of demolition was passed.

Held, that whether the proceedings were under S. 363 or 364 of Act III B.C. of 1923, they were irregular and the order of the Municipal Magistrate was not justified as the party had not been heard by the Corporation before sanction for prosecution was given.

Held, further that the proceedings under S. 449 of the Calcutta Municipal Act (III B.C. of 1899) could only be started by the General Committee and, therefore, in respect of unauthorized structures which existed before 1st April 1924, when the Calcutta Municipal Act of 1923 came into force, there was, after the passing of the latter Act, nobody competent to take proceedings under S. 449 of the Act of 1899. (*Sanderson, C. J. and Panton, J.*) RAM GOPAL GOENKA *v.* CORPORATION OF CALCUTTA. **29 C. W. N. 898 = 90 I.C. 317 = 52 Cal. 962 = 26 Cr. L. J. 1533 = A. I. R. 1925 Cal. 1251.**

—S. 363—Burden of proof.

———*Onus of proving that work was done more than five years previously is on owner.*

Under S. 363 (2), the question before the Magistrate is not whether the Corporation has shown the date of the work being done or that the date was within five years of the institution of the proceedings but whether the owner has established to his satisfaction that the work has been done more than five years previously. (*Rankin, C.J. and Patterson, J.*) RAM GOPAL GOENKA *v.* CORPORATION OF CALCUTTA. **50 C. L. J. 527 = 1930 Cr. C. 222 = A.I.R. 1930 Cal. 222.**

—S. 363—Demolition not punishment.

———The demolition of unlawfully erected work is not a punishment within the meaning of S. 363. 8 C. W. N. 142, Foll. (*Suhrawardy and Cammiade, JJ.*) KISHEN DAYAL *v.* CORPORATION OF CALCUTTA.
54 Cal. 532 = 31 C. W. N. 506 = 101 I. C. 183 = 45 C. L. J. 469 = 28 Cr. L. J. 407 = 8 A. I. Cr. R. 35 = A. I. R. 1927 Cal. 509.

—S. 363—Necessity for privacy.

———*However necessary for privacy it is breach of S.* 363 *to erect boundary walls* 18 *feet high without sanction—Magistrate's discretion ordering demolition held rightly exercised.*

A person without sanction and in defiance of the Calcutta Municipal Act and rules of the Corporation erected a boundary wall 18 feet high though under law he was limited to a height of 10 feet and the Magistrate ordered demolition. It was admitted that the walls were necessary for securing privacy of the premises.

Held, (Per *Buckland* and *Graham, JJ.*), that there was breach of S. 363 read with S. 3 (7) and the order of demolition by the Magistrate was valid and legal and the discretion was rightly exercised. (Per *Suhrawardy, J.*, contra). That Magistrate should not as a course of equity order demolition and that Magistrate did not exercise proper discretion when he took into account simply the fact that the structure was put up without the sanction of the Corporation. (*Buckland, J. On difference between Suhrawardy and Graham, JJ.*) SHAM LAL *v.* CORPORATION OF CALCUTTA. **1929 Cr. C. 525 = 33 C. W. N. 777 = A. I. R. 1929 Cal. 781.**

—S. 363—Old Act.

———*Procedure under S.* 363 *cannot be applied to provisions of S.* 449 *of old Act.*

It is quite impossible to carry out the provisions of S. 449 of the old Act by means of the procedure set forth in S. 363 of the new Act. A. I. R. 1925 Cal. 1251, Dist. (*Rankin and Duval, JJ.*) SATISH CHANDRA BOSE *v.* CORPORATION OF CALCUTTA.

53 Cal. 974 = 44 C. L. J. 37 = 27 Cr. L. J. 1146 = 97 I. C. 666 = A. I. R. 1926 Cal. 1138.

—S. 363—Scope and Discretion.

———*Discretion should be exercised on equitable grounds.*

Suhrawardy, J.—S. 363 is not imperative inasmuch as it says that the Magistrate may make an order directing that such erection etc., or so much thereof as has been executed unlawfully be demolished or altered. One of the grounds on which such an order can be passed is that the erection has not been commenced after obtaining the permission of the Corportion, but the section makes it discretionary with the Magistrate to make such an order and it has been interpreted by the Court that the discretion vested in the Magistrate under this section should be exercised on equitable ground. 33 Cal. 287 ; 34 Cal. 341, Foll. (*Buckland, J. On difference between Suhrawardy and Graham, JJ.*) SHAM LAL *v.* CORPORATION OF CALCUTTA.

1929 Cr. C. 525 = 33 C. W. N. 777 = A. I. R. 1929 Cal. 781.

— S. 385—No Continuance of offence.

———*Conviction under S.* 385 (1) *read with S.* 488 (1)—*Continuing to work mill after conviction is not continuance of the offence—Second conviction is bad.*

The accused set up a flour mill intending to work it by electricity without the previous written permission of the Corporation and was convicted under S. 385, Cl. (1) read with S. 488, Cl. (1), and was sentenced to pay a fine on 30th March, 1927. After the said conviction, he worked the mill from 1st April onwards. For this he was prosecuted for having committed an offence under S. 385, Cl. (1) read with S. 488, Cl. (2), and was sentenced to pay a daily fine of Rs. 10.

Held, that once the mill has begun to work with electricity, etc., the thing passes beyond the range of intention and it cannot be said to be a continuance of the same offence, but must be regarded as a new offence altogether and the conviction is bad in law and must be set aside. (*Mukerji, J.*) MURLIDHAR RAM *v.* CORPORATION OF CALCUTTA. **32 C. W. N. 591 = 108 I. C. 241 = 29 Cr. L. J. 361 = 10 A. I. Cr. R. 7 = A. I. R. 1928 Cal. 387.**

—S. 406—Applicability.

———*Accused found taking delivery of consignment of ghee discovered to be adulterated is not guilty of offence under S.* 406.

An accused was found by a Food Inspector unloading a consignment at a railway station. One of the tins which the accused said, contained ghee, appeared to the Food Inspector to contain something else. He accordingly seized the consignment and took it to the Municipal Office. Thereafter he purchased for a sum of four annas a sample of one of the tins for analysis and the analysis, when made, disclosed the fact that the ghee was grossly adulterated. Upon these facts, the accused was convicted.

Held, that he could not be convicted of an offence under S. 406. (*Chotzner and Lort-Williams, JJ.*) AKHOY KUMAR GHOSE *v.* CORPORATION OF CALCUTTA. **32 C. W. N. 842 = A. I. R. 1928 Cal. 320.**

—S. 406—Compulsory sale.

———*Compulsory sale is not sale within S.* 406.

A compulsory sale made under the provisions of S. 424, Cl. (1) cannot make any person amenable to the punishment provided for under S. 488 of the Act. (*Chotzner and Lort Williams, JJ.*) AKHOY KUMAR GHOSE *v.* CORPORATION OF CALCUTTA.

32 C. W. N. 842 = A. I. R. 1928 Cal. 320.

—S. 418—Interpretation.

———*"Prosecution" includes proceedings under S.* 421.

Graham, J.—The word "prosecution" used in S. 418, sub-S. (2) does not necessarily connote prosecution for an offence, and where it is intended to be so used it is usual to state so in plain terms. Prosecution in its wider or more general sense means a proceeding by way of indictment, or information, and as used in S. 418 (2) it may include such proceedings as those taken under S. 421 of the Act. (*Suhrawardy and Graham, JJ.*) DAULAT RAM *v.* CORPORATION OF CALCUTTA.

49 C. L. J. 502 = A. I. R. 1929 Cal. 283.

—S. 421—Burden of proof.

———*Article ordered to be destroyed—Onus is not on Corporation to prove that the article was intended for human consumption.*

It cannot be contended that because S. 418, Cl. (2) puts the burden upon the accused to prove that the article is not intended for human consumption in a case of prosecution under the chapter, it indicates that in all other cases, *e. g.*, in a case where the article is ordered to be destroyed under S. 421, the onus will be upon the Corporation to prove that it is intended for human consumption. (*Suhrawardy and Graham, JJ.*) DAULAT RAM *v.* CORPORATION OF CALCUTTA.

49 C. L. J. 502 = A. I. R. 1929 Cal. 283.

—S. 424—Procedure not followed.

Where the procedure prescribed by S. 424 of the Act was not followed, conviction under S. 412 was set aside. (*Mukerji, J.*) LALJI RAM *v.* CORPORATION OF CALCUTTA. **A. I. R. 1928 Cal. 243.**

—S. 449—Applicability.

———*Bengal General Clauses Act (I of* 1899 *B. C.), S.* 8—*Effect of saving—Demolition order for building built without sanction before the new Calcutta Municipal Act,* 1923—*Sanction by General Committee to proceed under S.* 449 *of the old Municipal Act, re-affirmed by the new Corporation—Demolition order is not valid.*

A prosecution had been sanctioned by the General Committee under S. 449 of the old Act (III B.C. of 1899), but the case was actually started under the new Act (III B.C. of 1923) by the new Corporation and notice upon the party was issued and an order of demolition was passed.

Held, that whether the proceedings were under S. 363 or 364 of Act III, B.C. of 1923, they were irregular and the order of the Municipal Magistrate was not justified as the party had not been heard by the Corporation before sanction for prosecution was given.

Held, further that the proceedings under S. 449 of the Calcutta Municipal Act (III B.C. of 1899) could only be started by the General Committee and, therefore, in respect of unauthorized structures which existed before 1st April, 1924, when the Calcutta Municipal Act of 1923 came into force, there was, after the passing of the latter Act, nobody competent to take proceedings under S. 449 of the Act of 1899. (*Sanderson, C. J. and Panton, J.*) RAM GOPAL GOENKA *v.* CORPORATION OF CALCUTTA. **52 Cal. 962 = 90 I. C. 317 = 26 Cr. L. J. 1533 = 29 C. W. N. 898 = A. I. R. 1925 Cal. 1251.**

— S. 488—No Continuing offence.

——*Re-thatching of roof with leaves and allowing it to remain in contravention of the requirements of R.* 7 *is not a continuing offence.*

Where the owner of a hut put new golpatta leaves upon the old framework of the roof of his hut and the charge against him on that occasion was that he had entirely re-thatched the roof of the hut with new golpatta, and thereafter another prosecution was instituted and it was contended on behalf of the Corporation that because the accused had not pulled down the golpatta roof or altered it in accordance with the requirements of R. 7, Sch. 17, he was guilty of a continuing offence. *Held*, that he was not guilty of continuation of the offence within S. 488 (2), as allowing the roof to remain is not a continuation of the offence of making the roof. *Marshall* v. *Smith*, 8 C. P. 416, Cons. (*Rankin, C. J. and C.C. Ghose, J.*) CORPORATION OF CALCUTTA *v.* ANANTA DHAR. **56 Cal. 126 = 114 I.C. 402 = 30 Cr. L. J. 296 = 12 A. I. Cr. R. 147 = 32 C. W. N. 696 = A. I. R. 1928 Cal. 336.**

—S. 488—Scope.

——So long as there is no disobedience by a party to the order of demolition of an unauthorised structure passed by the Magistrate, he commits no offence. (*Suhrawardy and Cammiade, JJ.*) KISHEN DAYAL *v.* CORPORATION OF CALCUTTA. **54 Cal. 532 = 31 C. W. N. 506 = 101 I. C. 183 = 8 A. I. Cr. R. 35 = 45 C. L. J. 469 = 28 Cr. L. J. 407 = A. I. R. 1927 Cal. 509.**

—S. 531—Revision of orders.

——*Order of Magistrate appointed under S.* 531 *is revisable by High Court—Cr. P. Code, S.* 6.

The Municipal Magistrate appointed under S. 531 is a Court of inferior criminal jurisdiction within the meaning of S. 6, Cr. P. Code, and orders for demolition passed by such a Magistrate are subject to revision by the High Court under Ss. 435 and 439, Cr. P. Code. Further, an order for demolition is a judicial order and whether made in the exercise of the Magistrate's civil or criminal jurisdiction is open to revision by the High Court. 43 Mad. 146 (P. C.), Foll. (*Sanderson, C. J. and Panton, J.*) RAM GOPAL GOENKA *v.* CORPORATION OF CALCUTTA. **29 C. W. N. 898 = 90 I. C. 317 = 52 Cal. 962 = 26 Cr. L. J. 1533 = A. I. R. 1925 Cal. 1251.**

—S. 533—Duty of Magistrate.

——*S.* 533 *must be taken to be subject to the provisions of S.* 200 (b), *Cr. P. Code—Cr. P. Code, S.* 200 (b).

Provisions of S. 533, Calcutta Municipal Act, must be taken to be subject to the provisions of S. 200 (*b*), Cr. P. Code, and a Municipal Magistrate is bound to examine the complainant before recording conviction of a person under S. 291 (2), Calcutta Municipal Act. (*C. C. Ghose and Gregory, JJ.*) AMBICA PROSAD DAS *v.* CORPORATION OF CALCUTTA. **48 C. L. J. 190 = 114 I.C. 82 = 32 C. W. N. 1091 = 30 Cr. L. J. 231 = 12 A. I. Cr. R. 204 = A. I. R. 1928 Cal. 483.**

—S. 535—Application for Costs.

——*Order passed under S.* 535 (2) (a)—*Person in whose favour order was passed claiming costs by subsequent application—Magistrate can consider that question.*

There is nothing in the terms of S. 535 or in any other section, which prevents the Magistrate from taking into his consideration on a date subsequent to the date of order under S. 535 (2) (*a*) the question of costs raised by an application by the person in whose favour that order was passed. (*C. C. Ghose and Panton, JJ.*) CORPORATION OF CALCUTTA *v.* T. H. E. EDWARDS. **57 Cal. 497 = A. I. R. 1930 Cal. 487.**

—S. 537—Scope.

——*Provisions of S.* 248, *Cr. P. Code, are not affected by S.* 537—*Powers under S.* 537 *are to be exercised in accordance with Cr. P. Code, S.* 248.

The provisions of S. 248, Cr. P. Code, have not been affected or abrogated in cases or proceedings by the Corporation by the provisions of S. 537 of the Calcutta Municipal Act. S. 537 of the Municipal Act is merely an enabling section and the powers given thereunder to do the various acts specified therein can only be exercised in accordance with the provisions of the Cr. P. Code. (*C. C. Ghose and Duval, JJ.*) SISHIR KUMAR *v.* CORPORATION OF CALCUTTA. **53 Cal. 631 = 96 I. C. 648 = 43 C. L. J. 369 = 30 C. W. N. 598 = 27 Cr. L. J. 984 = A. I. R. 1926 Cal 786.**

—S. 538—Applicability.

——*Provisions are not applicable to a suit for payment of money of the Provident Fund—Provident Funds Act (IX of* 1897), *S.* 5.

A suit against the Calcutta Corporation for payment of money in the account of the Provident Fund of the deceased by his legal representative is not one in respect of any act purporting to be done by the Corporation under the Calcutta Municipal Act, and so the provisions of S. 538 as to limitation do not apply to such a suit. A.I.R. 1928 Cal. 542, Affirmed. (*Rankin, C.J. and C. C. Ghose, J.*) CORPORATION OF CALCUTTA *v.* ASOKE KUMAR DE. **55 Cal. 1231 = 32 C.W.N. 515 = 113 I.C. 166 = A.I.R. 1928 Cal. 743.**

——*Special period of limitation does not apply to a suit by the son for the recovery of Provident Fund of an employee of the Corportion.*

Special period of limitation prescribed in S. 538 cannot apply to a suit, against the Corporation of Calcutta, in which the plaintiff claims as the only son and sole heir of his deceased father to recover from the Corporation a certain sum on account of his father's Provident Fund, unpaid salary and contributions for the purchase of a war bond. (*Buckland, J.*) ASHOKE KUMAR DE *v.* CORPORATION OF CALCUTTA. **115 I. C. 271 = A. I. R. 1928 Cal. 542.**

—S. 557—New Procedure.

——*New procedure prescribed by Act V of* 1926 *is to be applied to proceedings in contravention of the old Act as well as the new Act.*

By Act V of 1926 provision has been made whereby proceedings relating to a contravention of the provisions of the Calcutta Municipal Act, 1899, are to be taken in the manner prescribed by the Act of 1923; in other words, the new procedure is to be applied to contravention of the old Act as well as to contravention of the new Act. (*Rankin, C. J. and Buckland, J.*) RAM GOPAL *v.* CORPORATION OF CALCUTTA. **55 Cal. 964 = 47 C. L. J. 208 = 32 C. W. N. 454 = 10 A. I. Cr. R. 174 = 29 Cr.L.J. 509 = 109 I.C. 237 = A.I.R. 1928 Cal. 207.**

—S. 557—Scope and effect.

——*Effect and Scope enunciated.*

The effect of Cl. (4), S. 557-A is this that between August 1926 and August 1927, in a proceeding for demolition of structure under S. 363 even although five years may have expired, a legal proceeding would have been competent because the clause was intended as an extension of limit in view of the fact that legal proceedings had not been possible effectively for some considerable period prior to the amending Act. The clause does not say and it does not mean that no legal proceeding under S. 557-A is ever to be taken after the expiry of one year from August 1926. What it says is that if in the Act or any other law a legal proceeding between August 1926 and August 1927 would have been barred it is not to be barred until August 1927. Such a clause at no time was of any use to anyone except to the Corporation, and that in a case in which it was desired to get an extension of some restrictive period of limitation imposed by some other section of the Act or some other law. (*Rankin, C. J. and Patterson, J.*) RAM GOPAL GOENKA *v.* CORPORATION OF CALCUTTA. **50 C.L.J. 527 = 1930 Cr.C. 222 = A.I.R. 1930 Cal. 222.**

—Sch. 17—Scope.

———Rules 30 and 32 are intended to affect buildings and structures dealt with by the Act of 1899 and were never intended to apply to boundary walls which are included in the term "building" by the Act of 1923. (*Buckland, J. On difference between Suhrawardy and Graham, JJ.*) SHAM LAL KHETTRY *v.* CORPORATION OF CALCUTTA. **1929 Cr. C. 525 = 33 C. W. N. 777 = A. I. R. 1929 Cal. 781.**

CALCUTTA POLICE ACT (IV OF 1866.)

—Detention for unlimited period.

———*Deputy Commissioner in Calcutta has no power of detention for unlimited period.*

There is no power of detention for an unlimited period in the Deputy Commissioner, Calcutta by virtue of his being a Justice of Peace. (*Mukerji, J.*) EMPEROR *v.* PANCH KOWRI DUTT. **52 Cal. 67 = 86 I. C. 414 = 29 C. W. N. 300 = 26 Cr. L. J. 782 = A. I. R. 1925 Cal. 587.**

—S. 3.—Interpretation.

———"Profit or gain" is the cardinal constituent of the definition of a "common gaming house" (*Mukerji, J.*) PURAN MULL *v.* EMPEROR. **33 C. W. N. 668 = 1929 Cr. C. 325 = A. I. R. 1929 Cal. 644.**

—S. 44—Applicability.

———*Members of association alleged to carry on business for purchase and sale of jute for future delivery—No delivery intended—Accused are guilty under S. 44.*

Certain persons were members of an association called the Bengal Jute Association which carried on business at particular premises in respect of transactions for purchase and sale of jute for future delivery. It was found that there was no intention between the parties either to take or give delivery.

Held, that the accused were guilty under S. 44, their intention being to gamble and not to deal in jute. (*Rankin, C.J.*) THAKURDAS MUNDRA *v.* EMPEROR. **A. I. R. 1930 Cal. 637.**

———*Conviction under S. 44 requires sufficient evidence of gain.*

For conviction under S. 44 it is necessary to have sufficient evidence of the element of "profit or gain." (*Mukerji, J.*) PURAN MULL *v.* EMPEROR. **33 C. W. N. 668 = 1929 Cr. C. 325 = A. I. R. 1929 Cal. 644,**

—S. 45—Presumption.

———*Presumption is inapplicable where search in consequence of which find takes place is of place other than that ordered to be searched.*

Under S. 47, Police Act, if gaming instruments are found in a house, the presumption is that it is a common gaming house, provided the finding of the instrument is in conformity with S. 46. The search in consequence of which the find takes place must, therefore, be of a place of which a search warrant is issued and no such presumption can be drawn from search resulting in find of a place which is not ordered to be searched. (*Mukerji, J.*) AH YUNG *v.* EMPEROR. **A.I.R. 1930 Cal. 369.**

—S. 45—Scope.

———*S. 45 must be read with definition of gaming in S. 2 of Bengal Act IV of* 1919.

S. 45, Calcutta Police Act, must be read having regard to definition of gaming in S. 2 of Bengal Act IV of 1913. A petition began with the statement that "at No. 160, Harrison Road, cotton figure gambling has been carried on;" it went on with the statement that "all that happens is that a person who wants to take money will go to a stall-keeper as Modi; a number of them infest the place; every one of them has a book in which entries are made of the stake made by gamblers."

Held, that on these statements it is not possible to say that that does not disclose an offence under S. 45. (*Sanderson, C. J. and Richardson, J.*) BAJRANG LAL *v.* EMPEROR. **33 C. L. J. 287 = 25 C. W. N. 428 = 22 Cr.L.J. 599 = 62 I.C. 871 = A I. R. 1921 Cal. 719.**

—S. 46—Defect in Warrant.

———*Warrant under S. 46 defective — Presumption under S. 47 should not be raised.*

Where a search warrant purported to have been issued under S. 46 of the Act was defective;

Held, that no presumption under S. 47 that the house in question was a common gaming house should be raised : A.I.R. 1926 Cal. 966, Appl. (*Suhrawardy and Cammiade, JJ.*) GOUR MOHAN *v.* EMPEROR. **46 C. L. J. 186 = 9 A.I. Cr. R. 25 = 28 Cr.L.J. 871 = 104 I. C. 711 = A. I. R. 1927 Cal. 801.**

—S. 46—Interpretation.

———*"Reason to believe" is not same as "cause to suspect"—Officer issuing warrant must judicially have reason to believe.*

The expression "reason to believe" is entirely different from the expression "cause to suspect." The police may have cause to suspect that a certain house or place is used as a common gaming house, but the officer who issues the warrant has to bring his judicial mind to bear upon the question and he can only issue the warrant contemplated under S. 46 of the Act, if in his opinion there is reason to believe that a certain house or place is used as a common gaming house. (*C. C. Ghose and Chotzner, JJ.*) WALVEKAR *v.* EMPEROR. **53 Cal. 718 = 30 C. W. N. 713 = 27 Cr. L. J. 920 = 96 I. C. 264 = A. I. R. 1926 Cal. 966.**

—S. 46—Proof of contents.

———*Warrant issued under S. 46 is not public record —Its contents must be proved in a regular way—Evidence Act, S.* 57 (7).

A warrant issued under the provisions of S. 46 of the Calcutta Police Act is not a public record and there is no presumption of any kind attaching to it ; therefore, the contents thereof must be proved in the popular way and, therefore, it is incumbent upon the prosecution to prove that a warrant of this description was in strict compliance with the provisions of S. 46 of the Act and that it was issued after information upon oath had been brought before the issuing officer and after such enquiry as he thought it necessary to make had been made. (*C.C. Ghose and Chotzner, JJ.*) WALVEKAR *v.* EMPEROR. **53 Cal. 718 = 30 C. W. N. 713 = 27 Cr. L J. 920 = 96 I. C. 264 = A. I. R. 1926 Cal. 966.**

—S. 46—Regularity of warrants.

———*Warrants—Presumption under S.* 114, *Evidence Act, does not apply—Essential preliminaries must be proved to have been observed.*

S. 114, Ill. (*e*) of the Indian Evidence Act cannot be relied upon in order to presume the regularity of warrants under S. 46, Calcutta Police Act, and unless the law expressly says that proof shall be required, evidence ought to be required in every case of this description that the essential preliminaries precedent to the issue of such a warrant have been complied with. (*C.C. Ghose and Chotzner, JJ.*) WALVEKAR *v.* EMPEROR.

53 Cal. 718 = 30 C.W. N. 713 = 27 Cr. L. J. 920 = 96 I. C. 264 = A. I. R. 1926 Cal. 966.

—S. 54—Scope—Interpretation.

———*To uphold conviction actual physical and not potential possession of the 'thing' in some shape or form is necessary—Meaning of the terms, 'possession' and 'thing' explained.*

Per *Mukerji, J.*—The word 'possession' should be understood in a sense *ejusdem generis* with the words 'conveys' and 'offers and etc.' and in the sense of actual physical possession. The word 'thing' appears in the section, in sub-S. (1) as "anything" and in sub-S.(2) as "the thing" and must necessarily mean tangible moveable property having a corporeal existence and capable of being handled. It is the suspected thing itself in some shape or form that can form the subject-matter of a case under S. 54. If a man was in possession of stolen gold ornaments and had got it melted or converted into gold, the gold is still the thing itself in a different shape or form. If instead of having the gold in his hand he keeps it in his house or with a friend or goldsmith, the gold is still in his possession. To such a case the section will apply. If a man deposits money in a bank, or purchases a cash certificate with it, the money loses all its identity and it cannot be said that he is still in actual physical possession of the money as a tangible piece of moveable property. The cash certificate or the fixed deposit receipt may represent the money for certain purposes but it is not the money itself as a 'thing' in another shape or form of such thing. (*Graham, J.* Contra.) (*Buckland, J. on difference between Mukerji and Graham, JJ.*) RADHA KRISHNA GUPTA *v.* JAMUNADAS FATEHPURIA.

33 C. W. N. 477 = 49 C. L. J. 506 = 31 Cr. L. J. 59 = 120 I. C. 250 = 1929 Cr. C. 31 = A. I. R. 1929 Cal. 401 (403).

—S. 54-A—Applicability.

———*Prosecution must show that accused had stolen goods found with him.*

For the purposes of S. 54-A of the Police Act, it is obligatory on the prosecution to show that there is reason to believe that the goods had been stolen or fraudulently obtained. The mere evidence of the Police that second-hand articles of clothing were recovered from the house of the accused would hardly warrant one in saying that the articles had been stolen or fraudulently obtained. (*Walmsley and Suhrawardy, JJ.*) RASIK LAL DAS *v.* EMPEROR. **71 I. C. 503 = 26 C. W. N. 712 = 24 Cr. L. J. 151 = A. I. R. 1922 Cal. 492.**

———To justify a conviction under S. 54-A of the Calcutta Police Act, there must be reason to believe that the article has been stolen or *fraudulently* obtained. No conviction can be had in the absence of a reasonable ground for suspicion. (*Richardson and Huda, JJ.*) BAI DAS *v.* ALIM BUX KHAN. **23 C. W. N. 1053 = 59 I. C. 554 (1) = 22 Cr. L. J. 122.**

—S.. 54-A—Burden of proof.

———*S.* 54-*A is revolutionary in its provision of casting the entire burden of proof on the accused.*

The provision contained in S. 54-A is revolutionary in its character, as it relieves the prosecution of its ordinary burden of proof in a criminal case, beyond what is necessary to create a reasonable suspicion, and throw the entire *onus* on the accused of removing that suspicion. A penal provision of this character should be strictly construed. (*Buckland, J. On difference between Mukerji and Graham, JJ.*) RADHA KRISHNA *v.* JAMUNADAS FATEHPURIA. **33 C. W. N. 477 = 49 C. L. J. 506 = 31 Cr. L. J. 59 = 120 I. C. 250 = 1929 Cr. C. 31 = A. I. R. 1929 Cal. 401.**

—S. 54-A—Condition precedent.

———*Condition precedent is that property in possession of accused is stolen property.*

There must be reason to believe that the property found in the accused's possession was stolen property as a preliminary condition before the accused can be called on to account for that possession. 20 B. 348; 22 C. W. N. 936 and 23 C. W. N. 1053, Ref. (*Newbould and Suhrawardy, JJ.*) TULSI TOLINI *v.* EMPEROR.

72 I. C. 372 = 24 Cr. L. J. 372 = 50 Cal. 564 = A. I. R. 1923 Cal. 596.

—S. 54-A—Trial under I. P. Code.

When an accused has been tried under Ss. 381 and 411, I. P. C. he may be convicted of an offence under S. 54-A, Calcutta Police Act, though not separately charged with it. A. I. R. 1923 Cal. 596, Foll. but not Appr.; 29 Cal. 481, Ref. (*Buckland, J. on difference between Mukerji and Graham, JJ.*) RADHA KRISHNA GUPTA *v.* JAMUNADAS FATEHPURIA.

120 I. C. 250 = 33 C. W. N. 477 = 49 C. L. J. 506 = 31 Cr. L. J. 59 = 1929 Cr. C. 31 = A. I R. 1929 Cal. 401.

—S. 62-A—Kirpans exceeding limit.

———*Carrying kirpans, exceeding nine inches in length, in the town of Calcutta is illegal—Notification of Commissioner of Police dated* 21*st October*, 1922.

The carrying of a sword by calling it a kirpan, exceeding nine inches in length, in the town of Calcutta, is an offence under S. 62-A read with notification of Comissioner of Police dated 21st Oct. 1922. (*Ghose and Cuming, JJ.*) KRIPAL SINGH *v.* EMPEROR.

81 I. C. 940 = 25 Cr. L J. 1116 = 50 Cal. 912 = A. I. R. 1924 Cal. 231.

—S 68—Applicability and effect.

———*Cr. P. Code, S.* 403 (1)—*Conviction under Calcutta Police Act, S.* 68—*Trial under Merchants Shipping Act, S.* 103 (4) *on the same facts is barred.*

Where the accused, an officer of a steamship, was convicted under S. 68 of the Calcutta Police Act on a charge of drinking and disorderly conduct creating a disturbance by assaulting the Captain of the vessel and sentenced to pay a fine, and the Captain subsequently filed a complaint on the same facts under S. 103 (4) of the Merchants Shipping Act charging the accused with having assaulted him and he was convicted under the said section and sentenced.

Held, that the substantial charge under the Police Act being "assault," Cr. P. C. S. 403 (1), 2nd part is a bar to a second conviction upon the same facts under a different enactment, namely, the Merchants Shipping Act. (*Rankin and Chotzner, JJ.*) ALFRED LAIRD *v.* EMPEROR. **99 I. C. 1033 = 31 C. W. N. 195 = 28 Cr. L. J. 233 = 7 A.I. Cr. R. 386 = A. I. R. 1927 Cal. 224.**

— S. 76—Period of detention.

———*Deputy Commissioner of Police cannot detain arrested person longer than is necessary to bring him* *before Magistrate—He cannot order his detention till completion of police investigation.*

A Deputy Commissioner of Police by virtue of his powers as a Justice of the Peace or otherwise, cannot lawfully order the detention in police custody of a person arrested without warrant, for any longer time than is necessary to enable such person to be brought before a Presidency Magistrate, nor can he lawfully order that the detention of any such person as aforesaid at a police station or in police custody shall continue until the police investigation shall have been (*a*) further advanced, or (*b*) completed, notwithstanding that the time within which such person might have been brought before a Presidency Magistrate has elapsed. Cr. Mis. Case 51 of 1926, Overruled. (*Chatterjee, Greaves, Rankin, Panton and Mukerji, JJ.*) MUHAMMAD SULEMAN *v.* EMPEROR. **54 Cal. 218 = 44 C. L. J. 138 = 30 C. W. N. 985 = 27 Cr. L. J. 1201 = 7 A. I. Cr. R. 298 = 97 I. C. 961 = A. I. R. 1926 Cal. 1121 (1127) (F. B.).**

——*Arrest under orders of Deputy Commissioner of Police—Persons arrested can be detained in Police custody till investigation is over, but if they cannot be released on bail they should be produced before a Magistrate without unreasonable delay.*

It is not the duty of the Deputy Commissioner of Police, a Justice of the Peace, to place an offender forthwith before a Magistrate, for in the first instance there is no period mentioned in the Calcutta Police Act within which this must be done, and in the second place as a Justice of the Peace, the Deputy Commissioner is entitled to take such steps as may be necessary to complete an investigation before placing the matter before a Magistrate. A. I. R. 1925 Cal. 587, Rel. on. It is also proper that if the officer does not see his way to release the petitioners on bail, he should produce them before a Magistrate with as little delay as possible, so that the Magistrate may determine whether in the circumstances of the case the persons arrested are entitled to be enlarged on bail, and if there is any improper exercise of such power, that can be corrected by the High Court under suitable provisions of the law, such as S. 491, Cr. P. Code. (*Suhrawardy and Duval, JJ.*) SRILAL AGARWALLA *v.* EMPEROR. **44 C. L. J. 134 = 97 I. C. 945 = 27 Cr. L. J. 1185.**

—S. 78-A—Complainant's Statement.

——*Statements made by complainant under S. 78-A must be allowed to be used in evidence.*

A statement by the complainant during investigation to a Police Inspector reduced into writing and entered in a diary must be produced before the Court and allowed to be proved by the defence. (*Suhrawardy, J.*) PANCHANAN MUKHERJEE *v.* EMPEROR. **33 C. W. N. 203 = 116 I. C. 160 = 30 Cr. L. J. 577 = 12 A. I. Cr. R. 448 = A. I. R. 1929 Cal. 257.**

—S. 78-A—Powers of police.

——*A statement obtained in contravention of S. 78-A, Sub-S.* (3), *is not admissible—Police have no general inherent power in matters of investigation apart from the powers conferred on them by Acts and Circulars.*

There are no powers inherent in the Police which are not expressly set out in the four corners of the Calcutta Police Act. All investigations by the Police must be controlled, in the mofussil, by the Cr. P. C. and in Calcutta by the Police Act itself or by any circular Orders issued. Taking of statements generally by the Police apart from the provisions of any Act and then putting the statements so taken in evidence against the person by whom they were made is not permissible. (*Greaves and C. C. Ghose, JJ.*) SATYA CHARAN MITTER *v.* EMPEROR. **53 Cal. 650 = 30 C. W. N. 427 = 45 C. L. J. 15 = 27 Cr.L. J. 602 = 94 I. C 266 = A. I. R. 1926 Cal. 586.**

CALCUTTA PORT ACT (III OF 1890).

—S. 83—Addition of bandh.

——*Adding* bandh *to Hoogly river—Addition is an erection.*

If a person adds a platform or *bandh* to the existing bed of Hoogly river, within the limits of the Port of Calcutta, it is an erection within S. 83. (*Teunon and Suhrawardy, JJ.*) BENODE BEHARI BAGCHI *v.* HOOK. **22 Cr. L. J. 504 = 62 I. C. 328 (Cal.).**

—S. 83—Effect.

——*Section prohibits structures on private land and thus interferes with private rights.*

S. 83 does expressly deprive owners of property of their rights. It prohibits the erection of certain structures on private land, *i. e.*, land below high water mark which is clearly an interference with the rights of the owners. If it were assumed that all land below high water mark is the property of the Crown to which no other person had any rights, the provisions under the Act would have been superfluous since it would not be necessary to provide a special statute for the removal of structures erected by trespassers. (*Newbould and B. B. Ghose, JJ.*) RADHA KISSEN CHAMRIA *v.* EMPEROR. **51 Cal. 1030 = 84 I. C. 941 = 26 Cr. L. J. 397 = A. I. R. 1925 Cal. 404.**

—S. 84—Injunction by Civil Court.

——*Proceedings for contravention of S. 83 cannot be stopped by an injunction by a Civil Court.*

The Commissioners for the Port of Calcutta cannot be restrained by injunction by a Civil Court from proceeding with a certain criminal prosecution instituted by them against certain persons under S. 84, Calcutta Port Act, for contravention by the said persons of the provisions of S. 83 of the Act. (*C. C. Ghose and Chotzner, JJ.*) COMMISSIONERS FOR THE PORT OF CALCUTTA *v.* SURAJ MULL JULAN. **55 Cal. 978 = 112 I. C. 712 = 32 C. W. N. 576 = A. I. R. 1928 Cal. 464.**

—S. 84—Removal of obstruction.

——*Conviction under — Commissioners themselves should remove obstructions.*

Where a person is convicted under S. 84 he should not be dircted to remove the obstruction. The Port Commissioners should themselves remove the obstruction under S. 84 (1). (*Teunon and Suhrawardy, JJ.*) BENODE BEHARI BAGCHI *v.* HOOK. **22 Cr. L. J. 504 = 62 I. C. 328 (Cal.).**

CALCUTTA RENT ACT (III OF 1920).

—Alteration of order.

——*Order fixing standard rent is judgment* in *rem and cannot be altered on application by subsequent tenant.*

An order passed by the Rent Controller fixing the standard rent is an order which affects the house and it is therefore one which operates as a judgment *in rem* and the question cannot be re-opened on the application of a subsequent tenant. No doubt the standard rent can be altered or varied under certain circumstances, for instance, when there has been any alteration in the premises or an additional burden has been cast upon the landlord or similar circumstances, but that does not show that the judgment fixing the standard rent is not a judgment *in rem* and that it can be re-opened at any subsequent time. (*Suhrawardy and Graham, JJ.*) AHMUDDIN *v.* BANKU BEHARI. **31 C. W. N 308 = 100 I. C. 781 = A. I. R. 1927 Cal. 305.**

—Application.

———Where a landlord transfers his rights, wholly or partially the Act must be applied as it stands to the new rights and the new relations thus created. (*Sanderson, C. J. and Richardson, J.*) SALEH ABRAHAM *v.* MANEKJI COWASJI. **50 Cal. 491 = 75 I. C. 521 = A. I. R. 1924 Cal. 57.**

———*C. P. Code, O. 41, R. 33—Suit by landlord to eject tenant after giving notice—Calcutta Rent Act in force when suit dismissed—Rent Act expiring at the hearing of the appeal—Rent Act was held to be not applicable—Interpretation of statutes—Expiry of Act before decision in appeal.*

It is true that an appellate Court has to decide a case as it was presented before the trial Court and on a consideration of which the original judgment is based. But if the right claimed is one which has either ceased to exist or been modified by certain events which have transpired since the decree of the trial Court, the Court is bound to take notice of it in order to give just and proper relief to the parties to the appeal before it. The plaintiff let his premises to the defendant and standard rent was fixed under the Rent Act of 1920. On 14th March 1925, the plaintiff gave a notice to the defendant asking him to vacate the premises by the end of March 1925. The defendant not having vacated within the time allowed to him, a suit was instituted on 13th May 1925, for ejectment against the defendant. The trial Court dismissed the plaintiff's suit on the ground that the defendant was protected from ejectment under the provisions of S. 11, Rent Act. This order was pronounced on 30th July 1926. There was an appeal by the plaintiff against the decree of the trial Court. The appeal came on for hearing on 29th July 1927. In the meantime the Rent Act expired on 31st March 1927 and ceased to exist. The appeal was heard and allowed. Defendant came on second appeal.

Held, that the case was rightly decided as on the day the lower appellate Court delivered its judgment, the law applicable was the general law, *i.e.*, T. P. Act and the tenancy having been validly determined under it, a decree ordering ejectment was correct. (*Suhrawardy and Graham, JJ.*) SURESH CHANDRA CHATERJEE *v.* KANTI CHANDRA BATTACHARJEE. **47 C. L. J. 530 = 110 I. C. 715 = A. I. R. 1928 Cal. 436.**

—Powers of controller.

———*Premises let for more than Rs. 250 before November 1918—Application after the Act to fix standard rent of a part of the premises—Court can find what proportion of rent should be fixed for the part.*

Where certain premises were let out before 1st Nov. 1918 for more than Rs. 250 and after the Act an application was made to fix the standard rent of a portion of the premises originally let,

Held: that the Rent Controller has power, for the purpose of fixing standard rent. if necessary for him, to decide what portion of the rent, originally paid for the entire premises was to be allocated in respect of premises in respect of which an application is made, so as to determine whether he has jurisdiction to deal with the matter. (*Greaves and Mukerji, JJ.*) HURSUK DAS THAKUR DAS *v.* GOURI CHARAN LAW. **87 I. C. 796 = A. I. R. 1926 Cal. 372.**

—Property outside Calcutta.

———*Lease including property outside Calcutta—Parties not really intending to create tenancy in respect of such property—Rent Controller has jurisdiction to fix standard rent for the property in Calcutta.*

Where a lease of property in Calcutta included also property outside Calcutta to which the Calcutta Rent Act could not apply, and it was found that there was no genuine intention on the part of the lessor that the tenant should be put in possession of that property, and that such property was included in the lease to evade the provisions of the Rent Act,

Held: that the Rent Controller had jurisdiction to fix a standard rent in respect of the Calcutta property. (*Greaves and B. B. Ghose, JJ.*) L. R. COUNSEL *v.* SUKUMARI DEBI. **53 Cal. 115 = 91 I. C. 417 = 30 C. W. N. 114 = A. I. R. 1926 Cal. 250.**

—Revision.

———High Court is not entitled to revise President's decision even if on going through the evidence High Court should think he has devoted an insufficient amount of attention or attributed an insufficient importance to one element of a question of fact. (*Rankin and Page, JJ.*) BASANTI CHARAN SINHA *v.* RAJANI MOHAN CHATTERJEE. **28 C. W. N. 467 = 83 I. C. 368 = A. I. R. 1924 Cal. 629.**

—Tenant's status after notice.

———*Tenant ceasing to be a tenant cannot take advantage of the Act.*

After a landlord gives a notice to quit, the tenant thereafter becomes a trespasser and can no longer claim the advantage under the Act. (*Sanderson, C. J. and Buckland, J.*) W. & T. AVERY, LTD. *v.* KESSORAM PODDER. **30 C. W. N. 152 = 92 I. C. 1001 = A. I. R 1926 Cal. 481.**

—S. 1 (4)—Proviso (inserted by Act I of 1924)—Effect of amendment.

———*Proceedings before President, C. I. T. not over on 31-3-24—Premises of higher monthly rental than Rs. 250 on 1-11-18—No appeal lies to President, C.I.T.*

By the Calcutta Rent (Amendment) Act 1924 (Bengal Act No. I of 1924) the duration of the Calcutta Rent Act of 1920 was extended until the end of March 1927, but it was provided by this last amending Act that after the 31st March 1924, the principal Act should cease to apply to any premises the rent of which exceeded Rs. 250 a month or Rs. 3,000 a year, on the 1st November 1918.

Held : that the President of the Calcutta Improvement Tribunal was right in holding that by virtue of this proviso he could not entertain appeals to him from decisions of the Rent Controller in cases in which the proceedings before him had not terminated on the 31st March 1924, if such proceedings related to premises the rent of which exceeded Rs. 250 a month or Rs. 3,000 a year on the 1st November 1918. (*Greaves and Chakravarty, JJ.*) KUNDAMUL DALMIA *v.* W. DYER. **29 C. W. N. 281 = 86 I. C. 139 = 52 Cal. 551 = A. I. R. 1925 Cal. 571.**

—S. 2—Applicability.

———*Tenant at sufferance is a tenant within S. 11.*

A monthly tenant, whose period of tenancy had terminated and who received a notice to quit before the Act came into force, remains a tenant within the scope of S. 11, though he is not a tenant under S. 2. (*Rankin, J.*) BITHAL DAS CHANDAK *v.* LALBEHARI DUTT & SONS. **49 Cal. 369 = 68 I. C. 361 = 25 C. W. N. 967 = A. I. R. 1922 Cal. 391.**

—S. 2—Fans and lights in building.

———*Whether electric fans and lights go with the premises demised depends upon the intention of parties and their agreement.*

It depends on the intention of the parties and on the nature of the agreement to be gathered from the same whether electric fans and lights are intended to go with and to form a part of the premises or building demised. A.I.R. 1924 Cal. 868, Dist. (*Greaves and B. B. Ghose, JJ.*) D. D. BARBAR *v.* DEBENHAM. **53 Cal. 123 = 42 C. L. J. 87 = 30 C. W. N. 274 = 90 I. C. 4 = A. I. R. 1926 Cal. 469.**

—S. 2—Hire of furniture.

——*Controller cannot fix hire of furniture though he can of premises in a furnished flat but parties to the original agreement are unaffected by the order.*

The Rent Controller cannot fix the hire of furniture though he is entitled to fix the standard rent of premises where they are comprised in a furnished flat. Though the controller or the tribunal as the case may be. may make an order about the standard rent to be paid in respect of premises when such premises have been let at a given rent which includes payment for the use of furniture, still the liability of the parties under the original agreement remains unaffected, whatever be the effect of such an order as between other parties or in other circumstances. The order does not determine the agreement. (*Buckland, J.*) ELLEN EVELINE WELLS *v.* JOHN DICKINSON AND CO., LTD. **28 C. W. N. 774 = 81 I. C. 853 = A. I. R. 1924 Cal. 868.**

—S. 2—Interpretation.

——*Premises includes different blocks.*

It cannot be said that because a house consists of different blocks, consisting of servants' quarters and offices, garage and the main building, it is not premises within the meaning of the Act. (*Cuming and B. B. Ghose, JJ.*) S. G.P. SINGH *v.* PROBODH KUMAR. **53 Cal. 479 = 30 C. W. N. 308 = 95 I. C. 289 = A. I. R. 1926 Cal. 681.**

——*'Premises' does not mean part of a hut.*

The definition of premises as given in S. 2 (*c*) does not cover a part of a hut. (*Woodroffe and Ghose, JJ.*) RAMGOLAM KALWAR *v.* GUMTI SHAW. **69 I. C. 976 = A. I. R. 1924 Cal. 535.**

——*'First let'—Entire building let out—Sub-letting of part thereof is not 'first letting'.*

If the words "first let" in S. 2 (*f*) (ii) should be construed to mean first letting between the tenant and the sub-tenant, the object of the Act may be frustrated. If such a construction is accepted, then an entire premises may be taken on lease by a tenant at a rent of Rs. 500 a month, and he may sub-let in four flats at a rent of Rs. 500 or at any rent he pleases for each flat, each of which will be a first letting so far as that particular flat is concerned. (*Chatterjee and Cuming, JJ.*) REBEIRA *v.* ELIAS E. M. JACOB. **27 C. W. N. 569 = 77 I. C. 623 = A. I. R. 1923 Cal. 553.**

——*"Premises"—Property whether premises depends upon the purpose for which it was let.*

To see whether a property comes within the term 'premises' as defined in the Act it is necessary to ascertain the purpose for which the premises were let. The Rent Controller will have to determine whether the premises in question were let for the purposes mentioned in S. 2, Cl. (*c*) of Calcutta Rent Act, though on the question what was the purpose of the original letting the actual user of the premises may be evidence. (*Woodroffe and Ghose, JJ.*) ABDUL HUQ *v.* MOHAMADDIN. **67 I. C. 302 = A. I. R. 1923 Cal. 311.**

——*Workshop is not "premises".*

A workshop is not within the meaning of the word "premises" as used in the Calcutta Rent Act. The mere fact that the Engineer of the Company had a retiring room, or that a room was used for the purpose of

an office connected with the workshop does not bring the case within the word "premises" as used in the Rent Act. (*Chatterjee and Cuming, JJ.*) INDIAN ENGINEERING AND MOTOR CO., LTD. *v.* GLADSTONE WYLLIE & CO. **26 C. W. N. 102 = 68 I. C. 907 = A. I. R. 1921 Cal. 470.**

—S. 2—What is standard rent.

——*Standard rent is fixed by Act—Application to Controller is not necessary.*

Prima facie the standard rent mentioned in sub-S. (i) of Cl. (*f*) of S. 2 should be the standard rent, and in the absence of any application by the landlord to fix it at a higher rate, under S. 15 the "standard rent" should be taken to be the rent at which the premises were let on the 1st of Nov. 1918 with the addition of ten per cent. as provided by sub-S. (*i*). It is not necessary that an application should be made to the Rent Controller to fix it. (*Sanderson, C. J. and Buckland, J.*) W. & T. AVERY, LTD. *v.* KESSORAM PODDER. **30 C. W. N. 152 = 92 I. C. 1001 = A. I. R. 1926 Cal. 481.**

—S. 4—Provision for renewal.

——*Demise for 3 years with provision for renewal is not one for five years or upwards—High Court will exercise powers of revision, if Rent Controller fails to exercise his powers under Rent Act.*

Where the demise was clearly for a period of three years the fact that there was option for renewal for a further period of three years after the expiration of the first three years does not make it a lease for five years or upwards within the meaning of S. 4, Sub-sec. 3. If the Rent Controller has refused to exercise the jurisdiction conferred upon him by the Calcutta Rent Act, the High Court will interfere under S. 115. (*Greaves and B. B. Ghose, JJ.*) BASANTA CHARAN SINHA *v.* RAJANI MOHAN CHATTERJEE. **86 I. C. 227 = 49 Cal. 928 = 26 C. W. N. 711 = 39 C. L. J. 85 = A. I. R. 1922 Cal. 514.**

—S. 8—Method of deciding application.

——*Application for standardization of rent must be decided though relationship of landlord and tenant ceases after proceedings are begun.*

There is nothing in the Act to justify the dropping of a proceeding which has been started regularly under the Act because one of the parties was not at the date of the hearing occupying the position which he did at the commencement of the case. When a case has been regularly started there must be some direct provision in law to disqualify it from being carried to the end. (*Suhrawardy and Page, JJ.*) F. D. BELLEW *v.* T. ELKE. **51 Cal. 577 = 29 C. W. N. 30 = 78 I. C. 874 = A. I. R. 1924 Cal. 715.**

—S. 9—Scope and Meaning.

——*Premium paid in pursuance of an agreement prior to 15-3-20 is not prohibited.*

The meaning of S. 9 with its sub-sections and proviso is that if a grant of a tenancy is made after the commencement of the Act, and if a fine or premium is required as the consideration thereof, and if it has been paid after the date of the commencement of the Act, the tenant can recover it from the landlord, unless the payment, which has in fact been made, was in accordance with the agreement entered into before the 15th March 1920. (*Sanderson, C. J. and Rankin, J.*) RAM CHUNDER SEROWJIE *v.* COWRI NATH DATTA. **53 Cal. 492 = 97 I. C. 376 = A. I. R. 1926 Cal. 927.**

— S. 11—Applicability.

———*Breach of covenant by tenants to repair—Removal of fixtures contrary to covenant—Tenants were held not liable to forfeit the protection of the Rent Act.*

The defendants had committed a breach of one of the covenants in that when they vacated the premises they removed certain fixtures which they had no right to remove and when they gave up possession the premises were not in good and substantial repair and condition in accordance with the terms of the lease.

Held, that the fact that the defendants had committed a breach of that covenant when they gave up possession of the premises, was not sufficient to disentitle them to the protection of the Rent Act during the whole of the period during which they were holding over after the expiry of the term of their lease and that the landlord was merely entitled to damages for the breach of covenant and not to any mesne profits on the footing that the tenant's possession after the expiration of the term of the lease was wrongful. (*Sanderson. C. J. and Rankin, J.*) G. M. HAY *v.* BONOMALI MULLICK. **88 I. C. 589 = 29 C. W. N. 636 = A. I. R. 1925 Cal. 791.**

———*Person having sufficient premises letting it out and trying to eject tenants in other premises—Requirement is not* bona fide.

To allow a landlord who has premises sufficient for his requirements to eject tenants because he chooses for his own convenience or profit to deprive himself of the use of the premises which he is occupying would be to defeat the objects of the Act. It is not sufficient that a plaintiff in order to defeat a plea under the Calcutta Rent Act, should merely say that he desires the premises *bona fide* for his own occupation. The word in the Act is not " desire " but " require." This involves something more than a mere wish and involves an element of need to some extent at least The tenant is justified in paying rent to the Controller month by month once there has been a refusal by the landlord to accept it. (*Buckland, J.*) REKHABCHAND DOOGAR *v.* J. R. D'CRUZ. **69 I. C. 963 = 26 C. W. N. 499 = A. I. R. 1923 Cal. 223.**

———*Agreement for lease—Tenant paying standard rent regularly, cannot be ejected.*

There was an agreement for a lease, though finally fixed, after occupation by the tenant. The tenant, however contended that the rent fixed was high and got standard rent fixed by the Controller after notice to the landlord. The approximate standard rent was paid monthly to the Controller and the covenants for the deposit of rent and the advance rent were complied with.

Held, the rent of the premises was the statutory rent fixed by the Controller and so long as the conditions were complied with, the landlord was not entitled to a decree for ejectment. (*Greaves, J.*) AHINDRA NATH CHATTERJEE *v.* E. K. TWISS. **49 Cal. 150 = 70 I. C. 75 = A. I. R. 1922 Cal. 394.**

———*If a monthly tenant does not pay the rent regularly landlord has right to eject him.*

If the tenant does not pay regularly the rent chargeable under the Act, he is not entitled to the benefits of the Act and the landlord is entitled to get an order for ejectment. The privilege under the Act is given to a tenant who pays his rent and performs the conditions and to no one else. (*Rankin, J.*) BITHAL DAS CHANDAK *v.* LALBEHARI DUTT & SONS. **49 Cal. 369 = 25 C. W. N. 967 = 68 I. C. 361 = A. I. R. 1922 Cal. 391.**

———*Defaulting tenant—Benefit of section* 11 *cannot be given.*

The Act gives to a mere monthly tenant considerable fixity of tenure upon a condition, namely, that he is a rent-paying and not a defaulting tenant. Where the rent payable for certain premises on the first November 1918 was Rs. 65 and not Rs. 55 as alleged by the tenant, and the sum of money which the tenant had paid to the Rent Collector was insufficient to meet either the contractual rent or the rent allowed under S. 2 (1) of the Act or the rent ultimately fixed as the standard rent by the Controller. *Held*, that the tenant was not in the circumstances a person who was entitled to the benefit of the provisions of S. 11 of the Act. (*Rankin, J.*) I. J. COHEN *v.* S. E. HOTTINGER. **49 Cal. 383 = 69 I. C. 988 = A. I. R. 1922 Cal. 380.**

———*Landlord, on faith of representation by tenant, agreeing to let premises to another and being likely to suffer for breach of agreement—Landlord should be protected.*

The legislature in enumerating in the proviso to S. 11 the grounds upon which a landlord can successfully claim an order for possession did not intend to limit the claim to those grounds but merely enumerated those grounds for the purpose of indicating the grounds upon which a landlord would be entitled to possession as of right, leaving it open to the Court to exercise a discretion in his favour upon any other grounds which might appear to the Court to be satisfactory. The tenant suggested to the plaintiff landlord long before the expiration of the term of the lease that the plaintiff was free to negotiate with other people for letting out the premises in question after the expiration of the lease. On the faith of that representation the plaintiff entered into a binding agreement for lease with another on the expiration of the existing lease or as soon as the existing tenant vacated.

Held, that the arrangement with the new tenant was not conditional and the landlord undertook to give possession of the premises to this new tenant on the expiration of the term of the previously existing lease, or, at any rate, within a reasonable time thereafter. If possession was not given by the plaintiff to the promisee, the plaintiff will be exposed to the consequences of a breach of his agreement and that it was just and proper that protection should be afforded to the plaintiff. (*Ghose, J.*) MANMATHA NATH *v.* WALTER LOCKE & CO. **25 C. W. N. 1012 = 68 I. C. 417 = A. I. R. 1921 Cal. 213.**

—S. 11—Harmless breach.

———*Breaches during tenancy can be taken into consideration ; but harmless breach which is waived cannot deprive tenant of benefit of the Act.*

With reference to the words of the first sub-section of S. 11 there are some things that those words must import; some things which they may import and there are some things which they cannot import. They cannot possibly mean that because a breach of covenant was committed in 1921 which was perfectly harmless, which never was made grievance of, and as to which no request for compensation or damage was ever made, therefore, it is impossible for the Court to give the tenant in 1924 the benefit of the Rent Act. By the last words of the proviso to sub-Sec. (1) the Court could in a proper case take into account breaches of the conditions of the tenancy committed during the course of the original tenancy. (*Sanderson, C. J. and Rankin, J.*) OFFICIAL TRUSTEE, BENGAL *v.* W. G. BOWDEN. **30 C. W. N. 199 = 94 I. C. 857 = A. I. R. 1926 Cal. 624.**

—S. 11—Scope and Conditions.

——*Suit for ejectment—Conditions to be fulfilled for the application of the provisions of—Non-payment of arrears and current rent, in due time—Other pleas of defendant will not be considered.*

Where the benefit of the Rent Act is claimed the defendant must show that he has paid arrears within three months of the Rent Act coming into force, and subsequently paid his rent regularly within the time fixed in the contract with his landlord or in the absence of any such contract by the 15th day of the following month or in the event of the landlord refusing to accept rent by depositing it with the Rent Controller within a fortnight of its becoming due. Where such of these conditions as are applicable are not fulfilled it is mere waste of time to consider any other plea under the Calcutta Rent Act. Where there is an agreement to extend the time for payment before the rent actually becomes due under the lease, there it might well be that the time within which under S. 11 (5) rent has to be paid to the landlord is such extended date but where the default has already taken place subsequent acceptance of rent by the landlord does not take the matter out of the provisions of S. 11. sub-S. (5). (*Buckland J.*) JETHA BHULCHAND *v.* F. C. GRACE.
26 C.W.N. 678 = 70 I.C. 494 = A. I. R. 1923 Cal. 227.

—S. 11—Sufficient Compliance.

——*Landlord refusing rent—Rent Controller's Office closed at expiry of fortnight from due date for rent—Rent paid at earliest opportunity after re-opening—S. 11 (4) and (5) are sufficiently complied with.*

Where a landlord refused to accept the rent offered by the tenant and at the expiry of a fortnight from the date on which the rent became due, the Rent Controller's Office was closed on account of some holidays and the rent was paid into his office at the earliest opportunity after the re-opening of it,

Held, that there was sufficient compliance with the section. (*Sanderson, C. J. and Rankin, J.*) G. M. HAY *v.* BONOMALI MULLICK. **29 C. W. N. 636 = 88 I. C. 589 = A. I. R. 1925 Cal. 791.**

—S. 14—Applicability.

——*Tenant need not continue to be as such at the time of claim.*

S. 14 is intended to give relief to any person who, having been a tenant, comes within the period of limitation to assert his claim to recover excessive rent paid, whether at the time he claims it, he is actually a tenant or not: A. I. R. 1926 Cal. 708, Reversed. (*Lord Atkin.*) KARNANI INDUSTRIAL BANK, LTD. *v.* SATYA NIRANJAN SHAW. **56 Cal. 80 = 55 I. A. 344 = 32 C. W. N. 1093 = 28 M. L. W. 862 = 111 I. C. 300 = A. I. R. 1928 P. C. 227 = 55 M. L. J. 464 (P.C.).**

—S. 15—Appeal.

——The Appellate Side of the High Court has jurisdiction to hear an application against an order of the Rent Controller refusing to fix a standard rent. (*Chatterjee and Pearson, JJ.*) KALI DASSI *v.* KANAI LAL DE. **26 C. W. N. 52 = 64 I. C. 709 = A. I. R. 1921 Cal. 486.**

—S. 15—Applicability.

——*S. 15 applies only where rent has been fixed.*

S. 15 of the Calcutta Rent Act contemplates a decision of the Rent Controller fixing the standard rent and therefore it does not apply where no rent is fixed. (*Suhrawardy and Graham, JJ.*) AHMUDDIN *v.* BANKU BEHARY. **31 C. W. N. 308 = 100 I. C. 781 = A. I. R. 1927 Cal. 305.**

—S. 15—Certificate of rent.

——*Rent Controller is bound to grant certificate.*

S. 15 makes it obligatory on the Rent Controller to grant a certificate certifying the standard rent. (*Rankin, J.*) ALLEN BROS. & CO. *v.* BANDO & CO.
49 Cal. 931 = 70 I. C. 371 = 26 C. W. N. 845 = A. I. R. 1923 Cal. 169.

—S. 15—Essentials.

——*Tenant must pay arrears and allowable rent fully within certain period to claim benefit of the section.*

The intention of the section is to give the tenant the benefit of the section if he complies with two conditions: in the first place he must have paid any arrears of rent which might be due at the time of the passing of the Act within three months of the commencement of the Act; and, secondly, he must pay the rent to the full extent allowable by the Act within the time fixed by the contract with his landlord, and in the absence of any such contract by the 15th day of the month next following that for which the rent is payable. (*Sanderson, C. J. and Buckland, J.*) W. & T. AVERY, LTD *v.* KESSORAM PODDER. **30 C. W. N. 152 = 92 I. C. 1001 = A. I. R. 1926 Cal. 481.**

——*Finding under cl. (3) is necessary—Whether rent is unduly low depends on facts—Test is actual rent with reference to actual state of house.*

In order that it may be a question at large how much the standard rent should be, there has first of all to be a finding within one or other of the sub-divisions of cl. (3) of S. 15. If that finding is come to then by the proviso the hands of the controller are tied, as to the amount to which he may raise the rent. He is forbidden to fix the rent at a higher amount than the highest actually paid for the premises since November 1918. But by the second part of the proviso, if one or other of the things therein mentioned is found, that particular restriction on the question of the amount is taken away and the result is that the amount is entirely at large. It is certainly suggested by the language of the second part of the proviso that where rent has not been increased since the 1st day of November, 1918 the rent must be unduly low. That, however, is not an enactment but only a suggestion arising out of the provisions dealing with details of the subject and whether that suggestion is well-founded in any particular case is purely a question of fact. The legislature has not therein enacted a presumption which binds the hands of the Controller when considering whether the rent on the 1st November 1918, was or was not unduly low. The test throughout the Act is intended to be the actual rent, that is to say, the rent at which the premises were let in fact on the 1st day of November 1918. Under cl. (*d*) the Controller has to ask himself whether that rent at that date was unduly low and the reference there is not to a hypothetical or notional state of normal repairs but to the actual condition of the premises as compared with the actual rent paid or agreed to be paid. It is perhaps open to some argument, that in a case where in November 1918, the premises were let at a rent which was low by reason only of bad condition, the landlord having put up the premises in repairs will be unable under the Rent Act to get an increase of rent. In order that the rent of a house may be unduly low all things must be considered. The premises may be out of repairs and still the rent may be unduly low. (*Rankin and Page, JJ.*) BASANTI CHARAN SINHA *v.* RAJANI MOHAN CHATTERJEE. **28 C. W. N. 467 = 83 I. C. 368 = A. I. R. 1924 Cal. 629.**

—S. 15—Expenses of improvement.

———*Expense of improvement must have been made by party to application for standardization of rent.*

The expenditure to be taken into account must be made by the landlord who applies for standardization of rent or against whom an application for standardization has been made. Upon the plain construction of the sections of the Rent Act the expenditure made by a third person cannot be taken into consideration in fixing the standard rent as between two contending parties. (*Cuming and B. B. Ghose, JJ.*) S. G. P. SINGH *v.* PROBODH KUMAR. **53 Cal. 479 = 30 C. W. N. 308 = 95 I.C. 289 = A. I. R. 1926 Cal. 681.**

—S. 15—Interpretation.

———*Tenant includes ex-tenant.*

In order to give any working effect to the Act it is necessary that the words "landlord and tenant" in S. 15 (1) must include, as they often do in ordinary parlance. ex-landlord and ex-tenant. *Remon* v. *City of London Real Property Co.*, (1921) 1 Q. B. 49, Rel. on. (*Lord Atkin.*) KARNANI INDUSTRIAL BANK, LTD. *v.* SATYA NIRANJAN SHAW. **56 Cal. 80 = 55 I.A. 344 = 32 C.W.N. 1093 = 28 M.L.W. 862 = 111 I. C. 300 = A. I. R. 1928 P. C. 227 = 55 M.L.J. 464 (P.C.).**

--S.15--Petition for standardization pending suit.

———*Notice terminating tenancy for breach of covenant served and suit for ejectment filed—Applicatian by tenant for standardization af rent during pendency of suit is incompetent although decree for ejectment is passed later.*

On the 15th August, 1923 the landlords served a notice on the tenants determining the lease on the ground of breach of covenants in the lease. They brought an action in ejectment on 10th September 1923. During the pendency of the suit, on 1st December 1923, the tenants applied to the Rent Controller under the Rent Act for standardization of rent. The Rent Controller fixed standard rent on the 11th March, 1924.

Held, that the petition for fixing standard rent was incompetent as the Rent Controller had no jurisdiction to fix a standard rent, the applicant being merely a trespasser from 1st December 1923, and, therefore, the decision of the Rent Controller was without jurisdiction and ought to be set aside. The fact that the decree was passed after the order of the Rent Controller fixing a standard rent did not affect the question because the decree did not terminate the tenancy. The judgment of the Court only showed that the plaintiffs were justified in terminating the tenancy on the 15th of August 1923. (*Greaves and B. B. Ghose, JJ.*) SATYA NIRANJUN *v.* KARNANI INDUSTRIAL BANK, LTD. **30 C. W. N. 236 = 93 I. C. 56 = A. I. R. 1926 Cal. 708.**

—S. 15—Petition for standardization after decree.

———*Application for standardization of rent is incompetent aftar a decree in suit for ejectment is passed.*

An application for standardization of rent to Rent Controller, after a decree in suit for ejectment is passed ejecting the tenant, is not competent as there is no tenancy in existence thereafter. (*Greaves and B. B. Ghose, JJ.*) SUKDEODAS RAM PROSAD *v.* JAINTILAL JAMUNA DAS. **92 I. C. 392 = A. I. R. 1926 Cal. 697.**

—S. 15—Retrospective effect.

———*Rent can be fixed retrospectively.*

The Controller has power to fix the standard rent so as to operate retrospectively. (*Lord Atkin.*) KARNANI INDUSTRIAL BANK, LTD. *v.* SATYA NIRANJAN SHAW. **56 Cal. 80 = 55 I, A. 344 = 32 C. W. N. 1093 = 28 M. L. W. 862 = 111 I. C. 300 = A. I. R. 1928 P. C. 227 = 55 M. L. J. 464 (P. C.).**

—S. 15—Scope.

———*Standard rent can be fixed before expiry of lease.*

There is nothing to prevent an application being made before the expiry of the lease for fixing the standard rent. (*Chatterjee and Cuming, JJ.*) H. D. CHATTERJEE *v.* L. B. TRIBEDI. **49 Cal. 528 = 68 I. C. 274 = 26 C. W. N. 78 = A. I. R. 1922 Cal. 427.**

———*Tenant applying for standardizing rent—Tenancy unlawful—Landlord having always treated tenancy as valid, standard rent must be fixed.*

Where in an application by the tenant to fix standard rent the landlord has never set up the invalidity of the tenancy due to the tenancy being for an unlawful purpose, but has always treated the tenancy as valid, standard rent should be fixed although the tenant admits the unlawful purpose of the tenancy. (*Chatterjee and Pearson, JJ.*) KALI DASSI *v.* KANNI LAL. **26 C. W. N. 52 = 64 I. C. 709 = A. I. R. 1921 Cal. 486.**

—S. 15—Wrong decision by Controller.

———*Premises first let as whole—Controller has jurisdiction—Wrong decision by Controller—Remedy is by appeal under S. 18.*

Sub-sec. (3) is ungrammatical; the first limb of the sentence should read: "Where by reason of any premises having been let in parts any difficulty arises in giving effect to this Act." Where the premises are first let as a whole, the Controller has jurisdiction to determine whether there is any difficulty which makes it in his opinion just to fix the standard rent under Cl. 3 (*a*), and if he comes to a wrong conclusion the remedy is not by way of attack on his jurisdiction, but by appeal to the President of the Improvement Tribunal under S. 18. (*Lord Atkin.*) KARNANI INDUSTRIAL BANK, LTD. *v.* SATYA NIRANJAN SHAW. **56 Cal. 80 = 55 I. A. 344 = 32 C. W. N. 1093 = 28 M. L. W. 862 = 111 I. C. 300 = A. I. R. 1928 P. C. 227 = 55 M. L. J. 464.**

—S. 18—Case started under old Act.

———*Case started before amendment of the Act in 1924 is governed by old Act.*

The appellant was let into possession on the 1st June, 1920, as a tenant, but the rent payable was not then fixed. He remained in possession until March 1923. The question of rent having been mooted in the meantime, the respondent-landlord demanded from the appellant rent at the rate of Rs. 4,500 per mensem, inclusive of taxes. The Appellant conceiving that this demand was excessive, decided to avail himself of the provisions of the Calcutta Rent Act (Bengal) No. 3 of 1920, which had come into force on the 5th May 1920. The appellant accordingly applied to the Controller. On the 23rd October 1922, the Controller fixed the rent at Rs. 4,500 per month; on the 25th November, 1922, the appellant appealed to the President of the Improvement Committee to review that decision. The President, whose time was fully occupied by appeals, did not take up the appellant's appeal at once, but from time to time adjourned the hearing, so that it was only finally disposed of on the 3rd August, 1924. He disposed of it by holding that he had no jurisdiction to determine the matter, by which time the Act had ceased to apply to premises of higher rent by virtue of the proviso to Calcutta Rent Amendment Act (Bengal) No. 1 of 1924.

Held, that the President had jurisdiction as the application of an Act is when the parties begin to move. (*Viscount Dunedin.*) KESHORAM PODDAR *v.* NUNDO LAL MALLICK. **54 Cal. 508 = 54 I. A. 152 = 1927 M. W. N. 340 = 101 I. C. 38 =**

29 Bom. L. R. 868 = 31 C. W. N. 646 = 38 M. L. T. 95 = 26 M. L. W. 435 = 25 A. L. J. 956 = 46 C. L. J. 341 = A. I. R. 1927 P. C. 97 = 52 M. L. J. 655 (P. C.)

—S. 18—Intention of Act.

———*Order under S.* 2 (f) (ii) *is revisable under S.* 18.

The Act contemplates fixing of the standard rent by the Controller even in cases not coming under S. 15, in other words in cases coming under S. 2 (*f*) (*i*). The order under S. 2 (*f*) (*ii*) of the Rent Controller is therefore liable to revision under S. 18 of the Act. (*Chatterjee and Panton, JJ.*) ASUTOSH CHATTERJEE *v.* UPENDRA CHANDRA AICH. **27 C. W. N. 50 = 72 I. C. 221 = 37 C L. J. 101 = A. I. R. 1923 Cal. 33.**

—S. 18—New point in revision.

———*New point cannot be raised before President in revision for the first time.*

Under the Act the Controller should first form his opinion whether the rent on the prescribed date was unduly low under Cl. (*d*) of S. 15 (3) of the Rent Act, and then he is to exercise his discretion in fixing the standard rent. When he does that it is open to the President of the Tribunal to revise that order on an application made by any of the parties, but it is a wrong application of the word " revision " to say that although the decision of the Rent Controller was not sought for on a particular point it was open to any of the parties by an application for revision to the President of the Tribunal to start a new point altogether and to have his decision—not revising a decision of the Rent Controller but a new decision of his own—for the first time. (*Cuming and B. B. Ghose, JJ.*) COUNSELL *v.* SUKUMARI DEBI. **53 Cal. 393 = 42 C. L. J. 588 = 30 C. W. N. 116 = 91 I. C. 1011 = A. I. R. 1926 Cal. 305.**

—S. 18—Powers of President.

———*President has power to determine if Rent Controller had jurisdiction to pass the order.*

The landlords are entitled to a decision from the President of the Calcutta Improvement Tribunal as to whether or not the Controller of Rents has jurisdiction to fix any standard rent in the case which is brought before him. The fact that the Petitioners before the President of the Tribunal contend that the Controller had no jurisdiction in the matter, cannot be construed to be a point against the Petitioners disentitling them to any relief at the hands of the President, for revision of an order fixing a standard rent. (*C. C. Ghose and Panton, JJ.*) DAMANIA BROTHERS & CO. *v.* V. JORTON & CO. **27 C. W. N. 287 = 73 I. C. 47 = A. I. R. 1923 Cal. 180.**

———*President cannot revise Controller's order not fixing rent.*

Where there is no decision by the Rent Controller fixing the standard rent, the President of the Improvement Trust Tribunal has no jurisdiction under section 18 of the Rent Act to revise the order. (*Chatterjee and Cuming, JJ.*) H. D. CHATTERJEE *v.* L. B. TRIBEDI. **26 C. W. N. 78 = 68 I. C. 274 = 49 Cal. 528 = A. I. R. 1922 Cal. 427.**

———*President of Tribunal has power to award costs under S.* 18 *and also to execute that order.*

The jurisdiction exercised by the President of the Calcutta Improvement Trust under S. 18 of the Rent Act is civil jurisdiction, so that in proceedings under that section the President is, a Court of Civil Jurisdiction. Therefore he has power to pass an order for costs and also to execute the same. Apart from the provisions

of the Rent Act the President would have power to execute an order for costs passed by him as every Court has power to execute its own orders. 34 Cal. 880, Appl. (*Chatterjee and Chotzner, JJ.*) BATA KRISTO *v.* A. K. ROY. **26 C. W. N. 30 = 65 I.C. 177 = A. I. R. 1921 Cal. 413.**

—S. 18—Sub-lease to prostitutes.

——*Sub-lease in favour of prostitutes does not affect validity of contract but where purpose of letting is continuing a brothel, contract is void and standard rent can't be fixed.*

Where the premises are rented for the purposes of continuing a brothel and are used as such, the contract becomes void and the Rent Controller will not take action on an application of a party for fixing standard rent. But the mere fact that the house in question is in the occupation of prostitutes as sub-tenants does not necessarily affect the validity of the contract between the landlord and the tenant. (*Pearson and Graham, JJ.*) RADHA KANTA DAS *v.* PANKOJINI DEVI. **51 Cal. 1005 = 80 I. C. 682 = A. I. R. 1925 Cal. 315.**

—S. 19—Object of section.

———*Section is directed against recovery of unauthorized rent, fine or premium.*

Section 19 must be directed against a person who knowingly receives a sum in excess of the standard rent, or a fine, premium or any other like sum in addition to the standard rent in contravention of the provisions of the Act. It cannot mean that if certain of the provisions of the Act authorize the landlord to receive and retain such sums, he is still to be liable to a fine by reason of the provision of S. 19. (*Sanderson, C. J. and Rankin, J.*) RAM CHUNDER SEROWGIE *v.* GOWRI NATH DUTT. **53 Cal. 492 = 97 I. C. 376 = A. I. R. 1926 Cal. 927**

— S. 20—Powers of President.

—— *President of Tribunal is competent to hold summary enquiry as per Chap. 22, Cr. P. Code.*

The President of the Tribunal is competent to hold summary enquiry referred to in section 20 of the Calcutta Rent Act. The combined operation of Ss. 29 and 5 (2) of the Cr. P. Code is that the enquiry must be held according to the provisions of Ch. 22 of the Cr. P. Code, under section 20, Calcutta Rent Act. (*C. C. Ghose and Cuming, JJ.*) ISHAN CHANDRA SARKAR *v.* MANMOTHA NATH DUTTA. **37 C.L.J. 298 = 71 I.C 611 = A. I. R. 1923 Cal. 339.**

--S. 20—Section not ultra vires.

———*S.* 20 *is not* ultra vires.

S. 20 so far as it has invested the President of the Tribunal, with power to try a criminal case and thereby has created a new Criminal Court is not *ultra vires* of the Legislature of the Governor in Council of Bengal, as the Rent Act was passed with the previous sanction of the Governor-General under S. 79 (2) of the Government of India Act. (*Sanderson, C. J. and Richardson, J.*) GOBARDHAN DAS *v.* DOOLIE CHAND. **48 Cal. 955 = 33 C.L. J. 551 = 22 Cr. L. J. 354 = 61 I.C. 210 = A.I.R. 1921 Cal. 708.**

—S. 23—Controller is Civil Court.

———*Rent Controller is a Civil Court.*

The Rent Controller is a Court of Civil Jurisdiction. (*Chatterjee and Cuming. JJ.*) H. D. CHATTERJEE *v.* L. B. TRIBEDI. **26 C.W.N. 78 = 68 I.C. 274 = 49 Cal. 528 = A. I. R. 1922 Cal. 427.**

—S. 23--Rule 4 under the section.

———*Rules framed under R.* 4—*Rule* 4 *is* ultra vires. —*Cr. P. Code, S.* 5.

CALCUTTA RENT ACT (1920), S. 24—Application for revision not a suit.

Rule 4 framed under S. 23 of the Rent Act for regulating the procedure in enquiries by the President of the Tribunal in so far as it has provided that the procedure laid down in the C. P. Code, 1908, should apply, is *ultra vires*. The rule is not an "enactment" within S. 5 (2) of the Cr. P. Code. (*Sanderson, C. J. and Richardson, J.*) GOBARDHAN DAS *v.* DOOLIE CHAND. **48 Cal. 955 = 33 C.L. J. 551 = 22 Cr. L.J. 354 = 61 I. C. 210 = A.I. R. 1921 Cal. 708.**

—S. 24—Application for revision not a suit.

—Application for revision cannot be treated as suit.

S. 24 apparently lays down that where there is a decision of the Controller on a particular question the President in revising that decision may take further evidence and come to his own conclusion having the decision of the Controller before him, but it does not mean that the President can treat the application for revision as a suit irrespective of what was done before the Rent Controller. (*Cuming and B. B. Ghose, JJ.*) COUNSELL *v.* SUKUMARI DEBI. **53 Cal. 393 = 42 C.L.J. 588 = 30 C.W.N. 116 = 91 I.C. 1011 = A.I.R. 1926 Cal. 305.**

—S. 24—Increase by President.

———*Rent fixed by Controller increased by President of Tribunal—Notice under S. 8 is unnecessary.*

A notice under S. 8 of the Rent Act is not necessary when the standard rent as fixed by the Controller has been further increased by the President of the Tribunal, the landlord having complied with the provisions of S. 8 as regards the increase allowed by the Controller. A certificate from the Controller is not necessary to entitle the landlord to recover the rent so increased. (*Sanderson, C.J. and Richardson, J.*) I. J. COHEN *v.* G. DIAS. **26 C.W.N. 961 = 70 I. C. 551 = A.I.R. 1922 Cal. 475.**

—S. 24—Inquiry by Controller not a suit.

———*C. P. Code, O. 46, R. 1—Rent Controller is Court but inquiry before him is not a suit within R. 1.*

The Court of the Rent Controller is in certain respects a Court of Civil Jurisdiction but the enquiry before the Rent Controller is not a suit within the meaning of O. 46, R. 1 and therefore the Rent Controller cannot make a reference under this order. (A. I. R. 1922 Cal. 427; A.I.R. 1923 Cal. 169, Ref.) *Suhrawardy and Duval, JJ.*) D. TANCRED *v.* D. N. MULLICK. **40 C.L.J. 578 = 84 I.C. 543 = 29 C.W.N. 521 = A.I.R. 1925 Cal. 391.**

—S. 26—Limits of Increase.

—Calcutta Municipal Act (1923), S. 131 (1)—Assessment cannot be increased above the standard rent.

Per *Rankin, C.J., Buckland and Cammiade, JJ., agreeing with Mukerji, J., Roy, J., dissenting*—The Corporation of Calcutta, in assessing certain premises under S. 131, sub-S. (1) of the Calcutta Municipal Act while the Calcutta Rent Act, 1920, is in force, are not competent to increase the assessment above the standard rent under S. 2, sub-S. (*f*), Cl. (*i*) of the Calcutta Rent Act, 1920. (*Rankin, C. J. and Buckland and Cammiade, JJ.*) CORPORATION OF CALCUTTA *v.* ASHUTOSH DE. **31 C.W.N. 864 = 103 I.C. 683 = 46 C.L.J. 535 = A I.R. 1927 Cal. 659 (F.B.).**

CALCUTTA SUBURBAN POLICE ACT (II OF 1866).

—S. 18—Place of Public resort.

A stall on which soda water is sold not for consumption on the premises cannot be held to be a place of public resort within the meaning of S. 18. (*Newbould and Suhrawardy, JJ.*) HEMANTA KUMAR SEN *v.* EMPEROR. **49 Cal. 451 = 62 I.C. 577 = 26 C. W. N. 56 = 34 C. L. J. 198 = 22 Cr. L. J. 561 = A.I.R. 1923 Cal. 135.**

—S. 47-A (inserted by III of 1910)—Police diary.

In areas covered by the Act, a police-officer investigating a case maintains a diary under S. 47-A and hence no privilege attaches to it (*C. C. Ghose and Cuming, JJ.*) SURESH CHANDRA GHOSE *v.* EMPEROR. **24 Cr. L.J. 757 = 74 I. C. 261 = A.I.R. 1924 Cal. 542.**

CALCUTTA SUPPRESSION OF IMMORAL TRAFFIC ACT (XIII OF 1923).

—S. 3—Jurisdiction.

———*Girl over sixteen—Police have no jurisdiction.*

If a girl has attained the age of 16, the police has no further jurisdiction to exercise under the Act of 1923. (*Suhrawardy and Panton, JJ.*) MAHARANI DASI *v.* EMPEROR. **30 C. W. N. 72 = 27 Cr. L. J. 159 = 91 I. C. 895 = A.I.R. 1926 Cal. 339.**

—S. 4—Applicability.

———*Act applies to females under S. 16, whether married or not — Bengal Children Act (II of 1922).*

Acts apply whether the female in question is unmarried or married and the whole matter turns not on the status of the female from the point of view of marriage or no marriage but on the question of age. If the word "girl" were limited to mean a young unmarried female, it would be easy for a person who desired to live on the immoral earning of young girls to marry them solely for the purpose of enabling him to put himself outside the provisions of the statutes and to set the whole law at defiance. (*Costello and Lort Williams, JJ.*) PANCHU GOPAL *v.* EMPEROR. **48 C.L. J. 586 = 33 C.W.N. 198 = 115 I. C. 266 = 30 Cr. L. J. 440 = 56 Cal. 750 = 12 A. I. Cr. R. 304 = A. I. R. 1929 Cal. 99.**

—S. 4—Residence.

———*Temporary residence is enough.*

A residence in a brothel for about four days before rescue comes within the meaning of the words "lives in." The whole purpose of the Act would be frustrated if a girl has to be an ordinary resident before the section can come into operation. (*C. C. Ghose and Duval, JJ.*) HEMANGINI DASI *v.* EMPEROR. **30 C.W.N. 768 = 27 Cr. L.J. 1066 = 97 I. C. 42 = A.I.R. 1926 Cal. 944.**

—S. 6—Conviction under.

———*Lessee sub-letting premises to prostitutes, collecting rent daily by sitting outside and actively associating with the business of the brothel—Conviction under S. 6 is proper.*

The accused took on lease certain houses for the purpose of making a living out of them and sub let the houses to prostitutes and made a fine profit out of them. He was not content with simply collecting his rents once a week or once a month, but he attended there daily and had full control over them. He was also daily sitting outside the houses collecting his rents, at times interviewing visitors, and having men there to assist him.

Held, (per *Graham and Duval, JJ.*)—That it was not a case of simply having let out the houses to some women who used them for immoral purposes, but was also a case where the lessee took the houses so as to make a profit out of prostitution and that his conviction under S. 6 was proper.

Per *Cammiade, J. contra.*—Letting rooms to prostitutes and sitting at the gate of the premises to collect daily rent does not amount to the offence punishable

CALCUTTA SUPPRESSION OF IMMORAL TRAFFIC ACT (1923), S. 6—Offence.

under S. 6. (*Duval, Graham and Cammiade, JJ.*) KAMBHO BERA *v.* EMPEROR. **32 C.W.N. 195 = 29 Cr.L.J. 917 = 111 I.C. 725 = A. I. R. 1928 Cal. 381 (F.B.).**

—S. 6—Offence.

Per *Graham, Cammiade and Duval, JJ.*)—Mere letting of rooms to prostitutes or collecting rents from them is not an offence. (*Duval, Graham and Cammiade, JJ.*) KAMBHO BERA *v.* EMPEROR. **32 C. W. N. 195 = 29 Cr. L. J. 917 = 111 I. C. 725 = 11 A. I. Cr. R. 68 = A. I. R. 1928 Cal. 381 (F.B.).**

(CANADA)—BRITISH COLUMBIA MUNICIPAL ACT (1914).

—S. 141 —Scope.

——*Rate-payers having exempted lands are not bound by-law—But rate payers can be collectively made answerable for debenture, debt and interest.*

S. 141 of Cl. 52 of the statute of British Columbia, 1914 does not mean that a rate-payer having lands that are exempted shall be bound by the bye-law but that rate-payers in the charged area shall as a body—that is collectively—be liable to be made answerable for the debenture debt and the interest. (*Lord Atkinson.*) CORPORATION OF THE CITY OF VICTORIA *v.* BISHOP OF VANCOUVER ISLAND. **A. I. R. 1921 P. C. 240.**

—S. 197—"Building".

——*"Building" includes land on which it stands—Word-Building.*

The word "building" occurring in S. 197, sub-Section 1 of the Act of 1914 means a thing composing of the fabric of the building and the ground that the fabric rests upon and encloses. (*Lord Atkinson.*) CORPORATION OF THE CITY OF VICTORIA *v.* BISHOP OF VANCOUVER ISLAND. **A. I. R. 1921 P. C. 240.**

—S. 216—Estoppel.

——*Sections do not estop assessee from claiming exemption to which he may be otherwise entitled.*

Ss. 216 and 230 of this Act of 1914 are merely machinery sections dealing with irregularities, mistakes and errors occurring in the drawing up, shaping and forming of the assessment rolls, and do not by any means empower the Corporation or its officers to assess and tax any kind of property expressly or impliedly exempted from taxation by the provisions of these very statutes from 1914 to 1918, both inclusive. These sections in no way disentitled the assessee from insisting for example on the contention that the ground on which a cathedral which is exempt under Sections 197 (1) stands is exempted from general taxation. (*Lord Atkinson.*) CORPORATION OF THE CITY OF VICTORIA *v.* BISHOP OF VANCOUVER ISLAND. **A. I. R. 1921 P. C. 240.**

—S. 484 –Interpretation.

——*Section does not apply to a suit for declaration that certain land is not taxable and for injunction restraining sale of land for taxes—Taxing untaxable property is not unlawful doing what could be lawfully done.*

S 484 only deals with actions brought against a Municipality for the unlawful doing of a thing which the Municipality might have lawfully done. Where the action is not of that character but is an action brought to obtain a declaration that the land upon which plaintiff's cathedral stands is not taxable and an injunction restraining the Corporation from offering the land for sale in respect of unpaid rates, S. 484 does not apply. (*Lord Atkinson.*) CORPORATION OF THE CITY OF VICTORIA *v.* BISHOP OF VANCOUVER ISLAND. **A. I. R. 1921 P. C. 240.**

(CANADA) MONTREAL STATUTE—Art. 1387 —Interpretation.

(CANADA)—CITIES AND TOWNS' ACT OF QUEBEC (1909).

—Art. 5755—Appeal.

——*Rights of appeal existing from judgments of the various Courts mentioned, applied to proceeding under Art.* 5755.

The power given to take proceedings before the different Courts mentioned in Article 5755 enables those proceedings to be taken as part of the ordinary business of the Courts mentioned, and the rights of appeal that exist from judgments given by those Courts are applicable to such proceedings, although no rights of appeal are found in the statute. (1913) A. C. 546. Ref. (*Lord Buckmaster.*) CANADA CEMENT COMPANY *v.* LA VILLE DE MONTREAL EST. **A. I. R. 1921 P. C. 219.**

(CANADA) DOMINION ACT (1905).

—Railway.

——*Railway declared to be worked for general advantage of Canada passes within exclusive legislative jurisdiction of Canadian Parliament.*

Upon the passing of the Dominion Act of 1905 in virtue of the enactments of S. 91, head 29, and S. 92, head 10 of the British North America Act, 1867, the "railway" declared to be a "work of general advantage of Canada," passed within the exclusive legislative jurisdiction of the Parliament of Canada and accordingly the Legislature of the province ceased to possess the authority theretofore vested in it under heads 10 and 13 of S. 92 of that Act, to deprive the railway company of its legal title to any of the subjects actually forming part of the "railway" so declared to be "a work for the general advantage of Canada" and to vest the title in another. However lands acquired by the railway company as a subsidy granted for the purpose of aiding the construction of the railway and not held by the company as part of its "railway" within the meaning of S. 2, sub-Sec. 21 of the Dominion Railway Act (R. S. Can., 1906, C. 37) or for its undertaking as a railway company were not withdrawn from the Legislative jurisdiction of the Province in relation to "property and civil rights" and that authority was notwithstanding the enactment of the Dominion Act of 1905, still exercisable in relation to such subjects. (*Mr. Justice Duff.*) WILSON *v.* ESQUIMALT AND NANAIMO RAILWAY COMPANY. **A. I. R. 1921 P. C. 234.**

(CANADA) LAND REGISTRY ACT.

—Effect.

—— *Canada—Montreal—Statutes* 4 *Geo.* 5, *c.* 9, 4, *Geo.* 5, *c.* 10 *and* 4 *Geo.* 5, *c.* 11.

The statutes 4 Geo 5, c. 9, 4 Geo. 5, c. 10, and 4 Geo. 5, c. 11 have effectively met the difficulty which was pointed out in the case of *Cotton* v. *The King* (1914 A. C. 176) as to the taxation imposed by the earlier statutes being indirect. (*Lord Phillimore.*) BURLAND *v.* THE KING. **A. I. R. 1921 P. C. 163.**

—S. 104—Applicability.

——*S. 104—Whether section applies to grants of special character or ordinary Crown grants.*

Quaere. Whether S. 104 of the Land Registry Act applies either to grants of a special character, such as those authorized by the Vancouve Island Settlers' Rights Act of 1904 and the Amending Act of 1917 or to ordinary Crown grants issued under the authority of the Land Acts. (*Mr. Justice Duff.*) WILSON *v.* ESQUIMALT AND NANAIMO RAILWAY COMPANY. **A. I. R. 1921 P. C. 234.**

(CANADA) MONTREAL STATUTE.

—Art. 1387 (g)—Interpretation.

——*"Every person" refers to persons within the province.*

(CANADA) MONTREAL STATUTE—6 Ed. 7 C. 11—Ultra vires.

The words "every person" to whom moveable property outside the province is transmitted in Art. 1387 (*g*) refers to every person on whom the duties are imposed, and those persons are, persons within the province. (*Lord Phillimore.*) BURLAND *v.* THE KING.

A. I. R. 1921 P. C. 163.

—6 Edward, 7. C. 11—Ultra vires.

———*Decision in* 1914 *A. C.* 176 *that statute was* ultra vires *was not* obiter dictum.

The decision that the statute was *ultra vires* was in no sense a wayside dictum in Cotton's case. (1914) A.C. 176, it was just as complete and fundamental as the decision that bore on the constructions of the statute. (*Lord Phillimore.*) BURLAND *v.* THE KING.

A. I. R. 1921 P. C. 163.

—4 Geo. 5, c. 9, 4 Geo. 5, c. 10 and 4 Geo. 5, c. 11.

———*Effect.*

The statutes 4 Geo. 5, c. 9, 4 Geo. 5 c. 10 and 4 Geo. 5 c. 11 have effectivelly met the difficulty which was pointed out in the case of *Cotton* v. *The King* (1914 A. C. 176) as to the taxation imposed by the earlier statutes being indirect. (*Lord Phillimore.*) BURLAND *v.* THE KING. **A. I. R. 1921 P. C. 163.**

—4 Geo. 5, c. 10—Interpretation.

———*Taxation regarding property outside province—Person to whom property is transmitted must be domiciled or ordinarily resident within the province*

The conditions stated in 4 Geo. 5. c, 10 upon which taxation attaches to property outside the province are two. (1) That the transmission must be within the province and, (2) That it must be due to the death of a person domiciled within the province. The first of these conditions can only be satisfied if the person to whom the property is transmitted is either domiciled or ordinarily resident within the province. (*Lord Phillimore.*) BURLAND *v.* THE KING. **A. I. R. 1921 P. C. 163.**

(CANADA) QUEBEC CIVIL PROCEDURE CODE.

—S. 54—Appeal.

———*No appeal lies from Circuit Court.*

There is no right of appeal from the judgment of Circuit Court. (*Lord Buckmaster.*) CANADA CEMENT COMPANY *v.* LA VILLE DE MONTREAL EST.

A. I. R. 1921 P. C. 219.

(CANADA) QUEBEC CODE, Art. 405.

—Fishery.

———*Right of fishing can be separately transferred—Such a right may not be for life only but may be perpetual.*

The principles on which the jurisprudence of Quebec with regard to rights in land rests, are very different from those which obtain in the common law of England. In the latter country there has always been permitted great latitude in splitting up the title to the fee simple, with important results as regards the right of possession. But in other countries, such as, those where the Roman law prevails, and in countries such as Scotland, which has its own system, the fee simple cannot be so freely disintegrated. The property title may, as for example in the latter country, be in the main indissoluble, a right for life only being treated, not as a separate right of property as in England, but as a mere burden on the radical title. In the system in Quebec, to some extent, and quite apart from the Code, encroachments on the radical rights of property have been permitted. A right of fishing could be excluded and held separately from the right of the tenant to the land held by him under the seignior whether the river is navigable or not. Even where the tenure of the land to which the fishing

rights belonged was not seignorial, but was of the ordinary kind, the owner of the land could, in virtue of his general title divide or split off the fishing rights which fell within his ownership and convey them separately as a subject of property strictly so called. It may be that no grant of fishing rights is practically possible without its comprising some right of using the *solum*. Where the terms of the cession are sufficient to have passed such a right, even if the right to fish and to use the *solum* for the purpose constituted no more than an usufruct, this would not constitute a difficulty for such a right may be a transferable one. Art. 479 of the Civil Code of Quebec ought not to be relied as cutting down the duration of such a right, at all events when granted under circumstances in which there is no practical objection to its existence in perpetuity. The words "if for life" refer only to the kind of usufruct which is ended by death. However marked was the tendency in the earlier Roman and French law to restrict what was called usufruct to a personal title, this tendency became relaxed in the latter phases of both of these systems, to such an extent that the expression "usufruct" became so general as to extend to rights analagous in incident to those of property. At least in modern times dismemberment of the complex of property rights is possible under Quebec law, through which a usufruct may be created which is a veritable right *in rem*. A usufruct is a right of enjoying things in which another possesses the property. But it may by a splitting off of incidents in that property, become a true real right against all who seek to interfere with it. The right to fishing accompanied with a right of way for the enjoyment of the former right is more than usufructuary in the older and stricter meaning. It is right to a separate subject or incident of property. There is no inherent reason for refusing to treat a fishing right as a self-contained and separable subject. In the seigniorial cases they were treated as self-contained and separable. In the law of Scotland, where the fee cannot be split up, they are regarded as proper subjects for a separable title to property in fee. The definition in Article 405 of the Quebec Code presents this analogy that it places no difficulty in the way of regarding the right of fishing as an item among others comprised in the subject-matter. There is no reason why, consistently with the language of Articles 405, 406 and 408 of the Quebec Code there should not be ownership of a fishing right as a mode of enjoying and disposing of separable and physical subject for possession. The title to take the fish is a title to take a product of the river and Article 408 recognizes as possible in law the union with it as an accessory of the right to use bed of the river or the banks when naturally or artificially stipulated for as part of that which is joined to the fishing right. (*Viscount Haldane.*) MATAMAJAW SALMON CLUB *v.* DUCHAINE.

A. I. R. 1921 P. C. 200.

(CANADA) QUEBEC STATUTE

—10 Geo. 5. c. 79. Ss. 64 and 62—Appeal.

———*No right of appeal exists from Circuit Court.*

By the statue of Quebec, 10 Geo. 5, c. 79, the whole of the sections of the C. P. Code in which the provisions relating to the Circuit Court and the right of appeal find place are declared to be replaced by the other provisions, and so far as the Circuit Court is concerned, the provisions as to appeal drop out, and therefore, Section 64 of the Act, does not avail to confer a right of appeal to the Court of King's Bench from the decisions of the Circuit Court. (*Lord Buckmaster.*) CANADA CEMENT COMPANY *v.* LAVILLE DE MONTREAL EST. **A. I. R. 1921 P. C. 219.**

(CANADA) VANCOUVER ISLAND SETTLERS RIGHTS ACT (1904).

—S. 3—Procedure.

——*Lieutenant-Governor in Council should act, judicially in deciding a question under S. 3—But he is not bound by technical rules of evidence or procedure—Government—Practice—Jurisdiction.*

The Statute of 1904 requires that before the authority to issue a Crown grant under Section 3 is acted upon the Lieutenant-Governor in Council shall decide the question whether or not there is "reasonable proof" or "improvement" or "occupation" and of intention to reside; and the function of the Lieutenant-Governor in Council in deciding upon such questions is judicial in the sense that he must "preserve a judicial temper" and perform his duties "conscientiously with a proper feeling of responsibility" whether or not the proof advanced is "reasonable proof" is a question of fact for the designated tribunal, and the decision by the Lieutenant-Governor in Council in the affirmative cannot be questioned in any Court so long as it is not demonstrated that there was no "proof" before him which acting judicially, he could regard as reasonably sufficient. The Lieutenant-Governor in Council is not bound by the technical rules of British Columbia law touching the reception of hearsay evidence, and there is nothing necessarily incompatible with the judicial character of the inquiry in the fact that such evidence is received. Where there is some evidence in support of the application and there is no adequate reason for holding that this evidence might not be properly considered to be reasonably convincing, the grant made by the Lieutenant-Governor in Council cannot be questioned. As to matters touching the refusal to direct the production of the deponents in support of the application for grant for cross-examination and the refusal to grant an adjournment for the purpose of the opposite party to adduce evidence in opposition to the application, where the opposite party were given the fullest opportunity to present before the Lieutenant-Governor in Council everything they might desire to urge against the view that the depositions produced in themselves constituted "reasonable proof" and they had the fullest opportunity also of supporting their contention that the depositions alone in the absence of cross-examination ought not to be considered sufficient and that further time should be allowed to enable them to prepare their case.

Held that the appointed authority for dealing with the matter, was the Executive Government of the province directly answerable to the Legislature and that the Lieutenant-Governor in Council was not bound to govern himself by the rules of procedure regulating proceedings in a Court of justice. Where it cannot be suggested that he proceeded without any regard to the rights of the respondents the procedure followed must be presumed, in the absence of some conclusive reason to the contrary, to have been adopted in the exercise of his discretion under the statute as a proper mode of discharging the duty entrusted to him. His decisions taken in the exercise of that discretion are, final and not reviewable in legal proceedings. (*Mr. Justice Duff.*) WILSON *v.* ESQUIMALT AND NANAIMO RAILWAY COMPANY. **A. I. R. 1921 P. C. 234.**

CANCELLATION.

See (1) LIMITATION ACT, ARTS. 91 AND 95.
(2) SP. REL. ACT, S. 39.

CANTONMENT.

—Adverse possession.

——*Land in, cannot be adversely possessed.*

CANTONMENT LAND—Building—License.

The Secretary of State is absolute owner of all Cantonments land, unless it can be proved that he parted with it. There can be no adverse possession against him. A person occupying land, in cantonments not specifically transferred to him by the Secretary of State, can only hold it as a licencee from him, who could eject him at will by revoking his licence. (*Stuart, J.*) SECY. OF STATE *v.* MULLA. **66 I. C. 582 = A. I. R. 1922 All. 57.**

—Ownership.

——*Mere declaration of lands to be within Cantonment area does not vest their ownership in Government.*

The mere fact that certain lands are declared by the Government to be within a Cantonment area does not vest their ownership in the Government unless it is shown that the lands were acquired by the Government for that purpose. (*B. B. Ghose and Roy, JJ.*) SECY., CANTONMENT COMMITTEE, BARRACKPORE *v.* SATISH CHANDRA SEN. **31 C. W. N. 1033 = 105 I.C. 565 (2) = A. I. R. 1927 Cal. 786.**

—Suit for declaration.

——*Regulation allowing sale to civilians with sanction of military authorities creates licences in favour of grantees—Transfer without consent justifies a suit for declaration.*

Where Army Regulations were in force by which a house could not be sold at all to Civilians and later on it was allowed to be sold with the sanction of the commanding officer, *Held*, in the absence of evidence as to the actual terms, it must be presumed that the permission was subject to a reservation about sanction. Therefore every transfer made with the permission of the military authority must be treated as indicating an admission of a new licence upon the prevailing conditions. *Held* further, that a transfer without sanction furnished a cause of action for a declaration that it was not binding on the Secretary of State.

Per *Sulaiman, J.*—The rights of the occupier to sell the materials of the house are not affected by the Regulation. (*Lindsay and Sulaiman, JJ.*) RAGHUBAR DAYAL *v.* SECRETARY OF STATE. **22 A. L. J. 354 = 78 I.C. 642 = 5 L. R. A. Civ. 242 = 46 All. 427 = A.I.R. 1924 All. 415.**

CANTONMENT LAND.

—Building—License.

——*Subsequent to establishment of cantonment possession of one enclosed plot of land with original owner described as "malik" in official record who subsequently built on portion of land with permission of cantonment authorities and let out buildings for shops—Permission to build is not license with regard to site for shops only but original owner continued to be licensee of whole plot of land.*

Within the limits of the bazaar area of the Meerut Cantonment there was a plot of land of which although the ownership was transferred to the Secretary of State on establishment of the cantonment, possession continued to be of the original owner. Along portion of its sides were a number of shops which with the boundary walls made the area practically into an enclosure with open gate-ways. In the official records the original owner's possession was shown as that of "malik."

The original owners let out the shops to tenants and collected rents for the same. Before these shops and enclosure were built, original owners obtained the permission of the cantonment authorities to build the shops as required.

Held: that the fact of the grant of the permission did not mean the grant of the licence of the site only and the original owner had wide extent of rights in the whole enclosure and of which he was a licensee. (*Boys *and Young, JJ.*) RAM DASS *v.* SECRETARY OF STATE. **A. I. R. 1930 All. 587.**

—Ownership.

———*Of cantonment land vests in Secretary of State subsequent to establishment of cantonment—Presumption as to compensation.*

Where subsequent to the establishment of a cantonment the ownership of the land within the cantonment becomes vested in the Secretary of State and the prior owners of the land were compensated for the loss of such rights as they may have actually suffered, it is a fair presumption that the amount of compensation would vary according to whether the prior owner was deprived wholly of ownership and possession or whether he was deprived only of ownership and allowed to remain in possession as licensee without the payment of any rent. (*Boys and Young, JJ.*) RAM DASS *v.* SECRETARY OF STATE. **A. I. R. 1930 All. 587.**

CANTONMENTS ACT (XV OF 1910).

—S. 15—Taxation.

———*Committee empowered to levy tax on water—Tax could not be increased or varied without sanction from Government.*

The Cantonment Committee, Hyderabad, received its supply of water from the Hyderabad Municipality on payment of certain charges settled by the two bodies on some date prior to 1913. The Cantonment Committee recouped itself for the amount paid to the Municipality by recovering certain water rates from the occupants of the property within the Cantonment limits, which were sanctioned by Government in 1913. Government Notification No. 5099 of 1923 empowered the Committee *inter alia* to levy for use of water for domestic purposes a flat rate of 10 per cent. on the rental of all premises within their limits and provided for the mode of fixing such rentals. Government Notification No. 5594 empowered the Committee to charge certain water rates for buildings under construction with minimum flat rate of Rs. 4 per month where no water-main was on the premises, and a graduated, but a uniform scale of rates to be levied depending on the dimensions of the watermain.

Held, that the rates were levied as a tax and could not be increased or varied by the Committee without the like sanction of Government. *Badcock* v. *Hunt*, (1889) 22 *Q. B. D.* 145, *Ref.* (*Rupchand Bilaram, A. J. C.*) JOTSING HURISING *v.* SECY. OF STATE. **20 S. L. R. 325 = 92 I.C. 361 = A. I. R. 1926 Sind 130.**

—S. 266—Interpretation.

———S. 266, Cantonments Act, only lays down that no Court shall proceed to the trial of any offence under Cantonments Act unless moved by the persons mentioned therein and if the persons mentioned therein initiate the proceedings as provided in the section, the Court must follow the procedure laid down in Cr. P. Code. (*Ghulam Mohiuddin, J.*) SURAJDEEN BANIA *v.* EMPEROR. **10 A. I. Cr. R. 365 = 109 I. C. 607 = 29 Cr. L. J. 591 (Nag.).**

—S. 266—Procedure.

———*Cr.P. Code, S. 537—Cantonment Board lodging a complaint signed by execution officer filing no authority but having power to file such complaint—Affidavit filed in the revision Court showing that he had an authority to do so—Omission to file is curable.*

A complaint was lodged by the Cantonment Board, through a Sub-Overseer, signed by the Executive Officer of the Board. The Executive Officer never appeared before the Magistrate. Sub-Overseer did not hold any power of attorney on behalf of the Board. No power of authority was filed to show that the Executive Officer had any authority to lodge such a complaint. On conviction the accused filed a revision. The Executive Officer filed an affidavit that he had an authority to file the complaint.

Held, that failure to file the authority is an omission curable under S. 537 ; 116 P. L. R. 1907, Foll. (*Addison, J.*) KUSHAL CUSHAND *v.* EMPEROR. **11 A. I. Cr. R. 13 = 111 I.C. 326 = 29 Cr. L. J. 822 = A. I. R. 1928 Lah. 946.**

———(II OF 1924).

—S. 5—Ownership.

———*Cantonment lands—Mere declaration of lands to be within Cantonment area does not vest their ownership in Government.*

The mere fact that certain lands are declared by the Government to be within a Cantonment area does not vest their ownership in the Government unless it is shown that the lands were acquired by the Government for that purpose. (*B. B. Ghose and Roy, JJ.*) SECY., CANTONMENT COMMITTEE *v.* SATISH CHANDRA SEN. **31 C. W. N. 1033 = 105 I. C. 565 = A. I. R. 1927 Cal. 786.**

—S. 118—Ingredients.

———The giving of offence by the exposure of the person is not a necessary ingredient of the offence under S. 118 (1) (*a*) (*iii*). The offence is complete if the exposure is " wilful or indecent" and in a public place. (*Boys, J.*) BEHARI *v.* EMPEROR. **27 Cr. L. J. 107 = 91 I.C. 539 = A. I. R. 1926 All. 263.**

—S. 118—Scope.

———*Takhtposh or moveable wooden platform does not fall within Cl.* (c).

A takhtposh or moveable wooden platform cannot be held to be " earth, or material of any description, or any offensive matter, or rubbish " within the meaning of Cl. (*c*), S. 118 (1). (*Shadilal, C. J.*) SRIRAM *v.* EMPEROR. **28 Cr. L. J. 683 = 103 I. C. 411 = 9 A. I. Cr. R. 24 = A. I. R. 1927 L. 647.**

—S. 181—Permission.

———*Permission granted without any reservation cannot be subsequently modified.*

Where Cantonment authority grants permission without any reservation so far as the use of the building for shops was concerned, its subsequent resolution modifying the previous one by adding the words " shops rejected " is *ultra vires.* 52 P. R. 1900, Rel. on. (*Bhide, J.*) BIHARI LAL *v.* SECRETARY OF STATE. **A. I. R. 1930 Lah. 822.**

—S. 213—Presumption—Evidence Act, S. 114.

———Where a person, who was a butcher by trade and had no licence, actually imported meat in large quantities far more than could be required for his personal use and had distributed it but where there was no evidence that he actually received any money the presumption that he actually imported meat and sold it can be legitimately drawn. (*Barlee, J.C. and Kalumal Pahlumal, A.J.C.*) MAHOMEDDIN *v.* EMPEROR. **1929 Cr. C. 318 = 118 I. C. 223 = 30 Cr. L. J. 906 = A. I. R. 1929 Sind 150.**

—S. 236—Males.

———A Magistrate can convict a male of the offence of loitering for the purpose of prostitution under S. 236 (1). (*Marten and Madgavkar, JJ.*) EMPEROR *v.* MARIDAS LAZAR. **28 Bom. L. R. 298 = 27 Cr. L. J. 555 = 93 I. C. 1051 = A. I. R. 1926 Bom. 227.**

CANTONMENTS (HOUSE ACCOMMODATION, ACT (II OF 1902).

—Ss. 6 and 11—Restriction by Cantonments Magistrate.

———*Contract Act, S. 23—Restriction by Cantonment's Magistrate that the intending purchaser must vacate the house for military officer is not illegal.*

The Cantonment Act does not contain any prohibition against a transfer by an owner of his right to continue in occupation of the house. All that the Act says is that no notice shall be issued under S. 6 if the house is occupied by the owner. The owner, therefore, may agree that if the house is required by the military authorities, he would deliver possession thereof to them. The Cantonment Magistrate is not prohibited from entering into any such agreement with an intending purchaser or even an owner in possession. Such an agreement would not defeat the provisions of the Cantonment Act. (*Mulla, J.*) ARDESHIR FRAMJI GHASVALLA *v.* TRICAMDAS GORDHANDAS.

25 Bom. L. R. 938 = 85 I. C. 442 = A. I. R. 1924 Bom. 258.

—(VI OF 1923).

—S. 18—Enhancement of rent.

———*Claim for enhanced rent made after commencement of tenancy—Owner cannot claim enhanced rent through Committee.*

S. 18 only refers to the case where rent is fixed by the Committee of Arbitration upon a requisition by the owner at the very commencement of the tenancy, but where the owner does not raise the question of enhancement until the commencement of the tenancy, and he is served with a notice for repairs, he is not entitled to enhanced rent from the commencement. (*Kanhaiyalal and Ashworth, JJ.*) JASWANT RAI *v.* J. LUCK.

25 A. L. J. 91 = 97 I. C. 71 = A. I. R. 1926 All. 746.

—S. 30—Appeal.

———*Notice issued under S. 7—Person aggrieved can appeal under S. 30—No other remedy open.*

A person aggrieved by the issue of a notice against him under S. 7 for vacating a house in the Cantonment, has only one remedy open to him namely, to appeal under S. 30, whether the notice is legal or not. Civil Courts have no jurisdiction to entertain a suit in respect of such notice. (*Marten and Fawcett, JJ.*) NUR MAHOMED BEG MAHOMED *v.* G. MONTEATH.

49 Bom. 152 = 27 Bom. L. R. 56 = 86 I. C. 81 = A. I. R. 1925 Bom. 162.

CARRIAGE.

See CARRIER.

CARRIER.

—Contract.

———*Goods to be carried by several carriers—Contract is an indivisible one—With which carrier the contract was made is a question of fact.*

Where goods are booked to be carried over the lines of several carriers, the proper person who is liable is the person to whom the goods were delivered and the contract is not a divisible one and the question with whom the contract was made is a question of fact: *Muschamp* v. *The Lancaster and Preston Junction Railway Company*, (1841) 8 M. and W. 421, Rel. on. (*Duval and Miller, JJ.*) INDIA GENERAL NAVIGATION AND RY. CO. *v.* GIRDHARILAL GOVARDHONE.

54 Cal. 430 = 31 C. W N 358 = 100 I. C. 903 = A. I. R. 1927 Cal. 394.

—Damages.

———*Goods not delivered by carrier according to contract—Measure of damages is value of goods at place of destination—Principles discussed.*

Where goods entrusted to a carrier are not delivered according to the contract, the measure of damages of the value of the goods at the place of destination, in the condition in which the carrier undertook to deliver them, at the time when they should have been delivered, less the proper charges of transportation and delivery, if these have not been paid by the consignor. The fundamental principle that the party wronged by the breach of obligation should be awarded compensation for the losses which he has sustained in consequence and should be placed in the same position pecuniarily as if the contract had been performed, is subject to important limitations, and compensation is not in fact recoverable for every loss or detriment which may be traceable as a consequence however remote, of the breach of obligation. The natural and probable consequence of the failure of the carrier to deliver the goods at the time and place they should have been delivered, is *prima facie* a loss to the owner amounting to the value of the goods at that point. But this ordinary and definite effect of the failure of the carrier may be aggravated in a particular case by special circumstances, such as, the intention of the consignee to sell the goods in the most profitable market in the world. The aggravations of the normal consequences are not to be taken into account in the assessment of damages, except so far as the circumstances to which they are due were the ordinary probable circumstances which might beforehand be expected to attend or follow upon the breach of obligation. This is subject to the exception that if the party, who has broken the contract, entered into it, in contemplation of special circumstances which would affect the consequences of a breach and accepted those circumstances as condition under which the contract was to be performed, he is liable for any special loss which may have resulted. The knowledge must be brought home, to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it. A person cannot consequently be allowed compensation for losses which might have been reasonably avoided. (*Mookerjee and Fletcher, JJ.*) INDIAN GENERAL NAVIGATION AND RAILWAY CO. *v.* EASTERN ASSAM COMPANY.

33 C. L. J. 72 = 61 I.C. 14 = A. I. R. 1921 Cal. 315.

—Liability.

———*'Restraint of Rulers' clause' exempts carrier from liability after he is commandeered during war—Carriage after such commandeering must be paid for under S. 70 of the Contract Act.*

Where the contract between the Steamship Company and consignees provided for exemption in case of restraints of Rulers and a ship carrying goods to be delivered to the consignees at Cochin was commandeered at Bombay and where the Steamship Company through their Bombay agents arranged for the carriage of the goods to Cochin from Bombay but only on payment of the freight and other charges incurred in carrying the goods from Bombay to Cochin.

Held that the Steamship Company were free from the obligation to carry the goods from Bombay to Cochin.

Held farther that even if the Company had no authority to carry the goods from Bombay to Cochin, in view of the correspondence of the party after commandeering of the ship, S. 70 of the Contract Act entitled the Company to claim charges for carriage as compensation. 32 Cal. 374, Dist. (*Krishnan, J.*) CLAN LINE, LTD. *v.* SRINIVASA PAI.

20 M L.W. 378 = 80 I.C. 892 = A.I.R. 1924 Mad. 885.

—Negligence.

———*By sea must prove peril of the sea—That accident could be avoided by greater foresight does not prove negligence.*

The mere fact that the accident might have been avoided by greater foresight does not make it negligence. The difference between ordinary perils and extraordinary perils suggested in Story on Bailments (S. 512) has not been accepted by the authorities. (Carver, S. 87). The loss need not be extraordinary in the sense that the cause must be uncommon. It is true that negligence does not save the defendants' liability; but if reasonable care is taken the perils of the sea while not including the effects of mere ordinary wear and tear will include the consequences of any kind of accident ending in damage by sea water. (*Ramesam and Jackson, JJ.*) ESUF ALI *v.* THAHA UMMAL.
20 M.L.W. 91 = 80 I.C. 154 = 47 Mad. 610 = 1924 M.W.N. 648 = A.I.R. 1924 Mad. 773 = 47 M.L.J. 150. (P.C.).

———*Common Law liability—Contract to the contract is valid.*

Under Indian Law, a common carrier by sea can contract out of the Common Law liability for negligence of himself and his servants provided the saving clause is expressed in clear and unambiguous terms. (*Twomey, C.J., Robinson and Rigg, JJ.*) B.I.S.N. CO. *v.* ALIBHAI. **62 I.C. 378 (2) = 10 L.B.R. 292 (F.B.)**

—Railway.

———*Consignor is primarily liable for freight.*

In a suit for freight, by a carrier, against the consignor and the consignee, the person who is primarily liable for the payment of freight is the consignor because the carrier in accordance with the ordinary rule of agency, is entitled, *prima facie*, to treat the consignor as the person with whom he contracts. (English cases fully discussed.) (*Fazl Ali, J.*) SECRETARY OF STATE *v.* GANJI DOSA. **10 P.L.T. 287 = 8 Pat. 669 = 117 I.C. 305 = A.I.R. 1929 Pat. 265.**

CARRIER'S ACT (III OF 1865).

—S. 2—Applicability.

———The Act does not apply to carriage by sea. (*Marten, C.J. and Blackwell, J.*) BOMBAY STEAM NAVIGATION CO. *v.* VASUDEV. **52 Bom. 37 = 29 Bom. L.R. 1551 = 106 I.C. 470 = A.I.R. 1928 Bom. 5.**

—S. 2 -Interpretation.

———*"For all persons indiscriminately" means simply that carriers are not at liberty to refuse business—Carriers' liability.*

So far as the words "for all persons indiscriminately" are concerned these simply mean that persons so engaged in and catering for business satisfy the demands or applications of customers as they come and are not at liberty to refuse business. This arises from the public employment in which they are engaged. Apart from danger arising, say, from the nature of the goods received, the carrier is by his office bound to transport the goods as clearly as if there had been a special contract which purported so to bind him, and he is answerable to the owner for safe and sound delivery. (*Lord Shaw.*) INDIA GENERAL NAVIGATION AND RAILWAY CO. *v.* DEKHARI TEA CO.
51 I. A. 28 = 5 L.R.P.C. 121 = 80 I.C. 1038 = 26 Bom. L. R. 571 = 51 Cal. 304 = 34 M.L.T. 53 = 22 A.L.J. 173 = 19 M.L.W. 277 = 1924 M.W.N. 158 = 28 C.W.N. 302 = A.I.R. 1924 P.C. 40.

—S. 6—Limitation to liability.

———What is required to limit the liability in the case of a person who answers the definition under the Indian Carriers Act, *viz.*, of transporting for hire goods from place to place for all persons indiscriminately, is that the nature of the contract entered into must either have the limitation of the liability under the Indian Carriers Act made expressly and in writing or the facts must be such that for the contract in question the contractor was departing from his usual business and engaging in a different type of business from that of common carrier. The special circumstances that goods were to be carried by a through route, does not decategorise carriers from being common carriers under statute, nor does it relieve them from their legal obligations as such. In order to effect such a result the particular contract would require to come up to this, that *quoad* that transaction, another and different type of business had been entered on. (*Lord Shaw.*) INDIA GENERAL NAVIGATION AND RAILWAY CO. *v.* DEKHARI TEA CO. **51 I.A. 28 = 80 I.C. 1038 = 5 L.R.P.C. 121 = 26 Bom.L.R. 571 = 51 Cal. 304 = 34 M.L.T. 53 = 22 A.L.J. 173 = 19 M.L.W. 277 = 1924 M.W.N. 158 = 28 C.W.N. 302 = A.I.R. 1924 P.C. 40 (c).**

—S. 9—Loss of goods.

———*Suit against carrier—Plaintiff need not prove negligence—Railways Act, S. 72.*

Under S. 9, in a suit brought against a common carrier for the loss, damages or non-delivery of goods entrusted to him for carriage, it is not necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents. The burden of proof of absence of negligence is thus thrown upon the common carrier, on the theory that the loss or damage to the goods is *prima facie* proof of negligence. But where evidence has been given on both sides, of the circumstances under which the loss took place and the Court has arrived at a finding upon the whole of such evidence, the question of burden of proof ceases to have any practical importance. (*Mookerji and Fletcher, JJ.*) INDIA GENERAL NAVIGATION AND RAILWAY CO. *v.* EASTERN ASSAM CO., LTD. **33 C.L.J. 72 = 61 I.C. 14 = A.I.R. 1921 Cal. 315.**

—S. 9—Negligence.

———Loss from an unknown cause is presumptive proof of negligence. 24 Cal. 786 and 26 Cal. 398 (P.C.), Foll. (*Mukerji, J.*) RIVERS STEAM NAVIGATION CO., LTD. *v.* BISWESWAR KUNDU. **116 I.C. 148 = A.I.R. 1928 Cal. 371.**

—S. 10—Contract.

———A contract with a carrier provided: "No claim of any kind whatsoever in respect of this contract shall be valid unless in writing and delivered at the office of the Company....within six months from the date of any default, loss or damage in respect of which such claim arises."

Held that the condition was not unreasonable. 3 Mad. 107 and 27 C.L.J. 294, Rel. on. (*Mukerji, J.*) RIVERS STEAM NAVIGATION CO., LTD. *v.* BISWESWAR KUNDU. **116 I.C. 148 = A. I. R. 1928 Cal. 371.**

—S. 10—Notice.

———*Notice to local agent is sufficient.*

Notice to local agent is sufficient. The essential of a good notice appears to be that it should reach the person who is liable to make good the loss. (*Duval and Mitter, JJ.*) INDIA GENERAL NAVIGATION AND RAILWAY CO. *v.* GIRDHARILAL GOBURDHONE DAS. **54 Cal. 430 = 31 C.W.N. 358 = 100 I.C. 903 = A.I.R. 1927 Cal. 394.**

CASBATI—*See* LAND TENURE.

CASE-LAW—*See* PRACTICE—PRESIDENT.

CASTE.

See also (1) C. P. CODE, S. 9.
(2) HINDU LAW—CASTE, CONVERSION.

—Ex-communication.

———*Ex-communication is a mode of enforcing payment of fine or is a punishment in default of payment.*

Distinctions are supposed to exist between ex-communication and fine and also between payment of a fine and giving a caste dinner. The fine imposed may be a fixed sum of money or the price of a dinner, but it is a fine in both cases. And the ex-communication is merely the only means available for enforcing the payment of the fine. Every such disciplinary decision of a caste can be regarded either as a sentence of ex-communication which can be set aside on payment of a fine or as a sentence of fine with ex-communication in default of payment. (*Hallifax, A.J.C.*) GOKUL TELI *v.* BANIA CHAMAR. **76 I.C. 341 = A.I.R. 1924 Nag. 157.**

—Jurisdiction.

———*Court can decide that rights to the user of property in accordance with caste usage exist but cannot decide whether a particular user is sanctioned by custom of caste.*

Court has jurisdiction to decide that the plaintiffs were entitled to the user of the properties in dispute in accordance with the caste usage and custom because a question of property is involved. But once the Court holds that the Plaintiffs have that right then the way in which they might exercise their right is a question which is really one for the castes themselves to decide and not for any particular individual or faction and is certainly a question which to Court would possibly determine. (*Macleod, C. J. and Crump, J.*) CHUNILAL GULABDAS *v.* CHHOTALAL PRANJIVAN. **76 I. C. 635 = A. I. R. 1924 Bom. 522.**

—Race distinction.

———*Maternity is of no importance.*

It is settled that as regards the racial claim maternity is of no importance. (*Lord Phillimore.*) SAKLAT *v.* BELLA. **30 C. W. N. 289 = 92 I. C. 200 = 28 B. L R. 161 = 53 I. A. 42 = 3 Rang. 582 = 23 A. L. J. 1016 = 43 C. L. J. 23 = A. I. R. 1925 P. C. 298 = 49 M. L. J. 821 (P.C.).**

CASTE DISABILITIES REMOVAL ACT (XXI OF 1850).

—Applicability.

———*Bengal Land Revenue Settlement Regulation* (*Ben. Reg. VII of* 1832)—*Applicability to Oudh—Conversion before date of annexation—Acts do not apply.*

Regulation VII of 1832 or Act XXI of 1850 can be held to be applicable to the Province of Oudh from the date of annexation at the earliest, *i.e.*, on 13th February, 1856 and therefore the Regulation and the Act do not apply to the case of convert who renounced his religion before that date. (*Stuart, C.J. and Wazir Hasan, J.*) MITAR SEN SINGH *v.* MAQBUL HASAN. **3 Luck. 154 = 107 I. C. 890 = 4 O. W. N. 1243 = A. I. R. 1928 Oudh 138.**

———The Act only relieves from forfeiture the person who has for some reason or other changed his religion and not any other person who may be affected by such a change. (*Curgenven, J.*) SUNDARAMMAL *v.* AMEENAL. **24 M. L. W. 675 = 1926 M. W. N. 952 = 98 I. C. 867 = A. I. R. 1927 Mad. 72.**

—Succession.

———*Hindu convert to Shia—Heirs to the estate of such person must be determined by Shia law and not by the Act—Mahomedan law.*

CASTE DISABILITIES REMOVAL ACT (1850), S. 1—Applicability.

In determining the heir or heirs to the estate of a person who has renounced the Hindu religion and embraced the Shia faith of Islam recourse must be had to the Shia law of inheritance and not to Act XXI of 1850: 10 M. I. A. 511 (P.C.); Rel. on. (*Stuart, C.J. and Wazir Hasan, J.*) MITAR SEN SINGH *v.* MAQBUL HUSIN. **3 Luck. 154 = 107 I. C. 890 = 4 O. W. N. 1243 = A. I. R. 1928 Oudh 138.**

———A Hindu daughter cannot inherit from her father who has been converted to Mahomedanism because of Act XXI of 1850; 40 Mad. 1118, Foll. 11 All. 100, Not Foll. (*Curgenven, J.*) SUNDERMMAL *v.* AMEENAL. **24 M. L. W. 675 = 98 I.C. 867 = 1926 M. W. N. 952 = A. I. R. 1927 Mad. 72.**

———*Hindu Law—Succession—Even after conversion right to inheritance is not lost.*

A convert or an outcaste retains his right of inheritance whether the right occurs before or after the conversion to another religion or exclusion from caste. (*Jwala Prasad and Ross, JJ.*) RAM PERGASH SINGH *v.* MT. DAHAN BIBI. **3 Pat. 152 = 78 I.C. 749 = 5 P. L. T. 203 = 1924 P. H. C. C. 85 = A. I. R. 1924 Pat. 420.**

———*Muhammadan convert—Death—Non-muhammadan relatives, not entitled to succeed to him otherwise than as Muhammadans, cannot succeed.*

On the death of a Burman Buddhist who, adopted the Muhammadan faith, his mother, brothers and sisters, who were still Burmese Buddhists, claimed as heirs, their shares in the estate of the deceased. It was contended that, though according to Muhammadan law they were not entitled to inherit any portion of the estate of the deceased by reason of their religious disability, this disability had been removed by Act XXI of 1850;

Held, the Burmese Buddhist relations of the deceased could not succeed as they failed to show that they had a right to succeed otherwise than as Muhammadans. (*Rigg, J.*) ASHA BIBI *v.* MA KYAWYIN. **64 I. C. 514 = A. I. R. 1922 L. Bur. 15.**

—S. 1—Applicability.

———*S. 1 applies only to person actually converted or outcasted—Succession to such person however is governed by law applicable to convert after conversion.*

S. 1 in terms only applies to protect the actual person who either renounces his religion or has been excluded from the communion of any religion or has been deprived of caste. It is intended to protect such a person from losing any right of property or of succeeding as heir. But when once a person has changed his religion and changed his personal law that will govern the rights of succession of his children. 11 All. 100, Overruled ; 40 Mad. 1118, Appr. (*Lord Atkin.*) MITAR SEN SINGH *v.* MAQBUL HASAN KHAN. **A. I. R. 1930 P. C. 251.**

———*Ancestor of propositus changing his religion—Act will not apply for determining the heirs of such propositus.*

The Act has no application to a case where the claimant of rights has neither renounced nor has been excluded from the communion of any religion or been deprived of caste, and S. 1 cannot be read in any wider sense than that it removes the personal disability of the person who has changed his religion from enforcing his rights which he possessed prior to the change. Therefore, if any, ancestor of the propositus in any degree of ascent has changed his religion the Act would not apply in determining the status of an heir to such a propositus. 33 All. 356 ; 40 Mad. 1118 ; 1 Lah. 376, Rel. on; 11 All. 100, Expl. and Diss. from. (*Stuart,* *C. J. and Wazir Hasan, J.*) MITAR SEN SINGH *v.* MAQBUL HASAN. **3 Luck. 154 = 107 I.C. 890 = 4 O.W.N. 1243 = A. I. R. 1928 Oudh 138.**

—S. 1—Partition.

——*Conversion does not give right to partition if there is none prior to conversion* (1912) *M. W. N.* 386, *Overruled.*

The effect of the Act is not to enlarge the convert's interest in any property or to get rid of any condition or restriction to which it was originally subject. 19 Cal. 289, Foll. (1912) M.W.N. 386, Overruled. 40 Cal. 407, Diss. from 9 M. I. A. 195, Expl. Conversion from Hinduism cannot give a member of a Tarwad a right to a partition of Tarwad property which is impartible under the Marumakkathayam Law.

Kumaraswami Sastri, J.—All that the convert is entitled to is to continue to reside in the house and be maintained as before if the other members are willing or to get separate residence and the maintenance allotted to him if the other members refused. (*Wallis, C.J., Spencer and Kumaraswami Sastri, JJ.*) M. P. P. PARU *v.* RAMAN NAMBIAR. **44 Mad. 891 = 64 I. C. 676 = 14 M. L. W. 257 = 1921 M. W. N. 594 = A. I. R. 1921 Mad. 224 = 41 M.L.J. 243 (F.B.).**

CASTE QUESTIONS.—*See* C. P. CODE, S. 9.

CATTLE—*See* CATTLE TRESPASS ACT.

CATTLE POUNDS—*See* CATTLE TRESPASS ACT.

CATTLE TRESPASS ACT (I OF 1871).

—Conviction-legality of.

——*Conviction not justified under law and fine arbitrary—Conviction can be set aside—Cr. P. Code, S.* 439.

Where a conviction was not justified under the Cattle Trespass Act and especially where the fine was arbitrary High Court interfered and set aside the conviction. (*Pullan, J.*) EMPEROR *v.* MADHO. **7 O. W. N. 461 = A. I. R. 1930 Oudh 250.**

S. 10—Offence under.

——*Penal Code. S.* 379—*Detaining cow for* 24 *hours is not theft, or any offence.*

A person, detaining cow in his custody for less than 24 hours as he is entitled under S. 10, Cattle Trespass Act, is not guilty of offence under S. 379, intention for causing wrongful loss being absent. Where the accused kept the cow in his custody for damages done over night for the purpose of impounding unless he received compensation, *held*, that he was legally entitled to keep it in his own custody for 24 hours before lodging it in the pound. 14 C. W. N. 238, Foll. (*Batten, J C.*) RAMRATAN *v.* EMPEROR. **23 Cr. L. J. 511 = 68 I. C. 47 = A. I. R. 1923 Nag. 64.**

—S. 10—Private defence.

——*Penal Code, S.* 105—*Right of private defence—Trespass by cattle—Cattle can be chased even outside the fields trespassed.*

Certain cattle belonging to accused trespassed a field where they were grazing. An attempt was made by the owner of the field to seize them in order to take them to cattle pound. The cattle ran towards the field of the accused where the chasers followed them. The accused inflicted mortal injuries on one of the chasers, who consequently died. It was urged that the chaser had no right to pursue out of the field trespassed and the accused were entitled to a right of private defence.

Held, that notice of trespass being taken at once, the mere fact that the cattle had left the land, before they could be seized, did not deprive the owner of the field of the right of seizure conferred upon him by S. 10, and

no case for private defence was proved: A. I. R. 1925 Nag. 53, Dist. (*Shadi Lal, C. J.*) WARYAMI *v.* EMPEROR. **13 A. I. Cr. R. 39 = 116 I. C. 463 = 30 Cr. L. J. 627 = A. I. R. 1928 Lah. 692.**

—S. 10—Seizure.

——*Right to seize cattle subsists only until the cattle leave the land.*

The owner of the land trespassed on cannot go to the owner of the errant cattle and demand their delivery in order that he may take them to the cattle pound. Because, under S. 10 the right to take hold of cattle trespassing on land and doing damage subsists only while the cattle are on the land. It does not continue after the cattle have left the land. (*Kinkhede, A.J.C.*) BHAGWANT RAO *v.* CHAMPAT RAO. **25 Cr. L. J. 1004 = 81 I. C. 716 = A. I. R. 1925 Nag. 50.**

——*Watchman—General instruction to seize cattle trespassing—Rescuing cattle seized by watchman is an offence.*

Under S. 10, a watchman watching crops on land on behalf of a cultivator or occupier is entitled to seize cattle trespassing on the land under his charge when he is given general instructions to seize them while so trespassing. (*Adami, J.*) K. DUSADH *v.* SARABI DUSADH. **A. I. R. 1922 Pat. 317.**

—Ss. 11 and 24—Conviction under.

——*Railways Act, S.* 125 (4)—*Cattle passing over regular track at place where there is no fencing to railway line—Unless there is damage conviction under S.* 24 *cannot be sustained.*

In order that an offence may be established under S. 24, the seizure of the cattle must be legal and consequently driving herds of cattle across the railway line at a place where there is no fence and where there is a regular track does not constitute any offence under S. 24 in the absence of any damage to the line: 43 I. C. 445; 1 P. L. T. 176, and 23 C. W. N. 387, Rel. on. (*Pullan, J.*) EMPEROR *v.* MADHO. **7 O. W. N. 461 = A. I. R. 1930 Oudh 250.**

—S. 20—Interpretation.

——*General Clauses Act, S.* 10—*Principle of S.* 10 *may be applied to S.* 20.

Although S. 10, General Clauses Act, only applies to Acts made on or after 14th January, 1897, and does not cover in terms, an Act like Cattle Trespass Act passed in 1871, the principle underlying S. 10, General Clauses Act, should be applied to complaints under Cattle Trespass Act, S. 20. (*Findlay, J. C.*) MOHADEO GANPATI PATIL *v.* NABHA VISHWANATH. **30 Cr. L. J. 125 = 113 I.C. 285 = 12 A.I. Cr. R. 69 = A. I. R. 1929 Nag. 96.**

—S. 20—Jurisdiction.

——*Cr. P. Code* (*V of* 1898), *Ss.* 4 (c) *and* 29—*Magistrate generally empowered under Cr. P. Code, to try offences has jurisdiction to try offences under S.* 20.

A Magistrate generally empowered under the Cr. P. Code to receive complaints of offences, has jurisdiction in respect of offences under S. 20 of the Cattle Trespass Act without any special authorization by the District Magistrate to receive complaints under the above section; 44 Bom. 42 and 34 Cal. 926, Foll. (*Wallace, J.*) DEENADAYALU *v.* RATNA PADAYACHI. **100 I. C. 381 = 25 M. L. W. 282 = 1927 M.W.N. 167 = 28 Cr.L.J. 301 = 50 Mad. 841 = A. I. R. 1927 Mad. 396. = 52 M. L. J. 251.**

—S. 21—Complaint—Validity of.

——*Agent authorised to file a complaint though cannot give direct evidence of all circumstances.*

CATTLE TRESPASS ACT (1871), S. 22—Compensation.

For a complaint by an agent to be valid, it is not necessary that the agent must know all about the matter from what he has seen himself and not from what he has been told by others; that is, the agent need not be a person who is capable of giving what is called direct evidence of all the circumstances and not of a part of them only. (*Hallifax, A. J. C.*) JUKARAM *v.* GANPAT.
26 Cr. L. J. 327 = 84 I. C. 551 = A. I. R. 1923 Nag. 156.

—S. 22—Compensation.

———*Compensation cannot be awarded in absence of loss and unless specifically claimed—Sentence of imprisonment under S. 22 in default of compensation is illegal.*

Compensation under S. 22 cannot be allowed in the absence of loss alleged or proved. The Magistrate cannot award it arbitrarily at his own sweet will. The complainant must make a specific claim about it. Further the Magistrate can only award compensation for illegal seizure of cattle and cannot impose fine. He is also not competent under S. 22 to pass sentence of imprisonment and thus when he passes a sentence of imprisonment in default of payment of compensation, the sentence is illegal. (*Mohiuddin, A. J. C.*) RAMDULAREY *v.* MANOHAR. **31 Cr. L. J. 278 = 121 I. C. 665 = 26 N. L. R. 158 = A. I. R. 1930 Nag. 149.**

———*Compensation may be awarded to owner of the cattle and not to agent filing complaint.*

Where the complaint is lodged by an agent, the Magistrate can award reasonable compensation, which will be paid to the complainant (owner of cattle and not to the agent who filed the complaint. (*Mohiuddin, A. J. C.*) MANOHAR *v.* RAMDULAREY.
30 Cr. L. J. 633 = 116 I. C. 424 = 1929 Cr. C. 18 = 13 A. I. Cr.R. 63 = A. I. R. 1929 Nag. 152.

———*Compensation need not be claimed in the complaint.*

There is no restriction in the Act that the Court cannot award compensation unless it is claimed in the complaint; A. I. R. 1923 Pat. 292, Not Foll. (*Jackson, J.*) KOLANDAI CHETTY *v.* PERUMAL KAVUNDAN.
29 Cr. L. J. 325 = 108 I. C. 80 = 1 M. Cr. C. 125 = A. I. R. 1928 Mad. 369.

———*Loss not proved—Compensation not asked for in petition—Compensation order is illegal.*

If no compensation was claimed in the petition of complaint and no allegation was made as to the loss caused by the seizure of the cattle, the order directing payment of compensation cannot stand. The person under whose orders the cattle were seized is liable to compensate the complainant, equally with those who directly seized them under his orders. (*Ross, J.*) BAIJNATH SAHAY *v.* KING-EMPEROR. **4 P. L. T. 231 = 72 I.C. 71 = 1923 P.H.C. C. 96 = 1 Pat. L.R. Cr. 34 = 24 Cr. L. J. 311 = A. I. R. 1923 Pat. 292.**

———*Cr. P. Code (Act V of 1898), Ss. 408 and 413—Order of compensation is appealable—Compensation is not fine.*

An order awarding compensation and re-payment of fines under S. 22 is appealable under S. 408 of the Cr. P. Code, the compensation so awarded not being a fine, the restrictive provisions of S. 413, Cr. P. Code are not applicable. (*Macleod, C. J. and Shah, J.*) BARTHOL DUMING RODRIKS *v.* PAPA DADA. **46 Bom. 58 = 63 I. C. 160 = 23 Bom. L. R. 836 = 22 Cr.L. J. 624 = A. I. R. 1922 Bom. 191.**

—S. 22—Grazier.

———*Grazier of cattle is agent within S. 22.*

A grazier is entrusted with the charge of the cattle during the period the cattle are with him for the purpose of grazing and therefore he may be presumed to be an agent of the owners of the cattle during the time the cattle are in his charge. Such an authority must be presumed from the circumstances of the case. The person personally acquainted with the circumstances can only be the person in charge of the cattle when seizure is made and therefore comes under the category of "an agent personally acquainted with the circumstances" mentioned in S. 21. A. I. R. 1923 Nag. 156, Ref. (*Mohiuddin, A. J. C.*) MANOHAR *v.* RAMDULAREY.
30 Cr. L. J. 633 = 116 I.C. 424 = 1929 Cr. C. 18 = 13 A. I. Cr. R. 63 = A. I. R. 1929 Nag. 152.

—S. 24—Interpretation.

———*'Rescue' includes driving by shouts and cries.*

Driving cattle by shouts and cries does constitute rescuing them under S. 24. (*Spencer, J.*) KAMA KONDIAH, *In re.* **24 Cr. L. J. 456 = 72 I. C. 616 = 17 M. L. W. 546 = 32 M. L. T. 365 = 1923 M.W. N. 437 = A. I. R. 1923 Mad. 608.**

—S. 24—Liability.

———*For conviction under S. 24 liability of the cattle to be seized must be proved.*

Before a conviction under S. 24 can be sustained it is necessary to prove that the cattle which has been rescued was liable to be seized under the Act. (*Sulaiman, J.*) BABU *v.* EMPEROR. **24 A. L. J. 280 = 27 Cr. L. J. 313 = 7 L. R. A. Cr. 40 = 92 I. C. 697 = A. I. R. 1926 All. 276.**

—S. 24—Offence.

———*Penal Code, Ss. 447, 441 and 40—"Offence" in S. 441 includes offence under S. 24.*

Entering the cattle pound with intent to commit an offence under S. 24, Cattle Trespass Act amounts to criminal trespass within the meaning of S. 447, I. P. C. and entering the pound with intent to intimidate the person in charge of the pound amounts to an offence under S. 447. (*Fforde and Addison, JJ.*) EMPEROR *v.* BHOLA. **8 Lah. 331 = 103 I. C. 201 = 28 Cr. L. J. 665 = 28 P. L. R. 519 = 8 A. I. Cr. R. 293 = 9 L. L. J. 354 = A. I. R. 1927 Lah. 495.**

—S. 24—Sentence.

———*Penal Code, S. 323—Separate sentences can be passed.*

The offence of causing hurt is a separate offence from that of rescuing cattle and separate sentences may legally be passed. (*Wallace, J.*) ANTHONI UDAIYAN *v.* RAYAPPUDAYAR. **39 M. L. T. 543 = 1927 M. W. N. 850 = 105 I. C. 806 = 28 Cr. L. J. 982 = 9 A. I. Cr. R. 160 = A. I. R. 1928 Mad. 18 = 53 M. L. J. 653.**

CAUSE OF ACTION.

See (1) C. P. CODE, S. 20, O. 2, R. 2, O. 9, R. 8.
(2) DAMAGES.
(3) TORT.

CAVEAT—*See* PROB. AND ADMIN. ACT, Ss. 50, 70.

CAVEAT EMPTOR.

See (1) C. P. CODE, O. 21, R. 93.
(2) T. P. ACT, S. 55.

CENTRAL PROVINCES COURTS ACT (I OF 1917).

—S. 9—Procedure.

———*Question of law referred to Bench—Judge disposing of the case need not be on the Bench.*

Section 9 does not make it necessary that the Judge who is disposing of the case should be a member of the Bench for the decision of which a question of law is referred. (*Macnair, Offg. J. C. Staples and Subhedar, A. J. Cs.*) SITARAM *v.* KAINRAM. **12 N. L. J. 148 = 121 I. C. 57 = A. I. R. 1929 Nag. 251 (F. B.).**

CENTRAL PROVINCES COURT-FEES AMENDMENT ACT (I OF 1923.)

—Interpretation.

———*The Act has no retrospective effect.*

Neither the notification of the C. P. Local Government to the effect that in suits for possession of land the value of the land for purposes of jurisdiction would be 12½ times the annual revenue payable for the land nor the C. P. Court Fees Amendment Act (I of 1923) can have retrospective operation so as to affect the value of such land either for purposes of Court-fees or for purposes of jurisdiction in suits previously instituted for possession of such land. (*Findlay, O. J. C. and Wadegaonkar, A. J. C.*) CHUNILAL *v.* KISANDAS RAMDAS. **89 I. C. 407 = A. I. R. 1926 Nag. 71.**

CENTRAL PPOVINCES COURT OF WARDS ACT (IMP. XXIV OF 1899.)

—Commissioner—Powers of.

———*Commissioner representing Court of Wards—Powers of.*

The Commissioner as representing the Court of Wards is not entitled to make a voluntary alienation of his ward's immoveable property so as to bind the ward even after his attaining majority. (*Macnair, A. J. C.*) DHARAMSINGH *v* LAKNATHSINGH. **4 N. L. J. 1 = 62 I. C. 198 = A. I. R. 1921 Nag. 56.**

—S. 18—Commissioner—Powers of.

———*Deputy Commissioner can execute documents for Court of Wards.*

The Deputy Commissioner is authorized to execute a document on behalf of the Commissioner who is the Court of Wards, under S. 18 (2). (*Hallifax and Kotval, A. J. Cs.*) SETH GOKULDASS NATHANI *v.* LAL ARTATRAN. **95 I. C. 824 = A. I. R. 1926 Nag. 466.**

—S. 31 (as amended by Act I of 1915)—Effect of

———The effect of S. 31 as amended is to declare that the property or person of a ward is not liable for necessaries under S. 68 of Contract Act. (*Mittra, A. J. C.*) HEMRAJ SHA *v.* PANNALAL. **61 I. C. 563 (2) = 17 N. L. R. 20.**

— S. 31—Court of Wards—Powers of.

———*Minor—Powers of Court of Wards to bind minor's estate are not greater than those of natural guardian.*

The powers of the Court of Wards to bind the minor ward by a simple money bond executed on his behalf are no greater than those of a natural guardian. Except in so far as the Court of Wards Act gives special powers to bind the minor's estate, the powers of the Court of Wards are co-extensive with those of a natural guardian. (*Hallifax and Dhobley, A. J. Cs.*) JIWANDAS *v.* JANKI. **5 N. L. J. 49 = 65 I. C. 53 = 18 N. L. R. 145 = A. I. R. 1922 Nag. 98.**

———(Amendment Act I of 1915.)

—Suit—Mantainability of.

———*Suit based on Contract Act, S.* 68, *is not maintainable subsequent to coming into force of C. P. Court of Wards Act* (*I of* 1915).

After the coming into force of the Central Provinces Act I of 1915 a suit against a minor so far as it is based on S. 68 of the Contract Act is not maintainable. (*Mittra, A. J. C.*) THAKUR HEMRAJ SHA *v.* PANNALAL. **17 N. L. R. 20 = 61 I. C. 563 = A. I. R. 1921 Nag. 105.**

CENTRAL PROVINCES CRIMINAL CIRCULARS.

—No. 1-28, Para. 6—Procedure.

———*Trial of young offenders by 2nd Class Magistrate is barred.*

CENTRAL PROVINCES LAND REVENUE ACT (1881), S. 4 (3)—Cess.

The Circular states that adolescents should be tried by a Magistrate not below the rank of Sub-Divisional Magistrate. It does not say that a Second Class Magistrate may try an adolescent but must refer the case for punishment to the Sub-Divisional Magistrate. (*Kotval, A. J. C.*) BABA *v.* EMPEROR. **22 N. L. R. 166 = 74 I. C. 66 = 24 Cr. L. J. 738 = A.I.R. 1924 Nag. 37.**

CENTRAL PROVINCES GENERAL CLAUSES ACT (I OF 1914.)

—S. 5 (c)—Scope.

———It cannot be said that S. 5 (*c*) requires the proceedings to continue before the original Court and not before the Court to which jurisdiction may have been tranferred by the repealing Act. (*Jackson, A. J. C.*) GOKAL PRASAD *v.* GOVINDRAO SUBHEDAR. **12 N.L.J, 82 = 119 I.C. 682 = A.I.R. 1929 Nag. 282.**

CENTRAL PROVINCES LAND ALIENATION ACT (II of 1916.)

—S. 9 (3)—Applicability.

———*S.* 9 (3) *applies also to suits instituted after commencement of Act.*

In a suit on a mortgage executed by a member of the original Tribes in the Central Provinces and containing a condition of foreclosure in case of the non-payment of the debt, no foreclosure decree can be passed and the sub-Section (3) of Section 9 applies to suits pending at the commencement of the Act or instituted afterwards. (*Dhobley, A. J. C.*) MST. GORA *v.* RAMLAL. **64 I. C. 729 = A. I. R. 1921 Nag. 146.**

—S. 16—Interpretation.

———"*Made*" *qualifies* "*decree or order*" *and not* "*execution.*"

The word "made" qualifies the words "decree or order" and not the word "execution". The very plain meaning of the words of the section is that a sale shall not be held in execution of a decree or order if that decree or order is passed or made after a certain date, but that it can be held if the decree or order is prior to that date whether the application for execution is prior or subsequent to that date. (*Hallifax, A. J, C.*) INDAL BAPU *v.* MAHOMED ALI. **60 I. C. 545 = A. I. R. 1921 Nag. 93.**

CENTRAL PROVINCES LAND REVENUE ACT (XVIII OF 1881.)

—Wajib ul-arz.

———*Agreement by lambardar not to demand* haqq *is valid—Abandonment.*

Where the lambardar agreed not to demand his *haqq*, in consideration of the consent of the co-sharers to his appointment.

Held, any person can agree to abandon a claim to money already due to him. There is nothing invalid in an abandonment for consideration of a payment to which a person is declared entitled by the law. But future right could not be relinquished or transferred to which the holder is not declared entitled by the law, directly or indirectly. (*Hallifax, A. J. C.*) YADO PRASAD *v.* GANGARAM. **70 I. C. 72 = A. I. R. 1923 Nag. 211.**

—S.4 (3)—Cess.

———*Ss.* 76, 132 (*h*) *and* 153—*Cess determined by Settlement Officer—Sanction by Commissioner of the cess is sufficient—No sanction as to rates is necessary.*

S. 76 authorizes the Settlement Officer to determine and record the village cesses, if any, which are leviable, according to village custom, and the persons by and from whom and the rates at which, they are leviable, and it directs that such cesses shall, if sanctioned by the Chief Commissioner, be leviable accordingly. S. 132

(*h*) gives similar powers to the Deputy Commissioner when the settlement is not in progress. When the cesses are thus sanctioned it is not necessary for the Chief Commissioner to sanction the rates. (*Das and Adami, JJ.*) RAKHYAPAL SINGH *v.* LAL BIR SURJODAY SINGH DEO. **1 Pat. 83 = 69 I. C. 672 = A. I. R. 1922 Pat. 399.**

—S. 4—Desehra Bhet.

———*Suit for recovery of* Desehra Bhet *and* Kot Chhauni *not sanctioned or recorded does not lie.*

Payments of *Desehra Bhet* and *Kot Chhauni* are village cesses and unless sanctioned by the Commissioners or recorded at the settlement a suit for recovery of the same is barred by S. 153. (*Hallifax and Kotval, A. J. Cs.*) ZAMINDAR OF HATA *v.* RATAN PATEL. **64 I. C. 722 = A. I. R. 1922 Nag. 19.**

—S. 83—Settlement entries.

———*Limitation Act, Arts.* 14 *and* 120*—Suit for amendment is governed by Art.* 14 *of the Lim. Act.*

In the matter of limitation, a suit under S. 83 of the C. P. Land Revenue Act of 1881 for the amendment of Settlement entries is governed by Art. 14, Sch, I of the Limitation Act. A suit of this nature is to be filed within one year of the date on which the assessment is offered to the proprietors after the Record-of-Rights is 'duly made and attested.' (*Hallifax and Dhobley, A. J. Cs.*) ONKAR LAL *v.* SHALIGRAM LALA. **5 N. L. J. 199 = 65 I. C. 970 = A. I. R. 1922 Nag. 76.**

—S. 83—Wajib-ul-arz.

———*Wajib-ul-arz omitting custom of payment of* Desehra Bhet *and* Kot Chhauni*—No direction under S.* 77 (d) *for its being recorded—Suit for correction of record does not lie.*

Where the Wajib-ul-arz omitted to mention the custom of making the payments of *Desehra Bhet* and *Kot Chhauni* and there was no direction under S. 77 (*d*) for its insertion.

Held, a suit for its insertion in the Record and for correcting the same does not lie. (*Hallifax and Kotval, A. J. Cs.*) ZAMINDAR OF HATA *v.* RATAN PATEL. **64 I. C. 722 = A. I. R. 1922 Nag. 19.**

S. 87—Widow—Succession.

———*Widow merely temporary thekadar—Award of Settlement Officer subsequently creating permanent hereditary right—Widow holds such interest as widow of her husband —It descends not as stridhan to her heirs but to her husband's heirs.*

An award by a Settlement Officer, conferring upon a widow rights which she had not hitherto enjoyed must be held to be governed by the provisions of S. 87. Where, therefore, a widow was merely a temporary thekadar, her interest could not be described as a proprietary interest, and subsequently if a permanent and heritable right is created by the award of a Settlement Officer such permanent interest by virtue of the provisions of S. 87 is held by the widow as the widow of her husband and it descends to his heirs and not as stridhan of the widow. (*Courtney Terrell, C. J and James, J.*) SANKAR PRASAD MISRA *v.* BRAJAMOHAN DEB. **A. I. R. 1930 Pat 357.**

—S. 137—Lambardar.

———*Lambardar is not entitled to Mukaddam Gomasta's remuneration.*

The proprietors of a village cannot be made liable for the money paid to a Mukaddam Gomashta over and above 5 per cent, on the land revenue. (*Batten, O. J. C.*) GOVINDRAM *v.* MANAKCHAND. **63 I. C. 1000 = A. I. R. 1921 Nag. 88.**

—S. 137—Lambardari haq.

———The amount of cesses must be excluded in calculating Lambardari haq. (*Batten, O. J. C.*) GOVINDRAM *v.* MANAKCHAND. **63 I. C. 1000 = A. I. R. 1921 Nag 88.**

—S. 152 (a)--Jurisdiction.

———In the case of an estate of disqualified Chief under Government supervision the Political Agent gave sub-lease of Chief's gauntia interest. The Local Government subsequently granting protected status on the kadar —Original lease if not fraudulent, civil Court connot try question about validity of grant of protected status. If, however, the sub-lease on which the protected status was granted is obtained by fraud and is voidable on that ground the sub-lessee can gain nothing by the fact that the protected status has been granted on a fraudulent sub-lease. (*Courtney Terrel, C. J. and James, J.*) SANKER PRASAD MISRA *v.* BRAJMOHAN DEB. **A. I. R. 1930 Pat. 357.**

———(II of 1917).

—S. 2—Agriculture.

———*Khudkhast land left under grass—Tenants cannot graze free of charge—C. P. Tenancy Act* (1920), *S.* 2*—Agriculture.*

Keeping land under grass is "agriculture" within the meaning of that term in the Tenancy Act and therefore where a plot is recorded as khudkhast, villagers are not entitled to graze their cattle free of charge therein merely because it is left under grass. (*Prideaux and Mohiuddin, A. J. Cs.*) ABDUL HAI *v.* BAPURAO. **25 N. L. R. 16 = 116 I. C. 76 = A. I. R. 1929 Nag. 108.**

—S. 2—Gaontiahi village.

———*Gaontia is proprietor of bhogra land and lessee of the rest from Government—All co-sharer Gaontias hold share in tenancy land.*

In a Gaontiahi village the Gaontia is the proprietor of the bhogra and the lessee from Government of all the rest and where out of all the co-sharers the Lambardar alone pays the land revenue in respect of the tenancy lands, and himself takes or pays the difference between that and the amount of rents he collects he would be the sole lessee of the tenancy lands. (*Hallifax, A. J. C.*) RAGHUBAR LAL *v.* NARAYAN. **95 I. C. 381 = A. I. R. 1926 Nag 373.**

—S. 2—Lambardar.

———*Lambardar may include person subsequently ceasing to be proprietor.*

The definition of lambardar may include a person who has been appointed a lambardar and has subsequently ceased to be a proprietor of a mahal. (*Macnair, A. J. C.*) RAGHUBAR *v.* HUKUMCHAND. **123 I. C. 897 = A. I. R. 1930 Nag. 210.**

—S. 2—Rights of Mulguzar.

———*Held* that escheated *malik-makbuza* plots, when made over to the mulguzar for the term of settlement are not survey numbers within the meaning of the C. P. Land Revenue Act. *Held further*, that where such plots are made over to the *mulguzar* for the term of the settlement, unless the *mulguzar* continues to cultivate the land he will have no rights when the settlement expires. (*Macnair, A. J. C.*) MOHANLAL *v.* MUKA. **26 N. L. R. 181.**

—S. 2—Sir right.

———*Accrual—Proprietary and occupancy right must be in same person.*

The *sir* right is undoubtedly made up of two parts, one the proprietary and the other occupancy and it can accrue synthetically by the union of these two parts in the same person, and this is made clear in the proviso to section 2 (17) of the Land Revenue Act, 1917. But it must be in the same person. (*Hallifax, A. J. C.*) SHEORAM *v.* TIKARAM. **19 N. L. R. 26 = 71 I. C. 129 = A. I. R. 1923 Nag. 93.**

—S. 66—Cause of action.

———*Entries by Patwari in khasra and jamabandi do not cast cloud on title of person affected thereby making it necessary for him to bring suit—Cause of action arises when such wrong entries are made by Settlement Officer under S.* 66 (1).

The entries made by the Patwaris in the khasras and Jamabandis are merely a piece of inclusive evidence as to the real position of the persons and do not carry the same weight as the entries made in the Record-of-Rights by the Settlement Officer. Thus wrong entries made by the Patwari do not cast any cloud on the title of the person affected thereby making it necessary for him to rush into Court with a suit. The cause of action to sue arises when such entries are made in the Record-of Rights by the Settlement Officer. (*Subhedar, A. J. C.*) RAO SARDARSING *v.* RAO VISHALSING. **26 N. L. R. 94 = 120 I. C. 321 = A. I. R. 1930 Nag. 92.**

—S. 80—Limitation.

———*Where Revenue authorities decline to interfere no question of limitation arises.*

No question of limitation arises where the only order passed by the Revenue authorities was on declining to interfere. (*Baker, J. C.*) RAMBAX *v.* MOTI. **20 N. L. R. 70 = 78 I. C. 872 = A. I. R. 1924 Nag. 256.**

—S. 80—Presumption.

———*Settlement Officer's order not produced—No presumption can be made in favour of his having duly enquired into question involved.*

The lower Court had held on the evidence that the Settlement Officer had not made an enquiry on the point involved in the case. Neither party produced the order of the Settlement Officer.

Held, that although there was a presumption in favour of the Settlement Officer having passed his orders after due enquiry, yet in the absence of the order passed by him, the Court could not make any presumption that it contained or did not contain any reference to the matter in question as being passed after enquiry, because the party relying on it had not produced it either, although it would have materially strengthened his case. (*Baker, J. C.*) RAGHO *v.* R. M. DOYE. **8 N. L. J. 36 = 87 I. C. 81 = A. I. R. 1925 Nag. 324.**

—S. 80—Scope.

———S. 80 applies to an entry made in accordance with the order of the Settlement Officer and not to an entry made contrary to his order. (*Baker, J. C.*) JAGANNATH *v.* BABU. **81 I. C. 1039 = A. I. R. 1925 Nag. 34.**

—S. 80—Wajib-ul-arz.

———Wajib-ul-arz *prepared at the time of granting proprietary rights not restricting them—Restrictions in a subsequent* wajib-ul-arz *are incorrect—Proprietor was not deprived of any rights ordinarily due.*

In 1903, inferior proprietary rights were conferred on the mailk makbuza holder of mouza Deosur in Amagarh Chowki which was transferred from Chanda to Drug District in 1907. The *wajib-ul-arz* of 1904 prepared about the time when the inferior proprietary rights were granted does not record restrictions on the rights of the inferior proprietor.

Held, that the entries in a subsequent *wajib-ul-arz* which curtail such rights are incorrect and that it could

not be presumed that the inferior proprietor was deprived of any rights, which are ordinarily enjoyed by inferior proprietors. (*Mohiuddin and Macnair, A. J. Cs.*) SHEOSHANKAR *v*, LAL INDRA SHAH. **116 I.C. 666 = A. I. R. 1929 Nag. 139.**

———*Suit to set aside entry—Copy of* wajib-ul-arz *not produced—Copy applied for but not granted—Suit is not bad.*

Where a certified copy of the *wajib-ul-arz* was applied for but was not granted, the same not being ready, its non-production cannot vitiate a suit to set aside an entry in the Settlement Record. 13 C. P. L. R. 140, Dist. 7 N. L. R. 176, Ref. to & Foll. (*Baker, J. C.*) RAGHO *v.* R. M. DOYE. **8 N. L. J. 36 = 87 I.C. 81 = A. I. R. 1925 Nag. 324.**

—S. 82—Presumption.

———*Every entry of the settlement is not, but only entry in the record-of-rights is presumed to be correct.*

S. 82 of the Land Revenue Act shows that when the record-of-rights is duly made and attested all entries therein shall be presumd to be correct until the contrary is shown. This presumption does not apply to every entry of the settlement, but as the clear wording of S. 82 shows it applies only to such entries as are to be found in the record-of-rights. The decision which the Settlement Offieer has to make after the due enquiry into all claims to hold lands rent-free is required to be embodied in paragraph 8 of the wajib-ul-arz which is a part of the record-of-rights or the village. An entry in the jamabandi or a settlement parcha which is only a certificate given to a tenant showing the list of lands held by him is not such an entry. No presumption can therefore be attached to any of these documents in the absence of a copy of the village *wajib-ul-arz*. (*Kinkhede, A. J. C.*) KHUB CHAND *v.* MULLOO. **89 I. C. 741 = A. I, R. 1925 Nag. 452.**

—S. 106—Jurisdiction.

———*Deputy Commissioner's order regarding village customs—Civil Court can set aside order.*

Where a Deputy Commissioner passed an order declaring that the tenants had the right to take water and earth free and that they could take fuel and timber, also that they were entitled to graze a number of cattle and that the excess grazing dues taken by the plaintiff should be refunded to the defendants.

Held, that a suit lay for a declaration that the order complained of was erroneous and for a declaration of the proper rights of the defendants and for an injunction against them. (*Prideaux, A. J. C.*) MADHORAO *v.* LAXMANRAO. **87 I. C. 1054 = A. I. R. 1925 Nag. 371.**

—S. 107—Lease.

———*Lease in* A's *name—Money belonging to* A *and* B—B's *right against* A *is not affected—Principle applies whether lease is granted voluntarily or lessor is compelled to give it—Benami.*

When any person takes in his own name a lease in perpetuity, or indeed any other lease or any other contract, with money belonging to himself and others, the rights of these others against him are not affected by his omission to mention their names, though their rights and liabilities in respect of the other party to the contract may be. There is no difference in principle when the lessor does not grant the lease voluntarily but is compelled to do so under the provisions of S. 107 of the Land Revenue Act. (*Hallifax, A. J. C.*) SUKHDEO *v.* UJAL. **100 I. C. 772 = A. I. R. 1927 Nag. 207.**

———*Plea challenging lease and kabuliyat is barred.*

Anyone, who is entitled to the benefits of a protected thekadar, is equally bound to perform the duties prescribed by the law for such a thekadar. Therefore, the thekadar is not entitled to question the conditions laid down in the lease and kabuliyat. 10 N. L. R. 64, Foll. (*Findlay, Offg. J. C.*) NAKTU *v.* RAMCHANDRA BAPU. **91 I. C. 304.**

—S. 108—Lease.

———*Leases and kabuliyats drawn by Settlement Officer under S.* 108—*Civil Court cannot question terms of such lease.*

Where under the provisions of S. 108 the Settlement Officer enquires into the conditions under which the villages are held and draws up written leases and kabuliyats by which the theka-jamas are enhanced considerably, the civil Court has no jurisdiction to question the terms of the lease and kabuliyats. (*Macnair, A. J. C.*) SHAMSHERKHAN *v.* ABDUL WAHID.

A. I. R. 1930 Nag. 209.

—S. 109—Exclusive possession.

———*Members of thekadar's family taking exclusive possession of a village—No arrangement for joint or divided enjoyment proved—Thekadar is entitled to claim exclusive possession.*

A protected thekadar, who has been excluded from a village and a house therein included in the theka by the other members of his joint family, is entitled to absolute possession of the village as well as the house on the strength of his protected status certificate, even though the other members be held to be co-sharers in the theka with the thekadar when there is no arrangement for the joint or divided management and enjoyment of the village or part thereof among the members as provided in S. 109 (1) (*a*). (*Sir John Wallis.*) BHAGWAN SINGH *v.* DARBAR SINGH.

55 Cal. 725 = 55 I A. 150 = 24 N. L. R. 179 = 27 M. L. W. 763 = 108 I. C. 365 = A. I. R. 1928 P. C. 96 = 54 M. L. J. 576 (P.C.).

———*Exclusive possession can't be granted to protected thekadar against other members of his family.*

No decree for exclusive possession of a village can be granted to the manager of a joint Hindu family who is the recorded protected Thekadar of the village against other members of that family who are co-sharers in the *theka*. S. 109 of the Land Revenue Act (1917) certainly makes the tenure impartible but that does not take away the ownership of any person who has a share in it nor his right to joint possession. (10 N.L.R. 64, Ref.) (*Hallifax, A. J. C.*) KHEDU SINGH *v.* BHAGWAN SINGH. **79 I. C. 400 = A. I. R. 1924 Nag. 163.**

—S. 109—Interpretation.

———*Words "protected thekadar shall be entitled on the expiry of his lease to a renewal and on the occurrence of any such renewal the provisions of S.* 108 *shall apply" do not mean that no enquiry under S.* 108 *shall be made unless lease has expired.*

Words "protected thekadar shall be entitled on the expiry of his lease to a renewal and on the occurrence of any such renewal the provisions of S. 108 shall apply" refer to the expiry of the lease before the enquiry under S. 108 has been made and does not lead to the inference that no enquiry under S. 108 should be made unless the lease has expired. The only inference that can be drawn is that a valid lease affords some protection to a protected thekadar and that on the expiry of that lease, his position requires special consideration. (*Macnair, A.J.C.*) SHAMSHERKHAN *v.* ABDUL WAHID.

A. I. R. 1930 Nag. 209.

—S. 109—Jurisdiction.

———*Deputy Commissioner upon application under S.* 112 *transferring theka to applicant—Subsequent application under S.* 109 (3) *rejected by him—Such order rejecting transfer is not without jurisdiction though transfer was not made by thekadar but by Deputy Commissioner—C. P. Land Revenue Act* (1917), *S.* 112 —(Obiter).

When the Deputy Commissioner upon application under S. 112 and upon proper enquiry and with the consent of the then thekadar transferred the theka to the applicant and where subsequently an application was made under S. 109 (3) to set aside transfer and it was rejected by him as there was nothing bad in the previous transfer such order rejecting an application is not without jurisdiction although the transfer was not made by the thekadar but by Deputy Commissioner upon application and will bar a suit in a Civil Court to set aside the transfer. (*Staples, A. J. C.*) KUNWARIA *v.* PANDI. **118 I. C. 469 = A. I. R. 1929 Nag. 201.**

———*Civil Court cannot entertain application under S.* 109 (3)—*C. P. Land Revenue Act* (1917), *S.* 220—(Obiter).

The fact that S. 109 is not expressly mentioned in S. 220 (1) does not in any way prejudice the general provisions of S. 220 and a civil Court has no authority to entertain an application under S. 109 (3). (*Staples, A. J. C.*) KUNWARIA *v.* PANDI. **118 I. C. 469 = A. I. R. 1929 Nag. 201.**

—S. 109—Surrender.

———*Thekedars co-sharers can have private partition so as to affect surrenders by tenants of several co-sharers.*

There is no distinction between a private partition and a partition effected under the Land Revenue Act. If the proprietors elect to partition the village and if they agree that each proprietor shall collect the rents from those tenants whose lands fall within his share, and if the tenants in their turn make attornment, then each proprietor becomes the landlord of his *patti* within the meaning of the Tenancy Act, and therefore if a tenant in one *patti* surrenders land to the owner of another *patti*, the surrender is not binding on the proprietor of the first *patti* who is consequently entitled to possession. 12 C. P. L. R. 66, Ref. (*Baker, J. C.*) KHET SINGH *v.* MANMOD SINGH. **78 I. C. 134 = A. I R. 1924 Nag. 383.**

—S. 112—Jurisdiction.

———Order by Revenue Court upon matter within jurisdiction is not *ultra vires*, though based on mistake of fact—Application under S. 112 by person purporting to be member of family of protected thekadar—Deputy Commissioner upon enquiry holding appellant entitled to be maintained out of income of theka and transferring theka to him—His order not without jurisdiction though as matter of fact applicant not entitled to be maintained out of income of theka—S. 220 bars jurisdiction of civil Court to question such order. 25 Bom. 337; A. I. R. 1926 Nag. 379; 5 N. L. R. 176, Ref.; 8 N. L. R. 107; 8 N. L. R. 169; A. I. R. 1922 Nag. 10; 25 Cal. 833; 37 Cal. 107; A. I. R. 1924 Bom. 1, Dist. (*Staples, A. J. C.*) KUNWARIA *v.* PANDI.

118 I. C. 469 = A.I.R. 1929 Nag. 201.

—S. 128—Sale.

———*Co-operative Societies Act, S.* 44—*Agriculturist's house is not exempt from sale for debts due to the Society.*

Under S. 44, Co-operative Societies Act, read with S. 128, Land Revenue Act, an agriculturist's house as such is not exempt from sale for the recovery of debt due from him to the Society. (*Findlay, J. C.*) BALAJI SAO *v.* ANAND PRASAD. **23 N. L. R. 66 = 103 I. C. 131 = A. I. R. 1927 Nag. 217.**

—S. 131—Offence under.

———*Penal Code, S.* 353—*C. P. Code, O.* 21, *R.* 24—*O.* 21, *R.* 24 *applies to warrants under L. R. Act, S.* 131—*Resistance to a time-barred warrant issued under S.* 131 *is no offence.*

Where the date fixed for the return of the warrant had already expired on the day that the process-server went to execute it :

Held, that he was not acting in the execution of his duty and the conviction under section 353 for assaulting him was bad. O. 21, R. 24, C. P. Code applies to a warrant issued under S. 131 of the Land Revenue Act. 10 C. 18 and 31 C. 424, Foll. (*Baker, Offg. J. C.*) NANDLAL *v.* EMPEROR. **19 N. L. R. 183 = 76 I. C. 655 = 25 Cr. L. J. 223 = A. I. R. 1924 Nag. 68.**

—S. 151—Pre-emption.

———A claim to pre-empt under S. 151 is enforceable in execution proceedings, and not by separate suit. A I. R, 1926 Nag. 193 and 21 N. L. R. 157, Overruled (*Hallifax, Kinkhede and Macnair, A. J. Cs.*) GOVINDA *v.* MURLIDHAR. **23 N. L. R. 141 = 10 N. L. J. 228 = 106 I. C. 170 = A. I. R. 1928 Nag. 48.**

———*Civil Court executing decree—Application for pre-emption cannot be entertained.*

An application under S. 151 for pre-emption of property sold by a civil Court in execution under C. P. Code, cannot be entertained, though such an application would be entertainable before a Revenue Officer conducting a sale. (*Findly, O. J. C.*) SITARAM *v.* KANIRAM. **21 N. L. R. 157 = 91 I. C. 962 = A. I. R. 1926 Nag. 193.**
[Overruled *See* **A.I.R. 1928 Nag. 48.]**

—S. 156—Set-off.

———*To claim set-off no agreement is necessary.*

S. 156 does not contemplate an agreement between parties in order to entitle a co-sharer to claim set-off although it cannot be claimed without the permission of the Court. (*Hallifax, A. J. C.*) MAN MOHAN SINGH *v.* BISHAL SINGH. **100 I. C. 812 = A. I. R. 1927 Nag. 175.**

—S. 159—Bar to suit.

———*Suit for revenue chargeable but not assessed is for apportionment of revenue and is barred by S.* 220.

The proper course for the proprietor to recover land revenue not assessed from a person who has not paid it is to apply to the Deputy Commissioner to assess a proportionate share of the land-revenue of the village on the land under S. 159 and a suit in a civil Court is barred by S. 220 (*o*). (*Baker, J. C.*) LAXMANRAO *v.* SADASHEO. **22 N. L. R. 121 = 89 I. C. 292 = A. I. R. 1925 Nag. 419.**

—S. 160—Limitation.

———*Period of Limitation under, is* 3 *years and one day—Limitation Act, S.* 12 (1).

By S. 12 (1) of the Lim. Act, or S. 8 of the General Clauses Act and S. 160 of the Land Revenue Act the period of limitation is not three years but three years and one day. Therefore either the claim in respect of the first year is not time-barred or the claim in respect of the fourth year is not premature, if the suit is brought on the first day of the Revenue year which is the first day of limitation in respect of the fourth year and last day in respect of the first year. (*Hallifax, A. J. C.*) NARAYAN PATEL *v.* ABDUL GHANI. **69 I. C. 527 = A. I. R. 1922 Nag. 261.**

—S. 160 (3)—Scope.

———Operation of Limitation Act, S. 6 is not excluded. (*Hallifax, A. J. C.*) MADHO RAO GHOTATE *v.* BALAJI NARAYAN. **91 I. C. 563 = A. I. R. 1926 Nag. 236.**

—S. 169—Limitation.

———*Time for suit as directed by S.* 169 (1) (b) *runs from the date of Deputy Commissioner's order and not Commissioner's order in appeal therefrom.*

An order was passed by Deputy Commissioner on 15th February, 1921 under S. 169 (1) (*b*) requiring plaintiff to institute within six months a suit in the Civil Court for the determination of the questions raised. The plaintiff went up to the Commissioner in second appeal but that appeal was dismissed on 21st November, 1921. The suit as directed by Deputy Commissioner was instituted on 3rd March, 1922 for a declaration of title to the lands.

Held, that the suit not having been brought within six months from the date of the order of the Deputy Commissioner, namely 15th February, 1921, was barred by S. 169 (2) (*b*) of the C. P. Land Revenue Act II of 1917. (*Kinkhede, A, J. C.*) LABHNA SAO *v.* CHETAN. **20 N. L. R. 145 = 79 I. C. 161 = A. I. R. 1924 Nag. 275.**

———*Partition order to file Civil suit—Suit need not be filed within* 6 *years from date of order—Limitation Act, Art.* 120.

A Civil Court can enquire into the question as to whether the *khudkasht* or *sir* lands are or are not the sole property of a person or whether they are joint property ; though it cannot decide whether there should be a partition or not, the question of title may have to be decided for other purposes for partition. Even as regards the question of partition the Civil Courts are not precluded from giving a declaratory decree as to what are the pre-existing titles of the parties, though of course they can give no direction whatever as whether there should be a partition or how a partition should proceed. So far then as a suit is a suit for ascertaining what the titles of the parties respectively are over the lands in the *mahal*, the suit cannot be time-barred merely because the Revenue Officer declined more than six years before the institution of the suit to proceed with a partition until the question of title had been decided in a Civil Court. (*Batten, J. C.*) DONGAR SINGH *v.* VISHWANATH SINGH. **19 N. L. R. 11 = 71 I. C. 205 = A. I. R. 1923 Nag. 86.**

—S. 173—Partition.

———Where, *Sir* or *khudkasht* land, held merely in severalty by a co-sharer and not as his own exclusive property, is allotted, at an imperfect partition, to a *patti* other than his, and there is no express order of the Deputy Commissioner making him a tenant, or he is not recognised or created a tenant of that land by the co-sharer in whose patti it fell, he does not become a tenant of that land. (*Hallifax, A. J. C.*) JAGESHWAR *v.* KRISHNA. **17 N. L. R. 107 = A. I. R. 1921 Nag. 80.**

—S. 173—Rent.

———Where a person does not hold the *sir* land from another person, he is not liable to pay rent to the latter. A. I. R. 1928 Nag. 39, Foll. (*Findlay, J. C.*) KASHI RAO *v.* SANTOSH RAO. **111 I. C. 527.**

—S. 182—Suit for ejectment.

———*Lambardar can sue for ejectment of transferee of absolute occupancy holding transferred without his consent but with consent of other co-sharers.*

Notwithstanding consent of other co-sharers to the transfer of an absolute occupancy holding the lambardar is entitled to maintain a suit for the ejectment of the transferee when the transfer has been made without his consent. (*Prideaux, A. J. C.*) WITHAL *v.* WAMAN. **21 N. L. R. 139 = 82 I. C. 495 = A. I. R. 1925 Nag. 140.**

—S. 187—Lambardar.

——*Appointment of lambardar under S. 187—He must be presumed to have all the powers of lambardar under S. 188.*

Where a lambardar has been appointed under S. 187, until his appointment as lambardar is upset, he must be presumed to have all the ordinary powers of the lambardar under S. 188, Land Revenue Act. (*Findlay, J. C.*) RAOJI *v.* MT. GIRJABAI. **11 N. L. J. 1 = 107 I. C. 527 = A. I. R. 1928 Nag. 123.**

—Ss. 187 to 189—Lambardar.

——*Lambardar of one patti—A lambardar of a mahal can exercise powers in another patti, though not a proprietor therein.*

S. 188 (2) does concentrate in the lambardar certain powers appertaining to the whole proprietary body, which before 1917 were in almost all cases given to him by that body, sometimes expressly but more often tacitly but which need not have been so given and could be withdrawn or modified at any time; now under the new Act the lambardar has those powers by law, and his co-proprietors can neither refuse or limit them at the beginning nor withdraw or modify them subsequently. But this does not by any means involve the impossibility that a lambardar appointed for a mahal should continue to exercise those powers over a separate patti in which he is not even a proprietor. (*Hallifax, A. J. C.*) RAM KRISHNAPURI *v.* TANKA. **6 N. L. J. 85 = 71 I.C.777 = 19 N.L.R. 59 = A. I. R. 1923 Nag. 153.**

—S. 188—Consent.

——*Condition in a* wajib-ul-arz*—Consent of every co-sharer in petty cases is not necessary.*

Where under the *wajib-ul-arz* of the village the lambardar was to manage the village with the consent of the co-sharers, the lambardar need not obtain the consent of every individual co-sharer, in petty cases such as allowing a cow to graze in the village. (*Baker, J. C.*) PARASRAM *v.* KANHIYA. **7 N. L. J. 193 = 84 I. C. 862 = 26 Cr. L. J. 382 = A. I. R. 1923 Nag. 336.**

—S. 188—Construction.

——*Section was intended to give legislative sanction to pre-existing practice—Landlord means whole body of landlords.*

Before 1917 the custom of appointing the lambardar as the agent of the whole of the proprietary body was so general that it was held that he must be deemed to have been so appointed unless and until the contrary was proved and the enactment in S. 188 (2) (*a*) of the Act II of 1917 can only have been intended to give the legislative sanction and confirmation to this view, which after all is only an inference of fact drawn in each particular case from the known facts of that case and the judge's knowledge of the common course of human conduct and public and private business. 13 C. P. L. R. 113; 8 N. L. R. 29, Disc. (*Hallifax, A. J. C.*) LACHMAN *v.* THAKUR BALWANT SINGH. **6 N. L. J. 231 = 84 I. C. 639 = A. I. R. 1923 Nag. 286.**

—S. 188—Co-sharers.

——*Remuneration of mukaddam, gumashta and havildar—Co-sharers are not bound to share unless they have agreed and their services are necessary.*

There is no authority for the view that when a lambardar chooses to engage a havildar or mukaddam gumashta he is entitled to saddle the co-sharers with a share of his wages. At any rate, before he can be entitled

to charge the co-sharers with such expenses, it must be proved that their entertainment was absolutely essential for the collection of the rent and land revenue, and the co-sharers agreed thereto. The legislature intended the lambardari haq to cover expenses like these. (*Findlay, J. C.*) MT. SARJI BAI *v.* DURGA. **102 I. C. 612 = A. I. R. 1927 Nag. 267.**

——*Expenses of public festivals—Co-sharers are not bound to share unless they have agreed to—Payment in past does not constitute implied agreement.*

Before the co-sharers can be made liable for money which the lambardar spends on celebration of public festivals, distinct proof of a prior agreement to share these expenses on the part of the other co-sharers would be necessary. Such items cannot be regarded as essential expenses for village management. The mere fact that they were shared in the past is not sufficient to assume that there was an implied agreement to pay. (*Findlay, J. C.*) MT. SARJI BAI *v.* DURGA. **102 I. C. 612 = A. I. R. 1927 Nag. 267.**

——*C.P. Code, S. 34.*

There is certainly no ground for granting interest where a co-sharer makes no demand for his share of the profits. (*Batten, J. C.*) MAKUNDRAM *v.* SRI KRISHNA. **19 N. L. R. 24 = 73 I. C. 142 = A. I. R. 1923 Nag. 197.**

—S. 188—Interest.

——*Suit for profits against landlord—Interest should be allowed from 1st November of the year for which profits are due.*

Under S. 188 (2) (*c*) of the Land Revenue Act, 1917, the cause of action accrues from 1st of November, therefore, interest on profits should be allowed from that date and not from the last day of the agricultural year when they became due. (*Hallifix, A. J. C.*) NARAYANDAS *v.* RADHABAI. **9 N. L. J. 7 = 93 I. C. 196 = A. I. R. 1927 Nag. 62.**

——*Refusal to pay debt—Interest must be allowed.*

An offer to pay about half the sum really due is clearly a refusal to pay the debt. The plaintiff is therefore entitled to interest. Interest should not be awarded in suits of this nature unless the plaintiff proves special circumstances entitling him to claim interest one of such circumstances is the refusal to pay the debt. (*Hallifax, A. J. C.*) YADO PRASAD *v.* GANGARAM **70 I. C. 72 = A. I. R. 1923 Nag. 211.**

—S. 188—Interpretation.

——*Term "collect village profits" explained.*

The term "collect the village profits" in S. 188, sub-S. (2) (*c*), includes profits said to have been derived by co-sharers in the village from excess *sir* and *khudkasht* land in their possession. (*Findlay and Prideaux, A. J. Cs.*) SHANKAR RAO *v.* GYANBA **11 N. L. J. 113 = A. I. R. 1928 Nag. 176.**

—S. 188—Lambardar.

——*Lambardar of undivided village has no sole right to appoint village servants.*

There is no authority to support the proposition that a person as the lambardar of the undivided village has the right to appoint persons who simply make a living in the village by their labour as village servants and a co-sharer has no right to interfere with their appointment. (*Subhedar, A.J.C.*) KASHIRAM HAZARI *v.* AASARAM. **1929 Cr. C. 532 = 31 Cr. L. J. 20 = 120 I. C. 215 = A. I. R. 1929 Nag. 328.**

——*C. P. Tenancy Act (1920), S. 49—Ex-proprietor becoming an occupancy tenant of his sir land held in severalty is tenant of the purchaser of his village share—The latter and not the lambardar can claim rent from him.*

Where a co-proprietor of a village sells his share to a third party and becomes an occupancy tenant of his *sir* held in severalty, such an ex-proprietor is the tenant of his vendee and the vendee is primarily entitled to claim the rent and not the lambardar. Having regard to the definition of "landlord" and "tenant,' in S. 2 (7) and (11) respectively of the Tenancy Act, this conclusion is inevitable. A. I. R. 1928 Nag. 39 (1), Foll. S. 188 (2) (*a*), Land Revenue Act, does not exclude the co-sharer concerned in such a case from demanding rent from his tenant. (*Findlay, J. C.*) BAPU *v.* SANTOSH RAO. **108 I. C. 790 = A. I. R. 1928 Nag. 229.**

———*Section does not authorise lambardar to grant lease of land held separately by other co-sharers.*

S. 188 of the Land Revenue Act gives no authority to the lambardar to grant a lease of land already separately held by other co-sharers and thus to oust them. (*Kinkhede, A. J. C.*) SHEIKH DANGU *v.* NARAYAN. **7 N. L. J. 241 = 85 I. C. 73 = A. I. R. 1925 Nag. 181.**

———*Lambardar cannot transfer rights of other co-sharers without their consent.*

Under S. 188 of the C. P. Land Revenue Act the lambardar has authority to manage the village on behalf of the proprietors. But under that section the lambardar has no authority to dispose of the proprietary rights of other co-sharers without their consent. (*Baker, J. C.*) MT. RANGUBAI *v.* MADHO RAO. **81 I. C. 276 = A. I. R. 1925 Nag. 101.**

———*Suit within six months of the end of the year is not premature.*

A suit within six months of the end of the year by co-sharers against *lambardar* mentioned in S. 188 (2) (*c*) is not premature in view of S. 6. (*Prideaux, A. J. C.*) SARJI RAO *v.* HARAKCHAND. **6 N. L. J. 234 = A. I. R. 1923 Nag. 287.**

———*Leasable trees not leased by* lambardar—*No negligence can be presumed.*

Where a lease of the sindi trees for tapping could admittedly bring in Rs. 50 a year, but no such lease was given, *held*, until it is at least alleged that the actual reason was negligence it is not incumbent on the *lambardar* to deny or disprove it, and the presumption is that it was not negligence. 15 N. L. R. 85, Ref. (*Hallifax, A. J. C.*). YADO PRASAD *v.* GANCARAM. **70 I. C. 72 = A. I. R. 1923 Nag. 211.**

—S. 188—Landlord and tenant.

———*Fractional co-sharer leasing his* sir *land—Lessee recorded as occupancy tenant surrendering land to lambardar—Land becomes original grantor's separate* khudkasht *and lambardar cannot lease it to any one—Original tenant is entitled to possession.*

A fractional co-sharer in a village holding land in severalty as *sir* leased it to another who was recorded as an occupancy tenant. Then the latter surrendered the land to the lambardar who put in another as an occupancy tenant. In a suit by the fractional shareholder against this last named person for possession.

Held, that immediately on the extinction of the original lessee's rights the land became the plaintiff's separate *khudkasht*, that the lambardar was not entitled to grant a lease of it and that plaintiff was entitled to possession. (*Hallifax, A. J. C.*) UMED SINGH *v.* RAMDAYAL. **63 I. C. 733 = A .I. R. 1921 Nag. 163 (2).**

—S. 188—Suit for rent.

———*Lambardar can sue for arrears of rent due for the period of his predecessor.*

A suit for arrears of rent by a lambardar for the period for which his predecessor held office is maintainable. (*Kotval, A. J. C.*) TEMPLE OF SHRI RAMCHANDRA OF KAMTIA (THROUGH MANAGER, BALARAM) *v.* KANHAIYALAL. **22 N. L.R. 11 = 98 I. C. 357 = A. I. R. 1926 Nag. 244.**

—S. 189—Lambardar.

———*Lambardar continues to be so even after he ceases to be proprietor.*

Where a person who is a proprietor and is appointed a lambardar, the appointment continues even after he ceases to be a proprietor till he is removed from office under S. 189. A. I. R. 1928 Nag. 123, Rel. on; A. I. R. 1923 Nag. 153, Expl. (*Macnair, A. J. C.*) RAGHUBAR *v.* HUKUMCHAND. **123 I. C. 897 = A. I. R. 1930 Nag. 210.**

—S. 192—Cost of Collection.

———*Cost of collection can be awarded on general principles or under Contract Act, S. 70.*

Even if S. 192 does not entitle lambardar to get 5 per cent of the revenue payable as costs of collection in the absence of any order by the Deputy Commissioner, he is entitled to get it on general principles of equity or under S. 70 of the Contract Act. (*Hallifax, A. J. C.*) SHANKARGIR GURU *v.* CHINNIJI. **6 N. L. J. 1 = 71 I. C. 140 = A. I. R. 1923 Nag. 164.**

—S. 192—Lambardar.

———In all appointments of lambardars the remuneration of that post, unless fixed by a revenue officer is not recoverable by suit. A. I. R. 1926 Nag. 274 and 6 N. L. R. 27, Foll. Similarly, if such a suit is not maintainable, on the same analogy a defence also may not be available. (*Kinkhede, A. J. C.*) HARPRASAD *v.* CHHADAMI. **105 I. C. 567 = A. I. R. 1928 Nag. 68.**

———Sadar lambardar as such is not entitled to any remuneration. A. I. R. 1926 Nag. 274, Foll. (*Hallifax, A. J. C.*) MANMOHAN SINGH *v.* BISHAL SINGH. **100 I. C. 812 = A. I. R. 1927 Nag. 175.**

———A sadar lambardar is not entitled as such under the Land Revenue Act to any remuneration at all. (*Hallifax, A. J. C.*) KESHAO RAO BUTI *v.* KRISHNA RAO KOMTI. **23 N. L. R. 31 = 93 I. C. 121 = A. I. R. 1926 Nag. 318.**

———*Fixation of lambardar's remuneration is not a condition precedent for a suit for its recovery in Civil Court—S. 192 does not abrogate lambardar's right to recover lambardari dues fixed under rules under S. 137 where he is appointed before the new Act.*

S. 192 (1) does not say that the fixation of the remuneration payable to a lambardar is a condition precedent to his maintaining a suit for the recovery of such remuneration in a Civil Court although the section as amended by Act VI of 1923 confers exclusive jurisdiction on a Revenue Court to fix such remuneration. S. 192 does not abrogate the right of a lambardar who has been already appointed, before the new Act came into force to recover his lambardari dues at the rate fixed by the rules under S. 137 of the repealed Act. S. 229 of the new Act expressly saves this right. (*Kinkhede, A. J. C.*) JAN RAO *v.* LAXMAN. **20 N.L.R. 142 = 83 I.C. 172 = A.I.R. 1925 Nag. 129.**

———*Lambardar was entitled to get remuneration.*

Defendant's contention was that the plaintiff was not entitled to get any remuneration at all as lambardar because the Deputy Commissioner had never fixed the remuneration for the lambardar of that village under S. 192 of the Land Revenue Act, 1917

Held, that as the defendant has admitted in the first Court that the plaintiff was legally entitled to recover this money from him, he could not deny it in appeal, and that in any case S. 229 of the Act II of 1917 continued the state of things existing under Act XVIII of 1881 in regard to the remuneration of lambardars (*Hallifax, A. J. C.*) BHOLARAM *v.* TUKARAM.

CENTRAL PROVINCES LAND REVENUE ACT 1917), S. 203—Abadi.

66 I.C. 465 = A. I. R. 1922 Nag. 111.

—S. 203—Abadi.

———*A tenant in one patti of a mahal cannot hold house site in the abadi land of another patti, when the abadi land is sub-divided into pattis.*

Where the abadi of the mahal has been divided into pattis so that each pattidar has his separate abadi for the tenants or agriculturist of his patti, the agriculturists or non-agriculturists of each patti have a separate provision made for their residence in the abadi of their own patti and have no right to look to another patti or its abadi for residential quarters. (*Kinkhede, A. J. C.*) DAYARAM GANPATSA *v.* DASHRATH RATIRAM.
10 N.L.J. 262 = 110 I.C. 834 = A. I. R. 1928 Nag. 86.

———*House site—Owner of house having no intention of constructing a house for residence there—Landlord is entitled to its possession.*

Sub-section (1), S. 203 means that each person described in it is entitled to a site of reasonable dimensions for his house, his house meaning his residence. Unless, then, there is an intention to construct a house for a residence, there is no right to any site and such a person is liable to ejectment at the will of the landlord. 11 N. L. R. 126, Foll. (*Macnair, A.J.C.*) MT. RANIBAHU *v.* RAO NARAYANRAO. **23 N.L.R. 150 = 109 I.C. 177 = A. I. R. 1928 Nag. 69.**

———*Occupation by tenant can be ended by landlord selling the land unless tenant was given the land as house site.*

A tenant occupying Abadi site in a village is only a licensee. S. 203 of the Act does not help him unless the land is given to him as house site. If the landlord sells the land, the license will come to an end. A prescriptive title cannot be acquired by the tenant in regard to such land in the absence of any assertion of adverse title against the landlord. (*Baker, J. C.*) PUNJARAJSA *v.* CHAGANLALSA. **82 I. C. 182 = A. I. R. 1925 Nag. 81.**

———*Even person becoming agriculturist subsequent to his entering* abadi *is not competent to transfer site.*

Even a person who originally held site in abadi as a non-agriculturist but became agriculturist subsequently is equally incompetent to transfer the same as a person who entered the abadi as an agriculturist. (*Hallifax, A. J. C.*) ABDUL AZIZ KHAN *v.* BAIRODAN.
75 I. C. 925 = A. I. R. 1924 Nag. 225.

—S. 203—Abandonment.

———*Mortgage of a house is not necessarily abandonment—License is heritable — Burden of proof is on stranger to prove that his transferer had transferable interest.*

A license granted to a non-agriculturist labourer to occupy the abadi site is heritable but if the heir has never signified his intention to take it up, the malguzar cannot be presumed to have knowingly extended the license to him. A landlord has a right to demand back possession of abadi site from a stranger in possession of the house on it and the burden of the proof lies on the latter to establish that his transferer had a transferable interest in the abadi and not merely a license to occupy or that the terms of the license were such as disentitled the proprietor from re-entering on the site. Execution of a possessory mortgage-deed by an agriculturist resident of an abadi site does not work a forfeiture so as to give a right of re-entry to the proprietor, where there is no proof that the agriculturist has abandoned the site finally. The mere fact that the equity of redemption has not yet been foreclosed does not necessarily indicate that the mortgagor or his heirs have maintained their hold on the abadi site of the house. (*Kinkhede, A.J.C.*) BHAGWAN *v.* RAGHUBAR DAYAL.

CENTRAL PROVINCES LAND REVENUE ACT (1917), S. 203—Interpretation.

86 I. C. 763 = A. I. R. 1925 Nag. 396.

—S. 203—Alienation.

———*Transfers of all kinds of houses in abadi without malguzar's permission are forbidden.*

Wajib-ul-arz forbids all kinds of transfers, whether by sale or otherwise of houses in the abadi without malguzar's consent. Thus a mortgage of such a house without malguzar's permission is void against him and can only be enforced as against the superstructure. (*Jackson, A. J. C.*) JADURAM *v.* BHAWANISAO. **13 N. L. J. 1 = 121 I. C. 666 = A. I. R. 1930 Nag. 89.**

———*Person having site insufficient for his agricultural needs can purchase abadi site without landlord's consent—Civil Court can decide validity of transfer.*

The words "such site" in Cl. (3) do not refer to the site which it is desired to transfer. They refer to the words "a house-site of reasonable dimensions in the abadi." A person having a site insufficient for his requirements as agriculturist is, therefore, entitled to purchase an abadi site without the permission of the landlord. Cl. (4), S. 203 does not prevent Civil Court from deciding whether such a transfer is valid. (*Macnair, A. J. C.*) PRAMADAS *v.* BALKISAN.
114 I. C. 452 = A. I. R. 1929 Nag. 64.

———*A tenant has right to transfer site subject to exceptions without landlord's consent.*

A tenant has a right of transfer subject to certain exceptions mentioned in the section. A transfer of a site to a person entitled to and not already in possession of it being perfectly legal is not voidable at the instance of the landlord, because the transferrer and the transferee settled the bargain without reference to him. (*Kinkhede, A.J.C.*) DATTATRAYA BALWANT BHARADE *v.* WAMAN RAO RUSTAM RAO. **11 N. L. J. 240 = 113 I.C. 176 = A. I. R. 1929 Nag. 59.**

———*Mortgage by tenant does not entitle landlord to sue for re-entry.*

As a mortgage is not a transfer, which permanently extinguishes a tenant's interest, it affords no cause of action to a landlord to sue for re-entry. In respect of an Abadi site the landlord does not get any right of re-entry under S. 203 of the C. P. Land Revenue Act unless there is a permanent transfer such as a sale, etc. It is not competent for him to sue for ejectment from the Abadi site when there is only a temporary loss of a right of enjoyment of occupation of the site on account of an execution of a possessory mortgage. (*Kinkhede, A.J.C.*) LABHCHAND *v.* DARYA SINGH.
82 I. C. 1056 = A. I. R. 1925 Nag. 204.

—S. 203—Interpretation.

———*Word "contract" does not include entry in* wajib-ul-arz.

The word "contract" cannot be so liberally or widely interpreted as to include within its scope an entry in the *wajib-ul-arz* that the landlord's permission is necessary for the validity of a transfer. (*Kinkhede, A. J. C.*) DATTATRAYA BALWANT BHARADE *v.* WAMAN RAO. RUSTAM RAO. **11 N. L. J. 240 = 113 I.C 176 = A.I.R. 1929 Nag. 59.**

———*"Every person" includes females but excludes a married female living with her husband.*

"Every person" must include females, but excludes married females living with their husbands as by their doing so they are deemed to have no intention to have separate house for themselves and so they are not entitled to house sites in the abadi land. (*Macnair, A. J. C.*) MT. RANIBAHU *v.* RAO NARAYAN RAO.
23 N.L.R. 150 = 109 I.C. 177 = A.I.R. 1928 Nag. 69.

———Sub-Section (2) merely lays down that the right to a site is forfeited when certain contingencies happen: it it does not state that a right which exists cannot cease unless one of those contingencies happens. (*Macnair, A. J. C.*) MT. RANIBAHU *v.* RAO NARAYAN RAO. **23 N.L.R. 150 = 109 I.C. 177 = A.I.R. 1928 Nag. 69.**

—S. 203 (8)—Wajib-ul-arz.

——*Express provision that tenant of* 30 *years can transfer his house site—No consent of lambardar was held necessary.*

Where wajib-ul-arz provided that such of the tenants as are in possession of village sites from before the thirty years settlement are fully entitled to transfer the said sites and it was contended that lambardar's consent was necessary to a transfer of a house in abadi.

Held, that no consent was necessary in view of the explicit language of the wajib-ul-arz. 11 N. L. R. 126, Dist. (*Findlay, J. C.*) BALAJI JAGANATH KALAR *v.* SARFRAJKHAN. **24 N. L. R. 85 = 109 I. C. 647 = 11 N. L. J. 123 = A. I. R. 1929 Nag. 41.**

—S. 212—Ryotwari lands.

——*Where ryotwari lands are in possession of one heir other heirs have a right to share therein—Ryotwari fields form part of the estate of a man.*

Where ryotwari fields are in the possession of one heir and they are entered in his name in the Revenue papers, the right of other heirs to a share therein is not lost by such entry. They can sue for a share in the produce or they may apply for partition to the Dy. Commissioner. 8 C. P. L. R. 11, Dist. (*Baker, J. C.*) RAHMAT BI *v.* BHURI BI. **6 N. L. J. 161 = 73 I.C. 959 = A.I.R. 1923 Nag. 307.**

—S. 219—Jurisdiction.

——*Deputy Commissioner can eject a trespasser on communal land temporarily but not permanently.*

The right to exclude a trespasser on communal land permanently is not a matter which the Deputy Commissioner can determine under S. 219, C. P. L. R. Act, he can only eject him summarily and the section itself expressly saves the jurisdiction of the Civil Court to decide the question of the right of permanent exclusion. (*Halifax, A. J. C.*) SAKHARAM *v.* RAMCHANDRA. **75 I. C. 914 = A.I.R. 1923 Nag. 326.**

—S. 220—Applicability.

——*Does not apply where no correction is sought nor any ruling is sought on matters in S.* 220.

Where plaintiffs do not ask for any correction of the Record-of-Rights or for any ruling in respect of any of the matters referred to in S. 220, that section does not apply. (*Baker, J. C.*) RAMBAX *v.* MOTI. **20 N. L. R. 70 = 78 I.C. 872 = A.I.R. 1924 Nag 256.**

—S. 220—Jurisdiction.

——*Order by Revenue Court upon matter within jurisdiction is not* ultra vires *though based on mistake of fact—Application under S.* 112 *by person purporting to be member of family of protected thekedar—Deputy Commissioner upon enquiry holding appellant entitled to be maintained out of income of theka and transferring theka to him—His order not without jurisdiction though as matter of fact applicant not entitled to be maintained out of income of theka—S.* 220 *bars jurisdiction of Civil Court to question such order—C.P. Land Revenue Act* (1917), *S.* 112.

An order passed by a competent Revenue Court upon a matter within its jurisdiction is not *ultra vires* or without jurisdiction even though it is based upon a mistake of fact. Where an application is made under S. 112 by a person purporting to be a member of the family of protected thekedar, who is entitled to share in the theka or to be maintained out of its income and the Deputy Commissioner upon enquiry holds that that member is entitled to be maintained out of the income and transfers the theka in his favour, his order cannot be without jurisdiction even though as a matter of fact the applicant is not entitled to be maintained out of the income; and S. 220 bars the jurisdiction of the Civil Court to question such order as it is not without jurisdiction. 25 Bom. 337; A. I. R. 1926 Nag. 379; 5 N. L. R. 176, Ref.; 8 N. L. R. 107; 8 N. L. R. 169; A. I. R. 1922 Nag. 10; 25 Cal. 833; 37 Cal. 107; A. I. R. 1924 Bom. 1, Dist. (*Staples, A. J. C.*) KUNWARIA *v.* PANDI. **118 I.C. 469 = A.I.R. 1929 Nag. 201.**

——*Civil Court cannot entertain application under S.* 109 (3).

Obiter: The fact that S. 109 is not expressly mentioned in S. 220 (1) does not in any way prejudice the general provisions of S. 220 and a Civil Court has no authority to entertain an application under S. 109 (3). *Staples, A. J. C.*) KUNWARIA *v.* PANDI. **118 I. C. 469 = A. I. R. 1929 Nag. 201 (206).**

——*Question regarding any engagement with Government or agreement by proprietors not involved—Jurisdiction of Civil Courts is not excluded.*

Where no question as to the validity of any engagement with the Government for the payment of land revenue or of any agreement entered into by superior or inferior proprietors in a settlement or sub-settlement arises, the jurisdiction of the Civil Court is not excluded. (*Mohiuddin and Macnair, A. J. Cs.*) SHEOSHANKAR *v.* LAL INDRA SHAH. **116 I. C. 666 = A.I.R. 1929 Nag. 139.**

——*Suit for possession of abadi.*

A suit for possession of an abadi site, by a co-sharer to whose share it has fallen, against persons who own another patti in the same village can be entertained by Civil Courts. (*Ghulam Mohiuddin, A.J.C.*) NANHE *v.* GANGDEO. **112 I.C. 648 = A.I.R. 1929 Nag. 17.**

——*Suit by lambardar for arrears of his remuneration—Civil Court can try.*

A Civil Court is not precluded by anything in S. 220 of the Act from maintaining a claim by lambardar to recover the arrears of his remuneration. (*Kinkhede, A.J.C.*) GAN RAO *v.* LAXMAN. **20 N. L. R. 142 = 83 I. C. 172 = A. I. R. 1925 Nag. 129**

—S. 220—Lambardar.

——*Sadar lambardar is entitled to remuneration like lambardars but not until it is fixed.*

S. 2 (15) implies that sadar lambardar has to collect the land revenue from his fellow-lambardars and pay it to Government along with the land revenue of his own patti. He is no more and no less liable than the other lambardars for any deficiency on the part of any of the lambardars. The sadar lambardar is not *prima facie* entitled to the whole of remuneration. This share can only be fixed by the revenue authority under S. 220 (*p*). (*Findlay, O.J.C. and Kotval, A.J.C.*) ANANDRAO *v.* DAULAT. **22 N. L. R. 37 = 92 I. C. 909 = A. I. R. 1926 Nag. 274.**

CENTRAL PROVINCES LOCAL SELF-GOVERNMENT ACT (IV OF 1920).

—S. 73—Scope.

——*Claims arising out of contract are not governed by S.* 73.

The words " anything done or purporting to be done under the Act or any rule or bye-law made under it " in S. 73 must be interpreted as relating only to an act done or purporting to be done in direct execution of the Act or of a rule or bye-law. Breach of a duty imposed or exercise of a power conferred, by a contract is not such an act. 2 Mad. 124; 22 Mad. 524; 31 Mad. 522; 19 Bom. 407 and 2 C. W. N. 689, Rel.; A. I. R. 1922 Bom. 380, not Appr.; A. I. R 1923 All. 267, Dist.

(*Jackson and Mohiuddin, A. J. Cs.*) K. L. NEYOGI & CO. *v.* DISTRICT COUNCIL, BULDANA.
26 N. L. R. 81 = 123 I. C. 903 = 13 N. L. J. 71 = A. I. R. 1930 Nag. 179.

CENTRAL PROVINCES MUNICIPAL ACT (XV OF 1903).

—S. 21—Bye-laws, Cl. 4.

——*Committee, if it adopts procedure of sending round one notice of special meeting to all members, should send it round to every member concerned that call may come to his notice.*

Obiter: Taking into consideration the intention of either sending, giving or serving notice of a special meeting which is to invite every member because he must be given facility to exercise his right to attend it and to influence his deliberations, the committee, if it adopts the procedure of sending round one common notice to all members can be reasonably expected to send it round to every one of the members concerned as often as possible in order that the call may come to his notice. (*Prideaux and Kinkhede, A. J. Cs.*) MUNICIPAL COMMITTEE, KHANDWA *v.* RADHAKISON.
A. I. R. 1930 Nag. 157.

——*Mere circumstance that proof of service of notice of special meeting to a member is not forthcoming is no reason for holding that meeting is not duly summoned and properly conducted.*

Where Municipal records are in due order and state that meetings are held, it will be presumed in the absence of clear evidence to the contrary that such meetings are duly summoned and properly conducted. Thus mere circumstance that the matter of personal service of notice of a meeting to a member is left in doubt and its proof is not forthcoming is no reason for holding that meeting is not duly summoned and properly conducted. (*Prideaux and Kinkhede, A.J.Cs.*) MUNICIPAL COMMITTEE KHANDWA *v.* RADHAKISON.
A. I. R. 1930 Nag. 157.

——*Provisions as to certificate are not mandatory.*

Obiter: The provisions in respect of the certificate that the proceedings have been confirmed as required by cl. 19 of the bye-laws are merely discretionary and not mandatory. (*Prideaux and Kinkhede, A. J. Cs.*) MUNICIPAL COMMITTEE, KHANDWA *v.* RADHAKISON. **A. I. R. 1930 Nag. 157.**

—S. 24—Irregularity.

——*Irregularity of decision by circulating papers is not curable by S. 24.*

Where there was no meeting of the Building Sub-Committee and all that the Engineer did was to circulate the papers to a majority of the members of such Building Sub-Committee who endorsed on them their opinions that the application should be refused,

Held, that the expedient of circulating the papers to individual members is highly inexpedient, and the defect in question was not curable or cured by S. 24. (*Findlay, O.J.C.*) MAROTRAO *v.* MUNICIPAL COMMITTEE, NAGPUR. **92 I. C. 796 = A. I.R. 1926 Nag. 281.**

—S. 30—Auction sale.

——*Auction sale held on behalf of Municipality and confirmed by President in a meeting becomes a contract.*

The word "contract" as used in Ss. 30 and 31 of the C.P. Municipal Act must be taken in its ordinary meaning. Where a Municipal Committee sold certain grass by auction to the plaintiff as the highest bidder and the sale was confirmed in a resolution of the municipality and memorandum of auction was signed by plaintiff highest bidder) and the Vice-President and Secretary f the Municipality,

Held, that the contract as contemplated by Ss. 30 and 31 was complete. (*Baker, J.C.*) ABDUL AZIZ KHAN *v.* MUNICIPAL COMMITTEE, KHANDWA.
78 I. C. 1052 = A. I. R. 1924 Nag. 227.

—S. 35—Market due.

——*"Market due" meaning—Unpaid lease—Money is not a tax recoverable under S. 44.*

At an auction held by the Municipal Committee of Nagpur of the right to sell provisions at a certain stall in the Cotton Market near the Railway Station the applicant Yeshwant made the highest bid. He paid a portion of the amount of his bid and the sale was presumably sanctioned in due course. But before Yeshwant executed the deed required of him, the Committee broke one of the conditions of the contract and he filed a suit for damages. The Committee then applied under S. 44 to a Magistrate to recover the unpaid balance of the lease money from him by distress and sale of his moveable property.

Held, that the unpaid lease money was not a "market-due" or tax of the kind mentioned in S. 35 as it was never imposed in the manner prescribed by that section and, therefore, not recoverable by the summary procedure provided by S. 44. (*Hallifax, A. J. C.*) YESHWANT RAO *v.* NAGPUR MUNICIPALITY.
19 N. L. R. 122 = 73 I. C. 52 = 24 Cr. L. J. 516 = A. I. R. 1923 Nag. 264.

—S. 39—Notice.

——*Service of notice on members forming quorum is not necessary.*

Obiter: The statutory requirement is the presence of a particular quorum for the validity of a special meeting. It does not require that the quorum must be of members served with notice of meeting. (*Prideaux and Kinkhede, A. J. Cs.*) MUNICIPAL COMMITTEE, KHANDWA *v.* RADHAKISON. **A.I.R. 1930 Nag. 157.**

—S. 39—Notification of imposition of tax.

——*It is not only under S. 67 (8) but even under the old Act, law makes notification of imposition of tax issued by Local Government conclusive proof of the fact that "the tax has been imposed in accordance with the provisions of the law applicable."*

The new S. 67 (8) has not introduced any new change in the existing state of the law beyond making S. 67 self-contained; it expressly dispenses with the necessity of reading it in conjunction with the corresponding provisions of Ss. 22 (5) and 23, C. P. General Clauses Act (I of 1914). Therefore whether the old C. P. Municipalities Act or the new one is applied, the law makes the notification of the imposition of the tax issued by the Local Government the conclusive proof of the fact that "the tax has been imposed in accordance with the provisions" of the law applicable and so the moment the notification is proved to have been published the Judge is expressly directed to dispense with all corroborative evidence and to forbid all opposing evidence and to draw the presumption of law that the tax is imposed in accordance with the provisions of the law authorizing its imposition. (*Prideaux and Kinkhede, A.J.Cs.*) MUNICIPAL COMMITTEE, KHANDWA *v.* RADHAKISON JAIKISAN. **A. I. R. 1930 Nag. 157.**

—S. 39—"Purposes of the Act."

Obiter: The Act being intended to make better provision for organization and administration of municipalities, any tax imposed as a means to this end is within its purposes. (*Prideaux and Kinkhede, A.J.Cs.*) MUNICIPAL COMMITTEE, KHANDWA *v.* RADHAKISON. **A. I. R. 1930 Nag. 157.**

—S. 64—Building.

——*Hut is a building—S. 68 does not apply to leased nazul-land.*

CENTRAL PROVINCES MUNICIPAL ACT (1903), S. 66—Building.

Cowshed is a building. S. 68 has no application in the case of a nazul plot specifically let out for a long term of years for building thereon by a private individual. (*Findlay, O.J.C.*) MAROTRAO *v.* MUNICIPAL COMMITTEE, NAGPUR. **92 I. C. 796 = A. I. R. 1926 Nag. 281.**

—S. 66—Building.

———A building means a structure with a roof. (*Drake Brockman, J.C.*) THAKUR LAL *v.* SECRETARY, MUNICIPAL COMMITTEE, KHANDWA. **22 Cr. L. J. 754 = 64 I. C. 274 = A. I. R. 1921 Nag. 147.**

—S. 105—Bye-law 5 (a).

———*Lease can only be terminated according to law and it does not come to end at mere will of Committee—Transfer of Property Act, S.* 106.

A lease can only be terminated according to law and it does not come to an end, at the sweet will of the Committee, by passing a resolution. A Municipal Committee granted a lease of immovable property. The lease was from month to month. No 15 days' notice as required by law was given, but the Committee passed a resolution by which the lessee was to quit the land after seven days' notice. On lessee's failure to do so he was convicted for breach of the bye-law 5 (*a*).

Held, that the lease could only be terminated with 15 days' notice and as no such notice was given there was no breach of the bye-law 5 (*a*), and the conviction was illegal. (*Mohiuddin, A.J.C.*) MULCHAND BALBADHAR *v.* MUNICIPAL COMMITTEE, GONDIA. **1929 Cr. C. 511 = A. I. R. 1929 Nag. 332.**

—S. 105 (1)—Bye-Law No. 7 and S. 139.

———Bye-Law No. 7 does not apply to the case of a refusal to vacate land held for some years and subsequently found to be nazul. (*Hallifax, A.J.C.*) SHRIPATI *v.* SECRETARY, MUNICIPAL COMMITTEE. **A. I. R. 1923 Nag. 157.**

—S. 114—Permission.

———*Evidence Act, S.* 91—*Provisions of S.* 91 *are not applicable to permission granted under S.* 114.

The provisions of S. 91 are not applicable to permission granted by municipality under S. 114 for connecting the private drain with the municipal drain. (*Subhedar, A.J.C.*) ABDULLA *v.* AMBADAS. **120 I. C. 221 = A. I. R. 1930 Nag. 130.**

—S. 122—Encroachment.

———*Encroachment by previous owner—Present owner omitting to remove it is not guilty.*

S. 122 cannot be interpreted as making punishable an omission to remove an existing encroachment not made by the accused person. The word "obstructs" in S. 122 of the Act applies to the persons who built or caused to be built the encroachment and not to the accused who originally had nothing to do with its erection. Sub-S. (2) of S. 67 read with S. 139 provides a remedy in the case of an encroachment not made by the present owner. (*Prideaux, A. J. C.*) CHUNILAL *v.* MUNICIPAL COMMITTEE, ARVI. **23 Cr. L. J. 127 = 65 I. C. 559 = 18 Nag. L. R. 92 = A. I. R. 1922 Nag. 167.**

CENTRAL PROVINCES MUNICIPALITIES ACT (II OF 1922).

—Notification.

———*Berar Municipal Law* (1886), *S.* 41 (1) *A* (*b*)—*Notification No.* 456, *dated 29th April,* 1913—*Effect.*

The operation of the Notification No. 456, dated the 29th April, 1913, is not subject to the maximum of Rs. 500 imposed by proviso 1 to R. 1 of the Hyderabad Residency O. 112, dated the 18th March, 1899. (*Kinkhede, A. J. C.*) DEPUTY COMMISSIONER, AKOLA *v.* GURUPRATAPSING. **22 N. L. R. 153 = 99 I. C. 422 = A.I.R. 1927 Nag. 102 (104).**

CENTRAL PROVINCES MUNICIPALITIES ACT (1922), S. 66—Interpretation.

—S. 12—Vote.

———*Any member of joint Hindu family having an annual income of not less than Rs.* 120 *is entitled to vote—Explanation to cl.* (*a*) *applies only when total income exceeds Rs.* 120 *but not the separate income individually.*

Where a member of a joint Hindu family is clearly a person in receipt of an annual income of not less than Rs. 120, he is entitled to vote under S. 12 (1) (*a*). It matters not, whether such person pays in or does not pay in his income or part thereof to the joint family fund. He is clearly under cl. (*a*) entitled to a vote. The explanation to cl. (*a*) is not a disabling provision, but only applies where the total income of a joint Hindu family exceeds Rs. 120 but the income of individual members is less than that amount. In such a case, the Legislature intended to provide that the manager of a joint Hindu family alone should have a vote in a *quasi*-representative capacity on behalf of the family. (*Findlay, O. J. C.*) NAGPUR MUNICIPAL COMMITTEE *v.* DEVIDAS. **21 N. L. R. 182 = 88 I.C. 480 = A.I.R. 1926 Nag. 66.**

—S. 25—Payment of allowance.

———*Burden of obtaining sanction for payment of allowance is on Municipal Committee and unless it is refused, party receiving allowance, receives it legally.*

In the *M* Municipal Committee, *A* was originally employed as a Sanitary Inspector. Three years later he was appointed Secretary on a monthly consolidated pay of Rs. 75. Later on he applied to the Committee to give him some allowance for doing the work of supervision of sanitation and the Chairman of the Public Health Committee proposed that *A* should get Rs. 12 as monthly allowance for doing additional work from the date on which he became Secretary. This proposal was ultimately confirmed by the Municipal Committee and *A* was accordingly paid this allowance with retrospective effect. The payment of this allowance was, however, objected to by the auditor on the ground that it required sanction of the Local Government under the proviso to S. 25. The Committee applied for sanction but the Commissioner returned the application without forwarding it to the Local Government. The Committee thereupon sued *A* for the recovery of the amount of allowance paid to him.

Held, that assuming that sanction of Local Government was necessary the burden of obtaining it was on the Committee and that unless the Local Government was approached and it refused to accord its sanction, the payment already made to *A* could not be said to have been illegally received by him so as to give the Committee a right to recover the amount from him. (*Subhedar, A. J. C.*) WAMAN BALKRISHNA *v.* MUNICIPAL COMMITTEE, MURTIZAPUR. **116 I. C. 418 = A. I. R. 1929 Nag. 213.**

—S. 66—Interpretation.

———*"According to their circumstances and property within those limits" meaning explained.*

When the Act speaks of circumstances within certain limits it means circumstances within those limits and not property giving rise to them and circumstances arising out of agricultural property (situated in the same district as the limits mentioned or elsewhere) are in this respect not different from circumstances arising out of other kinds of property. Malguzari villages outside the limits of the Municipality cannot be called circumstances within the limits of the Municipality. But words " within those limits " do qualify the " circumstances " and " the circumstances " do not include land-revenue payable. (*Hallifax, A. J. C.*) KASTURCHAND *v.* SECRETARY, MUNICIPAL COMMITTEE, BETUL. **107 I. C. 902 = A. I. R. 1928 Nag. 243.**

—S. 66—Taxation.

——*Power to vary tax under S. 66 (4) is not dependent upon imposition of maximum under sub-S. (2).*

It is not obligatory upon the Local Government to fix any maximum under S. 66 (2) and, if none is fixed, the Municipal Committee is still competent to effect variation under S. 66 (4). A. I. R. 1927 Nag. 102, Rel. on. (*Subhedar, A. J. C.*) BAGMAT GINNING FACTORY *v.* MUNICIPAL COMMITTEE. **13 N. L. J. 13 = 122 I. C. 691 = A. I. R. 1930 Nag. 153.**

——*Haisiyat tax—Payment towards income-tax may be excluded, but those towards insurance premia and house-rent may not be wholly excluded.*

In assessing the haisiyat tax the Municipal Committee should make allowance for income-tax paid by the assessee, but the extent to which allowance should be made in respect of house-rent and insurance premia is a matter to be decided in connexion with each case by the Municipal Committee or the Deputy Commissioner, Commissioner or other officer hearing the appeal and no principle can be laid down on the point. (*Kotwal, A. J. C.*) MD. HAMID *v.* MUNICIPALITY. **23 N.L.R. 161 = 106 I. C. 397 = A.I.R. 1928 Nag. 71.**

—S. 67—Imposition of tax.

——*It is not only under S. 67 (8) but even under the old Act, law makes notification of imposition of tax issued by Local Government conclusive proof of the fact that " the tax has been imposed in accordance with the provisions of the law applicable"—C.P. Municipalities Act (XV of 1903), S. 39.*

The new S. 67 (8) has not introduced any new change in the existing state of the law beyond making S. 67 self-contained ; it expressly dispenses with the necessity of reading it in conjunction with the corresponding provisions of Ss. 22 (5) and 23, C. P. General Clauses Act (I of 1914). Therefore whether the old C. P. Municipalities Act or the new one is applied, the law makes the notification of the imposition of the tax issued by the Local Government the conclusive proof of the fact that " the tax has been imposed in accordance with the provisions " of the law applicable and so the moment the notification is proved to have been published the Judge is expressly directed to dispense with all corroborative evidence and to forbid all opposing evidence and to draw the presumption of law that the tax is imposed in accordance with the provisions of the law authorizing its imposition. (*Prideaux and Kinkhede, A. J. Cs.*) MUNICIPAL COMMITTEE, KHANDWA *v.* RADHAKISON JAIKISON. **A. I. R. 1930 Nag. 157.**

—S. 68—Jurisdiction.

——*Civil Court can consider legality of tax in spite of its being imposed in pursuance of its notification in Gazette—Berar Municipal Law, S. 44 (9).*

S. 44 (9), Berar Municipal Law and S. 68 (9), C. P. Municipalities Act, do not oust the jurisdiction of Civil Court to determine if a particular tax purporting to be imposed under those enactments is illegal or *ultra vires* even when the tax is levied in pursuance of notification published in the Government Gazette. 15 N. L. R. 42, Expl. ; 8 N.L.R. 107 ; A. I. R. 1922 Nag. 10 ; 35 Cal. 859 and A. I. R. 1928 Lah. 53, Rel. on. (*Subhedar, A. J.C.*) BAGMAL GINNING FACTORY *v.* MUNICIPAL COMMITTEE. **13 N. L. J. 13 = 122 I C. 691 = A. I. R. 1930 Nag. 153.**

—S. 98—Bye-laws.

——*Breach of Sub-S. (2)—Bye-laws framed under Sub-S. (3) enabling Municipality to prosecute party concerned are not* ultra vires.

If a person who does not give notice in writing of his intention to erect or re-erect any building as required by Sub-S. (2), erects or re-erects or commences to erect or re-erect the building without the sanction of the Committee which is necessary under Sub-S. (1) of S. 98 of the new Act, the person can be prosecuted for not giving the notice in the manner prescribed by bye-laws framed by the Committee in exercise of the power conferred under Sub-S. (3) of the said section. Such bye-laws are not *ultra vires*. (*Kinkhede, A. J. C.*) KING-EMPEROR *v.* SHRIBALLABH. **26 Cr. L. J. 1084 = 88 I. C. 28 = A. I. R. 1925 Nag. 393.**

—S. 176—Sanction of allowance.

——*Rules under S. 176 do not authorise Commissioner to withhold application to Local Government for sanction of allowance—Refusing to forward such application by Commissioner is* ultra vires.

Rule 1 of the rules under S. 176 (2) (*iii*) not only does not delegate to the Commissioner the power of the Local Government of according sanction in a case covered by the proviso to S. 25, Municipalities Act, but does not even authorise the Commissioner to withhold forwarding such a proposal and the action of the Commissioner in refusing to forward to the Local Government the representation of the Municipal Committee for sanction of the amount is *ultra vires*. (*Subhedar, A. J. C.*) WAMAN BALKRISHNA *v.* MUNICIPAL COMMITTEE, MUTIZAPUR. **116 I. C. 418 = A. I. R. 1929 N[illegible] 13.**

—S. 199—Interpretation.

——*Words "every day after the first" must be interpreted as every day after first day to which conviction relates,*

The words " every day after the first " must be interpreted as every day after the first to which the conviction relates. If a person has been committing a breach of a bye-law since 8th July, 1928, he can be properly fined Rs. 50 on 21st November, 1928. It is misreading S. 199 to think that he should be fined Rs. 5 only on 21st November, 1928, because he was on that date continuing the offence. (*Macnair, Offg. J. C.*) SECRETARY, MUNICIPAL COMMITTEE, NAGPUR *v.* YENKA KHATISH. **1929 Cr. C. 684 = 121 I. C. 64 = A. I. R. 1929 Nag. 360.**

—S. 199—Proof.

——*Lawful direction by a notice lawfully issued and disobedience to such a direction must be proved.*

What the prosecution has to prove under S. 199 is that a lawful direction was given to the accused by a notice lawfully issued under the powers conferred by Part 3 of the Act and that the accused disobeyed the said direction. (*Kolhatkar, A. J. C.*) WASUDEO *v.* AKOLA MUNICIPALITY. **10 A. I. Cr. R. 566 = 29 Cr. L. J. 785 = 111 I. C. 113 = A. I. R. 1928 Nag. 337.**

—S. 218—Complainant.

——*Police officer authorised to make complaints by committee—Police officer making complaint and not committee is complainant.*

Where a police officer is authorized under S. 218 by the Municipal Committee to make complaints with regard to offences under the Municipal Act, that police officer making the complaint and not the committee is to be regarded as complainant. (*Staples, A. J. C.*) NANHE *v.* MUNICIPAL COMMITTEE, JUBBULPORE. **25 N. L. R. 194 = 1930 Cr. C. 89 = 31 Cr. L. J. 382 = 12 N. L. J. 127 = 122 I. C. 258 = A. I. R. 1930 Nag. 33.**

CENTRAL PROVINCES MUNICIPALITIES ACT (1922), S. 218—Public servant.

—S. 218—Public servant.

——*Committee delegating authority to public servant by virtue of his office—Such public servant acts in his capacity as public servant when making complaint and his personal attendance in Court for examination is not necessary—Cr. P. Code, S.* 200, *proviso* (*aa*).

As a Municipal Committee is empowered to delegate its authority of making complaint under S. 218 (2), when such authority is delegated to a public servant by virtue of his office and not by name, he acts in his capacity as a public servant when making a complaint within the meaning of S. 200, proviso (*aa*), Cr. P. Code, and his personal attendance for examination is not necessary. (*Staples, A. J. C.*) NANHE *v.* MUNICIPAL COMMITTEE, JUBBULPORE. **25 N.L.R. 194 = 122 I. C. 258 = 1930 Cr. C. 89 = 31 Cr.L.J. 382 = 12 N. L. J. 127 = A. I. R. 1930 Nag. 33.**

CENTRAL PROVINCES STAMP LAW RULINGS CIRCULARS (1887), Nos. 7, 9, 11 and 12.

—Agreement.

——*Agreement must be for price paid or premised.*

An agreement for sale of goods or merchandise within the meaning of the C. P. Stamp Law Rulings Circulars Nos. 7, 9, 11 and 12 of 1887 is one in consideration of a price paid or promised and not one to deliver goods in exchange for goods and further it must be unattested. (*Kinkhede, A. J. C.*) COLLECTOR OF NIMAR *v.* LAKHMICHANDRA. **98 I. C. 631 = A. I. R. 1927 Nag. 72.**

CENTRAL PROVINCES TENANCY ACT (IX OF 1883).

—S. 38—Interest.

For the purposes of S. 38 (2) of the Tenancy Act of 1883 (or S. 41 (2) of the Act of 1898, which is identical with it) interest on previous mortgage for five years or for the period since its execution whichever is greater should be included as part of the sum secured thereby. (*Hallifax, A. J. C.*) SHEOBAKHSH SINGH *v.* JAGANNATH. **64 I. C. 99 = A. I. R. 1921 Nag. 161.**

—S. 38—Mortgage.

A *Zur-i-peshgi* lease is usually nothing less than a mortgage and might well be held to be included in the term "mortgage" in S. 38 (2) of the Tenancy Act. (*Hallifax, A. J.C.*) SHEOBAKHSH SINGH *v.* JAGANNATH. **64 I. C. 99 = A. I. R. 1921 Nag. 161.**

—S. 42—Vendor and Vendee.

——*Evidence Act, S.* 115—*C. P. Tenancy Act* (1883), *S.* 42, *requiring express words for passing* sir *rights—Express words not used, by agreement between the parties who wanted the question to remain open—Vendor cannot plead the statute as objection to vendee's claiming those rights.*

Where the decree did not contain an express direction for the sale of the judgment-debtor's rights in the *sir* land due to the fact that by agreement of the parties the question was purposely left open, *held*, that the judgment-debtor was prevented by estoppel from setting up the plea that as there was no sale of his rights in the *sir* land expressly directed by the decree, the auction-purchaser by virtue of S. 42 of the C. P. Tenancy Act was not entitled to those rights. (*Lord Buckmaster.*) GULAB SINGH *v.* BALLABHDAS. **48 I. A. 220 = 48 Cal. 591 = 19 A. L. J. 361 = 61 I.C. 769 = 34 C. L. J. 1 = 25 C. W. N. 938 = 14 M. L. W. 228 = 1921 M. W. N. 310 = 17 N. L. R. 84 = A. I. R. 1921 P. C. 13 = 40 M. L. J. 418 (P.C.).**

—S. 43—Limitation.

——*Limitation Act* (*IX of* 1908), *Sch. I, Art.* 91—*Applicability—Suit by landlord against a transferee of tenant—Transfer voidable.*

To a suit by the landlord against the transferee of a tenant in C. P. who has taken possession of a holding in execution of a decree on a mortgage voidable at the instance of the landlord, Art. 91 of the Limitation Act (1908), 1st Schedule, is inapplicable. The transfer is binding on the tenant and cannot be cancelled by the landlord though it can be declared void as against him. 34 Cal. 329 (P. C.), Ref. to. (*Mitra, A. J. C.*) SETH SAGUNCHAND *v.* LALA CHHABILERAM. **18 N. L. R. 11 = 76 I. C. 884 = A. I. R. 1922 Nag. 60 (b).**

—S. 50-B (2)—When inapplicable.

——*Grant—Village service tenure—Two Kotwars—In the settlement one selected for service and the other recorded as sub-tenant of the first—In the next settlement this arrangement not recorded and sub-tenant dispossessed—Right to possession and record of his life-tenancy—This case not governed by the S.* 50-*B* (2).

At the last settlement the Settlement Officer decided that one Kotwar sufficed for the village. Of the two Kotwars one was retained by lot and the other dismissed. The latter was however to retain possession of the field under his cultivation as sub-tenant of the retained Kotwar, paying him the assessed rental as embodied in the Settlement Record and *Wajib-ul-arz*. At the current settlement the entire village service holding was recorded in the sole name of Kotwar's son and the new *Wajib-ul-arz* omitted the clause as to the sub-tenancy. On ejectment the sub-tenant sued for re-instatement in possession and correction of the new *Wajib-ul-arz*.

Held, a right of sub-tenancy was created in favour of the Kotwar whose services were dispensed with and he is entitled to remain in possession of the field in his cultivation and the new *wajib-ul-arz* should be modified by insertion of an entry that the sub-tenancy enjoyed by him until ejectment will enure for his life-time only.

Held also that the case was not governed by S. 50-B (2) of the Tenancy Act, 1883. (*Drake-Brockman, J. C.*) JHIBLIA *v.* DAWLATIA. **18 N. L. R. 34 = A. I. R. 1922 Nag. 158.**

—(XI OF 1898).

—Jurisdiction.

——Suit by tenant to maintain a person as his sub-tenant is cognizable only by the Revenue Court. (*Hallifax, A. J. C.*) LAKSHMI PRASAD *v.* DADU. **A. I. R. 1923 Nag. 4.**

—Landlord.

——*"Landlord" must act as a whole proprietary body.*

Anything which the landlord is required or authorised to do under the Tenancy Act must be done by the whole proprietary body or by an agent acting on their behalf. (*Drake-Brockman, J. C.*) DEOKARAN *v.* NATHU. **4 N.L.J. 138 = 63 I.C. 352 = A.I.R. 1921 Nag. 12.**

—S. 2—Tenant.

——*Holder of land for growing vegetables.*

Where land is let for the purpose of growing vegetable crop, the holder of such land comes within the category of a tenant as defined in the Tenancy Act because cultivation of gardens, orchards or planting of agricultural gardens is a species of agriculture, and there is nothing inherently impossible which would prevent the holder of such land from claiming to acquire the status of a tenant on the basis of such letting of the land to him. The mere circumstance that the period or the term for which he holds the land is only a part of the year or particular season of the year does not and ought not to make any difference in his status. (*Kinkhede, A. J. C.*) GOPALRAO *v.* SITARAM.

9 N. L. J. 215 = 97 I. C. 694 = A. I. R. 1927 Nag. 19.

—S. 5—Mortgage.

——*Consent of malguzar—Mortgage without validity.*

There is no authority for saying that a mortgage which has not been consented to by the malguzar must be held to be in abeyance, to have no real existence and to be in fact void until it is so consented to by the malguzar and can, until it is so consented to, have no priority against another mortgage of a later date. As between the mortgagor and mortgagee a mortgage is valid unless and until it is avoided by the malguzar. (*Batten, J.C.*) KUNJI LAL *v.* PANNALAL. **19 N. L. R. 10 = 71 I. C. 325 = A.I.R. 1923 Nag. 91.**

—S. 6—Jurisdiction.

——*Landlord ejecting transferee—Vested rights of tenant.*

Landlord's right to eject the transferee is correlative with tenant's right to force the landlord to put him in possession, and therefore if the landlord is entitled to enforce his right under the provisions of S. 41 of the old Act, it follows that the tenant's right to be reinstated must be enforced under the provisions of sub-S. (8) of the old section. Rights already acquired under the repealed enactment were expressly saved by S. 110 of the new Act of 1920. S. 6 of the new Act which abolishes the provisions of sub-S. (8) of S. 41 of the old Act cannot override a right already vested and acquired under the old Act. 7 N. L. R. 125, Diss. from.

Consequently, Revenue Officer has jurisdiction to entertain an application for reinstatement by the tenant. 13 C.P.L.R. 143 and A.I.R. 1923 Nag. 33, Rel. on. (*Kinkhede, O.A.J.C.*) LAL SINGH *v.* WAMAN RAO. **22 N. L. R. 114 = 96 I. C. 905 = A. I. R. 1926 Nag. 499.**

—S. 32—Compensation.

——*Tenant's right to.*

Improvement, compensation for, can be claimed only if tenant is ordinary or occupancy tenant—Sub-tenant can claim it only if landlord has consented to improvement. (*Batten, J.C.*) BALARAM *v.* BHAGIRATHIBAI. **A.I.R. 1922 Nag. 47.**

—S. 34—Surrender.

——*Holding left uncultivated without payment of rent for more than two years—Holding deemed to be surrendered—Execution of decree by malguzar by ejectment of tenant—No right of forfeiture could exist which could be waived.*

Where a tenant leaves his holding uncultivated and without paying its rent for a period of more than two years his tenancy is deemed to have been surrendered under S. 35 (4). The malguzar cannot at his option treat the tenancy as still subsisting and make the tenant liable for the rent of the subsequent years. There is no right of forfeiture in such cases which the malguzar can be said to have waived by applying for ejectment. (*Macnair, Offg. J. C.*) ANAND *v.* PANDURANG. **120 I. C. 334 = A.I.R. 1930 Nag. 139.**

—S. 35—Surrender.

——Surrender of portion of holding is invalid. (*Prideaux, A.J.C.*) ALLIBHAI *v.* SHAMRAO. **18 N. L. R. 82 = 64 I. C. 902 = A. I. R. 1922 Nag. 216.**

—S. 35—Surrender, when implied

——An ordinary tenant is deemed to leave the holding uncultivated and the rent of it unpaid after a transfer (after which he leaves the village), even if it is cultivated by the transferee who is not a sub-tenant or

the malguzar or anybody else and the rent is paid in full. There is clearly an implied surrender. (*Hallifax, A. J. C.*) LAKSHMI PRASAD *v.* DADU. **A. I. R. 1923 Nag. 4.**

—S. 35—Surrender by Hindu widow.

——A surrender of an ordinary tenancy if not impeachable for fraud or on other like ground is binding on the widow's husband's reversioners. 9 N.L.R. 126, Foll. (*Prideaux, A.J.C.*) MUKUNDA *v.* DIWAKAR. **73 I. C. 126 = A.I.R. 1924 Nag. 95.**

—S. 36—Jurisdiction.

——*Claimant put in possession by Revenue authorities—Civil Court cannot interfere.*

Where an occupancy holding is surrendered and the heir of the person surrendering applies to the Revenue authorities to be put in possession and he is so put in possession, there is no power in any outside authority to revise the decision of the Revenue Officer and divest the claimant of the right vested in him under the order. (*Kinkhede, A.J.C.*) FAKIRA *v.* RAMKISAN. **21 N. L. R. 25 = 87 I. C. 1045 = A. I. R. 1925 Nag. 277.**

—S. 36—Surrender set aside—Female heir—Nature of holding.

——Female heir applying to have surrender of occupancy holding set aside—Surrender set aside and female heir placed in possession—Statutory liabilities paid from her separate funds—She does not become absolute owner. A. I. R. 1923 Nag. 34, Overruled. (*Baker, J. C. and Kinkhede, A.J.C.*) WASUDEO *v.* BHIMA. **21 N. L. R. 62 = 89 I. C. 44 = A. I. R. 1925 Nag. 306.**

—S. 39—Interpretation.

——Absolute occupancy right is a tenancy and not a proprietary right. (*Hallifax, A.J.C.*) RAMCHANDRA BALKRISHNA *v.* RAMCHANDRA JAIRAM. **65 I. C. 952 = A. I. R. 1922 Nag. 222.**

—S. 41—Jurisdiction.

——Landlord ejecting transferee—Tenant can apply to Revenue Officer for reinstatement under sub-S. (8) even after the new Act coming into force—S. 6 of Act of 1920 cannot override vested right under S. 41 (8) of old Act—C. P. Tenancy Act (1920), Ss. 110 and 6. 13 C.P.L.R. 143 and A. I. R. 1923 Nag. 33, Rel. on. (*Kinkhede, O.A.J.C.*) LAL SINGH *v.* WAMANRAO. **22 N. L. R 114 = 96 I. C. 905 = A. I. R. 1926 Nag. 499.**

—S. 41—Limitation.

——*Limitation Act, Art.* 120—*Tenant giving notice of sale—Suit for pre-emption—Art.* 120 *applies.*

In a suit for pre-emption under S. 41 (5) where the tenant had merely given notice but had not actually sold his holding,

Held, that Art. 120 applied to the case. 1 N. L. R. 6; 6 C.P.L.R. 67; Dist. (*Hallifax, A.J.C.*) RAI *v.* SIDAKALI. **65 I.C. 959 = A. I. R. 1922 Nag. 14.**

—S. 41—Mortgage.

——*S.* 6 *does not validate mortgage which is voidable under S.* 41 (7).

S. 6 applies only to mortgages effected after the date of its coming into force. It does not do away with the voidability under cl. (7), S. 41 (Tenancy Act of 1898), attached to mortgages executed in contravention of that section. (*Kotval, A. J. C.*) KALURAM *v.* MOHAN SINGH. **24 N.L.R. 153 = 113 I.C. 128 = A.I.R. 1929 Nag. 30.**

——*Transfer of defined part—Right of entry—Consent to mortgage by conditional sale.*

A transfer without the consent of the landlord of a part of an absolute occupancy holding, even though defined and demarcated, will not give the landlord a right of re-entry under S. 41 of the Tenancy Act. Consent to the mortgage by conditional sale is consent to the conditional sale as well as to the mortgage. An involuntary transfer under compulsion is something more than a voluntary transfer, not something less, and consent to the greater naturally includes consent to the less. 8 N.L.R. 147, Diss.; 12 N. L.R. 86, Dist. (*Hallifax, A.J.C.*) BAPUJI *v.* RAM RAO.

7 N. L. J. 99 = 81 I.C. 664 = A. I. R. 1924 Nag. 139.

—S. 41—Mortgage or Lease—Test.

———Whether mortgage or lease depends on whether the document secures a debt or discharges a debt. (*Dhobley, A.J.C.*) RAMPRASAD *v.* CHANDULAL.

4 N. L. J. 262 = 65 I. C. 241 = A. I. R. 1922 Nag. 156.

—S. 41—Notice.

———A notice under S. 41 (2) of the C. P. Tenancy Act need not be worded with the accuracy of a plea. Where the information given in the notice is amply sufficient to inform the landlord of the tenant's intention to mortgage the whole of his absolute occupancy holding, it is sufficient compliance with the law. S. 41 (2) does not say that the particulars specified in that subsection should be given in the notice but it merely states the circumstances under which the tenant must give notice, and presupposes a knowledge on the part of both landlord and tenant as to the particulars of the tenant's holding. (*Batten, A. J. C.*) RAGOJI RAO *v.* RAJESWAR. **65 I. C. 816.**

—S. 41—Occupancy holding.

———*Devolution of—Inheritance and not survivorship.*

Under the Tenancy Act of 1898 the devolution of absolute occupancy holdings was governed by the rule of inheritance and not by the rule of survivorship obtaining under the Hindu Law, irrespective of the question whether the person or persons who held the tenancy or was or were interested in the holding for the time being, was or were the sole tenant or co-tenants thereof or members of a joint co-parcenary. (*Kinkhede, Offg. A. J. C.*) MULCHAND *v.* CHANDRA SINGH.

9 N. L. J. 207 = 95 I. C. 589 = A. I. R. 1926 Nag. 433.

———*Law as to—As at the date of devolution.*

The law applicable to the devolution of occupancy holding is the law existing at the date of devolution. The mere fact that during the interval the Legislature thought fit to change the law is no ground for thinking that the old law which it repealed was of the same nature as the repealing enactment itself. (*Kinkhede, Offg. A. J. C.*) MULCHAND *v.* CHANDRA SINGH.

9 N. L. J. 207 = 95 I. C. 589 = A. I. R. 1926 Nag. 433.

—S. 41—Possession.

———*Voidable mortgage with possession by tenant—Malguzar buying rights of tenant—He is entitled to possession even against mortgagee.*

A malguzar who has bought up the rights of an absolute occupancy tenant is entitled to possession as against a mortgagee when the mortgage is voidable at the option of the malguzar. 12 C. P. L. R. 127 and 12 C. P. L. R. 134, Overruled. 12 C. P. L. R. 158, Rel. on. (*Macnair, Offg. J. C. and Subhedar, A. J. C.*) JAIRAM *v.* JANKIBAI. **12 N. L. J. 156 = 122 I. C. 697 = A. I. R 1930 Nag. 119.**

—S. 41—" Premium."

———The term " premium " should be regarded as the equivalent of the vernacular *nazarana* by which is commonly meant, a payment made in lump when a lease is granted or renewed. In the Central Provinces, it is usual when *nazarana* is taken to take also a periodical rent. The term " rent " as defined in S. 2 (8) of the Tenancy Act may include a *nazarana*. In S. 41 (2), however, the term " premium " is used in contradiction to rent and so, similarly, to its employment in S. 105, Transfer of Property Act. But the restriction in S. 41 (2) of the Tenancy Act should be strictly construed. The term " premium," therefore, should not be pressed so as to make it include what is ostensibly a merely periodical payment. 6 N. L. R. 65, Foll. (*Drake-Brockman, J. C.*) JAGANNATH *v.* BEHARI.

59 I. C. 419 = A. I. R. 1921 Nag. 137.

—S. 41—Procedure.

———Tenant applying for reinstatement—Time fixed for depositing landlord's costs—Time can be extended. (*Kinkhede, O. A. J. C.*) LAL SINGH *v.* WAMANRAO.

22 N. L. R. 114 = 96 I. C. 905 = A. I. R. 1926 Nag. 499.

—S. 41—Reinstatement.

———*Forcible possession not equivalent to.*

Where a lessee from a tenant has been ejected by landlord through Court the tenant must apply within one year for reinstatement. In the absence of such an application to the revenue Court tenant cannot be deemed to be reinstated by his taking forcible possession of the holding. (*Hallifax, A. J. C.*) MADHAO RAO *v.* JHAMA DHANGAR. **93 I. C. 125 = A. I. R. 1926 Nag. 328.**

—S. 41—Sale.

———*Sale of portion voidable by landlord.*

The landlord has a right to eject the transferee of a portion of absolute occupancy holding assuming that there was a genuine transfer and that such transfer was not consented to by the landlord. (S. A. 203 of 1905, dated 4th August, 1905, Dist.; 8 N. L. R. 147, Foll.) (*Prideaux, A. J. C.*) GANPAT *v.* MANOHAR HARBAJI. **7 N. L J. 105 = 78 I. C. 834 = A. I. R. 1924 Nag. 264.**

—S. 41—Suit for ejectment.

———*C. P. Tenancy Act* (1920), *S.* 110—*Mortgage of occupancy holding prior to Act of* 1920—*Possession under mortgage decree taken after Act of* 1920—*Malguzar has no right to sue in ejectment.*

Where a mortgage of absolute occupancy holding was executed without malguzar's consent, when the Tenancy Act (1898) was in force, but possession in execution of decree on that mortgage was taken by the mortgagee decree-holder after the Act of 1920 came into force,

Held, that the cause of action for ejectment suit by the malguzar arose on the date possession was taken and the new Act of 1920 not providing for an ejectment suit, the malguzar's suit for ejectment was not maintainable. A.I.R. 1927 Nag. 127, Affirmed. (Case-law considered.) (*Findlay, J.C.*) YESHWANTRAO *v.* SADASHEO RAO. **103 I.C. 71 = A. I. R. 1927 Nag. 277.**

———*Mortgage in contravention of S.* 41—*Foreclosure decree obtained before but tenant actually dispossessed after the Act of* 1920—*Landlord cannot eject the mortgagee.*

Where an absolute occupancy holding was mortgaged in contravention of S. 41 of the Act of 1898 and a foreclosure decree was obtained before but the tenant was actually dispossessed after the Act of 1920 came into force,

Held, that the landlord cannot eject the mortgagee as no complete vested right accrued in favour of the landlord before the Act of 1920 came into force. (*Find-*

lay, J. C.) KEDARNATH BHARGAVA *v.* NETRAM. **23 N. L. R. 50 = 10 N. L. J. 29 = 101 I. C. 284 = A. I. R. 1927 Nag. 127.**

—S. 41—Transfer by Tenant.

——On receipt of notice by tenant of the intended transfer by tenant, landlord must intimate his desire to purchase and must apply for fixing the value to revenue officer or should bring a regular suit within the prescribed period on payment of the price fixed. Otherwise the transfer becomes unavoidable. *(Findlay, O. J. C.)* PILURAM *v.* MAHADEO. **22 N. L. R. 19 = 91 I. C. 290 = A. I. R. 1927 Nag. 110.**

——*S. 41 (7) and (8)—S. 6 of the new Act of 1920—Transfer by tenant—Landlord's right to sue tenant in ejectment under old Act not taken away by the new Act.*

S. 41 of the Act of 1898 gave the landlord more than a mere right of pre-emption. The landlord had right to sue the transferee in a case where the sale had been made without his consent. S. 6 of the Act of 1920 does not give the landlord the power to bring the suit; but if his right to do so had already arisen under the former Act, it would not be taken away by the change in the new Act. *(Prideaux, A. J. C.)* VINAYAK *v.* MAHEBULLA KHAN. **68 I. C. 427 = A. I. R. 1923 Nag. 33.**

——*Landlord and Tenant—Transfer of part of absolute holding—Right to sue for ejectment.*

In order to maintain an action for ejectment a plaintiff (landlord) must be entitled to immediate entry into possession and before a landlord can eject his tenant's transferee he must prove abandonment by the tenant. A tenant's holding is one and indivisible; where it is not alleged that he has refused to pay the rent of the whole, he cannot be said to have abandoned the holding while still in possession of part. The landlord's interests are safeguarded by recognising his right to hold the original tenant liable for the rent of the entire holding; if he fails to pay, S. 43 will enable him to sell the holding and the sale cannot be opposed by the transferee. S. A. No. 203 of 1905, Ref. *(Hallifax, A. J. C.)* GODHARAJ *v.* DAWLAT. **18 Nag. L. R. 109 = A. I. R. 1922 Nag. 241.**

—S. 45—Application of.

——*Devolution by death.*

S. 45 of the Tenancy Act has no possible application to a case of devolution by death, and therefore sub-S. 3 of that section does not forbid the registration of a will by which *sir* land is bequeathed. *(Hallifax and Prideaux, A. J. Cs.)* MURLIDAS *v.* HARIDAS. **4 N. L. J. 43 = 62 I. C. 246 = A. I. R. 1921 Nag. 34.**

—S. 45—Lease.

——Where a proprietor executes an instrument of tenancy to commence in future in regard to *sir* land but in the meanwhile loses his proprietary rights, the would-be tenant cannot claim the protection of S. 45 (5). The fact that he is already in possession under a previous tenancy makes no difference so far as his rights to possession under the subsequent instrument is concerned. 11 N. L. R. 170, Dist. *(Dhobley, A. J. C.)* LAKMICHAND *v.* BOJIRAO. **5 N. L. J. 251 = 69 I. C. 870 = A. I. R. 1921 Nag. 170.**

—S. 45—Sir lands—Lease of.

——The Tenancy Act contemplates leases to ordinary tenants of *sir* lands apart from transfers of the kind provided for in S. 45 (1) which applies only to leases or other transfers of proprietary rights in *sir* fields and does not apply to agricultural leases which do not affect the proprietary rights. *(Kinkhede, A. J. C.)* DURGAPRASAD *v.* THAKURPRASAD. **87 I. C. 72 = A. I. R. 1925 Nag. 377.**

—S. 45—Sir land.

——*Registration Act, Ss. 49, 17 and 18—Will—Transfer of* sir *land without reservation of occupancy right—Will illegally registered—Will is admissible in evidence.*

A deed of gift or transfer of *sir* land without reservation of occupancy rights and of other property as well would be wholly inoperative and wholly inadmissible in evidence only by reason of the provisions of S. 49 of the Registration Act, which apply only to documents of which registration is compulsory under S. 17 of the same Act. They do not forbid the operation or admissibility in evidence of documents of which registration is optional under S. 18, and a will is such a document. Provided, therefore, that the will has been properly proved it can operate in respect of all property mentioned in it which the testator legally was competent to devise even if it was illegally registered. *(Hallifax and Prideaux, A. J. Cs.)* MURLIDAS *v.* HARIDAS. **4 N. L. J. 43 = 62 I. C. 246 = A. I. R. 1921 Nag. 34.**

——*Alienation by will, of cultivating rights in* sir *land—No sanction is necessary.*

Under the Hindu Law a malguzar can alienate the full cultivating and proprietary rights in his *sir* land without any sanction at all. The restriction on the power of transfer is imposed only by the Tenancy Act and not by the Hindu Law. Even so, S. 45 of the Tenancy Act does not take away the proprietor's right to alienate the cultivating rights in his *sir* land. It merely lays down a condition which must precede the exercise of that right *inter vivos. (Hallifax and Prideaux, A. J. Cs.)* MURLIDAS *v.* HARIDAS. **4 N. L. J. 43 = 62 I. C. 246 = A. I. R. 1921 Nag. 34.**

—S. 45—Surrender.

——*Surrender taking place 9 months after sale—Agreement to surrender entered into on the date of sale—Both are one transaction but the surrender only is void.*

If a covenant to relinquish the *sir* lands is part of the transaction of sale or of mortgage, the agreement to surrender will be void and unenforceable. Where the surrender took place nine months after the sale but there was an agreement of even date between the parties as to the surrender,

Held, that the two were one transaction but that only the surrender was void. 39 All. 173 (P. C.) and 39 All. 645, Foll. *(Baker, J. C. and Prideaux, A. J.C.)* BHAGWAT *v.* ANANDRAO. **22 N. L. R 136 = 86 I. C. 515 = A. I. R. 1925 Nag. 302.**

——*Sale of trees and surrender of occupancy holding executed on the same day—Both are one transaction and are invalid.*

Where an occupancy tenant executed a sale-deed in respect of mango trees standing on the holding and on the same day surrendered the holding to the co-sharer malguzar,

Held, that the sale and the surrender together constituted a single transaction, the object of which was to avoid necessity of obtaining the sanction prescribed by S. 45 (1), Tenancy Act, and was therefore illegal and void. 39 All. 173 (P. C.) and 40 All. 449, Rel. on.

Held, further that the mere fact that the vendee obtained possession did not suffice to separate the surrender from the sale, nor does the mere fact that the sale-deed purporting to deal with the trees apart from the soil was executed first and the surrender of the soil, pure and simple, followed it make any difference. In order that there could be a valid severance of interest or property in the trees, the trees must themselves have already become the separate property of a person other than the owner of the soil on which they stand, by an independent transaction, and further the interest in the trees as also in the soil must be of a nature transferable under the law applicable to the land. (*Kinkhede, A. J. C.*) FAKIRA *v.* RAMKISAN. **21 N.L.R. 25 = 87 I. C. 1045 = A. I. R. 1925 Nag. 277.**

—S. 46—Gift.

———*Gift not to the nearest heir—Effect.*

In regard to the view that S. 46 contemplates a transfer only to the nearest existing heir at the time it is made, if the words of that section and S. 47 did not make it clear that this is not so, it seems the matter would be set beyond doubt at least for all practical purposes by sub-S. 2 of the latter section. Even if a gift of his holding to his daughter by an occupancy tenant who has a son is invalid and the landlord sets it aside, the daughter can immediately re-enter, and the result is exactly the same as if the gift were valid, except that there have been two sets of procedure and one change of possession more than was necessary. (*Hallifax, A.J.C.*) MT. KRISHNABAI *v.* DEBI SINGH. **71 I. C. 409 = A. I. R. 1923 Nag. 195 (196).**

—S. 46—In the male line.

———The expression "in the male line" does not necessarily mean that the person at the lower end of the line must be a male. S. 46 does not disqualify a female from inheriting an occupancy holding if she is otherwise qualified according to the personal law to which she is subject. *Sayer* v. *Bradly*, (1856) 5 H. L. C. 873, Referred to. (*Hallifax, A. J. C.*) SAKHU BAI *v.* HARI. **5 N. L. J. 261 = 67 I. C. 229 = A. I. R. 1922 Nag. 207.**

—S. 46—Mortgage.

———*Trees standing on* sir*—Ownership in* sir *rights separate from that in trees—Mortgage of trees not illegal.*

Where property in trees is separate from that in *sir* land on which they stand and cultivating and other *sir* rights are separated from the ownership of such trees, there is nothing illegal in these trees being included in mortgage by the owner of the trees. A. I. R. 1925 Nag. 277, Dist. (*Findlay, J.C.*) RAM GOPAL *v.* AMBAPRASAD. **113 I. C. 891 = A. I. R. 1929 Nag. 6.**

———Mortgage of occupancy land is invalid even *inter partes*. (*Baker, J. C.*) OMRAO *v.* RAMDHAR. **81 I. C. 873 = A. I. R. 1925 Nag. 130.**

—S. 46—Occupation.

———Partition of holding and accretion by one co-sharer to his share—Death of such co-sharer—Other sharers cannot be said to have "occupied the holding" of the deceased sharer and cannot resist claim of landlord for possession. (*Hallifax, A. J. C.*) SONSINGH *v.* THAKKURAM. **18 N. L. R. 48 = 69 I. C. 359 = 5 N. L. J. 243 = A. I. R. 1922 Nag. 21.**

—S. 46 (1)—"Occupy"

———A proprietor holding cultivating possession of *sir* land can be said to "occupy" that land for the purposes of S. 46 (1): Case-law discussed. (*Hallifax, A. J. C.*) PANDU *v.* KANTIKA BAI. **23 N.L.R. 75 = 103 I. C. 178 = A. I. R. 1927 Nag. 245.**

—S. 46—Registration.

———*Registration contravening S.* 46 *is ineffective.*

Registration in contravention of S. 46, Tenancy Act, is ineffectual whether it be brought about by the fraud of the parties to the document or effected owing to ignorance or inadvertence on the part of the registering officer. (*Hallifax, A. J. C. Afterwards Kotval and Prideaux, A.J. C's.*) CHINDHU *v.* RAMESWARNATH. **22 N. L. R. 128 = 97 I. C. 1015 = A. I. R. 1927 Nag. 30.**

—S. 46—Succession.

———*Daughter's daughter's son and brother's son—Latter is preferred.*

The brother's son, who will as a collateral ordinarily be excluded from succeeding to an occupancy holding if not cultivating jointly with the previous holder will be preferred to daughter's daughter's son. The condition requiring the collateral who claims succession to have shared in the cultivation is a disqualification which disentitles the nearest collateral if he has not fulfilled the condition. But it does not confer any right of the succession to the occupancy tenure on a more remote relation, like a *Bandhu* even though he may have shared in the cultivation. (*Batten, J. C.*) AHILIA *v.* BADAN SINGH. **5 N. L. J. 270 = 67 I.C. 292 = 18 N. L. R. 105 = A. I. R. 1922 Nag. 117.**

—S. 46—Transfer.

———*Inadvertent inclusion of occupancy field along with others in mortgage deed—Validity of the transaction.*

Inadvertent inclusion of an occupancy field amongst fields, other than occupancy, in a mortgage-deed in a case of genuine and *bona fide* mistake on the part of the parties to a mortgage, where the mortgage deed does not purport to transfer any rights in occupancy land, does not vitiate the registration of the deed and does not strike at the root of the whole transaction. Its inclusion is to be treated merely as a surplusage. A. I. R. 1928 Nag. 1, Dist.; Nag. F. A. No. 95 of 1924 and Nag. Misc. Appeal No. 5 of 1923, Appr.; Nag. S. A. No. 481 of 1918, Ref. (*Findlay, J. C.*) RAM GOPAL *v.* AMBAPRASAD. **113 I. C. 891 = A. I. R. 1929 Nag. 6.**

———S. 46 prohibits registration of deeds of transfer, or in other words, such transfers as could not be made except by registered instruments. Transfers which can be made otherwise than by a registered instrument, such as an oral sale for less than Rs. 100 under S. 54, T. P. Act, are not prohibited. (*Kinkhede, A. J. C.*) BEHARI *v.* BATTULAL GENDALAL. **9 N. L. J. 123 = 96 I. C. 353 = A. I R. 1926 Nag. 432.**

———*Trees standing on occupancy holding—Transfer of, is invalid.*

An occupancy tenant has the same analogous rights in the trees as he has in the holding on which they stand, and therefore he cannot transfer the trees by sale as apart from the land on which they stand. (*Kinkhede, A. J. C.*) FAKIRA *v.* RAMKISAN. **21 N. L. R. 25 = 87 I. C. 1045 = A. I. R. 1925 Nag. 277.**

———*A proprietor or a tenant purchasing the tenant's or proprietor's right, the result is the same in both cases.*

When the rights of co-sharer and an occupancy or absolute occupancy tenant converged in the same person he is an occupancy or absolute occupancy tenant according to the nature of the tenancy. (*Baker, J. C.*) KESARBAI *v.* JAMADAR. **20 N. L. R. 162 = 82 I.C. 126 = A. I. R. 1925 Nag. 125 (127).**

———*Transfer of trees is transfer of rights in occupancy tenure.*

Mortgage of trees amounts to a transfer of the rights in the occupancy tenure in a portion of the tenancy holding and the document cannot be registered in contravention of S. 46 (5). The mortgage is not operative as regards the other property except the trees covered by it. An instrument so registered cannot operate in respect of any part of the property ostensibly transferred by it. (*Prideaux, A. J. C.*) TUKARAM *v.* NARBA. **70 I. C. 34 = A. I. R. 1922 Nag. 252.**

—S. 47—Exchange.

———About 1903 the defendant started to cultivate an absolute occupancy holding belonging to one *H* and allowed *H* to cultivate an occupancy holding of his own in exchange, each finding the land of the other more conveniently situated than his own. The record remained unchanged and each paid rent for the land he cultivated, but in the name of the other till in 1917-18, the Settlement Officer recorded each of them as the occupancy tenant of the land he was actually cultivating.

Held, if the arrangement of 1903 was an out-and-out exchange, the landlord lost his right to set it aside many years before he filed his suit. If it was only an arrangement by each tenant for the cultivation of land by the other which it undoubtedly was, he has no right whatever to interfere with it. (*Hallifax, A. J. C.*) CHIMANLAL PATIL *v.* INDRARAJ SINGH. **83 I. C. 946 = A. I. R. 1923 Nag. 144.**

—S. 47—Transfer.

———*Transfer by occupancy tenant to non-co-sharer—Remedy of landlord.*

If an occupancy tenant of land belonging to the sole landlords of the whole of it transfers it to a stranger or a person who is not a co-sharer landlord, and if the document is by mistake admitted for registration, the proper remedy for the landlords is to make an application to the Revenue Courts unless there is fraud involved in which case Civil Courts will have jurisdiction. S. 47 refers not only to sub-section 3 of S. 46 but also to sub-S. 5. (*Hallifax, A. J. C.*) CHINGA PRASAD *v.* PHULWA. **67 I. C. 121 = A. I. R. 1922 Nag. 126.**

—S. 49—Lessee.

———*Lessee is not "proprietor" within S. 49.*

A lessee, whether permanent or not, is not a proprietor within the meaning of that section, and therefore he does not retain any interest as an occupancy tenant in the *Sir* land on the determination of the lease. (*Baker, J. C.*) BALWANT RAO *v.* FARID SAHEB. **8 N. L. J. 44 = 87 I. C. 253 = 21 N. L. R. 133 = A. I. R. 1925 Nag. 274.**

—S. 49—Private contract.

———*Private contract is effective only up to next settlement.*

The combined effect of Ss. 49 and 51 is to make the occupancy tenant liable for the rent fixed at the settlement for the term of the settlement. A private agreement not inconsistent with the Act as to the rent payable may be given effect to only until the next settlement ; but at the next settlement the agreed rate of rent is superseded by a rate of rent fixed by the Settlement Officer. 7 N. L. R. 17, Rel. on. (*Kinkhede, A. J. C.*) KHUBCHAND *v.* MULLOO. **89 I. C. 741 = A. I. R. 1925 Nag. 452.**

—S. 49—Transfer.

———*Transfer in favour of next reversioner by widow without sanction of revenue authorities is invalid.*

The transfer by a widow of occupancy rights in *sir* land in favour of her next reversioner is invalid in absence of the sanction of revenue authorities. Ss. 49 and 50 do not make any exceptions in the case of a transfer to an heir and reversioner. (*Baker, J. C.*) MT. BHAGWATI BAI *v.* DADU KHUSHIRAM. **81 I. C. 878 = A. I. R. 1925 Nag. 95.**

—S. 60—Contract.

———Section does not apply to contracts before the Act. (*Mittra, Offg. A. J. C.*) MT. LAHANI *v.* BALA. **18 N. L. R. 85 = 77 I. C. 798 = A. I. R. 1922 Nag. 227.**

—S. 63—Remission of rent.

———*Agreement for, cannot prevail for more than one settlement.*

The respondent claimed the right to hold his tenancy field free of rent on the ground that in 1874 the then landlord agreed to allow his father to hold the field free

of rent and executed an agreement to that effect. In the *pattas* of both the settlements, *i.e.*, 1897 and 1913 a note was made to the effect that the landlord would pay the rent.

Held, that the Settlement Officer in 1913 has not decided as he is supposed to have decided, that the terms of the original agreement would be binding on the successors of the parties, and S. 63 of the Tenancy Act, 1898, plainly enacts that no agreement for reduction or remission of rent can prevail for more than one settlement. 15 C. P. L. R. 9, Ref. (*Batten, J.C.*) MAHILAL *v.* BINDRABAN. **A. I. R. 1923 Nag. 247.**

—S. 69—Procedure.

———*Defendant inducted on* khudkasht *and* sir *land by widow, sold* malguzar, *having Hindu widow's estate—Reversioner suing to eject defendant as trespasser after widow's death—Defendant setting up unregistered perpetual leases by widow—Plaintiff's remedy lies in Revenue Court under S.* 97.

Defendant was put in possession of the land in dispute, which consisted of *sir* and *khudkasht*, by a woman who was the sole *malguzar* of the village, holding a Hindu widow's interest in it. The plaintiff was the sole reversionary heir after her death and sued to eject the defendant alleging that he was a trespasser. The defendant alleged that the widow had given him the *sir* and *khudkasht* land under two separate written perpetual leases which were not registered.

Held, that plaintiff's remedy lay in Revenue Court under S. 97. 1 N. L. R. 4, Dist. (*Hallifax, A. J. C.*) AMAN SINGH *v* CHURMAN SINGH. **61 I. C. 593 = A. I. R. 1921 Nag. 169.**

—S. 70—Mortgage.

———*Mortgage property including trees and a well in an ordinary field—Registration of the mortgage is invalid as a whole.*

Where, by a mortgage-deed a house and crops situated in occupancy and ordinary fields as well as certain trees and a well situated in an ordinary field were hypothecated,

Held, that under S. 70, sub-S. (3), the mortgage of the well and trees situated in the ordinary field was invalid and that the whole mortgage-deed was, therefore, void, having been registered in contravention of S. 70, sub-S. (5): 13 N. L. R. 165 and 1 N. L. R. 112, Foll.; A. I. R. 1928 Nag. 41, Expl. and Dist. (*Findlay, J. C.*) TARACHAND *v.* NOKHE SINGH. **11 N. L. J. 119 = 109 I. C. 586 = A. I. R. 1928 Nag. 248.**

—S. 70—Sale.

———*Sale void—Return of consideration.*

In the case of a sale made to circumvent the Statute prohibiting the sale of ex-proprietary rights the consideration is not recoverable. Defendant, if he fails to get possession, cannot recover the consideration, on the ground that the so-called surrender was a sale in contravention of the Tenancy Act, and the Registration obtained was a fraud upon the Registration Statute ; he can, however, claim compensation, before he delivers back possession. (*Prideaux, A. J. C.*) DHONDIBA *v.* PANDURANG. **68 I. C. 252 = A. I. R. 1923 Nag. 111.**

—S. 71—Tenancy.

———*Widow of tenant transferring tenancy to daughter—Death of daughter—Succession—Lapse.*

B, an ordinary tenant, died and his widow transferred in 1907 all his moveable and immoveable property to his daughters with the *Malguzar's* consent. The daughters died in 1918 and their husband took possession of the ordinary holding. In a suit by the *Malguzar* for recovery of possession on the ground, that the tenancy lapsed in the absence of any heir to *B*,

Held, that (1) the transfer by *B's* widow to his daughters was not a transfer but an acceleration of the succession ; that (2) in all matters of tenancy the personal law applies except in so far as it is limited or altered by the Tenancy Law and there is nothing in the Tenancy Act to limit a Hindu widow's power to accelerate succession by retiring from the ownership of it ; (3) that the daughters of *B* were not absolute owners of the tenancy, but held a limited estate so that it passed on their death to their father's heirs and not to their own heir, the husband. In the absence of heir the tenancy lapses and the landlord can resume possession. (*Hallifax, A. J. C.*) SUNDER LAL *v.* BISAMBUR.
A. I. R. 1922 Nag. 24.

—S. 92—Jurisdiction.

———Suit by an ejected tenant against a co-sharer who had since ceased to be a *lambardar* is not a suit between a landlord and tenant and is triable by a judge who is not a Revenue Officer. [*Note.*—This question of jurisdiction will not now arise since the passing of the new Tenancy Act of 1920]. (*Hallifax, A. J. C.*) JAGANNATH *v.* SAHEBRAO. **65 I. C. 127= A. I. R. 1922 Nag. 27.**

—S. 92—Landlord and Tenant.

———*Occupancy holding acquired by operation of law —Status of Tenant.*

Where the occupancy holding of a certain tenant is acquired by some persons under a foreclosure decree, their becoming tenants of the entire proprietary body is only one of several possibilities, and that status can only arise by its acceptance by both parties. 4 N. L. R. 120, Foll. (*Hallifax, A. J. C.*) NILKANTH *v.* KASUBAI.
4 N. L. J. 55=63 I. C. 46=A. I. R. 1921 Nag. 17.

—Ss. 93—Costs.

———*Court having jurisdiction not ordering costs—Subsequent suit therefor does not lie.*

If the Court is not entitled to order costs, and costs are incurred, they may be made the subject of consideration as to damages in a subsequent suit. If the Revenue Officer has power to award costs, and he does not do so, he must be held to have disallowed them and a subsequent suit will not lie. All Revenue Officers holding enquiries of the nature described in S. 95 of the Tenancy Act, which includes enquiries under S. 93 have, by rules having the force of law, been given the powers of Civil Courts in the matter of costs. (*Batten, J. C.*) MOTI RAM *v.* HARI. **18 N. L. R. 65=65 I. C. 67= A. I. R. 1922 Nag. 169.**

—S. 93—Applicability—Disputes between neighbouring tenants.

———*Neighbouring tenant—Dispute—Act does not apply.*

The Tenancy Act is an act mainly to provide for the relations between landlord and tenant, and contains no provisions, for settling disputes between neighbouring tenants as such. They must have recourse to the common law. (*Batten, J. C.*) MOTI RAM *v.* HARI.
18 N. L. R. 65=65 I. C. 67=A. I. R. 1922 Nag. 169.

—S. 110—Re-instatement.

———*Landlord ejecting transferee—Tenant can apply to Revenue Officer for reinstatement under S.* 41 (8) *of the old Act, even after the new Act came into force.*

Landlord's right to eject the transferee is correlative with tenant's right to force the landlord to put him in possession, and therefore if the landlord is entitled to enforce his right under the provisions of S. 41 of the old Act, it follows that the tenant's right to be reinstated must be enforced under the provisions of sub-S. (8) of the old section. Rights already acquired under the

repealed enactment were expressly saved by S. 110 of the new Act of 1920. S. 6 of the new Act which abolishes the provisions of sub-S. (8) of S. 41 of the old Act cannot override a right already vested and acquired under the old Act. 7 N. L. R. 125, Dissented from.

Consequently Revenue Officer has jurisdiction to entertain an application for re-instatement by the tenant, 13 C. P. L. R. 143 and A. I. R. 1923 Nag. 33, Rel. on. (*Kinkhede, Offg. J. C.*) LAL SINGH *v.* AMAN RAO.
22 N. L. R. 114=96 I. C. 905= A. I. R. 1926 Nag. 499.

—(I OF 1920).

—Absolute Occupancy.

———*Absolute occupancy holding—Purchaser in execution—Rights of.*

The auction-purchaser in execution of a rent decree of an absolute occupancy holding does not get it free from all incumbrances. He steps into the shoes of the holder of the first charge and has the capacity to redeem *qua* holder of the equity of redempton. He has the option to fall back on the prior charge or offer to redeem the mortgage. (*Kinkhede, A. J. C.*) ASARAM *v.* KANCHEDILAL. **9 N. L. J. 229=99 I. C. 445= A. I. R. 1927 Nag. 119.**

———*Retrospective operation.*

Act I of 1920 has no retrospective operation. A.I.R. 1922 Nag. 227 and A.I.R. 1923 Nag. 227, Foll. (*Mohiuddin, A.J.C.*) LILADHAR *v.* MOOLCHAND.
109 I.C. 543=11 N.L.J. 41.

—Benami Tenancy.

———Although tenancy is personal, there is nothing in the C. P. Tenancy Act to prevent a tenancy being held benami. (*Subhedar, A.J.C.*) PURA *v.* JALAM SINGH.
118 I. C. 684.

—Lambardar.

———*Lambardar cannot recover beyond his share without consent of co-sharers.*

Even after the C. P. Land Revenue Act, 1917, lambardar cannot recover beyond his share, on transfer in contravention of S. 12, C.P. Tenancy Act, without consent of other co-sharers. 4 N.L.R. 120, Foll. (*Findlay, O.J.C.*) WAMANRAO *v.* SHRAWAN. **22 N.L.R. 86= 9 N.L.J. 90=94 I.C. 941=A.I.R. 1926 Nag. 345.**

—Object.

———*Intention of law is against disposition by will.*

The intention of enacting the law of tenancy in the Central Provinces has been understood, in all the law Courts for all these years, to be to recognize a tenant's right of a restricted character as regards its heritability, transferability, partibility under certain conditions and limitations, but it has never been understood to carry with it the incident of divisibility by will at the instance of the tenant. It is property in which the interest carved out is more of a limited or personal character, than of a character conveying unlimited powers of disposition to the incumbent for the time being. The whole trend of the decisions on the question of tenancy has always been one way and consistent with such intention. (*Kinkhede, A. J. C.*) SHEODYAL *v.* REWAPRASAD. **90 I.C. 247=A.I.R. 1926 Nag. 222.**

—Occupancy holding.

———*Law as to devolution of occupancy holding is law existing at date of devolution.*

The law applicable to the devolution of occupancy holding is the law existing at the date of devolution. The mere fact that during the interval the Legislature thought fit to change the law is no ground for thinking that the old law which it repealed was of the same nature as the repealing enactment itself. (*Kinkhede, Offg. A.J.C.*) MULCHAND *v.* CHANDRASINGH.

9 N.L.J. 207=95 I.C. 589= A.I.R. 1926 Nag. 433.

—Right to sue—Mortgagee.

———*Possessory mortgagee of fractional interest in village is not landlord and cannot sue for rent.*

The position assignable to a mortgagee in possession of a fractional interest in a village is that of a mere transferee of a money claim to a portion of the arrears of rent when they have been proved due to the landlord of the holdings held by tenants of the village. Therefore such mortgagee is not a landlord within the meaning of the C. P. Tenancy Act and a suit for rent against the tenants is not maintainable by him. (*Kinkhede, A.J.C.*) SETH HARBAX *v.* LACHMAN. **82 I.C. 201= A.I.R. 1925 Nag. 183.**

—S. 1—Absolute occupancy.

———*Absolute occupancy right is tenant right.*

The inevitable consequence of placing the holder of an absolute occupancy right in the category of a 'tenant' is to make his enjoyment of the tenant right subject to the acceptance by him of the responsibilities attaching to that right in so far as they may be incidental to his position as such tenant towards his landlord under the general law which must govern the relations of landlord and tenant. 6 N. L. R. 6, Ref. (*Kinkhede and Staples, A.J.Cs.*) MT. GOURA *v.* SHRIRAM.

25 N. L. R. 198=122 I.C. 259= A.I.R. 1930 Nag. 124.

—S. 2—Co-lambardars.

———One out of two lambardars can bring a suit to recover a village site, when he is not acting adversely to the interests of the other lambardar. 12 N.L.R. 24, Dist. (*Prideaux, A.J.C.*) BABURAO *v.* RAM KRISHNA. **108 I.C. 434=A.I.R. 1928 Nag. 275.**

—S. 2—Grazing.

———*C. P. Land Revenue Act (1917), S. 2—Khudkhast land left under grass—Tenants cannot graze free of charge*

Keeping land under grass is "agriculture" within the meaning of that term in the Tenancy Act and therefore where a plot is recorded as khudkhast, villagers are not entitled to graze their cattle free of charge therein merely because it is left under grass. (*Prideaux and Mohiuddin A.J.Cs.*) ABDUL HAI *v.* BAPU RAO.

25 N.L.R. 16=116 I.C. 76=A.I.R. 1929 Nag. 108.

—S. 2—Tenancy.

———*Person in possession of holding for five years without protest—No tenancy is created even by acquiescence.*

A tenancy cannot be created by implication or acquiescence. Tenancy can only be created by a contract. The failure of the landlord to protest against a person's possession of a holding for five years is entirely insufficient as proof that the landlord had entered into a contract with that person. 8 N.L.R. 163, Rel. on. (*Macnair, A.J.C.*) GULAB SINGH *v.* NANAJI.

114 I.C. 622=A.I.R. 1929 Nag. 13.

———*Tenancy can be held benami though it is personal.*

In the Central Provinces under the C. P. Tenancy Act the contract of tenancy is a personal one. But a recorded tenant may hold land benami for some other person. If there are circumstances showing that the landlord knew that the recorded tenant was merely a benamidar he is not entitled to treat the tenancy as abandoned, when the benamidar disappears and the person for whom the benamidar was holding the benami cultivated the holding. (*Findlay, O. J. C.*) MT. KAUKARI *v.* TIKARAM. **92 I.C. 80= A.I.R. 1926 Nag. 239.**

—S. 4—Absolute occupancy.

———Landlord can create absolute occupancy tenancy. (*Hallifax, A. J. C.*) RAMCHANDRA BALKRISHNA *v.* RAMCHANDRA JAIRAM. **65 I.C. 952= A.I.R. 1922 Nag. 222.**

—S. 5—Absolute occupancy.

———*Absolute occupancy right cannot be bequeathed.*

An absolute occupancy tenant is not empowered to bequeath any right in his holdings. 15 C. P. L. R. 1, Affirmed. (*Kotval and Prideaux, A.J.Cs. then Hallifax, A.J.C.*) MT. RUPIR *v.* SADASHEO.

82 I.C. 1038=A.I.R. 1925 Nag. 190.

—S. 5—Occupancy holding.

———*Surrender by widow—S. 89, C. P. Tenancy Act.*

A Hindu widow has not the right to surrender her late husband's holding, whether absolute occupancy or occupancy, in such a manner as to defeat the expectancy of a reversioner when the object of the surrender is to defeat that expectancy, although according to the nature of property she may surrender it to escape liability for rent. 6 C. P. L. R. 135; 15 C. P. L. R. 89; 8 N. L. R. 154; 6 C. P. L. R. 138; 5 N. L. R. 172; A.I.R. 1925 Nag. 306, Foll.; A. I. R. 1927 Nag. 129; A.I.R. 1927 Nag. 330, Not Appr. (*Macnair, Offg. J.C. and Mohiuddin, A.J.C.*) LAXAMAN *v.* BHULABAI.

26 N.L.R. 1=123 I.C. 449=A.I.R. 1930 Nag. 65.

—S. 5—Scope of.

All that S. 5 of the Central Provinces Tenancy Act does is to legislate for the rights of succession to a holding after the tenant has died. It does not make all the incidents applicable to the joint Hindu family apply during the life-time of the tenant. (*Findlay, J. C.*) RAMAPPA *v.* BAPU SAHEB. **121 I. C. 661.**

—S. 5—Succession.

———*Son dying—Mother getting his property by prescription—On her death the reversioners of the son succeed—Hindu Law—Succession—Reversioners.*

The title to an absolute occupancy field acquired by a mother by prescription after her son's death is a limited title of a female heir, and on her death the person entitled to inherit the property would be the reversionary heir of the son. (*Kolhatkar, A. J. C.*) MAHEPAT *v.* MUKUNDRAO. **114 I.C. 454=A.I.R. 1928 Nag. 329.**

———*Under S. 41, Tenancy Act (1898), survivorship was not applicable so there was no vested right by birth.*

The law of survivorship was not applicable to absolute occupancy land under the Tenancy Act of 1898; a person could, therefore, get no vested right by birth in the absolute occupancy land before the introduction of the Tenancy Act, 1920. 4 N. L. R. 9; 5 N. L. R. 103 and A. I. R. 1926 Nag. 433, Foll. (*Findlay, J.C.*) GANPAT *v.* BHANU DAS. **104 I.C. 291= A.I.R. 1927 Nag. 381.**

—S. 5—Landlord's right of re-entry.

———*If nearest heir fails to take up tenancy landlord is entitled to re-enter.*

In the case of an absolute occupancy tenant if the nearest heir fails to take up the tenancy the malguzar thereupon is entitled to re-enter and the whole line of more remote heirs need not be exhausted before the malguzar can claim to come in. 2 C. P. L. R. 6; 16 C. P. L. R. 55 and 2 N. L. R. 101, Ref. (*Kinkhede and Staples, A. J. Cs.*) MT. GOURA *v.* SHRIRAM.

25 N. L. R. 198=122 I. C. 259= A. I. R. 1930 Nag. 124.

—S. 6—Alienation by Widow.

———*Hindu law—Sale of absolute occupancy holding without necessity is invalid though landlord consents to the transfer.*

C. P. TENANCY ACT (1920), S. 6—Mortgage.

A sale by a widow in possession, of her husband's absolute occupancy fields without legal necessity is liable to be set aside by the reversioners and the landlord's consent to the transfer cannot validate the transfer so as to amount to a surrender plus a subsequent grant of tenancy. 8 N. L. R. 154, Foll. (*Findlay, O. J. C.*) MAROTI *v.* CHINTU. **95 I. C. 626= A. I. R. 1926 Nag. 367.**

—S. 6—Mortgage.

———*S.* 6 *does not validate mortgage which is voidable under Tenancy Act* (1898), *S.* 41 (7).

S. 6 applies only to mortgages effected after the date of its coming into force. It does not do away with the voidability under Cl. (7), S. 41 (Tenancy Act of 1898), attached to mortgages executed in contravention of that section. (*Kotval, A. J C.*) KALURAM *v.* MOHANSINGH. **24 N. L. R. 153=113 I. C. 128= A. I. R. 1929 Nag. 30.**

—S. 6—Occupancy tenancy.

———*Hindu widow—Interest of, in occupancy tenancy, is same as that of a widow's estate subject to provisions of Tenancy Act.*

Though a Hindu widow's interest in an absolute occupancy tenancy which has devolved on her at her husband's death is the same in all respects as the estate of a Hindu widow in land inherited from her husband, there is the important exception that the limitations of her interest in the tenancy are subject to the provisions of the Tenancy Act as to surrender and alienation. (*Hallifax, A. J. C.*) RAMCHANDRA BALKRISHNA *v.* RAMCHANDRA JAIRAM. **65 I. C. 952= A. I. R. 1922 Nag. 222.**

—S. 6 (2) and S. 105—Pre-emption.

———*Tenant a minor—His mother contracting to sell the field—Notice to landlord and he exercising his right of pre-emption—Plaintiff cannot subsequently recover possession on the ground of want of legal necessity—Jurisdiction of Civil Court—Bar of.*

Plaintiff's mother, as guardian, entered into an agreement to sell an occupancy field to a third party. In accordance with sub-S. (2), S. 6, she gave notice to the lambardar of her intention to sell, who claimed the right to purchase the field in exercise of his pre-emptive title. In the revenue proceeding, the question of valuation alone was contested. The plaintiff brought a suit for possession alleging that there was no legal necessity for his mother to have made the transfer to the third party and the possession of the field by the defendant was illegal and that the plaintiff was entitled to retain possession.

Held, that the statutory right of pre-emption given to the landlord under S. 6, Sub-S. (2) cannot be regarded as an ordinary transfer. That right having been duly exercised, having regard to S. 105 (*a*) of the Act, the jurisdiction of the Civil Court was excluded and it was not open to the plaintiff, to come to Court on the alleged cause of action of want of legal necessity for the intended transfer. (*Findlay, J. C.*) BALAJI KHOSHTI *v.* RAMBILAS. **11 N. L. J 125= 109 I. C. 615=A. I. R. 1928 Nag. 249.**

— S. 6—Surrender.

———*Surrender and transfer by limited holder—No distinction can be drawn.*

There is no distinction between a surrender and a transfer by a limited holder where the limited holder has done all that was required of her under Ss. 5 and 6, C. P. Tenancy Act (1920), before making the transfer. A. I. R. 1925 Nag. 306 and A. I. R. 1927 Nag. 129, Foll. (*Findlay, J. C.*) GHULBA *v.* MAROTI.

10 N.L.J. 257=105 I.C. 559=A.I.R. 1928 Nag. 32.

—S. 9—Execution.

———*C. P. Code, S.* 68—*Collector to whom decree has been transferred for execution under S.* 68 *and S.* 9, *C. P. Tenancy Act, has powers of execution only and not of deciding other matters.*

A Collector, executing a decree under S. 9, C. P. Tenancy Act, and S. 68, C.P. Code, is a Judge of a Civil Court to which the decree has been transferred for execution, but his powers are limited to those which the Court from which the decree was transferred to him could exercise in the execution, of the decree only. He has no power to enquire into objections to attachment or applications for rateable distribution or matters of that kind. (*Hallifax, A. J. C.*) NANHELAL *v.* JAMNADAS. **109 I. C. 381=A. I. R. 1928 Nag. 297.**

—S. 11—Applicability.

———*Provisions apply to female tenant also.*

The provisions of S. 11 are to be read as applicable to male as well as female tenants *mutatis mutandis.* (*Kinkhede, A. J. C.*) BHAGWANDAS *v.* GAJADHAR. **23 N. L. R. 9=9 N. L. J. 221=98 I. C. 669= A. I. R. 1927 Nag. 68.**

—S. 11—Inheritance.

———*Mere separation in mess and residence of a son is not sufficient to cause exclusion from inheritance if there is no separation in estate.*

The personal law of the Hindus has no doubt to be administered in dealing with cases of inheritance to occupancy tenancy holdings ; but it does not follow that the rule of Hindu Law that a 'joint' son excludes a 'separated' son must hold good even where the separation consists only in mess and residence and not in estate. (*Kinkhede, A.J. C.*) KALIRAM KUNBI *v.* BAJILAL.

9 N.L.J. 163=97 I.C. 730=A. I. R. 1927 Nag. 107.

—S. 11—Interpretation.

———" *Collaterals* " *and* " *kindred* "—*Words should be construed differently so as to suit the principles of personal law of each tenant.*

The primary meaning of the words " collaterals " and " kindred " cannot be treated as the only meaning which the legislature intended to assign to them when used in the Tenancy Act. It would be proper to say that those words have only such technical meaning as they may bear under the system of personal law applicable to the tenant concerned, so that it should be open to the Court to put such different constructions on them as the personal law of inheritance of the particular tenant may justify. (*Kinkhede, A. J. C.*) BHAGWANDAS *v.* GAJADHAR. **23 N. L. R. 9=9 N. L. J. 221= 98 I. C. 669=A. I. R. 1927 Nag. 68.**

———" *Collaterals* "—*In the case of Hindu married woman's self-acquired occupancy tenancy rights* " *collaterals* " *means her husband's collaterals.*

In interpreting the rule of inheritance enunciated in S. 11, read with second proviso, as applicable to the devolution of a Hindu married woman's self-acquired occupancy tenant right, the word " collaterals " should be construed as the collaterals of her husband. (*Kinkhede, A. J. C.*) BHAGWANDAS *v.* GAJADHAR. **23 N. L. R. 9=9 N. L. J. 221=98 I. C. 669= A. I. R. 1927 Nag. 68.**

—S. 11—Occupancy holding.

———*Surrender of occupancy holding by Hindu widow—Reversioners cannot challenge.*

A surrender of occupancy holding by a Hindu widow cannot be challenged by the reversioners of the last male holder on the ground of want of legal necessity. A. I. R. 1927 Nag. 129 ; 9 N. L. R. 126 ; and 5 N. L. R. 172, Foll. : A. I. R. 1925 Nag. 306, *Expl.* (*Findlay, J. C.*) MT. JANI *v.* BAPU. **102 I. C. 888=A. I. R. 1927 Nag. 362.**

———*Surrender by widow of tenancy inherited from a male is not invalid against reversioners.*

The surrender to the landlord by a Hindu woman of a tenancy inherited from a male without legal necessity for making it is not invalid against that male's reversionary heirs: 5 N. L. R. 172 and 9 N. L. R. 126, Foll, A. I. R. 1925 Nag. 306, Expl. (*Hallifax, A. J. C.*) BIKRAM *v.* THAKUR GANESH SINGH.

23 N. L. R. 1 = 99 I. C. 187 = A. I. R. 1927 Nag. 129.

———*Hindu Law—Joint family—Lease which is joint family property though in name of manager passes by survivorship—This principle applies to occupancy holding in C. P.*

Ordinarily in the case of a lease taken by the manager of a joint Hindu family in his own name but with family funds and really on behalf of the whole family, it is universally accepted that the lease and the benefits of it belong to the whole family and if it is heritable it will pass by survivorship and not by inheritance, whatever the mutual rights and liabilities of the lessor and the members of the family other than the manager may be. This principle applies to an occupancy holding; 13 C. P. L. R. 137; 7 N. L. R. 36 and 10 N. L. R. 64, Foll. (*Hallifax, A. J. C.*) BARATI *v.* SURIT.

92 I. C. 916 = A. I. R. 1926 Nag. 277 (278).

———*Hindu widow cannot make a Will in respect of her husband's occupancy holding—Suit to challenge such Will lies in Civil Court.*

A Hindu widow in possession of her husband's estate as limited owner cannot make a testamentary disposition of the inherited occupancy holding of her husband so as to defeat the provisions of S. 11 of the new Tenancy Act, 1920, which provides that the occupancy holding shall on the death of the tenant pass by inheritance in accordance with his personal law. (8 N. L. R. 154 and 6 N. L. R. 47, Ref.) A suit to set aside such a disposition lies in Civil Court, a "Will" not being a "transfer". 33 All. 233 and 5 C. P. L. R. 1, Foll. (*Kinkhede, A. J. C.*) SHEODAYAL *v.* REWAPRASAD.

90 I. C. 247 = A. I. R. 1926 Nag. 222.

—S. 11—Procedure.

———*Difference in wording is merely curiosity in drafting.*

The omission to mention survivorship in the case of an occupancy holding in S. 11 seems to have no more meaning or effect than the omission to state that the interest in that section is the interest in the holding, and the difference in the wording of the two sections seems to be merely a curiosity in drafting. (*Hallifax, A.J.C.*) DURLU *v.* SHEOLAL. **102 I. C. 711 = A. I. R. 1927 Nag. 272.**

—S. 11—Tenancy.

———*Hindu Law of survivorship does not apply to tenancies in C. P.—Hindu Law.*

The Hindu Law of Succession by survivorship and the vesting of a son's interest by birth is not applicable to a tenancy governed by the Central Provinces Tenancy Act. (*Baker, Offg. J. C.*) MST. GOWRA *v.* CHAITRAM. **78 I. C. 63 = A. I. R. 1924 Nag. 372.**

—S. 11—Proviso (ii).

———*Female tenant—Succession to occupancy holding—Collaterals of husband.*

There is nothing in S. 11, Proviso (ii) of the C. P. Tenancy Act to show that it was ever intended that the succession should be confined to the collaterals of the female tenant only. The collaterals of the female tenant's husband can also succeed. (*Mohiuddin, A. J. C.*) DAU GEND SINGH *v.* BHAGWAN PERSHAD.

122 I.C. 377.

—S. 12—Lambardar.

———*Ex-proprietary tenant of* sir *land held in severalty surrendering it to the proprietor—Lambardar is not entitled to dispossess the proprietor under S. 13.*

Where co-sharers, holding *sir* land in severalty sell their share to a stranger and then surrender their ex-proprietary rights to him, the lambardar is not entitled to apply under S. 13 to set aside the transaction and the revenue Court has no jurisdiction to put the lambardar in possession. A. I. R. 1924 Nag. 381, Ref. (*Findlay, J. C.*) MURLIDHAR *v.* HUSAIN KHAN.

103 I. C. 818 = A. I. R. 1927 Nag. 325.

—S. 12—Occupancy holding.

———*Registration Act, Ss. 17 and 49—Deed of lease of occupancy holding is not compulsorily registrable because of C. P. Tenancy Act* (1920), *S.* 12 (4).

A deed of lease of an occupancy holding is not a document required by S. 17 of the Registration Act to be registered, and is not affected by the provisions of S. 49 of that Act because of C. P. Tenancy Act (1920), S. 12, (4). (*Hallifax, A. J. C.*) FAKIRA *v.* RAMCHANDRA. **93 I. C. 633 = A. I. R. 1926 Nag. 335.**

—S. 12—Occupancy rights.

———*Surrender of—Voidable—Contract Act, S.* 23—*Co-sharer.*

Surrender of occupancy rights contrary to S. 12 is not void but only voidable, and therefore the consideration of such a transfer is not illegal within S. 23, Contract Act, so as to debar the rights of contribution among the transferees *inter se.* (*Findlay, O. J. C.*) WAMANRAO *v.* SHRAWAN. **22 N. L. R. 86 = 9 N. L. J. 90 = 94 I. C. 941 = A. I. R. 1926 Nag. 345.**

—S. 12—Registration.

———*The provision does not prohibit registration merely for inclusion of trees standing on occupancy land.*

Where a mortgage deed draws an explicit distinction between the land and the trees thereon and implies that trees are held under a different title from the land held under occupancy right and are, unlike the land, capable of being validly mortgaged, then the mortgage deed does not come within the prohibition laid down in sub-S. 5 of S. 46 of the act of 1898. 7 C. P. L. R. 7; 7 N.L R. 63; A. I. R. 1925 Nag. 277 and 13 N. L. R. 165, Dist. (*Findlay, J. C.*) NARAIN *v.* MAHADEO.

23 N. L. R. 174 = 104 I. C. 843 = 10 N.L.J. 162 = A.I.R. 1928 Nag. 41.

—S. 12—Scope.

———S. 12 (4) *is an incidental provision and only a further safeguard.*

Section 12, sub-section (4) is obviously an extra safeguard introduced to prevent or discourage as far as possible improper transfers; it is an incidental provision so to speak, while the real nature of the transaction, as well as the extent to which it can be avoided are laid down in S. 13 of the Tenancy Act. Nagpur. S. A. 210 of 1920 and A. I. R. 1926 Nag. 310, Diss. (*Findlay, O. J. C.*) WAMANRAO *v.* SHRAWAN. **22 N. L. R. 86 = 9 N. L. J. 90 = 94 I. C. 941 = A.I.R. 1926 Nag. 345.**

—S. 12—Tenancy holding.

———*Land originally malik makbuza treated by holder as tenancy holding for more than 12 years—Holder becomes an occupancy tenant—His decree-holder cannot therefore attach the land.*

Where land originally malik makbuza has been treated by the holder as his tenancy holding for more than 12 years, he cannot claim any rights greater than those of a tenant in the land, and as an auction-purchaser cannot obtain any rights which the judgment-debtor can no longer enforce, and as tenancy rights are not attachable, the rights of such malik makbuza cannot be attached and sold. (*Macnair, A. J. C.*) KRISHNA *v.* NARAYAN. **103 I. C. 697 = A. I. R. 1927 Nag. 330.**

—S. 12—Transfer.

———*Surrender of occupancy field and creation of tenancy—Transfer is good until set aside under Ss.* 12 *and* 13.

Where an occupancy field has been surrendered to landlord and lease has been created in favour of a third person, the transfer stands good until it has been set aside in the manner contemplated by the provisions of Ss. 12 and 13. (*Findlay, J. C.*) TIKARAM *v.* SUKKA. **111 I. C. 358 = A. I. R. 1928 Nag. 338.**

———*Transfer from a tenant in another person's patti —Owner of the patti can prove his claim in a Civil Court.*

If an owner of an independent patti chooses to accept a surrender or a transfer from a tenant in another person's patti and then gives the land out to another tenant, the owner of the patti is not debarred from presenting his claim in a Civil Court. (*Prideaux, A. J. C.*) JUGALKISHORE *v.* NAGO. **107 I. C. 671 = A. I. R 1928 Nag. 221.**

———*Transfer by occupancy tenant—Transfer valid between the parties, but for S.* 12*—Transfer can be avoided only in manner and to extent mentioned in S.* 13 *—Civil Court cannot entertain suit to avoid the transfer.*

No landlord can sue in a Civil Court to evict a person to whom an occupancy tenant has made over his holding unless that person is one of those mentioned in S. 12 (1), (2) of the Tenancy Act, 1920 or holds under a lease for not more than one agricultural year granted not more than two months before the beginning of that year, without any covenant to renew being attached to it; in all other cases he must apply to a Revenue Officer under S. 13 of the Act. (Case-law discussed.) (*Hallifax, A. J. C.*) TIJAN *v.* GOPI. **87 I. C. 826 = A. I. R. 1925 Nag. 442.**

———*Sale of occupancy right to distant heir in presence of nearer heir is not opposed to S.* 12 (1) (ii).

The intention of the Legislature in framing S. 12 (1) (*ii*), was to clothe an occupancy tenant with a power to transfer his right in the holding to any distant heir even during the life-time of other nearer heirs, provided the transferee is a person to whom the right is likely to go by inheritance to the transferring tenant, in the absence of nearer heirs entitled to succeed under the new Tenancy Act and therefore a sale by an occupancy tenant to a distant heir is not in contravention of S. 12 (1) (*ii*). (*Kinkhede, A. J. C.*) MOHAN *v.* BODHAN. **21 N. L. R. 144 = 94 I.C. 655 = A. I. R 1925 Nag. 421.**

———*Mortgage of trees fully owned in occupancy fields is valid.*

Where the property mortgaged was fruit trees in occupancy fields and where the mortgagors were proprietors of the trees:

Held, that the mortgage deed was validly registered. (*Hallifax, A. J. C.*) MURALIDHAR *v.* ANAND RAO. **8 N. L. J. 153 = 93 I. C. 850 = A. I. R. 1925 Nag. 414.**

—S. 13—Applicability.

———*Question between landlord and trespasser—Act does not apply.*

The plaintiff as *lambardar* sued to recover possession of the suit land from the defendants alleging that *K* the original tenant had actually surrendered the land to him on 18-6-1918 and put him in possession. On 1-7-1920 the defendants took wrongful possession. The defendants pleaded that they were in possession under an

agreement (which was held to be a sub-lease) dated 25-12-1907 executed by *K* in favour of their father. They denied their surrender and pleaded that the suit was not tenable under S. 47 of the old C. P. Tenancy Act and under S. 13 of the new Tenancy Act, and that the suit was not triable by a Civil Court, and was barred by limitation.

Held, the agreement of 25-12-1907 was a sub-lease; that when *K* surrendered his tenancy, the sub-tenancy was determined also; that this is not a case between landlord and tenant but between landlord and trespassers, and thus triable by a Civil Court; that S. 47 does not apply and that no question of adverse possession arises. (6 C. P. L. R. 74, Foll. 8 N. L. R. 22, Dist.). (*Baker, Offg. J. C.*) GOPALA *v.* SAKHARAM. **6 N. L. J. 224 = 73 I. C. 15 = A.I.R. 1923 Nag. 261.**

—S. 13—Lambardar.

———*Tenant living and his right existing—Lambardar has no preferential right to possession.*

The lambardar as such has no perferential right and cannot be allowed to take possession of the land sold to stranger, when the tenant is alive and his tenant right has not come to an end. (*Mohiuddin, A. J. C.*) MAKSUDANSING *v.* DARBARGIR. **113 I. C. 110 = A. I. R. 1929 Nag. 65.**

———*Co-sharer—Surrender to one—Suit by others for possession-contribution.*

Where one co-sharer gets a surrender of a field from the tenant, the lambardar suing for joint possession is bound to contribute to the costs of acquisition of the surrender: A.I.R. 1926 Nag. 345, Foll. (*Findlay, J. C.*) MAHADEO *v.* BUDHARAM. **108 I. C. 878.**

—S. 13—Occupancy holding.

———*Holding transferred to one co-sharer—Lambardar consenting—Suit to challenge lies only on ground of fraud—Ejectment proceedings can lie in Revenue Court under S.* 13.

If an occupancy holding transferred to one of several co-sharers in the village is regarded as khudkasht, then it is admittedly transferred to the whole proprietary body. In that case if the separate holding of it as khudkasht has the consent of the lambardar, that is of the whole body of co-sharers, no member of that body can set aside that agreement except on the ground of fraud, or under S. 215 or S. 216 of the Contract Act or S. 90 of the Trusts Act if the lambardar has allotted the land to himself. In either case the whole proprietary body would have to sue, except of course the defendant. But a co-sharer who buys an occupancy holding does it for his own benefit, and he must surely be considered an outsider for the purposes of ejectment as well as in the transfer; he is simply the transferee of an occupancy holding, and can be ejected only on application to a Revenue Officer under S. 13 of the Tenancy Act, 1920, by the whole proprietary body; after ejectment he would of course go into possession as a co-sharer with the others, but he would be entitled to no contribution from them of a share in the cost of acquisition; Remarks in 4 N. L. R. 120 held as obiter and not Foll. (*Hallifax, A. J. C.*) DEVAJI *v.* GOVIND. **100 I. C. 27 = A. I. R. 1927 Nag. 161.**

—S. 13—Surrender.

———*Surrender to landlord—Landlord creating tenancy—Surrender can be contested under S.* 13.

Where surrender of occupancy field has been made in favour of landlord, and landlord has created the tenancy in favour of a third person the surrender can be contested under S. 13: A.I.R. 1927 Nag. 330, Rel. on. (*Findlay, J. C.*) TIKARAM *v.* SUKKA. **111 I.C. 358 = A. I. R. 1928 Nag. 338.**

C. P. TENANCY ACT (1920), S. 13—Surrender.

———*Widow can surrender the tenancy even to defeat the reversioners—Reversioners' remedy is to attack it as transfer under S.* 13.

S. 11, is the only provision which makes any distinction between the tenancy of a house and an agricultural tenancy of an occupancy field. Tenancy, like other contracts, is essentially personal and there is nothing apart from the said provision which limits the rights of a Hindu woman in respect of the contract of tenancy. A Hindu widow is therefore entitled to surrender the tenancy and that holds good, even if her motive is to affect the reversioners' rights and to secure the tenancy for her intended husband; A. I. R. 1927 Nag. 129. Foll.; A. I. R. 1925 Nag. 306, Dist. The only remedy the reversioners have is to attack the surrender as a transfer under S. 13, C. P. Tenancy Act, 1920. (*Findlay, J. C.*) MT. GANGOO *v.* LAXMAN.

103 I. C. 801=A. I. R. 1927 Nag. 330.

—S. 13—Transfer.

———*Transfer of holding by occupancy tenant can be set aside only by applying to Revenue Officer under S.* 13 *—Remedy in Civil Court is barred by S.* 105

A transfer of his holding by an occupancy tenant can be set aside and the landlord can recover possession only by application to a Revenue Officer under S. 13; under S. 105 he cannot be given any remedy by a Civil Court. (*Hallifax, A. J. C.*) BISHAN *v.* SUMER SINGH.

89 I. C. 231=A. I. R. 1926 Nag. 177.

———*Transfer by tenant—Lambardar not taking steps under S.* 13*—Lease by lambardar is illegal.*

On a tenant transferring his right to a co-sharer the lambardar does not get the right to lease the land to a third person without taking any steps u S. 13 to set the transfer aside. (*Baker, J. C.*) DHEK *v.* RAGHU.

8 N. L. J. 52=8, I. C. 115=
A. I. R. 1925 Nag. 259.

—S. 21—Liability.

———*Sub-tenant is not liable for arrears under S.* 21.

A sub-tenant of an occupancy holding who has grown and reaped crops in such holding is not liable to the landlord of the village for arrears of rent under S. 21. (*Prideaux, A. J. C.*) SUKHRANI *v.* WASUDEO.

11 N. L. J. 82=109 I. C. 775=
A. I. R. 1928 Nag. 211.

—S. 21—Limitation.

———The plaintiff claimed arrears of rent from defendants of whom defendant No. 3 was the purchaser of the standing crops prior to three months of the suit.

Held, that purchase of crops not brought to the knowledge of the landlord would not start limitation against the landlord. Appropriation commences from the date when crops began to be cut and limitation runs from that date. (*Baker, J. C.*) NATHU LALSA *v.* SHANKARLAL. **7 N. L. J. 80=81 I. C. 651=**
A. I. R. 1924 Nag. 87.

—S. 27—Rights.

———According to S. 27 (2) (*b*), any person who holds *sir* land as a tenant shall be deemed to be a sub-tenant of such land, but as the provisions of Act I of 1920 are not retrospective, the rights which were acquired under the Tenancy Act of 1898, remain unaffected, and, therefore, ordinary tenants of *sir* land remain ordinary tenants and do not become sub-tenants. (*Mohiuddin, A. J. C.*) LILADHAR *v.* MOOLCHAND. **109 I. C. 543=**
11 N. L. J. 41.

—S. 35—Transfer.

———The mere transfer of a right of occupancy does not entail a forfeiture of such right and if a landlord elects to set aside such transfer, all parties revert to the status in *quo ante*: 15 C. P. L. R. 17; 14 C. P. L. R. 14; 11

C. P. TENANCY ACT (1920), S. 41—Absolute Occupancy.

N. L. R. 124; 18 N. L. R. 82, Rel. on. (*Jackson, A. J. C.*) GANPATRAO *v.* RAGHO. **A.I.R. 1930 Nag. 193=**
26 N. L. R. 190=124 I. C. 252.

—S. 37—Occupancy.

———*Occupancy rights in malik makbuza acquired before* 1884 *can be extinguished by S.* 37*—Such occupancy tenant if not recorded in last settlement before* 1920 *is a sub-tenant.*

Though occupancy rights acquired before the first January, 1884 were left untouched by Act IX of 1883 (as amended) they can be extinguished under S. 37 of Act of 1920. The intention of S. 37, as regards occupancy rights under a malik makbuza is that, though a person might have acquired such rights, yet, if he was not recorded in the settlement records of the last settlement made before the Tenancy Act of 1920 came into force, he would be deemed to be a sub-tenant: 6 C. P. L. R. 101; 8 N. L. R. 39 and A. I. R. 1923 Nag. 227, Expl. (*Jackson, A. J. C.*) RIWAIN *v.* MARDAN SINGH.

116 I. C. 80=A. I. R. 1929 Nag. 112.

—S. 37—Occupancy Tenancy.

———*Status of.*

If a person is not recorded an occupancy tenant in the papers of the settlement of 1913 which preceded the Tenancy Act of 1920, but on the contrary he is recorded as a sub-tenant, he does not acquire the status of occupancy tenant in view of S. 37, C. P. Tenancy Act of 1920. (*Kinkhede, A. J. C.*) SANDU *v.* GOPIKABAI.

107 I. C. 661.

—S. 37—Tenancy.

———*Person cultivating on partnership basis is a tenant, that in* sir *is sub-tenant and in* khudkasht *an occupancy tenant.*

The ordinary presumption is that a man who cultivates the land of the *malguzar* whether on *batai* or on payment of rent is a tenant. The status of a person cultivating the proprietor's *sir* land under S. 37 of the new Act of 1920 is that of a sub-tenant. Where *sir* land and other land is given to a person under one lease or one set of conditions so as to constitute one holding, the status of the defendant so far as the *sir* land is concerned, is that of a sub-tenant. The landlord in an ejectment suit can therefore be given a decree declaring that defendants are liable on partition by proper authorities. In the case of *khudkasht* lands the status of defendant is that of an occupancy tenant and as such he is not liable to be ejected therefrom by the landlord except under S. 25 of the said Act. (*Kinkhede, A. J.C.*) GOKUL *v.* SHYAMLAL SINGH. **90 I. C. 76=**
A. I. R. 1926 Nag. 35.

—S. 38—Tenancy.

———*Sub-tenancy for one year does not continue after that year.*

There is no presumption that a sub-tenanay for a single year continues after that year expires: 14 N.L.R. 3, Dist. (*Macnair, A. J C.*) MOOKAT SINGH *v.* MUNI LAL. **23 N. L. R. 148=103 I. C. 713=**
A. I. R. 1927 Nag. 320.

—S. 39—Notice.

———*No notice or order of ejectment is necessary.*

No notice and no order of ejectment is necessary after the passing of a decree for arrears before actual ejectment under S. 39 as it is under S. 24. (*Mohiuddin, A. J. C.*) RAMALAL GANAPAT LAL *v.* RAMACHANDRA SHAMARAD. **25 N. L. R. 119=12 N. L. J. 57=**
116 I. C. 426=A. I. R. 1929 Nag. 120.

—S. 41—Absolute Occupancy.

———*Absolute occupancy holding—Mortgage with possession—Suit by Mulguzar in ejectment—Maintainability.*

**CENTRAL PROVINCES TENANCY ACT (1920)
S. 46—Interpretation.**

Where the mulguzar sued to eject the mortgagees in possession of an absolute occupancy land on the ground that the mortgage was without his consent and it also appeared the mortgagees had taken possession after the new Act came into effect. *Held* that the mulguzar had no vested right to eject the mortgagees under the old Act that therefore he could not eject them after the new Act came into force and that his remedies were only those prescribed in the new Act. (*Baker, O. J. C.*) GOPAL RAO *v.* HARPRASAD. **98 I. C. 767 (1) = 9 N. L. J. 192.**

—S. 46—Interpretation.

———*Mukaddam Gumashta is a village servant.*

The Mukaddam Gumashta is a village servant and in that respect is in exactly the same class as the Kotwar, being merely higher than the Kotwar in the performance of practically the same duties. A holding granted to him in lieu of service is village service holding. (*Hallifax, A.J.C.*) BASANT KAUR *v.* SHIOCHARAN. **101 I. C. 693 = A. I. R. 1927 Nag. 208.**

—S. 49—Interpretation.

———"*To occupy any portion of his* sir *land as proprietor.*"

The words "to occupy any portion of his *sir* land as a proprietor" in S. 49, mean to enjoy the proprietary rights in any portion of *sir* land. (*Macnair, Offg. J. C.*) NAGOBA *v.* A. V. ZINZARDE. **12 N. L. J. 117 = 26 N. L. R. 46 = 121 I. C. 54 = A. I. R. 1929 Nag. 338.**

———*Section is not retrospective.*

The provisions of S. 49 (1) of the Tenancy Act of 1920 relating to the lapsing of the tenancy rights granted by an ex-proprietor in the *sir* land cannot have retrospective effect over the tenancy rights created by him before the passing of the Act. (*Baker, J. C.*) CHAMPALAL *v.* KANJILAL. **83 I. C. 752 = A. I. R. 1925 Nag. 249.**

———*Last portion has no retrospective effect.*

The latter portion of sub-S. (1) of S. 49 has no retrospective effect. (*Batten, J. C.*) HINDU SINGH *v.* MANGAL. **19 N. L. R. 110 = 6 N. L. J. 227 = 72 I. C. 438 = A. I. R. 1923 Nag. 227.**

—S. 49—Occupancy Tenancy.

———*Owner of* sir *land adjudged insolvent—Order passed vesting his land in receiver—Owner becomes occupancy tenant of* sir *land—Provincial Insolvency Act, S.* 28 (5).

The intention of S. 49 appears to be that whenever proprietary possession temporarily passes from the owner of *sir* land he becomes an occupancy tenant. If an owner of *sir* land is adjudged insolvent and order is passed vesting his property in the receiver, he no doubt loses his right to proprietary rights in the *sir* land but by the vesting order he becomes the occupancy tenant of the *sir* land and is entitled to possession of the land. A. I. R. 1924 Nag. 158, Rel. on. (*Macnair, Offg. J. C.*) NAGOBA *v.* A. V. ZINZARDE. **12 N. L. J. 117 = 26 N. L. R. 46 = 121 I. C. 54 = A. I. R. 1929 Nag. 338.**

—S. 49 (2)—Procedure.

———*Registration Act, S.* 87—*Mistake in following the Procedure laid down in C. P. Tenancy Act, S.* 49 (2) *does not invalidate registration.*

S. 49 (2), Tenancy Act, lays down the way in which a registering officer must satisfy himself that proper sanction has been given to the transfer of the right to occupy *sir* land before registering a document purporting to transfer that right, that is, it regulates the procedure and nothing else. If, therefore, a registering officer commits a mistake in following the procedure, the registration is not invalidated thereby, 1 N. L. R. 112 and 8 N. L. R. 22, Dist. (*Hallifax and Mohiuddin, A. J. Cs.*) MT. CHHITIA BAI *v.* RAJ KUMAR. **111 I. C. 148 = A. I. R. 1928 Nag. 283.**

**CENTRAL PROVINCES TENANCY ACT (1920),
S. 49—Sir land.**

———*Sanction by Sub-Divisional Officer is valid though not in accordance with orders of Financial Commissioner.*

All that is required in the way of sanction by Ss. 49 and 50 of the Tenancy Act, 1920 or even by any of the rules on the subject made under S. 109 of the same Act, is the sanction of the Revenue Officer, that is, the Sub-Divisional Officer. There is nothing in the Act of the rules making the sanction of the Financial Commissioner (or the Deputy Commissioner) necessary for the validity of a transfer, even in these cases which have to be forwarded for orders; and a sanction granted by a Sub-Divisional Officer, after forwarding the case to the proper authority for orders, would be valid and sufficient even in the unlikely event of its being not in accordance with those orders. (*Hallifax, A. J. C.*) PREM NARAYAN *v.* MAN SINGH. **94 I. C. 829 = A. I. R. 1926 Nag. 343.**

—S. 49—Rent—Right to recover.

———*Ex-proprietor becoming an occupancy tenant of his* sir *land held in severalty is tenant of the purchaser of his village share—The latter and not the lambardar can claim rent from him—C. P. Land Revenue Act* (1917), *S.* 188 (2) (a).

Where a co-proprietor of a village sells his share to a third party and becomes an occupancy tenant of his *sir* held in severalty, such an ex-proprietor is the tenant of his vendee and the vendee is primarily entitled to claim the rent and not the lambardar. Having regard to the definition of "landlord" and "tenant" in S. 2 (7) and (11) respectively of the Tenancy Act, this conclusion is inevitable. A. I. R. 1928 Nag, 39 (1), Foll. S. 188 (2) (*a*), Land Revenue Act does not exclude the co-sharer concerned in such a case from demanding rent from his tenant. (*Findlay, J. C.*) BAPU *v.* SANTOSH RAO. **108 I. C. 790 = A. I. R 1928 Nag. 229.**

—S. 49—Rights in sir lands.

———*Rights in* sir *lands already extinguished before the Act cannot be revived by compromise between the parties after the new Act.*

The predecessor of the respondents took a mortgage from the appellant's father under which some part of the property in dispute was mortgaged by conditional sale, and he obtained a foreclosure decree on the mortgage, which was made absolute in 1897. Subsequently the present appellant brought a suit to have the former decree set aside. This suit ended in a compromise in 1923 under which the property was divided between the parties, some portion being left to the mortgagee as his absolute property and some passing to the mortgagor free from incumbrance on the mortgage. In the course of the execution proceedings for obtaining possession the mortgagor objected that the mortgagee could not obtain actual possession of the *sir* lands, as the occupancy tenancy rights vested in him under S. 49 of the new Tenancy Act.

Held, that the effect of the compromise decree was merely to vary the original decree, but even if it be taken to have superseded and extinguished the original decree, it did not purport to revive the rights of the mortgagor regarding the *sir* fields, under S. 49 of the new Tenancy Act. (*Baker, J. C. and Prideaux, A. J. C.*) GOPALA *v.* LAXIMICHAND. **90 I. C. 162 = A. I. R. 1926 Nag. 216.**

—S. 49—Sir land.

———*S.* 49 *impliedly treats* sir *as held in severalty.*

S. 49 impliedly treats *sir* land as held in severalty. Where a mortgage on *sir* lands was foreclosed and the mortgagor afterwards surrendered the lands to the lambardar who leased them to another.

Held that the lease was invalid, that the lambardar had no right to accept the surrender and that on surrender the lands became the mortgagee's *khudkasht* and not that of the proprietary body. (*Kotval, A. J. C.*) NAND KISHORE *v.* LAL SINGH. **78 I. C. 730 = A. I. R. 1924 Nag. 381.**

—S. 49—Surrender.

———*Surrender of* sir *land is void if it forms part of the transaction of sale.*

If a covenant to relinquish the *sir* lands is part of the transaction of sale or of mortgage, then only the agreement to surrender will be void and unenforceable. Where there was a difference of more than three months between the dates of the two transactions, sale of one anna share of a particular village and surrender of occupancy rights in *sir* land, and where no evidence was led to show that the two transactions were really one, the surrender was held to be not invalid. Nag. Second Appeal No. 530 of 1918, Appr. (*Jackson, A. J. C.*) RAJESHWAR *v.* AJABSINGH. **118 I. C. 865 = 12 N. L. J. 86 = A. I. R. 1929 Nag. 257.**

—S. 49—Tenant.

———*Ex-proprietary occupancy tenant is not a tenant of the proprietary body.*

An ex-proprietor becoming an occupancy tenant of *sir* held by him in severalty is the tenant of his vendee and the vendee is entitled to claim the rent and not the lambardar. (*Findlay, J. C. and Kotval, A. J. C.*) MT. BARIBAHU *v.* GANESHSINGH. **23 N. L. R. 160 = 10 N. L. J. 167 = 106 I. C. 429 = A. I. R. 1928 Nag 39.**

———*Mortgagor becomes occupancy tenant also of lands becoming* sir *after the date of mortgage.*

On the transfer of a village by foreclosure the mortgagor becomes an occupancy tenant not only of so much of the *sir* land as had that character at the date of the mortgage but also of that part which has become in the interval. (*Baker, J. C. and Hallifax A. J. C.*) BHIMRAJA *v.* MUKUNDI LAL. **76 I. C. 637 = A. I. R. 1924 Nag. 155.**

———*Execution sale against widow—Widow becoming occupancy tenant—Right of, will pass to reversioners after her death.*

The tenant right in his *sir* land left in proprietor after alienation of his ownership is all along a constituent part of the right he held in the *sir* land and is not something new which is created by the law. Therefore the heirs of the husband of a widow, who became an occupancy tenant owing to loss of proprietary right, by sale in execution of a decree against her, succeed to her occupancy right. (*Hallifax, A. J. C.*) SHEORAM *v.* TIKARAM. **71 I. C. 129 = 19 N. L. R. 26 = A. I. R. 1923 Nag. 93.**

—S. 49—Transfer.

———*Sale of a village without reservation of occupancy in the* sir *land which had not been sanctioned by a revenue Court constitutes a void agreement—Contract Act, S 23.*

Sale of a village without reservation of occupancy rights in the *sir* land which had not been sanctioned by a revenue officer, constitutes a void agreement. The whole agreement has to be set aside and not one or other of the two parts to which the parties try to give the appearance of separate agreements. The reason for holding such an agreement void is that the subject of the agreement "is of such a nature that; if permitted, it

would defeat the provisions" of S. 49, completely. (*Hallifax and Mohiuddin, A. J. Cs.*) KHUSHAL *v.* LALHAN RAO. **110 I. C. 351 = A. I. R. 1928 Nag. 232.**

———*Relinquishment by Hindu widow is not transfer —Registration Act, S. 77.*

A relinquishment by a Hindu widow of the whole estate including *sir*, inherited from her husband, in favour of his reversionary heirs without reservation of the cultivating rights in it, does not require permission from a revenue officer and its registration cannot be refused on the ground of its absence. A. I. R. 1927 Nag. 44, Foll. (*Hallifax, A. J. C.*) SAKHARAM *v.* KANTIKABAI. **102 I. C. 30 = A. I. R. 1927 Nag. 394.**

—S. 50—Rules under.

———*Sanction to transfer cultivation rights in* sir *granted—Transfer may be made in any form unless sanction restricts the form—Sanction for whole includes sanction for part.*

Permission by the proper Revenue Officer to transfer the cultivating rights in *sir* land is permission to transfer them in any way for any consideration to any person at any time the owner pleases, unless the permission is expressly limited in any of these ways, and sanction for a complete transfer by sale includes sanction for a partial transfer by mortgage. (*Hallifax, A. J. C.*) PREM NARAYAN *v.* MANSINGH. **94 I. C. 829 = A. I. R. 1926 Nag. 343.**

—S. 50—Sir.

———*Contract to sell a share in a village with cultivating rights in* sir*—Conditions necessary for sanction to transfer* sir *existing—Specific performance can be granted—Specific Relief Act, S. 21.*

A contract to sell a share in certain village with the cultivating rights in the *sir* is specifically enforceable where sanction to transfer *sir* land cannot be refused, the conditions necessary for sanction being satisfied. 6 N. L. R. 185, Diss. from. (*Hallifax, A. J. C. and Kinkhede, O. A. J. C.*) JANKI *v.* SETH SOBHAGMAL. **22 N. L. R. 101 = 9 N.L.J. 125 = 96 I. C. 898 = A. I. R. 1926 Nag. 465.**

———*Cultivating right in* sir *is not alienable—Insolvency Court cannot apply under S. 50.*

A proprietor's rights in *sir* land are composed of two component parts. The proprietary right is alienable and attachable but the cultivating right is neither. Under S. 12, para. 2, of the Tenancy Act, 1920, a Receiver cannot be appointed to manage an occupancy holding and the tenant's right does not vest in the Court or in the Receiver under the Provincial Insolvency Act of 1907. The Legislature contemplated that no one but the proprietor of *sir* land could divest himself of the occupancy rights and that the Insolvency Court cannot even apply under S. 50 of the Tenancy Act. (*Prideaux, A. J. C.*) SHRIKISHAN *v.* NAGOBA. **76 I. C. 634 = A I. R. 1924 Nag. 158.**

—S. 62—Rent.

———*Part of holding compulsorily acquired—Steps not taken by Government officials to have the rent reduced—Landlord can initiate proceedings to get the rent reduced.*

If there is any failure on the part of the land acquisition officials to take the necessary steps, it is open to the landlord to initiate the necessary proceedings under S. 62 to have the rent of the holding proportionately reduced when a part of it is compulsorily acquired by Government. (*Findlay, J. C.*) SADASHEO RAMJI BENDE *v.* GOPAL PATIL. **106 I. C. 665 = A. I. R. 1928 Nag. 143.**

CENTRAL PROVINCES TENANCY ACT (1920),

S. 65—Applicability.

———*S. 65 does not apply to sub-tenants.*

S. 65, does not say that it will apply to sub-tenants also and, therefore, a sub-tenant can neither claim suspension nor remission of his rent because his landlord may so claim it under S. 65. The tenure of a sub-tenant is governed by the terms as settled between him and the tenant from whom he holds. (*Gulam Mohiuddin, A. J. C.*) JAGANNATH RAMKISHAN *v.* MT. LAXMI BAI. **108 I. C. 881 = A. I. R. 1928 Nag. 149.**

—S. 68—Title.

———*Transfer of Property Act, S. 50—Tenant knowing about dispute as to claim to landlord's title but choosing one claimant—He is not protected—In case of doubt he can proceed as under S. 68.*

Where a tenant knew of the dispute between two rival claimants to the title of landlord but chose one of them and paid rent to him.

Held, that the payment cannot be said to be *bona fide* and S. 50 did not cover the case.

Held, further, that if he had entertained any genuine doubt as to whom the payment should be made, an easy way of escape was provided for him by S. 68. (*Findlay, J. C.*) GAMBHIRYA *v.* SAKHARAM. **101 I.C. 647 = A. I. R. 1927 Nag. 237.**

—S. 75 (1)—Interpretation.

———Rent ceases to be due within S. 75 (1) when a decree therefor has been passed. (*Kotval, A. J. C.*) (MAHANT) HARNARAYANGIR *v.* GANGARAM. **22 N.L.R. 63 = 96 I.C. 1027 = A.I.R. 1926 Nag. 352.**

—S. 89—Alienation by widow.

———A Hindu widow is not at liberty to defeat the rights of a reversioner by alienating or wasting property of any kind inherited from her husband : A. I. R. 1925 Nag. 306, Foll. ; 9 N. L. R. 126, Deemed overruled by 21 N. L. R. 62 ; A. I. R. 1925 Nag. 306 ; 89 I. C. 44 and A. I. R. 1927 Nag. 30, Not Appr. 4 N. L. R. 57 and 8 Mad. 304, Ref. (*Macnair, Offg. J. C. and Mohiuddin, A. J. C.*) LAXMAN *v.* BHULABAI. **26 N. L. R. 1 = 123 I. C. 449 = A. I. R. 1930 Nag. 65.**

—S. 89 (1)—Applicability.

———*Section is not applicable to a landlord willing to end the tenancy.*

S. 89 provides only for the case where the tenant wishes to put an end to his tenancy without reference to the wishes of the landlord and has not application to a case where the landlord is willing to end the tenancy. (*Kotval, A. J. C.*) GANPATRAO *v.* THALLUA. **24 N. L. R. 3 = 105 I. C. 495 = A. I R. 1928 Nag. 70.**

—S. 89—Gift with landlord's consent.

———*Gift with the consent of landlord can be regarded as surrender and re-grant to transferee.*

A transfer by gift with the consent of the landlord, even though it was a subsequent consent, can be regarded as a surrender to him by the widow and a fresh grant by him to the transferee. (*Hallifax, A. J. C.*) RAMCHANDRA BALKRISHNA *v.* RAMCHANDRA JAIRAM. **65 I. C. 952 = A. I. R. 1922 Nag. 222.**

—S. 89—Rights of absolute Occupancy.

———Per *Macnair, Offg. J. C.*—The rights of an absolute occupancy tenant are now so similar to those of owner of property that it seems impossible to hold that a Hindu widow can wilfully defeat the expectancy of a reversioner. (*Macnair, Offg. J. C. and Mohiuddin, A. J. C.*) LAXMAN *v.* BHULABAI. **26 N. L. R. 1 = 123 I. C. 449 = A. I. R. 1930 Nag. 65 (71).**

———Per *Mohiuddin, A. J. C.*—In the case of absolute occupancy holding the basis of contract is wholly inapplicable. It is a right created by Government and

conferred on old malguzars who had lost their proprietary rights in course of time. It is, therefore, not a contractual tenancy right but a sort of semi-proprietor's right with certain restrictions. (*Macnair, Offg. J. C. and Mohiuddin, A. J. C.*) LAXMAN *v.* BHULABAI. **26 N. L. R. 1 = 123 I. C. 449 = A. I. R. 1930 Nag. 65 (73).**

—Ss. 89, 5 and 11—Surrender by widow.

———*Hindu widow cannot surrender absolute occupancy or occupancy holding so as to defeat expectancy of reversioner—She may surrender it to escape liability for rent.*

A Hindu widow has not the right to surrender her late husband's holding, whether absolute occupancy or occupancy, in such a manner as to defeat the expectancy of a reversioner when the object of the surrender is to defeat that expectancy, although according to the nature of property she may surrender it to escape liability for rent. 6 C.P.L.R. 135 ; 15 C.P.L.R. 89 ; 8 N.L.R 154 ; 6 C.P.L.R. 138 ; 5 N.L.R. 172 ; A.I.R. 1925 Nag. 306, Foll. ; A. I. R. 1927 Nag. 129 ; A.I.R. 1927 Nag. 330, not Appr. (*Macnair, Offg. J.C. and Mohiuddin, A.J.C.*) LAXMAN *v.* BHULABAI. **26 N.L.R. 1 = 123 I.C. 449 = A.I.R. 1930 Nag. 65 (70)**

———*Hindu widow can surrender without consent of nearest reversioner.*

A Hindu widow can surrender a tenancy without the consent of the next reversioner. A.I.R. 1925 Nag. 306 : 21 N.L.R. 62, not Foll. (*Hallifax, A.J.C.*) MT. BAYAN BAI *v.* PARAS. **A.I.R. 1926 Nag. 431 = 95 I.C. 456.**

———*Lambardar is the proper person to whom surrender must be made—Surrender to a fractional co-sharer is not valid and he cannot claim contribution from other co-sharers—He must pay other co-sharers their proper shares.*

The lambardar is the proper person to whom the surrender should be made, and the fractional owners of the village have not the power to accept the surrender of a holding. Such a surrender in favour of a fractional co-sharer is a device to evade the tenancy law as to the transfer of the holding. It is, therefore, an agreement forbidden by law. Therefore, when a tenant is induced to part with his land to a fractional co-sharer and not to the lambardar, the land thus becoming khudkasht of the whole proprietary body, the purchasing co-sharer should not be allowed to claim compensation from his other co-sharers, because he had obtained possession by a device intended to defeat the Tenancy Law ; and that unless the proper mode of procedure, *viz.*, a surrender to the lambardar, is followed, other co-sharers can claim shares according to their shares in the village without the payment of compensation. (*Baker, J. C. and Prideaux, A.J.C.*) ZINGOBA *v.* KANTIKABAI. **93 I.C. 106 = A.I.R. 1926 Nag. 310 (311).**

———*Surrender—Effect of—Collusive surrender—Injunction may be granted.*

A surrender by a Hindu widow under S. 89 operates only on the widow's interest in the holding and the surrendering Hindu female should be treated as dead as it were by a fiction of law unless the surrender may be deemed to be in the best interests of the estate which she represents. Injunction can be granted to restrain collusive surrender of the holding by the widow. (*Kinkhede, A. J. C.*) PANDURANG *v.* BAIJAJA. **8 N. L. J. 14 = 95 I.C. 371 = A. I. R. 1925 Nag. 251.**

—S. 89—Surrender of undivided share.

———*Surrender of undivided share by co-tenant is valid when the co-tenant's sons succeed and are accepted by the landlord.*

Where a co-tenant relinquishes his undivided share and on such relinquishment his sons succeed and where they are recognized by the landlord as tenants instead of their father, the arrangement is valid. (*Baker, J. C.*) SHER SINGH *v.* KALUSINGH. **22 N.L R. 17 = 80 I. C. 734 = A. I R. 1925 Nag. 124.**

—S. 89—Surrender to co sharers.

———*Surrender to some co-sharers is not a surrender but a transfer and is not binding on the lambardar.*

Where surrender was made to some of the co-sharers without the intervention of the lambardar.

Held, that such a transaction is a transfer, not a surrender and does not put an end to the tenancy unless the lambardar chooses to recognize it, and any arrangement between the co-sharer and the tenant is not binding on the lambardar. 4 N. L. R. 120, Foll. (*Baker, J.C.*) JAGO *v.* MADHORAO.. **89 I. C. 51 = A.I.R. 1926 Nag. 178.**

—S. 89—Surrender when not allowed.

———*Surrender made by four out of five brothers, in discharge of debt binding on all—Value of surrendered holding not more than amount of debt — Surrender is valid and binding even on fifth.*

Every act done by one joint tenant for the benefit of himself and his companion binds the other, but not those acts which prejudice the other. Thus where surrender is made by four brothers who are joint tenants with the fifth and who are in sole charge and management of the holding in consideration of a debt which is binding on all the tenants and where the value of the surrendered holding is not more than the amount of debt, such surrender made in discharge of the debts is not prejudicial to the fifth tenant and is valid and binding even on him. *Right* v. *Cuthell*, 7 R. R. 752, Rel. on; 8 N.L.R. 29, Ref. (*Subhedar, A.J.C.*) GAJADHAR *v.* SETH MEGHRAJ. **26 N.L.R. 130 = 121 I.C. 39 = A.I.R. 1930 Nag. 8.**

—S. 89—Termination by agreement.

———*Tenancy can be terminated in any way at the desire of both parties.*

S. 89 (1) specifies the conditions under which an absolute occupancy or an occupancy tenant may surrender his holding without consulting the wishes of his landlord. It does not state that the contract of tenancy cannot be terminated in other ways at the desire of both contracting parties. (*Macnair, A.J.C.*) MOORAT SINGH *v.* MUNI LAL. **23 N.L.R. 148 = 103 I.C. 713 = A.I.R. 1927 Nag. 320.**

—S. 95—Right to fruits.

———The right of removing the fruits from the trees standing in the field of a tenant by a third person cannot be acquired by prescription and it is immaterial whether that person (though he is the malguzar) has been for years taking the produce, for his doing so does not destroy tenant's right of annually recurring rent for the use thereof; 5 N. L. R. 52, Foll.; A. I. R. 1925 Nag. 277, Ref. (*Prideaux, A.J.C.*) GHOTI *v.* AMRUT LAL. **109 I. C. 58.**

—S. 96—'Trees'.

———The word "Trees" in S. 96 does not refer to palas trees only but refers to all trees on which lac can be propogated. (*Mohiuddin, A. J. C.*) BANSIDHAR *v.* BAIRAGI. **13 N. L. J. 62 = 122 I. C. 440 = A. I. R. 1930 Nag. 143.**

—S. 97—Scope.

———*Trees in a stranger's field can be attached.*

Attachment of trees standing in land belonging to another person is not prohibited by S. 97. (*Baker, Offg. J. C.*) GULSHER KHAN *v.* RAMSWARUP. **19 N.L.R. 150 = 77 I.C. 620 = A.I.R. 1924 Nag. 42.**

—S. 100—Lease of sir land.

———*Lease of* sir—*Subsequent sale of proprietary interest –Purchaser purchasing also lessee's interest—Purchaser becomes only a lessee from occupancy tenant.*

Where the proprietor lets out his *sir*, and then sells his proprietary interest, he becomes the occupancy tenant of the *sir*, and if the purchaser of the proprietary interest also purchases the interest of the lessees of *sir*, he still remains the lessee of the occupancy tenant, *i.e.*, the original proprietor and the original proprietor is entitled to possession as occupancy tenant on the expiration of the lease term. (*Hallifax, A. J. C.*) D. B. BALLABHDAS *v.* PUNABAI. **88 I. C. 126 = A. I. R. 1925 Nag. 383.**

—S. 104—Applicability.

———*C. P. Land Revenue Code* (*II of* 1917), *S.* 80—*Mortgagee foreclosing mortgage without impleading owners of equity of redemption—Entry in settlement records on basis of that decree—Mortgagee cannot set up S.*80 *and S.*104 *to defeat right to redemption of owner of equity of redemption—Transfer of Property Act, S.* 91.

On the principle that a man cannot take advantage of his own wrong, he may not plead in his own interest a self-created necessity, a mortgagee who forecloses a mortgagor, omitting to implead the owner of the equity of redemption as a party to the suit and at a time when he had left in him no interest to foreclose, cannot plead that the settlement entry based on a foreclosure, which brought him no part of the equity of redemption that had already vested in another person and gave him nothing beyond his own right as prior mortgagee, secured to him the status of an absolute occupany tenant under the provisions of S. 80, C.P. Land Revenue Code, and also under S. 104 of the Tenancy Act, and deprive the owner of the right of redemption which the Transfer of Property Act secures to him. (*Kinkhede, A. J. C.*) RAMANATH *v.* HAZARILAL. **25 N. L. R. 19 = A. I. R. 1929 Nag 246.**

—S. 104—Limitation Act—Applicability.

———*Tenancy right is extinguished with the loss of the remedial right to recover possession—Limitation Act, S.* 28.

S. 28, Limitation Act, does apply in view of the provision contained in S. 104, Sub-S. (4), C. P. Tenancy Act, to a case where the remedy by way of suit by the tenants is lost, having regard to Art. 1, Sch. 2, Tenancy Act and the tenancy right is extinguished with the loss of the remedial right to recover possession. 21 All. 204 and A.I.R. 1928 Nag. 280, Relied on. A.I.R. 1926 Nag. 99, Dist. (*Findlay, J.C.*) DADOO *v.* SUKHA. **109 I.C. 403 = A. I. R. 1928 Nag. 281 (1).**

———S. 28, Limitation Act, applies to the right in a tenancy in the Central Provinces. A.I.R. 1926 Nag. 99, Diss. from. (*Hallifax, A. J. C.*) DHARAM *v.* DALSINGH. **A. I. R. 1927 Nag. 352.**

—S. 105—Jurisdiction of Civil Court.

———*Civil Court's jurisdiction is not barred where transfer by occupancy tenant is void independently of Act.*

Where the transfer by the occupancy tenant is invalid independently of the prohibition of the Act, the jurisdiction of the Civil Court to avoid transfer is not barred. A. I. R. 1927 Nag. 30 and 8 N. L. R. 22, Rel. on; 11 N. L. R. 124, not Foll. (*Jackson, A.J.C.*) GANPATRAO *v.* RAGHO. **26 N. L. R. 190 = 124 I. C. 252 = A. I. R. 1930 Nag. 193.**

———*Unregistered sale-deed of occupancy holding for over Rs.* 100—*Purchaser is trespasser—Civil Court has jurisdiction to try suit for possession.*

Where an occupancy holding is sold by an unregistered document for more than Rs. 100, the sale being for more than Rs. 100, registration is necessary and as the document cannot be registered, there is no transfer and the vendee is a trespasser and the Civil Court has jurisdiction to entertain a suit to recover possession. A. I. R. 1927 Nag. 30, Rel. on. (*Mohiuddin, A. J. C.*) MAKSUDANSINGH *v.* DARBARGIR. **113 I. C. 110 = A. I. R. 1929 Nag. 65.**

———*Absolute occupancy holding—Alienation intended by mother—Statutory right of pre-emptors exercised by landlord—Suit by minor son for possession on the ground of want of legal necessity—Whether barred.*

Plaintiff's mother as guardian entered into an agreement to sell on occupancy field to a third party. In accordance with sub-section (2), S. 6, she gave notice to the lambardar of her intention to sell, who claimed the right to purchase the field in exercise of his pre-emptive title. In the revenue proceeding, the question of valuation alone was contested. The plaintiff brought a suit for possession alleging that there was no legal necessity for his mother to have made the transfer to the third party, and the possession of the field by the defendant was illegal and that the plaintiff was entitled to retain possession.

Held, that the statutory right of pre-emption given to the landlord under S. (2) cannot be regarded as an ordinary transfer. That right having been duly exercised, having regard to S. 105 (*a*) of the Act, the jurisdiction of the Civil Court was excluded and it was not open to the plaintiff, to come to Court on the alleged cause of action of want of legal necessity for the intended transfer. (*Findlay, J. C.*) BALAJI KOSHTI *v.* RAM BILAS. **11 N. L. J. 125 = 109 I. C. 615 = A. I. R. 1928 Nag. 249.**

———*Transfer bad under general law—Jurisdiction of Civil Court is not excluded.*

S. 12 of the Tenancy Act lays down certain limitations on the right of an occupancy tenant's transfer of his holding. If the said provision is transgressed, S. 13 allows "any person who, if he survived the tenant without nearer heirs, would inherit the holding or the landlord of such tenant to apply" for a certain remedy in the Revenue Court. In such a case the Revenue Court has exclusive jurisdiction, and this would naturally cover a case of transfer which was good under the general law and only bad under the special provision of the tenancy law. But where the alleged transfer is bad under the general law the jurisdiction of the Civil Court is not excluded. A.I.R. 1925 Nag. 442, Foll. (*Findlay, J. C.*) DEORAM GUJAR *v.* BIJU GUJAR. **10 N. L. J. 90 = 101 I. C. 822 = A. I. R. 1927 Nag. 226.**

———*Transfer of holding by occupancy tenant can be set aside only by applying to Revenue Officer under S. 13—Remedy in Civil Court is barred by S. 105.*

A transfer of his holding by an occupancy tenant can be set aside and landlord can recover possession only by application to a Revenue Officer under S. 13; under S. 105 he cannot be given any remedy by a Civil Court. (*Hallifax, A. J. C.*) BISAHU *v.* SUMER SINGH. **89 I. C. 231 = A. I. R. 1926 Nag. 177.**

———Civil Court cannot entertain a suit by a service tenant for restoration to possession on ejectment by landlord after the Act came into force. (*Hallifax, A. J. C.*) BALARAM *v.* ATMARAM. **71 I. C. 48 = A. I. R. 1923 Nag. 51.**

———*Rent-free land—Suit—Civil Court's jurisdiction is barred.*

Where the land has been recorded rent-free, and held without payment of rent and the tenant claims it to be held rent-free, S. 105 (2) applies and the suit is removed from the cognizance of the Civil Court. (*Kotval, A. J. C.*) GANPAT *v.* MOHANLAL. **A. I. R. 1922 Nag. 207.**

—S. 105—Occupancy holding.

———*Revenue Officer placing person in possession of occupancy holding under S. 13—Civil Court has jurisdiction to consider whether there had been a transfer or not.*

The grant of a special jurisdiction does not carry with it the power to act beyond and outside that jurisdiction and so any question of exercise of power which is *ultra vires* can be agitated in the Civil Court. Thus if the Revenue Officer takes action under S. 13 by placing a person in possession of the occupancy holding, the jurisdiction of the Civil Court to consider whether there had been a transfer is not barred for otherwise it would be possible for the Revenue Court to hold that a set of incidents amounted to a transfer although in fact or law they were not so, and so to oust the jurisdiction of the Civil Court. A.I.R. 1927 Nag. 30, Rel. on. (*Findlay, J. C.*) BALAJI KUNBI *v.* CHINDYA. **13 N. L. J. 33 = 122 I. C. 703 = A. I. R. 1930 Nag. 205.**

—S. 106—Trial of suit for rent.

———*Suit for arrears is triable by a Judge who is also a Revenue Officer—Only three years rent can be claimed.*

Under S. 106 of the new Act suits for arrears of rent are to be heard by a Judge who is also a Revenue Officer. Where a suit is brought in such Court against a person as trespasser, that suit is not maintainable, but where the plaintiff, in the course of suit, admits the defendant as tenant the suit becomes a suit for arrears and thus triable by the Court but if the date of admission happens to be after the coming into force of the new Act, the suit should be regarded as filed on the date of admission and arrears for three years only can be claimed. (*Baker, J. C.*) SETH GANESHDAS *v.* HIRALAL. **90 I. C. 279 = A. I. R. 1926 Nag. 212.**

—S. 109—Rights of tenants.

———*Civil and Revenue Courts—Tenant may sue or apply for possession at his option.*

The rights of tenant to sue in Civil Court under Specific Relief Act, S. 9, for possession or to apply to a Revenue Officer are alternative remedies, and the tenant's right to sue in Civil Court is not conditional on the rejection of his application by the Revenue Officer. (*Hallifax, A. J. C.*) D. B. BALLABHDAS *v.* PUNABAI. **88 I. C. 126 = A. I. R. 1925 Nag. 383.**

—S. 110—Effect of new Act on suit for ejectment.

———*C. P. Tenancy Act* (1898), *S.* 41—*Mortgage of occupancy holding prior to Act of* 1920—*Possession under mortgage decree taken after Act of* 1920—*Malguzar has no right to sue in ejectment.*

Where a mortgage of absolute occupancy holding was executed without malguzar's consent, when the Tenancy Act (1898) was in force, but possession in execution of decree on that mortgage was taken by the mortgagee decree-holder after the Act of 1920 came into force.

Held, that the cause of action for ejectment suit by the malguzar arose on the date possession was taken and the new Act of 1920 not providing for an ejectment suit the mulguzar's suit for ejectment was not maintainable. A. I. R. 1927 Nag. 127, Affirmed. Case-law considered. (*Findlay, J. C.*) YESWANT RAO MULEY *v.* SADASHIVA RAO. **103 I. C. 71 = A. I. R 1927 Nag. 277.**

—Sch. 2—Limitation for suit for possession.

———*Surrender by tenant—Limitation for suit for* *possession against licensee from tenant, by fresh grantee of the tenancy runs from the grant.*

On the surrender of a tenancy the license granted by the former tenant expires. In the absence of a fresh license granted by the new grantee of the tenancy, the possession of the licensee is adverse to the new tenant from the date on which the tenancy rights were granted to him. A suit for possession by the incoming tenant after two years of his becoming tenant is barred. (*Baker, J. C.*) MAHAMAD NIYAJUDUIN KHAN *v.* JETHU. **87 I.C. 823 = A. I. R. 1926 Nag. 51.**

—Sch. 2—Applicability.

———*Article is applicable to the lessee of an absolute occupancy tenant—Art.* 1 *applies to claims for joint possession.*

Article 1, Sch. 2, is applicable to the lessee of an absolute occupancy tenant. In such a case the lessee is the person who holds land of the tenant and is, or but for a special contract would be, liable to pay rent to him.

A right to joint possession being a lesser right than that of exclusive possession is included in the special provision of limitation relating to the exclusive right and therefore the limitation prescribed by Art. 1 or Sch. 2, Tenancy Act, will apply alike to claims for exclusive joint possession. A. I. R. 1926 Nag. 305, Ref. 4 N. L. R. 120, Dist. (*Mohiuddin, A. J. C.*) GANESH PRASAD *v.* BHAWANI PERSHAD.

A. I. R. 1928 Nag. 178 = 108 I. C. 785.

———*Art.* 1 *applies in preference to Art.* 47, *Limitation Act.*

Where the specific article applicable is the one contained in the Tenancy Act, while the more general article is the one contained in the Limitation Act, the former applies. (*Findlay, J. C.*) RAM RAO *v.* GULAB RAO. **10 N. L. J. 246 = 105 I. C. 431 = A. I. R. 1927 Nag. 402.**

———*Limitation Act, Art.* 141*—Starting point.*

In a suit by co-widow to set aside a gift of husband's property by her co-widow, the limitation begins to run from the date of co-widow's death. Art. 1 of the second schedule of the Tenancy Act does not apply. (*Findlay, J. C.*) DEORAM GUJAR *v.* BIJU GUJAR.

10 N. L. J. 90 = 101 I, C. 822 = A. I. R. 1927 Nag. 226.

———*Suit to enforce mortgage of absolute occupancy holding—Art.* 1 *does not apply.*

Suit to enforce mortgage of absolute occupancy holding does not come within the purview of Art. 1. (*Kinkhede, A. J. C.*) ASARAM *v.* KANCHEDILAL.

9 N. L. J. 229 = 99 I. C. 445 = A. I. R. 1927 Nag. 119.

———*Dispossession—Widow declaring that her adopted son was tenant since adoption—Widow cannot be said to be dispossessed.*

Where a Hindu widow having adopted a son alleges that she has in law ceased to be entitled to hold the land, the adopted son having taken her place as tenant, that does not amount to an unqualified abandonment and the cessation of her possession cannot be said to be brought about by any act of dispossession or exclusion within Art. 1. (*Kotval, A. J. C.*) SADASHIVA *v.* MT. ANNAPURNABAI. **98 I. C. 537 = A. I. R. 1927 Nag. 76.**

———*Article applies to suit by occupancy tenant dispossessed from part of holding.*

The period of two years' limitation prescribed by Schedule II, Art. 1 applies to a suit by an occupancy tenant who is dispossessed from a part of his holding. (*Kinkhede, A. J. C.*) MANSINGH *v.* SARNA.

83 I. C. 3 = A. I. R. 1925 Nag. 225.

———*Article applies to dispossession from part.*

There is no reason whatever for holding that the words of article (1) have reference only to an entire holding and not a part of it. (*Hallifax, A. J. C.*) BUDGA *v.* CHAIN. **78 I. C. 214 = A. I. R. 1925 Nag. 197.**

———*Applies to dispossession of a tenant by any person whether the landlord or not.*

The plaintiff's suit was for recovery of possession of a holding on the ground that the plaintiff was an occupancy tenant of the holding who had been dispossessed by the defendant in July, 1920. Defendant contended that the plaintiff had been out of possession since 1918 and had surrendered his tenancy and that the malguzar had placed the defendant in possession. Plaintiff in the course of the pleadings, stated through his pleader, that he had been out of possession since the end of 1918 and that the defendant had not actually dispossessed him but that the suit was filed against him as he was in wrongful possession. It was pleaded in reply that plaintiff not having been in possession of the land within two years of the suit, Art. 1 of Sch. II stood as a bar to his claim. On the day fixed for hearing arguments the plaintiff put in an application to amend his pleadings on the ground that he had by some oversight stated that he was dispossessed in 1918 whereas he was dispossessed of two fields out of three in 1919 and of one in 1920 and the plaintiff also applied to file copies of jamabandies in support of the statement.

Held, that the plaintiff not having in his plaint relied on the jamabandis he was debarred from amending his pleadings in order to get out of the effect of his admission and that under Art. 1 of Sch. II was not necessary that the dispossession should necessarily have been caused by the landlord and that the plaintiff's suit was undoubtedly barred under that article. (*Baker, J. C.*) RAGHUNATH SINGH *v.* GOBDOO.

80 I. C 355 = A. I. R. 1925 Nag. 127.

———*Period of limitation is the same in case of dispossession by third person as in that by landlord.*

The words " by any person" have their ordinary meaning and are not confined to a person claiming under the landlord. Dispossession by one tenant of another is governed by the same rule of limitation as dispossession by landlord. (*Baker, J.C.*) MEGHRAJ *v.* RAMGOPAL.

20 N. L. R. 103 = 78 I. C. 743 = A. I. R. 1924 Nag. 249.

—Sch. 2, Art. 1—Holding used for building.

———An absolute occupancy holding originally granted for agricultural purposes but which for long has been utilized for building upon is still a holding within the meaning of Art. 1. (*Prideaux and Kinkhede, A.J.Cs.*) KHUNDALAL *v.* SHIMANDLAL. **25 N. L. R. 9 = 112 I. C. 657 = A. I. R. 1929 Nag. 5.**

—Sch. 2, Art. 1—Interpretation.

———*Article applies to possession from part.*

The words " possession" and " person" do not comprise within their scope a claim for " joint possession," nor do they include a dispossession or exclusion from possession by a co-owner or a co-tenant. (*Kinkhede, A. J. C.*) AMARCHAND *v.* RAMJIWAN.

10 N. L. J. 174 = 111 I. C. 76 = A. I. R. 1928 Nag. 96.

———Holding includes part of holding. A. I. R. 1925 Nag. 197, Foll. (*Hallifax, A.J.C.*) THAKURSINGH *v.* MT. SONKUWAR. **92 I. C. 824 = A. I. R. 1926 Nag. 387.**

———*" Holding" includes a part of holding.*

The word " holding" in Art. 1 of the Act means not

CENTRAL PROVINCES TENANCY ACT (1920), **Sch. 2, Art. 1—Interpretation.**

only an entire holding but also a part thereof. (*Hallifax, A. J. C.*) PARMANAND *v.* MADHO RAO.
22 N. L. R. 46 = 93 I. C. 110 = A. I. R. 1926 Nag. 305.

———*"Tenant" includes a holder of survey number in Sambalpur territory.*

The holder of a survey number in the Sambalpur territory is included in the word " tenant" used in Art. 1. (*Hallifax, A. J. C.*) MANSARAM *v.* BUDHU.
92 I. C. 708 = A. I. R. 1926 Nag. 289.

———*Tenant includes absolute occupancy tenant.*

The word tenant in Art. 1 does include an absolute occupancy tenant. (*Hallifax, A. J. C.*) SHIDSAHAI SONAR *v.* RAMKRISHNA. **92 I. C. 62 = A. I. R 1926 Nag. 61.**

—Sch. 2, Art. 1—Suit for possession.

———*Owner wrongfully obtaining possession through Revenue Officer, but subsequently dispossessed—Suit within two years of dispossession is maintainable.*

If rightful owner obtains possession though wrongfully through a Revenue Officer and is subsequently dispossessed, a suit brought within two years from such dispossession is not barred. 11 W. R. 49; 5 Bom. 382; 22 Bom. 733; 28 Mad. 338, Dist. (*Macnair, Offg.J.C.*) NARBADI *v.* CHOOTI. **117 I. C. 281 = A. I. R. 1929 Nag 129.**

—Sch. 2, Art. 1—Trees.

———*Trees do not constitute holding or portion of holding—Non-exercise by tenant of his right under S.* 96 *to propagate lac for more than two years does not extinguish it.*

Trees do not constitute holding or a portion of a holding and therefore the period of limitation laid down in Art. 1 does not apply to them. Where therefore tenant does not exercise the right under S. 96 to propagate lac for more than two years and malguzar propagates lac during that period, the tenant's right is not extinguished. (*Mohiuddin, A. J. C.*) BANSIDHAR *v.* BAIRAGI.
13 N. L. J. 62 = 122 I. C. 440 = A. I. R. 1930 Nag. 143.

CEREMONIES.

See (1) HINDU LAW—MARRIAGE.
(2) PRE-EMPTION.

CERTIFICATE.

See (1) C. P. CODE, SS. 41, 86, O. 21, R. 2, O. 21, R. 93.
(2) EVIDENCE.
(3) EVIDENCE ACT.

CERTIFYING COUNSEL—*See* LEGAL PRACTITIONERS.

◆

CERTIORARI.

—When issued.

———*Writ of—Jurisdiction of High Court—English cases should be followed.*

In the matter of issuing a writ of certiorari the High Court acts not under statute but under the inherent powers which devolve upon it from the old Supreme Court. The High Court, therefore, stands with regard to prerogative writs in the same position as the Court of King's Bench in England and it ought to follow the rules laid down by that Court. (*Coutts-Trotter, C.J., Jackson and Sundaram Chetty, J.J.*) O. A. O. K. LATCHMANAN CHETTIAR *v.* COMMISSIONER, CORPORATION OF MADRAS. **50 Mad. 130 = 24 M. L. W. 778 = 1926 M. W. N. 985 = 99 I. C. 152 = A. I. R. 1927 Mad. 130 = 51 M. L. J. 742 (F.B.).**

—When not issued.

———*Madras Local Boards Act, Ss.* 54 (1), 52 *and* 51—

CEYLON EVIDENCE ORDINANCE (1895),—**Effect.**

President for Union Panchayat rejecting nomination of person who was not on Union Electoral Roll—His act in rejecting nomination not being judicial but ministerial and he moving within rules, no writ of certiorari can be issued.

The President of a Union Panchayat issued a notice for the election to be held, and fixed a day for nominations. On the same day a new election roll was published which omitted the name of the petitioner, apparently on the ground that he had not paid his taxes. The date for the scrutiny of nominations was fixed a few days later. On that day, the President scrutinized the nominations on the footing of the new electoral roll, and rejected the petitioner's nomination as he was not on the new electoral roll.

Held, that the decision of the President was a ministerial act and not a judicial one. And even if it be held that his act in rejecting the nomination was judicial, still his act was in accordance with rules and there was no fault to find with it. There was no ground, therefore, for the issue of a writ of certiorari. The petitioner's remedy was by way of election petition. A. I. R 1923 Mad. 475, Dist. (*Wallace and Madhavan Nair, JJ.*) DESI CHETTIAR *v.* CHINNASAMI CHETTIAR.
28 M. L. W. 642 = 1928 M. W. N. 727 = 113 I.C. 874 = A.I.R. 1928 Mad. 1271 = 56 M.L.J. 162.

———*Writ of—Applicant not objecting to jurisdiction and getting decision on merits in lower Court—Writ cannot be issued.*

Where the applicant armed with a point either of law or of fact which would oust the jurisdiction of the lower Court has elected to argue a case on its merits before that Court, he must be taken to have submitted himself to a jurisdiction which he cannot be allowed afterwards to seek to repudiate by applying for a certiorari. (*Coutts-Trotter, C. J., Jackson and Sundaram Chetty, JJ.*) O. A. O. K. LATCHMANAN CHETTIAR, *v.* COMMISSIONER, CORPORATION OF MADRAS.
50 Mad. 130 = 24 M.L.W. 778 = 1926 M.W.N. 985 = 99 I.C. 152 = A.I.R. 1927 Mad. 130 = 51 M.L.J. 742 (F.B.).

———*Other remedy open—Writ is not generally granted.*

Madhavan Nayar, J.—Writs of certiorari are not generally granted when other equally efficacious remedies exist under the law for the satisfactory redress of the grievances complained of. (*Odgers and Madhavan Nair JJ.*) MD. RAZA SAHEB *v.* SADASHIVA RAO.
49 Mad. 49 = 92 I.C. 918 = 1926 M.W.N. 467 = A.I.R. 1926 Mad. 297.

CESS.

See (1) B. T. ACT, S. 74.
(2) LANDLORD AND TENANT.
(3) MADRAS ESTATES LAND ACT, S. 143. ETC.

CESSION OF TERRITORY.

See (1) ACT OF STATE.
(2) CROWN.
(3) GRANT.

CESTUI QUE TRUST.

See (1) TRUST.
(2) TRUSTS ACT.

CEYLON EVIDENCE ORDINANCE (XIV OF 1895).

—Effect.

———*Ordinance is application of Evidence Act to Ceylon—Evidence Act, S.* 1.

CEYLON EVIDENCE ORDINANCE (1895). S. 9—Intercepted correspondence.

The Evidence Ordinance of Ceylon is merely the application to Ceylon of the Indian Evidence Act, S. 1. (*Lord Darling.*) VRASAPILLAI *v.* ELIATAMBY.
52 I. A. 372 = A. I. R. 1925 P. C. 229.

—S. 9—Intercepted correspondence.

———*Intercepted correspondence is no evidence.*

Any intercepted correspondence between the respondents in divorce cases cannot be considered as evidence against the person to whom it is addressed for any purpose whatever. 10 B.L.R. 301, Ref. (*Lord Darling.*) VRASAPILLAI *v.* ELIATAMBY. **52 I.A. 372 = A. I. R. 1925 P.C. 229.**

CEYLON LAND ACQUISITION ORDINANCE (XLIV OF 1917).

—Not Retrospective.

———*The ordinance is not retrospective.*

The amending Land Acquisition Ordinance of 1917 is prospective and not retrospective in its operation. (*Lord Phillimore.*) FERNANDO *v.* GUNATILLAKA.
1921 (II) A. C. 357 = A. I. R. 1921 P.C. 138.

CEYLON LAW.

—Presumption.

———*Marriage—Persons living as man and wife should be presumed to be legally married.*

According to the law of Ceylon, where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage. *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie*, (1881) 6 A.C. 364, Ref. Breadalbane case. 2 H. L. Sc. 269, Rel on. (*Lord Shaw.*) A. DINOHAMY *v.* W. L. BALAHAMY. **4 O.W.N. 759 = 104 I.C. 327 = A. I. R. 1927 P.C. 185 = 54 M.L.J. 388.**

CEYLON ORDINANCE (X OF 1863).

—S. 9—Rights of Crown.

———*Partition decree does not affect the rights of the Crown under Waste Lands Ordinance of* 1897.

There is nothing in the Ordinance to bind the Crown and a partition decree has not the effect of depriving the Crown of the important rights conferred under the Waste Lands Ordinance of 1897. (*Lord Buckmaster.*) HAMEED *v.* SPECIAL OFFICER UNDER THE WASTE LANDS ORDINANCES. **(1922) 1 A. C. 262 = A.I.R. 1921 P.C. 173.**

CEYLON TRUST ORDINANCE (IX OF 1917).

—S. 93—Meaning not affected by object.

———*Proviso explained—Object of legislature cannot affect meaning of words used—Interpretation of Statutes.*

S. 93 of the Ordinance of 1917 is in the following terms : "Where a person acquired property with notice that another person has entered into an existing contract affecting that property of which specific performance could be enforced the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract. Provided that in the case of a contract affecting immovable property such contract shall have been duly registered before such official."

Held on a question as to the construction of the final words of the section that the prior registration of the contract was a condition of the application to it of the benefit conferred by the section. The proviso applied even though the contract was incapable of registration for want of proper description. The object in the mind of the legislature in imposing such a condition even if it could be known, would not affect the meaning of the words used. (*Lord Warrington of Clyffe.*) ROBERT HALL *v.* PELMADULLA VALLEY TEA AND RUBBER CO., LTD. **1930 M.W.N. 211 = A.I.R. 1930 P.C. 214.**

CEYLON WASTE LANDS ORDINANCE OF 1897.

—S. 24—Chena lands.

———*Presumption of ownership of Crown—Words "which can only be cultivated after intervals of several years" do not apply to Chena lands.*

Chena lands are jungle lands subjected to periodic cultivation by means of burning down the jungle and then growing some grain crop upon the site. After this crop has been grown the land relapses once more into jungle until the period has come when it can again be profitably burned and the process of cultivation resumed. The character and quality of Chena lands must be determined by the actual use of the land itself and not by its potential possibilities. Land which is Chena land cannot be taken out of the category merely by evidence to show that by another method of cultivation, by the application of other processes in other hands, it might be cultivated in a different way. 1 Sup. Ct. Cir. 26 Foll. The expression "Which can be only cultivated after intervals of several years" has no application to Chenas. The section means that each enumerated head stands alone and unqualified and the last of these is the "other lands which can only be cultivated after intervals of several years." 4 Ceylon N.L.R. 135 and (8 Ceylon N.L.R. 265 Approved. (*Lord Buckmaster.*) HAMEED *v.* SPECIAL OFFICER UNDER THE WASTE LAND ORDINANCES. **1922 (1) A. C. 262 = A.I.R. 1921 P.C. 173.**

CHAIRMAN.

See (1) COMPANY.
(2) CORPORATION.

CHAMPERTY.

See CONTRACT ACT, S. 23.

CHANDAWAND.

See CUSTOM (PUNJAB).

CHARGE.

See (1) CR. P. CODE, SS. 221-240.
(2) DEED—CONSTRUCTION.
(3) MORTGAGE.
(4) T. P. ACT, SS. 58, 95,100.

———*Equitable charge—Company appointing banian—Banian undertaking to collect bills and pay dues—Banian whether acquires equitable charge for advances.*

Where under an agreement the banian was to collect all moneys due to the company and to see that the company's dues were properly credited, *held*, that the banian had a valid equitable charge for his advances on the outstanding bills due to the company. (*Rankin, C. J. and Buckland, J.*) PROBODH CHANDRA MITRA *v.* ROAD OILS (INDIA), LTD. **34 C. W. N. 570.**

CHARGE TO JURY.

See CR. P. CODE, SS. 297-307.

CHARITABLE AND RELIGIOUS TRUSTS ACT (XIV OF 1920).

—Applicability.

———Where a substantial portion of the profits of the endowed property is earmarked for the support and maintenance of certain specified individuals who are also the relations of the settlor and the remaining portion for public of Shia community, the wakf is not wholly for public purposes and the Acts 14 of 1920 and 42 of 1923 are not applicable to it. A.I.R. 1929 Oudh 225 (F.B.), Rel. on. (*Wazir Hasan and Misra, JJ.*) MOHAMMAD ABID *v.* JAFAR HUSAIN, **119 I. C. 365 = A.I.R. 1930 Oudh 53.**

CHARITABLE AND RELIGIOUS TRUSTS ACT, (1920),—Applicability.

See Ceylon Trust Ordinance (IX of 1917).

———*Scope.*

A trust covered by the provisions of the Charitable and Religious Trusts Act of 1920 is not to be so wide in its purpose as a wakf under the Mussalman Wakf Act of 1923. The Act of 1923 deals with a trust by a person professing the Mussalman faith whatever its purpose, public or private, or partly public and partly private. On the other hand, the Act of 1920 covers such trusts only as are created or exist for a public purpose only. (*Wazir Hasan, Ag. C. J., Misra and Raza, JJ.*) SHABBIR HUSSAIN *v.* ASHIQ HUSAIN.
6 O. W. N. 316 = 117 I. C. 739 = 4 Luck. 429 = A. I. R. 1929 Oudh 225 (F. B.).

———*Charitable Endowments Act* (1890), *S.* 2—*Public charity—Provisions for sadabarat—Contributions towards marriages and education of Brahman children—Religious and charitable trusts come within the purview of.*

A Hindu lady executed a deed of trust whereby she settled her properties by way of private gifts to relations, to friends, to Brahmans and Pandas and to others; there were gifts to the adopted boy too. In addition to these by Cl. 3 of the document she provided for maintenance and Puja of the deity of Thakurji, for public alms or food called sadabarat, for contribution towards the marriages and education of Brahman children. The lady called these as "religious and charitable purposes."

Held, that the charity referred to in the document undoubtedly meant public charity within the meaning of S. 2.

Held further, that the trust created by Cl. 3 is not a private trust and comes well within the purview of Charitable and Religious Trusts Act, 1920. *Jones* v. *Williams*, (1867) Amb. 651; *Goodman* v. *Mayor of Seltash*, (1882) 7 A. C. 633; *Commissioners* v. *Pemsel*, (1891) A. C. 531; *Nash* v. *Morley*, (1842) 5 Beav. 177 and Re *Gosling*, (1900) 48 W. R. 300, Ref.; 23 Bom. 659, Foll.; 8 Bom. 432 and 34 All. 468, Rel. on. (*Jwala Prasad and Wort, JJ.*) JADAB JHA *v.* SATDEO JHA. **10 P. L. T. 677 = A. I. R. 1929 Pat. 723.**

———*Grant—Land given to a Mahant of a temple and his heirs as occupancy tenants under a settlement decree without a right of transfer with condition that the grant to last so long as temple would be in existence—No condition of income being devoted to expenses of the temple—Grant is not for temple but is personal—Land covered by settlement decree is not wakf property—Act does not apply.*

The Settlement Officer gave a Mahant and his heirs rights as occupancy tenants without a right of transfer, without any condition as to the purposes to which the income of the land was to be devoted, without any reference to their being Mahants of a particular temple and without suggesting that the temple was to benefit from their possession. There were no conditions requiring the Mahant and his successors to devote any portion of the income towards the expenses of the temple. They were granted the property subject only to the condition that they might retain it so long as the temple was in existence.

Held, that the grant was not a grant to the temple, but a grant to an individual on the condition that he satisfied certain expenses of the temple from the income of the property granted, and the land given by the settlement decree was not wakf property given for religious or charitable purpose and Act XIV of 1920 was not applicable.

Wazir Hasan, J.—The essence of a trust for a public or religious purpose lies in its characteristic of permanency. The possibility of such a trust cannot be conceived in a tenure where the tenure can come to an end on default or even on the exercise of a volition on the part of the trustee. Where the right of occupancy which the plaintiff's predecessor had obtained in the lands in suit from the settlement Court is liable to be extinguished altogether in the event of non-payment or refusing to pay rent to the superior proprietor, the case is not one of trust falling within the purview of Act XIV of 1920. A. I. R. 1924 P. C. 109 and 5 Cal. 438 (P. C.), Foll. (*Stuart, C. J. and Wazir Hasan, J.*) JAGATJIT SINGH *v.* BRIJ MOHAN DAS. **3 Luck. 392 = 108 I. C. 98 = 5 O. W. N. 50 = A. I. R. 1928 Oudh 241 (245, 246).**

—S. 2—Nature of action under Act.

———*District Judge is subordinate to High Court.*

In the cases under Charitable and Religious Trusts Act, Judge acts as a Court of law and therefore under S. 3, C. P. Code, District Judge's Court is a Court subordinate to the High Court. (*Mukerji and Young, JJ.*) MOHAMMAD ABDUL WAHID KHAN *v.* RADHA KISHUN. **51 All. 957 = 121 I. C. 267 = 1929 A. L. J. 911 = A. I. R. 1929 All. 581.**

—S. 3—Applicability.

———*Wakf for benefit of specified person or class of persons such as kindreds, dependants and others is not a trust for a public purpose.*

The signification of "charity" is very wide in the Mahomedan law generally and it is wider in the Imamia law. Provision for the maintenance of one's kindred, dependants, servants and persons occupying similar position in relation to the wakf is "charity" in the eyes of the Mahomedan law and a wakf made in favour of any such person or class of persons is a valid wakf. But it cannot be said according to the same law that every wakf made for the benefit of a specified person or class of persons including persons and class of persons of the character described above is a trust for a "public purpose." (*Wazir Hasan, Ag. C. J., Misra and Raza, JJ.*) SHABBIR HUSAIN *v.* ASHIQ HUSAIN.
6 O. W. N. 316 = 117 I. C. 739 = 4 Luck. 429 = A.I.R. 1929 Oudh 225 (F. B).

———*Mussalman Wakf Act* (42 *of* 1923), *S.* 4—*Trust partly private and partly public—Interested person can apply under S.* 4—*S.* 3 *is not applicable.*

Where a trust is of a public nature any person having an interest in the said trust is entitled to make the application contemplated by S. 3, Charitable and Religious Trusts Act of 1920, but he is not so entitled if the purpose of the trust created by a Mahomedan is partly public and partly private. In the latter case his remedy lies to make an application under S. 4 of the Act of 1923. (*Wazir Hasan, Ag. C. J., Misra and Raza, JJ.*) SHABBIR HUSAIN *v.* ASHIQ HUSAIN.
6 O. W. N. 316 = 117 I. C. 739 = 4 Luck. 429 = A.I.R. 1929 Oudh 225 (229) (F.B.).

—S. 3—Interpretation.

———*Interpretation of words "public purpose"—Real substance and primary intention of creator must be looked at.*

The words "public purpose" in S. 3 of the Act of 1920 should not be interpreted in such a sense as to allow a trust which is created or exists for a public purpose in its substance and essence though supplemented by an illusory or wholly trifling provision, the purpose of which may not be public or may be even private to be taken out of the provisions of the Act of 1920. The real substance of the trust and the primary intention of the creator of the trust must be looked at in every case. (*Wazir Hasan, Ag. C. J., Misra and Raza, JJ.*)

CHARITABLE AND RELIGIOUS TRUSTS ACT (1920), S. 3—Interpretation.

SHABBIR HUSAIN *v.* ASHIQ HUSAIN.
6 O. W. N. 316 = 117 I. C. 739 = 4 Luck. 429 = A. I. R. 1929 Oudh 225 (F. B.).

———*'Interest in trust' explained.*

Words " having an interest in trust " must in each case depend upon the nature of the trust. (*Mukerji and Banerji, JJ.*) LAKHPAT RAI *v.* DURGA PRASAD.
50 All. 880 = 111 I. C. 129 = 26 A. L. J. 1379 = A. I. R. 1928 All. 758.

—S. 3—Proper Parties.

———*Persons not liable under S. 3 are not proper parties.*

In proceedings under the Act a person who has claims adversely to the trust and who is liable under S. 3 is not a proper party. (*Suhrawardy, J.*) SYED RAZA ALI *v.* KAZI NUR-UD-DIN AHMED. **78 I. C. 174 = A. I. R. 1925 Cal. 537.**

—S. 3—Scope.

———*Secretary of another public institution is, as such and as one entitled to stay in Dharmsala created by trust, interested in such trust.*

A Secretary of a public institution is a person who has an interest in a Dharmsala created by a trust instrument, inasmuch as he is entitled to stay in the Dharmsala and as Secretary of a public institution, and can ask for accounts from the trustee of the Dharmsala. (*Mukerji and Banerji, JJ.*) LAKHPAT RAI *v.* DURGA PRASAD. **50 All. 880 = 111 I. C. 129 = 26 A. L. J. 1379 = A. I. R. 1928 All. 758.**

—S. 5—Failure to comply with order.

———*Alleged trustee failing to institute suit for which permission given under S. 5—District Judge passing order against him—He can bring regular suit for declaration of his right to property—C. P. Code, S. 11.*

Per *Niamatulla, J.*, *Mukerji, J.*, *contra.*—Where the alleged trustee fails to institute a suit for which permission is granted to him under S. 5, and consequently an order against him is passed by the District Judge, a regular suit by him for declaration that the property is held by him in private ownership or in the alternative that it is not held in trust which is governed by Act 14 of 1920, is maintainable *contra.* 30 All. 44; A. I. R. 1925 All. 615, not applied. (*Mukerji and Niamatullah, JJ.*) MAHADEO BHARTHI *v.* MAHADEO RAM.
1929 A. L. J. 653 = 118 I. C. 513 = 51 All. 805 = A. I. R. 1929 All. 506.

—S. 5—Parties.

———*All the trustees of a temple should be made parties and given notice in case of application under S. 3.*

Where the management of the temple is by the vote of the majority of the archakas it is absolutely necessary under S. 5 (1) for a petitioner under S. 3 to make all the archakas respondents to his petition and for the Court to serve a copy of the petition together with notice of the date fixed for the hearing of the petition on each of these archakas or trustees. (*Krishnan, J.*) SRINIVASA AYYANGAR *v.* ANNATHANAM AYYAR.
A.I.R. 1925 Mad. 135.

—S. 6—Failure to comply with order.

———*C. P. Code, S. 92—Failure to comply with order under S. 5 (5)—Charitable and Religious Trusts Act—Suit instituted for breach of trust under S. 6—District Judge can grant any relief under S. 92 (1).*

When the order of the District Judge for filing of accounts under S. 5, Charitable and Religious Trusts Act, had not been complied with there is a breach of trust, by virtue of S. 6, which could be made the basis of a suit under S. 92, C. P. Code. Once such a suit is filed the District Judge has jurisdiction to grant any or all the reliefs mentioned in S. 98 (1), C. P. Code.

CHARITABLE ENDOWMENTS ACT (1890)—Claim against Committee.

(*Sulaiman and Kendall, JJ.*) UMRAO SINGH *v.* HAR PRASAD. **A. I. R. 1930 All. 582.**

—S. 6—Powers of Court.

———*Suit on basis of S. 6, Charitable and Religious Trusts Act filed—Accounts for whole period of trusteeship can be ordered.*

Where a regular suit under S. 92, C. P. Code, is instituted on the basis of S. 6, Charitable and Religious Trusts Act, Court has jurisdiction to order a trustee to render accounts for the whole period of his trusteeship, if such accounts have not been rendered before. (*Sulaiman and Kendall, JJ.*) UMRAO SINGH *v.* HAR PRASAD. **A. I. R. 1930 All. 582.**

—S. 7—Application by trustee.

———*Application to District Judge for advice is case.*

When trustee makes an application to the District Judge to obtain his opinion or advice, a case is presented before the District Judge for decision. A. I. R. 1917 P. C. 71, Appl. (*Mukerji and Young, JJ.*) MOHAMMAD ABDUL WAHID KHAN *v.* RADHA KISHUN.
1929 A. L. J. 911 = 121 I. C. 267 = 51 All. 957 = A.I.R. 1929 All. 581.

—S. 10—Interpretation.

———*Defendant may either furnish security or deposit money.*

The section can only mean that the option of furnishing the security or depositing the money rests with the defendant. The Court can order that he shall do one of these two things but it cannot specify which he is to do. The case is quite different from one where security for costs has been taken under the Code of Civil Procedure under which an order may subsequently be passed directing the person who has furnished the security to pay the costs for which security has been given and this order can then be executed against the surety under S. 145, Civil Procedure Code. But the security furnished under S. 10 of Act XIV of 1920 relates to the expenditure actually incurred or likely to be incurred by the plaintiff which is quite a different matter from the costs of the suit. The Court cannot order execution against the surety. (*Brasher, J.*) KIRPAL SINGH *v.* NIRANJAN SINGH. **69 I. C. 658 = A. I. R. 1924 Lah. 408.**

—S. 10—Nature of order.

———*C. P. Code, S. 115—Order under is a 'case'.*

An order asking defendant to deposit money in Court under S. 10 of Act XIV of 1920 is a ' case ' within S. 115 and revision lies. (*Brasher, J.*) KIRPAL SINGH *v.* NIRANJAN SINGH. **69 I. C. 658 = A. I. R. 1924 Lah. 408.**

—S. 12—Revisional powers.

———*C. P. Code, S. 115—High Court has revisional powers under Charitable and Religious Endowments Act.*

The acts of a District Judge under Act 14 of 1920 are open to correction by the High Court under its revisional jurisdiction exercisable under S. 115, C. P. Code Legislators were not ignorant of the existence of revisional jurisdiction in the High Court when they framed S. 12. They might have said that neither an appeal nor a revision shall lie. The omission of the word revision confirms the opinion that a revision is not shut out. (*Mukerji and Young, JJ.*) MOHAMMAD ABDUL WAHID KHAN *v.* RADHA KISHUN.
51 All. 957 = 121 I. C. 267 = 1929 A. L. J. 911 = A. I. R. 1929 All. 581.

CHARITABLE ENDOWMENTS ACT (VI OF 1890).

—Claim against Committee.

———*Suit against Secretary alone, is bad.*

CHARITABLE ENDOWMENTS ACT (1890), S. 2—Applicability.

There is no justification for suing the Secretary alone in respect of a claim which is directed against the Committee as a whole. The mere fact that the Secretary is described in the plaint as "*ex officio* Secretary of the King's Unani Hospital Committee" would not be sufficient to enable the plaintiff to execute against the Committee any decree which might be granted in his favour. (*Daniels, J. C.*) AJODHYA NATH *v.* THE CITY MAGISTRATE OF LUCKNOW. **26 O. C. 333 = 80 I. C. 495 = A. I. R. 1924 Oudh. 128.**

—S. 2—Applicability.

———*Public charity—Provisions for sadabarat—Contributions towards marriages and education of Brahman children—Religious and charitable trusts come within the purview of Charitable and Religious Trusts Act*, 1920.

A Hindu lady, executed a deed of trust, where by (the document) she settled her properties by way of private gifts to relations, to friends, to Brahmans and Pandas and to others; there were gifts to the adopted boy too. In addition to these by Cl. 3 of the document she provided for maintenance and Puja of the deity of Thakurji, for public alms or food called sadabarat, for contribution towards the marriages and education of Brahman children. The lady called these as "religious and charitable purposes."

Held, that the charity referred to in the document undoubtedly meant public charity within the meaning of S. 2.

Held, further, that the trust created by Cl. 3 is not a private trust and comes well within the purview of Charitable and Religious Trusts Act, 1920. *Jones* v. *Williams*, (1867) Amb. 651; *Goodman* v. *Mayor of Seltash*, (1882) 7 A. C. 633; *Commissioners* v. *Pemsel*, (1891) A. C. 531; *Nash* v. *Morley*, (1842) 5 Beav. 177 and Re *Gosling*. (1900) 48 W. R. 300, Ref.; 23 Bom. 659, Foll.; 8 Bom. 432 and 34 All. 468, Rel. on. (*Jwala Prasad and Wort, JJ.*) JADAB JHA *v.* SATDEO JHA. **10 P. L. T. 677 = A. I. R. 1929 Pat. 723.**

—S. 14—Scope.

———*S. 14 does not bar suit, in defiance of trust based on title paramount to settlor's.*

Suit for property alleged to be vested in the Treasurer of Charitable Endowments is maintainable, where settlor is alleged to have only a life interest based on a title paramount to the settlor's. The Act has nothing to do with a case where the claim is made in defiance of the trust and on a title paramount to the settlor's. (*Stuart, C. J. and Hasan, J.*) JAGDEO SINGH *v.* DEPUTY COMMISSIONER, PARTABGARH. **2 Luck. 507 = 29 O. C. 176 = 3 O. W. N. Sup. 56 = 96 I. C. 47 = 13 O. L. J. 762 = A. I. R. 1926 Oudh 431.**

CHARITY.

See (1) C. P. CODE, S. 92.
(2) CYPRES.
(3) HINDU LAW—RELIGIOUS ENDOWMENT; WILL.
(4) MAHOMEDAN LAW—WAKF.
(5) T. P. ACT, S. 14.
(6) WILL.

CHARTER ACT (3 & 4 WILL. IV, Ch. 85).

—S. 1—Interpretation.

———*'Trust' is not used in strict sense as in Trusts Act—Crown.*

The word "trust" is not used in the Charter Act in its strict technical sense and it will be far-fetched to hold that because the word used is "trust", therefore the law of trusts as strictly understood should govern the relations of the Company and the Crown. (*Venkatasubba Rao and Srinivasa Ayyangar, JJ.*) SECRETARY OF STATE *v.* RAJA PARTHASARTHY.

CHIT FUND—Legality.

49 Mad. 349 = 96 I. C. 1011 = 1926 M. W. N. 897 = A. I. R. 1926 Mad. 706 = 50 M. L. J. 699.

CHARTER-PARTY.

See (1) BILL OF LADING.
(2) CONTRACT.

CHASTITY—*See* HINDU LAW—WIDOW.

CHAUKIDARI CHAKRAN LAND.

See (1) BENGAL VILLAGE CHAUKIDARI ACT.
(2) TENURES.

CHEATING—*See* PENAL CODE, SS. 415-420.

CHELAS—*See* HINDU LAW—SUCCESSION.

CHEMICAL EXAMINER'S REPORT.

See CR. P. CODE, S 510.

CHEQUE.

See (1) BANKER AND CUSTOMER.
(2) NEGOTIABLE INSTRUMENTS ACT.

CHIEF COURT—JURISDICTION.

See (1) JURISDICTION.
(2) C. P. CODE, S. 115.

CHILD.

See (1) CR. P. CODE, S. 488 (2).
(2) FATAL ACCIDENTS ACT.
(3) PENAL CODE, S. 317.

CHIN HILLS REGULATION (V OF 1896).

—S. 4—Interpretation.

———*An application under S. 488, Cr. P. Code, is not of a civil nature—S. 4, Cl. 1 is qualified by clauses 4 and 5.*

An application under S. 488, Cr. P. Code, cannot be regarded as a proceeding of a civil nature within S. 12 although the failure to maintain a child is not a criminal offence. Cl. 1 of S. 4 is qualified by Cls. 4 and 5. The words "so far as regards persons other than Chins" in S. 4 (i) must be construed as meaning "so far as regards liabilities imposed by Law on persons other than Chins." (*Mac Coll, A. J. C.*) MAUNG *v.* MANG TOM. **25 Cr. L. J. 111 = 76 I. C. 111 = 4 U. B. R. 169 = A. I. R. 1925 Rang. 140.**

CHIT FUND.

—Legality.

———The plaintiffs were subscribers to a chit fund, the feature of which was that lots were drawn for prizes monthly and the winners got Rs. 50 the full amount of the chit, without any liability for further subscriptions. After the fiftieth drawing the unsuccessful subscribers would get back the full amount of their subscriptions but without interest. The plaintiffs brought this suit to recover Rs. 36 the amount paid by them for 18 instalments at Rs. 2 per month till it was stopped.

Held, that the chit transaction was not a wagering contract within the meaning of S. 30 of the Indian Contract Act. (1925) I. L. R. 48 M. 661, Followed; (1925) 49 M. L. J. 791 and (1919) M.W.N. 570, Overruled.

Quaere.—Where a chit transaction is a wagering contract, the moneys paid to the stakeholder by a subscriber for subscriptions cannot be recovered from him. (*Kumaraswami Sastri, Ramesam and Beasley, JJ.*) NARAYANA AIYANGAR *v.* VELLACHAMI AMBALAM. **103 I. C. 318 = 1927 M. W. N. 545 = 38 M.L.T. 390 = 50 Mad. 696 = 26 M. L. W. 796 = A. I. R. 1927 Mad. 583 = 52 M. L. J. 687.**

———In a chit transaction 500 persons undertook each to subscribe Rs. 2 at each instalment and there were to be 50 drawings at each of which the winner was to get Rs. 100 and walk out without any liability to subscribe for any subsequent instalments. After the 50th drawing those who had not drawn a prize were entitled to get their money back without interest. After subscribing for 48 instalments, one of the subscribers sued the stakeholder for the amounts subscribed by him with interest.

Held, that the whole transaction amounted to a lottery and the agreement between the promoter and the subscribers, amounted to a wagering agreement within the meaning of S. 30 of the Contract Act.

Held, further, that the agreement to repay the subscriptions in a case like this is not severable from the prize arrangement and the provisions of S. 65 cannot be invoked, for the agreement in this case did not become void nor was it discovered to be void but it was void for illegality from its inception. A. I. R. 1925 Mad. 870, Dist.; A. I. R. 1925 Mad. 281, Rel. (*Spencer and Madhavan Nair, JJ.*) P.V. VEERANNAN AMBALAM v. AYYACHI AMBALAM. **22 M. L. W. 772 = 1925 M. W. N. 857 = 92 I. C. 968 = A. I. R. 1926 Mad. 168 = 49 M. L. J. 791.**

———The defendant was carrying on a chit fund. There were 500 subscribers each paying one rupee per month. The chit was to go on for 50 months and every month two prizes of Rs. 25 each were to be drawn by lot; any subscriber who happened to win a prize would get Rs. 25 at once and had to pay thereafter only 8 annas a month, while if he won a second prize he would be given another Rs. 25 and thereafter his subscriptions would cease and his name would no longer be included in drawing the prize. At the end of 50 months all subscribers who had won no prize would be paid back the whole of the money they had subscribed. *Held*, the arrangement was clearly a lottery. Where the stakeholder discontinued the chit after 27 months and thereupon a subscriber sued him for refund of the subscriptions he had paid, *held*, per *Krishnan, J.* (*Odgers, J.*, holding *contra*) the main point was to pay back the total amount of subscriptions paid while the arrangement to give prizes were only a collateral one serving as an inducement to join the chit and hence the former was severable from the latter and the illegality of the latter did not necessarily attach to the former. The suit for refund was therefore maintainable. *Sankunni* v. *Ikkora Kirtti*, (1919) M. W. N. 570, not Followed.

Per *Odgers, J.*—As a material part of the illegal purpose had been carried out, the subscriber was not entitled to recover the amounts paid, as both the plaintiff and defendant were in *pari delicto* and there was no ground for holding they were not *potir est conditio possidentis*. Nor is the case one to which S. 65, Contract Act, would apply as the contract was illegal from the beginning. (*Krishnan and Odgers, JJ.*) NAGAPPA PILLAI v. ARUNACHALAM CHETTY. **85 I.C. 1016 = A. I. R. 1925 Mad. 281 = 47 M. L. J. 876.**

—Liability.

———*Defaulting subscriber.*

If a trustee who is bound to collect the funds for the benefit of beneficiaries fails to do so, he commits breach of trust and the proper procedure is to have the defaulting trustee removed and have another trustee appointed or to sue for the administration of the trust by the Court. A subscriber to the kuri chit made default in the payment of an instalment and he bid for and obtained the proceeds of a sale at auction and executed a security bond in favour of the manager. Plaintiff who was a successful highest bidder sued to enforce the security and joined the representatives of the defaulting subscriber and manager as defendants.

Held, that he was not entitled to enforce the security against the defaulter. The manager with respect to the transaction of security must be regarded in law only as a trustee and proper course would be a suit for the enforcement of a trust against the trustee or for the administration of the trust. (*Srinivasa Aiyangar, J.*) KUDKANJEE TIMMARSA PAI v. KANJARPANE SUBBA RAO. **1927 M. W. N. 721 = 108 I. C. 404 = A. I. R. 1928 Mad. 256.**

———*Charge.*

By the rules of a kuri a subscriber who took a prize was to furnish security for the payment of future subscriptions. The subscribers who took a prize executed a bond to the stake holder which was stamped as if it was a mortgage, by which the executants undertook, when required, to give the stakeholder a mortgage on the property. But there was another clause which was added to the deed as a sort of supplement before it was signed by the executants. This clause ran as follows: "We and the properties are liable for any arrears of future subscription mentioned above."

Held, that the supplementary clause was as much part of the completed deed as the undertaking to give a mortgage when required and the intention of the executants was to create a charge on the properties. *The United Realization Co., Ltd.* v. *Commissioners of Inland Revenue*, (1899) 1 Q. B. S. 361, Referred to. (*Waller and Madhavan Nair, JJ.*) VALIA RAJA AVERGAL v. OFFICIAL RECEIVER, SOUTH MALABAR, CALICUT. **39 M. L. T. 404 = 106 I. C. 508 = A.I.R. 1927 Mad. 1069 = 53 M. L. J. 730.**

———Apart from a specific agreement to that effect the default by the stakeholder in the payment of the prize does not relieve the subscriber from his liability to pay future subscriptions. (*Beasley, J.*) S. A. MUTHAYAN CHETTIAR v. P. PANCHAVARNA NADAR. **23 M. L. W. 210 = 93 I. C. 641 = A. I. R. 1926 Mad. 926.**

—Liability under contract.

———*Default by stakeholder in paying prize money does not justify non-payment by subscriber of further subscriptions.*

Apart from special agreement default in the payment of the prize-money does not relieve the subscriber from liability to pay future subscriptions. Such a termination of liability can only be on the ground that the whole contract is put an end to. (1911) 1 M.W.N. 79, Foll. (*Beasley, J.*) MUTHAIYAN v. PANCHAVARNA. **23 M. L. W. 210 = 93 I. C. 641 = A. I. R. 1926 Mad. 926.**

———Penalty.

Provision was made in a document that was executed by a subscriber to chit fund in favour of the stakeholder giving security for the amount of the instalment, engaging to pay the sum as and when they fell due regularly, for the payment of substantial interest on the amount of the chit or instalment omitted to be paid and for the payment of the whole amount if further default should be made for a period of one month;

Held, that on a proper construction of the document each instalment, on the due date and then alone, accrues as a debt due and in that view there can be no doubt whatever that the provision with regard to the whole amount becoming payable on default must be regarded as a penal clause and should be relieved against. A. I. R. 1925 Mad. 177, Rel. on. (*Srinivasa Aiyangar, J.*) SUBBIAH PILLAI v. SHANMUGAM PILLAI. **1927 M. W. N. 527 = 108 I.C. 319 = A. I. R. 1928 Mad. 245.**

———A bond executed by the successful bidders of the first chit in favour of the stake-holders of the regular payment of instalments due provided that on default of an

CHIT FUND—Penalty.

instalment, the whole of the arrears should fall due, *held*, the provision was penal and could be relieved against. Test of penal stipulations pointed out. (*Srinivasa Aiyangar, J.*) RAMALINGA ADAVIAR *v.* MEENAKSHISUNDARAM PILLAI. **21 M. L. W. 54 = 85 I.C. 261 = A.I.R. 1925 Mad. 177 = 47 M.L.J. 833.**

———The defendant, the successful bidder at the second auction, executed in favour of the plaintiff, the stakeholder, a bond which provided, *inter alia*, that in case the defendant failed to pay his subscriptions, he was not only to forfeit the dividend, interest and premium, but was also to pay the whole amount on demand with interest thereon at 1½ per cent. per mensem from the date of the auction, and that the defendant should within 15 days execute another document to the plaintiff for the due payment of the chit amounts of the subsequent instalments and for abiding by the terms of the bond. The defendant executed the other document referred to above. He paid the third, fourth and fifth instalments correctly and defaulted in payment of the sixth. In a suit by the plaintiff to recover the amount due under Exhibit A, held that the terms of the bond as regards (1) the defendant's liability for future instalments from the date of his default; (2) his deprivation of the dividend and interest; and (3) the imposition on him of liability for interest on the amount due from him at 18 per cent. from the date of his default, did not either each taken by itself, or altogether, amount to a penal stipulation. In cases such as the above, the Court has to decide whether the terms are unreasonable as a whole and whether they are so unreasonable that the parties never contemplated that they should receive effect.

Held, further, that the waiver by the plaintiff of his right to enforce the terms of the bond in connection with the fourth and fifth instalments did not affect his right to use the coercive measures provided by the bond in cases of future default. (*Oldfield and Ramesam, JJ.*) VAITHINATHA IYER *v.* GOVINDASWAMI ODAYAR. **1922 M. W. N. 203 = 67 I. C. 995 = A. I. R. 1922 Mad. 67 = 42 M. L. J. 551.**

—Validity of Chit Fund Contract.

———*Contract Act, S. 30—Chit fund—Winners to get prizes and subscribers to get refund of contribution in the end without interest—Contract is not wagering.*

Where the cardinal feature of the chit fund in suit is that lots are drawn for prizes monthly and that the winners get Rs. 50, the full amount of the chit without any liability for further subscription and after the 50th drawing, the unsuccessful subscribers get back the full amount of their subscriptions, but without interest.

Held, that the suit chit fund is not a wagering contract and there is no objection to enforce its terms in a Court of law. 48 Mad. 661, Affirmed; *Wallingford* v. *Mutual Society*, 5 A. C. 685, Foll.; 92 I. C. 968 = A. I. R. 1926 Mad. 168 = 49 M. L. J. 791 and 52 I. C. 989, Overruled. (*Kumaraswami Sastri, Ramesam and Beasley, JJ.*) NARAYAN AIYANGAR *v.* VELLACHAMI AMBALAM. **1927 M. W. N. 545 = 38 M. L. T. 390 = 50 Mad. 696 = 26 M. L. W. 796 = 103 I. C. 318 = A. I. R. 1927 Mad. 583 = 52 M. L. J. 687 (F. B.).**

CHITTAGONG PORT ACT (BENGAL ACT V OF 1914).

—S. 29—Effect of non-compliance.

———Non-compliance with the provisions of S. 29 renders the agreement not binding upon the Commissioners. Case-law discussed. (*Chatterji, A. C. J. and Panton, J.*) MAHOMED IBRAHIM *v.* COMMISSIONER FOR THE PORT OF CHITTAGONG. **54 Cal. 189 = 103 I. C. 2 = A. I. R. 1927 Cal. 465.**

CHOTA NAGPUR ENCUMBERED ESTATES ACT (1876), S. 2—Effect of order under.

—S. 38 (g)—Scope.

———The words used in S. 38 (*g*) are wide and it is not *ultra vires* of the Commissioners to let out a steam tug for operations outside the Chittagong river. (*Chatterji, Ag. C. J. and Panton, J.*) MAHOMED IBRAHIM *v.* COMMISSIONER FOR THE PORT OF CHITTAGONG. **54 Cal. 189 = 103 I. C. 2 = A. I. R. 1927 Cal. 465.**

CHOSE-IN-ACTION.

See (1) CONTRACT ACT, S. 78.
(2) T. P. ACT, SS. 132 TO 137.

CHOTA NAGPUR ENCUMBERED ESTATES ACT (IMPERIAL ACT VI OF 1876).

– Applicability.

———*Does not apply outside Chota Nagpur.*

The Chota Nagpur Encumbered Estates Act (Bengal Act VI of 1876) does not apply to immoveable property outside Chota Nagpur. That being so, the Act cannot in any case apply to properties in the district of Midnapur. 45 I. A. 105, Foll. (*N. R. Chatterjee and Chotzner, JJ.*) PRATAB CHANDRA *v.* JAGDISH CHANDRA. **40 C. L. J. 331 = 82 I. C. 886 = A. I. R. 1925 Cal. 116.**

—Language of Act.

———*Language of the Act is obscure.*

The Act is so framed as to render it not easy to construe; the language of the Act is obscure. (*N. R. Chatterjee and Chotzner, JJ.*) PRATAP CHANDRA *v.* JAGDISH CHANDRA. **40 C. L. J. 331 = 82 I. C. 886 = A. I. R. 1925 Cal. 116 (139).**

—Manager.

———Per *Das, J.*—Whether manager under the Act is a Court. (*Das, James and Rowland, JJ.*) MAHABIR PROSAD *v.* BHUPAL RAM. **10 P. L. T. 879 = A.I.R. 1929 Pat. 694 (F. B.).**

—Object and scope of Act.

———Object is to relieve embarrassed landholders in Chota Nagpur—Scheme and scope explained. (*N. R. Chatterjee and Chotzner, JJ.*) PRATAP CHANDRA *v.* JAGDISH CHANDRA. **40 C. L. J. 331 = 82 I. C. 886 = A. I. R. 1925 Cal. 116.**

—Title by lapse of time.

———*Title by lapse of time is not void.*

A title acquired by lapse of time cannot under the Chota Nagpur Encumbered Estates Act be regarded as void since there is nothing in the Act to suggest that it expressly or by necessary implication abrogates the law of limitation. 4 Bom. L. R. 797, Dist.; 33 Bom. 116, Rel. on. (*Das and Adami, JJ.*) BAGESWARI CHARAN *v.* JAGARNATH KUARI. **8 Pat. 549 = 115 I.C. 699 = A. I. R. 1929 Pat. 117.**

—S. 2—Effect of order under.

———*Vesting order under S. 2—Effect is to prohibit suit —No suit need be instituted to keep claim alive.*

Per *Rowland and James, JJ.*—On proper construction of S. 3 of the Act, the institution of the suit is prohibited and this prohibition is not restricted to debts notified under S. 7. The fact that no suit was instituted by the creditor does not bar the claim by limitation except as regards the claim allowed by the Commissioner. A. I. R. 1928 Pat. 179, not Appr.; 20 Cal. 609, Rel. on; A. I. R. 1926 Pat. 260; A. I. R. 1922 Pat. 287; 33 Cal. 1065; 4 P. L. J. 321; 11 All. 47 (P. C.); 12 M.I.A. 244 (P. C.); 23 Cal. 775 (P. C.); 43 Mad. 185 (F. B.); 35 Cal. 209; A. I. R. 1916 P.C. 96; 4 P.L.J. 321 and 33 Cal. 1065, Appl. (*Das, James and Rowland, JJ.*) MAHABIR PROSAD *v.* BHUPAL RAM. **10 P. L. T. 879 = A. I. R. 1929 Pat. 694 (F. B.).**

—S. 3—Applicability.

———*Usufructuary mortgage of part of estate by landlord—Suit for rent by mortgagee against tenants—Decree obtained—Estate taken subsequently under charge by the manager—Proceedings in execution of rent decree are not barred.*

Where a usufructuary mortgagee of a part of an estate brought a suit for rent against certain tenants of that estate and obtained a decree and the estate was subsequently placed under a manager under the provisions of the Chota Nagpur Encumbered Estates Act,

Held, that the decree obtained by the mortgagee was not barred under S. 3. S. 3 could not in any way be applied to the liability of a tenant to pay rent or his liability to have his holding sold under a decree for rent by the mortgagee in possession. That liability arose before the landlord's estate was placed under management and from the moment the decree was passed the liability under it was a liability of the tenant under the decree and in no sense a debt or liability of the landlord mortgagor under the mortgage. The section is applicable only to debts or liabilities of the disqualified proprietor and not the debts or liabilities of somebody else such as a tenant. (*Dawson Miller, C.J. and Kulwant Sahay, J.*) SRIKANTA MANJHI *v.* BALAK SINGH.

6 Pat. 742 = 109 I. C. 833 = A.I.R. 1928 Pat. 153.

———*Usufructuary mortgage by proprietor—Decree for rent against tenants—Estate vested in manager—Decree cannot be executed.*

Where the proprietor of the encumbered estate grants a usufructuary mortgage and the rent due by the tenants is taken by the mortgagee in lieu of interest on the loan,

Held, that in recovering a decree for rent against the tenants, the mortgagee is only recovering interest against his debtor and it is a debt or liability of the proprietor of the encumbered estate; and that, consequently, no proceedings in execution of the decree can be taken after the estate has vested in the manager. (*Ross, J.*) BALAK SINGH BHUMJI *v.* SRIKANTA MANJHI.

96 I. C. 587 = A. I. R. 1926 Pat. 524.

———*Suit pending—Estate taken over under the Act—Suit cannot proceed.*

S. 21-B cannot restrict the provisions of S. 3; this section refers to suits other than proceedings in regard to the debts or liabilities referred to in S. 2-A. The suit instituted before the estate is taken over cannot proceed after the estate is taken over, even though the manager is brought on record. (*Coutts and Macpherson, JJ.*) BANSIDHAR DAR *v.* TIKAIT HAR NARAYAN SINGH.

1922 P. H. C. C. 112 = 6 P. L. J. 685 = 65 I. C. 283 = A. I. R. 1923 Pat. 85.

—S. 3—Decree against manager.

———*Notice of claim need not be given.*

In a decree against the manager of an incumbered estate, the decree-holder need not notify his claim to the manager as Ss. 3 (thirdly) (*b*), 5 and 6 do not apply to such decree. (*Das and Ross, JJ.*) BURTON *v.* MIDNAPORE ZEMINDARY CO.

61 I. C. 902 (Pat.).

—S. 3—Distinction.

———*Protection of Estates—Estate release of—Creditor's rights which were in abeyance will revive.*

S. 3 gives a statutory protection to a person whose property is brought within the operation of the Encumbered Estates Act, and S. 12 removes that protection when the proprietor is restored to possession and provides in effect that all remedies which, but for S. 3, the creditor could enforce against the proprietor shall be enforcible against the proprietor as soon as he is restored to possession. (*Das and Ross, JJ.*) RAJA JYOTI PRASAD SINGH DEO *v.* RANJIT SINGH.

3 Pat.L.T. 94 = 1922 P.H.C.C. 152 = 6 P.L.J. 328 = 63 I. C. 743 = A. I. R. 1922 Pat. 287.

—S. 3—Institution of Suit.

———*Institution of suit is not barred—Limitation Act, S. 15.*

There is no provision in the Chota Nagpur Encumbered Estates Act providing that a vesting order under S. 2 has the effect of barring the institution of suits. 20 Cal. 609, Diss. But if such a suit be instituted, the institution of the suit has the effect of keeping the claim alive as against the person whose estate is attached under the Act. But where no such suit is filed, the period during which the property was under attachment cannot be excluded by the mortgagee of the attached property from limitation for instituting his suit on mortgage. (*Das and Allanson, JJ.*) KHAIRULLAH KHAN *v.* LACHMI RAM.

7 Pat. 109 = 9 P. L. T. 252 = 105 I. C. 643 = A. I. R. 1928 Pat. 179.

—S. 3—Interpretation.

———For the purpose of ascertaining the intention of the statute it is not necessary to draw a distinction between institution of suit and issue of summons. Regard should be had to the general scope of the statute. (*Das, James and Rowland, JJ.*) MAHABIR PROSAD *v.* BHUPAL RAM. **10 P. L. T. 879 = A.I.R. 1929 Pat. 694 (F.B.).**

———*"Such debts and liabilities" mean "all debts and liabilities to which the holder is subject."*

The words "such debts or liabilities" in S. 3 no doubt refer to the debts and liabilities mentioned in S. 2-A, but the Act contemplates that the holder should disclose all debts and liabilities to which the holder is subject and "such debts and liabilities" must mean "all debts and liabilities to which the holder is subject." (*Das and Ross, JJ.*) PURNENDU NARAIN *v.* MUKHAN LAL.

7 Pat. 480 = 10 P. L. T. 21 = 112 I. C. 236 = A. I. R. 1928 Pat. 457.

—S. 3—Interpretation and Scope.

———*A Court is incompetent to execute a decree in respect of debts or liabilities of defaulting proprietor except debts due or liabilities incurred to Government.*

The words "process as aforesaid" in para. (*b*), S. 3, must mean "process for or in respect of such debts and liabilities" and the words that follow, namely, "except for or in respect of debts due, or liabilities incurred to Government" support this view and, therefore, a Court is incompetent to execute a decree in respect of debts or liabilities of the defaulting proprietor except debts due or liabilities incurred to Government. (*Das and Ross JJ*) PURNENDU NARAIN *v.* MAKHAN LAL.

7 Pat. 480 = 10 P. L. T. 21 = 112 I. C. 236 = A. I. R. 1928 Pat. 457.

———*Scheme of payment of debts by manager, and approval of scheme by Commissioner—Period during which estate is under protection under Act excluded in computing limitation—Manager—Liability of, in drawing up scheme—Determination of debt by manager not judicial decree.*

There is no doubt that the Act is inartistic in its drafting. Too strict interpretation cannot be placed on S. 12. It could never have been in contemplation of the Legislature that the mere approval by the Commissioner of a scheme should for ever deprive all creditors of redress. The first clause of S. 3 becomes ineffectual when the vesting order itself is cancelled by a subsequent notification by merely drawing up a scheme for payment. The manager does not make himself liable to creditor since there is no contract between the manager and the creditor. The determination of a debt by the manager is not a judicial proceeding and his decision as to what the debt is does not amount to a decree. The word " bar " in regard to pending proceedings in cl. (1) of S. 3 means that all pending proceedings shall be stayed. (*Adami and Kulwant Sahay, JJ.*) MATHURA PROSAD SINGH *v.* JAGESHWAR PRASAD SINGH. **5 Pat. 404 = 1926 P. H. C. C. 65 = 94 I. C. 624 = A. I. R. 1926 Pat. 260.**

—S. 3—Mortgage suit.

———*Mortgage suit is pending till a final decree is passed or the same becomes barred by limitation—C. P. Code, O.* 34.

A mortgage suit does not come to an end with the preliminary decree and the proceedings are still pending at least until a final decree is made or the same becomes barred by limitation. Therefore, proceedings in a mortgage suit are deemed to be pending within the meaning of S. 3 of the Chota Nagpur Encumbered Estates Act after preliminary decree has been passed and before application for a final decree has been made. (*Dawson Miller, C. J. and Foster, J.*) TEKAIT MAHABIR PRASAD NARAYAN DEO *v.* CHOTA NAGPUR BANKING ASSOCIATION, LTD. **1926 P.H.C. C. 358 = 8 P. L. T. 189 = 99 I. C. 959 = A.I.R. 1927 Pat. 105.**

—S. 12—Effect.

———*Alienation is void from beginning although charge good for holder's lifetime.*

S. 12 provides that an alienation is void from the moment of such alienation although it suggests that a charge may be good for lifetime of the holder of the property. (*Das and Adami, JJ.*) BAGESWARI CHARAN *v.* JAGARNATH KUARI. **8 Pat. 549 = 115 I. C. 699 = A. I. R. 1929 Pat. 117.**

—S. 12—Interpretation and scope.

———*Though under the Act the estate is to be restored at end of management, only to the heir, he can be ousted through a Civil Court by a devisee.*

It is true the Act recognises only the heir and not the devisee, and the restoration of the estate is to be made to the heir on the death of the holder. But under S. 23, the Civil Courts in Chota Nagpur have jurisdiction to entertain and dispose of suits relating to the succession to immoveable property. "Succession" would include intestate as well as testamentary succession, so that although the heir would be restored to possession and a person claiming under a testamentary disposition would have to establish such claim in the Civil Court the possession of the heir would be subject to the result of such suit. (*N. R. Chatterjee and Chotzner, JJ.*) PROTAP CHANDRA *v.* JAGADISH CHANDRA. **40 C. L. J. 331 = 82 I. C. 886 = A. I. R. 1925 Cal. 116.**

—S. 12—Revival of proceedings.

———*Holder restored to property but not under circumstances mentioned in Cl.* (2)*—Proceedings stayed under S.* 3 *cannot revive.*

It is impossible to hold that there is a revival of proceedings which were stayed under the provision of S. 3, where the holder of the property or his heir has been restored but not under the circumstances mentioned in the second clause of the section. (*Das and Allanson, JJ.*) KHAIRULLAH KHAN *v.* PANSLAY LACHMI RAM. **7 Pat. 109 = 105 I. C. 643 = 9 P. L. T. 252 = A. I. R. 1928 Pat. 179.**

—S. 12—Scope.

———*Enforcing mortgage and not personal covenant implied in the mortgage is prohibited.*

All that is prohibited or meant to be prohibited is the alienation of the property or the creation of any charge on the property without the sanction of the Commissioner. There is nothing in the section to suggest that a person who is affected by the Act is debarred from borrowing money altogether. Though a mortgage cannot be enforced against the property under the terms of the Act the personal covenant to repay which is always implied in a mortgage can be enforced. A.I.R. 1925 Pat. 470, Foll.; A.I.R. 1916 P. C. 59, Dist. (*Das and Fazal Ali, JJ.*) BALMUKUND *v.* BHAGWAT NARAYAN. **8 Pat. 212 = 121 I. C. 367 = 11 P.L. T. 258 = A. I. R. 1929 Pat. 375.**

—S. 12—Applicability.

———*Only alienations* inter vivos *and not wills are referred to.*

S. 12-A refers to alienations *inter vivos* and not to wills. And if the expression "alienate" has been used in that sense in S. 12-A, it should be taken to have that meaning in S. 3 also, unless it is clear that some other meaning was intended. (*N. R. Chatterjee and Chotzner, JJ.*) PRATAB CHANDRA *v.* JAGDISH CHANDRA. **40 C. L. J. 331 = 82 I. C. 886 = A. I. R. 1925 Cal. 116.**

———*Property released on* 2-10-1915 *— Mortgage on* 10-10-1915 *was held void.*

The estate was attached under the provisions of the Encumbered Estates Act: but it was released on the 2nd October, 1915. On 10th October, 1915; a mortgage of the property was executed.

Held, that the mortgage was void under the provision of Sub-S. (1), Cl. (*b*) read with Sub-S. 3 of S. 12-A of the Encumbered Estates Act. (*Das and Adami, JJ.*) LADU NARAIN SINGH *v.* GOBERDHAN DAS. **4 Pat. 478 = 86 I. C. 721 = 6 P. L. T. 497 = 1925 P.H.C.C. 104 = A. I. R. 1925 Pat. 470.**

—S. 17—Powers of Managers

———*Contract made with Bengal Government does not bind the estate—Powers of manager under the Act discussed.*

Under the Act the owner is disabled not only from acts of management but from mortgaging, charging, leasing or alienating the property, whereas on the other hand the manager is vested and alone vested with such powers. Therefore a contract for sale for part of such estate entered into with Lieutenant-Governor of Bengal is neither binding on the manager nor on the estate. (*Lord Shaw.*) HUKUMCHAND *v.* RAN BAHADUR SINGH. **51 I. A. 208 = 80 I. C. 841 = 3 Pat. 625 = 34 M.L.T. 120 = 22 A.L.J. 935 = 5 L. R. P. C. 190 = 29 C.W.N. 342 = 1924 M.W.N. 710 = 21 M.L.W. 1 = 5 P. L. T. 639 = 3 Pat. L. R. (Civ.) 157 = A. I. R. 1924 P. C. 156 = 47 M. L. J. 562. (P.C.)**

—S. 23—Jurisdiction of Civil Court.

———*Though under the Act the estate is to be restored at end of management, only to the heir, he can be ousted through a Civil Court by a devisee—Encumbered Estates Act* (*VI of* 1876), *S.* 12.

It is true the Act recognises only the heir and not the devisee, and the restoration of the estate is to be made to the heir on the death of the holder. But under S. 23, the Civil Courts in Chota Nagpur have jurisdiction to entertain and dispose of suits relating to the succession to immoveable property. "Succession" would include intestate as well as testamentary succession, so that although the heir would be restored to possession and a person claiming under a testamentary disposition would have to establish such claim in the Civil Court the possession of the heir would be subject to the result of such suit. (*N. R. Chatterjee and Chotzner, JJ.*) PROTAP CHANDRA *v.* JAGADISH CHANDRA. **40 C. L. J. 331 = 82 I.C. 886 = A.I.R. 1925 Cal. 116.**

CHOTA NAGPUR ENCUMBERED ESTATES (AMENDMENT) ACT (B. & O. VIII OF 1922).

—Applicability.

——*Act applies even to estates vested before it came in force.*

The provisions of the amending Act were intended to apply to estates already under management as well as to those which might be vested in a manager subsequently. The provisions relate to procedure only and no question of vested rights arises. (*Dawson Miller, C. J. and Foster, J.*) Tekait Mahabir Prasad Narayan Deo *v.* Chota Nagpur Banking Association, Ltd. **1926 P. H. C. C. 358 = 99 I. C. 959 = 8 P. L. T. 189 = A. I. R. 1927 Pat. 105.**

CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE ACT (I OF 1879)—*see* Column 1079.

CHOTA NAGPUR TENANCY ACT (BENGAL ACT VI OF 1908).

—Application.

——Provisions of the Act, are provisions which primarily affect and regulate the relationship between the landlord and tenant, and not the rights of the tenant in relationship to third persons. (*Kulwant Sahay and Macpherson, JJ.*) Mt. Kishuni Kuar *v.* Andu Mahton. **10 P.L.T. 595 = 120 I.C. 300 = A.I.R. 1929 Pat. 734.**

—Entry in Khewat as Khuntkatti.

——*Entry of certain persons in* khewat *as having* khuntkatti *rights under the proprietor of the village does not necessarily shew that they were permanent tenure-holders.*

Where in the *khewat* the plaintiffs were shown as having *khuntkatti* rights in the lands in question under the proprietor of the village,

Held, that the survey entry does not necessarily show that the plaintiffs possessed the right of a raiyat having *khuntkatti* rights and that it cannot be definitely said that the plaintiffs were permanent tenure-holders and not temporary tenure-holders. (*Jwala Prasad and Ross, JJ.*) Jeo Lal Singh *v.* Wazir Narain Singh. **2 P. L. T. 638 = 63 I. C. 764 = A.I.R. 1921 Pat. 426.**

—Entry in Record-of-Rights.

——*Entry in record-of-rights showing relationship of landlord and tenant is sufficient basis for suit for rent in Revenue Court.*

That the Record-of-Rights showed the relationship of landlord and tenant is sufficient basis for the suit in the Revenue Court for rent under Act although that relationship may not be admitted. (*Das and Ross, JJ.*) Raghunandan Saha *v.* Kamakhya Narayan Singh. **11 P.L.T. 387 = 120 I. C. 35 = 8 Pat. 581 = A. I. R. 1930 Pat. 24.**

—Exemptions from sale.

——*Rent decree—Execution—Court cannot exempt any portion of holding from sale.*

There is nothing in the Act which would authorise the Court to exempt from sale in execution of rent decree, any portion of a holding or to forbid an intending purchaser to bid for a portion of it. The order of Court exempting the portions of the holding from sale is without jurisdiction and the sales themselves which purport to exclude the portions of the holdings which were put up for sale are also clearly without jurisdiction. (*Coutts and Das, JJ.*) (Kumar) Ramyad Singh *v.* Chhedia Barhi. **1 Pat. 750 = 71 I. C. 345 = 4 P. L. T. 439 = A. I. R. 1923 Pat. 64.**

—Goraiti lands.

——*Goraiti tenure—Services refused by grantee—Zamindar can eject grantee.*

Where the lands were goraiti lands and the grantees of that land have refused to perform services the zemindar can resume possession by ejecting the grantee. 22 Cal. 938, Foll. (*Das and Kulwant Sahay, JJ.*) Pulo Naik *v.* Bageshwari Charan. **A. I. R. 1929 Pat. 587.**

—No notice necessary.

——*Giving of notice to under-raiyat is not necessary.*

Giving of notice to an under-raiyat before ejectment is not provided for by Chota Nagpur Tenancy Act and the Transfer of Property Act does not apply to such a case by reason of S. 117. Therefore want of notice does not deprive a mortgagor to take khas possession of land after redemption of mortgage. (*Jwala Prasad and Wort, JJ.*) Jhagru Main *v.* Raghunath. **10 P.L.T. 625 = 119 I. C. 551 = A.I.R. 1929 Pat. 630.**

—Omission of definition of agricultural lands.

——*Definition of agricultural land appears purposely omitted.*

Agricultural land has not been defined in the Act, and it would appear that this omission is intentional. (*Das and Adami, JJ.*) Pratap Udainath Saha Deo *v.* Gobind Nath Saha Deo. **6 Pat. 48 = P. L. T. 641 = 97 I. C. 789 = A. I. R. 1926 Pat. 527.**

—Part purchaser in execution.

——Where in execution of rent decree in respect of a holding, the decree amount is deposited in Court by the purchaser of part of the holding and the landlord withdraws such amount he is precluded from denying that he recognised the part purchaser as co-tenant of the holding. (*Ross and Sen, JJ.*) Rajendra Narayan Singh *v.* Mahesh Chandra. **1924 P.H.C.C. 281 = 83 I.C. 203 = 6 P. L. T. 220 = 3 Pat. L. R. 268 = A. I. R. 1924 Pat. 669.**

—Under-valuation in execution.

——*In execution sale under-valuation of property is material irregularity though valuation is not enforced by law.*

Though there is no provision in the Chota Nagpur Tenancy Act requiring the Court to assess the value of property sought to be sold, and there are no rules in the said Act requiring the parties to assess the value the mention of a low valuation in the sale proclamation at the instance of the decree-holder amounts to a material irregularity which will vitiate the sale if low price is the result of the sale. (1898) 20 All. 412, Appl. (*Das and Ross, JJ.*) Jagat Mohan Nath Sahi *v.* Jaipal Singh. **3 Pat. 325 = 83 I.C. 772 = 5 P. L. T. 88 = A. I. R. 1924 Pat. 524.**

—S. 3—Decree for cess.

——Provided certain formalities are adopted the decree in suit for cess operates as a rent decree. A.I.R. 1922 Pat. 303, Foll. (*Das and Adami, JJ.*) Shrimati Tulshi Mahatan *v.* Gajadhar Marwari. **6 Pat. 317 = 103 I. C. 464 = A.I. R. 1927 Pat. 266.**

—S. 3—Interpretation.

——Under the Act rent does not include personal services. (*Das and Kulwant Sahay, JJ.*) Tulo Naik *v.* Bageshwari Charan. **A. I R. 1929 Pat. 587.**

——A landlord is not the same as a proprietor and a tenant may also be a landlord as defined in S. 3. (*Allanson, J.*) Lal Sahai *v.* Deba Mundar. **105 I. C. 58 = A. I. R. 1928 Pat. 87.**

S. 3—'Korkar'.

——Korkar is land reclaimed from waste for the purposes of rice cultivation. (*Allanson, J.*) Lal Sahai *v.* Deba Mundar. **105 I. C. 58 = A. I. R. 1928 Pat. 87.**

—S. 3—No presumption.

——*Resumable tenure—Grant to J and his brothers —J's branch extinct—Grant cannot be presumed.*

Where a grant is made to *J* and his brothers and not to *J* alone the mere fact that *J*'s branch has become extinct does not entitle the successors of the grantor to resume the grant so long as the branches of *J*'s brother are also not extinct. (*Das and Adami, JJ.*) DEONATH SINGH *v.* DEBENDRANATH RAI. **123 I. C. 640 = A. I. R. 1930 Pat. 78.**

—S. 3—Scope.

——*Classification is not exhaustive and does not cover all tenants contemplated by S.* 3 (26).

The classification of tenants under S. 4 is not exhaustive. There are tenants, for example, tenants of private land who though they are tenants under the general definition of the tenant under S. 3 (26) are not tenants under S. 4 and as such are not dealt with by the Act. Such class of tenants is governed by the general law laid down in the Transfer of Property Act. A.I.R. 1922 P. C. 142, Rel. on. (*Jwala Prasad and Wort, JJ.*) PRATAP UDAI NATH *v.* JAGANNATH. **10 P. L. T. 453 = 118 I. C. 305 = A. I. R. 1929 Pat. 444.**

—S. 3—Suit for cess.

——*Suit to recover cess—Revenue Court can try.*

A suit for recovery of cess is triable by the Revenue Court as under S. 3, Cl. (23) of the Chota Nagpur Tenancy Act, rent includes cess. (*Das and Adami, JJ.*) TULSI MAHATANI *v.* GAJADHAR MARWARI. **6 Pat. 317 = 103 I. C. 464 = A. I. R. 1927 Pat. 266**

—S. 3—Usufructuary mortgage by landlord.

———Usufructuary mortgagee of landlord's interest becomes landlord since mortgage—So where landlord making usufructuary mortgage of his interest sues for cess accruing due prior to mortgage date and obtains decree, that decree is not rent decree but merely money decree. A.I.R. 1914 P.C. 111, Appl.; 18 C. W. N. 1016, Rel. on. (*Das and Ross, JJ.*) GOSAINDAS BAISTAL *v.* GOPAL SINGH. **8 Pat 366 = 118 I. C. 727 = A. I. R. 1929 Pat. 321.**

—S. 4—Mundari Khuntkattidar.

———A Mundari Khuntkattidar is a tenant under S. 4. (*Allanson, J.*) LAL SAHI *v.* DEBA MUNDU. **105 I. C. 58 = A. I. R. 1928 Pat. 87.**

—S. 4—Scope.

———The enumeration of tenants in S. 4 is not exhaustive. (*Jwala Prasad and Ross, JJ.*) JEOLAL SINGH *v.* WAZIR NARAIN SINGH. **2 P. L. T. 638 = 63 I. C. 764 = A. I. R. 1921 Pat. 426.**

—S. 4—Thika dowami tenancy.

——*Origin and nature explained.*

The name thika dowami is given in the Record-of-Rights to a cultivating tenancy which has arisen after the desertion of a village or part of a village by a khuntkatti founder's family. When a family settles down on a deserted village site and carries on reclamation on land already cleared or partially cleared of jungle a tenancy arises which will not be within the definition of khuntkatti but which will be permanent and non-resumable. Such tenancies partake so much of a raiyati type, in being reclaiming tenancies, that in some old judgments the holders have been held to possess a right of occupancy in their tenure. But while by their nature and by custom they are permanent, neither permanency of rent nor transferability (early partnership is not understood as transfer) is an inherent characteristic of the tenancies; periodical settlement of rent are made between landlord and tenant on the basis of the permanency of the tenancy. (*Kulwant Sahay and Macpherson, JJ.*) KRISHNA PRASAD *v.* BUDHAN MANJHI. **7 Pat. 752 = 9 P. L. T. 379 = 111 I. C. 675 = A. I. R. 1928 Pat. 451.**

—S. 5—Construction of lease.

——*Tenure holder—Execution sale—Pattah--Raiyat.*

Where a pattah grant something more than the mere right to cultivate, in fact, where it grants all the rights save and except the right to receive the rent payable to the superior landlord, the grantee comes within the definition of tenure holder under S. 5 of the Chota Nagpur Tenancy Act. Therefore there is no bar to the sale of his interest in execution of a decree. (*Mullick and Jwala Prasad, JJ.*) BAIKUNTHA GORAIN *v.* GANGA PRASAD TRIVEDI. **70 I. C. 976 (Pat.).**

—S. 5—Nature of tenancy.

——*Whether person is tenure-holder or occupancy-raiyat is to be determined by intention at inception of tenancy of person acquiring right and not that of landlord creating it.*

In deciding whether a person is a tenure-holder as shown in the Record-of-Rights or an occupancy-raiyat as he asserts relying on the original settlement, the Court has to see what was the intention at the inception of the tenancy, and it is the intention of the person acquiring the right and not the intention of the landlord who creates it, that has to be looked to. (*Das and Adami, JJ.*) FULESHWAR SINGH *v.* AMBICA PRASAD. **119 I. C. 545 = A. I. R. 1929 Pat. 220.**

—S. 7—Dowami Thikas.

——*Dowami thikas are raiyati tenancies grown into tenures—Leases granted for reclaiming and settling land—Mere description of tenants as tenure-holders does not prove that their interest is not permanent.*

The tenancies of the type which are usually dealt with under the category of dowami thika are in fact raiyati tenancies which have grown into tenures. Where there is nothing in the kabuliyats to show that the lease was granted to the ancestors of the tenants for the purpose of collecting rents or bringing it under cultivation by establishing tenants upon it. But on the other hand, these leases were given for the purpose of reclaiming the lands of the village and for bringing them into cultivation.

Held · that in origin the tenancy was essentially a cultivating or raiyati tenancy though it may now have all the appearance of a tenure and the mere fact that the tenants were described now as tenure-holders did not necessarily show that their interest was not permanent. A. I. R. 1928 Pat. 451, Rel. on. (*Kulwant Sahay and Fazl Ali, JJ.*) JAGADISHWAR *v.* BULAK MAHTO. **10 P. L. T. 359 = 121 I. C. 360 = A. I. R. 1929 Pat. 376.**

—S. 7—Who are Dowami Thikadars.

——*Ancestor of defendants-tenants reclaiming and settling land from earliest times but not founder of village—Defendants are dowami thikadars.*

Even though the ancestor of the tenants through whom they claim dowami thikadari rights was not the founder of the village in the strict sense of the terms but if he came upon the scene during the earlier stages of reclamation and did the most of the reclamation and otherwise improved and settled the land through himself and his partners as well as their descendants, it is impossible to deny to the tenants the status of a dowami thikadar. (*Kulwant Sahay and Fazl Ali, JJ.*) JAGADISHWAR *v.* BULAK MAHTO. **10 P. L T. 359 = 121 I. C. 360 = A. I. R. 1929 Pat. 376**

—S. 11—Burden of proof.

———*Onus of proof of registration is on claimant for rent.*

The onus of proving registration is on the plaintiff whose claim for rent is questioned on the ground of non-registration under S. 11. 23 I.C. 844 Dist. (*Coutts and Macpherson, JJ.*) SHIVASAHAY RAM *v.* SHIVA BHOJAN LAL. **2 P. L. T. 580 = 64 I. C. 358 = 1921 P. H. C. C. 355 = 6 P. L. J. 677 = A. I. R. 1921 Pat. 357.**

—S. 11—Effect of unregistration.

———*Registration is imperative for maintainability of suit for rent—Decree cannot be obtained first and executed after registration.*

In the absence of registration under S. 11, the transferee cannot maintain a suit for rent at all. It cannot be held that registration may be made after the suit has been filed and a decree has been obtained therein and that the decree may be executed after such registration. 1917 P.H.C.C. 63 Dist. (*Coutts and Macpherson, JJ.*) SHIVASAHAY RAM *v.* SHIVA BHAJANLAL.

2 P. L. T. 580 = 64 I. C. 358 = 1921 P. H. C. C. 355 = 6 P. L. J. 677 = A. I. R. 1921 Pat. 357.

—S. 14—Effect of resumption.

———*Resumption of Jagir tenure annuls all Subtenures—Lands on which mines sunk are excepted—Onus of proof of consent.*

" Land whereon a mine has been sunk under lawful authority is expressly excepted from annulment by exception (*a*) of S. 14. When a jagir tenure is resumed all sub-tenures created by the previous Jagirdars are annulled and became void, and not merely voidable. The words " grantee or any of his ancestors" clearly mean 'succeeding grantees' and under tenures, created by whichsoever grantee (who successively held the tenures), would be annulled on resumption. To prove consent to the under-tenure is upon him who asserts it. A grantee or any of his successors could not create an under-tenure to exceed in duration the subsistence of their own tenure. S. 14 expressly provides that on resumption of the tenures all sub-tenures granted by the grantee of tenure whom he succeeded should be deemed to be annulled. 27 Cal. 156, 24 Cal. 715 and 17 M.L.J. 598 Foll. (*Adami, J.*) MAHARAJA PRATAB *v.* SUNDERBANS KOER. **71 I. C. 999 = 3 P. L. T, 628 = 24 Cr. L. J. 279 = A.I.R. 1923 Pat. 76.**

—S. 14—Limitation.

———*Limitation for annulling starts from date of the suit—Resumption occurs on unequivocal demand for re-entry—Sub-tenancy by successor* de facto *is covered by the section.*

Limitation for annulling sub-tenancy under S. 14 starts from the date the suit to resume the tenure is filed and not from the date of actual resumption. The word 'resumption' does not mean in S. 14 actual reentry upon or actual physical possession of the tenure nor does it refer to the happening of an even entitling the landlord to resume the tenure. Resumption means nothing more than an unequivocal demand for possession so as to operate as a final election by the landlord to re-enter. The word 'successor' in S. 14 includes a successor *de facto*. Sub-tenancy created by a successor *de facto* is one contemplated under S. 14. (*Das and Ross, JJ.*) KAMAKSHYA NARAIN SINGH *v.* SURAJ NATH MISRA. **3 Pat. 320 = 78 I. C. 474 = 5 P. L. T. 85 = 2 Pat. L. R. (Civ.) 69 = 1924 P. H.C. C. 60 = A. I. R. 1924 Pat. 449.**

—S. 19—Scope.

S. 19 is confined to " land for the time being held by him as a raiyat " and in the village of which he is a settled raiyat; (1919) P.H.C.C. 235 and 14 C.L.J. 170 Dist. (*Kulwant Sahay and Dhavle, JJ.*) JOY CHAND KUMAR *v.* BHUTNATH KHAN. **11 P. L. T. 207 = A. I. R. 1930 Pat. 236.**

—S. 20—Thickadar.

———*Ss.* 20 *and* 39—Thickadar *cannot acquire occupancy right in the land held under a* thicka. A *Thickadar* cannot acquire occupancy or non-occupancy right in the land that he cultivated as a *thickadar*, under the sections. (*Adami and Bucknill, JJ.*) RAJANATH SINGH *v.* WAHID KHAN.

3 Pat. L. T. 107 = 1921 P. H. C. C. 296 = A. I. R. 1922 Pat. 28.

—S. 23—Testamentary Disposition.

———*Testamentary disposition of rayati holding in favour of third persons.*

Although testamentary disposition by a raiyat in respect of his holding may or may not be binding upon the landlord there is nothing in the provisions which would prohibit such disposition in relation to third persons. (*Kulwant Sahay and Macpherson, JJ.*) MT. KISHUNI KUAR *v.* ANDU MAHTON.

10 P. L. T. 595 = 120 I. C. 300 = A. I. R. 1929 Pat. 734.

———*Raiyat can make valid testamentary disposition and it can be challenged only by landlord.*

A raiyat governed by the Chota Nagpur Tenancy Act, can make a valid testamentary disposition of his occupancy holding and such disposition cannot be challenged by persons other than landlord; A. I. R. 1929 Cal. 127; A. I. R. 1922 Pat. 114 (F.B.), Ref. 42 Cal. 254; 18 C. W.N. 1294 and 22 C.W.N. 474, Diss. from. (*Kulwant Sahay and Macpherson, JJ.*) MT. KISHUNI KUAR *v.* ANDU MAHTON. **10 P. L. T. 595 = 120 I. C. 300 = A. I. R. 1929 Pat. 734.**

—S. 25—Scope.

———*Occupancy tenant—Enhancibility of rent is ordinary incident.*

Enhancibility of rent is an ordinary incident of occupancy holding, but there is nothing incompatible between the nature of an occupancy holding and fixity of rent under Chota Nagpur Tenancy Act. (*Adami and Scroope, JJ.*) ACHAIMBI MAHATA *v.* RAJ KUMAR TEKAIT. **11 P. L.T. 251 = A. I. R. 1930 Pat. 392.**

—S. 26— Intention and effect.

———*The section does not invalidate agreements which were valid at their inception—Chota Nagpur Landlord and Tenant Procedure Act, S.* 21.

S. 26 was not contemplated to invalidate agreements which were valid in their inception but to validate agreements in special cases out of such agreements as would otherwise have been invalid owing to the provisions of S. 21 of the Chota Nagpur Landlord and Tenant Procedure Act. (*Ross and Sen, JJ.*) BHOLA NATH MAJHI *v.* SHIVA PRASAD SINHA.

6 P. L. T. 144 = 82 I. C. 988 = 1924 P.H.C.C. 307 = A. I. R. 1925 Pat. 297.

—S. 41—Scope.

———*Non-occupancy raiyat.*

Where a non-occupancy raiyat is admitted into the land under a registered lease for a term, he is liable to ejectment under S. 41, Cl. (*d*) upon the termination of that period. (*Mullick and Kulwant Sahay, JJ.*) RIKHI NATH KUARI *v.* RANGO MAHTO.

7 Pat. 675 = 9 P. L. T. 811 = 110 I. C. 494 = A. I. R. 1929 Pat. 18.

—S. 46—Applicability.

———*Surrender to landlord or sale by tenant to stranger with consent of landlord is not invalid.*

It is open to a tenant to give back his holding or to let his landlord take his holding (*i.e.*, surrender it) for a pecuniary consideration. A surrender is not a transfer within the meaning of S. 46. Even where a third party had paid consideration to a tenant as a result of which the tenant had agreed with the landlord to surrender his holding whilst the landlord had agreed to resettle the property with the person who had given the consideration to the outgoing tenant. *Held*, this circuitous arrangement could not in law be regarded as definitely illegal. (*Bucknill, J.*) BARIO SANTHAL *v.* FAKIR SANTHAL. **75 I. C. 601= A. I. R. 1924 Pat. 793**

—S. 46—Applicability.

———The mere fact that the plaintiff misdescribed the defendant as *korfa raiyat* in his notice, although he was actually a trespasser, cannot exclude the jurisdiction of the civil Court and bring the case within the provisions of S. 46 of the Chota Nagpur Tenancy Act. (*James and Chatterji, JJ.*) MUCHI RAM BAGAL *v.* BALARAM BHUMI. **11 P.L.T. 539.**

—S. 46 (4) – Jurisdiction of civil court.

———*Suit by landlord to eject under-raiyat does not lie in civil Court.*

If in a suit to eject a party the landlord admits that the party was his under-raiyat and it is also found to be so from evidence, the suit is not maintainable in the civil Court, for under S. 46 (4) the remedy of the landlord is by way of an application within three years of the expiration of the period for which the lease was granted to the Deputy Commissioner to put the landlord in possession. (*Das and Kulwant Sahay, JJ.*) SITA MAJHI *v.* KARLICK MODI. **A. I. R. 1929 Pat. 577 (1).**

———*Claim made by the landlord not coming under S.* 46 (4)—*Jurisdiction of the civil Court is not ousted.*

The Chota Nagpur Tenancy Act makes no provision for suits to eject under-raiyats, but it does make provision for suits to eject raiyats and non-occupancy raiyats. All that it provides for the ejectment of under-raiyats is that the Deputy Commissioner may entertain an application for the ejectment of an under-raiyat under the circumstances provided in Cl. (4), S. 46. If the claim made by the landlord is such that he cannot ask the Deputy Commissioner to intervene, then the jurisdiction of the Civil Court is not ousted ; 9 W.R. 513, 14 C.W.N. 297 ; and 23 I. C. 407 ; Foll.: A. I. R. 1926 Patna 403, Dist. (*Mullick, J.*) CHINTA SAHA *v.* MT. BUDHAN SAHUN. **108 I. C. 887= A. I. R. 1928 Pat. 232.**

—S. 46—No period fixed.

———*When no period fixed, lease is for five years only.*

In the absence of definite period agreed to between the parties a lease of a holding continues to be governed by S. 46 and is legal only for a period of five years, a term fixed by statute. Therefore, suit for ejectment in such case lies to revenue Court : A. I. R. 1926 Pat. 403 Ref. (*Das and Wort, JJ.*) JYOTIRMOY MANDAL *v.* BANAM ALI. **10 P. L. T. 661=121 I.C. 328= A. I. R. 1929 Pat. 635.**

—S. 46—Retrospective effect.

———S. 46 clearly shows that it is intended to be retrospective except as regards transactions after 1903. (*Mullick. Ag. C. J. and Jwala Prasad, J.*) SUKUL LAKHPAT RAM *v.* RAGHU KOERI. **8 P. L. T. 850= 105 I. C. 33=A. I. R. 1928 Pat. 109.**

—S. 46—Scope.

———The house and homested lands of an insolvent raiyat forming part of his raiyati holding cannot be sold by the receiver in insolvency in view of the provisions of Ss. 46 and 47. (*Ross and Allanson, JJ.*) KAMAKHYA NARAIN SINGH *v.* RAMSARAN LAL. **8 P. L. T. 669= 106 I. C. 298=A.I. R. 1927 Pat. 353.**

———***Suit for ejectment of under-tenant by his immediate landlord is barred as application lies under S. 46 to Deputy Commissioner.***

Under S. 46 an application for the ejectment of an under-tenant was cognizable by the Deputy Commisioner and under Cl. (8) of S. 139, as it stood before the amendment of 1920; and as it still stands an application under S. 46 is an application cognizable by the Deputy Commissioner. Thus it seems clear that under the terms of S. 139-A no suit could be brought in the civil Court for the ejectment of an under-tenant by his immediate landlord. (*Das and Adami, JJ.*) MADHAB PODDAR *v.* LALL SINGH BHUMIJ. **6 Pat. 69= 8 P. L. T. 231=1926 P. H. C. C. 288=97 I.C. 175= A.I.R. 1926 Pat. 403.**

—S. 46—Year to year Tenancy.

———*Act does not recognize tenancy of raiyat from year to year—S.* 46 *forbids it.*

The Act does not contemplate creating of an under-raiyat a tenant from year to year. This is expressly forbidden by S. 46 of the Act which does not recognize the lease by a raiyat for a period exceeding five years. (*Jwala Prasad and Wort, JJ.*) JHAGRU MIAN *v.* RAGHUNATH. **10 P. L. T. 625=119 I. C. 551= A.I.R. 1929 Pat. 630.**

—S. 47—Sale in Contravention.

———*Sale of raiyati holding in contravention of S.* 47 *cannot take place—Objection is not necessary.*

It is altogether illegal to sell a raiyati right in land even in execution of a decree or order directing such a sale. Not only may an objection be taken in execution that the land sought to be sold in execution is not saleable but whether the judgment-debtor took the objection or not, the sale of a holding which is found to be raiyati cannot take place in face of clear provisions of S. 47, A I.R. 1928 Pat. 227 Foll. (*Kulwant Sahay and Dhavle, JJ.*) JOY CHAND KUMAR *v.* BHUTNATH KHAN. **11 P. L. T. 207=A. I. R. 1930 Pat. 236.**

—S. 47—Sale in execution.

———*Sale of a raiyati holding cannot take place even in execution.*

Even if there is a mortgage decree for the sale of a raiyati holding such a decree cannot be executed. Not only may an objection be taken in execution that the land sought to be sold is not saleable, but it is the duty of the executing Court itself to endeavour to prevent abuse of its process in contravention of S. 47 : 49 Cal. 534 and 1 P. L. J. 33 Foll. (*Kulwant Sahay and Macpherson, JJ.*) RUP NATH MANDAL *v.* JAGANNATH MANDAL. **7 Pat. 178=9 P. L. T- 228= 107 I. C. 145=A. I. R. 1928 Pat. 227.**

—S. 50—Dismissal of application.

———Application under S. 50 by landlord—Title denied by tenant—Application dismissed but not on the ground of denial of title—Tenand is not liable to be ejected. (*Adami and Macpherson, JJ.*) BHIMKU SANAR *v.* BENGAL NAGPUR COAL, LTD **1926 P. H. C. C. 332=97 I. C. 123= 8 P. L. T. 171=A. I. R. 1927 Pat. 57.**

—S. 52—Suspension of right to rent.

———*Landlord and tenant —Suit to recover arrears of rent—Limitation —Co-sharer landlords—Apportionment of rent—Suspension of right to recover rent.*

Under Ss. 52 and 234 of the Act, rent falls due on the last day of each quarter of the agricultural year. A suit for arrears of rent should be brought within three years from the end of the agricultural year in which the arrears became due. Where, however, a co-sharer landlord brings a suit for apportionment of rent making the tenants and the other co-sharers parties to the suit the right to recover rent is deemed to be, held in suspense till a decree is passed in the suit. (*Jwala Prasad. J.*) MIDNAPUR ZEMINDARY COMPANY *v.* JAGA NATH

CHOTA NAGPUR TENANCY ACT (1908), S. 63 —Appeal against order.

SARANGI. **59 I. C. 314 (Pat.).**

—S. 63—Appeal against order.

———*Order under S. 63 is appealable under S.* 215 *and not under Criminal Procedure Code.*

An order under S. 63 shall have the force and effect of a decree of a civil Court and consequently it follows that any procedure to be adopted by a party subsequent to the making of that order cannot be governed by the Code of Criminal Procedure but comes under S. 215 and the appeal lies to the officers named therein. (*Adami and Wort, JJ.*) KRISHNA PRASAD *v.* EMPEROR. **7 Pat. 421 = 9 P. L. T. 496 = 29 Cr. L. J. 420 = 108 I. C. 556 = 10 A. I. Cr. R. 154 = A. I. R 1928 Pat. 370.**

—S. 64—Ejectment of tenant

———Where the tenants reclaimed lands of a certain village and Mundari Khuntkattidar sued as Maliks to eject them after the expiry of two years from the commencement of that reclamation.

Held they cannot be ejected from the land as the suit was barred under S. 64 (3). (*Allanson, J.*) LAL SAHI *v.* DEBA MUNDA. **105 I. C. 58 = A. I. R. 1928 Pat. 87.**

—S. 64—Korkar.

———It is not merely a tenant or resident of a village who can make Korkar in that village. A. I. R. 1921 Pat. 506. Foll. (*Allanson, J.*) LAL SAHI *v.* DEBA MUNDA. **105 I. C. 58 = A. I. R. 1928 Pat. 87.**

—S. 67—Failure to apply for ejectment.

———*Korkar land—Occupancy right acquisition of ejectment.*

Under S. 67 of the Chota Nagpur Tenancy Act, 1908, a raiyat who cultivates or holds, lands which he or any member of his family has converted into korkar has a right of occupancy therein. Nothing in the definition of korkar expressly or impliedly requires that the cultivator who artificially levels or embanks land primarily for the cultivation of rice must at the time when he commences the preparation of the land for cultivation be a raiyat of the landlord of such land or of the village wherein the land is situated. If no application to the Deputy Commissioner for the ejectment of the korkardar has been made by the landlord within two years from the time when they commenced to convert the lands into korkar the consent of the landlord to the conversion is, under the provisions of S. 64 (3) deemed to have been given, and they are not only raiyats of the landlord but have under S. 67, also an occupancy right in the lands and cannot be ejected. (*Coutts and Macpherson, JJ.*) PARASHRAM DEOGHARIA *v.* PROTAOP UDAI NATH SAHI DEO. **2 P. L. T. 635 = 63 I. C. 783 = A. I. R. 1921 Pat. 506.**

—S. 67—Jalsasan tenure.

———*Jalsasan tenure cultivated by raiyat becomes occupancy holding.*

In the absence of anything to show that the tenancy created was in the nature of a tenure, the definition of the word "korkar" including jalsasan given in S. 3 (13) read with the statutory provision in S. 67 inevitably leads to the conclusion that a jalsasan tenure cultivated or held by a raiyat comes to be an occupancy holding. A. I. R. 1921 Pat. 506, Rel. on. (*Jwala Prasad and Wort, JJ.*) JHAGRU MIAN *v.* RAGHUNATH. **10 P. L. T. 625 = 119 I. C. 551 = A. I. R. 1929 Pat. 630.**

—S. 71—Intention of amending Act.

———*Amending Act* (1920) *was not intended to take away vested rights under old Act.—Bihar and Orissa Act, VI of* 1920, *Ss.* 38 *and* 39.

CHOTA NAGPUR TENANCY ACT (1908), S. 74-A—Applicability.

The amending Act of 1920 was not intended or expressed to have retrospective effect. A suit for possession by tenant against his landlord in 1921 the cause of action for which arose in 1919 was held to be cognizable by civil Court. (*Adami and Bucknill, JJ.*) CHOTE LAL NAND KISHORE NATH SHAH DEO *v.* TULA SINGH. **8 P. L. T. 397 = 1926 P. H. C. C. 293 = 97 I. C. 608 = A. I. R. 1926 Pat. 561.**

—S. 71—Tenant's status.

———*Suit for possession by tenant against landlord—Question of tenant's status is immaterial.*

This question of the status of the tenant makes no difference in determining whether a suit is a suit by a tenant to recover possession from his landlord. (*Adami and Bucknill, JJ.*) CHOTE LAL NAND KISHORE NATH SHAH DEO *v.* TULA SINGH. **8 P. L. T. 397 = 1926 P. H. C. C. 293 = 97 I. C. 608 = A. I. R. 1926 Pat. 561.**

—S. 72—Incumbrance by tenant.

———*Does not contain provision similar to Cl.* (6) *of S.* 86 *of B. T. Act—Incumbrance by tenant is not binding on landlord.*

The provisions contained in S. 72 of the Act are similar to those contained in S. 86 of the B.T. Act with this difference that the provisions contained in clause (6) of the B. T. Act do not find place in S. 72 of the Chota Nagpur Tenancy Act. The absence of a provision similar to clause (6) of S. 86 of the B. T. Act from S. 72 of the Chota Nagpur Tenancy Act leaves no power to surrender conferred by the section, unhampered by the existence of any incumbrance over the property. Therefore in spite of a prior sale or mortgage by a raiyat he is free to exercise his right of surrender of the holding in favour of the landlord, for under clause (2) of S. 46 no transfer by a raiyat of his right in his holding on portion thereof is binding on the landlord unless it is made with his consent in writing. 25 C.W.N. 29 (F.B.) Dist. (*Jwala Prasad and Ross, JJ.*) RAMORAON *v.* DOMAN KALAL. **2 Pat. 898 = 75 I. C. 209 = 4 P. L. T. 562 = 1924 P. H. C. C. 117 = A. I. R. 1924 Pat. 100.**

—S. 72—Rights of under-raiyat.

———S. 72, Cl. (4), does not require an ejectment suit to be brought against the under-raiyat, nor is any notice or formality necessary to eject him. The landlord is entitled to enter on the holding immediately after surrender by the raiyat and either let it to another or take it under cultivation. The right of an under-raiyat ceases after surrender by the raiyat and he becomes a trespasser so far as the landlord is concerned. 40 Cal. 858; 4 C. W. N. 792; A. I. R. 1922 Pat. 197; and A. I. R. 1926 Pat. 244 foll. (*Jwala Prasad, J.*) HARPRASAD SINGH *v.* HULSAN CHAMAR. **10 A. I. Cr. R. 420 = 110 I.C. 98 = 9 P. L. T. 728 = 29 Cr. L. J. 642.**

—S. 74—No retrospective effect.

———*The section has no retrospective effect.*

S. 74 apparently cannot possibly have retrospective effect inasmuch as it affects the substantive rights of parties. Therefore, all agreements entered into prior to the date when the Act came into operation would obviously be beyond the scope of the section. The section contemplates only the case of a lease executed " with a view to the continuance of such occupation. " (*Ross and Sen, JJ.*) BHOLA NATH MAJHI *v.* SIVA PRASAD SINHA. **6 P. L. T. 144 = 82 I. C. 988 = 1924 P. H. C. C. 307 = A. I. R. 1925 Pat. 297.**

—S. 74-A—Applicability.

———*S. 74-A applies to both classes of village headmanship whether or not held in conjunction with land.*

On the death of the village headman, *A* on his application was appointed headman of the village. The

Deputy Commissioner declined to interfere on a subsequent application with the order already made. Thereupon, the villagers instituted a case before the Sub-Divisional Officer to set aside *A*'s appointment. The Sub-Divisional Officer's order was confirmed by the Deputy Commissioner by which *B* was appointed Munda of the village. Plaintiff then sued for a declaration that the second order was made without jurisdiction.

Held, that on a careful perusal of the section and particularly of sub-S. (3) what was intended by S. 74-A was to deal with all applications whether the village headmanship was held in conjunction or not in conjunction with land. By the words used in sub-S. (3) it was intended to express that the village headmanship was held in accordance with the custom of the village, and that the legislature did not intend to limit the section to one class of cases and, therefore, it could not be said that the Deputy Commissioner in making his order had no jurisdiction.

Held also, that the Sub-Judge had jurisdiction to enter into the merits of the case. (*Wort and James, JJ.*) PANDEA MUNDA *v.* LADURA MUNDA.

A. I. R. 1929 Pat. 436.

—S. 77—Ghatwali lands.

———*Chota Nagpur Landlord and Tenant Procedure Act (I of* 1879), *S.* 6—*Acquisition of occupancy rights in* ghatwali *lands.*

A person in possession of *ghatwali* lands for only ten years prior to the C.P. Tenancy Act of 1908 is not entitled to occupancy right under Act I of 1879 when Act VI of 1908 came into force. S. 77 of Act VI of 1908 prevented the occupancy rights being acquired in respect of *ghatwali* land as soon as the Act came into force. (*Ross and Sen, JJ.*) LAL SINGH BHUMIJ *v.* KRISHTO KHUTYA. **6 P. L. T. 534 = 84 I. C. 383 = 1924 P. H. C. C. 304 = A. I. R. 1925 Pat. 306.**

—S. 78—Applicability.

———*S.* 78 *only applies to save homestead so long as tenant continues to be raiyat in respect of other land but no longer.*

S. 78 (1) (*c*) saves a tenant from ejectment notwithstanding any contract with the landlord made even before the commencement of the Act, and the section would apply even if a tenant took a settlement of the homestead before taking a raiyati or agricultural settlement. But the moment the holding ceases to exist, the raiyati incidents of the homestead cease to exist and S. 78 will only apply so long as the tenant of the homestead continues to be a raiyat in respect of other land but no longer. A. I. R. 1930 Pat. 224. Rel. on. 43 Cal. 195 and A. I. R. 1926 Cal. 1199, Ref. (*Kulwant Sahay and Dhavle, JJ.*) JOY CHAND KUMAR *v.* BHUTNATH KHAN. **11 P. L. T. 207 = A. I. R. 1930 Pat. 236.**

—S. 78—Scope.

———S. 78 regulates incidents of tenancy of homestead and does not create raiyati interest. 21 C.L.J. 475 Ref. (*Kulwant Sahay and Dhavle, JJ.*) JOY CHAND KUMAR *v.* BHUTNATH KHAN. **11 P. L. T. 207 = A. I. R. 1930 Pat. 236.**

—S. 81—Applicability.

———Entry to the effect " occupancy raiyat with rent subject to enhancement " does not attract operation of S. 51-A (5) in Manbhum. (*Adami and Scroope, JJ.*) ACHAIMBIT MAHATU *v.* RAJ KUMAR TEKAIT.

11 P. L.T. 251 = A.I.R. 1930 Pat. 392.

—S. 81—Presumption.

———*Record-of-Rights—Particulars recorded will be presumed to be contained in the order under S.* 80—*Party alleging to the contrary must produce the order—Evidence Act.*

The ordinary rule with regard to official documents like record-of-rights is that they must be presumed to be correct until the contrary is shown, that is to say, it must be presumed that the entries made in the record-of-rights were those entries and those entries only which are required to be made in the order passed under S. 80, and if any party wishes to dispute the validity of the entry, then the onus would be on him to produce the order passed under S. 80 to show that these particulars were not in fact required. (*Dawson Miller, C. J. and Jwala Prasad, J.*) KALAYANDAS ADHIKARY *v.* JYOTI LAL PATAR. **1926 P. H. C. C. 338 = 99 I. C. 492 = 8 P. L. T. 239 = A. I. R. 1927 Pat. 97.**

—S. 81—Rent of trees.

———*Jurisdiction under—Settlement officer has to make entries regarding rent of tree if apart from rent of holding.*

If payment beyond the rent of the holding has to be made by the raiyat in respect of the trees standing thereon it would also be the duty of the settlement officer to record the fact in the remarks column and he has jurisdiction to do so under S. 81. (*Adami and Macpherson, JJ.*) UPANDRA SINGH *v.* SURJAN SINGH.

8 Pat. 266 = 120 I. C. 756 = 10 P. L. T. 311 = A. I. R. 1929 Pat. 328.

—S. 83—Admissibility of draft record in evidence.

———*Draft record-of-rights is admissible against final record-of-rights.*

Only the finally published record-of-right carries with it any presumption in its own favour. But this presumption is rebuttable and the draft record-of-rights and the proceedings leading to the final record may be put in evidence for rebbutting the presumption in its favour. (55 I. C. 922 and 18 C. W. N. 896, Expl.) (*Dawson Miller, C. J. and Kulwant Sahay. J.*) CHAND RAY *v.* BHAGWATI CHARAN GOSWAMI.

2 Pat. 814 = 81 I. C. 326 = A. I. R. 1924 Pat. 248.

—S. 83—Scope.

———Any order passed under S. 83 relates to the draft record only. (*Dawson Miller C. J. and Mullick, J.*) KAMAKHYA NARAIN SINGH *v.* JAWAHIR KHAN.

94 I. C. 1007 = A I. R. 1926 Pat. 369.

—S. 84—Jurisdiction of Civil Court.

———*Suit under S.* 87 *not filed—Entry is presumed to be correct and cannot be altered by civil Court.*

If the entry in the khewat is not rectified under S. 87, the entry stands and cannot be altered by the civil Court, and under S. 84 (3) it is to be " evidence of the matter referred to in such entry " and is to be presumed to be correct until it has been proved by evidence to be incorrect. (*Sir John Wallis.*) SURENDRA NATH KARAN DEO *v.* KAMAKHYA NARAIN SINGH.

31 M. L. W. 352 = 32 Bom. L. R. 515 = 123 I. C. 145 = 51 C. L. J 502 = A. I. R. 1930 P. C. 45.

—S. 84—Presumption.

———*Order under S.* 80 *containing particulars not mentioned in S.* 81—*Such particulars are proper to be recorded in the record-of-rights—Presumption under S.* 84 (3) *applies to them.*

Any particulars appearing in the record-of-rights which are specified in the order made under S. 80 are proper particulars to be recorded in the record whether they come within the different classes mentioned in S. 81, or whether they are in addition thereto and the presumption under S. 84 (3) will also attach to such particulars. (*Dawson Miller, C. J. and Jwala Prasad, J.*) KALYANDAS ADHIKARY *v.* JYOTI LAL PATAR.

1926 P. H. C. C. 338 = 99 I. C. 492 = 8 P. L. T. 239 = A. I. R. 1927 Pat. 97

—S. 84—Scope.

———*Record-of-rights not conclusive proof of tenancy rights.*

S. 132 applies only to Khuntkati lands and under S. 84 (3) a record-of-rights is not a conclusive proof of any tenancy right. (*Adami and Bucknill, JJ.*) RAJA. NATH SINGH *v.* WAHID KHAN. **3 Pat. L. T. 107 = 1921 P. H. C. C. 296 = A. I. R. 1922 Pat. 28.**

—S. 87—Decision not a decree.

———*Decision under S. 87—Second Appeal does not lie to High Court.*

A decision under S. 87 of the Chota Nagpur Tenancy Act is not a decree; it is a decision and there is no appeal to the High Court under the Civil Procedure Code from a decision not under S. 224 (2). (*Das and Ross, JJ.*) FOUJDAR SAHU *v.* NEMA BHOGTA. **1922 P. H. C. C. 109 = 65 I. C. 285 = 6 P. L. J. 634 = A. I. R. 1923 Pat. 135.**

—S. 87—Variation of decree by agreement.

———*Decree under S. 87 can be varied by subsequent agreement.*

Under S. 258, a decision under S. 87 gives a finality to the decree in a suit under that section and places it on the same footing as a decree of the civil Court and there is nothing to warrant that the parties cannot vary it by an agreement arrived at subsequent to such a decision. (*Scroope, J.*) MANMOHAN LAL *v.* BISHUN LAL SINGH. **122 I. C. 831 = A. I. R. 1930 Pat. 384.**

—S. 89—Applicability and effect.

———*Order under S. 89 of Attestation Officer can be revised by settlement Officer and such revision bars a suit in Civil Court by reason of S. 258.*

All orders whether by *khanapuri* officers or by Attestation Officers have to be made during the preparation of the draft Record-of-Rights and all such orders passed before final publication of the Record-of-Rights are subject to revision under the provisions of S. 89 of the Act. The order of the Attestation Officer is an entry made in the draft Record-of-Rights within the meaning of S. 89 and therefore the Settlement Officer has jurisdiction to revise that entry under the provisions of S. 89 of the Act and, therefore, S. 258 which provides that such an order of revision will be final and shall have the force and effect of a decree of civil Court, operates as a bar to the suit in Civil Court to set aside the order. (*Kulwant Sahay, J.*) GOVINDA BAURI *v.* KRISTO SURDAR. **90 I. C. 489 = A. I. R. 1926 Pat. 64.**

—S. 139—Applicability.

———*Suits on application under the Act only are barred.*

In order to bar a suit or an application to eject a tenant of an agricultural land from the jurisdiction of civil Courts it must be shown that such a suit on an application is made under the Act. Since there are no provisions dealing with ejectment of a tenant of a proprietor's private land known as manjhihas or zerait land the suit for such ejectment lies in the civil Court. (*Jwala Prasad and Wort, JJ.*) PRATAP UDAI NATH *v.* JAGANNATH. **10 P.L.T. 453 = 118 I.C. 305 = A I.R. 1929 Pat. 444.**

———*Provision refers only to a suit as between a landlord and a tenant.*

The provision of cl. (4), S. 139 refers only to a suit as between a landlord and a tenant. Where a plaintiff brought a suit for the recovery of a certain share in a tank on the footing that the defendants had no tenancy rights in the tank and though it was quite true that the record-of-rights was in favour of the defendants both the courts below had concurrently found that the record-of rights in so far as it recorded the defendants as tenants of the 6-annas shareholders was incorrect.

Held that cl. (4), S. 139, had no application to the facts of the case. A.I.R. 1926 Pat. 363, Dist. (*Das and Allanson, JJ.*) AGHOR MANJHI *v.* KSHIRIDA SUNDARI. **7 Pat. 82 = 109 I C. 477 = 9 P.L.T. 724 = A.I.R. 1928 Pat. 198.**

———*Suit for declaration that defendant tenant is not occupancy tenant and that he has no right to hold land against plaintiff's wish—Civil Court—Jurisdiction of.*

A suit filed not to eject the defendants-tenants or to cancel the lease but to declare that the defendants are not the occupancy raiyats and that they have no right to continue to hold possession of the land against the wish of the plaintiff-landlord after the expiry of the term of the lease is not barred by S. 139 (4). (*Jwala Prasad, J.*) RADHANATH TRIPATHI *v.* CHAUDRAI BHATTA. **8 P. L. T. 606 = 104 I. C. 800 = A.I.R. 1927 Pat. 348.**

———*Tenant putting another in charge of his land—That other taking possession—Case is not of ejectment within S.* 139 (5).

Where a tenant, being in possession of the land gave up possession voluntarily to the defendants for purposes of management, and he remained away for some years, then returned and when he tried to get back possession the defendants refused to give it up.

Held that this was not a case of ejectment and S. 139 (5) did not apply. (*Dawson Miller, C.J. and Adami, J.*) BARU HAPAN MANJHI *v.* GOPI MANJHI. **6 Pat. 436 = 104 I.C. 205 = A.I.R. 1927 Pat. 326.**

———*Person sued need not be raiyat—Rent payable must be in respect of agricultural land.*

A suit against a person who is not a raiyat but a tenure-holder, and is collecting rent in respect of agricultural land for the determination of the rent payable by him comes expressly under the provision of S. 139. In order that S. 139, cl. (2), may apply, it is not necessary that the defendant should be an agricultural raiyat, but it is necessary that the rent should be payable for agricultural land. (*Das and Adami, JJ.*) PRATAP UDAINATH SAH DEO *v.* GOBIND NATH SAH DEO. **6 Pat. 48 = 7 P.L.T. 641 = 97 I.C. 789 = A.I.R. 1926 Pat. 527.**

———*Suit filed as against trespasser but found to be non-occupancy tenant must be dismissed though it is triable only by Deputy Commissioner.*

Where the suit as framed was one to eject trespassers, but on the facts found the defendants were not trespassers but non-occupancy raiyats.

Held, the suit should be dismissed and the plaint cannot be returned for presentation to proper Court, viz., that of Deputy Commissioner. (*Dawson Miller, C.J. and Foster, J.*) MT. JAGESWAR KUER *v.* TIKAKDHARI SINGH. **2 Pat. 746 = 77 I.C. 587 = 5 Pat. L.T. 422 = A I.R. 1924 Pat. 267.**

—S. 139—Ejectment of under-tenant.

———*Suit for ejectment of an under-tenant is not maintainable in Civil Court.*

In a suit for the ejectment of an under-tenant, the plaintiff must seek his remedy by application or suit before the Deputy Commissioner and such a suit is not maintainable in the civil Court. A.I.R. 1926 Pat. 403, Foll. (*Adami and Allanson, JJ.*) NANDI MANJHI *v.* DWARKA NATH DUBEY. **101 I.C. 645 = A.I.R. 1927 Pat. 402.**

—S. 139—Jurisdiction of Civil Court.

———*Act provides for ejectment of trespasser if landlord claims alternatively that defendants be declared liable to pay rent—Revenue Court has exclusive jurisdiction in such case—Jurisdiction of Civil Court is not ousted, if no alternative relief is asked.*

Clause (4), S. 139, only applies to the ejectment of persons to whom Cls. (*a*), (*b*), (*c*) and (*e*), S. 41, are applicable. It does not apply to a person who has ceased to be a tenant and who has become a trespasser and is holding adversely to the landlord. Under S. 139 (4) (*a*) a trespasser is ejected if the landlord claims as an alternative relief that the defendants shall be declared liable to pay rent for the land, and in that case the suit is exclusively triable by the revenue Court, but if no such alternative relief has been asked, the jurisdiction of the civil Court is not ousted. A.I.R. 1924 Pat. 267, Dist. (*Mullick and Kulwant Sahay, JJ.*) RIKHI NATH KUARI *v.* RANGO MAHTO. **7 Pat. 675 = 9 P.L.T. 811 = 110 I.C. 494 = A I.R. 1929 Pat. 18.**

—S. 139—Pradhani rights.

——*Suit among rival claimants for declaration of Pradhani rights lies in revenue Court.*

A suit for declaration that the plaintiff has pradhani rights in a certain mauza and for possession by dispossessing defendant is cognizable only by a revenue Court. 5 P. L. W. 199, Expl. (*Kulwant Sahay and Macpherson, JJ.*) LACHMAN MAHTON *v.* LALU MAHTON. **7 Pat. 816 = 9 P.L.T. 544 = 112 I.C. 309 = A.I.R. 1928 Pat. 515.**

—S. 139—Question of title.

——*Case involving question of title does not fall within the section.*

S. 139 does not contemplate a case where there is a dispute with regard to title: and where the relationship of landlord and tenant is not admitted, a suit for possession of an occupancy holding on the ground of the defendants' denial of the tenancy right is not cognizable by the Deputy Commissioner. A.I.R. 1926 Pat. 64, Foll. (*Bucknill and Ross, JJ.*) HEMAT RAM *v.* KARU SAHU. **96 I.C. 452 = 1926 P.H.C.C. 246.**

—S. 139—Suit for cess.

——*Suit to recover cess—Revenue Court can try.*

A suit for recovery of cess is triable by the Revenue Court as under S. 3, Cl. (23) of the Chota Nagpur Tenancy Act, rent includes cess. (*Jwala Prasad, J.*) JAGROSHAN BHARTHI *v.* MADAN PANDA. **6 Pat. 317 = 103 I.C. 464 = A.I.R. 1927 Pat. 266.**

—S. 139—Summary suits for possession.

——*Summary suits for possession are barred from cognizance of Civil Courts but not title suits.*

The words "suits" and "applications" in S. 139, were not interchangeable terms, S. 139 (5), prior to amendment by S. 38 of Act VI of 1920, barred only applications under S. 71 to be tried by Civil Courts, but it did not bar suits. 13 C.L.J. 250, Ref. But the new S. 139-A, which came into force on the 5th November, 1920, and the amended S. 139, cl. (5), which by the amendment included "suits" also, bar the cognizance of purely possessory suits under the Specific Relief Act by Civil Courts and to restore the law as it stood prior to 1908. These new provisions in the Act do not in any way take away the jurisdiction of the Civil Courts to entertain suits for possession based upon the determination of title. Only summary suits for possession, and not title suits with consequential relief for possession are barred by these provisions. Nor do they bar suits in which the right to sue had accrued prior to their coming into force. A.I.R. 1926 Pat. 363, Diss. from ; A.I.R. 1926 Pat. 561, Appr. (*Dawson Miller, C.J. and Jwala Prasad, J.*) CHAUDHRY GURSARAN DAS *v.* AKHOURI PARMESHWARI CHARAN. **6 Pat. 296 = 8 P.L.T. 841 = 104 I.C. 580 = A.I.R. 1927 Pat. 203.**

—S. 139—Termination of tenancy.

——*Plaint showing tenancy duly terminated—Jurisdiction—Civil Court.*

Where a plaint sets out that tenancy having been duly terminated no longer exists, the suit lies in Civil Court though of course it is liable to dismissal if the averment of the termination of the tenancy is not substantiated. (*Kulwant Sahay and Macpherson, JJ.*) NANDU MAHATON *v.* BHOLU MAHTON. **123 I.C. 609 = A.I.R. 1930 Pat. 143.**

—S. 139—Underlying intention.

——S. 139 contemplates a case where the relationship of landlord and tenant is admitted to exist between the parties ; it does not contemplate cases where there is a dispute as regards title. Where the relationship of landlord and tenant is not admitted a suit for possession of occupancy holding on the ground of defendant's denial of the tenancy right is not cognizable by the Deputy Commissioner, and S. 139 does not operate as a bar to the maintainability of such a suit in the Civil Court. (*Kulwant Sahay, J.*) GOBINDA BAURI *v.* KRISTO SURDAR. **90 I. C. 489 = A. I. R. 1926 Pat. 64.**

—S. 139-A—Applicability.

——A suit for declaration of title as occupancy raiyats with consequential relief of recovery of possession by tenants who have been dispossessed of their lands by the landlord who settled the land with other tenants is cognizable by a civil Court : A. I. R. 1927 Pat. 203, Foll. (*Das and James, JJ.*) DEONANDAN PANDE *v.* ANHACH KAHAR. **9 P. L. T. 340 = 105 I. C. 561 = A. I. R. 1928 Pat. 128.**

—S. 139-A—Effect of Section.

——*Suit for ejectment of under-tenant by his immediate landlord is barred as application lies under S. 46 to Deputy Commissioner.*

Under S. 46 an application for the ejectment of an under-tenant was cognizable by the Deputy Commissioner ; and under Cl. (8) of S. 139, as it stood before the amendment of 1920 ; and as if still stands, an application under S. 46 is an application cognizable by the Deputy Commissioner. Thus it seems clear that under the terms of S. 139-A no suit could be brought in the civil Court for the ejectment of an under-tenant by his immediate landlord. (*Das and Adami, JJ.*) MADHAB PODDAR *v.* LALL SINGH BHUMJI. **6 Pat. 69 = 8 P.L.T. 231 = 1926 P.H.C.C. 288 = 97 I.C. 175 = A.I.R. 1926 Pat. 403.**

——*Suit for declaration as occupancy tenant and for possession is barred.*

A suit based on the allegation that the plaintiff had an occupancy right in the land but had been dispossessed by the defendant, whom the landlord set up as a tenant in order to get rid of the plaintiff is clearly barred by the provisions of S. 139-A, and the case is not excluded from the operation of S. 139 A by the mere fact that a declaration as to his occupancy status was asked for in the suit. (*Das and Adami, JJ.*) DHUPLAL SAHU *v.* BHEKHA MAHTO. **6 Pat. 64 = 7 P.L.T. 870 = 1926 P.H.C.C. 223 = 96 I.C. 1036 = A.I.R. 1926 Pat. 363.**

—S. 139-A—No retrospective effect.

——S. 139-A cannot have any retrospective operation over a right of action occurring prior to 1920 and S. 139, cl. (5), as amended in 1924, cannot have also any retrospective effect upon a right which accrued before 1924 : A.I.R. 1927 Pat. 203, Foll. (*Mullick, Ag. J. C. and Jwala Prasad, J.*) SUKUL LAKHPAT RAM *v.* RAGHU KOERI. **8 P. L. T. 850 = 105 I. C. 33 = A. I. R. 1928 Pat. 109.**

——There is nothing in the Amending Act VI of 1920 to show that the Legislature intended to give the new

S. 139-A retrospective effect and to destroy the right which had already accrued prior to the section coming into force. (*Dawson Miller, C. J. and Jwala Prasad, J.*) CHAUDHARY GURSARAN DAS *v.* AKHORI PARMESHWARI CHARAN. **6 Pat. 296 = 8 P. L. T. 841 = 104 I. C. 580 = A. I. R. 1927 Pat. 203.**

—S. 177—Appeal against decision of title.

———*Appeal lies to Judicial Commissioner from Deputy Collector if he decides question of title in proceedings under S. 177.*

Where proceedings are taken under S. 177 the Court will not come to a decision as to the respective title of parties to the suit, but where the Deputy Collector has decided a question regarding the interest in land as between the parties appeal lies to the Judicial Commissioner and not to the Deputy Commissioner.

Where in a suit for rent a person was joined under S. 177 of the Chota Nagpur Tenancy Act as an intervenor and the Deputy Collector decided a question of title or interest in land.

Held, that though the value of the suit was less than Rs. 100 appeal lay to Judicial Commissioner. (*Adami, J.*) JANKI CHOWDHURY *v.* SAMBODH KURMI. **1924 P. H. C. C. 278 = 84 I. C. 286 = A. I. R. 1924 Pat. 807.**

—Ss. 177 and 218—Appeal against order.

———*Appeal against order under S. 177 lies not to Judicial Commissioner but to Deputy Commissioner.*

Question as to title or interest in land cannot arise to be decided under S. 177 and so appeal from an order under that section can lie not to the Judicial Commissioner but to the Deputy Commissioner: A.I.R. 1924 Pat. 807, Dist.; 4 P.L.J. 163, Foll. (*Manchherson, J.*) MADHO DASS *v.* KUNTA KUARY. **120 I.C. 320 = A.I.R. 1929 Pat. 258.**

—S. 177—Applicability.

———*Rent suit—Plea of payment to third person—S. 177 does not apply.*

In a suit for recovery of rent, the defendants pleaded that they paid the rent to a third person namely the minor son of the previous proprietor.

Held, the case did not fall within S. 177, no claim to receive payment having been made by or on behalf of a third person. (*Das and Adami, JJ.*) BALKI LAL *v.* SURENDRA NATH RAY. **1 Pat. 255 = 69 I.C. 858 = A.I.R. 1922 Pat. 480.**

—S. 177—Claim for rent by Tenant.

———*Claim to receive rent on behalf of third person cannot be made by the tenant himself.*

What the tenants had done in this case is to claim the right, or rather, to acknowledge an obligation, to pay rent to a third person.

Held, a right to receive rent can only be claimed by or on behalf of the person entitled to receive it and not by a person who is under the obligation to pay it. (*Coutts and Ross JJ.*) GHURA MANJHI *v.* PRABODH CHANDRA MUZUMDAR. **3 P.L.T. 131 = 64 I.C. 1003 = 1922 P.H.C.C. 54 = 6 P.L.J. 603 = A.I.R. 1923 Pat. 55.**

—S. 177—Question of title.

———No question of title to land can arise under S. 177—If it is determined, it is only incidental. (*Macpherson, J.*) PRADHAN *v.* SATRUGHAN. **A. I. R. 1930 Pat. 273.**

—S. 177—Stranger entitled to rent.

———A person who is alleged to have been entitled to eceive rent should be made a party to the suit and the matter must be decided in his presence (*Jwala Prasad, J.*) PAGHALAN GARAIN *v.* CHOTU KUNJA. **2 Pat. L. R. (Civ.) 24 = 79 I.C. 601 =**

5 Pat. L. T. 614 = A. I. R. 1924 Pat. 522.

—S. 177—Zur-i-peshgidars.

———Zur-i-peshgidars were entitled to be registered under the old Act; but they were not necessary or proper parties to a rent suit. (*Ross and Fazal Ali, JJ.*) BALDEO DAS *v.* NILMANI NATH. **8 Pat. 122 = 9 P. L. T. 627 = 113 I. C. 681 = A.I.R. 1928 Pat. 615.**

—S. 178—Scope.

———*Ejectment executed—Time cannot be extended thereafter.*

The Power vested in the S. D. O. under S. 178 (3) is not exercisable after the decree for ejectment has been fully executed. (*Jwala Prasad and Adami, JJ.*) BISESWAR SAHU *v.* MD. ZAINUL RAHMAN. **3 Pat. L. T. 108 = 63 I. C. 779 = 6 P. L. J. 300 = 1921 P.H.C.C. 195 = A. I. R. 1922 Pat. 29.**

—S. 181—Starting point of limitation.

———The starting point of limitation for execution of a revenue decree runs from the date when the decree is signed. (*Ross and Das, JJ.*) BISHUN LAL *v.* BINDESWARI SAHU. **5 P.L.T. 374 = 78 I. C. 224 = 2 Pat. L. R. 7 = A. I. R. 1924 Pat. 712.**

—S. 181-A—Assignee of decree.

———Where a landlord assigns a decree for arrears of rent but not his interest in the land his assignee cannot apply for its execution. (*Das and Allanson, JJ.*) NAYAMAT RAM *v.* RAMESHWAR NATH. **6 Pat. 807 = 108 I. C. 432 = 9 P. L. T. 678 = A. I. R. 1928 Pat. 144.**

—S. 185—Interpretation.

———The term "warrant of execution" is not limited to cases of attachment of the person or moveable property only of the judgment-debtor. (*Ross and Fazal Ali, JJ.*) BALDEO DAS BIRLA *v.* LAL NILMANI NATH. **8 Pat. 122 = 9 P. L. T. 627 = 113 I. C. 681 = A. I. R. 1928 Pat. 615.**

—S. 190—Scope.

———*Sale of tenure for arrears—Notice is necessary to give jurisdiction to sell.*

Where a tenure is sold under S. 208 of the Act for arrears of rent, a notice under S. 190 of the Act is necessary to give the Court jurisdiction to sell the property. (*Ross and Fazl Ali, JJ*) BALDEO DAS *v.* NILMANI NATH. **8 Pat. 122 = 9 P. L. T. 627 = 113 I. C. 681 = A. I. R. 1928 Pat. 615.**

—S. 208—Conditions for applicability.

———*For S. 208, Chota Nagpur Tenancy Act and Ch. 14 of B. T. Act, all tenants of tenure are necessary parties—Representative must be selected by the tenants and not chosen by landlord.*

All the tenants of a tenure are necessary parties to the suit in order that the decree and the sale in execution of it may have the important consequences described in S. 208, Chota Nagpur Tenancy Act, or Ch. 14, Bengal Tenancy Act. It is not sufficient to show that the landlord has chosen to obtain a decree for rent against one out of several heirs; but it has to be established that all the tenants have held out one of them as their representatives in their transaction with the landlord. 17 C. W. N. 833 and A. I. R. 1921 Cal. 434, Foll. 26 Cal. 677 and 10 Cal. 996, Ref. (*Das and James, JJ.*) HARBANS SINGH *v.* JAGADISHWAR. **10 P. L. T. 125 = 8 Pat. 620 = 116 I. C. 538 = A. I. R. 1929 Pat. 188.**

—S. 208—Decree for cess.

———Provided certain formalities are adopted the decree in suit for cess operates as a rent decree. A.I.R. 1922 Pat. 303, Foll. (*Das and Adami, JJ.*) TULSI MAHATANI *v.* GAJADHAR MARWARI. **6 Pat. 317 =**

103 I. C. 464 = A. I. R. 1927 Pat. 266.

—S. 208—Effect of sale.

———*Sale in execution of rent decree—Interest of judgment-debtor in the tenancy only is transferred to the purchaser.*

The sale purported to be effected in execution of a rent decree under the provisions of S. 208, Chota Nagpur Tenancy Act, can only pass the interest of the judgment-debtor in the tenancy in respect of which the rent decree is passed. (*Kulwant Sahay and Macpherson, JJ.*) DWARIKA NATH *v.* JASODA DEVI. **9 Pat. L. T. 372 = 106 I. C. 563 = A. I. R. 1928 Pat. 243 at. 244.**

—S. 208—Part of holding.

———Deputy Commissioner has no jurisdiction to sell under S. 208 anything less than the whole holding on which the arrear of rent has accrued. Such a sale is not merely irregular. A. I. R. 1922 Pat. 64, Foll. A. I. R. 1922 Pat. 114. (F. B.), Dist, (*Kulwant Sahay and Macpherson, JJ.*) HARLAL CHAUBEY *v.* RAMESHWAR NARAYAN SINGH. **7 Pat. 832 = 10 P. L. T. 36 = 119 I. C. 894 = A. I. R. 1929 Pat. 28.**

—S. 208—Power of Civil Court.

———The power of the Civil Court to question a rent sale is limited to cases of fraud and want of jurisdiction. (*Ross and Fazl Ali, JJ.*) BALDEO DAS *v.* NILMANI NATH. **8 Pat. 122 = 9 P. L. T. 627 = 113 I. C. 681 = A. I. R. 1928 Pat. 615.**

—S. 208—Rights of purchaser.

———*Bengal Rent Recovery Act* (*VIII of* 1865), *S.* 16—*S.* 16 *applies to sale of tenure for arrears of cess.*

S. 16 of the Bengal Rent Recovery Act of 1865 does apply to the sale of a tenure or holding for arrears of cess by virtue of S. 208 of the Chota Nagpur Tenancy Act. It follows, therefore, that the purchaser acquires the property free from all incumbrances unless the case comes within the proviso to S. 16. (*Das and Adami, JJ.*) TULSI MAHATANI *v.* GAJADHAR MARWARI. **6 Pat. 317 = 103 I. C. 464 = A. I. R. 1927 Pat. 266.**

—S. 208—Scope.

———*S.* 208, *Chota Nagpur Tenancy Act with Rent Recovery Act forms a complete Code for actual process of selling and effect of sale but operation of sections dealing with institution of execution proceedings is not prevented—Bengal Rent Recovery Act* (*VIII of* 1865)—*C. P. Code, O.* 21, *R.* 22.

No doubt S. 208 with the Rent Recovery Act forms a complete Code for the actual process of selling and the effect of the sale of a tenure of holding, but this does not prevent the operation of sections dealing with the institution of the execution proceedings themselves; and if a decree is more than one year old, there is no reason why it should be executed, without notice, against a tenure or holding. (*Ross and Fazl Ali, JJ.*) BALDEO DAS *v.* NILMANI NATH. **8 Pat. 122 = 9 P. L. T. 627 = 113 I. C. 681 = A. I. R. 1928 Pat. 615.**

—S. 212—Applicability.

———*Persons interested in portion only.*

The fact that certain persons are interested in a portion only of the property does not exclude them from the class of persons "who claim an interest therein." (*Ross and Fazl Ali, JJ.*) BALDEO DAS *v.* NILMANI NATH. **8 Pat. 122 = 9 P. L. T. 627 = 113 I. C. 681 = A. I. R. 1928 Pat. 615.**

—S. 213—Khorposhdars.

———Khorposhdars not being owners of property cannot come under S. 213. A. I. R. 1923 Pat. 29, Foll. (*Ross and Fazl Ali, JJ.*) BALDEO DAS *v.* NILMANI NATH. **8 Pat. 122 = 9 P. L. T. 627 = 113 I. C. 681 = A. I. R. 1928 Pat. 615.**

—S. 213—Scope.

———*Execution Sale—Suit to set aside is not barred.*

S. 213 of the Act does not bar a suit to set aside an execution sale on account of want of jurisdiction. (*Coutts and Das, JJ.*) KUMAR RAMYAD SINGH *v.* CHHADIA BASHI. **1 Pat. 750 = 71 I. C. 345 = 4 P. L. T. 439 = A. I. R. 1923 Pat. 64.**

—S. 214—Scope.

———S. 214 is no bar for declaring effect of particular sale. A. I. R. 1928 Pat. 615 Dist. *Das and Ross, JJ.*) GOSAIN DAS BAISHNAB *v.* GOPAL SINGH. **8 Pat. 366 = 118 I.C. 727 = A. I. R. 1929 Pat. 321.**

———*Rent suit if entertained without jurisdiction, S.* 214 *allows another suit to set aside the sale thereunder on the ground of want of jurisdiction.*

Court cannot entertain a rent suit under Chota Nagpur Tenancy Act where a tenant who is a necessary party is omitted, and the whole tenancy is not represented by the members on record, another suit is maintainable under S. 214 to set aside the sale thereunder, because the former suit was entertained for want of jurisdiction. (*Das and James, JJ.*) HARBANS SINGH *v.* JAGADISHWAR DAYAL. **10 P. L. T. 125 = 8 Pat. 620 = 116 I.C. 538 = A. I. R. 1929 Pat. 188.**

———*Suit for declaration that certain auction-sale, although ostensibly rent sale, was not so in fact and cannot operate as rent sale, is a suit "to set aside or at all events to modify the effect of the sale" within section—Limitation Act, Art.* 12 *applies—Suit does not fall under Chota Nagpur Tenancy Act, S.* 177—*Lim. Act, Art.* 12.

A suit for declaration that certain auction-sale, although ostensibly a rent sale was not so in fact and cannot operate as a rent sale, but will pass only the right, title and interest of the judgment-debtor is a "suit" to set aside the sale or at all events to modify the effect of the "sale" within S. 214 of the Act and such a suit can only be brought on the ground of fraud or want of jurisdiction. To hold otherwise would be to destroy the special jurisdiction which the Act is designed to create. To a suit to set aside a sale operative as against the plaintiff, though liable to be set aside for fraud or want of jurisdiction, Art. 12, Limitation Act applies, 25 Bom. 337 (P. C.), Foll. The suit is not one contemplated by proviso to S. 177, Tenancy Act. (*Ross and Fazl Ali, JJ.*) BALDEO DAS *v.* NILMANI NATH. **8 Pat. 122 = 9 P. L. T. 627 = 113 I. C. 681 = A. I. R. 1928 Pat. 615.**

—S. 215—Appeal against order extending time.

———*Order extending time under S.* 178 (3)—*Appeal lies to Judicial Commissioner.*

In a suit under Section 139, Clauses (3) and (4) for arrears of rent and ejectment a decree was passed by the S. D. O. in the terms of Section 178. After the decree was fully executed the S.D.O. extended the time for payment under Section 178 (3). On the question, whether an appeal lay to the Judicial Commissioner.

Held, that the order was one coming under Section 215 (3) and that, consequently the appeal from an order, such as was passed in the present case, lay to the Judicial Commissioner under Section 224. (1912) 16 C. L. J. 520, Dist. (*Jwala Prasad and Adami, JJ.*) BISESWAR SAHU *v.* MD. ZAINUL RAHMAN. **3 Pat. L. T. 108 = 63 I. C. 779 = 6 P. L. J. 300 = 1921 P. H. C. C. 195 = A. I. R. 1922 Pat. 29.**

—S. 217—Applicability.

———*Rent suit—*Ex parte *decree—Application to set aside—Dismissal—No appeal lies.*

A suit for rent was tried by the Dy. Collector as Dy. Commissioner and was decreed *ex parte*. An application to set aside the decree was dismissed in default and a further application for restoring the previous one was also dismissed. In an appeal to Dy. Commissioner who set aside the decree and remanded the suit for re-trial, *Held*, on revision that (1) the second application is incompetent not being provided for in the Act, (2) that no appeal lay to the Dy. Commissioner against the order dismissing the application and therefore the Dy. Commr's order setting aside the *ex parte* decree was invalid but could not be revised by Revenue authorities under S. 227 but the High Court could revise the order and set it aside, if illegal. (*Mullick and Jwala Prasad, JJ.*) MUNSHI LAL CHAUDHARI *v.* NIDHI RAM DUTT. **60 I. C. 175=3 U. P. L. R. Pat. 13.**

—S. 218—Appeal from order under S. 177.

———*Appeal against order under S. 177 lies not to Judicial Commissioner but to Deputy Commissioner.*

Question as to title or interest in land cannot arise to be decided under S. 177 and so appeal from an order under that section can lie not to the Judicial Commissioner but to the Deputy Commissioner. A. I. R. 1924 Pat. 807; Dist.; 4 P. L. J. 163, Foll. (*Macpherson, J.*) MADHO DASS *v.* KUNTA KUARY. **120 I. C. 320= A. I. R. 1929 Pat. 258.**

—S. 218—Appeal when no question of title.

———*No question of title decided under S. 177—Appeal lies to Deputy Commissioner.*

Where no question of title is decided the appeals certainly lie to the Deputy Commissioner and he does not act without jurisdiction in hearing and determining them. A. I. R. 1929 Pat. 258, Foll. (*Macpherson, J.*) PRADHAN *v.* SATRUGHAN. **A. I. R. 1930 Pat. 273.**

S. 218—Appeal when question of title is decided.

———*Appeal lies to Judicial Commissioner from Deputy Collector if he decides question of title in proceedings under S. 177, 'Chota Nagpur Tenancy Act, Chota Nagpur Tenancy Act, S. 224'*

Where proceedings are taken under S. 177 the Court will not come to a decision as to the respective title of parties to the suit, but where the Deputy Collector has decided a question regarding the interest in land as between the parties appeal lies to the Judicial Commissioner and not to the Deputy Commissioner. Where in a suit for rent a person was joined under S. 177 as an intervenor and the Deputy Collector decided a question of title or interest in land.

Held, that though the value of the suit was less than Rs. 100 appeal lay to Judicial Commissioner. (*Adami, J.*) JANKI CHOWDHURY *v.* SAMBODH KURMI. **1924 P. H. C. C. 278=84 I. C. 286= A. I. R. 1924 Pat. 807.**

S. 218—Applicability.

———*Rent suit under Rs. 100—No revision lies to High Court against appellate judgment of Deputy Commissioner on the decree of Deputy Collector.*

Under S. 218 of the Act the judgment of the Deputy Collector in a suit for rent, where the amount sued for is less than Rs. 100, is not open to revision or appeal, except an appeal to the Deputy Commissioner. In such a suit no revision lies against the appellate judgment of the Deputy Commissioner on a decree passed by the Deputy Collector. The Courts of appeal and revision in rent suits are the Commissioner and Board of Revenue, and the High Court has got nothing to do with them where there is no question of title. (*Ross, J.*) AMBIKA BALA DASI *v.* GOBIND NAIK. **113 I. C. 697=A. I. R. 1928 Pat. 567 (1).**

—S. 224—Appeal when question of title is decided.

———*Appeal lies to Judicial Commissioner from Deputy Collector if he decides question of title in proceedings under S. 177.*

Where proceedings are taken under S. 177 the Court will not come to a decision as to the respective title of parties to the suit, but where the Deputy Collector has decided a question regarding the interest in land as between the parties appeal lies to the Judicial Commissioner and not to the Deputy Commissioner. Where in a suit for rent a person was joined under S. 177 as an intervenor and the Deputy Collector decided a question of title or interest in land.

Held, that though the value of the suit was less than Rs. 100 appeal lay to Judicial Commissioner. (*Adami, J.*) JANKI CHOWDHURY *v.* SAMBODH KURMI. **1924 P. H. C. C. 278=84 I. C. 286= A. I. R. 1924 Pat. 807.**

—S. 225—Applicability.

———*Rent suits, value of one above Rs.* 100 *and others below Rs.* 100*—Appeals preferred in latter suits to Deputy Commissioner and transferred under S.* 225 *to Judicial Commissioner—Judicial Commissioner has jurisdiction to try them.*

One out of the rent suits tried by the Deputy Collector was of the value of above Rs. 100 and the others were below Rs. 100. No question relating to title to land or to some interest in land was involved in any of the suits. An appeal was filed before the Judicial Commissioner in the suit which exceeded Rs.100 in value and the other appeals where preferred to the Deputy Commissioner but under S. 225 of the Act of 1908 were transferred to the Court of the Judicial Commissioner and all the appeals were heard and decided by him.

Held: the Judicial Commissioner had jurisdiction to deal with the transferred appeals. (*Mullick and Atkinson, JJ.*) SADANAND TEWARI *v.* DEB NATH MANJHI. **1922 P. H. C. C. 154=A.I.R. 1922 Pat. 184.**

—S. 227—Finality of order under S. 227.

———*Ss.* 227, 228, 157*—Order under S.* 227 *setting aside decree is final—Decree need not appear on face of it as* ex-parte, *to be within S.* 157.

An order under S. 227 setting aside such a judgment is final under S. 228. A decree need not appear on the face of it to have been passed *ex-parte* so as to be within S. 157, it is sufficient if it is shown to have actually been passed *ex-parte*. (*Coutts and Macpherson, JJ.*) CHAUDHURI SHYAM NARAIN SINGH. *v.* SIWCHARAN SAHU. **1 Pat. 32=62 I. C. 886= 1921 P H. C. C. 345=2 P. L. T. 734= A. I. R. 1922 Pat. 400.**

—S. 231—Applicability.

———*Limitation Act, Arts.* 95 *and* 12*—Suit to set aside sale under Chota Nagpur Tenancy Act on the ground of fraud is governed by Art.* 95*—S.* 231, *Chota Nagpur Tenancy Act, does not apply.*

A suit for possession of land and the right to ask for a declaration that a sale under the Chota Nagpur Tenancy Act has been fraudulently confirmed is clearly not a suit under the Chota Nagpur Tenancy Act. It is governed by Limitation Act, Art. 95. It is true that the Act in some cases takes away the right to sue for setting aside a sale, but it nowhere grants that right although to some extent it limits it. (*Dawson Miller, C. J. and Foster, J.*) RAMESHWAR NARAYAN SINGH *v.* MAHABIR PRASAD. **5 Pat. 759=1926 P. H. C. C. 225= 8 P. L. T. 124=96 I.C. 529=A. I. R. 1926 Pat. 401.**

———*Suit to set aside an execution sale on the ground* *of fraud is governed not by S.* 231 *but by Limitation Act, Art.* 95.

S. 214 bars a suit to set aside a sale under Chapter 16 of the Act except on the ground of fraud or want of jurisdiction. S. 258 contains a provision similar to that in S. 214. These sections do not create right to institute a suit to set aside a sale for a holding made under the Act. They bar the institution of such a suit except on the ground of fraud or want of jurisdiction. The right to institute a suit to set aside a sale has not been created but has been taken away under the provisions of these sections. The right exists in a person to bring a suit to set aside a sale under the general law and it was taken away by these sections except the right to bring a suit on the ground of the fraud or want of jurisdiction. Therefore a suit to set aside an execution sale on the ground of fraud is not a suit instituted under the provisions of the Chota Nagpur Tenancy Act as contemplated by S. 231 of the Act; and consequently the period of limitation is not the one provided by that section but the one provided by Art. 95 of the Limitation Act and the period of limitation is three years from the time when the fraud became-known to the plaintiffs. (*Kulwant Sahay, J.*) RAMESWAR NARAYAN SINGH *v.* MAHABIR PRASAD. **90 I. C. 325 = A. I. R. 1926 Pat. 47.**

—S. 240—Appeal in respect of small amounts.

———*Suit under for more than Rs.* 100—*Appeal in respect of Rs.* 41—Forum *of appeal is not changed.*

When a rent suit is brought against several tenants or sets of tenants collectively under section 240 of the Chota Nagpur Tenancy Act, and the total amount sued for exceeds Rs. 100, the appeal lies to the Judicial Commissioner even though the appeal relates to a tenant or a set of tenants against whom the claim does not exceed Rs. 100. (*Coutts and Macpherson, JJ.*) CHAUDHURI SHYAM NARAIN SINGH *v.* SIWCHURAN SAHU. **1 Pat. 32 = 62 I. C. 886 = 1921 P. H. C. C 345 = 2 P. L. T. 734 = A. I. R. 1922 Pat. 400.**

—S. 258—Interpretation.

———*Words "directly or indirectly" explained.*

The words "directly or indirectly" in S. 258 apply to the machinery used for the purpose of altering the decision and not to the result. (*Ross and Wort, JJ.*) LAL GOVIND NATH *v.* MAHESAR NATH. **10 P. L. T. 854 = 118 I. C. 135 = 7 Pat. 388 = A. I. R. 1928 Pat. 244.**

———*Fraud refers to order passed under S.* 213.

The fraud or want of jurisdiction contemplated in S. 258 is fraud or want of jurisdiction in the order passed under S. 213 refusing to set aside the sale. (*Adami and Kulwant Sahay, JJ.*) GOSAIN DAS BAISHNAB *v.* GOPAL SINGH. **8 P. L.T. 688 = 106 I. C. 430 = A. I. R. 1927 Pat. 382.**

——— *Fraud in obtaining decree under S.* 139—*Decree can be questioned.*

Section 258 contemplates that a decree passed under S. 139 can be questioned in a suit on the ground of fraud in obtaining the decree. (*Adami and Kulwant Sahay, JJ.*) GOSAIN DAS BAISHNAB *v.* GOPAL SINGH. **8 P. L. T. 688 = 106 I. C. 430 = A. I. R. 1927 Pat. 382.**

—S. 258—Jurisdiction of Civil Court.

———*Provisions of S.* 139 *are different from S.* 258—*Question of possession or title to land ejected from under S.* 65 *is not cognizable by Civil Court under S.* 258.

Section 139 gives a list of suits and applications which are cognizable only by a Deputy Commissioner. That is a very different thing from the express provisions under S. 258 that where an order has been passed by

a Deputy Commissioner under S. 65 no suit shall be entertained in any Court to vary, modify or set aside directly or indirectly such order or decision, and so the Civil Court has no jurisdiction, to enter into question of title or possession to land ejected from under S. 65. (*Adami, J.*) THAKUR CHANDRA MOHAN SINGH *v.* AHLAD MAHATO. **A. I. R. 1929 Pat. 467.**

—S. 258—Object of section.

———*Issue decided by Revenue Court in its decree can be raised by defendant in a subsequent suit brought against him.*

S. 258 does not contemplate that no Court shall try any issue already decided by a decree of any Deputy Commissioner or Revenue Officer so as to bar a defendant in a suit brought against him from raising the issue. (*Dawson Miller, C. J. and Jwala Prasad, J.*) MAHARAJA PRATAP UDAI NATH SAHI DEO *v.* GANESH NARAIN SAHI. **1921 P. H. C. C. 369 = 70 I. C. 232 = A. I. R 1921 Pat. 218.**

—S. 258—Removal of bar.

———*Fraud is the only ground to remove the bar.*

Under S. 258 fraud and gross laches are not identical; and it is fraud, not gross laches, which removes the bar imposed by that section, *i.e.*, so long as fraud, as distinct from gross negligence, is not established. S. 258 is a bar: 12 Cal. 69, Rel. on. (*Ross and Macpherson, JJ.*) RAJGOPAL ACHARJYA *v.* UPENDRA ACHARJYA. **5 Pat. 768 = 96 I. C. 437 = A. I. R. 1926 Pat. 528.**

—S. 258—Scope and effect.

———*Record-of-Rights recording a tenure to be non-resumable—Suit to declare that tenure is resumable is not barred.*

S. 258 does not bar a suit for declaring that a particular tenure recorded to be non resumable in the Record-of Rights is resumable; S. 84 (3) creates a statutory presumption in favour of the correctness of the finally published record, but implies the right to bring a suit averring the contrary. (*Dawson Miller, C. J. and Mullick, J.*) KAMAKHYA NARAIN SINGH *v.* JAWAHIR KHAN. **94 I. C. 1007 = A. I. R. 1926 Pat. 369.**

– S. 270—Object of section.

———*Landlord recognising transfer—Finding of Dy. Collector that registration was not necessary—Finding is not* ultra vires.

S. 270 provides for giving certain powers of control both to the Commissioner and to the Deputy Commissioner over acts performed by subordinates whilst exercising the powers of their superiors. If it can be shown that the Deputy Collector whilst exercising the powers delegated to him of the Deputy Commissioner has failed to exercise a jurisdiction which he might have exercised or has usurped a jurisdiction which it was not within his competency to exercise then the Deputy Commissioner would have power to order him either to exercise that jurisdiction or to refrain from exercising it as the case may be. The same, of course, would apply in the case of the Commissioner and the Board dealing with acts performed by the Deputy Commissioner. (*Dawson Miller, C. J. and Das, J.*) TIKAIT GANESH NARAIN *v.* CHANDU MISTRI. **1922 P. H. C. C. 3 = A. I. R. 1923 Pat. 83.**

CHOTA NAGPUR TENANCY AMENDMENT ACT (VI OF 1920).

—Ss. 38 and 39—Intention of amendment.

———*Chota Nagpur Tenancy Act* (1908), *Ss.* 71, 139 *and* 139-*A*—*Amending Act* (1920) *was not intended to take away vested rights under old Act.*

The amending Act of 1920 was not intended or expressed to have retrospective effect; that is to say, it

CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE ACT (1879), S. 5—Applicability.

was not intended to take away rights of action which had already vested. A suit for possession by tenant against his landlord in 1921 the cause of action for which arose in 1919 was held to be cognizable by Civil Court. (*Adami and Bucknill, JJ.*) CHOTI LAL NAND KISHORE *v.* TULA SINGH. **8 P. L. T. 397 = 1926 P. H. C. C. 293 = 97 I. C. 608 = A. I. R. 1926 Pat. 561.**

CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE ACT (I OF 1879), S. 10 (b) (As Amended by Bengal Act V of 1903.

—S. 5—Applicability.

——*Section governs transfers between 1st January and 4th November*, 1903.

S. 10 (*b*) contemplates that all transfers whether made before the Act came into operation or not, provided they were made after the 1st of January 1903, would come within the provisions of this section; though the section is silent as regards the fate of the transfers between the 1st day of January and 4th November, 1903, yet the meaning is plain and such transfers would come within the operation of the section, and would be rendered invalid. by the operation of that section. Where such title is invalid, the title remains in the original tenant or his heirs. It is not permissible to add words to the section in order to construe it. The section must be construed as it stands (*Ross and Kulwant Sahay, JJ.*) PRATAP UDAI NATH *v.* MAHABIR SAHU. **4 Pat. 838 = 88 I. C. 1032 = 6 P. L. T. 500 = 1925 P. H. C. C. 320 = A. I. R. 1925 Pat. 741.**

—S. 21—Intention of section.

——*Chota Nagpur Tenancy Act, S. 26—The section does not invalidate agreements which were valid at their inception.*

S. 26 of the Chota Nagpur Tenancy Act was not contemplated to invalidate agreements which were valid in their inception but to validate agreements in special cases out of such agreements as would otherwise have been invalid owing to the provisions of S. 21 of the Chota Nagpur Landlord and Tenant Procedure Act. (*Ross and Sen, JJ.*) BHOLA NATH MAJHI *v.* SHIVA PRASAD SINHA. **1924 P. H. C. C. 307 = 82 I. C. 988 = 6 P. L. T. 144 = A.I.R.1925 Pat. 297.**

CHRISTIAN MARRIAGE ACT (XV OF 1872).

—S. 88—Interpretation and Scope.

——*Meaning of " personal law" explained—Act does not deal with objections to validity of marriage.*

The Act is only concerned with the forms in which the marriage is to be solemnized, and does not deal with objections to the validity of the marriage. The expression "personal law" in S. 88 includes any personal law, apart from any personal law as to the form of the marriage, forbidding any of the parties to enter into a contract of marriage with one another. (*Case-law discussed*) (*Blackwell and Kemp, JJ.*) (PETER PHILIP). SALDANHA *v.* (ANNE-GRACE) SALDANHA. **54 Bom. 288 = 124 I. C. 776 = 32 Bom. L. R. 17 = A. I. R. 1930 Bom. 105.**

--S. 88—Interpretation.

——*Personal law is that applicable to religious community.*

The words 'the personal law applicable to either parties' in S. 88 refer to the personal law of the religious community to which either of the parties belong. (*Blackwell and Kemp, JJ.*) (PETER-PHILIP) SALDANHA *v.* (ANNE-GRACE) SALDANHA. **54 Bom. 288 = 124 I. C. 776 = 32 Bom. L. R. 17 = A. I. R. 1930 Bom. 105.**

CHUR.

See (1) ALLUVION AND DILUVION.
(2) BENGAL ALLUVION AND DILUVION REGN. (XI OF 1825).
(3) FISHERY.
(4) LANDLORD AND TENANT.

CHUR LANDS.

See (1) ALLUVION AND DILUVION.
(2) LANDLORD AND TENANT.

CIRCUMSTANTIAL EVIDENCE.

See (1) CRIMINAL TRIAL.
(2) EVIDENCE.

CITATION—*See* PRACTICE—PRECEDENTS.

CIVIL COURT.

See (1) C. P. CODE, S. 9.
(2) JURISDICTION.

CIVIL AND REVENUE COURTS.

See (1) AGRA TENANCY ACT.
(2) JURISDICTION.
(3) MADRAS ESTATES LAND ACT

COMPARATIVE TABLE OF THE SECTIONS OF THE CIVIL PROCEDURE CODES OF 1882 AND 1908.

C. P. Code, 1882.	C. P. Code, 1908.	C. P. Code, 1882.	C. P. Code, 1908.	C. P. Code, 1882.	C. P. Code, 1908.
1	S. 1	10	Omitted	21	Omitted
2	S. 2	11	S. 9	22	Ss. 22, 23 (1)
3	Ss. 154, 156, 157, 158	12	S. 10	23	Ss. 22, 23 (2)
4	S. 4	13	S. 11	24 paras. 1 & 3	Ss. 22, 23 (3)
4-A	S. 5	Expln. VI	S. 14	24 para. 2	Omitted.
5	S. 7	14	S. 13	25	S. 24
6 paras. (*c*) and (*d*)	Omitted.	15	S. 15	26	O. 1, rr 1, 4 (*a*)
6 last para.	S. 6	16	S. 16	27	O. 1, r 10 (1)
7	*Cf.* S. 4	16-A	S. 18	28	O. 1, rr 3, 4 (*b*)
8	S. 8	17	S. 20	29	O. 1, r 6
9	Omitted	18	S. 19	30	O. 1, r 8 (1)
		19	S. 17	31	O. 1, r 9
		20	Omitted		

C. P. Code, 1882.	C. P. Code, 1908.
32	O. 1, rr. 8 (2), 10 (2) (3), (5), 11
33	O. 1, r, 10 (4)
34	O. 1, r. 13
35	O. 1, r. 12
36	O. 3, r. 1
37	O. 3, r. 2
38	O. 3, r. 3
39	O. 3, r. 4
40	O, 3, r. 5
41	O. 3, r. 6
42	O. 2, r. 1
43	O. 2, r. 2
44	O. 2, rr. 4, 5
45	O. 2, rr, 3, 6
46	*Cf.* O. 2, rr. 6, 7
47	*Cf.* O. 2, rr. 6. 7
48	S. 26 ; O. 4, r. 1
49	*Cf.* S. 137
50	O. 7, rr. 1, 2, 4, 5, 6
51	O. 6, rr. 14, 15 (1).
52	O. 6, r. 15 (2) (3)
53	O. 6, r. 17 ; *Cf* O. 7, r. 11
54	O. 7, r. 11 ; *Cf* O. 6, r. 18
55	O. 7, r. 12
56	O. 7, r. 13
57	O. 7, r. 10
58	O. 7, r. 9
58 last para	O. 4, r. 2
59	O. 7, r. 14
60	O. 7, r. 15
61	O. 7, r. 16
62	O. 7, r. 17
63	O. 7, r. 18
64	S. 27 ; O. 5, r. 1
65	O. 5, r. 2
66	O. 5, r. 3
67	O. 5, r. 4
68	O. 5, r. 5
69	O. 5. r. 6
70	O. 5, r. 7
71	O. 5, r. 8
72	O. 5, r. 9
73	O. 5, r. 10
74	O. 5, r. 11
75	O. 5, r. 12
76	O. 5, r. 13
77	O. 5, r. 14
78	O. 5, r. 15
79	O. 5, r. 16
80	O. 5, r. 17
81	O. 5, r. 18
82	O. 5, rr. 19, 20 (1)
83	O. 5 r. 20 (2)
84	O. 5, r. 20 (3)
85	S. 28 ; O. 5, rr. 21, 23
86	O. 5, r. 22
87 88	O. 5, rr. 24, 29
89	O. 5, r. 25
90	O. 5, r. 26

C. P. Code, 1882.	C. P. Code, 1908.
91	O. 5, r. 30 (1) (2)
92	O. 5, r. 30 (3)
93	O. 48, r. 1
94	S. 142 ; O. 48, r. 2
95	S. 143
96	O. 9, r. 1
97	O. 9, r. 2
98	O. 9, r. 3
99	O. 9, r. 4
99-A	O. 9, r. 5
100	O. 9, r. 6
101	O. 9, r. 7
102	O. 9, r. 8
103	O. 9, r 9
104	Omitted
105	O. 9, r. 10
106	O. 9, r 11
107	O. 9, r. 12
108	O. 9, r. 13
109	O. 9, r. 14
110	O. 8, r. 1
111	O. 8, r. 6
112	O. 8, r. 9
113	O. 8, r. 10
114	*Cf* O. 6, r. 2
115	*Cf* O. 6, rr. 14, 15
116	*Cf* O. 6, rr. 16, 17
117	O. 10, r. 1
118	O. 10, .r 2
119	O. 10, r. 3
120	O. 10, r. 4
121	O. 11, r. 1
122	*Cf* O. 48, r. 2
123	O. 11, r. 3
124	O. 11, r. 5
125	O. 11, r. 6
126	O. 11, r. 8
127	O. 11, r. 11
128	O. 12 r. 2
129	O. 11, rr. 12, 13
130	O. 11, r. 14
131	O. 11, r. 15
132	O. 11, r. 17
133	O. 11, r. 18 (1)
134	O. 11, r. 18 (2)
135	O. 11, r. 20
136	O. 11, r. 21
137	O. 13, r. 10
138	O. 13, r. 1 (1)
139	O. 13, r. 2
140	O. 13, rr. 1 (2), 3
141	O. 13, r. 4
141-A	O. 13, r. 5
142	O. 13, r. 6
142-A	O. 13, r. 7
143	O. 13, r. 8
144	O. 13, r. 9
145	O. 13, r. 11
146	O. 14, rr. 1, 2
147	O. 14, r. 3
148	O. 14, r. 4
149	O. 14, r. 5
150	O. 14, r. 6
151	O. 14, r. 7
152	O. 15, r. 1

C. P. Code, 1882.	C. P. Code, 1908.
153	O. 15, r. 2
154	O. 15. r. 3
155	O. 15, r. 4
156	O. 17, r. 1
157	O. 17, r. 2
158	O. 17, r 3
159	O. 16, r. 1
160	O. 16, r. 2
161	O. 16, r. 3
162	O. 16, r. 4
163	O. 16, r. 5
164	O. 16, r. 6
165	O. 16, r. 7
166	O. 16, r. 8
167	O. 16, r. 9
168	O. 16, r. 10
169	O. 16, r, 11
170	O. 16, r. 12
171	O. 16, r. 14
172	O. 16, r. 15
173	O. 16, r. 16
174 175	O. 16, rr. 10 to 13, 17, 18
176	O. 16, r. 19
177	O. 16, r. 20
178	O. 16, r. 21
179	O. 18, rr. 1, 2 (1)
180	O. 18, rr., 2 (2), (3), 3
181	O. 18, r. 4
182	O. 18, r. 5
183	O. 18, r. 6
184	O. 18, r. 8
185	O. 18, r. 9
185-A first and secoud paras.	S. 138
185-A third para.	O. 18, r. 7
186	O. 18, r. 10
187	O. 18, r. 11
188	O. 18, r. 12
189	O. 18, r. 13
190	O.18, r. 14
191	O. 18, r. 15
192	O. 18, r. 16
193	O. 18, r. 17
194	O. 19, r. 1
195	O. 19, r. 2
196	O. 19. r. 3
197	S. 139
198	S. 33 ; O. 20, r. 1
199	O. 20, r. 2
200 201	*Cf.* S. 137
202	O. 20, r. 3
203	O. 20, r. 4
204	O. 20, r. 5
205	O. 20, r. 7
206 first and second paras.	O. 20, r. 6
206 third para.	S. 152
207	O. 20, r. 9

C. P. Code, 1882.	C. P. Code, 1908.
208 ..	O. 20, r, 10
209 ..	S. 34
210 ..	O. 20, r. 11
211 ..	S. 2 (12) ; O. 20, r. 12
212 ..	
213 ..	O. 20, r. 13
214 ..	O' 20, r. 14
215 ..	O. 20 r. 15
215-A ..	O. 20. r. 16
216 ..	O. 20, r. 19
217 ..	O. 20, r. 20
218 ..	*Cf.* S. 35 (1), (2)
219	
220	
221 ..	O. 20, r. 6 (3)
222 ..	*Cf.* S. 35 (3)
223, first para	S. 38
223, second and third paras.	S. 39
223, fourth para.	S. 41
223, fifth para	O. 21, r. 4
223, sixth para.	O. 21, r. 5
224 ..	O. 21, r. 6
225 ..	O. 21, r. 7
226 ..	O. 21, r. 8
227 ..	O. 21, r. 9
228 ..	S. 42
229 ..	S. 43
229-A ..	S. 45
229-B ..	S. 44
230 first para	O. 21, r. 10
230 second para	O. 21, r, 21
230 third and fourth paras.	S. 48
231 ..	O. 21. r. 15
232 ..	O. 21, r. 16
233 ..	S. 49
234 ..	S. 50
235 ..	O. 21, r. 11 (2)
236 ..	O. 21, r. 12
237 ..	O. 21, r. 13
238 ..	O. 21, r. 14
239 ..	O. 21, r. 26 (1), (2)
240 ..	O. 21, r. 26 (3)
241 ..	O. 21, r. 27
242 ..	O. 21, r. 28
243 ..	O. 21, r. 29
244 ..	S. 47
245 ..	O. 21, r. 17
245-A ..	S. 56
245-B ..	O. 21, r. 37
246 ..	O. 21, r. 18
247 ..	O. 21, r. 19
248 ..	O. 21 r. 22
249 ..	O. 21, r. 23
250 ..	O. 21, r. 24 (1)
251 ..	O. 21, rr. 24 (2), (3), 25 (1)
252 ..	S. 52
253 ..	*Cf.* S. 145
254 ..	O. 21, r. 30
255 ..	O. 21, r. 42
256 ..	O. 21, r. 11 (1)
257 ..	O. 21, r. 1
257-A ..	Omitted
258 ..	O. 21, r. 2
259 ..	O. 21, r. 31
260 ..	O. 21, r. 32
261 ..	O. 21, r. 34 (1) to (4)
262 ..	O. 21, r. 34 (5)
263 ..	O. 21, r. 35
264 ..	O. 21, r. 36
265 ..	S. 54
266 ..	S. 60
267 ..	O. 21, r. 41
268 ..	O. 21, r. 46
269 ..	O. 21, r. 73
270 ..	O, 21, r. 51
271 ..	S. 62
272 ..	O. 21, r. 52
273 ..	O. 21, r. 53
274 ..	O. 21, r. 54
275 ..	O. 21, r. 55
276 ..	S. 64
277 ..	O. 21, r. 56
278 ..	O. 21, r. 58
279 ..	O. 21, r. 59
280 ..	O. 21, r. 60
281 ..	O. 21, r. 61
282 ..	O. 21, r. 62
283 ..	O. 21, r. 63
284 ..	O. 21, r. 64
285 ..	S, 63
286 ..	O. 21, r. 65
287 ..	O. 21, rr. 66, 70
288 ..	Omitted
289 ..	O. 21, r. 67
290 ..	O. 21, r. 68
291 ..	O. 21, r. 69
292 ..	O. 21, r. 73
293 ..	O. 21, r. 71
294 ..	O. 21, r. 72
295 ..	S. 73
296 ..	O. 21, r. 76
297 ..	O. 21, r. 77
298 ..	O. 21, r. 78
299 ..	O. 21, r. 79 (1)
300 ..	O. 21, r. 79 (2)
301 ..	O. 21, r. 79 (3)
302 ..	O 21, r. 80
303 ..	O. 21, r. 81
304 ..	O. 21, r. 82
305 ..	O. 21, r. 83
306 ..	O. 21, r 84
307 ..	O. 21, r. 85
308 ..	O. 21, r. 86
309 ..	O. 21, r. 87
310 ..	O. 21, r. 88
310-A ..	O. 21, r. 89
311 ..	O. 21, r. 90
312 ..	O. 21, r. 92
313 ..	O. 21, r. 91
314 ..	O 21, r. 92
315 ..	O. 21, r. 93
316 ..	S. 65 ; O. 21, r. 94
317 ..	S. 66
318 ..	O. 21, r. 95
319 ..	O. 21, r. 96
320 ..	Ss. 68, 70 and 71
321 ..	Sch. III, Para. 1
322 ..	Do 2
322-A ..	Do 3
322-B ..	Do 4
322-C ..	Sch. III, Para. 5
322-D ..	Do 6
323 ..	Do 7
324 ..	Do 8
324-A ..	Do 9
325 ..	Do 10
325-A ..	Do 11
325-B ..	Do 12
325-C ..	Do 13
326 ..	S. 72
327 ..	S. 67
328 ..	O. 21, r. 97
329 ..	O. 21, r. 98
330 ..	O, 21, r. 98
331 ..	O. 21, r. 99
332 ..	O. 21, rr. 100, 101, 103
333 ..	O. 21, r. 102
334 ..	O. 21, rr. 97, 98
335 ..	O. 21, rr. 97, 99, 103
336 ..	S. 55
337 ..	O. 21, r. 38
337-A ..	O. 21, r. 40
338 ..	S. 57
339 ..	O. 21, r. 39 (1) to (4)
340 ..	O. 21, r. 39 (5)
341 ..	S. 58
332 ..	
343 ..	O. 21, r. 25
344—360-A ..	Repealed by the Provincial Insolvency Act, 1907
361 ..	O. 22, r. 1
362 ..	O. 22, r. 2
363 ..	O. 22, r. 3 (1)
364 ..	Omitted
365 ..	O. 22, r. 3 (1)
366 ..	O. 22, r. 3 (2)
367 ..	O. 22, r. 5
368 ..	O. 22, r. 4
369 ..	O. 22, r. 7
370 ..	O. 22, r. 8
371 ..	O. 22, r, 9 (1), (2)
372 ..	O. 22, r. 10
372.A ..	O. 22, r. 9 (3)
373 ..	O. 23, r. 1
374 ..	O. 23, r. 2
375 ..	O. 23, r. 3
375-A ..	O. 23, r. 4
376 ..	O. 24, r. 1
377 ..	O. 24, r. 2
378 ..	O. 24, r. 3

C. P. Code, 1882.	C. P. Code, 1908.
379	O. 24, r. 4
380	O. 25, r. 1 (1), (3)
381	O. 25, r. 2
382	O. 25, r. 1 (2)
383	O. 26, r. 1
384	O. 26, r. 2
385	O. 26, r. 3
386	S. 76 ; O. 26, r. 4
387	O. 26 r. 5
388	O. 26, r. 6
389	O. 26, r. 7
390	O. 26, r. 8
391	S. 78
392	O. 26, r. 9
393	O. 26, r. 10
394	O. 26, r. 11
395	O. 26 r. 12
396	O. 26, rr. 13, 14
397	O. 26, r. 15
398	O. 26, r. 16
399	O. 26, r. 17
400	O. 26, r. 18
401	O. 33, r. 1
402	Omitted
403	O, 33, r. 2
404	O. 33, r. 3
405	O. 33, r. 5
406	O. 33, r. 4
407	Q. 33, r. 5
408	O. 33, r. 6
409	O. 33, r. 7
410	O. 33, r. 8
411	O. 33, r. 10
412	O. 33, r. 11
413	O. 33, r. 15
414	O. 33, r. 9
415	O. 33, r. 16
416	S. 79 ; O. 27, r. 1.
417	O. 27, r. 2
418	O. 27, r. 3
419	O. 27. r. 4
420	O. 27, r. 5
421	O. 27, r. 6
422	O. 5, r. 27
423	O. 27, r. 7
424	S. 80
425	Omitted [Sec. 55, sub-sec. (2)]
426	O. 27, r. 8 (1)
427	O. 27. r. 8 (2)
428	S. 81
429	S. 82
430	S. 83
431	S. 84
432	S. 85
433	S. 86
434	S. 87
435	O. 29, r. 1
436	O. 29, rr. 2, 3
437	O. 31, r. 1
438	O. 31, r. 2
439	O. 31, r. 3
440	O. 32, rr. 1, 4 (2)
441	O. 32, r. 5 (1)
442	O. 32, r. 2
443	O. 32, rr. 3 (1) 4 (2)
444	O. 32, r. 5 (2)
445	O. 32, r. 4 (1)
446	O. 32, r, 9
447	O. 32, r. 8
448	O. 32, r. 10 (1)
449	O, 32, r. 10 (2)
450	O. 32, r. 12 (1)
451	O. 32, r. 12 (2) (3)
452	O. 32, r. 12 (4)
453	O. 33, r. 12 (5)
454	O. 32, r. 13
455	O. 32, r. 14
456	O. 32, rr. 3 (2) (3), 4 (4)
457	O. 32, r. 4 (1)
458	O. 32, r. 11 (1)
459	O. 32, r. 11 (2)
460	Omitted
461	O. 32, r. 6
462	O. 32, r 7
463	O. 32, r. 15
464	O. 32, r, 16
465	O. 28, r. 1
466	O. 28, r. 2
467	O. 28, r. 3
468	O. 5. rr. 28, 29
469	Omitted
470	S. 88
471	O. 35, r. 1
472	O. 35, r. 2
473	O. 35. r. 4
474	O. 35, r. 5
475	O. 35, r. 6
476	O. 35, r. 3
477 478	O. 38, r. 1
479	O. 38, r. 2
480	O. 38, r. 3
481	O. 38, r. 4
482	Omitted.
483 484	O. 38, r. 5
485	O. 38, r. 6
486	O. 38, r, 7
487	O. 38, r. 8
488	O. 38, r. 9
489	O. 38, r, 10
490	O. 38, r. 11
491	S. 95
492	O. 39, r. 1
493	O. 39, r. 2
494	O. 39, r, 3
495	O. 39, r, 5
496	O. 39, r. 4
497	S. 95
498	O. 39, r. 6
499	O. 39, r, 7
500	O. 39, r. 8
501	O. 39, r. 9
502	O. 39, r. 10
503	O. 40, rr. 1 to 3
504	O. 40, r. 5
505	Omitted
506	Sch. II, Para. 1
507	Do. 2
508	Do. 3
509	Do. 4
510	Do. 5
511	Do. 5
512	Do. 6
513	Do, 7
514	Do. 8
515	Do. 9
516	Do. 10
517	Do. 11
518	Do. 12
519	Do. 13
520	Do. 14
521	Do. 15
522	Do. 16
523	Do. 17
524	Do. 19
525	Do. 20
526	Do. 21
527	O. 36, r. 1
528	O. 36, r. 2
529	O. 36, r. 3
530	O. 36. r. 4
531	O. 36, r, 5
532	O. 37, r. 2
533	O. 37, r. 3
534	O. 37, r. 4
535	O. 37. r. 5
536	O. 37, r. 6
537	O. 37, r. 7
538	O. 37, r. 1
539	Ss. 92 and 93
540	S. 96
541	O. 41, r. 1
542	O. 41, r. 2
543	O. 41, r. 3
544	O. 41, r. 4
545	O. 41, r, 5
546	O. 41, r. 6
547	O. 41, r. 7
548	O. 41, r. 9
549	O. 41, r. 10
550	O. 41, r. 13
551	O. 41, r. 11
552	O. 41, r. 12
553	O. 41, r. 14
554	O, 41, r. 15
555	O. 41, r. 16
556	O. 41, r. 17
557	O. 41, r. 18
558	O. 41, r. 19
559	O. 41, r. 20
560	O. 41, r. 21
561	O. 41, r. 22
562	O, 41, r. 23
563 & 564	Omitted.
565	O. 41, r. 24
566	O. 41, r. 25
567	O. 41, r. 26
568	O. 41, r. 27
569	O. 41, r. 28
570	O. 41, r. 29

C. P. Code, 1882.	C. P. Code, 1908.	C. P. Code, 1882.	C. P. Code, 1908.	C. P. Code, 1882.	C. P. Code, 1908.
571 ..	O. 41, r. 30	598 ..	O. 45, r. 2	630 ..	O. 47. r. 8
572 ..	*Cf.* S. 135	599 ..	Omitted	631 ..	S. 116
573 }		600 ..	O. 45, r. 3	632 ..	S. 117
574 } ..	O. 41. r. 31.	601 ..	O. 45, r. 6	633 ..	S. 122
575 ..	S. 98	602 ..	O. 45, r. 7	634 ..	S. 118
576 —	O. 41, r. 34	603 ..	O. 45, r. 8	635 ..	S. 119
577 ..	O. 41, r. 32	604 ..	O. 45, r. 9	636 ..	O. 49, r. 1
578 ..	S. 99	605 ..	O. 45, r. 10	637 ..	S. 128 (2) (i)
579 ..	O. 41, r. 35	606 ..	O. 45, r. 11	638 ..	S. 120 (1); O. 49,
580 ..	O. 41, r. 36	607 ..	O. 45, r. 12		r. 3
581 ..	O. 41, r, 37	608 ..	O. 45, r. 13	639 ..	S. 120 (2)
582 ..	S. 107 (2); O. 22,	609 ..	O. 45, r. 14	640 ..	S. 132
..	r. 11	610 ..	O. 45, r. 15	641 ..	S. 133
582-A ..	*Cf.* S. 146	611 ..	O. 45, r. 16	642 ..	S. 135
583 ..	*Cf.* S. 144 (1)	612 to 615 ..	Omitted	643 ..	Omitted
584 ..	*Cf.* S. 100	616 ..	S. 112	644 ..	O. 48. r. 4
585 ..	*Cf.* S. 101	617 ..	S. 113; O. 46, r. 1	645 ..	S. 137
586 ..	S. 102	618 ..	O. 46, r. 2	645-A ..	S. 140
587 ..	S. 108; O. 42, r. 1	619 ..	O. 46, r. 3	646 ..	Omitted
588 ..	S. 104; O. 43, r. 1	620 ..	O. 46, r. 4	646-A ..	O. 46, r. 6
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CIVIL PROCEDURE CODE (VIII OF 1859.)

—S. 15—Applicability.

——*Declaratory decree without possibility of consequential relief cannot be passed.*

S. 15 of the C P C. (1859) has to be construed with reference to the principles upon which the Court of Chancery proceeds with such slight modification as the conditions in India may require. On such principles, a declaratory decree cannot be made unless there be a right to consequential relief capable of being had in the same Court or in certain cases in some other Court. So a suit for a declaration of a bare chance of succession would not have been allowed by the Courts. (*Spencer O. C. J. and Kumaraswami Sastri, J.*) MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR.

93 I. C. 705 = 48 Mad. 1 =
A. I. R. 1925 Mad. 497.

—(XIV of 1882.)

—S. 13—Interlocutory orders.

——*Finality of—Decree—Interpretation of—Reference to judgment and decree.*

The validity of an order made at one stage of a litigation, unless forthwith challenged by an appropriate proceeding in a superior tribunal, must be regarded as conclusive between the parties and cannot be questioned or collaterally attacked at a later stage. Case-law referred. On the other hand, reference may legitimately be made to the judgment in the suit and if need be to proceedings to interpret the decree and to ascertain what the Court has really decided. (*Mookerjee and Panton, JJ.*) SASHIKANTA ACHARYA *v.* SARAT CHANDRA RAI.

34 C. L J. 415 = 70 I C. 6 =
A. I. R. 1921 Cal. 699.

C. P. C. (1882), S. 211—Ascertainment of mesne profits.

—S. 36—Interpretation.

——*Pleader appointed by special agent—Can act on behalf of principal.*

A pleader is not appointed, on behalf of the intermediary or agent, to act on the agent's behalf, but by the agent on behalf of his principal, the litigant, to act on the litigant's behalf. The possessive pronoun '*his*' all through in S. 36 refers to the "party", *i.e.*, the litigant, not the intermediary or agent. (*Lord Atkinson.*) THIRUVENKATASWAMI IYENGAR *v.* PAVADAI PILLAY.

26 C. W. N. 376 = 70 I. C. 281 =
24 Bom. L. R. 606 = 30 M. L T. (P. C.) 109 =
48 I. A. 534 = 44 Mad. 736 = 14 M. L. W. 244 =
1921 M. W. N. 552 = A. I. R. 1922 P. C. 225 =
41 M. L. J. 645.

—S. 206—Decree—Interpretation of.

——The decree where necessary may be interpreted by reference to the judgment. 16 Cal. 173, P. C. Ref. (*Mookerjee and Panton, JJ.*) RAJA SASHIKANTA ACHARYA *v.* RAJA SARAT CHANDRA RAI CHAUDHURI.

34 C. L. J. 415 = 70 I. C. 6 =
A. I. R. 1921 Cal. 699.

—S. 211—Ascertainment of mesne profits — Nature of proceedings.

——*C. P. C.* (1908), *O.* 20, *R.* 12 *and O.* 22, *R.* 12.

Under the Code of 1882, a proceeding for the ascertainment of mesne profits is a proceeding in execution. Where the decree had been passed under the Code of 1882.

Held that the proceedings for the ascertainment of mesne profits must be held in execution and not in the suit and that therefore O. 22, R, 12 applied and substitution was not necessary. (*Lord Shaw.*) KEDARNATH *v.* ANANT PRASAD. **26 P.L.R. 243 = 88 I.C. 482 = 1925 M.W.N. 313 = 2 O.W.N. 355 = 41 C.L.J. 339 = 6 P.L.T. 366 = 27 Bom. L.R. 848 = 4 Pat. 507 = 52 I.A. 188 = 22 M.L.W. 7 = A. I. R. 1925 P.C. 117 = 30 C.W.N. 361 = 48 M.L.J. 482.**

—S. 211—Assessment of Mesne profits.

———*From when defendant offered possession.*

In no case can the plaintiff claim mesne profits for any period subsequent to an offer by the defendant to restore him possession. (*Mookerjee and Panton, JJ.*) SASHIKANTA ACHARYA *v.* SARAT CHANDRA RAI. **34 C.L.J. 415 = 70 I. C. 6 = A. I. R. 1921 Cal. 699.**

—S. 211—Decree—Interpretation of.

The decree where necessary may be interpreted by reference to the judgment, 16 Cal. 173 (P.C.), Ref. (*Mookerjee and Panton, JJ.*) SASIKANTA ACHARYA *v.* SARAT CHANDRA RAI. **34 C.L. J. 415 = 70 I. C. 6 = A. I. R. 1921 Cal. 699.**

—S. 211—"Decree".

The term "decree" in Section 211 signifies the ultimate decree which alone has operative force and is capable of execution. 3 Pat. L.J. 116 and 35 Cal. 1017, Foll. (Case-Law discussed.) (*Mookerjee and Panton, JJ.*) SASHIKANTA ACHARYA *v.* SARAT CHANDRA RAI. **34 C.L.J. 415 = 70 I.C. 6 = A. I. R. 1921 Cal. 699.**

—S. 211—Suit for partition.

———*No preliminary decree.*

There was no such thing as a preliminary decree under the old C.P.C. in a suit for partition, and of course no such thing as a final decree. As a matter of practice, the order ascertaining the several parties interested in the property to be divided and their several rights therein used to be treated as itself a decree subject to appeal and as such an order contained the adjudication as to the rights and shares and persons interested, the description of that order as a decree may not be considered inapt. The so-called decree then is not a preliminary decree but an interlocutory order ascertaining the rights and shares with a view to pass the partition decree. (*Oldfield and Venkatasubba Rao, JJ.*) RAMASWAMI AIYAR *v.* SUBRAMANIA AIYAR. **16 M.L.W. 297 = 74 I. C. 804 = 46 Mad. 47 = A. I. R. 1923 Mad. 147 = 43 M.L.J. 406.**

—S. 248—Execution without notice.

———(*Act V of* 1908), *O.* 21, *R.* 22.

An order for execution passed without notice under Section 248 of the old Code (Order 21, Rule 22 of the Code of 1908) is without jurisdiction and a sale at such execution cannot stand. The notice under Section 248 must be served on the judgment-debtor in order to be effective. Mere issue of notice is not enough. Similarly a mere issue of notice without its being actually served is not enough for the purpose of the proviso to Section 248. (*Chatterjea and Newbould, JJ.*) GURUDAS BISWAS *v.* BHOWANIPORE ZAMINDARY CO., LTD. **25 C.W.N. 972 = 64 I.C. 476 = A.I.R. 1921 Cal. 609.**

—S. 294.—Purchase by Decree-holder without permission.

———*Validity.*

A purchase by a decree-holder who has not obtained permission is not void nor a nullity but is only to be avoided on the application of the judgment-debtor or some other person interested. It would be injurious to those interested in the sale, if a decree-holder who had been forced up in the bidding to give a large sum of money could escape from fulfilling his contract by getting the sale declared a nullity and it would make all titles under such sale insecure, if at later periods they were liable to be treated as nullities. A sale is to be set aside upon application and upon cause shown. (*Lord Phillimore.*) RADHAKRISHNA *v.* BESHESHAR SAHAY. **16 M. L. W. 190 = 67 I.C. 914 = 3 Pat. L.T. 529 = 31 M. L.T. 209 = 49 I.A. 312 = 1 Pat. 733 = 21 A. L. J. 23 = 27 C.W. N. 294 = 37 C.L. J. 430 = 25 Bom. L. R. 630 = A.I.R. 1922 P.C. 336 = 44 M.L.J. 718 (P.C.).**

—S. 315.

———*No saleable interest—Refund of purchase money —Suit for.*

Under S. 315 of the Old Code an execution purchaser, when he discovers that the judgment-debtor had no saleable interest in the property sold, can maintain a suit for refund of purchase money, and was not restricted to the special procedure in execution mentioned in S. 315. (*Mookerjee and Chotzner, JJ.*) MAKAR ALI *v.* SARFADDIN. **36 C.L.J. 132 = 70 I.C. 606 = 27 C.W.N. 183 = 50 Cal. 115 = A.I.R. 1923 Cal. 85.**

—S. 335.

———*Order after notice—Binding nature of.*

A person claiming to be in possession of the property and offering obstruction to an auction-purchaser is bound by an order under S. 335 passed after notice to him though he may not be bound by the decree and the sale held under the decree. 25 Bom. 337 and 32 Cal. 296, Dist. (*Shah and Crump, JJ.*) BHIMAJI RAMCHANDRA *v.* BHIMABAI HIROJI. **45 Bom. 573 = 23 Bom. L. R. 62 = 61 I.C. 764 = A. I. R. 1921 Bom. 122.**

—S. 335.

———*Notice under S.* 335 *to person not bound by decree.*

On the application of the auction-purchaser notice under S. 335 for removal of obstruction was issued to a person in possession of the property who had been a party to the suit but had not been party to the compromise on which the decree was passed. He merely filed a statement alleging the property to be his own but did not take any other proceedings. The Judge passed an order for removal of obstruction without mentioning the section under which it was passed, but wrongly giving as the reason for the order that the person in possession was bound by the decree, having been a party to the suit.

Held, that under the circumstances of the case the order must be deemed to be one under S. 335 and not under S. 334. (*Shah and Crump, JJ.*) BHIMAJI RAMCHANDRA *v.* BHIMABAI HIROJI. **45 Bom. 573 = 23 Bom. L. R. 62 = 61 I.C. 764 = A.I.R. 1921 Bom. 122.**

—S. 354—Vesting of property.

———Where proceedings in Insolvency are taken under the C. P.C. of 1882 the whole property of the insolvent vests in the Receiver under S. 354 of the Code whether it be mentioned in the application or not and the Punjab Laws Act is inapplicable. (*Broadway and Wilberforce, JJ.*) BALKISHEN DAS *v.* DEVISARAN. **4 Lah. L.J. 164 = 62 I. C. 929 = A.I.R. 1922 Lah. 103.**

—S. 443—Certificated guardian.

———*Consent presumed—C. P.C.* (1908), *O.* 32, *R*, 4.

Under the Code of 1882 where a certificated guardian was proposed for appointment as guardian *ad litem* the Court might, unless he declined the appointment, presume his consent. (*Mookerjee and Panton, JJ.*) SARAT CHANDRA *v.* BIBHABATI DEBI. **34 C.L. J. 302 = 66 I.C. 433 = A.I.R. 1921 Cal. 584.**

CIVIL PROCEDURE CODE (1882), S. 462—Leave of Court.

—S. 462—Leave of Court.

———*Guardian under Bengal Court of Wards Act.*

Bengal Court of Wards Act (1879)—Guardian appointed under, can compromise proceedings without leave of Court. (*Lord Buckmaster.*) NAKIMO DEWANI *v.* MT. PEMBA DICHEN. **48 Cal. 469 = 59 I.C. 911 = 19 A.L.J. 171 = 23 Bom. L.R. 698 = 33 C. L.J.211 = 25 C.W. N. 797 = 14 M. L. W. 253 = 1921 M. W.N. 115 = 48 I.A. 27 = 29 M. L. T. 202 = A.I.R. 1921 P.C. 22 = 40 M.L.J. 201.**

—S. 539—Death of person obtaining permission.

———*Others can continue the suit.*

Where persons initially obtaining permission die during the pendency of the suit, other members of the public can continue the suit. (*Lord Dunedin,*) RAJA ANAND RAO *v.* RAMDAS DADURAM. **48 Cal. 493 = 48 I.A. 12 = 25 C.W.N. 794 = 13 M. L. W. 318 = 1921 M.W.N. 24 = 30 M.L.T. (P.C.) 194 = 17 N.L.R. 37 = 62 I.C. 737 = A.I.R. 1921 P. C. 123.**

CIVIL PROCEDURE CODE (1882), S. 539—Interpretation.

—S. 539—Interpretation.

———*Permission granted under S. 539 is not limited to any particular species of suits mentioned in it.*

Where sanction by the Advocate-General is granted, "to institute a suit under Section 539," that means any suit which may be raised under Section 539 and it is not confined merely to one of the species of suits that could be so raised, namely, the appointment of new trustees. (*Lord Dunedin.*) RAJA ANAND RAO *v.* RAMDAS DADURAM. **48 Cal. 493 = 48 I. A. 12 = 25 C.W.N. 794 = 13 M.L.W. 318 = 1921 M W.N. 24 = 30 M.L.T. (P.C.) 194 = 17 N. L. R. 37 = 62 I.C. 737 = A.I.R. 1921 P. C. 123.**

CIVIL PROCEDURE CODE (ACT V OF 1908.)

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CIVIL PROCEDURE CODE (V OF 1908).

—Applicability.

———The provisions as to arbitration as laid down in the C. P. Code do apply to proceedings under the Arbitration Act of 1899. (*Mukherji and Dalal, JJ.*) FIRM KACHAURI MAL KALYAN MAL *v.* FIRM WALI MD. ABDUL LATIF. **47 All. 179 = 22 A.L.J. 1031 = 5 L.R A. (Civ.) 756 = 85 I.C. 341 = A.I.R. 1925 All. 154.**

———*U. P. Land Revenue Act, S.* 233, *Clause* (1)—*Civil Court cannot declare that* 30 *years leave is over—Specific Relief Act, S.* 42.

Although no case for granting a declaratory relief under S. 42, Specific Relief Act, be made out on pleadings, yet there may be such evidence on the record and such attitude taken by the defendant as may have the effect of casting a cloud on the plaintiff's title, so as to justify the Court in granting the relief. A cloud upon a title is but an apparent defect in it. If the title, sole and absolute in fee, is really in the person moving against the cloud, the density of the cloud can make no difference in the right to have it removed. 30 C. 365 Appr. 5 O.C. 118; 20 L.J. 335; 48 I. A. 56 Foll.

Where a plaintiff asked a Civil Court to declare that according to a Settlement Court decree the defendant was a 30 years' lease-holder of certain land and that period had expired.

Held, that the Civil Court had no jurisdiction to grant such a relief. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) BISHUNATH SARAN SINGH *v.* SITLA BAKHSH SINGH. **10 O.L.J. 315 = 79 I. C. 784 = A. I. R. 1924 Oudh 69.**

—Applicability to jurisdiction under Letters Patent.

———Regulations duly made by Orders and Rules under the Code of Civil Procedure, 1908, are applicable to the jurisdiction exercisable under the Letters Patent, except that they do not restrict the express Letters Patent appeal. 25 Mad. 555 and 27 Mad. 121 overruled.

There is no reason why there should be any general difference between the procedure of the High Court in matters coming under the Letters Patent and its procedure in other matters. The Code is framed on the scheme of providing generally for the mode in which the High Court is to exercise its jurisdiction, whatever it may be, while specifically excepting the powers relating to the exercise of original civil jurisdiction, to which the Code is not to apply. It confers a general rule-making power saving only what is excepted in the body of the Code. (*Lord Sumner.*) MT. SABITRI THAKURAIN *v.* SAVI. **48 Cal. 481 = 48 I.A. 76 = 19 A.L.J. 281 = 23 Bom. L.R. 681 = 25 C. W. N. 557 = 33 C.L.J. 307 = 14 M.L.W. 362 = 1921 M.W.N. 159 = 60 I. C. 274 = A. I. R. 1921 P. C. 80 = 40 M.L.J. 308.**

C. P. CODE (1908), S. 1—Applicability to foreigners.

—Chief Court—Whether High Court.

———*Chief Court of Oudh is a High Court.*

The Chief Court of Oudh is a High Court within the meaning of C. P. Code. (*Stuart, C. J. and Raza, J.*) PUNJAB NATIONAL BANK *v.* JAI RAM DAS. **4 O.W.N. 1114 = A.I.R. 1928 Oudh 89 (1).**

—Essentials of a Code.

———*For matters covered by the Code, Court cannot go beyond the Code.*

The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction: 29 Cal. 707 (P. C.), Foll. (*Suhrawardy and Mukerji, JJ.*) GANGAPRASAD CHAUDHARI *v.* KULADANANDA ROY. **44 C. L. J. 399 = 30 C. W. N. 415 = 94 I. C. 235 = A. I. R. 1926 Cal. 568.**

———The essence of a Code is to be exhaustive on the matters in respect of which it declares the law and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction. 29 Cal. 707 (P.C.) Foll. (*Raymond, A. J. C.*) FIRM OF NOTANDAS *v.* FIRM OF PRIBHDAYAL. **63 I.C. 131 = 15 S.L.R 61 = A. I. R. 1921 Sind 38.**

—Interpretation with reference to old law.

———It is not right to interpret the Code of 1908 with reference to the Codes of 1859 and 1882: 23 Cal. 563 (P.C.) and A.I.R. 1928 P. C. 2, Ref. (*Stuart, C. J., Wazir Hasan and Srivastava, JJ.*) BAHADUR SINGH *v.* RAM PHAL. **7 O.W.N. 232 = A.I.R. 1930 Oudh 148 (159) (F.B.).**

—Relation with Limitation Act.

———Code of Civil Procedure and the Indian Limitation Act are the two great procedure Codes in India and they were amended in the same year and were to come into operation on the same day. They are statutes in *pari materia* and are to be taken together as forming one system, and as interpreting and enforcing each other. (1784) I Leach, C. C. (4th Ed.), p. 355, Foll. (*Das, Ross and Kulwant Sahay, JJ.*) BALMUKUND MARWARI *v.* BASANTA KUMARI. **3 Pat. 371 = 78 I.C. 200 = 5 P. L. T. 145 = 1924 P. H. C. C. 33 = A. I. R. 1925 Pat. 1 (F.B.).**

—Scope.

———The C. P. Code is a Code conferring powers on a Court and is not a Code restricting and delimiting its unlimited powers. (*Wallace, Beasley and Madhavan Nair, JJ.*) ALAGASUNDARAM PILLAI *v.* PICHUVIER. **30 M.L.W. 424 = 52 Mad. 899 = 120 I.C. 567 = A. I. R. 1929 Mad. 757 = 57 M. L. J. 381.**

—S. 1—Applicability to foreigners.

———The Code of Civil Procedure extends to the whole of British India, and there is no limitation in the

Code or in any other Act in force in this country excepting foreigners from the jurisdiction of British Indian Courts: 22 Cal. 222 (P. C.), Dist. (*Boys and Kendall, JJ.*) V. E. SMITH *v.* INDIAN TEXTILE, CO.
49 All. 669 = 25 A.L.J. 356 = 101 I.C. 673 = A.I.R. 1927 All. 413.

——It is a fundamental principle of international jurisprudence that a sovereign of a country acting through the Courts thereof has no jurisdiction over any matters with regard to which he cannot give effective judgment or which he can render effective only by interfering with the authority of a foreign sovereign or the jurisdiction of a foreign Court. Effective judgment means a decree which the sovereign under whose authority it is delivered, has, in fact, the power to enforce against the person bound by it, and which, therefore, his Courts can, if he chooses to give them the necessary means, enforce against such person. (*Rupchand Bilaram, A. J. C.*) DOONGERSI *v.* HARIBHOY PRAGJI.
23 S.L.R. 46 = 101 I.C. 438 = A.I.R. 1927 Sind 601.

—S. 1—Applicability.

——*Land in Agency tract.*

The Subordinate Judge of Vizagapatam has no jurisdiction in a suit pending before him to attach before judgment properties which admittedly are in the Agency tracts over which his Court has no jurisdiction. 42 M. 813 P.C. Rel. on. (*Wallace and Madhavan Nair, JJ.*) ZUBEDA BEGAM SAHEBA *v.* KOMMANA KANNIAH.
88 I.C. 430 = A.I.R. 1925 Mad. 1100 = 48 M. L. J. 680.

—S. 1—Government of India Act, S. 65.

The regulation of civil procedure has nothing to do with the obligations formerly vesting in the East India Company as a trading corporation, for it is incidental to the duties of the ruling power, and cannot be said to be subject to the Government of India Act, 1858, S. 65. (*Viscount Sumner.*) BHAGCHAND DAGDUSA GUJRATHI *v.* SECRETARY OF STATE FOR INDIA.
25 A.L.J. 641 = 104 I. C. 257 = 29 Bom. L. R. 1227 = 46 C.L.J. 76 = 1927 M.W.N. 561 = 1 L C. 291 = 54 I. A. 338 = 51 Bom. 725 = 32 C.W.N. 61 = 26 M. L. W. 809 = A. I. R. 1927 P.C. 176 = 53 M.L.J. 81.

—S. 2 (2).

Decree, Preliminary or Final.
Decree, What is.
Decree, What is not.
Order in Execution.
Miscellaneous.

—S. (2)—Decree—Preliminary or final.

——The direction in a final decree dissolving partnership that a partner should take good outstandings as found in the commissioner's report and account for them to the other partners leaves undetermined and undisposed of the distribution of assets and is in essence a preliminary decree; and the decree is final as regards matters finally decided and preliminary as regards matters still undisposed of: 42 Mad. 296; A.I.R. 1924 Cal. 160; Dist.; 35 All. 159, Ref. 44 I C. 671: 19 All. 155, App. (*Curgenven, J.*) RAMANATHAN CHETTY *v.* ALAGAPPA CHETTY.
53 Mad. 378 = A. I. R. 1930 Mad. 528.

Where final decree for partition cannot be drawn up without a partition having been effected as directed by a preliminary decree but the Court though no partition is made uses the form of the final decree and signs it, the decree does not amount to final decree for partition. (*Subhedar, A. J. C.*) MT. LAXMIBAI *v.* TUKARAM.
13 N.L.J. 83 = 122 I C. 441 = 26 N.L.R. 166 = A. I. R. 1930 Nag. 206.

——When a decree is made for possession, that portion of the decree is final; and when a decree is made for mesne profits in a suit it is only preliminary, because the final decree for mesne profits cannot be made unless the amount due is found upon further enquiry. In such a suit, although one decree is made, it is partly preliminary and partly final. The final part of the decree can be executed apart from the preliminary part and it falls within the provision of Art. 182, Limitation Act. Time for execution of the decree for possession runs at the latest from the date of the final decree of the appellate Court and not from the time when the decree ascertaining the mesne profits was passed. (*B. B. Ghose and Panton. JJ.*) SATISHCHANDRA *v.* SARAT KAMINI.
118 I. C. 852 = A. I. R. 1929 Cal. 383.

——If the Court in a suit for possession after ascertaining mesne profits passes a decree for past and future mesne profits besides directing defendant to deliver possession to plaintiff without directing an inquiry, the decree is not preliminary but final. A.I.R. 1922 Mad. 112, Rel. on. (*Venkata Subba Rao and Madhavan Nair, JJ.*) MUTHU ALAGAPPA CHETTIAR *v.* AHMED IBRAHIM.
22 M.L.W. 347 = 90 I.C. 789 = A. I. R. 1925 Mad. 1276.

——*Preliminary point decided first but no formal preliminary decree drawn up—No appeal lies.*

The drawing up of a decree, or the omission to do so must be taken as conclusive on the question whether the Court has in fact passed, or not passed, a preliminary decree and this is the only proper test to apply in considering whether the provisions of S. 97 are or are not applicable. 37 B. 480 and 16 Bom. L.R. 67 Ref. Ss. 2 and 96 of the Code, upon which alone the right of appeal is based, must be construed with reference to S. 33, which distinguishes between a judgment and a decree, and O. 20, R. 6, which prescribes the contents of a decree. If no such formal document has been drawn up, then, no decree has been "passed" from which an appeal can be brought under S. 96 or S. 97. (*Fawcett and Pratt, JJ.*) VAMANACHARYA RAMACHARYA *v.* GOVIND MADHAVCHARYA.
25 Bom. L.R. 826 = 76 I. C. 1014 = A. I.R. 1924 Bom. 33.

——*Finding under the Deccan Agriculturists' Relief Act, S.* 15.

A finding on an issue whether a party to a suit was an agriculturist prior to taking accounts under the provisions of Deccan Agriculturists' Relief Act is not a preliminary decree within the meaning of Ss. 2 and 97 of C.P.C. 39 Bom. 422 = A.I.R. 1921 Bom. 220, Foll. (*Macleod, C.J. and Kanga, J.*) JAISHINGRAO MADHARAO RAM *v.* VENKATRAO SATWAJIRAO BHOSLE.
70 I. C. 728 = A. I. R. 1922 Bom. 336.

——*Remand order.*

Where in a case falling under O. 20, R. 12, C. P. Code the Appellate Court held that a party was entitled to possession and mesne profits and remanded the case to the Lower Court *held* that the decision of the Court left nothing to be done by the lower court and that under the circumstances the remand order must be construed to be a preliminary decree and is appealable. (*Kumaraswami Sastri and Devadoss, JJ.*) SUBBE GOUNDAN *v.* KRISHNAMACHARI.
45 Mad. 449 = 68 I. C. 869 = 1922 M.W.N. 269 = 15 M.L.W. 537 = 30 M L.T. 217 = A.I.R. 1922 Mad. 112 = 42 M. L. J. 372.

——*Finding under the Deccan Agriculturists' Relief Act.*

The finding that a party is an agriculturist within the meaning of the Deccan Agriculturist Relief Act is not by itself an adjudication which can be embodied in a decree, though it may result in the plaint being returned for presentation in the proper Court. So such finding is not a preliminary decree within S. 2 or S. 97, C.P. Code.

Per *Macleod, C.J.*—Issues of law on which a case may be disposed of most often raise questions of jurisdiction or of limitation. But a finding that the court has jurisdiction or that the plaintiff has brought his suit within the time prescribed by the law of limitation, does not determine the rights of the parties with regard to all or any of the matters in controversy in the suit, it merely enables the court to proceed to inquire into those rights. So, too, an issue of *res judicata* found in the plaintiff's favour enables the court to deal with the merits of the case. It cannot be said that decisions in the plaintiff's favour on such issues as these determine his right to sue which is a matter of controversy in a suit, for there is no such right known to law as the 'right to sue'. A plaintiff in a suit claims to be entitled to a remedial right on the consequences, of an infraction of an antecedent right. *Holland's Jurisprudence* pp. 290 and 291 Ref. But an aggrieved party is not debarred from appealing at the end of the case from certain findings during the hearing of the case which merely decide that the suit must proceed, or which decide questions without disposing wholly or partially of the case. (*Macleod, C. J. and Fawcett, J.*) DATTATRAYA PURSHOTTAM *v.* RADHABAI BALKRISHNA.

45 Bom. 627 = 23 Bom L. R. 92 = 60 I. C. 885 = A. I. R. 1921 Bom. 220.

———*Single appeal from.*

In a suit for accounts it is competent for the appellant to prefer a single combined appeal against the preliminary and the final decrees if the dates permit him to do so. The Court-fee calculated upon the amount ascertained and embodied in the final decree is not sufficient to enable the appellants to appeal against the preliminary decree also. If the appeal in a suit for accounts is from the whole decree, the appellant is bound by the plaintiff's valuation in the plaint. 39 Mad. 725 Foll. 32 All. 517 Dissented from. (*Spencer. J.*) DAMODHAR PADHANO *v.* HARIBANDHU PATNAICK.

14 M.L.W. 389 = 70 I. C. 392 = 1921 M.W.N. 558 = A.I.R. 1921 Mad. 406.

—S. 2 (2)—Decree—What is—Abatement.

———Suit abating against one of the defendants—Application for setting aside abatement—Court dismissing application for setting aside abatement and holding that consequently suit abated *in toto* in special circumstances of the case—Former adjudication is appealable under O. 43, R. 1 (*k*) and later adjudication is appealable as a decree. (*Shadi Lal, C.J., and Campbell, J.*) RAGHBIR SARAN *v.* MT. SOHAN DEVI.

26 P.L.R. 32 = 86 I.C. 104 = A.I.R. 1925 Lah. 453.

—S. 2 (2)—Decree—What is—Accounts.

———Order defining mode and period of taking accounts is a decree. (*Mookerji and Rankin, JJ.*) (RAJA) PEARY MOHAN MOOKERJEE *v.* MANOHAR MUKERJEE. **38 C.L.J. 255 = 74 I.C. 373 = 27 C.W.N. 939 = A.I.R. 1924 Cal. 160.**

—S. 2 (2)—Decree—What is—Order refusing adjournment.

———A suit can be dismissed under O. 17, R. 3, only when time has been expressly granted for a specific purpose and the party to whom time has been so granted has failed to do what was necessary for that purpose. Where appellant prayed for adjournment on the ground of his illness but the Court refused and the next day passed orders refusing adjournment and dismissing suit.

Held that the order is a decree and is appealable as such. (*Heald and Cunliffe, JJ.*) MA CHON *v.* MAUNG MYINT. **5 Rang. 838 = 6 Bur. L.J. 77 = 101 I.C. 618 = A.I.R. 1927 Rang. 148.**

—S. 2 (2)—Decree—What is—Adjustment.

Application to record adjustment of a decree—Order of refusal is a decree (*Campbell, J.*) RULATE DIN *v.* HAZURIMAL. **26 P.L.R. 237 = 105 I.C. 724 = A.I.R. 1927 Lah. 809.**

—S. 2 (2)—Decree—What is—Court-fee.

———Appeal—Order rejecting memorandum of appeal for deficient Court fee is appealable. (*Drake Brockman, J.C.*) GAHBA *v.* KANCHHEDILAL. **18 N.L.R. 15 = 67 I.C. 225 = A.I.R. 1922 Nag. 62.**

———Appeal—Rejection for failure to pay deficit court-fee is a decree and not dismissal for default. (*Dawson Miller, C.J. and Coutts, J.*) SURAJ PAL PANDEY *v.* UTTEM PANDEY. **3 Pat. L.T. 117 = 63 I.C. 99 = 1921 P.H.C.C. 337 = 6 P.L.J. 625 = A.I.R. 1922 Pat. 281.**

———Order rejecting plaint for non-payment of extra Court-fee is decree—Appeal therefrom must be stamped *ad valorem.* (*Shadi Lal, C. J. and Wilberforce, J.*) SHAHAHU *v.* BAKRI. **3 Lah.L.J. 237 = 67 I.C. 901 = A.I.R. 1921 Lah. 43.**

—S. 2 (2)—Decree—What is—Dismissal under O. 41, R. 11.

———The expression of opinion dismissing the appeal is a judgment, although as a matter of practice such judgments are not pronounced in the form prescribed under O. 41, R. 31, and so the dismissal of an appeal under O. 41, R. 11, by the High Court is a decree within the definition of a decree in S. 2 (2). 24 Cal. 759; 22 Mad. 293; 30 All. 290 and 21 C.W.N. 430, Foll. (*B.B. Ghose, J.*) ALTAP' ALI *v.* JAMSUR ALI

30 C.W.N. 334 = 93 I.C. 909 = A.I.R. 1926 Cal. 638.

—S. 2 (2)—Decree—What is—Execution proceedings.

———(Per *Kennedy, J. C.*)—Appeal in execution matter—Appellate Court's order quashing plaintiff's decree and remanding case for fresh decree—Appellate Court's order is "decree" and appealable.

Contra—Per Madgavkar, A.J.C. (*Kennedy, J.C. and Madgavkar, A.J.C.*) SANGAT MAL LILARAM *v.* JAN MAHMED GULAM KHAN. **16 S.L.R. 260 = 79 I. C. 553 = A.I.R. 1921 Sind 102.**

—S. 2 (2)—Decree—What is—Land Acquisition Act.

———Decision in reference under S. 30 being one on rights of contending patries, is a decree within S. 2 (2), and is appealable under S. 96. B.L.R. Sup. Vol. 985, Rel. on. (*Devadoss and Jackson, JJ.*) MAHALINGA KUDUMBAN *v.* THEETHARAPPA MUDALIAR.

29 M.L.W. 237 = 115 I.C. 345 = 1929 M.W.N. 62 = A.I.R. 1929 Mad. 223 = 56 M.L.J. 387.

—S. 2 (2)—Decree—What is—Legal representative.

———If an order rejecting the claim of a person to be the legal representative of a deceased plaintiff is to have the character of a decree it must conclusively determine the right of the parties in the suit. (*Jackson, J.*) RUKMANI AMMAL *v.* VEERASWAMY AIYANGAR.

35 M.L.T. 82 = 80 I.C. 942 = 1924 M.W.N. 763 = A.I.R. 1924 Mad. 813 = 47 M.L.J. 370.

—S. 2 (2)—Decree—What is—Mesne profits.

———An order directing the decree-holder purchaser to pay mesne profits by way of restitution consequent upon setting aside of the sale is appealable even though the amount has not been worked out. It determines the rights of the parties finally with regard to matter in question and so it falls within the definition of decree under S. 2 of the Code. 15 Bom. 125 and 17 All. 112, Rel. on. 15 C. L. J. 187, Dist. (*B. B. Ghose and Bose, JJ.*) SARAT CHANDRA RAKSHIT *v.* SUBASHINI DEVI. **56 Cal. 550 = 120 I. C. 807 = A. I. R. 1930 Cal. 89.**

———In so far as the Court declines to ascertain the mesne profits and holds that the plaintiff's claim is beyond time under Art. 181 it is the formal expression of an adjudication conclusively determining the rights of the parties with regard to a matter in controversy in the suit within the meaning of S. 2, Cl. (2), C. P. Code. In such a case the decision of the lower Court operates as a decision and, therefore, a second appeal lies. (*Patkar and Baker, JJ.*) SHANKAR APPAJI *v.* GANGARAM BAPUJI. **52 Bom. 360 = 109 I. C 734 = 30 Bom. L. R. 503 = A. I. R. 1928 Bom. 236.**

———An order limiting the right of the decree-holder to recover mesne pofits for a certain period is of the nature of a final decree as defined in S. 2 and is appealable as such. 23 All. 152 (P. C.), Foll. (*B. B. Ghose and Bose, JJ.*) KHATEMANNESSA BIBI *v.* UPENDRACHANDRA. **115 I. C. 591 = A. I. R. 1928 Cal. 804.**

———An order declaring the defendants not liable for mesne profits, amounts to a decree and is therefore appealable. (*Newbould, J.*) NAIMUDDIN SARKAR *v.* IMANI MONDAL. **67 I.C. 93 = A.I.R. 1923 Cal. 308.**

—S. 2 (2)—Decree—What is.

———*Amended decree as the final one.*

The decree which can be called the final decree is the one which finally settles all disputed questions between the parties. And if a decree is modified in review, to whatever extent it may be, the modified decree is the decree which must be considered as the final decree in the case. (*Suhrawardy and Costello, JJ.*) ADITYA KUMAR *v.* ABINASH CHANDRA. **34 C. W. N. 1002.**

—S. 2 (2)—Decree—What is—Mortgage suit.

———Where in a suit by mortgagee for a final decree debarring the mortgagor from redeeming the mortgaged land the Court merely refuses to pass a final decree in terms of the preliminary decree but leaves it open to the mortgagee to file another application under O. 34, R. 8 (2), C. P. Code, for a final decree in some other form according to law, it is doubtful whether the order is a final order against which an appeal can lie. 42 Mad. 52, Dist. (*Tekchand and Bhide, JJ.*) ATMA RAM *v.* SURJAN. **10 L. L. J. 198 = 110 I. C. 81 = A. I. R. 1928 Lah. 355.**

—S. 2 (2)—Decree—What is—Order finally determining rights.

———If a decision really determines the rights of the parties fully and finally, it is in the eye of the law a decree and as such appealable even though the Court giving the decision has not formally embodied its result in the form of a decree. 20 C. L. J. 476 and A. I. R. 1923 Cal. 308, Foll. A. I. R. 1921 Nag. 108, Rel. on. 37 Bom. 480 ; 38 Bom. 331, Not Foll. (*Subhedar, A. J. C.*) PUNJAJI *v.* JAIRAM. **26 N. L. R. 24 = A. I. R. 1930 Nag. 122.**

—S. 2 (2)—Decree—What is—Revenue decree.

———"Decree" includes Revenue Court decree. (*Sulaiman and Mukerji, JJ.*) FATEH LAL *v.* SHER SINGH. **6 L. R. A. Civ. 63 = 85 I. C. 660 = A. I. R. 1925 All. 264.**

—S. (2) 2—Decree—What is—Revenue Officer's Order.

———It was competent to the Collector or other Revenue Officer to institute the enquiries specified in Regn. 2 of 1819 and Regn. 9 of 1825, and to follow the procedure laid therein and he was to record in a robokari his judgment as to the liability of the lands to assessment or otherwise in manner directed by S. 20, Regn. 2 of 1819 and such decision has the force and effect of a decree. (*Rankin, C. J. and C. C. Ghose, J.*) TARAKESHWAR *v.* SATISH KANTA. **51 C. L. J. 297 = A. I. R. 1930 Cal. 411.**

—S. 2 (2)—Decree—What is—Review.

———The effect of allowing an application for review is to vacate the decree originally passed. The decree that is subsequently made on the review, even if it does not modify the decree originally passed, is a new decree superseding the original one and therefore no appeal can lie from the decree originally passed. 28 All. 240 ; 34 All. 282 ; 44 Cal. 1011 ; and 140 P. R. 1919, Rel. on. (*Mukerji, J.*) NIBARAN CHANDRA *v.* ABDUL HAKIM. **107 I. C. 751 = A.I. R. 1928 Cal. 418.**

—S. 2 (2)—Decree—What is—Stay of execution.

———The order for staying execution of a decree till the decision of the appeal clearly falls under S. 2 (2) read with S. 47 and is appealable as a decree. The order finally and conclusively determines the question concerning the very important right of the decree-holder to reap forthwith the fruits of the decree and arising between parties to the suit and relating to the execution of the decree. 7 All. 73 ; 7 Cal. 733 ; 8 Cal. 477 ; 12 Cal. 624 ; 13 Cal. 111 ; 12 Bom. 30 ; 39 Mad. 541 and 14 C. L. J. 489 ; Ref. A. I. R. 1922 Lah. 480 ; A. I. R. 1923 Lah. 514 ; A. I. R. 1924 Lah. 631 ; A. I. R. 1925 Lah. 69 ; A. I. R. 1924 Lah. 602 and A. I. R. 1927 Lah. 915, Rel. on. A. I. R. 1921 Bom. 203, Diss from. ; A. I. R. 1924 All. 808 ; 41 Cal. 160 ; 55 I. C. 228. A. I. R. 1922 Lah. 400 and A. I. R. 1927 Lah. 852, Expl. (*Tekchand and Johnstone, JJ.*) DURGA DEVI *v.* HANS RAJ. **A.I.R. 1930 Lah. 187.**

—S. 2 (2)—Decree—What is—Trust—Scheme of Management for wakf.

———An order of the Court appointing a committee to draw up a scheme of management with regard to a wakf is a decree within the meaning of S. 2 (2) and is therefore appealable. (*Zafar Ali and Jai Lal, JJ.*) MUHAMMAD SHAFI *v.* MD. ABDUL RAHIM. **31 P.L.R. 220 = 121 I.C. 74 = A.I.R. 1930 Lah. 476.**

S. 2 (2)—Decree, what is—Trust.

———*Scheme of election of trustees framed by Court—Court reserving right to confirm them—Application for confirmation made and opposed—Order thereon is a decree and hence appealable.*

Where the Court reserves to itself the right to confirm elections held under a scheme framed by it and where application for confirmation is made by parties on one side in the suit and is opposed by parties on the other side, the order which the Court makes is not really an order in execution but is a decree in the suit itself and is, therefore, appealable as a decree under the Code. A. I. R. 1923 Mad. 284 ; 43 I. C. 772 ; and A. I. R. 1924 Cal. 330, Ref. ; 11 Mad. 26 (P. C.) ; 36 Bom. 47 ; 40 Bom. 509 ; *National Telephone Co.* v. *Postmaster-General*, (1913) A. C. 546 ; A. I. R. 1917 P. C. 71 ; A. I. R. 1924 Mad. 561 ; A. I. R. 1926 Rang. 25 (F. B.) ; A. I. R. 1927 Mad. 93 ; 7 Bur. L. T. 298 ; 24 Bom. 45 ; and 28 Mad. 319, Dist. (*Heald and Mya Bu, JJ.*) U BA PE *v.* U PO SEIN. **6 Rang. 97 = 110 I. C. 41 = A. I. R. 1928 Rang. 168.**

—S. 2 (2)—Decree, what is not.

———Order refusing to stay execution is not decree. (*Sulaiman, Ag. C. J. and Kendall, J.*) INAYAT BEG *v.* UMRAO BEG. **122 I.C. 182 = A.I.R. 1930 All. 121.**

———*Ex parte* order granting leave to apply for execution does not have the force of decree. (*Sulaiman and Sen, JJ.*) ATHERTON & CO. *v.* HABIB BAKSH. **1929 A. L. J. 553 = 115 I. C. 865 = A. I. R. 1929 All. 390.**

———*Decision under Chap. 7 of the Presidency Small Cause Courts Act.*

Proceedings instituted under Chap. 7 are not suits within the meaning of the C. P. Code. The decision of the Court based on such proceedings cannot be said to be a decree under S. 2 (2), C. P. Code ; 17 Mad. 216 ; 43 M. L. J. 288 ; and 25 L. W. 115 ; Foll.; 31 Bom. 259 ; 45 Bom. 972 ; and 57 Bom. 885, Ref.; 45 Mad. 320 (P. C.), Dist. (*Coutts-Trotter, C. J. and Ananthakrishna Aiyar, J.*) HYDER ALI SAHIB *v.* AMIRUDIN SAHIB. **1929 M. W. N. 174 = 115 I. C. 504 = 29 M. L. W. 537 = A. I. R. 1929 Mad. 69 = 56 M. L. J. 199.**

———Order striking off objection of judgment-debtor for default is not appealable (*obiter*)—Remedy is S. 151 or O. 47. (*Sulaiman, Ag. C. J. and Bennet, J.*) SUMERCHAND *v.* BENI PRASAD. **26 A. L. J. 1395 = 112 I. C. 380 = A. I. R. 1929 All. 123.**

———*Suit dismissed against some defendants on account of non-representation—Plaintiff not responsible for non-representation.*

The dismissal of a suit against some defendants on account of non-representation for which plaintiffs are not to blame is not a decree within the meaning of S. 2 (2). As regards these defendants there is no adjudication, far less any expression of an adjudication determining the rights of the parties with regard to any of the matters in the suit. (*Mukerji and Mallik, JJ.*) MAKSHUD MANDAL *v.* KHEDU MONDAL. **33 C. W. N. 742 = A. I. R. 1929 Cal. 669.**

———Preliminary decree for taking accounts and dissolution of partnership—Court finding account books to be in possession of particular partner and making order that accounts should be taken up to certain date—Such a finding is only a finding of fact and is not decree and therefore not appealable. A. I. R. 1924 Cal. 160, Dist. and Doubted; other case-law Ref. (*Zafar Ali and Jai Lal, JJ.*) BABU LAL *v.* HARI BAKSH. **120 I. C. 429 = A. I. R. 1929 Lah. 699.**

———An order for security to stay execution is not an order determining any rights of the parties. It is neither an order under S. 47, nor is it a "decree" within the meaning of S. 2 (2). It is therefore, not appealable: 41 Cal. 160, Foll. (*Zafar Ali, J.*) CHARANJI LAL *v.* RAJA RAM. **106 I. C. 890 (Lah.).**

———*Withdrawal—C.P. Code, O. 23, R. 1.*

An order permitting the withdrawal of a suit or appeal is not a decree within the meaning of the C. P. Code: 15 Bom. 370; 18 Cal. 322 and 27 Cal. 362, Ref. (*Kumaraswami Sastri and Wallace, JJ.*) KULANDAI *v.* INDRAM RAMASWAMI. **51 Mad. 664 = 27 M. L. W. 286 = 108 I. C. 539 = A. I. R. 1928 Mad. 416 = 55 M. L.J. 345.**

———*Directions to Official Commissioner.*

Directions given to an Official Commissioner appointed to determine certain matters in a partnership suit by a preliminary decree to allow credit to one of the parties in respect of partnership goods is not a decree and so no appeal lies therefrom: 39 Bom. 339; 35 All. 159; A.I.R. 1921 Oudh 224; 20 C.L.J. 476; and 24 Cal. 725 (F.B.), Foll. (*Percival, J. C., and Aston, A. J. C.*) UDHAVDAS *v.* DEVI DAS. **23 S.L. R. 87 = 107 I. C. 214 = A. I. R. 1928 Sind 100.**

———*Appellate Court framing additional issue and remanding the case reversing the decree, instead of calling for a finding retaining the case on its file—Order of remand is not appealable either under O. 43, R. 1 (u) or under S. 100, as it is not a decree.*

Whether an order of remand is appealable or not should depend on whether the conditions laid down by O. 41, R. 23, have been complied with and not on whether appellate Court purported or did not purport to make the order under R. 23. (*Page and Graham, JJ.*) BANKA BEHARI DEB *v.* BIRENDRA NATH DUTTA. **47 C. L. J. 69 = 103 I. C. 864 = 55 Cal. 219 = A. I R. 1927 Cal. 850.**

———*O. 41, R. 23—Remand under inherent power.*

Rule 23 operates only when one of the preliminary issues is tried by the Court of first instance and it disposes of the suit on that ground and says that it is not going to try the suit on any other issue. Where the trial Court tries all the issues, but the lower appellate Court frames some more and remands the case for decision thereon, the remand is not under R. 23, but one in the exercise of the inherent power of the Court. The order is not appealable as an order, nor is it a decree within S. 2. (*Das and Adami, JJ.*) CHANDRIKA PRASAD SINGH *v.* MITHU RAI. **6 Pat. 380 = 103 I. C. 722 = A. I. R 1927 Pat. 296**

———*Order under O. 1, r. 10 (2).*

An order under O. 1, r. 10 (2) discharging a defendant from a suit cannot be regarded as falling within the definition of a "decree" in S. 2 (2) and as such is not an appealable order; 42 Mad. 219, Diss. The mere drawing up a formal decree does not *ipso facto* make the corresponding order an appealable one, if it does not, in itself, really fall within the definition of a decree; 17 N.L.R. 66, Foll. (*Findlay, O.J.C.*) SHANKAR RAO *v.* RAGHUNATH RAO. **89 I. C. 331 = A. I R. 1926 Nag. 75.**

———*Not a decree and so not appealable.*

Whenever any Court delivers a decision in default of the plaintiff that decision will be an order and not a decree and will not be appealable. (*Dalal, J. C. and Wazir Hasan, A.J.C.*) MAHAMMAD ZAKA ULLAH *v.* MT. GULKANDI. **28 O. C. 124 = 85 I. C 393 = A. I. R. 1925 Oudh 485.**

———*Dismissal for default.*

Per *Mukerji, J.—Obiter.* The whole object of defining a "decree" in the Code appears to be to classify orders in order to determine whether an appeal or in certain cases a second appeal lies therefrom. Apart from that object this definition is of no value. It is not possible to reconcile either in principle or in theory why an order rejecting a plaint should stand on a different footing from orders of dismissal for default and yet one is a decree and the other is not. It is true that an order of rejection of a plaint has been expressly included in the definition of "decree" but the legislature has included it and no analogy can be drawn therefrom. The question whether an adjudication is an order or decree is to be tested not by general principles but by the expressions of the Code and those words are to be construed in their plain and obvious sense; only such orders of dismissal for default as are treated as such by the Code itself are excluded from the definition. 23 All. 152 P.C., Ref. (*Walmsley and M. N. Mukerji, JJ.*) KALIMUDDIN AHAMED *v.* ESABUDDIN. **51 Cal. 715 = 83 I. C. 220 = 28 C. W. N. 795 = 39 C. L. J. 399 = A. I. R. 1924 Cal. 830.**

———Order simply referring to Official Referee to take accounts without datermining any matter in controversy is not a Decree-Letters Patent (Madras), cl. 15. (*Kumaraswami Sastri, J.*) ABDUL WAHAB *v.* M ROKIA BIBI SAHIBA. **73 I. C. 903 = A. I. R. 1924 Mad. 406.**

———An Order striking out names of parties under

O. 1, R. 10 is not a decree and so not appealable. (*Oldfield and Ramesam, JJ.*) SHANMUKHA NADAN *v.* ARUNACHALA CHETTY. **45 Mad. 194 = 69 I. C. 961 = 30 M. L. T. 172 = 14 M. L. W. 642 = 1921 M. W. N. 799 = A. I. R. 1922 Mad. 332 = 42 M. L. J 97.**

———An order granting permission to a plaintiff to withdraw a suit under O. 23, R. 1, is not a decree and is, therefore, not appealable. (*Abdul Raoof and Martineau, JJ.*) SANT RAM *v.* MT. SAHIB KAUR. **65 I. C. 719 = A. I. R. 1922 Lah. 267.**

———*"Rubkari"*.

An order granting an application to set aside an *exparte*-decree "with costs" was made on 27th February, 1915. On the 8th March, 1915 a document, described as a "rubkari" was drawn up fixing the amount of the costs payable on 6th March, 1918. The applicant applied in execution for realisation of his costs but his application was dismissed as time barred, the Court holding that the rubkari was a decree, and that limitation began to run on 27th February, 1915.

Held, that the rubkari was not a decree under S. 2 (2), C.P. Code but was an order within S. 2 (4) of the Code which completed and rendered the order of 27th February 1915 capable of execution. Limitation commenced to run from 8—3—1815 and therefore, the application for execution was within time. (*Teunon and Beachcroft, JJ.*) NOOKOOR CHANDRA MULLICK *v.* RAJANIKANTA GHOSE. **59 I. C. 51 (1) (Cal)**

———A finding, unless it operates in the eye of the law as a decree, will not be a decree merely because the Judge chooses to make use of a printed form entirely inapplicable to that finding. Conversely, the absence of a formal decree will not make an adjudication any the less a decree, if in point of law the adjudication operates as a decree. (*Mittra, O. A. J. C.*) PANDURANG *v.* GAYABAI. **17 N. L. R. 66 = 62 I. C. 467 = A. I. R. 1921 Nag 108.**

———*Order rejecting application under S. 73, C. P. Code, Ss., 2 (2) and 73.*

An order under S. 73 is not an order under S. 47 inasmuch as the question which arises is not one between the parties to the suit and the order rejecting the application under S. 73 does not otherwise come within the definition of decree in S. 2, because it does not conclusively determine the rights of the parties. It would also be unduly extending the meaning of the word "suit" in that section, to make it include an application under S. 73, 42 Cal. 1. Foll. (*Coutts and Adami, JJ.*) MST. HURMOOZI BEGUM v. MST. AYASHA. **1921 P. H. C. C. 204 = A. I. R. 1921 Pat. 401 (b).**

—S. 2 (2)—Order in execution.

———The order to have the force of a decree must not only relate to a question which falls within S. 47, but it must also determine the rights of the parties with regard to any matter in controversy between them as regards the decree. Hence an order passed under O. 21, R. 22, for arrest, not being a final order, is not a decree which can be appealed against. 14 C. L. J. 489, Foll. (*Thiruvenkatachariar, J.*) SOMU AYYAR *v.* CHELLIAH PILLAI. **30 M. L. W. 230 = 119 I. C. 43 = 1929 M. W. N. 74 = A. I. R. 1929 Mad. 718.**

———In order to be appealable, an order under S. 47 must be of such a nature as to come within the word "decree" as defined by S. 2 (2). (*Iqbal Ahmad, J.*) ALIMUDDIN *v.* GOBIND PRASAD. **99 I. C. 455 = A. I. R. 1927 All. 208.**

———No appeal lies from an order accepting security concerning sufficiency thereof. 41 Cal. 160, Foll. (*Dulip Singh, J.*) CHATTAR SINGH *v.* M. HARI DATT-LAKHMI DATT. **106 I. C. 866.**

———An order passed in execution cannot be appealable merely because it fulfils the conditions laid down in S. 47. In order to be appealable it must fall within the definition of decree in S. 2 (2). (*Sulaiman, J.*) HIRALAL *v.* TIKAM SINGH. **94 I. C. 1 = A. I. R. 1926 All. 401.**

———*Auction purchaser.*

A *bona fide* auction-purchaser for value is not a party to the suit within the meaning of section 2 or S. 47 of the C. P. Code and an order refusing restitution against him is not a decree and therefore not appealable. (*Motisagar, J.*) MT. ASGHARI BEGUM *v.* IRSHAD-UD-DIN. **79 I.C. 57 = A.I.R. 1925 Lah. 176.**

———Order granting stay of execution is not appealable as decree under S. 47. (*Daniels and Boys, JJ.*) HUSAIN BHAI *v.* Y. BELTU SHAH GILAM. **46 All. 733 = 83 I. C. 1035 = 22 A. L. J. 706 = 5 L.R.A. Civ. 482 = A. I. R. 1924 All. 808.**

———*Question if execution is time-barred is under S. 47 and its decision is "decree" and is appealable.*

The question whether or not an execution was time barred is a question within S. 47 arising between the parties and relating to the execution of the decree and therefore its decision is a decree as defined in S. 2. (*Dawson Miller, C. J. and Foster, J.*) SHIVA NARAYAN LAL *v.* NARAYAN PRASAD. **2 Pat. L. R. 222 = 84 I. C. 576 = A. I. R. 1924 Pat. 683.**

———Every order made in proceedings under S. 47 is not necessarily appealable. (*Dawson Miller, C. J. and Foster, J.*) SHIVA NARAYAN LAL *v.* NARAYAN PRASAD. **2 Pat. L. R. 222 = 84 I. C. 576 = A. I. R. 1924 Pat. 683.**

———Order in proceedings under S. 47 is decree only if it determines a question which parties ask court to decide as to their rights or liabilities and not if it decides merely incidental questions of procedure. The duty of the Court to decide any of the questions that may arise does not come into existence till the parties are brought before the Court or after having been served they fail to appear. (*Dawson Miller, C.J. and Foster, J.*) SHIVA NARAYAN LAL CHOUDHARY *v.* NARAYAN PRASAD. **2 Pat. L. R. 222 = 84 I. C. 576 = A. I. R. 1924 Pat. 683.**

———Admission of execution application—Order is appealable. (*Coutts and Ross, JJ.*) RAM BHAGHWAN PRASAD SINGH *v.* NATHO RAM. **3 Pat L. T. 146 = 70 I. C. 483 = A. I. R. 1922 Pat. 59.**

———*Order under O. 21, R. 66.*

An order under O. 21, R. 66 is not a decree within S. 2 (2) and is not therefore appealable. (*Jwala Prasad and Adami, JJ.*) BRAJA SUNDER DEB *v.* SIVARANJAN DEI. **59 I. C. 282 = 1 Pat. L. T. 647.**

—S. 2 (2)—Miscellaneous.

———*Suit for damages—Agreement by parties to determine damages themselves—Judgment before ascertaining damages—Case is not finally and completely disposed of—Appeal against decree is premature.*

In a suit for damages parties agreed to calculate the damages themselves but before they determined them, a judgment was passed without the amount of damages being ascertained. The defendants filed an appeal.

Held, that the appeal was premature as the suit had not been finally and completely disposed of by the Court below and consequently there was no decree against which an appeal could be filed. (*Fforde and Agha Haidar, JJ.*) BEGG SUTHERLAND AND CO. *v.* BAHADUR CHAND. **110 I. C. 177 =**

C. P. CODE (1908), S. 2 (2)—Miscellaneous.

A. I. R. 1928 Lah. 841.

———" *Matters in controversy* ".

Wazir Hasan, J.—" Matters in controversy in the suit" are not merely matters which arise on the face of the plaint as at first presented ; they may include matters which are of vital importance between the parties, but which may come to arise, and in respect of which the parties may be at controversy, at a subsequent stage of a suit. (*Stuart, C. J. Wazir Hasan and Gokaran Nath Misra, JJ.*) RAMPAL SINGH *v.* ABDUL HAMID. **5 O. W. N. 633 = 3 Luck. 628 = 110 I. C. 826 = A. I. R. 1928 Oudh 362 (F.B.).**

———*Decree validly passed-event subsequent to decree.*

When a decree is validly passed, the appellate Court will not set it aside merely on the ground that an event happens subsequent to such decree which, happening before its passing, would have led to the dismissal of the suit. (*Shadi Lal, C. J. and Agha Haider, J.*) MT. NANDAN *v.* WAZIFA. **8 Lah. 215 = 100 I. C. 84 = 28 P. L. R. 341 = A. I. R. 1927 Lah. 198.**

———*Final order.*

If all the data for the ascertainment of liability of each tenant to his landlord can be found on the face of an order of Court, that order can be regarded as a final order although the actual liability of each such tenant may not have been worked out in detail. (*Das and Adami, JJ.*) GOPAL SARAN NARAYAN SINGH *v.* DEONANDAN MAHTON. **8 P. L. T. 141 = 102 I. C. 106 = A. I. R. 1927 Pat. 171.**

———*'Order of dismissal for default'.*

The expression "order of dismissal for default" refers not only to dismissal of suit for default but also to an order of the execution Court dismissing an objection for default. (*Sulaiman, J.*) HIRALAL *v.* TIKAM SINGH. **94 I. C. 1 = A. I. R. 1926 All. 401.**

———*No appeal—Expiry of time for appeal makes decree final.*

Where there is a decree but there is no appeal, the decree becomes final on the date on which time for filing an appeal expires. (1908) A.W.N. 13, Ref. to. (*Mukerji, J.*) FAZAL HUSAIN *v.* FAZALUDDIN. **47 All. 533 = 23 A. L. J. 215 = 86 I. C. 957 = A. I. R. 1925 All. 291.**

———*Decree against legal representative.*

Decree passed against a legal representative is not a personal decree and consequently only the property of the deceased and not the property of the judgment-debtor, is to be proceeded against in execution of the decree. (*Wazir Hasan, J. C.*) KUNWAR JUNG BAHADUR *v.* LALAGUR PRASAD. **27 O. C. 238 = 11 O. L. J. 554 = 80 I. C. 600 = A. I. R. 1925 Oudh 113.**

———*Preliminary decree—Scope of.*

In a partition suit, what the plaintiffs are required to do is to plead their title to and possession of and share in the property that is to be partitioned. It is not necessary for the plaintiffs to plead that particular lands purchased by the defendants at a sale in execution were liable to partition because that is a matter to be determined at the time of final decree. (*Ross and Kulwant Sahay, JJ.*) LACHMI NARAYAN *v.* RAMSARAN TEWARI. **6 P. L. T. 152 = 86 I.C. 785 = A. I. R 1925 Pat. 433.**

———*Suit cannot be dismissed after preliminary decree.*

The Court has no jurisdiction to dismiss the suit after a preliminary decree has been passed in a partition suit merely because there has been delay in producing the commissioner's fee. (*Ross and Kulwant Sahay, JJ.*) LACHMI NARAYAN *v.* RAMSARAN TEWARI.

C. P. CODE (1908), S. 2 (11)—Auction purchaser.

6 P. L. T. 152 = 86 I. C. 785 = A. I. R. 1925 Pat. 433.

———A preliminary decree must define the rights of the parties, though it does not necessarily lead to a final and complete disposal of the case. (*Mittra, Offg. A.J.C.*) PANDURANG *v.* GAYABAI. **17 N. L. R. 66 = 62 I. C. 467 = A. I. R. 1921 Nag. 108.**

—S. 2 (3)—Attaching creditor.

———Decree holder does not include an attaching creditor. (*Mukerji, J.*) RAM BADAN SINGH *v.* RAM PRASAD. **5 L. R. A. Civ. 629 = 80 I.C. 947 = A. I. R. 1925 All. 123.**

—S. 2 (3)—Decree-holder not the plaintiff.

———It is not necessary that a decree-holder in a decree for the sale of immoveable property should necessarily have been the plaintiff in the case. A sub-mortgagee and a puisne or a prior mortgagee sometimes become decree-holder as against the judgment-debtor in suits brought for foreclosure or sale of mortgaged property or for redemption thereof, as on the happening of certain contingencies, they acquire the right to have the property sold to discharge the amount declared to be due to them. (*Jai Lal, J.*) MATHURA DAS *v.* BRIJ RANI. **116 I. C. 212 = A. I. R. 1929 Lah. 492.**

———Where the plaintiff got a decree for specific performance of an agreement to sell immoveable property against defendant but did not want to execute the decree, *held* that the defendants were also 'decree-holders' within S. 2 (3) of the Code and as such could take out execution of the plaintiff. (*Macleod, C. J. and Coyajee, J.*) BAI KARIMABIBI *v.* ABDEREHMAN SAYAD BANU. **46 Bom. 990 = 24 Bom. L.R. 496 = 67 I. C. 667 = A. I. R. 1923 Bom. 26.**

—S. 2 (4)—High Court original side.

———Though the word "District" in the C.P. Code, does include the local limits of a High Court in its ordinary original civil jurisdiction, still it is not legitimate to construe the words " District Court " wherever they appear to mean and include a High Court in its ordinary original civil jurisdiction. 12 C. W. N. 446, Diss. from. (*Rankin, C. J. and C. C. Ghose, J.*) HYOD MAHOMED *v.* SHAIKH MANNU. **45 C. L. J. 71 = 100 I. C. 331 = A. I. R. 1927 Cal. 290.**

—S. 2 (5)—Definition inapplicable to Provincial Insolvency Act.

———The definition of the term "foreign Court" as contained in the Code is not applicable to all other enactments. In Provincial Insolvency Act, there is nothing as regards the definition of the term and though for the purpose of sending processes or of execution, provision is made in the Code, it is only for those purposes alone. 36 Cal. 233, Rel. on. (*Kumaraswami Sastri, J.*) VENKANNA *v.* CHENNAYYA. **30 M. L. W. 531 = A. I. R 1929 Mad. 900 = 57 M. L. J. 393.**

—S. 2 (9)—Shorthand notes.

———The shorthand notes dictated by, but never approved by, the Judge, cannot be considered as part of his actual judgment. (*Marten, C. J. and Kemp, J.*) MATHERAN STEAM LIGHT TRAMWAY *v.* B.N. LANG. **51 Bom. 267 = 100 I. C. 941 = 29 Bom. L. R. 126 = A. I. R. 1927 Bom. 113.**

—S. 2 (11)—Auction purchaser.

———The auction-purchaser in execution of a decree for sale on a mortgage of an under-proprietary tenure cannot be called the legal representative of the original under-proprietor because the term legal representative only denotes the class of persons on whom the status of a representative is fastened by reason of the death of a person whose estate they are held to represent. Further such an auction-purchaser cannot be called the representative of the original under-proprietor in respect of a liability arising subsequent to the mortgage on which the decree for sale is founded and in execution of which decree he becomes the purchaser, though he is certainly a representative of the under-proprietor *qua* the rights and liabilities which stood on the date of the mortgage. 9 O. C. 185, Ref. ; 12 O. C. 45, Rel. on. (*Wazir Hasan and Raza, JJ.*) BISHESHAR DAYAL *v.* BAJRANG BAHADUR. **6 O. W. N. 469 = 117 I. C. 452 = A. I. R. 1929 Oudh 353.**

—S. 2 (11)—Choice between Rival claimants.

———Where there are two rival claimants to the estate of the deceased it is open to the plaintiff or decree-holder to choose as the legal representative, the one who in the circumstances as they then exist appears to have the *prima facie* title. (*Wallace and Thiruvenkata Chariar, JJ.*) SANNA GOVAPPA *v.* SANNA GOVAPPA. **30 M. L. W. 778 = 120 I. C. 65 = A. I. R. 1929 Mad. 482.**

—S. 2 (11)—Death of member of joint Hindu family.

———When a member of a Hindu joint family, who has been sued on a pro-note, dies, and it is contended that his brothers can be impleaded as legal representatives, it must be shown *prima facie* that the deceased has an estate before the first definition in S. 2 (11), can be applied. (*Jackson, J.*) RENGATHAMMAL *v.* VENKATACHARIAR. **A. I. R. 1930 Mad. 575.**

—S. 2 (11)—Decree against one representative.

———*Ostensible sole heir brought on record—Decree binds whole estate.*

When a Court has issued notice to a person supposed to be the only legal representative of a deceased defendant or judgment-debtor and held that service is sufficient, the decree passed and the execution thereof will be considered sufficient to cover the entire estate including the shares of those heirs of the deceased defendant or judgment-debtor who were not brought on the record and who had not received notice. Rights of party complaining of non-representation indicated. (*Dalal, J. C. and Ashworth, A. J. C.*) MT. KANIZ ABBAS *v.* LALA BALA DIN. **12 O. L. J. 37 = 87 I. C. 892 = 2 O. W. N. 34 = 28 O. C. 177 = A. I. R. 1925 Oudh 330.**

—S. 2 (11)—Decree against person in possession.

———Where a decree is passed for a debt due by a deceased debtor in a suit brought against a person in possession, but who is not the heir of the deceased debtor's estate, the decree and the proceedings in execution of such decree bind the interest of the real heir. 38 M. L. J. 106. Foll. A decision obtained on contest on the merits against the holder of a property, who is subsequently found to be a trespasser, does, in the absence of anything to show that the decision was obtained through fraud or collusion, bind the rightful holder of the property.

All that is necessary in such cases is a sufficient representation of the estate through a person who has the estate under his control. (*Kinkhede, A. J. C.*) TANIABAI *v.* RANGNATH. **9 N. L. J. 183 = 96 I. C. 963 = A. I. R. 1926 Nag. 476.**

—S. 2 (11)—Decree against wrong person.

———The properties in suit belonged absolutely to the testatrix who by her will, dated 23-3-1872, appointed her sons *J* and *N* as trustees and directed them to maintian the relations of the testatrix and gave them during their life time the income from the estate after meeting all the charges. On the death of *J* and *N*, their sons were to be equally entitled to, and divide the properties with no power of sale, etc. They had power however if the income of the estate was insufficient to mortgage the estate for necessary purposes, *J* having died issueless probate of the will was granted to *N* who in 1889 mortgaged the estate for necessity. *N* died intestate in 1891 and letters of administration of the estate were granted to his daughter. The mortgagee instituted a suit on his mortgage and obtained a decree, in 1892 impleading the daughter of *N* as representing the estate. In execution of the decree the property was sold and purchased by the defendants. In a suit by the daughter's son of the testatrix *held*, that *J* and *N* having taken only a life estate in the properties of the testatrix, there was an intestacy on their death without male issue. Consequently on the death of *N* the plaintiff became the heir to the properties and decree passed against the daughter of *N* did not bind the estate in his hands. (*Teunon and Greaves, JJ.*) GURUDAS KUNDU CHOWDHURY *v.* KAMAL KUMAR DUTT. **70 I. C. 886 = 37 C. L. J. 90.**

—S. 2 (11)—Executor de son tort.

———Executor *de son tort* need not be added when there is other legal representative. (*Sanderson, C. J. and Chakravarti, J.*) SATYA RANJAN *v.* SARAT CHANDRA. **30 C. W. N. 565 = 96 I. C. 695 = A. I. R. 1926 Cal. 825.**

—S. 2 (11)—Heirs of intestate Parsi.

———Heirs of intestate Parsi who intermeddle with his estate are his legal representatives and proper parties to suit on mortgage by the deceased Parsi. (*Fawcett and Patkar, JJ.*) RATANBAI *v.* NARAYANDAS. **29 Bom. L. R. 900 = 104 I. C. 794 = 51 Bom. 771 = A. I. R. 1927 Bom. 474.**

—S. 2 (11)—Intermeddler.

———When a person intermeddles with the property of the deceased he is a legal representative of the deceased for the purposes of procedure to the extent of the property with which he has intermeddled, but there is no principle of law which makes him the representative of the deceased so far as succession to the propertyof the deceased is concerned. The definition of "legal representative" in the Code of Civil Procedure is only for the purposes of procedure in instituting and defending suits. Any definition for the purposes of adjective law cannot alter the rule of substantive law and the mere fact that an intermeddler is joined as a party to the suit for recovery of possession cannot make a decree in that suit in any way binding on the real heir who is not a party to that suit and who later on gets a decree against the intermeddler declaring his superior right. (*Gokul Prasad, J.*) LALSA RAI *v.* UDIT RAI. **75 I. C. 114 = A. I. R. 1924 All. 717.**

—S. 2 (11)—Mahant.

———A decree for removal of the defendant as mahant of a shrine on the ground of mismanagement cannot be executed against the succeeding mahant who was, on the death of the first, appointed by the Bhek, since the successor could not in any sense be treated as the legal representative of the deceased. (*Shadi Lal, C. J. and Martineau, J.*) RAM SINGH *v.* WARYAM SINGH. **5 L. L. J. 459 = 77 I. C. 585 = A. I. R. 1924 Lah. 251.**

—S. 2 (11)—Manager of Hindu family.

———Where a managing member sues and the suit refers to joint family estate, it is really a suit in a representative character for all the members of the family. When he dies, the next managing member can come in, as the legal representative. 42 B. 504, not Appr. (*Krishnan and Odgers, JJ.*) NAGAPPA NADAR *v.* KARUPPIAH NADAR. **21 M. L. W. 21 = 86 I. C. 178 = A. I. R 1925 Mad. 456.**

—S. 2 (11)—Nominee of Deceased.

———*Right to receive money after depositor's death.*

A person deposited a certain amount in a Bank and signed a nomination form prescribed by the Bank whereby he nominated a certain person to receive the amount of deposit on his death. The depositor died before withdrawing the deposit.

Held, that the nominee cannot recover the deposit if the nomination does not observe all the necessary formalities of a will. Also the nomination cannot be enforced as a contract between the Bank and the depositor as the nominee being a stranger to the contract cannot take advantage under it. Nor can the nomination be considered as a mandate as it became revoked after depositor's death. 33 M. L. J. 476, Dissented from; Re *Williams*: *Williams* v. *Ball*, (1917) 1 Chan. 1 and *Towers* v. *Hogan*, 23 L. R. Ir. 53, Rel. on; *Ashby* v. *Costin*, (1888) 21 Q. B. D. 401, Dist. (*Wallis, C. J. and Krishnan, J.*) NANA TAWKER *v.* BHAVANI BOVEE. **1921 M. W. N. 70 = 60 I. C. 239 = A. I. R. 1921 Mad. 199.**

—S. 2 (11)—No possession of assets.

———Suit against legal representatives of a deceased should not be dismissed merely on the ground that they are not in possession of any assets of the deceased. (*Wadegaonkar, A. J. C.*) SHANKARLAL *v.* GANESH SINGH. **89 I. C. 236 = A. I. R. 1926 Nag. 170.**

—S. 2 (11)—Notice as representative in execution.

———Judgment-debtor attaining majority is not entitled to fresh notice of execution proceedings as legal representative—C.P. Code, O. 21, R. 22. (*Oldfield and Devadoss, JJ.*) NAGAPPA CHETTY *v.* MUTHURAMAN CHETTY. **78 I. C. 12 = A. I. R. 1925 Mad. 158.**

—S. 2 (11)—Person in possession.

———The person in possession of the property of a deceased judgment-debtor after his death is the legal representative of the deceased according to the definition in S. 2 (11) and if he is properly substituted as the legal representative in the execution proceedings the sale passes the title which the deceased debtor had in the property to the auction purchaser. (*Ghose, J.*) KUSUM BANDHU CHAKRAVAKTY *v.* RAMDAYAL BHATTACHARJEE. **69 I. C. 179 = A. I. R. 1924 Cal. 362.**

—S. 2 (11)—Purchaser of co-parcener's share.

———*Hindu Law—Joint family—Possession of purchaser of portion of joint family property or of the interest of co-parcener in specific property is not wrongful—Co-parcener's acquiescence in such purchaser's possession disentitles him to mesne profits.*

A co-parcener can recover possession of the joint family property from an outsider but if he stands by it and allows the outsider to remain in possession he cannot demand account for the past profits though his interest in the property remains unaffected by the acquiescence. The possession of a purchaser of a particular portion of a joint family property or the purchaser of interest of one of the members of the joint family in any particular item of joint family is not wrongful possession against the other members, though the purchaser is not entitled to possession, he is not liable to account for the mesne profits. (*Macleod, C. J. and Shah, J.*) GANGABISAN JEEVANRAM MARWADI *v.* VALLABHDAS SHANKAR LAL. **48 Bom. 428 = 87 I. C. 703 = 26 Bom. L. R 464 = A. I. R. 1924 Bom. 433.**

—S. 2 (11)—Sale of equity of redemption.

———Heirs of deceased mortgagor whose equity of redemption has already been sold are not his legal representatives relating to that property but the proper representatives are the purchasers of the equity of redemption. 33 Mad. 6; 14 M. I. A. 605 and 29 M. L. J. 698, Dist. (*Phillips and Odgers, JJ.*) CHETTIVANKANDI *v.* MOZHUVAMMAL AHMAD. **95 I. C. 904 = 1926 M. W. N. 276.**

—S. 2 (11)—Scope.

———*Decree against wrong representatives—Binding nature of.*

Prima facie no person can be held bound by a decree or order to which neither he nor the person from whom he claims was a party. But when a person, who is impleaded as the legal representative of another which he is not, in a suit or in proceedings of the execution of a decree, sufficiently represents the estate the result is that a decree or order which is passed against him an assumed representative character is held to be binding on the true representative though the latter was no party to the same. The conditions necessary for making such representation effective against the true representative are that the plaintiff or decree-holder, must have acted, *bona fide*, the decree obtained must be free from fraud or collusion, and the person wrongly impleaded must have been impleaded in a representative capacity and the decree or order must have been passed against him as representing the estate of the deceased, the plaintiff must have been ignorant of facts which operate to displace the title of the supposed legal representative, and the person having the real title must not have intervened during the pendency of the suit. 31 M. L. J. 222; 32 Cal. 296 (P. C.), Dist.; 14 M. I. A. 605 (P. C.); 29 M. L. J. 698; 26 Mad. 230; 25 Bom. 337; 33 Mad. 6, Ref. (*Wallace and Thiruvenkata Chariar, JJ.*) SANNA GOVAPPA *v.* SANNA GOVAPPA. **30 M. L. W. 778 = 120 I. C. 65 = A. I. R. 1929 Mad. 482.**

———*Decree against wrong legal representative—Binding nature of.*

A suit was brought on a mortgage executed by a minor with his step-mother as his heir. The grandfather of the minor was also made a party but was subsequently struck off on his pleading that he was an unnecessary party. Subsequently, on an objection raised by certain transferees from the grandfather and the step-mother it was held that so far at least the grandfather and persons claiming under him were concerned, the decree must be deemed to have validly passed. (*Shah and Fawcett, JJ.*) CHHAGAN LAL SAKARLAL *v.* JAYARAM DEORAJ. **51 Bom. 125 = 29 Bom. L. R. 107 = 100 I. C. 956 = A. I. R. 1927 Bom. 131.**

———Where a person has been brought on the record in some capacity as a representative of the deceased, then although such a person is not impleaded as a representative in his real capacity, there is sufficient representation. (*Dawson Miller, C. J. and Foster, J.*) JAGAL PRASAD SINGH *v.* SURJOO LAL. **1926 P. H. C. C. 353 = 99 I. C. 865 = 8 P. L. T. 287 = A.I.R. 1927 Pat. 114.**

———Where the widow of a person asserted in defence to a suit that her husband had dedicated the property in dispute to religious purposes,

Held, she acted in a representative character and that on her death her husband's step-mother for whose maintenance also provision was made by his will, became her legal representative for the purposes of the suit inasmuch as all the male heirs of the deceased had refused to recognise the dedication. (*Martineau and Campbell JJ.*) MT. TEHL KUAR *v.* AMAR NATH. **17 P. W. R. 1923 = 79 I. C. 670 = A. I. R. 1925 Lah. 2.**

—S. 2 (11)—Surviving Co-parceners.

———Surviving co-parceners in a Hindu joint family are not "legal representatives". 42 Bom. 504 & Mayne's Hindu Law, 8th Edn., R. 329, Ref. (*Chevis and Scott Smith, JJ.*) DWARKA DAS *v.* KRISHNA KISHORE.
2 Lah. 114 = 61 I.C. 628 = 3 L.L J. 349 = 73 P.L.R. 1921 = A. I. R. 1921 Lah. 34.

—S. 2 (11)—Trustees

———Within S. 2 (11), trustees are not legal representatives of their predecessors-in-office. (*Phillips, J.*) THIRU MALAI PILLAI *v.* ARUNACHALA PADAYACHI.
92 I.C. 520 = A. I. R. 1926 Mad. 540.

—S. 2 (11)—Undivided Hindu father as Legal representative of his son.

Where a father and son are co-parceners and where after the son's undivided share is attached in execution of a decree against him alone, the son dies, the equity of redemption in the property in respect of which the charge is created by the attachment vests in the father and the father is the legal representative of his deceased son and the decree can be executed against him. (*Sulaiman and Daniels, JJ.*) FAQIR CHAND *v.* SANT LAL.
48 All. 4 = 23 A.L.J. 877 = 6 L. R. A. (Civ.) 511 = 89 I.C. 291 = A. I. R. 1926 All. 157.

—S. 2 (12)—Against possessory mortgagee.

As long as mortgage subststs possession of a mortgagee who is in possession under a possessory mortgage is not wrongful and therefore mesne profits cannot be ordered against him. 3 U.B.R 141, Rel. on. (*Heald, J.*) MAUNG MYA *v.* MAUNG KYA THI.
A.I. R. 1930 Rang. 152 (1).

—S. 2 (12)—Alienation by widow.

———A transfer by a Hindu widow is only voidable and until the reversioner signifies his intention to avoid it, the transferee cannot be deemed to be in wrongful possession. So, the transferee is not liable for any mesne profits or to pay any compensation for the use of the land until the transfer is repudiated. 34 Cal. 329 (P.C.), Foll. 14 C.P.L.R. 129 Dist. (*Kotwal, A.J.C.*) MT. RAIJI *v.* SHRIRAM. **69 I.C. 368 = A. I. R. 1921 Nag. 133.**

—S. 2 (12)—Arrears.

———"Mesne profits" does not exclude arrears for previous years which may be claimed and recovered at later years. (*Pullan, J.*) HARNARAIN DAS *v.* GAJRAJ SINGH. **119 I.C. 366 = A I.R. 1930 Oudh 51.**

—S. 2(12) —Basis of Calculation.

———Mesne profits should be calculated on the basis of the profits the trespasser might have made and not what the rightful owner was receiving before eviction—Joint trespassers are severally and jointly liable for whole of the profits. A trespasser is liable jointly with his lessees for the entire amount of mesne profits and not merely to the extent of the rents realized by him. (*Cuming and Page, JJ.*) PROMODE NATH ROY *v.* SECRETARY OF STATE. **53 Cal. 992 = 31 C. W. N. 112 = 99 I.C. 428 = A.I.R. 1927 Cal 182.**

———The ordinary use to which the parties would put the land is what should be taken into account in determining mesne profits. Where parties are big zamindars who would not ordinarily cultivate lands in khas, mesne profits should not be awarded on the basis of actual produce. (*Greaves and Mukerji, JJ.*) MAHARAJ BAHADUR SINGH *v.* BHUPENDRA NARAYAN SINGH.
44 C.L.J. 182 = 98 I.C. 198 = A.I.R. 1926 Cal. 1233.

———In a suit for title and possession where the land was in the occupation of tenants, mesne profits should be awarded not on the basis of the produce but on the basis of rent. (*Mukerji, J.*) MAJID MIA *v.* MUNSHI MIA. **94 I. C. 255 = A. I. R. 1926 Cal. 860.**

———The defendant in a suit for mesne profits was found to have been directly in possession during nine consecutive seasons and suffered considerable loss throughout.

Held, that in such a case he cannot be said to be dealing with due diligence, for if the lands had been let out they would have fetched some rent however low it may be. But in such case the person claiming mesne profits must produce some affirmative evidence as regards the amount for which the lands might have been reasonably let out. In the absence of such evidence it is not possible to ascertain mesne profits. The party claiming mesne profits must bear the onus of proving what profits might with diligence have been received in a year but the party in actual possession is bound to prove what profits he actually received when that question arises. Mesne profits are in the nature of compensation for damages except in cases in which it can be proved that what was received or recovered actually by the party in possession was below what would have been so recovered or received if due diligence was exercised. The proper measure to award is to be determined by what the party in possession actually received. (*Spencer, Offg. C. J. and Srinivasa Aiyangar, J.*) MAHOMED ABDUL GAFFUR ROWTHER *v.* MAHOMED SAMSUDDIN ROWTHER.
92 I. C. 139 = A. I. R. 1925 Mad. 297 = 47 M. L. J. 730.

———Mesne profits are in the nature of damages which the Court may mould according to the justice of the case. 27 Cal. 951, Foll. Mining differs from agricultural operations on the surface. (*Richardson and Shamsul Huda, JJ.*) SHAMBHU NATH *v.* SATISH CHANDRA. **25 C. W. N 369 = 66 I. C. 49 = A. I. R. 1921 Cal. 363.**

———Mesne profits must be calculated on the actual outturn in the years in suit and where the defendants have been in possession of separate plots of land within those years, mesne profits ought to be calculated as against each defendant on the basis of his possession. (*Sultan Ahmed, J.*) RAM BILAS SINGH *v.* AMIR SINGH. **61 I. C. 425 = 1 Pat. L. T. 235.**

—S. 2 (12)—Bona fide claimant.

———Persons in possession of mines under a *bona fide* claim of title and not "without any colour of title" or "in a manner wholly unauthorised and unlawful", though found to be trespassers, are entitled to the allowances for royalties paid and to compensation for expenses incurred in working the mines. (*Richardson and Shamsul Huda, JJ.*) SHAMBU NATH *v.* SATISH CHANDRA. **25 C. W. N. 369 = 66 I. C. 49 = A. I. R. 1921 Cal. 363.**

—S. 2 (12)—Claim against co-sharer.

———In case of co-sharers, if a decree for mesne profits or for compensation is to be passed, it must be found that there was dispossession. (*Mukerji, J.*) MAJID MIA *v.* MUNSHI MIA. **94 I. C. 255 = A. I. R. 1926 Cal. 860.**

—S. 2 (12) —Conditional possession.

———Where a deed is only to be set aside on payment of certain sums, the person holding under such a deed must be deemed to be lawfully in possession until it is set aside and is not therefore accountable for mesne profits. 41 All. 63 (P. C.), Foll. and 35 Cal. 420 (P. C.), Not Foll. (*Macnair, A. J. C.*) MAROTI *v.* ABHIMAN.
61 I. C. 543 = A. I. R. 1921 Nag. 132.

—S. 2 (12)—Decree under Specific Relief Act.

———A person who has secured a decree under S. 9 of the Specific Relief Act is entitled to recover mesne profits as against a person in possession other than the true owner and it is for the person in possession to prove that he has superior right to possession and to appropriate the profits. 24 All. 501, Foll. (*Kinkhede, A. J. C.*) NAGO *v.* MULTANMAL. **97 I.C. 1028 = A.I.R. 1927 Nag. 9.**

—S. 2 (12)—Delay in taking possession.

———Where plaintiff had not taken steps to get possession as soon as he had become entitled, he can claim mesne profits only from date of filing suit. (*Ross and Sen, JJ.*) HARI MOHAN PRASAD CHAUDHURY *v.* MD. BASHIDUL HAQUE. **1924 P.H.C.C. 268 = 84 I.C. 130 = 5 P.L.T. 616 = A. I. R. 1924 Pat. 780.**

—S. 2 (12)—Future mesne profits.

———Where the plaintiff obtained a decree for 'future mesne profits from the date of the suit to be ascertained in the execution department,'

Held, that under the decree the plaintiff is entitled to recover whatever rents have been realized by the judgment-debtor in the years in question irrespective of the fact whether those were arrears of rent for the years previous to the institution of the suit or whether they were on account of the current year. With regard to collections in villages the word 'profits' has always been intended to include realizations of arrears for past years as well as for current years. (1887) A.W.N. 250 and A. I.R. 1924 All. 481 (F.B.), Foll. (*Sulaiman, J.*) LALLU SINGH *v.* GUR NARAIN. **92 I.C. 768 = A. I. R. 1926 All. 404.**

—S. 2 (12)—Interest.

———Statutory definition of mesne profits includes interest. (*S. K. Ghose, J.*) SATISH CHANDRA CHAUDHURI *v.* SASI KANTA ACHARJYA. **A.I.R. 1930 Cal. 525.**

———Mesne profits now include interest ; so the decree-holder is entitled to interest up to the date of realisation of the mesne profits. (*Jwala Prasad, A. C. J. and Kulwant Sahay, J.*) HARAKHPAN MISSIR *v.* JAGDEE MISSIR. **4 Pat. 57 = 84 I C. 272 = 5 P.L.T. 626 = 1924 P.H C.C. 265 = 3 Pat. L. R. (Civ.) 32 = A. I. R. 1924 Pat. 781.**

———*Mesne profits include also interest on such profits.*

The definition of mesne profits includes not only the profits of immoveable property but also interest on such profits. (*Shadi Lal, C. J.*) CHHABER SINGH *v.* RADHU RAM. **4 L.L.J. 333 = 68 I. C. 807 = A.I.R. 1921 Lah. 234.**

———*Discretion of Court.*

Interest on mesne profits is in the discretion of the Court. (*Greaves and Mukerji, JJ.*) MAHARAJ BAHADUR SINGH *v.* BHUPENDRA NARAYAN SINGH. **44 C.L.J. 182 = 98 I.C. 198 = A. I. R. 1926 Cal. 1233.**

———Rate of interest on mesne profits is a matter entirely within the discretion of the Court and the High Court will not interfere with its decision. (*Das and Ross, JJ.*) SURAJ PRASAD PANDEY *v.* SOMRA MAHTO. **2 P.L.T. 648 = 68 I.C. 903 = A. I. R. 1921 Pat. 430.**

———*Decree silent as to interest.*

Where a decree declares that the plaintiff is entitled to mesne profits and says nothing about interest, if the amount of mesne profits is left for determination by the Court of execution, the decree-holder is entitled to interest upon the mesne profits and to have such interest added to the mesne profits when they are ascertained. But if the Court which ascertains the mesne profits has omitted to allow interest, it is not open to the Court which executes the decree for mesne profits to allow interest in execution proceedings. 6 C. L. J. 462 and Wallace, J., in No. 74 of 1924, Foll.; A.I.R. 1922 All. 117, not Foll. (*Madhavan Nair, J.*) RAMAN MENON *v.* PANGUNNI MENON. **96 I.C. 697 =**

A. I. R. 1926 Mad. 952 = 50 M.L.J. 563.

———*Decree silent about interest.*

Where a decree grants mesne profits but says nothing about interest,

Held, that the decree-holder can claim that the simple decree for mesne profits carries interest. (*Walsh and Stuart JJ.*) LALTA PRASAD *v.* SRI GANESHJI. **44 All. 579 = 67 I.C 219 = 20 A.L.J. 348 = A. I. R. 1922 All. 117.**

—S. 2 (12)—Mesne profits after decree.

———Where execution of a decree is stayed on the judgment-debtor giving security for mesne profits from the date of the decree up to the disposal of an appeal therefrom,

Held, that the order certainly meant that such mesne profits (as would be determined by the executing Court) would be realized in the execution proceedings and that no further proceedings by way of a separate suit would be necessary. (*Addison, J.*) JWALA SINGH *v.* SUNDAR SINGH. **28 P.L.R. 178 = 103 I.C. 328 = A. I. R. 1927 Lah. 346.**

—S. 2 (12)—Mesne profits—Burden of proof—Basis of calculation.

———On an application by defendant for recovery of mesne profits, as regards the amount of mesne profits which might with ordinary diligence have been received by the person in occupation, the onus lies on the person claiming it, (here) the defendant. A court cannot act on the report of a Commissioner based opon the evidence of persons not recorded by him. (*Spencer and Venkatasubba Rao, JJ.*) RAMAKKA *v.* NAGESAM. **47 Mad. 800 = 92 I.C. 792 = A.I.R. 1925 Mad. 145 = 48 M. L. J. 89.**

—S. 2 (12)—Mesne profits—Possession by Court.

———In an action for mesne profits when the ground of the action is the bare fact of possession, damages can only be recovered for the time possession was actually retained. Where lands remained under attachment by the operation of the order under S. 146, Cr. P. Code, and Court was in custody of it on behalf of the rightful owners, *held*, that it cannot be said that the defendants were in possession of the lands. (*Walmsley and M. N. Mukerji, JJ.*) CHHAGANMULL AGARWALLA *v.* AMANATULLA MOHAMMAD PRODHAN. **51 Cal. 853 = 80 I.C. 529 = 39 C.L.J. 447 = A. I. R. 1924 Cal 1010.**

—S. 2 (12)—Rate of interest—Discretion of Court—Bona fide trespasser.

———Interest should ordinarily be allowed on mesne profits, though inasmuch as the interest forms an integral part of mesne profits, the interest is as much in the discretion of the Court as the mesne profits themselves. The cases in the books do not disclose a uniform rule as to the rate of interest allowable on mesne profits. But there is a distinction between the respective liabilities of *bona fide* and *mala fide* trespassers. Thus, although all trespassers whether *bona fide* or *mala fide*, are liable for mesne profits the *bona fide* trespasser may be allowed to deduct collection charges, while no such concession is made in favour of the *mala fide* trespasser. Similarly, in regard to the rate of interest also, the fact of the trespasser being a *bona fide* one may be taken into consideration. Case law referred. (*Mukerjee and Panton, JJ.*) SASHIKANTA ACHARYA *v.* SARAT CHANDRA RAI. **34 C.L.J. 415 = 70 I.C. 6 = A. I. R. 1921 Cal. 699.**

—S. 2 (12)—Suit by lessee.

———No suit is maintainable for mesne profits by lessee for period subsequent to expiry of lease on dispossession by lessor. (*Hallifax, A. J. C.*) ABDUL KARIM *v.* LUTUDHAR. **101 I.C. 733 =**

A. I. R. 1927 Nag. 373.

—S. 2 (12)—Tenant holding over.

———Tenant holding over, receiving premium from sub-tenant—Landlord can recover premium as mesne profits. (*Macleod, C. J. and Crump, J.*) GULAM MOHIUDDIN *v.* DAYABHAI CHIMANLAL. **25 Bom.L R. 447 = 73 I.C. 442 = A. I. R. 1923 Bom. 398.**

—S. 2 (12)—Test for calculation.

———The test set by the statutory definition of mesne profits is clearly not what a person has lost by his exclusion, but what the trespasser has or might reasonably have made by his wrongful possession. What the person in such a case might or would have made can only be relevant as evidence of what the trespasser might with reasonable diligence have received. The true test in calculating mesne profits is what the ordinary prudent agriculturist would have grown. (*Sir George Lowndes.*) HARRY KEMPSOR GRAY *v.* BHAGU MIAN. **1930 A.L.J. 128 = 121 I.C. 540 = 34 C.W.N. 257 = 7 O.W.N. 303 = 31 M.L.W. 425 = 32 Bom.L.R. 525 = 57 I.A. 105 = A.I.R. 1930 P.C. 82 = 58 M.L.J. 215 (P.C.).**

—S. 2 (12)—Test.

———True criterion for mesne profits is not the loss caused to the person wronged but the gain made by the wrong-doer. 62 I. C. 25, Foll. (*Courtney-Terrell, C. J. and Ross, J.*) BALGOVIND MANDAR *v.* B. DWARKA PRASAD. **10 P.L.T. 525 = 116 I. C. 40 = A.I.R. 1929 Pat 530.**

—S. 2 (12)—Trespasser.

———A trespasser cultivating land must pay mesne profits to its owner on the basis of its produce. (*Cuming and B. B. Ghose, JJ.*) EASIN SHEIKH *v.* SIKANDAR. **94 I.C. 118 = A.I.R. 1926 Cal. 847.**

—S. 2 (12)—When not allowed.

———*Mortgage—Construction—Possessory mortgage—Mortgagor to discharge debt in Jeth—Mortgagor's default—No right to mesne profits from date of suit up to delivery of possession.*

In a mortgage with a stipulation for redemption in Jeth, the mortgagee can only be called upon to vacate possession in favour of the mortgagors if all steps necessary to redemption have been taken so as to enable the mortgagee to vacate possession in the fallow season of Jeth. If in one particular year the mortgagors fail to take all the necessary steps to obtain redemption in the fallow season the mortgagee is entitled under the terms of the mortgage to remain in possession till the fallow season of the following year and it could not therefore be said, where the plaintiffs have made default in taking proceedings for redemption in one year, the mortgagee is, for the year which follows, in wrongful possession. On the contrary he is in possession in strict accordance with the terms of the mortgage contract and therefore in such a case mesne profits cannot be allowed from the date of the suit till the date of delivery of possession. (*Mears, C.J. and Lindsay, J.*) GOKUL KALWAR *v.* CHANDAR SEKHAR. **48 All. 611 = 24 A.L.J. 769 = 96 I.C. 1 = A.I.R. 1926 All. 665.**

—S. 2 (12)—When reasonable.

———Mesne profits can be claimed only against the person who is in actual possession and limitation for its recovery is three years from the date when the cause of action for its recovery arises. (*Abdul Raoof and Abdul Qadir, JJ.*) RAGHO AND MALLO *v.* DWARKA DAS. **10 P.W.R. 1923 = 79 I.C. 687 = A.I.R. 1924 Lah. 738.**

—S. 2 (12)—Wrongful possession.

———In a suit for mesne profits defendants, who were in wrongful possession, gave no evidence to show that they could not cultivate the lands themselves or that the

lands were in possession of tenants before they entered upon them as trespassers.

Held, that under these circumstances the defendants were bound to pay mesne profits on the basis as if they were in direct possession of the lands in suit. (*B. B. Ghose, and Cammiade, JJ.*) SARADA CHARAN SEN *v.* BANKA BEHARI DAS. **108 I.C. 584 = A.I.R. 1928 Cal. 474.**

—S. 2 (15)—Advocate—Authority to Compromise.

———An advocate of the High Court has, when briefed on behalf of a party in a subordinate Court, the implied authority of his client to settle the suit. He must be treated as though briefed on the trial of the suit, though he may be engaged to press an interlocutory application. The power to compromise a suit is inherent in the position of an advocate in India. The considerations which have led to this implied power being established in the advocate of England, Scotland and Ireland, apply in equal measure to India. (*Lord Atkin.*) SOURENDRA NATH MITRA *v.* TARUBALA DASI. **34 C.W.N. 453 = 123 I.C. 545 = 1930 A.L.J. 489 = 32 Bom. L R. 645 = 51 C.L.J. 309 = 11 P.L.T. 461 = 31 M.L.W. 803 = A.I.R. 1930 P.C. 158 = 58 M.L.J. 551.**

—S. 2 (15)—Vakalatnama—Construction.

———" Vakalatnama " empowering filing of compromise does not empower to enter into compromise or sign it—C. P. Code, O. 3, R. 1. (*Pullan, J.*) RAM KIRAT *v.* GAJADHAR SHUKLA. **7 O.W.N. 153 = A.I.R. 1930 Oudh 112.**

—S. 2 (17)—Sheriff.

———The Sheriff of Bombay is a " public officer ". (*Marten, C.J. and Blackwell, J.*) SHERIFF, BOMBAY *v.* HAKMAJI MOTAJI & CO. **51 Bom. 749 = 29 Bom. L.R. 1071 = 104 I.C. 685 = A.I.R. 1927 Bom. 521.**

S. 2 (17)—Municipal Council.

———A Municipal Council is not an officer of the Government. (*Madhavan Nair, J.*) VASUDEVA RAO *v.* MUNICIPAL COUNCIL, ANANTAPUR. **1930 M.W.N. 821.**

—S. 2 (17)—Officer working on commission charge to private person.

———The payment to an officer of commission charged to a private person for service rendered or the refunding by Government of such commission for the purpose of meeting the cost of an officer who is paid a fixed salary by Government does not affect the question of such officer being a public officer. It is the performance of a public duty by an officer which renders him a public officer. The Court of Wards discharges the functions of Government delegated to it by the Act and the officer-in-charge is amenable to Government in every way. Even a private person appointed by the Court of Wards to act as a manager of the property of a Government ward has been declared by the statute to be a public officer. (*Rupchand Bilaram, A.J.C.*) VISHNOMAL *v.* COURT OF WARDS, SIND. **22 S.L.R. 63 = 105 I.C. 729 = A.I.R. 1928 Sind 76.**

—S. 2 (17)—Official Assignee.

———The Official Assignee is a public officer within S. 2 (17). (*Taraporewala, J.*) HARDAYAL SHIVLAL *v.* HAJI ADAM GOOL MAHOMED. **49 Bom 638 = 87 I.C. 1011 = 27 Bom L.R. 545 = A.I.R. 1925 Bom. 344.**

—S. 2 (17)—Official Receiver.

———An Official Receiver appointed under Provincial Insolvency Act is a public officer within the meaning of S. 2, Sub-S. 17 and he is protected by S. 80. An Official Receiver stands on a higher footing than a receiver appointed in a particular case and therefore no suit is maintainable against him without the requisite notice. A sanction granted by Insolvency Court *ex parte* cannot be taken as an adequate compliance with the requirsments of S. 80 of the Code of Civil Procedure. (*Lindsay and Kanhaiya Lal JJ.*) MURARI LAL *v.* E.V. DAVID. **47 All. 291 = 84 I.C. 739 = 22 A.L.J. 1116 = 6 L.R.A. Civ. 106 = A.I.R. 1925 All. 241 (2) (a).**

—S. 2 (17)—Sanitation Panchayat.

———Village Sanitation Panchayat is not a Public Officer within the meaning of S. 80 and no notice of suit is necessary. 34 Bom. 583, Diss. (*Macnair, A.J.C.*) VILLAGE SANITATION PANCHAYAT COMMITTEE *v.* S. R. DESHMUKH. **114 I.C. 288 = A.I.R. 1929 Nag. 70.**

—S. 2 (20)—" Signed "—Use of stamp.

———Use of stamp bearing the name of the party is sufficient even in cases where he is able to sign. 3 All. 75, Appl. (*Kumaraswami Sastri and Wallace. JJ.*) MUTHU RAMALINGA SETHUPATHI *v.* SHUNMUGHA NADAN. **51 Mad. 242 = 107 I.C. 804 = 27 M.L.W. 237 = 1927 M.W.N. 885 = A.I.R. 1928 Mad. 175 = 54 M.L.J. 65.**

—S. 3—Court subordinate to the High Court.

———*Collector acting under S.* 18 *of the Land Acquisition Act* (*I of* 1894) *if a.*

The Collector though he may be acting judicially when exercising his functions under S. 18 of the Land Acquisition Act and though he may even be called a Court, is certainly not a Court, subordinate to the High Court. (*Mohiuddin, A.J.C.*) SETH GOVERDHANDAS *v.* COLLECTOR OF BHANDARA. **123 I.C. 911 = A.I.R. 1930 Nag. 271.**

—S 4—Letters Patent.

———*Letters Patent* (*Madras*), *Cl.* 36—*Procedure to be adopted by High Court in case of equal division is to be governed by Cl.* 36 *and not by S.* 98.

Per *Full Bench.*—Whether the appeal is under C. P. Code or under the Letters Patent, the procedure to be adopted in either case by the High Court in case of an equal division of opinion between the Judges is to be governed by Cl. 36, Letters Patent, and not by S. 98, C. P. Code. A.I.R. 1921 P.C. 6 and A.I.R. 1921 P.C. 80, Rel. on. Case-law discussed. (*Kumaraswami Sastri, Ramesam and Reilly, JJ.*) DHANARAJU *v.* MOTILAL DAGAR. **29 M.L.W. 823 = 116 I.C. 343 = 52 Mad. 563 = A.I.R. 1929 Mad. 641 = 57 M.L.J. 264 (F. B.).**

—S. 4--Revision in rent suit.

———The plaintiffs filed certain suits for rent which were heard by an Assistant Collector of the second class. On appeal his decrees were confirmed by the Collector. There were further appeals to the District Judge, which were unsuccessful. The defendant then applied in revision under S. 115, C. P. Code, for the discharge of the decree passed by the District Judge.

Held, that an application for revision to the High Court in these circumstances is not maintainable. (*Kanhaiya Lal, J.C.*) KALI BAKSH SINGH *v.* BHAGWAN DAS. **10 O.L.J. 191 = 72 I.C. 1023 = 5 L.R. Oudh 17 = A.I.R. 1924 Oudh 16.**

—S. 6—Applicability.

———The proceedings before the President of the Calcutta Improvement Tribunal is not a suit, and S. 6 does not apply to an order passed in such proceedings. (*Cuming and B.B. Ghose, JJ.*) NANDLAL *v.* NRITYAKALI DEVI. **31 C.W.N. 142 = 94 I.C. 170 = A.I.R. 1926 Cal. 853.**

———*Bengal N. W. P. and Assam Civil Courts A t, S.* 19—*Court's jurisdiction is not ousted where mesne profits allowable under O.* 20, *R.* 12 (2), *C. P. Code, exceed its jurisdiction—Application for final decree is not a plaint and neither this application nor original plaint can be returned for want of jurisdiction—C. P. Code, O.* 20, *R.* 12 (2).

Per *Full Bench* (*Walmsley, J., dissenting*).—Where a Judge has in the proper exercise of his jurisdiction passed a decree for possession and also a preliminary decree for mesne profits, he must be held to have jurisdiction to make a final decree in accordance with his decision. This jurisdiction is not limited, if, as a result of the inquiry directed by him, the mesne profits are found to exceed the amount of his pecuniary jurisdiction as regards the value of the suit. If a suit is rightly entertained as within the jurisdiction of the Judge and a decree passed, his power to grant the proper and adequate relief is not affected by any event which increases the value of the relief during the pendency of the suit. The forum of appeal is determined with reference to the value of the suit, and not the amount decreed. The plaintiff is neither required nor bound to state any amount in his application. The application is not a plaint, and the admission of both parties that the plaint should be returned for presentation to a higher Court cannot be accepted for the reason that a preliminary decree has already been passed in the case by the Munsif on the original plaint, and the only thing that remains to be done is to give effect to the preliminary decree by a final decree. There is no provision in the law for the return of a plaint after a preliminary decree has been passed. (*Walmsley, C. C. Ghose, Suhrawardy, B. B. Ghose and Duval, JJ.*) BIDYADHAR BACHAR *v.* MANINDRA NATH DAS. **53 Cal. 14 = 89 I.C. 726 = 42 C.L.J. 49 = 29 C.W.N. 869 = A.I.R. 1925 Cal. 1076 (F.B.).**

—S. 6—" Court of Competent Jurisdiction".

———*Transfer of decree to Court of competent jurisdiction.*

If a Court has no pecuniary jurisdiction to entertain and try an original suit it is incompetent to execute the decree in that suit. The suit, therefore, cannot be transferred to it for execution under S. 39 of the Civil Procedure Code. S. 39, Clause (2) of the new Code which modifies S. 223 of the old Code requires that when the Court sends a decree *suo motu* to another Subordinate Court, the latter must be a Court " of competent jurisdiction." The competency cannot be determined irrespective of its pecuniary jurisdiction. (*Jwala Prasad and Bucknill, JJ.*) AMRIT LAL *v.* MURLIDHAR. **1 Pat. 651 = 3 Pat. L. T. 422 = 67 I. C. 533 = 1922 P. H. C. C. 229 = A. I. R. 1922 Pat. 188.**

—S. 6—Remand.

———*Order of remand cannot confer jurisdiction—C. P. Code, O.* 41, *R.* 23—*Punjab Courts Act, S.* 26.

A remand order cannot confer on the subordinate Court a jurisdiction which that Court would not have had but for the remand. It would be highly anomalous to hold that a Court not having jurisdiction in the ordinary course becomes competent in consequence of a remand by a superior Court. (*Dalip Singh and Skemp, JJ.*) ISHAR SINGH *v.* DHANPAT RAI. **30 P.L R. 244 = 116 I. C. 324 = A. I. R. 1929 Lah. 534.**

—S. 7—Attachment before judgment.

—*Small Cause Court—C. P. Code, O.* 38, *R.* 5.

A Small Cause Court has power to attach immovable property before judgment under O. 38, R. 5. (*Devadoss and Wallace, JJ.*) KOTHENDARAMA CHETTIAR *v.* ANNAMALAI PILLAI. **1925 M. W. N. 169 = 48 Mad. 488 = 87 I. C. 399 = 22 M. L. W. 103 = A. I. R. 1925 Mad. 589 = 48 M. L. J. 406.**

———*Small Cause Court.*

Under the Code of 1908, Provincial Small Cause

C.P. CODE (1908) S. 7—Attachment of immovable property.

Court has no power to attach immovable property before judgment and to decide a claim case thereon. 6 M. H. C. R. 90 Ref. (*Rankin and B. B. Ghose, JJ.*) SADEK ALI *v.* SAMED ALI SERANG. **28 C.W. N. 16 = 80 I. C. 300 = A. I. R. 1924 Cal. 193.**

—S. 7—Attachment of immovable property.

———*Small Cause Court.*

A Small Cause Court cannot attach immovable property in execution of a decree, even though it is also an ordinary Court, unless the decree has been formally transferred to the ordinary side. (*Addison, J.*) SIRI RAM *v.* TULSI RAM. **30 P.L.R. 40 = 114 I.C. 329 = A. I. R. 1929 Lah. 398.**

—S. 7—District Judge Jurisdiction of.

———*Decree of Madras Small Cause Court transferred to Mofussal District Munsif for execution—District Judge can hear appeal from order in execution proceedings.*

Where the decree of the Madras Small Cause Court had been transferred to the original jurisdiction of a District Munsif's Court.

Held, that the C. P. Code was applicable to the execution of such proceedings, and that the District Judge had jurisdiction to hear an appeal from the decision of the District Munsif in execution proceedings and his order was not without jurisdiction. (*Devadoss and Wallace, JJ.*) PONNAPPA REDDI *v.* THIRUVENGADA PILLAI. **22 M. L. W. 455 = 1925 M. W. N. 713 = 90 I. C. 509 = A. I. R. 1925 Mad. 1179 = 49 M. L. J. 104.**

———**S. 9.**

Act of state.
Arbitration.
Caste question.
Civil Court.
Civil Right.
Honours.
Jurisdiction.
Religious Office.
Religious Question.
Special Tribunal.
Statutory Body.
Voluntary Offerings.

—S. 9—Act of State.

———Political Agent appointed to manage State of minor Chief—Appointment cannot be questioned in Municipal Courts—Municipal Courts can, however, try suit by Chief for redress of breach of trust for embezzlement by Political Agent or his subordinates with regard to property in British India. (*Courtney-Terrel, C. J. and James, J.*) SANKAR PRASAD MISRA *v.* BRAJA MOHAN DEB. **A. I. R. 1930 Pat. 357.**

———*Government of India Act* (5 *and* 6 *Geo.* 5 *ch.* 61 *etc.*) *Ss.* 29 (*b*) *and* 32—*Commandeering order.*

A commandeering order is one which no one but Government can make, and being an act of the Sovereign, the Secretary of State evidently cannot be sued in respect of it. (*Chotzner, J.*) KESSORAM PODDAR AND CO. *v.* SECRETARY OF STATE. **54 Cal. 969 = 107 I. C 360 = A. I. R. 1928 Cal. 74 (81).**

—S. 9—Arbitration.

———*Suit to set aside proceedings under Sch. 2, C. P. Code lies if proceedings are fraudulent, fictitious and vexatious and not to set aside award made on agreement to refer.*

A suit would lie to set aside the proceedings purporting to be taken under Sch. 2, C. P. Code, if the proceeddings are fraudulent, fictitious or vexatious, but not if there has been an agreement to refer and the party wants to impugn the award made on such reference. 29 Cal. 167 (P.C.) Ref. and A. I. R. 1922 P. C. 374, Dist. (*Kemp and Murphy, JJ.*) RAOJI NARAINJI *v.* RATANSI KANJI. **32 Bom. L.R. 389 = A.I.R. 1930 Bom. 431.**

C. P. CODE (1908), S. 9—Caste question.

—S. 9—Caste question.

———A Konkani Brahmin had been excommunicated by order of spiritual tribunal which was the recognized authority in all such matters the order having been passed in perfect good faith, without malice and in due exercise of spiritual authority. There was no negation of natural justice, on which ground alone such private quarrels could have been recognizable by law Courts.

Held, that the suits by the Brahmin for declaration that he was in caste as well as for damages, on the ground that the order of the spiritual tribunal was illegal and libellous ought to be dismissed as uncognizable. (*Ramesam and Jackson, JJ.*) SURATENDRA TIRTHA SWAMY *v.* N. N. PRABHU. **1929 M. W. N. 532 = 123 I. C. 14 = A. I. R. 1930 Mad. 100.**

———*Khojas and Cutchi Memon—Ex-communication—Decision of " Jamait " not arrived at in consonance with principles of justice—Court has jurisdiction to interfere.*

The decision of the " Jamait " or Council of the Khoja community excommunicating a person is within the scope of its authority if arrived at in a manner consonant with the ordinary principles of justice, but if it is not so arrived at, the Court would have jurisdiction to interfere. 26 Bom. 174, Foll. (*Wild, A. J. C.*) FAKIR MAHOMED NANJI *v.* AGHA KHAN. **A. I. R. 1930 Sind 204.**

———*Member of panchayat, breaking its rule not to marry second wife during lifetime of first—Dispute referred to arbitration and award made—Member consenting to award validity—Dispute involves purely caste question and no suit would lie—Award, if can be enforced—Civil Courts—If can entertain suit—C. P. Code, Sch. 2, para.* 20 (1).

A certain panchayat had passed a resolution to the effect that no member of the panchayat should marry a second wife in the lifetime of his first wife, and whosoever would do so disregarding the resolution of the panchayat, shall not be considered as a member of the brotherhood. A member married a second time when his first wife was living, and at a meeting of the panchayat an arbitrator was appointed to settle the dispute, who decided that the member should pay a certain sum as fine. The decision was accepted by the member as binding on him. When he refused to pay, a suit was brought to enforce the award.

Held, that a suit of this nature would clearly relate to matters affecting the internal autonomy of the caste and its social relations and it will not be open to the Court to go into the question of the validity or otherwise of a rule laid down by the Panchayat. Although the delinquent here agreed to pay the fine, yet the agreement involved a caste question and, therefore, no suit would lie to enforce it. 20 Bom. 190, Foll.

Held, further, that as the disputes referred to arbitration related to caste questions which could not be made the subject of a suit, they could not also, be the subject of an award enforceable in a Court of law, and even if the parties affected by such an award would agree not to challenge it, their consent cannot confer jurisdiction on a Court, where it has none, to enforce the award. (*Rupchand Bilaram, A. J. C.*) NARAINDAS ASANSAL *v.* VALABDAS VISHANDAS. **23 S. L. R. 299 = 111 I. C. 425 = A. I. R. 1929 Sind 1.**

———*Court has jurisdiction over a matter not relating to internal administration of caste but to the property of the caste though there has been a division of opinion in them.*

Where question at issue is not a matter relating to the internal administration and affairs of the caste, but to the property of caste the Court has jurisdiction to interfere. Such jurisdiction of the Court is not excluded in every case in which there has merely been a division of opinion in the caste. (*Macleod, C. J. and Coyajee J.*) FULCHAND *v.* HARILAL. **50 Bom. 124 = 27 Bom. L. R. 1503 = 92 I. C. 549 = A. I. R. 1926 Bom. 69.**

—S. 9—Civil Court.

——*Question of distribution of Government revenue is duty of Collector—Civil Court cannot deal with it.*

The question of distribution of the Government revenue is primarily the duty of the Collector, and it is a matter which the Civil Court cannot deal with. (*Das and Allanson, JJ.*) DOMA BHAGAT *v.* RAJA RAM SINGH. **9 P. L. T. 661 = 8 Pat. 95 = 115 I.C. 225 = A. I. R. 1929 Pat. 22.**

——*Income-tax Act, S. 52—Suit to recover income-tax levied on income outside scope of Income-tax Act is maintainable.*

Where a certain income is outside the scope of the Act, such as agricultural income or income not earned in or brought into British India, any assessment in respect of such income would be outside the scope of the Act and a civil suit to recover it would not be barred by reason of S. 52. (*Devadoss and Mackay, JJ.*) B. RAJA RAJESWARA SETHUPATHI AVERGAL *v.* SECRETARY OF STATE. **114 I. C. 829 = 52 Mad. 12 = 28 M. L. W. 667 = A. I. R. 1929 Mad. 179 = 55 M. L. J. 770.**

——*Proceedings before Collector without jurisdiction —Civil Court can determine rights of parties—Question of title—Suit raising—Jurisdiction of Civil Court barred by Bengal Land Revenue Sales Act (XI of 1859).*

Where the proceedings before the Collector are without jurisdiction, the Civil Court undoubtedly has the right to determine the rights of the parties. A question of title is a matter for the Civil Court and not for the revenue Court to decide, and the civil Court has the right to entertain any suit of a Civil nature unless barred by any express enactment. There is nothing in Act XI of 1859 to bar the right of the Civil Court to entertain a suit actually raising a question of title as to definite share: 13 W. R. 67; 15 W. R. 112, and 23 W. R. 104, Dist. (*Doss and Allanson, JJ.*) DOMA BHAGAT *v.* RAJA RAM SINGH. **9 P. L. T. 661 = 8 Pat. 95 = 115 I. C. 225 = A. I. R. 1929 Pat. 22.**

——*Landlord and tenant—Suit between rival claimants of qabzadari land is cognizable by a Civil Court.*

A suit between rival claimants of qabzadari lands is not a suit between a tenant-in-chief and a sub-tenant and therefore, is maintainable in a civil Court. A. I. R. 1926 Oudh 205, Dist. (*Stuart, C.J. and Raza, J.*) SAHEB DIN *v.* MAHABIR SINGH. **1 L.C. 677 = 107 I. C. 326 = 3 Luck. 273 = 9 L. R. A. Rev. 350 = A. I. R. 1928 Oudh 95 (a).**

——*Decision of Revenue authorities can be quashed by Civil Courts.*

Proceedings of Revenue authorities may be subject to being quashed in the ordinary Courts of law if they are tainted by fundamental irregularity. A. I. R. 1924 P. C. 175, Ref. (*Newbould and Graham, JJ.*) MAHABUNESSA BIBI *v.* SECY. OF STATE. **53 Cal. 561 = 98 I. C. 334 = A. I. R. 1926 Cal. 1064.**

——*Suit to recover balance of expenses ordered by a Criminal Court to be paid to witness lies in Civil Court.*

There is no provision in the Code under which the Court can order payment of diet money to a witness. That power is vested in the Court under the general rules of the High Court and therefore a suit for recovery of such money is maintainable in a Civil Court. S. 547, Cr. P. Code, does not apply to such a case. (*Suhrawardy and Page, JJ.*) KAMAL MANDALINI *v.* PARAMASUKH CHAKRABUTTY. **29 C. W. N. 1033 = 90 I. C. 488 = A. I. R. 1926 Cal. 289.**

——*Civil Courts are not debarred from trying a suit to contest the validity of an election by reason of S. 51 of the Bengal Village Self-Government Act—Bengal Village Self-Government Act (V of 1919), S. 51.*

It is not the intention of the Legislature to set up the Divisional Commissioner as the person finally to decide questions of franchise to the annulment of the ordinary Civil Courts' right to decide such questions, and the Civil Courts are not debarred from exercising their ordinary powers to try all suits under their general power under S. 9, C. P. Code, including a suit to contest the validity of an election. (*Suhrawardy and Duval, JJ.*) NASARUDDIN MANDAL *v.* ANANTH NATH. **52 Cal. 943 = 90 I. C. 700 = A. I. R. 1926 Cal. 279.**

——*Suit for damages against licensee under Electricity Act for failure to supply energy on a proper requisition is not barred—Electricity Act, S. 22.*

There is nothing in the Indian Electricity Act which bars, either expressly or impliedly, a suit for damages against licensee for failure to supply energy on proper requisition. (*Campbell, J.*) MUNICIPAL COMMITTEE, AMRITSAR *v.* SHANKAR DAS. **97 I. C. 537 = A. I. R. 1926 Lah. 349.**

——*Hindu Law—Marriage.*

Civil Courts can declare a *pat* marriage to be invalid. (*Prideaux, A. J. C.*) MANI *v.* ZEHOO. **22 N. L. R. 134 = 9 N. L. J. 160 = 95 I. C. 705 = A. I. R. 1926 Nag. 488.**

——*Debt incurred after order of adjudication, though not provable under the Insolvency Act, can be sued on in the ordinary Civil Court—Provincial Insolvency Act (1920), S. 28.*

The jurisdiction of a Civil Court to try a suit in respect of a debt or liability incurred by an insolvent after the order of adjudication, is not barred by the Provincial Insolvency Act. Such a debt or liability is not provable under the Insolvency Act. (*Kinkhede, A. J. C.*) HIRALAL *v.* TULSIRAM. **22 N. L. R. 118 = 80 I. C. 946 = A. I. R. 1925 Nag. 77 (a).**

——*B.T. Act, Ss. 158 and 188—S. 158 does not oust the general jurisdiction of Court under C.P. Code, S. 9 to entertain a suit for settlement of fair rent—Hence suit by some only of the co-sharers is competent.*

S. 158 is not restrictive and tho right to claim a fair and equitable rent is an obligation arising out of the contract between the parties and is enforceable in the ordinary Civil Courts under the provisions of S. 9 of the C. P. Code. Hence S. 158 of the B. T. Act is no bar to the maintenance of a suit for fair and equitable rent, by plaintiffs who are not the entire body of the landlords. It cannot be held that the only jurisdiction for assessing a fair rent, where no rent has at any time been previously assessed, is that conferred by Ss. 52, 105, 157 and 158 and similar sections of Act VIII of 1885. (*Mullick and Ross, JJ.*) RAM GOBIND SINGH *v.* SHASHI SEKHAR PRASAD SINGH. **1925 P. H. C. C. 153 = 88 I.C. 959 = 6 P. L. T. 849 = A. I. R. 1925 Pat. 517.**

——*Suit for fixing liability of defendant regarding revenue for which plaintiff is liable is a civil suit.*

Where the suit is not a suit for partition of revenue-paying lands, and the plaintiff does not ask the Court to separate the Government revenue as between the plaintiff and the defendants, but invites the Court to fix the liability of the defendants in regard to the Government revenue for which the plaintiff is liable to the Collector. *Held*, this is a suit of a civil nature. (*Das and Ross, JJ.*) GULAM CHAND *v.* DUKHI RAI.

78 I.C. 188 = A.I.R. 1924 Pat. 795.

———*Civil nature—Question as to validity of votes at a meeting is one within the jurisdiction of a Court of law to try.*

The question of the validity of a vote is a question of law, and a Court of Law has jurisdiction to entertain it. It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. But surely questions relating to the validity of votes are not questions relating to the internal management of a Corporation. They are questions that can be disposed of only by a Court of Law. (*Mulla, J.*) K. F. NARIMAN *v.* MUNICIPAL CORPORATION, BOMBAY.

25 Bom. L.R. 689 = 83 I.C. 856 = 47 Bom. 809 = A. I. R. 1923 Bom. 305.

———*Suit for declaration that plaintiff is a qualified voter is cognizable by Civil Court.*

Where the Chairman of a Municipality has acted in contravention of the rules, a suit for a declaration that plaintiff is a qualified voter and for mandatory injunction against the Chairman to enter the plaintiff's name in the register of voters, lies in a Civil Court. (*Tennon and Newbould, JJ.*) ATAUL HUQ *v.* MANICKTALA MUNICIPALITY. **48 Cal. 378 = A.I.R. 1921 Cal. 85.**

—S. 9—Civil Right.

———*"Right of burial".*

A right of burial is a civil right. 30 Mad. 15, Foll.; 17 All. 87 and 23 Bom. 666, Ref. (*Wazir Hasan, J.*) JANG BAHADUR *v.* WAZIR KHAN.

6 O.W.N. 1109 = A.I.R. 1930 Oudh 54.

———*Suit by relation of deceased for possession of corpse and declaration of right to bury it can be maintained.*

The law regards the right to burial as a Civil Court right and recognizes the rights of an executor to obtain or retain possession of a corpse. The rights of an executor may reasonably be extended to the nearest relation of the deceased in the absence of an executor. Therefore a suit by a relation for possession of a corpse and a declaration of a right to bury it will lie. 26 Bom. 198; 7 Bom. 323 and 30 Mad. 15, Rel. on. (*Mya Bu and Bagulley, JJ.*) MA KIN *v.* U. BA.

7 Rang 603 = 121 I. C. 775 = A. I. R. 1930 Rang. 143 (2).

———*Specific Relief Act, Ss. 42 and 54—Plaintiff obstructed by defendants in sacrificing cow is entitled to declaration that he can sacrifice his cow in his house in place not exposed to public view and is entitled to an injunction restraining defendants from interfering with such right.*

A plaintiff who is obstructed by the defendants in the sacrifice of his cow is entitled to a declaration that he is entitled to sacrifice a cow which is his own property in his own house at a place which is not exposed to the public view and is also entitled to a perpetual injunction restraining the defendants from obstructing him in the exercise of such a right. 17 O.C. 354, Dist.: 30 All. 181 and A.I.R. 1925 P. C. 36, Rel. (*Bannerji and Kendall, JJ.*) MUHAMMAD SALIM *v.* RAM KUMAR SINGH. **26 A.L.J. 1001 = 110 I. C. 657 = A. I. R. 1928 All. 710.**

———*Suit for declaration by a body of Brahmins that they have a right to recite Vedas, etc., in a temple is maintainable.*

The Thengalai Vaishnava Brahmans, residents of Triplicane, brought a suit for a declaration that they were entitled to recite the Prabandam and Vedas in the Parthasarthi Swami temple and to receive the emoluments without being appointed or removed by the Dharmakarthas of the temple.

Held, that the suit was maintainable in a Civil Court. (*Kumaraswami Sastri, J.*) ANNA RANGACHARIAR *v.* V. PARTHASARATHY IYENGAR.

98 I. C. 229 = A. I. R. 1927 Mad. 131.

———*Plaintiff claiming to be carried in a palanquin in public street as Jagadguru—Suit is not of civil nature.*

A claim that the plaintiff has the right of being carried in a cross-palanquin in procession as Jagadguru if a religious dignity and privilege is not cognizable by a Civil Court. (*Macleod, C.J. and Fawcett, J.*) ANDANISWAMI *v.* TOTADSWAMI. **45 Bom. 590 = 23 Bom. L.R. 75 = 60 I. C. 907 = A. I. R. 1921 Bom. 140.**

—S. 9—Honours.

———*No suit lies for declaration of right to religious honours.*

As religious honours involve no civil right a Civil Court cannot entertain a suit for declaration of one's right to such honour. (*Phillips and Madhavan Nair, JJ.*) CHENNA BASAPPA *v.* SANKARA BHARATI SWAMI GARU. **29 M. L. W. 604 = 1929 M. W. N. 341 = 119 I. C. 149 = A. I. R. 1929 Mad. 493.**

———*Claim for honours as Gurikar—No services to be performed—Claim is not of a Civil nature.*

A claim for certain temple honours to be shown to Plaintiff as 1st Gurikar of a certain caste in a certain village, having no duties to be performed, not being a claim of a Civil nature cannot be maintained in a Civil Court. 2 Bom. 476; 19 Mad. 62; 7 Mad. 91 and 10 Bom. 233 Foll. (*Spencer and Ramesam, JJ.*) BABU PUJARI *v.* THUKRA GURIKARA.

1921 M.W.N. 395 = 63 I. C. 115 = 41 M.L.J. 287.

—S. 9—Jurisdiction.

———*Rule taking out jurisdiction must be explicit.*

The jurisdiction of a Civil Court should not be taken away merely upon the ground that though the rule as formulated is not explicit enough, such a rule should be supplemented by a process of reasoning and the corollary or inference should be invested with the same legal efficacy as an express rule of law. (*Boys and Sen, JJ.*) BHAGWATI PRASAD SINGH *v.* HARI HAR PRASAD SINGH. **26 A.L.J. 673 = 9 L.R.A. Rev. 200 = 115 I. C. 650 = A. I. R. 1928 All. 511.**

———*It is the authority to decide a case at all and not the decision given therein which constitutes jurisdiction.*

It is the authority to decide a case at all and not the decision given therein which constitutes jurisdiction. Jurisdiction is the power to hear and determine and it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly. An irregular exercise of jurisdiction does not render the order made in the case without jurisdiction and such orders regularly made must be set aside and cannot be challenged in a collateral proceeding. A.I.R. 1921 Cal. 34 and 25 Bom. 337, Rel. on. (*Mitter and Mallick, JJ.*) MAHOMMAD HOSSEIN CHOUDHURY *v.* KHANA KAZI. **113 I. C. 570 = A. I. R. 1928 Cal. 606.**

———It is for the party who seeks to oust the jurisdiction of the ordinary Civil Courts to establish his contention. (*Shadi Lal, C.J., Fforde and Tek Chand, JJ.*) ALI MUHAMMAD *v.* HAKIM.

9 Lah. 504 = 108 I. C. 748 = 29 P.L.R. 396 = A. I. R. 1928 Lah. 121 (F.B.).

——The venue in a particular case is determined by the nature of the claim as brought. 9 N.L.R. 54, Foll. (*Prideaux, A.J.C.*) JUGAL KISHORE *v.* NAGO. **107 I. C. 671 = A. I. R. 1928 Nag. 221.**

——*Decision of chairman in a meeting—Civil Court can revise.*

The decisions of a chairman are not necessarily final, and if on any important question he wrongly rules out a particular amendment, then it is open for the Court to revise his decision and to hold if necessary that the resolution passed thereafter was irregular and not binding. *Henderson* v. *Bank of Australia* (1890) 45 Ch. D. 330, Rel. on. (*Marten, C. J. and Crump, J.*) GOPAL NARAYAN *v.* SANMUKAPPA NINGAPPA. **29 Bom. L.R. 1325 = 106 I. C. 265 = A. I. R. 1927 Bom. 603.**

——*Court can decide that rights to the user of property in accordance with caste usage exist but cannot decide whether a particular user is sanctioned by custom of caste.*

Court has jurisdiction to decide that the plaintiffs were entitled to the user of the properties in dispute in accordance with the caste usage and custom because a question of property is involved. But once the Court holds that the Plaintiffs have that right then the way in which they might exercise their right is a question which is really one for the castes themselves to decide and not for any particular individual or faction and is certainly a question which no Court would possibly determine. (*Macleod, C. J. and Crump, J.*) CHUNILAL GULABDAS *v.* CHHOTALAL PRANJIVAN. **76 I. C. 635 = A. I. R. 1924 Bom. 522.**

——*Decree—Validity—Defendants in ejectment suit recorded as occupancy tenant in record of rights—Decree is not without jurisdiction.*

The fact that defendants in ejectment suits are entered in the record of rights as occupancy tenants is not a sufficient reason for holding that the decrees in these suits were without jurisdiction or were wrong in law. (*Ross, J.*) TUFANI LAL *v.* MT. BIBI UMATUL RASOOL. **5 P L.T. 535 = 1924 P.H.C.C. 244 = A. I. R. 1924 Pat. 765.**

——*Civil and Criminal—Order for maintenance against father by Criminal Court—Civil Court can make declaration as to paternity of child—Cr. P. Code, S.* 489.

The jurisdiction of the Civil Courts to grant a declaratory decree cannot be affected by the provisions of the Cr. P. Code relating to the maintenance of wives and children. The Civil Courts no doubt have no jurisdiction to cancel an order for maintenance or to grant an injunction against a Criminal Court, but there is no reason why the Civil Court having issued a declaration the party who has obtained it should not apply to the Criminal Court, under the provisions of S. 489 of the Cr. P. Code or otherwise, for an order to stay the payment of maintenance. (*Saunders, J. C*) NGA PO THEIN *v.* MA ME SAN. **1 Bur. L. J. 82 = 70 I. C. 897 = 4 U. B. R. 120 = A. I. R. 1922 U. B. 20.**

——*Suit in foreign Court—Person within jurisdiction of Court in British India can be ordered not to continue suit.*

A Court has jurisdiction to restrain a party within the jurisdiction from prosecuting a suit in a foreign Court if it thinks that the action of the party in filing the suit in the foreign Court is opposed to notions of equity, etc., of the Court seeking to restrain him. It cannot actually prevent the party from continuing his action in the foreign Court but if he came within the jurisdiction of the Court, proceedings might be taken against him for contempt. 44 Bom. 272, Foll. (*Macleod, C. J. and Fawcett, J.*) LAKHMIRAM KEVALRAM *v.* POONAMCHAND PITAMBER. **45 Bom. 550 = 59 I. C. 444 = A. I. R. 1921 Bom. 128.**

—S. 9—Religious office.

——*Appointment as Swamiyar—Specific Relief Act, S* 42.

The hereditary right to appoint to the office of a Swamiyar is a possible legal right. (*Lord Phillimore.*) MANICKAVACHAGA DESIKAR *v.* PARAMASIVAN. **1929 M. W. N. 161 = 113 I. C. 476 = 33 C. W. N. 382 = 29 M. L. W. 414 = A. I. R. 1929 P. C. 53 = 56 M. L. J. 121 (P. C.).**

——*Specific duty of being present at the performance of religious ceremonies—Emoluments attached—It must be regarded as an office within S.* 9.

The presence at the performance of religious ceremonies of persons who are or may be supposed to be well versed in the rituals and the manner of performance may be regarded as not only useful but necessary in the interests of the institution, and it is impossible to hold that even though the performance of obligation or duty of such character may not possess all the aspects of a regular office, still it does not constitute an office of such a nature as to make it a civil claim with regard to which Civil Courts will have jurisdiction. If there is at least one specific duty and there are also emoluments, it must be regarded as an office. (*Srinivasa Iyengar and Curgenven, JJ.*) THATHACHARIAR *v.* SINGARACHARIAR. **109 I. C. 771 = A. I. R. 1928 Mad. 377.**

——*Watan—Office of hereditary Joshipana exists in C. P.—Watandar Joshi can sue for his dues.*

The office of hereditary Joshipana exists in Central Provinces as separate from Berar, and a Watandar Joshi in the Central Provinces proper can sue for his dues. S. A. No. 172 of 1917, Foll. (*Prideaux, A. J. C.*) NATHU BAWA *v.* PANDURANG. **107 I. C. 911 = A. I. R. 1928 Nag 150.**

——*Suit for a right to religious office is of a civil nature though no emoluments are attached.*

A suit by a person, claiming to be entitled to a religious office against a usurper, for a declaration of his right to the office is a suit of a civil nature and will therefore be entertained by a Civil Court though no emoluments are attached to the office at all. 15 Cal. 159 and 27 Cal. 30, Foll.; 19 Mad. 62; 28 Mad. 23 and 2 Bom. 470, Not Foll. (*Duval and Mitter JJ.*) DEBENDRA NARAIN *v.* SATYA CHARAN. **54 Cal. 614 = 105 I. C. 188 = A. I. R. 1927 Cal. 783.**

——*Specific Relief Act, S. 54—Plaintiff, a Hindu priest—Defendant prohibiting plaintiff from officiating—Suit for injunction lies—But plaintiff's acquiescence is bar to granting of relief—Hindu Law—Religious Office—Nature of right.*

A plaintiff is entitled to sue for an injunction restraining defendant from prohibiting plaintiff from officiating as the family priest of a certain caste. (36 Bom. 94, Foll). But where the plaintiff has acquiesced in the defendant's action such injunction will be refused. 3 Bom. 232 Ref. to. (*Macleod, C. J. and Fawcett, J.*) GIRJASHANKAR DAJI BHAT *v.* MURLIDHAR NARAIN CHAUDHARI. **45 Bom. 234 = 59 I. C. 271 = A. I. R. 1921 Bom. 209.**

——*Pujari of deity removed for misconduct by private tribunal duly constituted under previous agreement made by Pujari—Civil Court can determine if he was removed on valid grounds.*

There is nothing wrong in principle that the holder of a spiritual office should be subject to discipline and liable to deprivation for what may be called misconduct from an ecclesiastical point of view or for flagrant and continued neglect of duty.

Where a pujari of a deity was removed from office in accordance with his agreement after having been held to have been guilty of misconduct by a private tribunal duly constituted as per agreement.

Held, that although, so far as Hindus are concerned, there is no State church and no Ecclesiastical Court, there is nothing to prevent Civil Courts from holding that a pujari has been removed from his office on valid grounds. (*Mookerjee, A.C.J. and Fletcher, J.*) NAFAR CHANDRA *v.* KAILASHCHANDRA- **25 C. W. N. 201=62 I. C. 510= A. I. R. 1921 Cal. 328.**

—S. 9—Religious Question.

———*Court cannot interfere with question of ritual.*

A Civil Court cannot interfere with a pure question of ritual. A. I. R. 1926 Mad. 559, Rel. on. (*Curgenven, J.*) RAMALINGA MUDALIAR *v.* SUNDARA SASTRIAL. **1929 M. W. N. 300=120 I. C. 874= A. I. R. 1929 Mad. 526.**

———*Court will not decide mere questions of religious rites or ceremonies unless it is necessary to decide rights to property.*

Speaking very generally, the protection of the law in religious matters is confined to the protection of religious property or a religious office. The Court will not decide mere questions of religious rites or ceremonies, nor will it pronounce on any religious doctrine unless it is necessary to do so in order to determine rights to property. It is the policy of the State to protect all religions, but to interfere with none. (*Marten, J.*) ADVOCATE-GENERAL OF BOMBAY *v.* YUSUF ALI EBRAHIM. **24 Bom. L. R. 1060=84 I. C. 759= A. I. R. 1921 Bom. 338.**

—S. 9—Special Tribunals.

———*Dispute in Upper Burma involving ecclesiastical matter within competence of Buddhist ecclesiastical authorities—Civil Courts have no jurisdiction--Buddhist law (Burmese)—Ecclesiastical jurisdiction.*

In a suit, the nature and extent of the rights of the monks to use and occupy monastic lands which is religious property invokes a dispute regarding ecclesiastical matter within the competence of the Buddhist ecclesiastical authorities to decide, consequently, the Civil Courts in Upper Burma have no jurisdiction to entertain the dispute. (1897-01) 2 U. B. R. 42; (1892-96) 2 U. B. R. 59 and (1892-96) 2 U. B. R. 72, Ref. (1902-03) 2 U. B. R. Buddhist Law, Ecclesiastical P. 1, Rel. on. (*Mya Bu and Baguley, JJ.*) U AHSAYA *v.* U PYINNYA. **6 Rang. 783=114 I. C. 540= A. I. R. 1929 Rang. 77.**

———*A Civil suit for restoration of property sold under Ss. 87 and 88, Cr. P. Code, is barred even though there have been irregularities in sale—Cr. P. Code, S. 89.*

A "proclaimed" person, whose immovable property has been attached and sold by a Criminal Court in proceeding under Ss. 87 and 88, Cr. P. Code, has no right to maintain an ordinary civil action for the restoration of the property sold, even though the procedure laid down for issuing the proclamation and attachment have not been strictly followed. 8 W. R. 207; 5 Pat. L. J. 321 and A. I. R. 1923 Bom. 198, Dist.; 27 All. 572, Diss. from and Dist.; 39 P. R. 1917; 32 P. R 1919 and A. I. R. 1926 Lah. 662, Rel. on.

A civil suit for the purpose of setting aside such a sale is impliedly barred by the provisions of Cr. P. Code. (*Tekchand and Bhide, JJ.*) DEWA SINGH *v.* FAZALDAD. **10 Lah. 338=111 I. C. 508= A. I. R. 1928 Lah. 562.**

———*Interpretation of statute—Power given by legislature causing injury to an individual—Mode of redress also specified in the statute—Civil suit is barred.*

It is an established principle of law that when an act of Legislature gives power to any person for a public purpose from which an individual may receive an injury, then if the mode of redress is also specified in the statute jurisdiction of ordinary Courts will be ousted. (*Tekchand and Bhide, JJ.*) DEWA SINGH *v.* FAZAL DAD. **10 Lah. 338=111 I. C. 508=A. I. R. 1928 Lah. 562.**

———*Suit for appointment of guardian does not lie—Guardians and Wards Act, S. 7.*

The question of the appointment of a guardian for a minor's person and property is a matter specially within the provisions of the Guardians and Wards Act, and no suit can be brought for that purpose. (*Gulam Mohiuddin, A. J. C.*) MT. ANJANI *v.* VITHU. **110 I. C. 46=A. I. R. 1928 Nag. 297.**

———*Guardians and Wards Act, S. 3—Suit by minor with next friend for possession—Defendant claiming to be in possession as minor's guardian—Suit is barred, proper procedure being under the Guardians and Wards Act.*

A Suit by minor with next friend for possession of property against a person who admits the minor's title but claims to be in possession as minor's guardian is not maintainable, the proper procedure being under the Guardians and Wards Act for the appointment of a guardian. 26 All. 594, Appr. (*Prideaux, A. J. C.*) MT. BHAGI *v.* KASHIRAM. **21 N. L. R. 75= 89 I. C. 55=A. I. R. 1925 Nag. 328.**

—S. 9—Statutory Body.

———*Municipality acting* ultra vires—*Civil Court can interfere and grant relief to aggrieved party.*

If the Municipality acted *ultra vires*, the Civil Court has the power to interfere as also the power to grant proper relief to the aggrieved party. This is the principle on which Civil Courts interfere with acts of public bodies such as Municipalities, created by statutes. 27 Cal. 849, Foll. (*Suhrawardy and Cammiade, JJ.*) NUDDEA MILLS CO., LTD. *v.* SIDHESWAR CHATTERJEE. **32 C. W. N. 1055=56 Cal. 280= 115 I. C. 515=A. I. R. 1929 Cal. 33.**

———*Punjab Municipal Act, S. 193—Leave to build chabutra in front of applicant's house refused by Committee as title to land was with them—A suit was brought for "injunction to restrain Committee from preventing building on his land"—Prayer for declaration of his title and maintainability.*

A person intended to erect a chabutra in front of his house and gave notice of the intention to the Committee under the provisions of S. 189 (2). The Committee refused permission to build on the ground that the title of the land on which it was proposed to build vested in the Committee. He brought a suit for "an injunction against the Committee restraining it from preventing him from building a platform on the land owned and possessed by him."

Held, that the relief claimed implied a prayer for the declaration of the person's title and the Court should adjudicate on the question of title in the land and if it was found to vest in the person he was entitled to the injunction prayed for. (*Jai Lal, J.*) UTTAM CHAND *v.* MUNICIPAL COMMITTEE, NAKODAR. **115 I. C. 755=A. I. R. 1929 Lah. 774.**

———*Bombay District Municipal Act (III of 1901), S. 49—Karachi Municipality Rules—Dismissal in accordance with rules and bye-laws—Court cannot* *enquire further—But if dismissal is wanton or against rules and bye-laws, servant can succeed as in ordinary suit between master and servant.*

In a suit for damages for wrongful dismissal brought by an officer or servant of the Karachi Municipality against the Municipality, once the Court is satisfied that the plaintiff's dismissal has been in accordance with the rules and bye-laws of the Municipality, it has no jurisdiction to probe any further into the question. If, however, the Court finds that the plaintiff's dismissal had been wanton and in utter disregard of the rules and bye-laws of the Municipality, the Municipality would forfeit the protection and privileges afforded to them by Statute and the plaintiff would be entitled to succeed as in an ordinary suit between master and servant for wrongful dismissal. *R.* v. *Darlington School Governors*, (1844) 6 Q. B. 682, Rel. on. (Case-law considered). (*Lobo, A. J. C.*) ABRAHAM REUBEN *v.* THE KARACHI MUNICIPALITY. **113 I. C. 387= A. I. R. 1929 Sind 69.**

——*Suit for injunction against Municipality restraining demolishing plaintiff's latrine is maintainable.*

A suit by the owner of a house for perpetual injunction restraining Municipality from demolishing a latrine in the plaintiff's house is maintainable in Civil Court, the object of the suit being to prevent an infringement of the plaintiff's proprietary rights by the Municipal Board. (*Iqbal Ahmad, J.*) MUNICIPAL BOARD FEROZEPUR *v.* BHOLA NATH. **101 I. C. 446= A. I. R. 1927 All. 432.**

——*Punjab Municipal Act, S.* 152—*Notice issued to plaintiffs to leave certain area, they being public prostitutes—Suit to restrain Municipality from enforcing the notice lies in Civil Court.*

The Civil Courts have jurisdiction to decide in a suit by alleged public prostitutes against Municipal Committee for their having issued notice under S. 152 of the Municipal Act, the question whether or not the plaintiffs were public prostitutes and, on a finding of this issue in their favour, to issue an injunction restraining the Municipal Committee from enforcing their notice prohibiting them from residing within the specified limits of the Municipality. A. I. R. 1926 Lah. 461 Rel. on; A. I. R. 1924 Cal. 334, Dist.

There is no express provision of the law which bars the jurisdiction of the Civil Courts in such a case and it is for the Municipality to show that such jurisdiction is barred by implication.

It is only when the Municipal Committee acts *bona fide*, reasonably and in conformity with and strictly within the powers conferred by the law that it can escape the exercise of the restraining powers of the Civil Courts: and that if its requisitions go beyond the powers conferred upon it then the Civil Courts have jurisdiction to restrain it from enforcing them. The Courts have no jurisdiction to interfere with the mode in which the powers of Municipal bodies are exercised, but they are competent to restrain such bodies if they act *ultra vires*, and as the act of the Municipal Committee issued a notice under S. 152 of the Municipal Act against persons who are proved not to be public prostitutes, the Committee acted beyond the powers conferred upon it by the Legislature and its action in issuing the notice was *ultra vires*, and hence Civil Courts would interfere. (*Jai Lal, J.*) MUNICIPAL COMMITTEE, LAHORE *v.* MT. ALLAH RAKHI. **100 I. C. 1010= A. I. R. 1927 Lah. 358.**

——*Punjab Municipal Act (III of* 1911), *S.* 152—*If action of Municipality is* ultra vires *Civil Courts can*

interfere—Mode of action is not, but power to take action is, open to examination by Civil Courts.

It is a well-recognized rule of the law that when it is alleged that action of the Municipal Committee is *ultra vires* or is not covered by the authority of the Act, the Civil Courts have power to interfere. It is only when the action of the Municipal Committee has been exercised in conformity with the powers conferred upon it by the Municipal Act that the jurisdiction of the Civil Courts is ousted. Their discretion as to the mode of action is not subject to a scrutiny by the Civil Courts but their power to take that action is always open to examination by such Courts. (*Jai Lal, J.*) MOTI JAN *v.* MUNICIPAL COMMITTEE OF DELHI. **93 I.C. 827= A. I. R. 1926 Lah. 461.**

—S. 9—Voluntary offerings.

——*Suit by priest for voluntary gifts made to another by jajman is not tenable either against the jajman or the other priest in the Provinces of Bihar and Orissa—Hindu Law—Religious office.*

Both the hereditary priest as well as those appointed by the sacrificer or jajman stand on the same footing in the matter of dismissal. As to whether a priest, of a whatever class he may be, is competent to perform the ceremonies and whether he is faultless or not must rest entirely upon the conscience, faith and judgment of the jajman, and a Court of Justice will be incompetent to deal with such a question. He may be guided by his sentiments of good and evil, or even by caprice and superstitions: 12 C.L.J. 74; 13 C.L.J. 449; 20 All. 234; 26 M.L.J. 482 (1850) S.D.A. 296; (1852) S.D.A. 398 (1857) S. D. A. 362; 14 C. W. N. 1037 and 13 C. L. J. 449, Foll. (1818) 2 Select Rep. S. D. A. 332, *Held*, Overruled. So far as the Provinces of Bihar and Orissa are concerned, it is well settled that a jajman has a right to appoint any priest he chooses to perform the religious ceremonies and to dismiss any priest who formerly used to perform the ceremonies whether appointed by himself or by the former generations, that is hereditary priest; and this is in accordance with the correct interpretation of the texts on the subject. (*Courtney Terrell, C.J. and Jwala Prasad, J.*) DINANATH JHA *v.* GANESHDUTT. **10 P. L. T. 147=116 I. C. 513= 8 Pat. 677=A. I. R. 1929 Pat. 103**

——*Rights of Acharajs* inter se *can be adjudicated upon and enforced by Civil Courts.*

A Court cannot control the selection of an acharaj by the jajman and if it transpires that that the jajman has chosen a particular acharaj to the exclusion of another, the Court will not give any decree so as to affect such a selection; but as between the acharajs themselves in the absence of an express selection by the jajmans to whom it may be immaterial whether the brit is received by one or the other, the rights of the acharajs *inter se* can be adjudicated upon and enforced by the Civil Courts 96 P. R. 1911, Expl. (*Jayalal, J*) LADHARAM *v.* RALLARAM. **10 L. L. J. 242=112 I.C. 262= A. I. R. 1928 Lah. 730.**

——*Suit to recover share of offerings made by disciples—Offerings not connected with any office—Suit is not maintainable in Civil Court.*

A suit to recover a share of the offerings (technically called sishyadayam) made by disciples and collected by the guru, does not lie in a Civil Court when the existence of any office in connexion with which the voluntary offerings are made by the disciples has not been established: 19 Mad. 62; 32 All. 527; 1 L.W. 389; 1 P. L. J. 381; and 13 C. L. J. 449, Rel. on 17 M. L. J. 493 and 27 Cal. 30, Ref. to. (*Waller and Madhavan Nair, JJ.*) BASHYAM KONAYAMMA *v.* BASHYAM RAMA-

SAMI. **110 I. C. 782=A. I. R. 1928 Mad. 851.**

———*Suit to establish claim to performance of Urus and management of offerings lies in a Civil Court.*

A suit to establish a claim to perform the Urus ceremonies and to manage the offerings, can be entertained in a Civil Court, because though the offerings may be uncertain and voluntary, still when they are made to a particular deity they are the property of the temple (or shrine) concerned and can be the subject-matter of a civil suit. 13 Bom. 429; 2 Mad. 62 (P. C) 45 Bom. 683 and 12 Bom. 247, Foll. (*Fawcett and Madgavkar, JJ.*) KASAM KHAN *v.* KAJI ISUL. **50 Bom. 148=28 Bom. L. R. 60=93 I. C. 127=A.I R. 1926 Bom. 161.**

———*Suit chiefly with respect to the right to receive offering and incidentally to the right to worship is maintainable.*

Plaintiff sued for an injunction permanently restraining the defendant from obstructing him in worshipping the deity in question, in doing every other business in connection with the deity and appropriating the profits at the temple of the deity, on the basis that he was entitled to all those rights to the exclusion of the defendant.

Held that there was a dispute between the plaintiff and the defendant as to the right to the property which consisted of voluntary offerings made before the deity, and that is the property with reference to which the right was to be determined, hence the suit is maintainable. It is quite clear that there is a contest substantially as to the property, and incidentally as to the right to perform the worship at the temple which is connected with the right to take the offerings. (*Shah and Coyajee, JJ.*) LAXMAN BAVALING GURVA *v.* VISHRAM MAHADEO RANE. **76 I. C. 629=A. I. R. 1925 Bom. 209.**

———*Suit lies for share of income earned as Hindu priest on the river banks.*

Gains made by the performance of services at the spots called *chaukis* built on the banks of the river where one or the other of the members of Hindu priest family use to sit, receive his clients and help them in the observance of their religious ceremonies connected with the river such as bath, offering flowers etc. are property in law and a suit for a share in the business resulting in such gains is maintainable as a claim of a civil nature within S. 9 of the Code. 18 A. L. J. 679, 1923 All. 350; 43 All. 581, 15 C. L. J. 375, 5 O. C. 225, Foll. 11 O. C. 212, Dist. (*Wazir Hasan and Neave, JJ.*) MT. RACHCHAPALI *v.* MT. CHANDESAR. **10 O. L. J. 595=78 I. C. 256=27 O. C. 114=A. I R. 1924 Oudh 252.**

———*Hindu Law—Religious endowment—Temple—Partition of offering—Suit by female is maintainable.*

Where the plaintiff a female heir prayed with regard to her share in the offerings of the temple that she should be allowed to take a turn at the worship in the temple so that her full share in the offerings might be secured to her without any future trouble and litigation.

Held that such a suit is maintainable, 39 All. 651 and 19 All. 428, Dist. (*Mears, C. J. and Banerjee, J.*) KUNJ BEHARI LAL *v.* MT. NARAINI. **45 All. 437=71 I.C. 1026=A. I. R. 1923 All. 425.**

———*Specific Relief Act, S. 42—Right to receive dan by offering kusha grass to pilgrims on river bank cannot be declared.*

Under S. 42 it cannot be declared that plaintiffs have a right to take *dan* that is, alms by offering kusha to Hindu pilgrims on the bank of the Ganges at a particular spot. (*Tudball and Sulaiman, JJ.*) BANSI *v.* KANHAIYA. **43 All. 159=59 I. C. 659=A. I. R. 1921 All. 374.**

———*Offerings to deity—Suit for share in, is cognizable by Civil Courts.*

The offerings to the deity in temple may be uncertain and voluntary; still when the offerings are made they are the property of the temple. So a suit by the *pujari* for recovering a share in the offerings relates to that property and the Civil Courts can try it. (*Shah and Crump, JJ.*) SAKHARAM DAJI *v.* GANU RAGHU. **45 Bom. 683=23 Bom. L. R. 125=60 I. C. 924=A. I. R. 1921 Bom. 297.**

—S. 10—Appeal and connected appeal.

———*Appeal before the Dist. Judge—Another connected first appeal before High Court between same parties—High Court may order transfer of former before itself without any security.*

Where an appeal is pending before the District Judge and a connected first appeal between the same parties is pending in High Court, the High Court may order the transfer of the appeal before the District Judge to be heard with the appeal pending before it without any security as S. 10 does not contemplate the giving of any security for such transfer. (*Harrison, J.*) RIKHI KESH *v.* MELA RAM. **8 L. L. J. 76=27 P. L. R. 185=A. I. R. 1926 Lah. 304.**

—S. 10—Appeal and suit.

———*Same matter in issue in suit in another Court and appeal in High Court between same parties—High Court can order stay.*

In a suit where the matter in issue is also in issue in an appeal pending in High Court through previous suit between the same parties. High Court is competent to order stay of suit under S. 10. Lah. L. P. A. 351 of 1925, Foll. (*Jai Lal, J.*) RIKHI KESH *v.* MELA RAM. **96 I.C. 958=A. I. R. 1926 Lah. 692.**

—S. 10—Arbitration proceedings.

———*Arbitration proceedings are not in the nature of suit—Nor is arbitrator a party to proceedings to set aside an award.*

Arbitration proceedings are not in the nature of a suit within the purview of S. 10 read with S. 141, C. P.Code, nor is an arbitrator a party to the proceedings instituted by a person adversely affected by the award filed under the Arbitration Act, to have it set aside. A. I. R. 1922 Sind 6, Doubted. (*Rupchand Bilaram, A. J. C.*) MALOTRA & CO. *v.* SUKHDAYAL KAPUR. **23 S. L. R. 427=112 I. C. 318=A. I. R. 1928 Sind 169.**

—S. 10—Conflict of jurisdiction.

———Two points appear to be usual on considering whether the Court should have regard and defer to a jurisdiction with which it may come in conflict or whether the Court can fairly expect that other jurisdiction to defer to it. One is the priority in time and the other is the extent of the relief asked for or obtainable in the other jurisdiction. It is for the Court to say that the action is a collusive action and to recall the order made by it for the appointment of a receiver. It is of the utmost importance that where concurrent proceedings for similar relief are taken in two different and independent Courts, no order should be passed which may lead to friction or conflict of jurisdiction. No other Court of co-ordinate jurisdiction or independent jurisdiction can treat it as of no effect in an interlocutory proceedings. (*Das and Ross, JJ.*) SRIDHAR CHOWDHURY *v.* MUGNIRAM BANGAR. **3 Pat. 357=78 I. C. 620=5 P. L. T. 243=1924 P. H. C. C. 54=A. I. R. 1924 Pat. 491.**

—S. 10—Date of appearance after stay.

———*Suit stayed under S. 10—The Court has no jurisdiction to fix a further date for appearance unless moved.*

Once a Court has made an order under S. 10 staying the proceedings in a suit, it has no jurisdiction to fix further dates for the hearing of the suit unless moved to do so by either party. (*Jai Lal, J.*) FAKIR SINGH *v.* SECRETARY OF STATE. **112 I. C. 324 = A. I. R. 1928 Lah. 751.**

—S. 10—Different parties.

———*Same question but not same parties in two suits —Section does not apply.*

S. 10 does not apply where the two suits are not between the same parties or between parties under whom they or any of them claim, litigating under the same title, even though some of the questions in the two suits are the same. (*Odgers, J.*) S. RAMAKRISHNA PILLAI *v.* KRISHNASWAMI PILLAI. **15 M. L. W. 667 = 68 I. C. 167 = 1922 M. W. N. 521 = A. I. R. 1922 Mad. 321.**

—S. 10—Dismissal of suit.

———*Does not bar suit nor justifies dismissal.*

A suit cannot be said to be premature under S. 10 if there is a valid cause for it. S. 10 does not bar a suit nor can a Court dismiss a suit under the section. (*Jwala Prasad and Ross, JJ.*) MUSAMMAT DULJIN *v.* MUSAMMAT BIBI ALI FATIMA. **77 I. C. 157 = A. I. R. 1925 Pat. 201.**

—S. 10—Distinction.

———Whilst S. 10 bars only a suit, S. 11 bars the trial of both the suit and of issue involved in that suit. 11 All. 148, Rel. on. (*Wazir Hasan, Ag. C.J. and Misra, J.*) CHANNAM KUER *v.* SAHDEO SINGH. **4 Luck. 573 = 114 I. C. 775 = 7 O. W. N. 157 = A. I. R. 1929 Oudh 341.**

—S. 10—Execution proceedings.

———*S. 10 does not apply to execution proceedings.*

Interlocutory orders under S. 10 occur in suits and not in execution proceedings. The section is not exhaustive and its application has been extended only to proceedings under certain Acts and miscellaneous proceedings by virtue of S. 141 and this latter section does not cover proceedings in execution of a decree. (*Johnstone, J.*) MAHBOOB BEGUM *v.* GHULAM MAHOMED. **119 I. C. 488 = A. I. R. 1929 Lah. 694.**

—S. 10—Interlocutory orders after stay.

———*Stay of suit—Does not prevent passing of interlocutory orders.*

An order staying a suit under S. 10 does not prevent a Court from making interlocutory orders, such as orders for a receiver or an injunction or an order for attachment before judgment. (*Macleod, C. J. and Shah, J.*) SENAJI KAPURCHAND *v.* PANNAJI DEVICHAND. **46 Bom. 481 = 23 Bom. L. R. 1228 = 64 I. C. 580 = A. I. R. 1922 Bom. 276.**

—S. 10—Interpretation.

———*Suit includes appeal—Distinct and different debts—Section not applicable.*

"Suits in S. 10 include appeals.", 24 C. L. J. 514, Foll. But the section is not applicable where the suits are for distinct and different debts. 11 A. 148, Ref. (*Rankin, J.*) CHAUDHURY JAMINI NATH MALLICK *v.* MIDNAPUR ZEMINDARY CO. **27 C. W. N. 772 = 75 I. C. 231 = A. I. R. 1923 Cal. 716.**

—S. 10—"Matter in issue" meaning.

———*"Matter in issue" means entire subject in controversy and not main question involved.*

"Matter in issue" should not be construed as meaning the main question involved in the suit. The real intention of the Legislature in framing S. 10 was merely to prevent later suits relating to the same subject-matter being tried before an earlier suit relating to the same subject-matter is tried and disposed of. The expression "matter in issue" has reference to the entire subject in controversy between the parties. (*Srinivasa Aiyangar, J.*) KUBERAN NAMBUDRI *v.* KOMAN NAIR. **88 I. C. 421 = A. I. R. 1925 Mad. 574 = 48 M. L. J. 251.**

—S. 10—Order amounts to case decided.

———*Order resuming proceedings is " a case decided" within C. P. Code, S. 115.*

An order by which proceedings are resumed in a suit which had been stayed under S. 10 is a "case decided" within the meaning of S. 115. 6 O. L. J. 96; A. I. R. 1924 Lah. 425 (F.B.) and 13 O. C. 109, Rel. on. (*Stuart, C J., Wazir Hasan and Gokaran Nath Misra, JJ.*) SAHDEO SINGH *v.* MT. CHANUN KUER. **3 Luck. 650 = 5 O. W. N. 604 = 111 I. C. 161 = A. I. R. 1928 Oudh 355 (F.B.).**

—S. 10—Proceedings to file award.

———*S. 10 applies also to proceedings to file award in Court but parties in the two proceedings should be same.*

Ss. 10 and 11, C.P. Code, are concerned with the law of procedure and the mere use of the word "suit" in S. 10 does not restrict its applicability to suits alone but the sections can be extended to Civil Miscellaneous proceedings by virtue of S. 141, if it is otherwise applicable. Where in a dispute between *A* and *B* an award is passed and the arbitrator applies to the Sind Court to file the award, and it appears that *B* has filed a suit against *A* in Delhi to set aside the award,

Held, that the arbitrators who are applicants in Sind, not being parties to the Delhi suits, S. 10 does not apply. Once an award is filed there is no equitable reason for checking its legitimate consequences because a suit has been filed to set it aside. (*Raymond, A.J.C.*) JAI NARAYAN *v.* FIRM OF NARAYAN DAS. **16 S. L. R. 79 = 66 I. C. 796 = A. I R. 1922 Sind 6.**

—S. 10—Power to stay suit in foreign court.

———*Suit in foreign Court—Whether subordinate Court in British India cannot stay by injunction.*

It is doubtful whether a subordinate Court in British India has power to restrain by injunction a party from prosecuting a suit in a foreign Court (though within the British Empire). The Chartered High Courts have such power not by reason of O. 39, Rr. 1 and 2, C. P. Code but by reason of the equity jurisdiction they inherited from the old Supreme Courts. 34 Cal. 97 and 34 Cal. 101 Ref. (*Ramesam and Devadoss, JJ.*) KN. PR. PERIAKARUPPAN CHETTIAR *v.* R. M. S. R. M. RAMASWAMI CHETTIAR. **27 M. L. W. 418 = 109 I.C. 281 = A. I. R. 1928 Mad. 491.**

—S. 10—Refusal to stay.

———*Order refusing to stay a suit pending a previous one is revisable.*

High Court can set aside an order refusing to stay suit under S. 10 pending the final decision of a suit previously instituted for the same subject-matter and between the same parties. (*Zafar Ali, J.*) MEHTAH SHAH *v.* ALI HAIDER SHAH. **82 I. C. 234 = A. I. R 1925 Lah. 144 (2).**

———*Refusal to stay suit—No revision lies—C. P. Code, S. 115.*

No revision lies against an order refusing to stay a suit under S. 10 of the Civil Procedure Code, there being no case decided within S. 115. A.I.R. 1923 L. 69; A.I.R. 1922 L. 54; 42 A. 409 and 43 A. 564, (F.B.), Rel on. (*Abdul Raoof, J.*) BAGH SINGH *v.* BHAGWAN DAS. **75 I. C. 101 = A. I. R. 1924 Lah. 567.**

—S. 10—Remedy—When section inapplicable.

———*S. 10 is not the only section applicable for staying of suits—Courts can order stay of suits under S. 151 to prevent an abuse of Courts and to render effective, orders already passed.*

A suit cannot only be stayed under the provisions of S. 10, but even under the inherent powers of the High Court and under the powers of general supervision and superintendence vested in it; a suit in a particular Court can be stayed pending the decision of another suit in different Court. To allow the former suit to proceed on the face of an injunction issued by the latter Court for staying the proceedings of the former, pending the decision of the latter, would amount to an abuse of the Court and injunction issued by the latter would be rendered ineffective. (*Addison, J.*) KODU MAL-JETHA NAND *v.* TILAK RAM. **10 L.L.J. 470 = 113 I.C. 783 = A. I. R. 1929 Lah. 12.**

———*Court can stay suit under its inherent powers even where it does not come within the provision of S. 10.*

The inherent powers of the Court are not to be deemed to be limited or otherwise affected by the express provisions of the Code and so even where a suit cannot be stayed under the terms of S. 10, it can be so stayed by the Court if it is necessary to do so to do justice between the parties. 33 Cal. 927 and In S. 115 Application No. 44 of 1927, Foll. (*Wazir Hasan, Ag. C. J. and Misra, J.*) CHANNAN KUER *v.* SAHDEO. **4 Luck. 573 = 114 I. C. 775 = 7 O. W. N. 157 = A. I. R 1929 Oudh 341.**

—S. 10—Remedy—When stay not granted.

———Order rejecting application for stay of suit is interlocutory order and is therefore not subject to revision—Court can, however, interfere under Act. C. P. Code, S. 151 or Government of India S. 107—Punjab Courts Act, S. 44. A. I. R. 1922 Lah. 54; A. I. R. 1924 Lah. 567 and A.I.R. 1923 Lah. 615, Foll.; A.I.R. 1925 Lah. 144, not Foll. (*Tapp, J.*) CHELA RAM TAJ BHAN *v.* GANESH DAS & SONS. **31 P. L.R. 174 = A. I. R. 1930 Lah. 525.**

—S. 10—Revision against—Order.

———*Order refusing to exercise jurisdiction under S. 10 is revisable—C. P. Code, S. 115.*

An order, the effect of which is to refuse to exercise a jurisdiction vested in the Court under S. 10, is open to revision. (*Stuart, C. J., Wazir Hasan and Gokaran Nath Misra, JJ.*) SAHDEO SINGH *v.* MT. CHANUN KUER. **3 Luck. 650 = 5 O. W. N. 604 = 111 I.C. 161 = A. I. R. 1928 Oudh 355 (F.B.).**

—S. 10—Revision of order.

———*Order staying suit under S. 10 is not revisable.*

Where the Lower Court wrongly passed an order staying a suit under S. 10 of the C. P. Code, the High Court refused to revise the order but pointed out to the Lower Court the desirability of revising its order on proper application. (*Abdul Raoof, J.*) MELA RAM *v.* RIKHI KESH. **33 P. W. R. 1922 = 69 I. C. 111 = A. I. R. 1923 Lah. 69.**

—S. 10—Stay—When desirable.

———*Mortgage suit by insolvent's mortgagee—Application by receiver under S. 53, Provincial Insolvency Act, respecting the mortgage—Court trying the mortgage suit does not cease to have jurisdiction over the suit—Proper course is to stay mortgage suit—Application for stay should be made to the Court trying suit or any other Court having power to stay—Provincial Insolvency Act, S. 53.*

The proper course, in cases where a civil suit is pending on a mortgage and where the Official Receiver applies to the Insolvency Court for a declaration that the mortgage is bad under S. 53, would be to have the

proceedings in the suit stayed till the disposal of the application by the Insolvency Court. It would save time and trouble if the proceedings in the civil suit are stayed pending the disposal of the application under S. 53. The order of the Insolvency Court under S. 53 would be binding upon the parties; and the ordinary Civil Court would therefore not be able to execute the mortgage decree passed by it. The application must be made either to the Court in which the civil suit is pending or to a Court which has power to stay the proceedings in that suit. But there is no warrant either in law or in practice for the contention that the presentation of an application to the Insolvency Court for an order under S. 53 takes away the jurisdiction of the Civil Court to proceed with the suit of a secured creditor. It does not follow that because a transaction is void under S. 53, therefore, the mortgagee has no remedy against the mortgagor. The transaction under S. 53 is only voidable and not void. The jurisdiction to set aside a transaction which is good against the mortgagor, but not good against the general body of creditors, is an exclusive jurisdiction of the Insolvency Court. But that does not take away the jurisdiction of the Civil Court to proceed with the mortgagee's suit decree. A mortgage which is voidable under S. 53 is only voidable to the extent to which the property transferred is necessary to satisfy the creditors of the insolvent. (*Devadoss and Wallace, JJ.*) OFFICIAL RECEIVER OF COIMBATORE *v.* PALANISWAMI CHETTI. **48 Mad. 750 = 88 I. C. 934 = 1925 M. W. N. 672 = A. I. R. 1925 Mad. 1051 = 49 M. L. J. 203.**

—S. 10—Stay—When granted.

———*Suit in respect of property out of British India pending in appeal—Defendant residing in British India—Suit for mesne profits lies in British India but should be stayed till the dispute is subsisting out of British India—C. P. Code, S. 20.*

A British Indian Court will not adjudicate on questions relating to the title to, or the right to the possession of, immovable property out of British India. But the Civil Procedure Code does not forbid the institution of a suit for mesne profits even if the decision in the suit involves adjudication regarding the plaintiff's title to immoveable property outside British India, where the decree of the Court for mesne profits can effectively be enforced by the personal obedience of the defendant within the jurisdiction. A. I. R. 1927 Cal. 768, Foll. (*Mcnair, A. J. C.*) YADAO GHIRNIKAR *v.* KRISHNAJI DORAB. **23 N. L. R. 170 = 10 N. L. J. 232 = 106 I. C. 7 = A. I. R. 1928 Nag. 56.**

———Before an order under S. 10 staying a suit is passed, the Court must see that all the different conditions contained in that section are present in the case. The pendency of the previously instituted suit will not by itself constitute a bar to the trial of the subsequent suit. The Court must see (1) if the matter in issue is also directly and substantially in issue in a previously instituted suit; (2) between the same parties; (3) in the same or any other Court in British India; and (4) having jurisdiction to grant the relief claimed. (*Ghulam Mohiuddin, A. J.C.*) KUNDANLAL *v.* DULA. **110 I. C. 418.**

—S. 10—When applicable.

———*Defendant filing a suit in a Native State—Plaintiff filing his suit in British India Court regarding the same subject-matter—Defendant submitting to the jurisdiction of British India Court—Latter Court has jurisdiction to restrain defendant from proceeding with his suit.*

Where defendant filed a suit in the Hyderabad State, being a resident of that State, against the plaintiff and subsequently the plaintiff filed another suit against the defendant in the Bombay High Court, the subject-matter of the suit being the same as that in the defendant's suit and the defendant entered appearance in the plaintiff's suit without protest and also made a counter-claim.

Held that Bombay High Court would have jurisdiction in the plaintiff's suit to pass an order restraining the defendant from proceeding with his suit in the Hyderabad Courts. But the jurisdiction to stay suits is one of a delicate character and it requires to be exercised with caution. (*Marten, C.J. and Kemp, J.*) V. R. NAIK *v.* BALVANT SITARAM. **29 Bom.L.R. 138 = 100 I.C. 951 = A.I.R. 1927 Bom. 135.**

———*Final decree in redemption suit bars fresh redemption suit.*

Where a suit for redemption has been instituted and a decree for redemption has been passed therein but not executed, a subsequent suit is not maintainable for the redemption of the same mortgage. S. 10 would be better applicable as the former suit cannot be deemed to have been taken to a conclusion and must be deemed to be still pending. 25 Mad. 300 and 39 Mad. 896, Foll.; 43 Bom. 334, Diss. (*Dalal, J. C. and Wazir Hasan, A.J.C.*) NARAYAN *v.* GAYA DIN. **28 O.C. 212 = 87 I.C. 290 = A.I.R 1925 Oudh 696.**

———Where two suits contain same issues, later suit cannot be proceeded with. (*Phillips, J.*) RAMACHANDRAN PILLAI *v.* NEELAMBAL. **16 M.L.W. 607 = 70 I.C. 5 = A.I.R. 1923 Mad. 88.**

———S. 10 of the Code does not apply unless every man in dispute is directly and substantially in issue in the two suits and the parties are the same. (*Martineau, J.*) BISHEN DEVI *v.* BISHENCHAND. **61 I. C. 830 (Lah.).**

S. 10—When inapplicable.

———*Suit for possession by vendee—Want of title in vendor pleaded—Suit dismissed — Appeal pending—Vendee filing suit against vendor for recovery of money—Vendor praying for stay of suit till disposal of appeal—S. 10 held inapplicable—But Court has power to safeguard interest of vendor by reserving judgment under C. P.Code, S. 151.*

A instituted a suit for possession of property which he alleged he had purchased from one of the defendants by means of a sale deed. The plea of the defendants was that the vendor had no title to sell the land and that this fact was known to *A*. *A*'s suit was dismissed, over which he appealed. While the appeal was pending, he filed a suit against his vendor for return of the money paid by him for the purchase of the property. The vendor applied to the trial Court to stay the suit till the decision of the appeal but the trial Court declined to stay the suit.

Held, that S. 10 did not apply to the circumstances of this case, therefore the order of the trial Court under the circumstances was correct.

Held, further, that it was necessary to safeguard the interest of the vendor which could be done under S. 151 by trying the suit but refraining from pronouncing the judgment till the appeal was disposed of. (*Jai Lal, J.*) AMRAO SINGH *v.* BEHARI LAL. **A. I R. 1930 Lah. 527.**

———*Applicability—Suit or recovery of profits—Appeal before Privy Council between the parties relating to question of title—Stay of suit—Inherent power of Court.*

In order to attract the provisions of S. 10, C.P. Code, it is necessary that the entire subject-matter of the two suits should be the same and further that the two courts must be courts of concurrent jurisdiction. Where a suit before the Assistant Collector under S. 108 (16) of the Oudh Rent Act for recovery of profits was sought to be stayed because of an appeal pending before the Privy Council as between the parties relating to the question of title of properties including the suit items, *held*, that S. 10 was not applicable.

Held, however, that the court might stay the suit under S. 151, C.P. Code. (*Hasan and Bisheshwar Nath, JJ.*) BISHESWAR BAKSH SINGH *v.* DULHIN JADUNATH KUER. **7 O.W.N. 386 = 14 R.D. 171 = 123 I. C. 50.**

———*Suit for profits which is solely cognizable by a Revenue Court cannot be stayed by prior suit for declaration of title pending in Civil Court.*

In order to hold that S. 10 is applicable the two courts must be courts of concurrent jurisdiction, that is to say, each of those courts must be in a position to try any one of the two suits and to grant the relief claimed in either of them. So a suit for profits which is solely cognizable by revenue courts cannot be stayed on account of a prior suit for declaration of title which is pending in a civil court. 114 P.R. 1919 and 12 N.L.R. 174, Foll. (*Wazir Hasan, Ag. C.J. and Misra, J.*) CHANNAN KUER *v.* SAHDEO SINGH. **4 Luck. 573 = 114 I. C. 775 = 7 O.W.N. 157 = A.I.R. 1929 Oudh 341.**

———*Agra Tenancy Act (II of 1901), Ss. 167 and 199—Ejectment suit—Question of title raised in defence—Defendant directed to file suit in Civil Court—Suit filed after expiry of time prescribed but before the conclusion of suit in Revenue Court is not entertainable.*

If a party has been ordered by a revenue court to file a suit in a civil court within three months, he is not at liberty to ignore the restriction and file his suit after three months although the suit in the revenue court may be pending. A suit instituted after the three months should be dismissed by the civil court. (Case-law discussed.)

Per *Daniels, J.*—S. 10 of the Code of Civil Procedure will not apply because the revenue court, though its decision may indirectly produce the same result, could not have granted the relief asked for in the civil court.

Per *Sulaiman, J.*—Although it is not possible to bring the case within the provisions of S. 10 of the C.P. Code, as the revenue court is not competent to grant the relief asked for in the civil suit, nevertheless the principle underlying that section may be of wider application. (*Sulaiman and Daniel, JJ.*) GANGA CHAMAR *v.* BINDESARI RAI. **23 A.L.J. 529 = 88 I. C. 684 = 47 All. 904 = A. I. R. 1925 All. 615.**

———*S. 10 is inapplicable unless both subject-matter and reliefs are identical—Fact of one issue being in common would not necessitate stay of subsequent suit—"Matter in suit" means entire matter in controversy.*

Unless the subject-matter in two suits is identical and the reliefs are also the same, S. 10 is inapplicable. The mere fact that one issue is common in two suits would not necessitate the stay of subsequent suit. The words "matter in suit" mean the entire matter in controversy and not one of the several issues in the case. S. 10 is limited in its scope. 11 All. 148; 24 C.L.J. 514; 4 Pat. L.J. 557 and A.I.R. 1925 Mad. 574, Ref. (*Sulaiman and Niamatullah, JJ.*) GARGI DIN *v.* DEBI CHARAN. **51 All. 1017 = 1930 A. L. J. 284 = A.I.R. 1929 All. 805.**

———*S. 10 does not apply to applications under C. P. Code, Sch. 2, S. 20.*

An application under S. 20, Sch. 2, is not a plaint and the hearing of such an application is not a suit though under sub-cl. (2), S. 20, it has to be numbered and registered as a suit. S. 10 is applicable only to suits. No doubt the principles embodied in S. 11 in some instances do apply when there have been previous litigious proceedings not amounting to suits but that does not mean that S. 10 also should be held to apply when one of the proceedings is not a suit. For S. 10 to apply the matter in issue in one suit must be directly and substantially in issue in the previously instituted suit. A.I.R. 1921 Bom. 389; A.I.R. 1921 Pat. 161, Foll. (*Addison, J.*) GURBAKSHI SINGH *v.* SANT RAM. **30 P.L.R. 395 = 117 I.C. 94 = A. I. R. 1929 Lah. 533 (a).**

———*Ground not traversed in former suit—Issue as under O. 14, R. 1, not raised in former suit—Subsequent suit for mesne profits no bar under S. 10.*

Where in the former suit for specific performance there was not even a prayer in the plaint for the award of future mesne profits, and consequently there could have been no allegation in the written statement traversing the right of the party and there was therefore no issue raised by reason of O. 14, R. 1,

Held, the same matter in a subsequent suit cannot be deemed to be a matter directly and substantially a matter in issue in a former suit within the meaning of S. 10. (*Sundaram Chettiar, J.*) R. SOBHANADRI *v.* S. RAMAREDDI. **30 M. L. W. 738 = A.I.R. 1929 Mad. 785 = 57 M.L.J. 515.**

———*C. P. Code, S. 10—For S. 10 to be applicable entire subject-matter of two suits must be same—Where former suit relates to declaration of title with regard to certain properties and latter suit is for profits in regard to one of those properties S. 10 will not apply.*

In order to attract the provisions of S. 10 it is not enough that the same issue should be involved in the two suits but it is also necessary that the entire subject-matter of the two suits should be the same. So where the former suit is a suit relating to the declaration of title in regard to certain properties and the latter is a suit for profits in regard to a portion of these properties S. 10 will have no application. 24 C. L. J. 514 ; A. I. R. 1923 Cal. 716 ; 4 P. L. J. 557; A. I. R. 1925 Mad. 574; 6 O. L. J. 96 and 82 I. C. 539, Foll. (*Wazir Hasan, Ag. C. J. and Misra, J.*) CHANNAN KUAR *v.* SAHDEO SINGH. **4 Luck. 573 = 114 I. C. 775 = 7 O. W. N. 157 = A. I R. 1929 Oudh 341.**

———*Subsequent suit for mesne profits accruing subsequent to institution of prior suit is not barred by S. 10.*

Where a suit was brought for the recovery of mesne profits which had accrued subsequently to the institution of a prior suit relating to the same property, and although there was one issue common to both the suits, yet they did not embrace the entire subject in controversy between the parties, the subsequent suit for mesne profits does not attract the operation of S. 10. A.I.R 1923 Cal. 716 and A.I.R. 1925 Mad. 574, Rel. on. (*Pratt, Offg. C. J. and Ormistone, J.*) MA KHO U *v.* MAUNG BA SEIN. **6 Rang. 775 = 115 I. C. 665 = A. I. R. 1929 Rang. 67.**

———*Applying for or obtaining leave to appeal to His Majesty does not amount to pendency of appeal.*

The mere applying for or obtaining leave to appeal to the Privy Council cannot of itself amount to the pendency of an appeal till such appeal is actually filed. 21 Mad. 18, Foll. (*Pratt, Offg. C. J. and Ormistone, J.*) MA KHO U *v.* MAUNG BA SEIN. **6 Rang. 775 = 115 I. C. 665 = A.I.R. 1929 Rang. 67.**

———*Stay of suit—Agreement between parties to bring suit at a particular place—A bringing suit in pursuance of contract—B bringing suit in another Court and asking for stay of A's suit—Such relief cannot be granted.*

There was a binding contract between the plaintiff and the defendant that any suit in respect of the transactions between the parties should be brought either in the High Courts or in the Small Causes Court of Bombay. Plaintiff sued in the Bombay Court and defendant sued in the Ludhiana Court for their respective claims. Defendant applied for the stay of Bombay suit.

Held, that the defendant was not entitled to any relief. S. 10 is not a section which prevents the Court from enforcing contractual rights of this nature as between two parties. (*Marten, C. J. and Blackwell, J.*) TILAKRAM CHAUDHURI *v.* KODUMAL. **30 Bom. L. R. 546 = 110 I.C. 727 = A. I. R. 1928 Bom. 175.**

———*Award passed at* K—*Suit to set aside award in* M *Court—Subsequent application under S. 14, Arbitration Act at* K—*Application to stay proceedings at* K *on account of the pendency of the suit at* M *is not competent,* M *Court having no jurisdiction to entertain application under S. 14, Arbitration Act.*

A brought a suit at *M*. The matter in dispute was already referred to arbitration and an award was passed at *K* during the pendency of the suit. An application was filed at *K* under S. 14, Arbitration Act. *A* subsequently filed another application to stay proceedings in *K* Court under S. 10, C. P. Code, on the ground that he had filed a suit in *M* Court, where the award was being enforced against him as a decree, to have the award set aside.

Held, that the only Court competent to entertain the application under S. 14, Arbitration Act, was the *K*. Court and hence the suit instituted by *A* at *M* was not pending in a Court having jurisdiction to grant relief claimed in *K* Court and therefore *K* Court was not barred to go into the same grounds. (*Rupchand Bilaram, A. J. C.*) MALOTRA & CO. *v.* SUKHDVAL KAPUR. **23 S. L. R. 427 = 112 I. C. 318 = A. I. R. 1928 Sind 169.**

———*Identity of reliefs is not necessary—Object of section is to avoid conflict of judicial decisions—Mortgagee's suit for personal decree—Mortgagor's suit in another Court for declaration and injunction against mortgagee's selling mortgaged property—Suits do not fall within S. 10.*

Under S. 10 it is necessary that the matters directly and substantially in issue in the one suit should also be directly and substantially in issue in the other suit. Identity of reliefs is not necessary. But the mere identity of one or more issues, apart from their importance and bearing does not suffice. The object of the section is to avoid a conflict of judicial decisions. The cause of action as disclosed in the pleadings, the matter directly and substantially in issue, and the relief claimed, are three connected parts of the same legal structure and must be viewed both singly and as a whole. A suit for a personal decree against the mortgagor by mortgagee and another suit in another Court by mortgagor for a declaration and injunction against the mortgagee's right of possession or of sale and for damages do not come within the provision of S. 10. (*Madgaonkar, J.*) F. E. DINSHAW *v.* JOHN CARAPIET GALSTAUN. **29 Bom. L. R. 382 = 102 I. C. 229 = A. I. R. 1927 Bom. 245.**

———*Stay of suit—S. 10 does not apply unless matter in dispute is directly and substantially in issue in two suits.*

Where the plaintiff applied to the District Munsif to stay the trial of the suit which was ready for judgment on the ground that the Munsif was not competent to try the case because the very matter was the subject-matter of an appeal in the District Court, but it was found that the suit in the Munsif's Court was for the recovery of certain sums of money as having been received by the defendant which ought to be paid to him and the main issue in the suit which was under appeal was whether there was a partnership or not,

Held, that the subject-matter being different, the suit need not be stayed. (*Devadoss, J.*) NARAPPA NAIDU *v.* NARAYANASAMI NAIDU. **106 I. C. 661 = A. I. R. 1927 Mad. 1199.**

——*Two suits having only one issue in common—S. 10 does not apply.*

S. 10 is applicable to two suits of which the matter in issue is identical, although the reliefs asked for may differ. It does not apply to two suits merely because they have one issue in common. A. I. R. 1922 Mad. 304 and A. I. R. 1925 Mad. 574, Foll. (*Curgenven, J.*) VELLACHAMY *v.* MUTHIAH. **26 M. L. W. 241 = 103 I. C. 274 = A. I. R. 1927 Mad. 1132.**

——*U. P. Land Revenue Act* (3 *of* 1901), *S.* 118—*Suit for partition pending in Revenue Court—Suit in Civil Court for partition of house is not barred.*

The Revenue Court has no jurisdiction to partition a house, *i.e.*, partition the buildings, at all. It can partition the site occupied by a house along with other land in a village. If in making a partition it is necessary to include in the portion allotted to one co-sharer, the land occupied by a dwelling house or other building in possession of another co-sharer, the latter can, under S. 118 of the Land Revenue Act, be allowed to retain it (the land) with the buildings thereon on condition of his paying a reasonable ground rent to the co-sharer in whose portion it may be included. Hence the pendency of a suit for perfect partition in a Revenue Court is no bar to a suit in a Civil Court for possession of a certain share of a house by partition thereof. If a house is in the occupation of one co-sharer and the site is allotted to another, it would be retained by the occupier of the house on payment of a rent to be fixed. A.I.R. 1924 All. 854, Foll. (*Sulaiman and Daniels, JJ.*) KULSUM BIBI *v.* MUHAMMAD ISMAIL. **47 All. 915 = 89 I.C. 186 = 23 A. L. J. 585 = A. I. R. 1925 All. 677.**

——*Later suit not having same issue as previous suit cannot be stayed.*

Where *A* filed a suit against *B* for partition and later, *B* filed a suit against *A* on a rent deed executed by *A* to *B*, and *A* prayed for a stay of the rent suit on the ground that the same questions of title were involved in both suits. *Held*, that no question of title could be raised in a rent suit and as there could thus be no common issue in both the suits, no stay of the rent suit could be granted. (*Abdul Raoof, J.*) MELA RAM *v.* RIKHI KESH. **33 P. W. R. 1922 = 69 I. C. 111 = A. I. R. 1923 Lah. 69.**

——*Some issues only common to two suits—S. 10 does not apply.*

Where some of the issues alone are common to two suits between the same parties, S. 10 does not apply and there can be no stay of the subsequently filed suit. The terms, "the matter in issue" in S. 10, Civil Procedure Code, has reference to the entire subject in controversy between the parties. 24 C. L. J. 514, followed. (*Venkatasubba Rao, J.*) KOTA SREERAMULU *v.* KOTA SREERAMULU. **15 M.L.W. 646 = 70 I. C. 682 = 31 M. L. T. 360 = A.I.R. 1922 Mad. 304.**

—S. 11.

Adverse finding.
Appealability.
Applicability and Scope.
Cause of action.
Co-defendants.
Competent Court.
Compromise or consent decree.

Connected or cross-appeals and suits.
Co-plaintiffs.
Directly and substantially in issue.
Execution proceedings.
Ex parte decree.
Fraud.
Heard and finally decided.
Issue of fact or law.
Judgment in rem.
Leave to withdraw suit.
Litigating under the same title.
Might and ought.
Minor.
Miscellaneous proceedings.
Parties and representatives.
Plea of.
Prior decision.
Rent suits.
Representative capacity.

—S. 11—Adverse finding.

——On a suit by the landlord for ejectment of his under-raiyat, it was contended by the defendant that he was a co-sharer. The Courts held the plea to be unavailing, that point having been already decided in a prior suit between them in spite of defendant's contention that the previous suit having been dismissed on the ground that notice had not been served to the defendant that point was undecided.

Held, that even then the question of the status having been already decided in that suit, did operate as *res judicata*. 13 Cal. 17, Dist.; A. I. R. 1922 P. C. 241, Rel. on. (*Mukerji and Mallik, JJ.*) MURAD BISWAS *v.* BASTI MANDAL. **A. I. R. 1929 Cal. 449.**

—S. 11—Adverse Finding—Favourable Decree.

——A finding cannot be conclusive against a party if the decree is not based upon it but is made in spite of it. Such a finding against the plaintiff cannot found a plea of *res judicata* when they succeed on other pleas and have no occasion to go further as to the finding against them. A. I. R. 1922 P. C. 241 and 11 Cal. 301, Ref. (*Sulaiman and Niamatullah, JJ.*) ABHEY RAM *v.* JHANDU. **1929 A.L.J. 1100 = 121 I.C. 102 = A.I.R. 1929 All 910.**

——In a suit for rent, tenant claimed a deduction in rent. The trying Court held that the plea was barred by reason of the decision in a previous rent suit, acting as *res judicata*; but the first Appellate Court on appeal was of a different opinion, but it decreed the plaintiff's suit in full so that the plaintiff could not prefer any appeal against this adverse finding of the appellate Court on the question of *res judicata*.

Held, that under circumstances such as these the finding as to *res judicata* cannot operate as *res judicata*, the decree of the first appellate Court not being based on the finding, but in spite of it, and such a finding not being necessary for its decision. (*Greaves and M. N. Mukerji, JJ.*) SIVADAS DUTTA *v.* BIRENDRA KRISHNA. **43 C.L.J. 116 = 94 I.C. 844 = A.I.R. 1926 Cal. 672.**

——*Appeal held incompetent but issue decided favourably.*

A usufructuary mortgagee brought a suit against mortgagor for possession. He applied for an amendment to add alternate prayer for recovery of debt but his application was refused and his suit dismissed. Court held that consideration had passed. On appeal by defendant Court held that no consideration passed but the appeal was wrongly dismissed on the ground that defendant was successful in lower Court and no appeal lay. Plaintiff brought a second suit for money

decree for the debt. *Held*, that the first suit operated as *res judicata*. *Raghunath Kurmi* v. *Deo Narain Rai* (S. A. 1419 of 1916, Patna), Foll. (*Adami and Sen, JJ.*) RAM AUTAR PANDE *v.* SHANKER DAYAL.
7 P. L. T. 150 = 1925 P. H. C. C. 338 = 90 I. C. 622 = A. I. R. 1926 Pat. 87.

———Where the plaintiffs in previous suit abandoned their rights to claim a mortgage decree against the defendants and the defendants against whom the suit had been dismissed had no right of appeal upon the finding as to the nature of the debts and therefore the question was not finally decided as between the opposing parties to the suit,

Held, the question could be re-agitated. (*Spencer, Offg. C. J. and Srinivasa Aiyangar, J.*) KUPPUSWAMI GOUNDAN *v.* MARIMUTHU GOUNDAN.
1924 M W.N. 807 = 20 M.L.W. 783 = 82 I.C. 438 = A. I. R. 1925 Mad. 52 = 47 M. L. J. 487.

———Per *Ayling and Odgers, JJ.*—Where a suit by the inamdar was dismissed for want of notice to quit on a finding that the inamdar was entitled to land and not merely assessment but that no notice was given and the order as to costs which were awarded to the plaintiff was based on the ground that the plaintiff had succeeded on the main contention and that decision remained unappealed against,

Held, that decision about the extent of the inam operated as *res judicata* in a suit for ejectment between the same parties. 13 Cal. 17 and 48 Cal. 460, Dist. (*Napier and Odgers, JJ*, then *Ayling and Odgers, JJ., afterwards Krishnan and Venkatasubba Rao, JJ.*) VEERASAMI MUDALI *v.* PALANIYAPPAN.
19 M. L. W. 513 = 84 I. C. 799 = 34 M. L. T. 175 = 1924 M. W. N. 466 = A. I. R. 1924 Mad. 626 = 46 M. L. J. 515.

———Adverse finding in a decree in favour of a party is not *res judicata*. 36 M.L.J. 641, 48 Cal. 460 (P.C.), Foll.; 12 L.W. 277; 31 M.L.J. 311, Diss. (*Krishnan and Waller, JJ.*) RAMASWAMI REDDI *v.* T. MAKUDAI REDDI. **47 Mad. 453 = 84 I.C. 622 = 19 M. L. W. 377 = 34 M. L. T. 62 = 1924 M. W. N. 241 = A. I. R. 1924 Mad. 469 = 46 M. L. J. 198.**

———A finding not necessary to the relief granted by the decree cannot operate as *res judicata*. (*Daniels, A. J. C.*) OUDH BEHARI LAL *v.* DAL SINGH.
10 O. L. J. 404 = 79 I. C. 666 = A. I. R. 1924 Oudh 205.

———In the first suit for ejectment the defendant pleaded that he was a permanent tenant and that the suit must fail as no notice to quit was served upon him. The Court in that suit held that the suit must fail for want of notice to quit. It also came to the finding that the defendant had failed to prove that he had a permanent tenancy. The decree was one of dismissal and the defendant could not appeal against that finding, *Held*, the decree could not operate as *res judicata* on the question whether the defendant had a permanent tenancy or not. (*N. R. Chatterjee and Pearson, JJ.*) RAJENDRA KISHORE CHOUDHURY *v.* KUMUD BAN MAHATA. **67 I. C. 271 = A. I. R. 1923 Cal. 297.**

———Per *Sadasiva Aiyar, J.*—Finding against a party not necessary for a decree in his favour though given only to settle the main contentions of the parties is *res judicata*. (*Spencer and Devadoss, JJ.*) SARAVANAPERUMAL *v.* SUBBAYYAN. **16 M. L. W. 802 = 1922 M. W. N. 763 = 31 M. L. T. 430 = A. I. R. 1922 Mad. 514.**

—S. 11—Appealability.

———The question of finality is unaffected by considerations whether an appeal lay from the decision, or whether it was embodied in the decree. If the decision is on a matter which was substantially in issue between the parties it will be *res judicata* although there was no appeal, or could have been no appeal, and although the decree itself was based on ground independent or in spite of the particular decision. Case-law considered. (*Jackson, J.*) OBLA SUBBIER *v.* RAMASWAMY KONAR.
25 M. L. W. 797 = 103 I. C. 90 = A. I. R 1927 Mad. 643.

——— If a party could not have appealed against the decree, the decision cannot be held to operate as *res judicata*. 11 Cal. 580 and 41 C. L. J. 396, Foll. (*Suhrawardy and Mukerji, JJ.*) GANGAPRASAD CHOWDHURY *v.* KULADANANDA ROY.
44 C. L. J. 399 = 94 I. C. 235 = 30 C. W. N. 415 = A. I. R. 1926 Cal. 568.

———Where the previous application was to the lower Court and where the lower Court's order dismissing the application was not open to appeal, and where a fresh application for the same relief was made to the High Court by the previous applicant and another and where such application urged additional grounds,

Held, that it was not barred. (*Martineau, J.*) BIHARI LAL OF LAHORE *v.* SHANKAR DAS.
7 L. L. J. 6 = 86 I. C. 246 = A. I. R. 1925 Lah. 309.

—S. 11—Applicability—Alteration of Law.

———Even where law has been since determined to be otherwise by judicial decision, the rights of parties decided upon prior law remain unaffected. The legislature by statute may alter the rights of parties and when it does so, it makes such provision as it thinks proper to prevent injustice. Courts of law are in no way authorized to alter the rights of parties since they profess, at all events, to ascertain the law. If the binding character of a decision upon a concrete question as to the terms of particular holding is to fluctuate with every alteration in the current of authority, the Courts will become an instrument for the unsettlement of rights rather than for the ascertainment thereof. 32 Cal. 749, Overruled; 10 Cal. 1087, Foll. (*Rankin, C. J., C. C. Ghose, Suhrawardy, B. B Ghose and Mukherji, JJ.*) TARINI CHARAN *v.* KEDAR NATH. **56 Cal. 723 = 48 C. L. J. 327 = 33 C. W. N. 126 = 115 I. C. 593 = A. I. R. 1928 Cal. 777 (F.B.).**

———*B. T. Act, Ss.* 109, 105—*Proceedings under*—Res judicata.

The tenant claimed abatement of rent under S. 52, but no such question was raised or investigated in the proceeding under S. 105. The landlord contended that as in a case where S. 11, C. P. Code, is applicable, a question which might and should have been raised is deemed to have been raised and decided, High Court should hold under S. 109 that a matter has been the subject of an application under S. 105 whenever it might and ought to have been raised and decided under S. 105 read with S. 105-A.

Held, that this contention is unsound. If this construction were accepted words which are not found there would have to be read into S. 109. It would be held on the analogy of the doctrine of constructive *res judicata* that the jurisdiction of the Civil Court has been constructively excluded even when a point has been neither raised nor decided under S. 105 read with S. 105-A. 44 C. 783, Foll. (*Das, J.*) MAHARAJA BAHADUR KESHO PRASAD SINGH *v.* BHAGWAT SARAN PANDE. **67 I. C. 710 = A. I. R. 1923 Pat. 174.**

———Ss. 10 and 11, C. P. Code, are concerned with the law of procedure and the mere use of the word " suit " in S. 10 does not restrict its applicability to suits

alone but the sections can be extended to civil miscellaneous proceedings by virtue of S. 141, if it is otherwise applicable. (*Raymond, A. J. C.*) *In the matter of* ARBITRATION BETWEEN THE FIRM OF JAI NARAIN BABULAL *v.* FIRM OF NARAINDAS JANIMAL.
16 S. L. R. 79 = 66 I. C. 796 = A. I. R. 1922 Sind 6.

—S. 11—Applicability—Arbitration.

———The proceedings under paras. 20 and 21 of the second schedule are not proceedings in a suit, though for the purposes of convenience they may be numbered and registered as a suit. 32 All. 484 ; 29 Cal. 167 and 18 Cal. 414, Ref. (*Macleod, C. J. and Fawcett, J.*) RAJMAL GIRDHARI LAL *v.* MARUTE SHIVRAM.
45 Bom. 329 = 59 I. C. 755 = A. I. R. 1921 Bom. 389.

—S. 11—Applicability.

———Whilst S. 10 bars only a suit, S. 11 bars the trial of both the suit and of issue involved in that suit. 11 All. 148, Rel. on. (*Wazir Hasan, Ag. C. J. and Misra, J.*) CHANNAN KUER *v.* SAHDEO SINGH.
4 Luck. 573 = 114 I. C. 775 = 7 O. W. N. 157 = A. I. R. 1929 Oudh 341.

—S. 11—Applicability and Scope—Custom (Punjab).

———Custom in the Punjab is primarily tribal and at any rate in the case of two villages situate within a few miles of each other it is not possible to contend that the decision on the question of custom given in a suit about the property situate in one village is not *res judicata* in a suit brought about property situate in a neighbouring village. A. I. R. 1927 Lah. 289 (F. B.), not Appl. (*Dalip Singh, J.*) NANHAR *v.* HARNAM.
119 I. C. 768 = A. I. R. 1929 Lah. 769.

—S. 11—Applicability and Scope—Date of applying rule.

———*Whether an issue is* res judicata *should be looked to when it comes to be decided and not when litigation commenced.*

The rule of *res judicata*, so far as relates to the trial of an issue refers, "not to the date of the commencement of the litigation but to the date when the Judge is called upon to decide the issue. (*Iqbal Ahmad, J.*) ITAR SINGH *v.* UMRAO. **8 L. R. A. Rev. 33 = 99 I. C. 299 = A. I. R. 1927 All. 189.**

—S. 11—Applicability and scope.

———*Decision conclusive though not* res judicata.

Defendant No. 1 in the suit was a tenant. In a previous suit for rent by the plaintiff against another tenant of the same property the defendant pleaded that he had obtained a renewal from the second defendant who was also the second defendant in that suit. The second defendant was *ex parte*. It was decided that the second defendant had no right to manage the property.

Held, that the point as to the second defendant's right to manage the property was *res judicata* in the subsequent suit between plaintiff and defendant 2. Also it was binding on the first defendant though not as *res judicata*. 13 C. L. J. 38 and 17 C. W. N. 627, Foll. ; and 44 M. 778, Applied. (*Venkatasubba Rao, J.*) CHERIAKKATAVAN KORAN *v.* KOROTH AMMALU.
85 I. C. 562 = A. I. R. 1925 Mad. 1025.

—S. 11—Applicability and scope—Decision out of Court.

———*Walsh, J.—Obiter* :—A decision between the parties out of Court in the course of a suit is governed by the principles of *res judicata*, independently altogether of the special provisions of S. 11 of the Code. (*Walsh, Kanhaiya Lal and Mukerji, JJ.*) GAJENDRA SINGH *v.* DURGA KUMARI. **23 A. L. J. 561 = 88 I. C. 768 = 47 All. 637 = A. I. R. 1925 All. 503 (F. B.).**

—S. 11—Applicability and scope.

———Court cannot travel outside S. 11 when case falls within its terms. (*Kumaraswami Sastri and Reilly, JJ.*) VENKATASUBBA *v.* VIGNESWARADU.
1928 M. W. N. 336 = 28 M. L. W. 82 = 110 I. C. 554 = A. I. R. 1928 Mad. 840 = 56 M. L. J. 52.

—S. 11—Applicability and scope—False case.

———If a man fighting a case fights it on false statements and does not call necessary evidence to support his own statements, he cannot afterwards gain any advantage for those omissions of his. He must be considered to be as much bound by the decision as he would have been if he put forward a true case and called all the evidence that was available. (*B. B. Ghose and Panton, JJ.*) DWIJAPADA DAS *v.* KALIPADA DE.
46 C. L. J. 596 = 31 C. W. N. 898 = 100 I.C. 510 = A. I. R. 1927 Cal. 421.

—S. 11—Applicability and scope—Finding by implication.

———For the purposes of *res judicata* a finding by necessary implication is no less potent than an express finding on a particular point. 15 Bom. 89 ; 24 C. W. N. 223, Foll. (*Addison and Bhide, JJ.*) HAIDAR HASAN *v.* ANJUMAN MUHAFAZ AUKAF.
113 I. C. 120 = A. I. R. 1928 Lah. 888.

—S. 11—Applicability and scope.

———*Judgment on property out of jurisdiction.*

If a Court pronounces a judgment upon the title or the right to possession of land out of its jurisdiction, the Courts of the country where it is situated, are justified in refusing to be bound by it, or to recognize it; and this even if the judgment proceeds on the *lex loci rei sitae*. (*Tek Chand, J.*) AMRU *v.* BHAGWANI.
119 I. C. 482 = A. I. R. 1929 Lah. 627.

—S. 11—Applicability and scope—Foreign Courts.

———In the case of a former decision of a "Municipal Court" the decision of a "necessary" issue is under certain circumstances a bar to the re-trial of the same issue by another "Municipal Court." It cannot be said that every issue decided by the foreign Court is binding upon the British Indian Court. Every issue, albeit necessary for the decision of the matter in dispute, cannot be regarded as a matter directly adjudicated upon. S. 13, C.P. Code, is no bar to the Courts in British India deciding an issue relating to title to immoveable property in British India, though it had been adjudicated upon by a foreign Court. 13 Bom. 224, not Foll.; A.I.R. 1928 Mad. 327, Foll. (*Tekchand, J.*) AMRU *v.* BHAGWANI.
119 I. C. 482 = A.I. R. 1929 Lah. 627.

———S. 11 refers to the decision with regard to the issues also. S. 13 speaks only of the matter directly adjudicated upon by the foreign judgment. Although having regard to the language of S. 13, the contention that it refers only to a decree cannot be accepted, still at the same time it cannot be said that every issue decided by the foreign Court is binding upon the British Indian Court. The expression "matter directly adjudicated upon" in S.13 should be held as undoubtedly to include the right set up, but limited only to the particular relief granted or refused. (*Kumaraswami Sastri and Srinivasa Aiyangar, JJ.*) CHOCKALINGA *v.* DURAISWAMI. **51 Mad. 720 = 108 I. C. 305 = 29 M. L. W. 250 = A. I. R. 1928 Mad. 327 = 54 M. L. J. 479**

—S. 11—Applicability and scope—Income tax.

———Principle of *res judicata* does not apply to orders passed under S. 33, Income-tax Act. (*Coutts-Trotter C. J., Odgers and Beasley, JJ.*) COMMISSIONERS OF INCOME-TAX, MADRAS *v.* MASSEY & CO., LTD., MADRAS. **29 M. L. W. 476 = 115 I. C. 814 = A. I. R. 1929 Mad. 453 = 56 M. L. J. 451 (F.B.).**

—S. 11—Applicability and scope—Interpretation "Matter in issue."

———"Matter in issue" in S. 11 of the Code is distinct from the subject-matter and the object of the suit as well as from the relief that may be asked for in it and the cause of action on which it is based, and the rule of *res judicata* requiring the identity of the matter in issue will apply even when the subject-matter, the object, the relief and the cause of action are different. It is the matter in issue and not the subject-matter of the suit that forms the essential test of *res judicata*. *Bras* v. *Jackson*, 1 Phil. 582; 6 Cal. 715; 13 Bom. 25; 15 Mad. 494; 4 All. 55; 11 All. 148; 8 Mad. 219; 24 All. 112; 30 All. 470 and A.I.R. 1923 All. 613, Ref. (*Mukerji and Mallick, JJ.*) ABDUL GANI *v.* NARENDRA KISHORE ROY. **33 C. W. N. 876 = 57 Cal. 258 = A. I. R. 1930 Cal. 47.**

—S. 11—Applicability and scope—Interpretation.

———The doctrine of *res judicata* should not be unduly conditioned and qualified by all sorts of ingenious attempts at evasion where there has been in fact a fair contest on a question in dispute between the parties and the court intended to give and has given a final decision on that question. 36 M. L. J. 641. Foll. (*Abdul Raoof, J.*) KALU *v.* NUPU. **67 I. C. 755 = 108 P. L. R. 1919.**

—S. 11—Applicability and scope—Issue.

———Issue constituting "*res judicata*"—Construction. (*Fazl Ali and Chatterji, JJ.*) SAKALDIP SINGH *v.* IMRIT BARHI. **10 P. L. T. 630 = 120 I. C. 292 = A. I. R. 1930 Pat. 71.**

—S. 11—Applicability and scope—Jurisdiction.

———A previous decision of Revenue Court holding that a suit was not maintainable in Revenue Court does not act as *res judicata* in a subsequent suit in revenue Court between the same parties regarding the same land. (*Mukerji, J.*) JWALA DEBI *v.* AMIR SINGH. **10 L. R. A. Rev. 173 = A.I.R. 1929 All. 132.**

—S. 11—Applicability and scope—Not exhaustive.

———S. 11 is not exhaustive of all the instances of *res judicata*. (*Kemp and Murphy, JJ.*) RAOJI NARAINJI *v.* RATANSI KANJI. **A. I.R. 1930 Bom. 431.**

—S. 11—Applicability and scope—Obiter.

———A remark in the nature of an *obiter dictum* which is not the basis of a decree, cannot operate as *res judicata*. (*Bhide, J.*) PREM DAS *v.* SARBALAUD. **114 I. C. 331 = A. I. R. 1929 Lah. 225.**

—S. 11—Applicability and scope—Over-valuation.

———Arbitrary or over-valuation of second suit will not prevent the application of *res judicata*. (*Ashworth and Iqbal Ahmad, JJ.*) TAMIZUN-NISSA BIBI *v.* SYED MOHAMMAD HUSAIN. **25 A. L. J. 1035 = 108 I. C. 462 = A. I. R. 1928 All. 127.**

—S. 11—Applicability and scope — Preliminary and final decree.

——-Appeal from preliminary decree pending—Final decree passed is valid. (*Mukerji and Niamatullah, JJ.*) KHAIR-UN-NISSA BIBI *v.* OUDH COMMERCIAL BANK, LTD. **1929 A. L. J. 480 = 119 I. C. 510 = 51 All. 640 = A. I. R. 1929 All. 287.**

—S. 11—Applicability and scope—Scope.

———S. 11 is not exhaustive of the circumstances in which an issue is *res judicata*. (*Lord Williams.*) ABDUL RAHIM OOSMAN & CO. *v.* OJAMSHED PURSHOTTAMDAS & CO. **56 Cal. 639 = 120 I. C. 710 = A. I. R. 1930 Cal. 5.**

———The proposition of law, that S. 11 is not exhaustive of the circumstances in which an issue is *res judicata*, is undoubtedly unquestionable, but at the same time the statutory principles as enacted in S. 11 must be fulfilled before any of the principles of *res judicata* can be applied in bar of a suit. A. I. R. 1921 P.C. 11, Ref. (*Tapp, J.*) MT. SAID KHANAM *v.* SAID MUHAMMAD. **A. I. R. 1930 Lah. 487,**

———*Obiter.*—The principle of *res judicata* is not limited to the provisions of S 11. A.I. R. 1921 P.C. 11 and A.I.R. 1922 P.C. 80, Rel. on. (*Fforde and Bhide, JJ.*) NIRBHE RAM *v.* MOOLCHAND. **117 I. C. 83 = A. I. R. 1929 Lah. 781.**

———The provisions of S. 11 are exhaustive and therefore the general principles of *res judicata* cannot be extended to cases which are within the terms of S. 11. 29 Cal. 707 (P. C.), Rel. on. (*Harrison and Dalip Singh, JJ.*) FIRM NATHU MAL *v.* FIRM LACHMI NARAIN. **96 I. C. 910 = A. I. R. 1926 Lah. 670.**

———S. 11 of the Civil Procedure Code does not exhaustively state the whole law of *res judicata*. The effect of the section is not to supersede the general principles on the subject. (*Wazir Hasan, A. J. C.*) GAURI MISRA *v.* MOHAN. **80 I. C. 847 = A. I. R. 1925 Oudh 118.**

———The principle which prevents the same case from being twice litigated is of general application and is not limited by the specific words of the Code of Civil Procedure in this respect. 43 Cal. 694; A.I.R. 1922 P.C. 253, Foll. (*Mookerjee and Suhrawardy, JJ.*) DWIJENDRA NARAIN ROY *v.* JOGES CHANDRA DE. **39 C. L. J. 40 = 79 I.C. 520 = A. I. R. 1924 Cal. 600.**

———An appeal against a preliminary decree filed on a date subsequent to the date of the final decree is barred but in the circumstances of the case the appeal was allowed to be converted into an appeal from final decree. (*Mookerjee and Suhrawardy, JJ.*) NANIBALA DASI *v.* ICHHAMOYEE DASI. **40 C. L. J. 291 = 84 I. C. 674 = A. I. R. 1925 Cal. 218.**

———Principle is to avoid repeated litigation as to same matter. (*Wazir Hasan, A. J. C.*) GAURI MISRA *v.* MOHAN. **80 I. C. 847 = A. I. R. 1925 Oudh 118.**

———Decision in previous suit when *res judicata*. (*Mears, C. J. and Banerji, J.*) BARU MAL *v.* SUNDER LAL. **21 A. L. J. 330 = 4 L. R. A. (Rev.) 165 = 72 I. C. 155 = A. I. R. 1924 All. 10.**

—S. 11—Applicability and Scope—Rent suits.

———Decisions in rent suits do not operate as *res judicata*. (*Kinkhede, A. J. C.*) TULARAM *v.* MT. SUNRATI. **79 I. C. 621 = A. I. R. 1924 Nag. 422.**

—S. 11—Applicability and Scope—Same proceedings.

———*Definite order cannot be set aside except on review by the same Judge or his successor though S. 11 does not apply.*

On general grounds when a definite decision has been given between the parties on any matter in controversy and such decision purports finally to adjudicate on such matter, it is not competent to the same Judge or his successor in office to set aside the former decision in the same proceeding. The parties, if they consider themselves aggrieved have their remedy by review or appeal to superior Courts. A.I.R. 1924 P. C. 202, Foll. (*Jai Lal, J.*) SHER KHAN *v.* PRABH DAYAL.

C. P. CODE (1908), S. 11—Applicability and scope —Same proceedings.

7 Lah. L. J. 319 = 26 P. L. R. 587 = 90 I. C. 683 = A. I. R. 1925 Lah. 507.

———The principle of *res judicata* is applicable to all orders passed in the same suit between the same parties when the question arises in subsequent proceedings in the suit. 48 Cal. 409 (P. C.), Foll. (*Kumaraswami Sastri, J.*) ABDUL WAHAB *v.* RAKIA BIBI SAHEBA. **73 I. C. 903 = A. I. R. 1924 Mad. 406.**

———It is difficult, if not impossible, to answer in general terms a question as to whether a whole class of cases can or cannot be held to be barred by the principle of *res judicata.* (*Wazir Hasan, Ag. C. J. Misra and Pullan, JJ.*) KEDAR NATH *v.* BALDEO PRASAD. **6 O. W. N. 191 = 116 I. C. 200 = 4 Luck. 603 = A. I. R. 1929 Oudh 172.(F.B.).**

—S. 11—Applicability and scope—Scope.

———The principle of conclusiveness of a decree is much wider than the terms of S. 11. A. I. R. 1921 P. C. 11 and A. I. R. 1922 P. C. 80, Foll. (*Wazir Hasan and Raza, JJ.*) DURGA PRASAD *v.* JAGATJIT SINGH. **3 Luck. 487 = 5 O. W. N. 265 = 112 I. C. 169 = A. I. R. 1928 Oudh 359.**

———*Section cannot be extended to cases not strictly covered.*

It would not be right on the part of a Court to extend S. 11 to cases which cannot be brought within the four corners of it. 29 Cal. 707 (P. C), Foll. (*Devadoss, J.*) VENKATAPPAYYA *v.* VENKATACHALAPATHI RAO. **99 I. C. 989 = A. I. R. 1927 Mad. 450.**

———The general doctrine of *res judicata* has no application to a case which is clearly governed by, and comes within the purview of S. 11, C. P. Code. (*Shadi Lal, C.J. and Agha Haider, J.*) QASIM ALI *v.* PURAN MAL. **117 I. C. 68.**

———*General doctrine of* res judicata.

If a case is covered by the provisions of S. 11, the general doctrine of *res judicata* cannot be invoked. (*Shadi Lal, C. J. and Agha Haider, J.*) QASIM ALI *v.* PURAN MAL. **117 I. C. 68.**

———General principles of *res judicata* cannot be invoked for cases covered by S. 11. Case-law discussed. (*Suhrawardy and Mukerji, JJ.*) GANGAPROSAD CHOUDHURI *v.* KULADANANDA ROY. **44 C. L. J. 399 = 30 C. W. N. 415 = 94 I. C. 235 = A. I. R. 1926 Cal. 568.**

———Where it is contended that an issue should not be re-tried inasmuch as it was directly and substantially tried in a former suit between the same parties, the question as to be determined upon the provisions of S. 11 of the C, P. Code, and it is not open to rely upon the principle of finality which forms the basis of the general law of *res judicata* a part from those provisions. 5 Bom. 387, Dist. (*Mukerji, J.*) CHHADEK KARIKAR *v.* SAYAD ALI KAVIRAJ. **85 I. C. 979 = A. I. R. 1925 Cal. 1046.**

———*Personal estoppel.*

The rule of *res judicata* does not create any right or interest in the property, though it may indirectly affect the rights of persons against whom it is effective. The rule is a rule of personal estoppel and does not attach itself to property. (*Napier and Krishnan, JJ.*) RAJESWARA SETHUPATHI *v.* RAMANATHASWAMI. **44 Mad. 514 = 63 I. C. 205 = A. I. R. 1921 Mad. 306 = 41 M. L. J. 288.**

— S. 11—Applicability and scope—Subject matter.

———S. 11 only requires that the issue, and not the subject-matter of the suit, should be common. (*Curgenven, J.*) PATTRACHARIAR *v.* ALAMELUMANGAI AMMAL. **25 M. L. W. 11 = 100 I. C. 40 = A. I. R. 1927 Mad. 273.**

C. P. CODE (1908), S. 11—Applicability and scope —Untenable claim.

———For the application of the principle of *res judicata* it is not necessary that the subject-matter, in the sense of the property, involved in the two suits should be the same. (*Wazir Hasan, A. J. C.*) ALI MOHAMMAD SHAH *v.* GAURI SHANKARLAL. **2 O. W. N. 430 = 12 O. L. J. 524 = 89 I. C. 282 = A. I. R. 1925 Oudh 444.**

———It is not necessary to the application of the rule of *res judicata* that the subject-matter of the two suits should have been identical. It is enough if the issue determined is the same. 12 I. A. 16, Foll. (*Daniels, J. C.*) MAHANT RAM DAS *v.* BHAGWAN KUNWAR. **12 O. L. J. 248 = 88 I. C. 985 = 2 O. W. N. 292 = 29 O. C. 93 = A. I. R. 1925 Oudh 390.**

S. 11—Applicability and scope—Third party.

———Observations in a judgment relating to a different matter though connected cannot bind a third party and the judgment itself cannot be evidence against him. (*Ramesam and Cornish, JJ.*) L. V. NARSIMHA SASTRI *v.* OFFICIAL ASSIGNEE, MADRAS. **1930 M. W. N. 396 = A. I. R. 1930 Mad. 751.**

———Where in a previous suit between the husband and wife it was decided that there was no divorce, on the husband's suit for restitution of conjugal rights against his wife and father in-law,

Held, that the question of divorce was *res judicata* and that the *father-in-law* could not be permitted to agitate it again. *Held*, further, that though S. 11, C. P. Code, had no application when the question was raised by the father-in-law yet that section was not exhaustive and that rules of justice should not be interpreted so as to operate against the course of justice. (*Mukerji, J.*) MT. KHATOON BIBI *v.* NAZIAP. **78 I. C. 1049 = A. I. R. 1924 All. 815.**

—S. 11—Applicability and scope—Under protest.

———Accepting a decision and acting in accordance with it under protest does not prevent its being *Res judicata.* (*Dawson Miller, C. J. and Jwala Prasad, J.*) MAHADEO PRASAD SAHU *v.* GAJADHAR PRASAD SAHU. **1 Pat. L. R. 145 = 73 I. C. 359 = A. I. R. 1924 Pat. 362.**

—S. 11—Applicability and scope—Unnecessary suit.

———*Finding in unnecessary suit can create* res judicata.

A finding contained in a decree in a suit which the plaintiff was not bound to institute but which he as a fact instituted can very well operate as *res judicata.* It is not the law that a finding given in a suit which is perhaps an entirely useless suit and need not have been instituted at all does not create *res judicata* in a subsequent suit whichc oncerns the same matter if the remaining requirements of law as found in S. 11 have been fulfilled. (*Abdul Raoof and Moti Sagar, JJ.*) HATHI KHAN *v.* MT. ALMO. **78 I. C. 3 = A. I. R. 1925 Lah. 160.**

—S. 11—Applicability and scope—Untenable claim

———Bar of *res judicata* cannot be got over by adding untenable claim in the later suit. (*Odgers, J.*) VELAYUDA PANDARAM *v.* SUNDARA. **23 M. L. W. 653 = 95 I. C. 968 = A. I. R. 1926 Mad. 829 = 51 M. L. J. 630.**

———*Applicability—Co-sharers — Ejectment suit by some only of—Dismissal of, on ground of non-joinder of the others—Effect of, in subsequent suit by ejectment by same co-sharers who were plaintiffs in prior suit.*

In the former ejectment suit only two co-sharers sued. The suit was dismissed on the ground that all co-sharers had not sued. There was no appeal against that order as there could have been. In the District Judge's Court later in a case of profits it was held in appeal that the other two co-sharers alluded to in the former suit were not entitled to profits from the *sir* as their names were not set down as *sirdars* with the two who were the plaintiffs in the former suit and who were the only plaintiffs in the later suit. In a fresh suit for ejectment by the plaintiff's co-sharers, *held*, that the principle of *res judicata* applied and that the later suit for ejectment should be dismissed on that ground. (*Pim, S.M. and Mc Nair, J. M.*) TULWA *v.* RAUF-UD-DIN. **13 R. D. 169.**

—S. 11—Applicability.

———*Issue unnecessary but invoked by party.*

Where a person instituted a suit against another for possession of certain trees on the ground that he was their owner and the defendant contended that the plaintiff was only the mortgagee and not the owner and thereupon an issue was framed on the point and the Court decided that the plaintiff was only a mortgagee and granted relief to him as a mortgagee,

Held, that, the plaintiff himself having raised the question whether he was the owner and not the mortgagee, the finding thereon, even though unnecessary, operated as *res judicata* against him. (*Boys, J.*) MT. KAMELA BIBI *v.* BAQAR HUSAIN. **118 I. C. 168.**

—S. 11—Applicability—Landlord and tenant—Different lands.

Where the question in the previous suit was whether certain land entered as qabzadari should be recorded as ordinary tenancy without rent and the subsequent suit related to certain land which was recorded as *bila lagan*, *held*, that the later proceeding was not barred by *res judicata*. (*Srivastava, J.*) BAKHTAWAR SINGH *v.* DAMBAR. **13 R. D. 114.**

———Appeal against adverse findng is not rendered incompetent because of another suit having been filed to contest that finding. (*Adami and Wort, JJ.*) RAGHUNANDAN PRASAD *v.* GHANANAND.

11. P L. T. 483 = A. I. R. 1930 Pat. 521.

—S. 11—Cause of action.

———Where the cause of action in two suits are different the estoppel by *res judicata* should be restricted to questions of fact and mixed questions of fact and law and should not be extended to pure questions of law. (*Suhrawardy, J.* Dubitante.) 11 C. L. J 461, Foll. (*Suhrawardy and Jack, JJ.*) HRIDAY NATH ROY *v.* AKHIL CHANDRA ROY. **49 C. L. J. 357 = A. I. R. 1929 Cal 445.**

———The test as to whether a previous adjudication operates as a bar to a subsequent adjudication of the same matter does not lie in the fact as to whether the two causes of action are different or the same. 12 O. C. 347; 20 All. 110 affirmed in 24 All. 429 (P.C.), Foll.; A I. R. 1924 Pat. 265, Ref. (*Wazir Hasan, Ag. C. J. Misra and Pullan, JJ.*) KEDAR NATH *v.* BALDEO PRASAD. **6 O. W. N. 191 = 116 I. C 200 = 4 Luck, 603 = A.I.R. 1929 Oudh 172 (F. B.).**

———*Alienation by Hindu father set aside.*

Plaintiffs purchased a certain property from a Hindu father and the sale was subsequently cancelled in a suit by the sons to set it aside on their depositing a certain sum in Court. Plaintiffs sued the sons of vendor, for the balance of the purchase-money.

Held, that the suit is not barred by the principles of *res judicata* as money paid to the father as consideration for the sale at the time of the sale cannot be regarded as a debt of the father until the sale had been set aside and the right of the vendee to get back the sale consideration from the father has accrued. (*Dalal and*

Pullan, JJ.) RAGHUNATH PRASAD *v.* RAM BHAROSE. **100 I. C. 745 = A. I. R. 1927 All. 421.**

———*Ejectment suit.*

The right to sue for ejectment accrues from year to year, and therefore the withdrawal of a previous suit for ejectment does not bar a subsequent suit for ejectment against the same party. (*Sulaiman, J.*) KUMARI *v.* ADIT MISIR. **89 I. C. 379 = A. I. R. 1926 All. 34.**

———*Right not available before.*

Where at the time of a declaratory suit the plaintiff has not acquired title by adverse possession his subsequent declaratory suit on the basis of adverse possession is not barred by *res judicata*. (*Harrison and Dalip Singh, JJ.*) DEBI SAHAI *v.* RAMJI LAL.

27 P. L. R. 617 = 97 I. C. 170 = A. I. R. 1926 Lah. 668.

———*Purchaser from Hindu coparcener.*

A partition suit by a purchaser of a coparcener's interest in a joint Hindu family is not barred by a prior decision against him for declaration of his right to possession under O. 21, R. 103. (*Spencer and Odgers, JJ.*) SHANMUGAM PILLAI *v.* PANCHALI AMMAL.

49 Mad. 596 = 23 M. L. W. 551 = 95 I. C. 209 = A. I. R. 1926 Mad. 683 = 50 M. L. J. 681.

———*Suit for possession was dismissed by 1st appellate Court on ground of adverse possession of defendant. In second appeal the plea of adverse possession was not considered but suit was dismissed on ground of limitation. Second suit by plaintiff against same defendant for possession on differ nt cause of action is not barred.*

When the decision of a lower Court is appealed to a superior tribunal and that tribunal for any reason does not think fit to decide the matter, it is left an open question and hence the second suit is not barred on the ground of *res judicata*. 8 Cal. 631 ; 24 Cal. 616 (P.C.) ; 7 Cal. 381; 45 Cal. 442 (P.C.) and 6 Bom. 110, Ref. (*Chatterjee and Cuming, JJ.*) NRIPENDRA NATH BHOWMIK *v.* BASANTA KUMAR LAHIRI. **29 C.W.N. 861 = 89 I. C. 207 = A. I. R. 1925 Cal. 1195.**

———*Right to immediate possession and right to recover possession at some future time.*

Heirs of a deceased Mahomedan sued his widow for immediate possession of his property held and retained by the widow in lieu of dower, on the ground that her dower-debt had already been satisfied. They also claimed mesne profits for some period before and during suit. The suit was decreed on condition that the plaintiffs were to pay to the widow certain amount as the balance of dower, within a certain time. The sum was not paid and the suit thus stood dismissed. The widow thereupon gifted away the property mentioning in the gift-deed that she had become absolute owner of the property.

Held, that the effect of the non payment by plaintiff in the prior suit had not the effect of conferring absolute estate on the widow and the decision in the prior suit did not extinguish plaintiff's right to claim possession at any future time, a question different from that adjudicated, a right to immediate possession. (*Lord Atkinson.*) MT. MAINA *v.* VAKIL AHMAD.

52 I. A. 145 = 47 All. 250 = 86 I. C. 579 = 27 Bom L R. 796 = 23 A.L.J. 115 = 30 C.W.N. 673 = 6 L. R. P. C 25 = 2 O.W.N. 180 = A. I. R. 1925 P. C. 63 = 48 M. L. J. 667 (P.C.).

———*Reliefs same.*

When the causes of action are different it cannot be said from the mere fact that the same relief is claimed in both, that the later suit is barred by reason of the eariier suit. 29 Mad. 153, Foll. (*Devadoss, J.*) KARIPPAYI KATHIRI *v.* K. KANNAN. **86 I. C. 949 = A. I. R. 1925 Mad. 1172.**

——*Suit for accounts.*

Subsequent suit is barred under S. 11, where the subsequent suit is exactly of the same nature as the previous suit with the difference that the date from which the accounts are asked for in the later suit is a few years later than in the previous suit. (*Macleod, C. J. and Crump, J.*) SIDAGAVADA KANAGAVADA *v.* RAMCHANDRA BABAJI. **A. I. R. 1924 Bom. 118.**

——*Different.*

Where there are two agreements to sell two consignments of *mohua* a suit for damages for failure to deliver one consignment and a decree thereon do not bar a fresh suit on the agreement to deliver the second consignment. (*Drake-Brockman, J. C.*) JODHRAJ *v* BYRAM. **7 Nag. L. J. 25 = 83 I. C. 309.**

——*Suit for possession—Previous suit for declaration no bar.*

The dismissal of a suit of the reversioner for a declaration that he was the next reversioner during the lifetime of the widow on the occasion of transfer by her by way of gift is no bar to a subsequent suit for possession of the property. (*Gokul Prasad, J.*) RAMJAS *v.* MT. SARTAJI. **70 I. C. 635 = A. I. R. 1922 All. 401.**

——*Scheme suits.*

Though a scheme of management was asked and prepared by the trial Court in a previous suit the first appellate Court gave a personal direction to the trustee and the High Court thought it sufficient. No finding was given on the question of scheme. The present suit so far as it prays for a scheme, being based on a different set of facts which came into existence at least partly after the previous suit had been filed and on a different sanction newly obtained from the Collector was held to be not barred. (*Spencer and Krishnan, JJ.*) GOVINDASWAMI NAIDU *v.* UCHAPPA GOUNDAN. **70 I. C. 579 = 1922 M. W. N. 477 = A. I. R. 1922 Mad. 413.**

——*Previous decree for cess.*

A previous decree for cess does not operate as *res judicata* as a cess is a recurring charge. (*Jwala Prasad and Ross, JJ.*) PITAMBER CHAWDHRY *v.* SHAIKH RAHMAT ALI. **1 Pat. 218 = 65 I. C. 138 = 1922 P. H. C. C. 167 = 3 Pat. L. T. 282 = A. I. R. 1922 Pat. 303.**

——*Mortgage—Suit for interest—Subsequent suit for mortgage amount.*

A mortgage deed contained a distinct and separate covenant to pay interest. The mortgagee sued for interest alone based on this covenant, obtained a money decree and in execution thereof got the mortgaged property sold in execution, free of his mortgage. He then sued for payment of the mortgage money out of the sale proceeds deposited in Court but his suit was dismissed. Thereupon he filed a suit on the mortgage itself.

Held, that the previous suits did not operate as a bar under O. 2, R. 2, inasmuch as the cause of action in those suits were different from the one in the present suit.

Held further, that if no mortgage decree could be given on other grounds, a money decree for the mortgage amount will be barred either under O. 2, R. 2 if no such relief was asked for in the previous suit or under S. 11 if such relief was asked for and not granted. (*Brown, A. J. C.*) MAUNG KYIN PEIN *v.* MA PWA ME. **4 U. B. R. 62 = 64 I. C. 953 = A. I. R. 1922 U. B. 1.**

——*Rent suits.*

'It is said that the party is bound by the decisions in the rent suits which operated as *res judicata*. If this were the law, it would, indeed, be very strange ; but having regard to the facts of this case and having regard to the way in which the rent suits were disposed of, we are of opinion that this is not the law." In this case, the former suit was for payment of rent and the new suit for fixation of fair and equitable rent under very different set of circumstances. The causes of action were therefore different. But the general question was left open. (*C. C. Ghose and Chotzner, JJ.*) DEBI PRASAD BHAKAT *v.* OFFICIAL TRUSTEE OF BENGAL. **37 C. L. J. 314 = 72 I. C. 1013 = A. I. R. 1923 Cal. 333.**

——*Decision in respect of non-existing right.*

An adverse decision as to plaintiff's right to impeach a transfer which was then not a valid transfer but only one of *spes successionis* is not *res judicata* as regards his subsequent suit to impeach the same transfer after the limited owner's death. (*Shadi Lal, C. J. and Wilberforce, J*) BUTA SINGH *v.* JHANDU. **3 L. L. J. 211 = 61 I. C. 375 = A.I.R. 1921 Lah. 133.**

——*Rejection of plaint.*

Under a compromise *A* and *B* were bound to pay maintenance to *C* every year. *A* paid the whole amount for two years and sued *B* for contribution. The appellate Court rejected the plaint as disclosing no cause of action because the compromise did not contain any clause as to contribution. *A* then sued again on the same cause of action and the same subject-matter. *Held*, the suit was barred. (*Sadasiva Aiyar and Napier, JJ.*) SANTHA NATH AMMAL *v.* ISSAKI SUPPAN ASSARAN. **(1920) M. W. N. 616 = 60 I. C. 694 = 12 M. L. W. 457.**

——*Suit for declaration—Dismissal for default—Subsequent suit for possession.*

A suit for declaration that an alienation in favour of the defendant is invalid was dismissed for default. The plaintiff subsequently sued for partition and possession of a share. *Held*, the cause of action being different, the suit is not barred. R. 9 bars a suit where the cause of action is the same. (*Ayling and Krishnan, JJ.*) ASIA BIVI *v.* SEHU MOHAMMAD ROWTHER. **60 I. C. 201 = 12 M. L. W. 431 = 39 M. L. J. 412.**

Co-defendants.

Conflict of interest.
Constructive res judicata.
Finding not in decree.
Ingredients.
Necessary Decision.
No issue between.
Partition suit.
Pro forma defendants.
Substantially in issue.

—S. 11—Co-defendant—Conflict of interest.

——*Suit by reversioner.*

One of the two reversioners brought a suit to obtain possession of half of the property sold by a Hindu widow making the other reversioner *K* a co-defendant with the vendee. *K* was not a contesting defendant to the suit. The suit was decreed on the finding that the sale was not for legal necessity. Subsequently *K* sued the same vendee to obtain possession of the other half of the property and it was contended that the finding regarding legal necessity in the previous suit was not binding on the vendee inasmuch as *K* was not a contesting defendant in that suit.

Held, that though *K* was not a contesting defendant, there was an issue between *K* and the vendee, *viz.*, whether the sale was binding on the reversioners and *K* was equally interested in the issue with the plaintiff in the previous suit and as it was necessary to decide that issue in order to grant relief to the plaintiff the decision operates as *res judicata* in the subsequent suit. A. I. R. 1925 Cal. 431, Appr. ; A. I. R. 1925 Lah. 89, Dist.; A. I. R. 1922 All. 19 and A. I. R. 1924 Nag. 429, Rel. on. (*Jackson, A. J. C.*) GOVIND *v.* JANKI BAI. **26 N. L. R. 121 = 121 I. C. 41 = A. I. R. 1930 Nag. 3.**

———*Inter-pleader suit.*

An inter-pleader suit from its very nature, as described in S. 88, C. P. Code, is a suit in which several claimants are to be deemed to be claiming adversely to each other. Consequently though a widow who adopts a son and another person who is adopted by a co-widow are arrayed in that suit on the same side as defendants, yet they must be deemed to be claiming adversely to each other. If in such a suit the latter puts forward his adoption by the widow under the powers conferred upon her under the will of her late husband it is the duty of co-widow to contest the said adoption, both in respect of the factum as well as its validity, by filing a written statement to that effect. If she does not do so in spite of the fact that she is represented by a pleader on the date, when the issue relating to the adoption was framed on the pleadings of other defendants, she must be deemed to have raised the point, and if the Court decided it adversely, the matter must be deemed, under Expl. 4 to S. 11, C. P. Code, to be a matter directly and substantially in issue in that suit and it is no more open to her to contest the factum and the validity of the adoption in a subsequent suit, the decision in the previous suit operating as *res judicata* against her. (*Gokar Nath Misra, J.*) ABDUL HALIM KHAN *v.* SAADAT ALI KHAN. **1 L. C. 733 = 108 I. C. 817 = A. I. R. 1928 Oudh 155.**

———*Gift—Suits to set aside.*

Donor's heirs challenging gift on the ground of insanity of donor—Donor and donee both made defendants and they successfully contesting suit—Subsequent suit by donor to cancel gift on the same ground is not barred nor was the plaintiff equitably estopped from challenging the gift. (*Iqbal Ahmed, J.*) KAMPTA PRASAD *v.* BHULAI MUSIR. **100 I. C. 527 = A. I. R. 1927 All. 365.**

———A matter may be *res judicata* in a subsequent suit, although the parties in such subsequent suit were arrayed as co-defendants in the previous suit, if the matter in dispute in the second suit was directly and substantially in issue in the former one, especially when there is a contest *inter se* between the defendants in the previous suit and their rights are then fully adjudicated upon. (*Findlay, J. C.*) KUNHAI *v.* VYANKAT RAO GUJOR. **103 I.C. 701 = A. I. R. 1927 Nag. 369.**

———*Suit by third party—Mortgagor and mortgagee as defendants.*

Money spent by mortgagee in possession in defending his title as a mortgagee in a suit brought by a third party in which both the mortgagor and the mortgagee were joined as defendants can be tacked on to the mortgage money under S. 72 and also on the ground of *res judicata* between mortgagor and mortgagee where the finding in the suit was that the mortgagee could add that amount to his mortgage money and recover it when the mortgagor seeks to redeem the property. (*Stuart, C. J. and Misra, J.*) HARDEO BAKHSH *v.* DEPUTY COMMISSIONER, SITAPUR. **1 Luck. 367 = 29 O. C. 336 = 13 O. L. J. 303 = 3 O. W. N. 304 = 98 I. C. 542 = A. I. R. 1926 Oudh 281.**

———*Mortgagor and mortgagee as co-defendants.*

Where the previous suit was one brought by minor reversioners for the usual declaration that the alienation, being wanting in consideration and necessity, should not affect their reversionary rights and in that case it was decided that all the consideration had not passed and that necessity was not proved.

Held, that the decision did not preclude a suit for possession by the mortgagee against the mortgagor as there was no conflict of interest between mortgagor and mortgagee in the previous suit. 77 P. R. 1894, Foll.; 103 P. R. 1912, Dist. (*Broadway and Wilberforce, JJ.*) DEWA SINGH *v.* GOKAL. **3 L. L. J. 295 = 67 I. C. 881 = A. I. R. 1921 Lah. 25.**

———If there is a conflict of interests amongst the co-defendants and the judgment defines their real rights and obligations *inter se*, the decision is *res judicata* between them and will bar the same matter being litigated by one of the said defendants against the other : Case-law discussed. (*Tyabji, A. J. C.*) NIAMAT *v.* UMAR. **96 I. C. 406 = A.I.R. 1926 Sind 282.**

———*Res judicata* applies if conflict of interest existed and if decision of suit rested on the issue. (*Sulaiman and Daniels, JJ.*) MAHIP NARAIN *v.* MANNU SINGH. **47 All. 778 = 23 A.L.J. 453 = 88 I.C. 130 = 6 L.R.A. (Civ.) 385 = A.I.R. 1925 All. 546.**

———Where the plaintiffs and defendants in the subsequent suit were arrayed as two sets of defendants in the previous suit and therein they contested with each other on a point of relationship,

Held, that that point was *res judicata* in the subsequent suit. (*Campbell, J.*) MEHR DAD *v.* MOHAMMED ALI SHAH. **26 P.L.R. 504 = 7 L.L J. 195 = 90 I.C. 250 = A.I.R. 1925 Lah. 434.**

———As regards co-defendants, adjudication which is necessary to give the proper relief to the plaintiff is *res judicata* as between the co-defendants as well, provided there is a conflict of interest. (*Walsh and Ryves, JJ.*) RAM PRASAD *v.* MAHABIR. **46 All. 220 = 22 A.L.J. 91 = 79 I.C. 803 = 5 L.R.A. (Civ.) 71 = A.I.R. 1924 All. 310.**

———*Res judicata* as between parties arrayed on same side does not arise in absence of active controversy between them and of the necessity for adjudication between them for granting relief to plaintiff. (*Kinkhede, A. J. C.*) LUXMAN *v.* JANOO. **20 N.L.R. 197 = 80 I.C. 389 = A.I R. 1924 Nag. 429.**

———Co-defendants—No conflict of interests—Decision does not operate as *res judicata.* (*Stuart, J.*) KALI DIN *v.* MADHO. **77 I.C. 862 = A.I.R. 1923 All. 169.**

———Co-defendants—Previous suit for ejectment—No contest between defendants—Decision is not *res judicata*, on the question of validity of partition deed where it was not necessary for one of them to raise the question of the validity of the partition in the previous suit (*Kumaraswami Sastri and Devadoss, JJ.*) MADHAVAN NAIR *v.* ABDUR RAHIMAN. **77 I.C. 917 = A.I.R. 1922 Mad. 404.**

———Consent decree—No conflict of interest between co-defendants—Decree is not *res judicata.* (*Chatterjea and Panton, JJ.*) RAJENDRA KUMAR *v.* BISWARUP DAY. **35 C. L. J. 173 = 64 I. C. 603 = A.I.R. 1921 Cal. 632.**

———Co-defendant not necessary party—No conflict of interest—Decision is not *res judicata.* (*Leslie Jones and Broadway, JJ.*) MEHRA *v.* DEVI DITTA MAL. **2 Lah. 88 = 3 L.L.J. 223 = 62 I.C. 665 = 72 P.L.R. 1921 = A.I.R. 1921 Lah. 47.**

—S. 11—Co defendants—Constructive Res Judicata.

———Constructive *res judicata* principle is not applicable between co-defendants *inter se.* (*Suhrawardy and Mukerji, JJ.*) GANGAPARSAD CHOWDHRY *v.* KULA-

DANANDA ROY. **44 C.L.J. 399 = 30 C.W.N. 415 = 94 I.C. 235 = A.I.R. 1926 Cal. 568.**

—S. 11—Co-defendants—Finding not in decree.

———Where suit is dismissed, findings in judgments as between co-defendants not embodied nor implied in decree are not *res judicata* nor appealable. Case-law discussed. (*Ramesam and Reilly, JJ.*) P. VENKOBACHARLU *v.* S. RADABAYAMMA.

1924 M.W.N. 867 = 22 M.L.W. 384 = 85 I.C. 868 = A.I R. 1924 Mad. 858 = 47 M.L. J. 612.

—S. 11—Co-defendants—Ingredients.

———For the decision in a suit to operate as *res judicata* between co-defendants therein, it is necessary (1) that there should be active controversy between the co-defendants, and (2) that an adjudication *inter se* between the co-defendants should be necessary to give the appropriate relief to the plaintiff. 33 M. L. J. 740, Foll. (*Madhavan Nair and Thiruvenkatachariar, JJ.*) SAVITHRI BAYI *v.* K. ACHUTAN.

119 I. C. 167 = A.I.R. 1929 Mad. 638.

———It is only when the determination of the question as between co-defendants is necessary for the determination of the plaintiff's claim that the decision as between co-defendants would operate as *res judicata.* If such determination as between co-defendants were not necessary for the decision of the plaintiff's case such decision would not operate as *res judicata.* Whenever the contest between co-defendants is not indicated and included in the plaintiff's action itself, then it follows that for the purpose of a decision operating as *res judicata* as between co-defendants there must have been actually a conflict or issue raised as between them and that such conflict or issue must have been necessary for the determination of the plaintiff's case or claim: A.I.R. 1922 Mad. 452 (F.B.), Foll.; 11 Bom. 216, Rel. on.; 25 Bom. 589; 18 All. 59 and 33 M. L. J. 740, Dist. *A* filed a suit against *P*, a tenant, for possession and rent and joined *B* and *C* as co-defendants. In the plaint *A* admitted that the property belonged to *A*, *B* and *C*. *B* contested that *C* had no interest in the property. *C* remained *ex parte.* The suit was decreed and possession also decreed in favour of *A* and *B* in two equal shares. Later on *C* sued *A* and *B* for partition, ascertainment, and delivery of one-third share in the property. The defence was that the decision in the previous suit was *res judicata.*

Held, that the suit was not so barred, (*Jackson and Srinivasa Aiyangar, JJ.*) GOPALA *v.* GOPALAKRISHNA. **1928 M.W.N. 321 = 110 I.C. 596 = A.I.R. 1928 Mad. 630.**

———Notwithstanding the dismissal of the plaintiff's suit, the decision can be held to operate as *res judicata* as between co-defendants but, it should be necessary to decide on the conflict between co-defendants in order to give to the plaintiff the relief appropriate to his suit, and the judgment should contain a decision on the question as between co-defendants. Case-law reviewed. (*Suhrawardy and Mukerji, JJ.*) GANGAPRASAD CHOWDHRY *v.* KULADANANDA ROY.

44 C.L J. 399 = 30 C.W.N. 415 = 94 I.C. 235 = A.I.R. 1926 Cal. 568.

———Conflict of interest between co-defendants and necessity to adjudicate on that dispute to give relief to plaintiff are necessary to make the decision *res judicata* between them. (*Das and Foster, JJ.*) MAHARAJ BAHADUR SINGH *v.* A. H. FORBES.

1926 P. H. C. C. 249 = 97 I. C. 205 = A.I.R. 1926 Pat. 478.

———Ordinarily the doctrine of *res judicata* does not operate as between co-defendants and the Court applies

the doctrine with considerable caution as between co-defendants; this doctrine has been applied as between co-defendants where there is a conflict of interest as between them, where it is necessary for the Court to decide the conflict and where the judgment clearly decides the question as between those co-defendants. 36 Cal. 193; 31 Cal. 95 and 35 C. L. J. 173, Ref. (*Greaves and Chakravarty, JJ.*) HALADHAR DAS JANTI *v.* NAGENDRA NATH MONDAL.

51 Cal 997 = 84 I.C. 846 = A.I.R. 1925 Cal. 431.

———For an adjudication to be *res judicata* as between co-defendants three conditions are necessary (1) there should be a conflict of interest between the co-defendants; (2) it should be necessary to decide on that conflict in order to give the plaintiff relief appropriate to his suit; and (3) the judgment should contain a decision of the question raised as between the co-defendants. 25 C. L. J. 322; 2 Lah. 88 and A.I.R. 1923 Bom. 203, Foll. (*Pratt, J.*) MA TOK *v.* MA YIN.

3 Rang. 77 = 92 I.C. 489 = A.I.R. 1925 Rang. 228.

———In order that a finding in a case should be *res judicata* between co-defendants three things are necessary:—(1) That there should be a conflict of interest between co-defendants, (2) that it should be necessary to adjudicate upon that conflict in order to give appropriate relief to the plaintiff, (3) that the judgment should in fact determine the rights and liabilities of the defendants *inter se.* 11 Bom. 216, Foll. and 40 Bom. 210, Dist. (*Abdul Raoof and Moti Sagar, JJ.*) SUKHA DIAL *v.* MT. BHOPI. **71 I.C. 481 = A. I. R. 1923 Lah. 186.**

—S. 11—Co-defendants—Necessary decision.

———*Active controversy—Suit in Revenue Court—Taluqdars* v. *Plaintiff and defendant—Court not deciding defendant's right—Decision is not* res judicata *between plaintiff and defendant.*

In a suit by taluqdars against plaintiff and defendant the defendant pleaded that he was a partner, and the Revenue Court decided that the taluqdars were entitled to get the relief they sought from the plaintiffs whom they themselves had named, and who were the only ones entered in the revenue papers, but the Court refused to decide whether or not the defendant had any partnership right, *held*, that, in a subsequent suit by the plaintiff against defendant in which the defendant raised the plea that he was entitled to a partnership right with plaintiff the previous decision did not operate as *res judicata.* (*Simpson, A. J. C.*) KHALIL *v.* MAHOMED ISMAIL.

9 O. L. J. 540 = 74 I. C. 195 = A. I. R. 1923 Oudh 101.

—S. 11—Co-defendants—Necessary decision—Co-existing right.

———9, out of 15 properties mortgaged, purchased by mortgagee, 4 by *A* and 2 still in mortgagor's possession—*A* suing for redemption making mortgagor and mortgagee defendants—Court taking account of liability for redemption and deciding that certain sum was payable by properties in mortgagor's possession—Decision is binding on mortgagor in his subsequent redemption suit. (*Mukerji and Niamatullah, JJ.*) GHURA KOER *v.* BISHUN RAM. **1929 A. L. J. 908 = 119 I. C. 97 = A. I. R. 1929 All. 814.**

—S. 11—Co-defendants — Necessary decision — Effect of.

———Where in a prior suit by mortgagee against persons who were arranged as plaintiff and defendant in the latter suit the decision as to relationship between them was absolutely necessary to decide the prior suit.

Held, that the decision was *res judicata* in the subsequent suit. (*Hallifax, A. J. C.*) MT. MUNNA *v.*

SUKLAL. **78 I. C. 987 = A. I. R. 1924 Nag. 142.**

———If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case, and the co-defendants will be bound by the decision. The father of defendants 2, 3 and 4 mortgaged certain property to plaintiff. In a previous suit for partition brought by defendants 2 and 3 the plaintiff's mortgage was declared fraudulent and not binding. Plaintiff was a party to this suit, while the father was *ex parte*. Plaintiff then brought this suit to enforce his mortgage against the mortgagor and his sons one of whom was born after the execution of the mortgage. *Held*, the present suit was barred since the after-born son had no *locus standi* to challenge the mortgage on any ground whatsoever as he had no independent right to do so. The decision in the previous suit for partition declaring the invalidity of the mortgage so far as the unborn son was concerned must be deemed to have, by necessary implication, decided that the mortgage was invalid as against the father mortgagor. *Held* further that though the father was *ex parte* in the previous suit the decision was *res judicata* as between him and the present plaintiff. (*Schwabe, C. J. Oldfield and Coutts-Trotter, JJ.*) KONGA RAMASWAMI IYER *v.* THUMBAYASAMI. **1922 M. W. N. 526 = 31 M. L. T. 370 = 16 M. L. W. 981 = 70 I. C. 769 = A. I. R. 1922 Mad. 452.**

———S. 11—Co-defendants—Necessary decision—Representative defendant acting in personal capacity.

———Previous decision would operate as *res judicata* if the co-defendant had actively supported the plaintiff in the previous case as against the other defendant, though the active support was limited to filing a written statement admitting the plaintiff's claim and leaving it to the plaintiff to press the claim in which both he and such defendant were jointly interested. Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between plaintiff and defendants. (*Heald and Lentaigne, JJ.*) MAUNG THWE *v.* MA SHWE PON. **3 Bur. L. J. 54 = 82 I. C. 423 = A. I. R. 1924 Rang. 279.**

—S. 11—Co-defendants—Necessary decision—Suit by Jenmi.

———In a suit for redemption brought by a Jenmi, if there is a contest as to which of the defendants is entitled to get the value of the improvements, it is the duty of the Court to decide the contest and declare as to who should be given the value of improvements, instead of leaving that question to be fought out in a separate suit between the defendants and so the decision of that question becomes necessary in the suit. A. I. R. 1928 Mad. 354, Foll. (*Madhavan Nair and Thiruvenkatachariar, JJ.*) SAVITHRI BAYI *v.* K. ACHUTHAN. **119 I. C. 167 = A. I. R. 1929 Mad. 638.**

—S. 11—Co-defendants—Necessary decision—Test.

———The test for finding whether a decision is *res judicata* between co-defendants is whether it was necessary for the purpose of supporting his actual decision for the Judge to decide directly or by implication any conflicting issue between co-defendants. *Cottingham* v. *Earl of Shrewsbury*, 3 Hare 627, Foll. (*Das, J.*) MA PAN NUYN *v.* MAUNG SIT PHAUNG. **6 Rang. 575 = 114 I.C. 686 = A.I.R. 1928 Rang. 315.**

———If a plaintiff cannot get at his right without trying and deciding a case between co-defendants the Court will try and decide that case and the co-defendants will be bound. But if the relief given to the plaintiff does

not require or involve a decision of any case between co-defendants the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains. 3 Hare 627, Foll. (*Coutts-Trotter and Ramesam, JJ.*) RAMASWAMY NAICKER *v.* ALAMELU AMMAL. **34 M.L. T. 301 = 1924 M. W. N. 204 = 78 I. C. 921 = A.I. R. 1924 Mad. 604 = 46 M. L. J. 298.**

———Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group. (1886) 11 Bom. 216, Foll. (1886) P.J. 15 Dist. (1914) 38 Bom. 438, 16 Bom. L. R. 283, Foll. (*Macleod, C. J. and Crump, J.*) GANGARAM BALKRISHNA *v.* VASUDEV DATTATRAYA. **47 Bom. 534 = 25 Bom. L. R. 268 = 73 I. C. 912 = A. I. R. 1923 Bom. 203.**

—S. 11 — Co-defendants— Necessary decision — What is not.

———Issue between co-defendants should be decided by a Court where such determination is necessary before the plaintiff's claim can be determined. But such issues should not be determined after the plaintiff's suit has been dismissed. *Kevan* v. *Crawford*, (1877) 6 Ch. D. 29, Rel. on. (*Rutledge, C.J. and Brown, J.*) MA NGE *v.* MAUNG PO SAING. **6 Bur. L. J. 52 = 101 I. C. 637 = A. I. R. 1927 Rang. 156.**

———*Suit against transferee from mortgagee.*

A brought a suit for redemption against *B*, the mortgagee, impleading *C*, a transferee from *B*. *B* alleged that sale to *C* was benami. Court found that sale to *C* was for consideration and with notice of the mortgage. Redemption was allowed against *B* as well as *C*. Subsequently *B* brought a suit against *C* for declaration that he was the owner of lands.

Held, that as the decision in the previous suit that the sale to *C* by *B* was benami was not necessary to give relief to plaintiff in that suit, the previous suit would not be *res judicata*. (*Heald and Chari, JJ.*) MA MO *v.* MA SET. **4 Bur. L. J. 250 = 93 I. C. 197 = A. I. R. 1926 Rang. 71.**

———*Suit between shebaits.*

A suit was instituted by some of the co-shebaits of a deity against the other co-shebaits for the better management of the debuttar properties. One of the defendants in the suit denied the debuttar character of the properties.

Held, that the question of *debuttar* was not *res judicata* as between the co-defendants as it was not necessary to decide that question between them in order to give relief to the plaintiff in the suit. (*Chatterjea and Cuming, JJ.*) SRI SRI GOPAL JEW THAKUR *v.* RADHA BINODE MANDAL. **41 C. L. J. 396 = 88 I. C. 616 = A. I. R. 1925 Cal. 996.**

———A finding against a co-defendant on a question of title does not operate as *res judicata* if it was not necessary for the disposal of the suit was not embodied in the decree and no decree was passed against the co-defendant against whom it was given. 1919 M. W. N. 34, Foll. 9 M. L. W. 180, Diss. and A. I. R. 1924 Mad. 469 and A. I. R. 1922 P. C. 241, Foll. (*Madhavan Nair, J.*) P. C. SURYA-

NARAYANA DEO *v.* M. APPAYYA. **86 I. C. 384 = A. I. R. 1925 Mad. 947.**

———Where both defendants claimed property exclusively but both denied plaintiff's claim and plaintiff's claim was dismissed and one of the defendants was declared to be sole owner.

Held, the decision was not *res judicata* between the co-defendants as there was no necessary conflict between them nor was the point necessary for disposal of plaintiff's suit. 33 M.L.J. 740, Foll. (*Spencer, Offg. C. J.*) MAHOMED ESUF ROWTHER *v.* SULTAN ABDUL KADAR. **34 M. L. T. 147 = 78 I. C. 1055 = 1924 M. W. N. 569 = A. I. R. 1924 Mad. 711 = 47 M. L. J. 20.**

———In a prior suit *L* sued *A* on a bond and *G* was added, he being the surety. *G* admitted his liability as surety but the suit against *A* was dismissed on the ground that there was no evidence to prove the execution of the bond in suit. A decree was passed against *G* on his own confession. *G* then sued *A* to recover the money which he was compelled to pay under *L*'s decree.

Held, that the decision in the prior suit was not *res judicata* and that *G* could recover. (1843) 3 Hare 627, 638, Foll. (*Baker, J. C.*) JAGESHWAR RAO *v.* GAJAL RAO. **79 I C. 22 = A. I. R. 1924 Nag. 168.**

———A decision between co-defendants cannot be *res judicata* under the provisions of S. 11, Civil Procedure Code, unless it was necessary to decide an issue between the co-defendants in order to grant relief to the plaintiff in that suit. A decision in a suit in which a co sharer was made a defendant, simply because he had an interest, could not be held to have the effect of *res judicata* as between the defendants whose title was not in issue and was never determined in the previous suit. 28 Mad. 457, Foll. (*Mears, C.J. and Banerji, J.*) MD AHMED *v.* ZAHUR AHMED. **44 All. 334 = 67 I. C. 523 = 20 A. L. J. 193 = A. I. R. 1922 All. 19.**

—S. 11—Co-defendants—No issue between.

———A decision in a suit in which there is no issue between co-defendants cannot operate as *res judicata* between them. A. I. R. 1927 All. 717 = 1 A. L. J. 416, Ref. (*Kendall, J.*) SHAM DAT RAI *v.* RENUKA RAI. **117 I. C. 100.**

———The finding of a court of competent jurisdiction operates as a bar against the trial of issues in respect of which the finding is given in a subsequent suit only the issue is directly and substantially the same. Where in prior resumption proceedings certain issues were not raised *inter se* between the parties who were arrayed on one side but the only question was as regards the proprietors' rights as against the parties, *held*, that the finding did not operate as *res judicata* as among the defendants in the prior proceedings as regards issues between them. (*Hasan, J.*) ABBAS HUSSAIN KHAN *v.* HAJI GHULAM HUSAIN. **122 I. C. 329.**

—S. 11—Co defendants—Partition suit.

———In a partition suit all the parties who are interested in the property to be partitioned occupy much the same position whether they are plaintiffs or defendants and a party claiming or resisting partition whether he is plaintiff or defendant is bound by the decision of the court. 17 Bom. L. R. 1, Dist. (*Macleod, C. J. and Crump, J.*) GANGARAM BALKRISHNA *v.* VASUDEO DATTATRAYA. **47 B. 534 = 25 Bom. L.R. 268 = 73 I. C. 912 = A. I. R. 1923 Bom. 203.**

———As it is not possible in a suit for partition to make a hard and fast line between the plaintiffs and the defendants a decision affecting the right of one defendant

as against another is a decision *inter partes* so as to be *res judicata*, A.I.R. 1914 P.C. 31, Foll. (*Wazir Hasan, Ag. C. J. and Pullan, J.*) RAJENDRA NATH *v.* MAHABIR PRASAD. **6 O. W. N. 281 = 118 I. C. 766 = 4 Luck. 713 = A. I. R. 1929 Oudh 275.**

———*Obiter.* Where, in a prior suit for partition certain parties were arrayed as co-defendants and the decision in that suit did not decide any question of partition amongst them *inter se*, that decision does not operate as *res judicata*. A. I. R. 1922 All. 19, Foll. (*Suhrawardy and Mukerji, JJ.*) GANGAPRASAD CHOWDHURI *v.* KULADANANDA ROY. **44 C. L. J. 399 = 30 C. W. N. 415 = 94 I. C. 235 = A. I. R. 1926 Cal. 568.**

———Where there is a complete decree for partition the rights of each party are determined not only as against the plaintiff but as against all the other parties including co-defendants, and therefore in order to see whether the rights between co-defendants amongst themselves have not been determined, the nature of a partition suit should be borne in mind. (*Tyabji, A. J. C.*) NIAMAT *v.* UMAR. **96 I. C. 406 = A. I. R. 1926 Sind 282.**

—S. 11—Co-defendants—Pro forma defendants.

———Suit for arrears of rent by one co sharer making other co-sharers *pro forma* defendants under S. 148-A, Bengal Tenancy Act—Decision as to amount of rent does not operate as *res judicata* in a similar suit brought by other co-sharers. (*Das and James, JJ.*) BASUDEO PANDE *v.* NIRMAL KUMAR. **122 I. C. 529 = 11 P. L. T. 458 = A. I. R. 1930 Pat. 355**

———Where in a suit there were two sets of defendants, one set being merely impleaded *pro forma* and no question fell to be determined between the two sets of defendants,

Held, no matter raised in a subsequent suit between the defendants can be *res judicata*. (*Kulwant Sahay and Macpherson, JJ.*) MITA DUSADH *v.* ANU MAHTO. **7 Pat. 566 = 109 I. C. 287 = A. I. R. 1928 Pat. 603.**

—S. 11—Co defendants—Substantially in issue.

Per *Jackson, J.*—Inasmuch as the principle of *res judicata* can only apply to a matter which has been substantially in issue between the parties, an issue raised by a defendant which is not strictly appropriate to the pleadings in the plaint cannot be held to have been a matter substantially in issue between that defendant and another defendant who elected to remain *ex parte* after perusal of the plaint alone. (*Jackson and Srinivasa Aiyangar, JJ.*) GOPALA *v.* GOPALAKRISHNA. **1928 M. W. N. 321 = 110 I. C. 596 = A. I. R. 1928 Mad. 630.**

———*Title—Rent suit.*

Where the issue raised in a previous rent suit only incidentally raised the question of a co-defendant's title and the question of title as between the co-defendants was neither directly nor substantially in issue in the previous suit, the decision of such an issue incidentally raised in the previous suit cannot be treated as *res judicata* when the question is directly and substantially in issue between these co-defendants in a subsequent suit. 11 Cal. 301 (P. C.) and 12 Cal. 580 (F. B.), Foll. (*Walmsley and Chakravarty, JJ.*) DHARANIDHARA BHANDARI *v.* SRIMATI HEMANGINI DASI. **96 I. C. 625.**

Competent Court.

Civil and Revenue Courts.
Exclusive Jurisdiction.
Foreign Court.
Jurisdiction.

C.P. CODE (1908) S. 11—Competent Court—Civil and Revenue Courts—Exclusive jurisdiction.

Scope.
Settlement Court.
Special Act.

—S. 11—Competent Court—Civil and Revenue Courts—Exclusive jurisdiction.

———When a matter exclusively within the jurisdiction of a Court of Revenue has been tried and decided by the Court as between the parties, no subsequent suit will lie in a Civil Court having for its sole object the annulment of the decree passed by the Court of Revenue. 41 All. 203 and A. I. R. 1922 All. 336, Appl. (*Raza, J.*) HAR NATH SINGH *v.* SRIRAM. **6 O. W. N. 1214 = 93 I. C. 374 = A. I. R. 1926 Oudh 348.**

———A decree for profits in favour of defendant passed by the Revenue Court which was the competent Court of exclusive jurisdiction to pass such a decree. cannot be declared to be invalid and incapable of execution by a Civil Court, in a suit for a declaration brought by plaintiff, for that purpose. 43 All. 191 (F.B.), Appl. (*Gokul Prasad, J.*) SYED SHABBIR HUSSAIN *v.* SYED GHULAM HUSSAIN. **5 L. R. A. (Rev.) 144 = 72 I. C. 276 = A. I. R. 1923 All. 437.**

———Where a *lambardar* who had paid the profits to the plaintiff as a purchaser from a co-sharer, recovered it back by suit in a Civil Court on the ground that the plaintiff was not entitled to it, and thereupon the plaintiff sued the *lambardar* under S. 164 of the Tenancy Act,for his share of the profits, *held* that the Civil Court decree could not operate as *res judicata*, and bar the suit which is a suit for profits only triable by a Revenue Court. (*Ryves and Gokul Prasad, JJ.*) KUNJ BIHARI LAL *v.* GHANSHAM DAS. **65 I. C. 530 = A. I. R. 1922 All. 397.**

———The decision of a Revenue Court in matters in which it has exclusive jurisdiction is *res judicata* in a subsequent suit in Civil Court. (*Shadi Lal, C. J. and Broadway, J.*) MANJ *v.* SARDARA. **11 L. L. J. 248 = 121 I. C. 507 = 30 P. L. R. 427 = A. I. R. 1929 Lah. 586.**

———The decision of the Revenue Court, in a matter within the exclusive cognizance of that Court, is binding on the Civil Courts. (*Iqbal Ahmad, J.*) ITAR SINGH *v.* UMRAO. **8 L. R. A. (Rev.) 33 = 99 I. C. 299 = A. I. R. 1927 All. 189.**

———*Bengal Tenancy Act.*

The plaintiff's name was recorded in the finally published record-of-rights as the owner of 8 gandas 3 karas and 5 dantis. The defendant No. 1 thereupon instituted a suit under S. 106 of the Bengal Tenancy Act for a correction to be made in the entry of the names of the owners of the Taluk and alleged that she had 14 annas and odd share therein. She made one *J*, defendant No. 2, a *pro forma* defendant, alleging that he owned a share of one anna and odd. Defendant No. 1 was successful in the said proceedings. The plaintiff thereupon instituted a suit for declaration of title and recovery of possession.

Held, that the decision in the suit of defendant No. 1 under S. 106 of the Bengal Tenancy Act did not operate as *res judicata* in respect of the plaintiff's claim. 12 C. W. N. 8; 18 C.W.N. 938 and 15 C.W.N. 974, Rel. on. (*Greaves and M. N. Mukerji, JJ.*) ASRUFANNESSA KHATUN *v.* HEM CHANDRA. **54 Cal. 114 = 44 C. L. J. 467 = 100 I. C. 293 = A. I. R. 1927 Cal. 216.**

———A decision by the Revenue Court that defendant was not plaintiff's tenant does not bar a plea that a party was a rent-free grantee. (*Sulaiman, J.*) CHAUDHARI HAR *v.* BRIJNANDAN LAL. **5 L.R.A. (Rev.) 103 = 79 I. C. 587 = A. I. R. 1924 All. 479.**

C. P. CODE (1908), S. 11—Competent Court—Civil and Revenue Courts—When not res judicata.

—S 11—Competent Court—Civil and Revenue Courts—Powers of Civil Court.

———It is not open to a Civil Court to treat a decree of a Revenue Court as *ultra vires* because it is of opinion that the revenue Court has exceeded its special jurisdiction. (*Ashworth, J.*) AIMMAT SINGH *v.* BHABHUTI SINGH. **93 I.C. 85 = A.I.R. 1926 Oudh 369.**

—S. 11—Competent Court—Civil and Revenue Courts—When not res judicata.

———*U*, the malguzar had brought a suit in Revenue Court for ejecting his tenant *M*. *S* was added as a defendant on his own application. *M* resisted the suit on the ground that he was looking after the land on behalf of *S*, who had the right of a grove holder. No issue was framed as to whether *S* had the rights of a grove-holder. It was found that the land was neither agricultural land nor a grove, and an ejectment decree was passed against *M*. *S* then brought a suit in Civil Court against *U* for possession of the grove.

Held, that the finding as to the state of the land in the previous suit could not be *res judicata* in the subsequent suit (whether *S* had rights of a grove-holder at the time of his suit; that the Revenue Court not being competent to try the subsequent suit, the finding of the Revenue Court could not amount to *res judicata* and that *S* would not be barred by estoppel as the decree granted by Revenue Court was merely to eject *M* and a decree in favour of *S* would not in any way affect that decree. (*Bennet, J.*) SHRI DHAR *v.* UDAIBIR SINGH. **9 L. R. A. (Rev.) 289 = 115 I. C. 454 = A. I. R. 1929 All. 17.**

———*Status of tenant.*

Held, that the Revenue Court's decision regarding the status of a tenant will not bar an adjudication on the point by the Civil Court. (*Raza and King, JJ.*) MAHMUD-UL-HASAN *v.* BALDEO SINGH. **14 R. D. 196.**

———The Court of Revenue has the exclusive jurisdiction to determine what is the status of a tenant of lands, and what are the special or other terms upon which such tenant holds and the Civil Courts have the exclusive jurisdiction to decide whether or not a person in possession of lands holds a proprietary or under-proprietary right in the lands and therefore a decision of a Revenue Court as to the status of a tenant is not *res judicata* in a suit in Civil Court. 20 O. C. 8, Rel. on. (*Raza and King, JJ.*) MAHMUDUL HASAN *v.* BALDEO SINGH. **100 I. C. 851 = A. I. R. 1927 Oudh 183.**

———A decision by a Court recovering thakkavi arrears that rent was not paid by the sub-tenant to the tenant in proceedings for sale of the tenure to recover takkavi paid to the tenant is not *res judicata* in a subsequent suit by the purchaser against the sub-tenant for the recovery of the rent payable by the sub-tenant. (*Mukerji, J.*) SOBHA RAM *v.* RAMPRASAD. **5 L. R. A. (Civ.) 230 = 78 I. C. 378 = A. I. R. 1924 All. 910.**

———*Estate Lands Act.*

The Revenue Court is not a competent authority to decide finally whether any particular lands constitute an estate or not. If they constitute an estate, then the Revenue Court has jurisdiction and exclusive jurisdiction in the matter of commuting rents. For the purpose of deciding whether it should exercise that jurisdiction, the Revenue Court like any other Court of limited jurisdiction has to determine whether the facts are such as to give it jurisdiction. That decision however will not be binding on a Civil Court. (*Wallis, C. J. and Oldfield, J.*) RAMADINA DAS *v.* BOISHAMO MUNDALO. **14 M. L. W. 251 = A. I. R. 1921 Mad. 473.**

C. P. CODE (1908), S. 11—Competent Court—Civil and Revenue Courts—When not Res judicata.

———Where in a suit by the landlord for arrears of rent the tenant pleads payment in good faith to a third person who is therefore made a party to the suit and the suit is decided against him, *held*, that such a decision does not preclude the latter from establishing his title in a Civil Court, as the previous suit does not come within the purview of those rulings of this Court which held that a suit will not lie in a Civil Court if its object is to avoid a decision arrived at by a Revenue Court in a matter in which it had exclusive jurisdiction. (*Ryves and Gokul Prasad, JJ.*) MAKIL KHAN *v.* FIDA HUSAIN. **4 L.R.A. (Rev.) 138 = 71 I. C. 1017 = A. I. R. 1924 All. 270.**

S. 11—Competent Court—Civil and Revenue Courts—When res judicata.

———*Agra Tenancy Act.*

In a former suit a landlord declared a tenant to be his non-occupancy tenant and desired his ejectment under S. 58, Agra Tenancy Act, II of 1901. The Assistant Collector held that the tenant was not an occupancy tenant, but that he held the grove under such condition that he could not be ejected under S. 58. His view further was that in the alternative the tenant would be a rent-free grantee of the land for the purposes of planting a grove. Then the landlord sued the tenant in the Civil Court for his ejectment on the ground that the tenant was a licensee of that grove under certain conditions and he desired to eject him as the license terminated.

Held, that the Civil Court, after the refusal of the Revenue Court to eject the tenant could not inquire into the matter whether the tenant was a licensee of the landlord or not. The Revenue Court had jurisdiction to hold that the tenant was a grove-holder. (*Dalal, J.*) RAM LAGAN BHAGAT *v.* PHAKKAR DAS. **9 L.R.A. (Rev.) 141 = 118 I. C. 171 = A. I. R. 1928 All. 343.**

———A decision of a Revenue Court under S. 199 (3) operates as a decision by a Civil Court for the purpose of *res judicata.* A.I.R. 1922 All. 95 and A.I.R. 1924 All. 10, Foll. (*Ashworth and Iqbal Ahmad, JJ.*) AMAR SINGH *v.* GOBIND RAM. **49 All. 606 = 25 A.L.J. 387 = 101 I.C. 501 = 8 L.R.A. (Rev.) 122 = A. I. R. 1927 All. 717.**

———A decision of the Revenue Court on the question whether the plaintiffs were agricultural tenants or not is one within its jurisdiction and the trial of the same question by the Civil Court is barred by the principle of *res judicata.* A.I.R. 1927 All. 70, Rel. on. (*Iqbal Ahmad, J.*) BEHARI LAL *v.* RAGHUNATH SINGH. **8 L.R.A. (Rev.) 235 = 102 I.C. 887 = A. I. R. 1927 All. 613.**

———Although S. 167 of the Agra Tenancy Act does not apply to suits between rival claimants to a tenancy, nevertheless once a matter has been decided by a Revenue Court it cannot be re-opened in a Civil Court. This view is not based on the provisions of S. 167 nor on the principle of *res judicata* but rather on the general ground that the effect of allowing such a thing to be done would be to nullify the decree of the Revenue Court which is final and binding on the parties. 41 A. 97, Foll. (*Sulaiman, J.*) SURJAN SINGH *v.* UMARI SINGH. **78 I. C. 1008 = A. I. R. 1924 All. 609.**

———Where during partition proceedings there was dispute among several co-sharers at to who should bear the burden of the lease and the deed of gift and it was definitely decided that the burden should be borne rateably by the Revenue Court sitting as a Civil Court,

Held, that it will be unfair to reopen the question subsequently in a Civil Court. 12 O.C. 97; 23 All. 324, Dist. (*Dalal, J. C.*) KALKA SINGH *v.* BISHUNATH SINGH. **12 O.L.J. 638 = 2 O.W.N. 539 = 89 I.C. 221 = A. I. R. 1926 Oudh 72.**

C. P. CODE (1908), S. 11—Competent Court—Exclusive jurisdiction.

———If after a decision of a suit by a Revenue Court, the losing party comes to the Civil Court for the same relief which would have the effect of setting aside the decree of the Revenue Court the civil suit would not be maintainable and would stand barred by the principles of *res judicata.* A.I.R. 1922 All. 336; A.I.R. 1921 All. 348; 41 All. 203; 41 All. 97, Ref. (*Rafique, J.*) MT. CHITTO *v.* GANGA SAHAI. **77 I.C. 638 = A. I. R. 1923 All. 527.**

———Where plaintiff sued to eject defendants on the basis of their being sub-tenants and on the latter's contention that they were landlords time was given to them to establish their case in the Civil Court but they did not do so and as a consequence the Revenue Court passed a decree for ejectment in plaintiff's favour, *held*, that the defendants could not thereafter, in a suit for actual possession by the plaintiff, contend again that their possession was that of landlords. (*Gokul Prasad, J.*) BHAGWANT *v.* MARE. **72 I. C. 1024 = A.I.R. 1923 All. 113.**

———In a suit for ejectment of the defendant as a sub-tenant of certain holding the decision of the Revenue Court, that he is a tenant-in-chief and the suit must be dismissed, is binding, as that Court is competent to decide the question and no suit lies in the Civil Court for setting aside that decision. (*Mears, C.J. and Gokul Prasad, J.*) RAM DAS *v.* DUBBRI KOERI. **44 All. 724 = 77 I. C. 139 = 20 All. L. J. 606 = A. I. R. 1922 All. 336.**

———Rent suit in Revenue Court—Defendants alleged to be liable as sub-tenants—Defendants denying allegation and claiming to be occupancy tenants—Defendants' contention overruled—Defendants subsequently suing for a declaration that they are occupancy tenants—Suit is barred. (*Tudball, Ryves and Gokul Prasad, JJ.*) MULLO *v.* RAM LAL. **43 All. 191 = A.I.R. 1921 All. 348.**

———*Punjab Land Revenue Act.*

A question whether a person holds such an interest in a plot of land as entitles him to ask for a partition in the Revenue Court is a question of title within S. 111 of the Punjab Land Revenue Act and the decision of a Revenue Court upon which question under S. 117 of the Act operates as *res judicata* in a Civil Court. (*Abdul Raoof and Harrison, JJ.*) MANAK CHAND *v.* SHAHAB DIN. **63 I. C. 781 (Lah.).**

—S. 11—Competent Court—Exclusive jurisdiction.

———*Land Record Officer.*

The judgment of a Court of exclusive jurisdiction, directly upon the point is conclusive upon the same matter between the same parties, coming incidentally in question in another Court for a different purpose. Hence the order of the Land Record Officer declaring that a person who had mortgaged his village should be declared as ex-proprietary tenant of his *sir* land will operate as *res judicata* and the question cannot be opened again in a civil suit, although provisions of S. 11, C. P. Code are not applicable to such a case, the Land Record Officer having exclusive jurisdiction to pass such an order. A.I.R. 1924 P.C. 175, Dist. (*Stuart, C.J. and Wazir Hasan, J.*) MOOL CHAND *v.* ILTIFAT HUSAIN. **4 Luck. 220 = 115 I.C. 837 = 6 O.W.N. 1310 = A.I.R. 1929 Oudh 362.**

———*Madras Estates Land Act, S.* 189 (3).

The decision of Revenue Court in a suit exclusively triable by it does not bind the Civil Court, though the subsequent suit could not be brought in the Revenue

Court as S. 189 (3) is not more comprehensive than S. 11 of the C. P. Code. (*Sadasiva Iyer and Spencer, JJ.*) SOBHANADRI APPARAO *v.* DATHADU VENKATRAJU. **43 Mad. 859 = 1920 M.W.N. 639 = 12 M.L.W. 512 = 60 I.C. 700 = 28 M.L.T. 359 = 39 M.L.J. 476.**

—S. 11—Competent Court—Foreign Court.

———Title to land is to be directly determined, not merely according to the laws of the country where the land is situate, but by the Courts of that country. So an adjudication by a Pondicherry Court with respect to land in British India is not *res judicata.* 5 L. W. 740, Rel. on. (*Kumaraswami Sastri and Srinivasa Aiyangar, JJ.*) CHOCKALINGAM *v.* DORAISWAMI. **51 Mad. 720 = 29 M.L.W. 250 = 108 I. C. 305 = A.I.R. 1928 Mad. 327 = 54 M.L.J. 479.**

—S. 11—Competent Court—Jurisdiction—Extent of res judicata.

———Former Court though competent to try the first suit could not try the second suit which owing to joinder of other claims was beyond its jurisdiction.

Held, prior decision is a bar so far as that claim was concerned. (*Mukerji and Bennet, JJ.*) MT. TAMIZUN NUSSA BIBI *v.* MUHAMMAD HUSAIN. **50 All. 306 = 113 I. C. 745 = A. I. R. 1928 All. 714.**

———Although taking all the causes of action together, the second suit may be said to be outside the jurisdiction of the original Court, still if the specific question be within the jurisdiction of the original Court and was determined by the original Court, it is no answer to say that the whole suit was beyond the jurisdiction. The principles of *res judicata* would apply to that part of the claim which was within the jurisdiction of the Court which tried the first suit. 29 Cal. 707 (P. C.), Dist.; 8 Mad. 83 and 25 M. L. J. 379, Foll.; 35 Cal. 353, not Foll. (*Curgenven, J.*) PATTRACHARIAR *v.* ALAMELUMANGAI AMMAL. **25 M.L.W. 11 = 100 I.C. 40 = A. I. R. 1927 Mad. 273.**

———Decision of Small Cause Court as regards actual subject-matter is *res judicata* although not as regards question of title. (*Ramesam, J.*) RAMAN MENON *v.* MADHAVA MENON. **98 I. C. 176 = A. I. R. 1927 Mad. 96.**

—S. 11—Competent Court—Jurisdiction—Necessity of.

———The Court trying the first suit should be a Court having jurisdiction to try it. 37 All. 485 (P. C.), Rel. on. (*Fawcett, J.*) RAJARAM *v.* CENTRAL BANK OF INDIA. **28 Bom. L. R. 879 = 98 I. C. 341 = A. I. R. 1926 Bom. 481.**

———A decree in a previous suit cannot be pleaded as *res judicata* in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and decide, not only the particular matter in issue, but also the subsequent suit in which the issue is subsequently raised. 29 Cal. 707 (P. C.), Foll. (*Macleod, C. J. and Shah, J.*) VYANKAT AWACHIT *v.* ONKUR NATHU. **45 Bom. 805 = 23 Bom. L. R. 250 = 61 I. C. 276 = A. I. R. 1921 Bom. 434.**

—S. 11—Competent Court—Jurisdiction—What determines.

———The test as to whether the previous decision operates as *res judicata* or not depends on whether the Court which tried the former suit could have tried the subsequent suit and for determining Court's jurisdiction plaintiff is bound by his valuation. But if a particular relief claimed in the subsequent suit was adjudicated in the previous suit, the previous Court having jurisdiction to try, that relief would be barred in the subsequent suit. (*Greaves and Panton, JJ.*) DRUPAD CHANDRA NASKAR *v.* BINDUMOYI DASI. **43 C. L. J. 606 = 97 I. C. 209 = A. I. R. 1926 Cal. 1053.**

—S. 11—Competent Court—Jurisdiction—When not res judicata.

———The decision on an issue by a Court of an inferior jurisdiction does not operate as a bar to trial of that issue by a Court of superior jurisdiction in a subsequent suit, if the latter suit was beyond the jurisdiction of the Court of inferior jurisdiction. A. I. R. 1926 Lah. 603, Dist. A suit for ejectment of tenant having been dismissed another suit was brought for possession of the house on the basis of title. The first being valued at the annual rental (Rs. 42) and the second at the market value of the house (Rs. 2,800), the second was beyond the jurisdiction of the Munsiff, who tried the first and the suits were not identical.

Held, that the second suit could not be barred under S. 11. (*Fforde and Bhide, JJ.*) NIRBHE RAM *v.* MOOL CHAND. **117 I. C. 83 = A. I. R. 1929 Lah. 781.**

———Decision in previous suit by Court which would have no pecuniary jurisdiction to try the subsequent suit cannot operate as *res judicata* so as to bar the subsequent suit. A.I.R. 1928 Lah. 929, Ref. (*Shadi Lal, C.J. and Agha Haidar, J.*) ALA MUHAMMAD *v.* ALLAH BAKSH. **A. I. R. 1930 Lah 501.**

———Where a judgment has been delivered by a Court of incompetent jurisdiction, that is to say, by a Court which had no jurisdiction to hear the case, the judgment cannot be pleaded as *res judicata.* 9 All. 191 (P. C.), Expl. (*Mukerji, J.*) PEYARE LAL *v.* BANKE LAL. **95 I. C. 406 = A. I. R. 1926 All. 650.**

———Previous decrees passed without jurisdiction being invalid altogether cannot be pleaded as *res judicata.* (*Mukerji and Bennet, JJ.*) LAKHMI CHAND *v.* MADHO RAO. **A.I.R. 1930 All. 681.**

———*Assistant Collector, 2nd Class.*

Assistant Collectors of the Second Class in U. P. have no power to try a suit for ejectment at all. Therefore a dismissal of suit for arrears of rent in such Court is no bar to a suit for ejectment against the same party in the Court of Assistant Collector of 1st Class whose Court has jurisdiction to try an ejectment suit. 11 Cal. 301 (P. C.) and A. I. R. 1924 All. 466, Rel. on. (*Sulaiman, J.*) KUMARI *v.* ADIT MISIR. **89 I.C. 379 = A.I.R. 1926 All. 34.**

———Any order which is passed without jurisdiction is of no effect, *i. e.*, not *res judicata.* (*Cuming and Chakravarti, JJ.*) SASI BHUSAN *v.* SADANAND. **92 I. C. 845 = A. I. R. 1926 Cal. 991.**

———A previous decision in a rent suit of a Court having no jurisdiction is not *res judicata* in a subsequent suit between the same parties, but it is a valuable piece of evidence which must be considered in the subsequent suit. 48 Cal. 499 (P. C.) and A. I. R. 1922 P. C. 80 Expl. (*Walmsley and Mukerji, JJ.*) BHABATARINI *v.* ROY KIRAN CHANDRA. **91 I. C. 1026 = A. I. R. 1926 Cal. 603.**

———A decision of an Assistant Collector of the Second Class about a certain Khudkhasht being owned by one party does not bar a suit in the Court of an Assistant Collector of the First Class. (*Stuart, J.*) LALA SUNDER *v.* BHUP SINGH. **5 L. R. A. Rev. 105 = 88 I.C. 164 = A. I. R. 1924 All. 466.**

———An Assistant Collector, Second Class, who had no power to try an ejectment suit passed a decree for rent in favour of *A*; but later on an Assistant Collector, First Class, who had power to try an ejectment suit, dismissed *A's* suit for ejectment.

Held, that the decision of the Assistant Collector, Second Class, was no bar to the decision of the Assistant Collector, First Class. 32 All. 8, Dist. (*Stuart, J.*) RAM DIN *v.* HAR DAYAL. **82 I. C. 790 = A. I. R. 1923 All. 368.**

———*Same Judge in different capacity.*

Under S. 33 of the Provincial Small Cause Courts Act the Judge when trying a suit as a regular suit is a Court different from that of the judge trying a suit in the Small Cause Court jurisdiction, therefore a decision on an issue as a Small Cause Court Judge does not bar trial of the same issue as a regular Judge. (*Pratt and Fawcett, JJ*) RUKMINI VITHU *v.* RAYAYI DATTATRAYA. **48 Bom. 541 = 26 Bom. L. R. 672 = 83 I. C. 45 = A. I. R. 1924 Bom. 454.**

———*Same Judge in different capacity.*

A judgment does not operate as *res judicata* where the Munsif in his capacity of an officer hearing a suit of a Small Cause Court nature is not competent to try the later suit. Apart from his capacity as an officer trying suits of a Small Cause Court nature he may be competent to try the later suit but the combination of two functions in the same officer does not affect the question of competency. (*Stuart, J.*) SHAKIRA BIBI *v.* NANDAN RAI. **66 I. C. 613 = A. I. R. 1922 All. 241.**

———The original mortgagors from whom plaintiff purchased the property subject to mortgage had sued the original mortgagees for redemption in 1896. That case had been tried by a Munsif, second class, who, holding that the interest was a charge on the property decreed redemption on payment of Rs. 873. This decree had been varied on appeal by the Divisional Court, but the trial Court's decree was restored by the Chief Court. Plaintiff in appeal against the decree of the trial Court contended that the decision of the former suit by the Munsif who had power up to 500 could not act as *res judicata* or estop him from urging that according to the terms of the mortgage deed itself, the interest was not a charge on the property as held by trial Court.

Held, the Munsif, second class, in the former case had no jurisdiction in law to try the case. Therefore, the former suit does not operate as a bar to the consideration of the question relating to interest. 6 C. L. J. 621 ; 14 C. L. J. 220 and 7 I. C. 781, Dist.; 51 P. R. 1912, Foll. (*Broadway and Abdul Qadir, JJ.*) MAYA DAS *v.* JINDA RAM. **5 L. L. J. 494 = 73 I. C. 874 = A. I. R. 1923 Lah. 141.**

———There is no *res judicata* where the Court which tried the former suit could not, by reason of its limited pecuniary jurisdiction, have tried the present suit. 29 Mad. 65, Foll. (*Simpson, A. J. C.*) UDAIRAJ SINGH *v.* RAM UDIT TEWARI. **10 O. L. J. 376 = 77 I. C. 340 = A. I. R. 1924 Oudh 147.**

———Where the prior suit was decided by a Munsiff who had jurisdiction to try suits up to the value of Rs. 1.000 only and the later suit was laid at Rs. 1,100 and was tried by a Munsif who had jurisdiction to try suits up to the value of Rs. 2,000.

Held, the Munsif who tried the previous rent suits had no jurisdiction to try the later suit. 28 Cal. 78, Dist.

Therefore the decision in the previous rent suits does not operate as *res judicata* in the subsequent suit. (*Chatterji and Pearson, JJ.*) ASAN ALI *v.* SARDA CHARAN KASTAGIR. **A. I. R. 1922 Cal. 138.**

—S. 11—Competent Court—Jurisdiction—When res judicata.

———Where on an application under S.105, Bengal Tenancy Act, the Revenue Officer had jurisdiction to decide whether or not the applicants when they made the application to him under S. 105 were joint landlords, and he did decide the question and his decision on this point was not questioned by appeal.

Held, that the applicants cannot challenge it subsequently by separate suit. (*Newbould and Graham, JJ.*) UPENDRA NANDAN DAS *v.* UMAI SET. **30 C. W. N. 974 = 97 I. C. 702 = A. I. R. 1926 Cal 1180.**

———A Court is not entitled to reject the decision in a declaratory suit by reason of the fact that the Court that passed it had no jurisdiction. The decree of such a Court is binding until it is set aside in appeal or by any other recognized method and operates as *res judicata*. Where therefore a Court trying a declaratory suit declaring certain execution application to be void and unlawful has *prima facie* jurisdiction to try it, its failing to take into consideration S. 47 will not render the decree inoperative. A Court that takes cognizance of a case and gives a decree must be deemed to have decided that it has jurisdiction. 31 C.L.J. 272 and 37 Bom. 563, Dist. (*Ashworth and Raza, JJ.*) RAMSUCHIT *v.* KALKA PRASAD. **13 O. L. J. 594 = 3 O. W. N. 233 = 93 I. C. 951 = A. I. R. 1926 Oudh 239.**

———Where the value of the present suit was beyond the jurisdiction of the Court which tried the previous suits,

Held, that nevertheless the principle of *res judicata* applied as the increase in value was only due to the joining together of the subject-matter of the previous suits. (*Daniels and Neave, JJ.*) MAGAN LAL *v.* G. I. P. RY. **22 A. L. J. 745 = 83 I. C. 969 = 5 L. R. A. Civ. 580 = A. I. R. 1924 All. 849.**

—S. 11—Competent Court—Scope.

———The reasonable construction of the words "in a Court competent to try such subsequent suit" as used in S. 11, C. P. Code, is that they must refer to the jurisdiction of the Court at the time when the first suit was brought, that is to say, if the Court, which tried the first suit, was competent to try the subsequent suit, if then brought, the decision of such Court would operate as *res judicata* although on a subsequent date by a rise in the value of the property the said Court has ceased to be a proper Court, so far as the pecuniary jurisdiction is concerned, to take cognizance of a suit relating to that very property. (*Shadi Lal, C.J. and Dalip Singh, J.*) SARUPA *v.* KHEM LAL. **10 Lah. 528 = 113 I. C. 90 = 30 P. L. R. 620 = A. I. R. 1928 Lah. 929.**

———The condition precedent to the applicability of the doctrine of *res judicata* is that the decision of the Court which is pleaded in bar should be the decision of a Court competent to try the subsequent suit or the suit in which the issue has been subsequently raised. (*Kumaraswami Sastri and Reilly, JJ.*) VENKATASUBBA *v.* VIGNESWARADU. **1928 M. W. N. 336 = 28 M. L. W. 82 = 110 I. C. 554 = A. I. R. 1928 Mad. 840 = 56 M. L. J. 52.**

———The C. P. Code, like any other Code must ordinarily be taken to be exhaustive of the matters on which it does deal and S. 11 in a suit makes it essential that the original Court must be competent to try the subsequent suit before the law of *res judicata* can apply. 29 Cal. 707 (P. C.) and A.I.R. 1926 Lah. 603, Foll. (*Dalip Singh, J.*) HUSSAIN SHAH *v.* GHULAM NABI. **108 I. C. 623.**

———It has to be established before applying the doctrine of *res judicata* that the decision claimed to

operate as *res judicata* was pronounced by a Court competent to try the later proceeding. A. I. R. 1921 P. C. 11 and A.I.R. 1922 P. C. 80, Foll. (*Das and Wort, JJ.*) SHOUKHI SAO *v.* GAIBI SAO.
107 I. C. 149.

———*Pecuniary jurisdiction must be looked to, to determine competency.*

It is not sufficient that the first Court should have been competent to try one or other of issues. Further pecuniary jurisdiction must be looked to to determine competency. 32 All. 8, Dist.; 16 All. 183, Foll. (*Boys and Kendall, JJ.*) KHUB LAL *v.* GULZARI LAL. **49 All. 543 = 25 A. L. J. 564 = 8 L. R. A. Rev. 101 = 100 I. C. 601 = A. I. R. 1927 All. 297.**

———The competency of Court for the purpose of S. 11 is to be determined irrespective of any provision as to right of appeal from the decision of such court. 6 A.L.J. 991, Foll. (*Iqbal Ahmad, J.*) ITAR SINGH *v.* UMRAO. **8 L. R. A. Rev. 33 = 99 I. C. 299 = A.I.R 1927 All. 189.**

———The amount as well as the nature of the suit must be taken into consideration in deciding whether a subsequent suit is barred under S. 11. (*Odgers, J.*) VELAYUDA PANDARAM *v.* SUNDARA.
23 M. L. W. 653 = 95 I. C. 968 = A. I. R. 1926 Mad. 829 = 51 M. L. J. 630.

———The principle that, for the purpose of dealing with the question of *res judicata* it is open to the Court to split up the causes of action in the subsequent suit and if it be found that one of these causes of action is the same as the cause of action relied upon in the earlier suit, then although, taking all the causes of action together the second suit may be said to be outside the jurisdiction of the original Court; still if the specific question be within the jurisdiction of the original Court, and was determined by the original Court, it is no answer to say that the whole suit is beyond its jurisdiction, is dangerously wide and, if taken too literally, would entail a risk of a conflict with the statutory provision contained in S. 11. 25 M.L.J. 379, Expl. (*Findlay, O. J. C.*) MT. KHURSHID BEGAM *v.* ABDUL RASHID. **9 N. L. J. 11 = 92 I. C. 913 = A. I. R. 1926 Nag. 234.**

———*General doctrine of* res judicata.

In order to make the decision of the Court final and conclusive in another Court, it must be the decision of a Court, which would have had pecuniary jurisdiction over the matter in the subsequent suit, on which the first decision is given in evidence as conclusive. There is no reason so far as the necessity for this condition is concerned, for making any distinction between a case, to which the strict rule of *res judicata* as enacted in S. 11 of the C. P. Code, applies and a case in which the principles of *res judicata* such as, for instance, those laid down by the Privy Council in 9 M. I. A. 539 (P.C.) and 40 All. 593 (P.C.) and other cases, is sought to be availed of. Case-law discussed. (*Wallace and Madhavan Nair, JJ.*) VIRASWAMI *v.* NAYUDAMMA.
22 M. L. W. 178 = 91 I. C. 497 = A. I. R. 1925 Mad. 1270 = 49 M. L. J. 430.

———Competency in S. 11, C.P. Code, has reference to the value of the suit and not the territorial jurisdiction. (*Ramesam and Venkatasubba Rao, JJ.*) AYISHA BIBI AMMAL, *In re.* **87 I. C. 705 = A. I. R. 1925 Mad. 1167.**

———If the later suit was not of a Small Cause Court nature a decree for money made in a previous suit instituted in the Small Cause Court does not operate as *res judicata* nor does the decision of the High Court

refusing to interfere with that decree in revision. (*Rankin and B. B. Ghose, JJ.*) MOHINI MOHAN ROY *v.* RAMADAS PARAMHANSA.
28 C. W. N. 271 = 80 I. C. 210 = 39 C. L. J. 532 = A. I. R. 1924 Cal. 487.

———*Appeals to different courts.*

It is the competency of the Court of first instance to entertain the two suits which regulates the application of the rule of *res judicata*, the fact that in the two suits appeals may lie in different Courts does not affect the application of the rule. 20 P.R. 1891, Dist.; 32 A. 67, Foll. (*Scott-Smith, J.*) PIR BAKSH *v.* JHANDU KHAN. **76 I. C. 176 = A. I. R. 1924 Lah. 644.**

———*Trial Court.*

The "competent Court" to which reference is made in S. 11 is the trial Court and it does not affect the question whether the decision is a decision of an appellate court or whichever the appellate Court may be. 9 Cal. 439 (P. C.), Foll. (*Stuart and Sulaiman, JJ.*) KAMMOO *v.* MT. FAHIMAN. **44 All. 712 = 76 I. C. 932 = A. I. R. 1922 All. 445.**

—S. 11—Competent Court—Settlement Court.

———*J*, the holder of an estate died and at the Settlement in about 1867 certain claimants put forth their claims to the estate. The claimants were *I*, daughter of *J*, and *B* an agnate of *J*. The questions raised were whether *J* was excluded from inheritance under the family custom and whether *B* was really an agnate as asserted by him. The Settlement Court held that *I* was entitled to inherit, under Hindu Law, to a limited interest as a daughter and that *B* was the reversioner as alleged by him. Subsequently *I* entered into an agreement with her son's daughter, whereby the latter was to be the owner of the estate after *I's* death. *B* instituted a suit for declaration that the agreement was invalid and not binding on him.

Held, that the question as to the status of *B* was *res judicata*, the same having been decided in *B's* favour in the Settlement Court. So also was the question as to the interest held by *I* as a limited owner, and *B* was entitled to the declaration prayed for. (*Mr. Ameer Ali.*) RANI INDAR KUAR *v.* THAKUR BALDEO BAKSH SINGH. **23 O. C. 291 = 18 A. L. J. 1057 = 28 M. L. T. 334 = 7 O. L. J. 439 = 57 I. C. 397 = 25 C. W. N. 170 = A. I. R. 1921 P. C. 131 = 39 M. L. J. 115 (P. C.).**

———Where during settlement proceedings mortgagor applied to the Revenue Court for redemption and the Settlement Officer dismissed the application on the ground that the term within which redemption was to be made had expired and that in consequence the mortgagor had no right left in him to redeem.

Held, that the Settlement Court acted with jurisdiction and a later redemption suit of the plaintiffs cannot be sustained, whether the mortgages were executed prior to the annexation of Oudh by the British Government in 1856 or were executed subsequently. (*Dalal, J. C.*) CHANDAN SINGH *v.* SHEO NARAYAN SINGH.
10 O. L. J. 606 = 5 L. R. Oudh 92 = 80 I. C. 698 = A. I. R. 1924 Oudh 245.

———Where the Settlement Court through oversight decreed that the mortgagor had no right left in him with respect to a particular property the question of the existence of the right to redeem is final and suit for redemption by the mortgagor or his successors-in-title is barred. (*Stuart and Kanhaiya Lal, A. J. Cs.*) TILAK CHAND *v.* SHAMBHU SINGH. **23 O. C. 269 = 7 O. L. J. 524 = 60 I. C. 404 = 2 U.P.L.R. 163.**

—S. 11—Competent Court—Special Act.

———*Madras Hereditary Village Offices Act* (*III of*

1895), *S.* 13.

Under S. 13, the Collector has jurisdiction to determine whether lands are the emoluments of an office or not, and the parties to the proceeding are debarred by S. 11, C. P. Code, and the general principles of *res judicata* from re-agitating the same question subsequently in a civil suit. 30 Mad. 320, Foll. (*Anantakrishna Ayyar, J.*) (PALAKOLANU) MANIKYAM *v.* (PALAKOLANU) CHANDRASEKHARUDU. **31 M. L. W. 537 = A. I. R. 1930 Mad. 573 = 58 M. L. J. 542.**

———*Gujarat Talukdars' Act* (*Bombay Act VI of* 1888). *S.* 16.

The decision of the District Court under S. 16 of the Act does not bar a regular suit on the principle of *res judicata.* 30 Bom. 220 Approved. (*Macleod, C. J., Pratt and Crump, JJ.*) AMARSANGJI DUNGARJI *v.* DEEPSANGJI RADABHAI. **49 Bom. 442 = 27 Bom. L. R. 345 = 87 I. C. 588 = A. I. R. 1925 Bom. 241 (F. B.).**

———*Agra Tenancy Act, S.* 199 (*b*).

A decision of Assistant Collector acting under S. 199 (*b*), Agra Tenancy Act, bars a subsequent suit to determine title between the same parties. 6 A. L. J. 917, Rel. (*Daniels, J.*) AMIN UDDIN *v.* ABDUL SHAKOOR. **5 L. R. A. Rev. 26 = 73 I. C. 460 = A. I. R. 1923 All. 556.**

—S. 11—Consent decree—Absence of issues.

———Judgment given by consent when there are no pleadings in action does not operate as *res judicata.* In order to effect an estoppel it was necessary that it should appear on record that the question had been put in issue. Wood. V. C., in *Gouchar* v. *Clayton*, 34 L. J. Ch. 239, Foll. ; 36 Bom. 283. A. I. R. 1926 Cal. 672, Dist. Where in a prior suit claiming certain amount on account of a certain cess defendants appeared in person filed no written statement and simply confessed judgment whereupon a decree was passed against them.

Held, that the decision in the prior suit did not preclude the party from disputing in a subsequent suit the right of the party to levy the cess. (*Madhavan Nair, J.*) GOVINDA KRISHNA *v.* VENKATASUBBIAH. **117 I. C. 295 = A. I. R. 1929 Mad. 694.**

—S. 11—Compromise decree—Basis of.

———*A* sued *B* for recovery of khas possession of some lands. The lands in dispute were included in a bigger area which formed the subject-matter of a previous litigation between the same parties, which was compromised and in which a decree was made in accordance with a Commissioner's map. In the present suit the lower Court held that the Commissioner in the litigation had committed a mistake and came to the conclusion that the disputed lands fell to the share of *A*.

Held, that the lower Court was wrong in law when it went behind the compromise decree and proceeded to consider the question whether the Commissioner had committed any mistake in preparing the map. It ought to have proceeded in determining the case on the basis of the Commissioner's map as such. (*Mullick and Garlick, JJ.*) GOPAL CHANDRA *v.* SHASI BHUSAN. **111 I. C. 1 = A. I. R. 1928 Cal. 852.**

—S. 11—Compromise Decree—Discharged defendant.

———Where in a previous suit certain defendants are discharged owing to a compromise between the plaintiffs of that suit and the contesting defendants the compromise decree does not operate as *res judicata* in a subsequent suit between the plaintiffs and the alienees from the discharged defendants. (*Wazir Hasan, A. J. C.*) DUNYA SINGH *v.* GANGA DHAR. **2 O. W. N. 684 = 90 I. C. 608 = A. I. R. 1925 Oudh 650.**

—S. 11—Compromise decree—Effect of.

———*Syndicate—Non-registration—Illegality.*

In a suit by or against a syndicate the parties cannot compromise the question whether the syndicate is or is not an unregistered association if the Court was bound to take notice of want of registration, and in order that it may be incumbent upon the Court to investigate the plea there must be circumstances which amount to something more than the possibility of the association being illegal. If the illegality is not *ex facie* apparent, or if it is a mixed question of law and fact or is a question the determination of which depends on extraneous facts, the Court is not bound to assume that the illegality exists or must necessarily come to light on trial of the facts, and consequently if the parties consent to the question of registration being *res judicata*, the fact of the illegality if subsequently established in other proceedings cannot overcome the plea of *res judicata. Shoe Machinery Co.* v. *Cutlan*, (1896) 1 Ch. 667; *North Western Salt Co., Ltd.* v. *Electrolytic Alkali Co., Ltd.* (1914) A. C. 461 and 33 Bom. 479, Ref. (*Kemp and Murphy, JJ.*) RAOJI NARAINJI *v.* RATANSI KANJI. **32 Bom. L. R. 389 = 126 I. C. 305 = A. I. R. 1930 Bom. 431.**

———S. 11 does not apply in terms to consent decrees as it cannot be said in the case of such decrees that the matters in issue between the parties have been heard and finally decided within the meaning of the section. A consent decree, however, has to all intents and purposes the same effect as *res judicata* as it raises an estoppel as much as a decree passed *in invitum.* (*Tapp, J.*) MT. SAID KHANAM *v.* SAID MUHAMMAD. **12 Lah. L. J. 157 = A. I. R. 1930 Lah. 487.**

———An order by consent, not discharged by mutual agreement and remaining unreduced is as effective as an order of the Court made otherwise than by consent and not discharged on appeal. A party bound by a consent order must, when once it has been completed, obey it unless and until he can get it set aside in proceedings duly constituted for the purpose. The only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the Court : the second stands unless and until it is discharged on appeal. (*Lord Blanesburgh.*) CHARLES HUBERT KINCH *v.* EDWARD KEITH WALCOTT. **1929 A. C. 482 = 118 I. C. 7 = 30 M. L. W. 606 = A. I. R. 1929 P. C. 289 = 57 M. L. J. 429 (P. C.).**

———S. 11, C. P. Code, does not apply to compromise suits as it applies in terms only to what was actually heard and finally decided (1912) M. W. N. 1071, Foll. (*Kumaraswami Sastri and Reilly, JJ.*) RAMASWAMY MUDALIAR *v.* ALAGATHAI ANNI. **1928 M. W. N. 654 = 116 I. C. 116 = A. I. R. 1929 Mad. 96.**

———A compromise decree operates as *res judicata. South American and Mexican Co.*, (1895) 1 Ch. D. 37 and 22 Mad. 508 (P.C.), Foll. (*Gokaran Nath Misra and Pullan, JJ.*) DURGA PRASAD *v.* NARAIN. **5 O. W. N. 1081 = 4 Luck. 181 = 115 I. C. 294 = A. I. R. 1929 Oudh 63.**

———*Res judicata* by its very words means a matter upon which the Court has exercised its judicial mind, and a judgment passed on consent cannot be considered as a judicium. A consent decree, therefore, does not come within the rule of *res judicata* as contained in S. 11. It, however, raises as an estoppel as much as a decree passed *in invitum.* (*Greaves and M. N. Muker-*

ji, JJ.) SIVADAS DUTTA *v.* BIRENDRA KRISHNA. **43 C. L. J. 116 = 94 I. C. 844 = A. I. R. 1926 Cal. 672.**

———A judgment by consent is intended to put a stop to litigation between the parties, just as much as is a judgment, which results from the decision of the Court, after the matter has been fought out to the end, unless the compromise can be attacked in some effective manner. (1895) 1 Ch. 37, 35 M. 75 and 11 M. 191. Ref. (*Ayling and Odgers, JJ.*) CHEURAYA GOUNDAN *v.* ATHAPPA GOUNDAN. **18 M. L. W. 177 = 75 I.C. 336 = 1923 M. W. N. 545 = A. I. R. 1924 Mad. 88.**

———A decision in a former suit, unless tainted by fraud or procured by undue influence, against the predecessor-in-title of the plaintiff will be binding on him. (*Mears, C. J. and Banerji, J.*) MD. AHMED *v.* ZAHUR AHMED. **44 All. 334 = 67 I. C. 523 = 20 A.L.J. 193 = A. I. R. 1922 All. 19.**

———*Relief prayed but not granted.*

A consent order raises an estoppel as much as a decree passed *in invitum*, so that where a particular relief is prayed for but the matter is settled by a consent order which does not grant the relief prayed, the relief must be deemed to be refused. The same relief cannot again be claimed. 24 Cal. 216; 24 Bom. 77 and 36 Bom. 283 Rel. on. (*Das and Ross, JJ.*) RAMESHWAR SINGH BAHADUR *v.* HITENDRA SINGH. **2 P. L. T. 628 = 62 I. C. 469 = 6 P.L.J 208 = A. I. R. 1921 Pat. 131.**

—S. 11—Compromise decree—Estoppel.

———A party cannot approbate and reprobate with knowledge of the facts, and if the husband or the wife once deliberately affirms the marriage, he or she cannot subsequently object to the marriage. Therefore, where a previous petition for declaring the marriage a nullity has been dismissed by consent of parties a second petition is not competent. Lord Shelborne in *G. v. M.*, (1885) A. C. 171, Rel. on. (*Marten, C.J., Crump and Blackwell, JJ.*) H. *v.* H. **30 Bom. L. R. 523 = 110 I. C. 266 = A.I.R. 1928 Bom. 279 (b).**

—S. 11—Compromise decree—Fraud.

———Application challenging validity of a compromise decree under S. 151 dismissed—Subsequent suit for the same purpose is not barred—C.P. Code, S. 151. (*Jwala Prasad, J.*) PARSHAN SAHI *v.* G. L. RICHARDSON. **5 Pat. 276 = 94 I. C. 765 = A. I. R. 1926 Pat. 289.**

—S. 11—Compromise decree--Guardian and Wards Act.

———*Proceedings under.*

Where under a compromise the petitioner (father) acquiesced in the retention of the custody, minor by the respondent (mother)

Held, that the authority delegated by a natural guardian to any other person to retain the custody of the minor is revocable although the compromise has been embodied in a decree. (*Oldfield and Venkatasubba Rao, JJ.*) SATYANARAYANA VARAPRASADA RAO *v.* VENKATA LAKSHMI NARASAYAMMA. **18 M. L. W. 173 = 73 I. C. 948 = 1923 M. W. N. 668 = A. I. R. 1924 Mad. 45.**

—S. 11—Compromise decree—Might and ought.

———A compromise decree cannot be taken to decide every point that ought to have been pleaded, as a decree on the merits must. All S. A. 2024 of 1925, Rel. on. (*Ashworth and King, JJ.*) MADAN LAL *v.* GAJENDRAPAL SINGH. **51 All. 575 = 116 I. C. 436 = 1929 A. L. J. 344 = A.I.R. 1929 All. 243.**

—S. 11—Compromise decree—Order recording compromise.

———*Decree passed thereafter—Appeal from first order.*

Where a preliminary decree or order is followed by a final decree, appeal does not lie against the former after the final decree is passed. An appeal from an order, recording a compromise under O. 23, R. 3, filed after a decree is prepared in pursuance of that order in accordance with the provisions of R. 3, is incompetent. A.I.R. 1925 Cal. 218, 36 Cal. 726, 32 Cal. 1023 and 17 C.W.N. 868, Foll.; 10 M.I.A. 203 (P.C.) Ref. (*Suhrawardy and Cuming, JJ.*) BENGAL COAL CO., LTD. *v.* APCAR COLLIERIES LTD. **29 C.W.N. 928 = 87 I. C. 248 = A. I. R. 1926 Cal. 412**

—S. 11—Compromise decree—Portion of dispute not settled.

———Explanation 5 apparently has a reference to what has been adjudicated by the Court and not to the result arrived at by a compromise, in which the parties have omitted to settle a part of their dispute. (*Mukerji and Bennet, JJ.*) ISHRI PRASAD *v.* MUNNA LAL. **A.I.R. 1930 All. 619.**

—S. 11—Compromise decree—Pre-emption.

—Certain occupancy tenants in a village sold their occupancy rights to the appellant *R*. The plaintiffs claimed to pre-empt the sale. The sale was by deed, dated 25th August 1917, and the conveyance was registered on the 27th August. Shortly after the purchase he sold one-half to *B*, *P* and *M*. The suit to pre-empt the sale to *R* was brought on 7th October 1919. The vendees began to build shops on the land so purchased. Then, on 9th September 1918, a suit was filed on behalf of all the landlords of the village numbering 216, among whom the plaintiffs were included, against the appellant *R* and his co-sharers. That suit was decreed by the Assistant Collector in January 1919, but was dismissed in appeal. A further appeal was then made to the Commissioner and then a compromise among all the parties was effected, by which the sale to *R*, *B* and *M* was recognized and mutation allowed to be effected. The revenue officer sanctioned the sale in favour of the appellant *R*. The Commissioner passed a decree in terms of the compromise on 2nd June 1919.

Held, that the occupancy rights consolidated, or rather merged in the ownership rights; that these belonged to the appellants, and that as the respondents were themselves parties to the suit in the course of which the compromise arrangement was come to be followed by the decree and mutation proceedings and, therefore, whether the case be viewed under the heading of *res judicata* or of estoppel, or of no title and interest to sue, the result would be the same, namely, that the plaintiffs' claim to pre-empt cannot be entertained, apart from the question of limitation. (*Lord Shaw.*) RIKHI RAM *v.* DHANPAT RAI. **10 Lah. 75 = 110 I.C. 1 = 55 I.A. 266 = 48 C. L. J. 158 = 33 C. W. N. 90 = 30 P. L. R. 1 = A. I. R 1928 P. C. 190.**

—S. 11—Compromise decree—Question not decided.

———Where a person although showing his willingness to have a scheme settled, contended that his right to the ownership of a particular house should be left undisturbed, and the Board did not purport to decide that question, the order of the Board embodying the scheme, although it assumed that the temple was the owner of the house, cannot be a decision on the point of the ownership of the house. (*Venkatasubba Rao and Reilly, JJ.*) JAGANNATHA RAO PANTULU *v.* M. RAMA CHARLU. **116 I.C. 142 = A.I.R. 1929 Mad. 687.**

—S. 11—Compromise decree—Terms not known.

———A rent-decree passed in a previous suit on the basis of a compromise in the absence of the terms of the compromise, does not operate as *res judicata* in a subsequent suit between the parties with regard to the rate of rent, but only amounts to proof of an admission in respect of the amount claimed. 16 Cal. 300 (F. B.), Foll. (*Suhrawardy and Cuming, JJ.*) OFFICIAL TRUSTEE OF BENGAL *v.* SAGAR PAIK.

87 I. C. 781 = A.I.R. 1925 Cal. 1011.

—S. 11—Compromise decree—Unnecessary matters.

———*Portions dealing with matters not necessary for disposal of suit are not* res judicata.

A compromise decree is to be confined to so much as is necessary in order to dispose of the conclusions of the suit. In so far as it deals with other matters it cannot operate as *res judicata.* (*Rankin, J.*) SASHI BHUSAN SHAW *v* HARI NARAYAN SHAW. **48 Cal. 1059 = 66 I. C. 705 = 25 C.W.N. 990 = A.I.R. 1921 Cal. 202.**

—S. 11 - Connected or cross-appeals - Abatement of appeal.

———In the first Court the suits were tried together. Appeals were filed in both the suits, but one of the appeals having abated, no decision on merits was given by the appellate Court.

Held, that on account of the appeal in the connected case having abated, the matters were never finally decided by the appellate Court, the abatement should not, therefore, operate as *res judicata.* A. I. R. 1927 Lah. 289 (F. B.) and A. I. R. 1927 Lah. 1, Foll. (*Bhide, J.*) CHHITAR MAL *v.* RADHA RAWAN. **109 I. C. 564.**

—S. 11—Connected or cross-appeals—Appeal from one decree.

———Both parties appealing against trial Court's decision—One appeal allowed and the other dismissed—Second appeal filed against one appellate decree only—Other unappealed decree does not bar hearing of the second appeal. (*Lindsay and Ashworth, JJ.*) NANNU PRASAD *v.* NAZIM HUSAIN. **50 All. 517 = 26 A. L. J. 258 = 113 I. C. 93 = A. I. R. 1928 All. 274.**

———Two suits by husband and wife against each other, tried together and disposed of by one judgment—Two decrees prepared—Appeal by husband against the decree in his own case—Unappealed decree does not operate as *res judicata.* (*Addison, J.*) GULHASAN *v.* MT. RESHAMGAN. **9 L.L.J. 526 = 105 I.C. 850 = A. I. R. 1927 Lah. 821.**

———Where a suit was, filed to recover money on accounts and the defendant having subsequently filed another suit against the plaintiff the two suits were consolidated and the plaintiff's suit was decreed and the defendant's suit was dismissed and the defendant preferred an appeal as against the decree in the plaintiff's suit only. *Held*, that the failure to appeal as against the decision in the other connected suit did not operate as a bar.

Per *Graham, J.*, that the decision in the defendant's suit was not a decision in a former suit within the meaning of S. 11, Expl. 1. (*Graham and Mitter, JJ.*) MANOMOHAN DAS *v.* SHIB CHANDRA SAHA.

34 C. W. N. 839.

———The applicant filed suits against two tenants for the full amount of rent pleading that he alone had been collecting rent. The respondent intervened and contested the plaintiff's right to collect rent. In both the suits the court held that the plaintiff was entitled to collect the whole rent. The tenants did not appeal but the respondent appealed in one suit. *Held*, that the question at issue being the same the decision in the suit not appealed against operated as *res judicata.* (*Oakden, S. M. and Smith, J. M.*) SHEO PAL SINGH *v.* RAM DAYAL SINGH. **14 R. D. 324.**

———*Two cross-suits about the same subject-matter filed simultaneously between the same parties—Suits consolidated and one judgment delivered in both the suits, but two decrees framed—Appeal from one of the decrees only—No appeal from the other decree—Appeal is not barred by* res judicata—*Principle of* res judicata *applies only to judgments and not decrees—Principles of* res judicata *fully discussed.*

Two widows *A* and *B* were jointly in possession of certain land. Each sued the other for declaration that she (the plaintiff) was the exclusive owner of that land and that the other (defendant) had no right in it of any kind. Both suits were disposed of by a single judgment which decided that *A* was the owner but that *B* was entitled to hold possession of half the land in lieu of maintenance. A separate decree was drawn up in each suit declaring the rights of the plaintiff according to that decision. *B* appealed against one of these decrees only, namely, the decree given in the suit in which she was the plaintiff.

Held (*per Full Bench, Dalip Singh, J., dissenting*), that the fact that no appeal had been preferred by *B* against the decree in the other suit of *A*, could not prevent *B*'s appeal from proceeding.

Held, further, that there could be no bar to the hearing of cross-objection filed by *A* pressing her claim to exclusive possession. Principles of *res judicata* and case-law thereon fully discussed. 85 P. R. 1905 (F. B.); A.I.R. 1926 Lah. 458; 33 Cal. 1001 (F.B.); 29 Mad. 333 (F. B.) and A. I. R. 1923 All. 490 (F. B.), Appr.; 33 All. 51, Disappr.; 11 Lah. 83 = 53 I.C. 137; 4 L. L. J. 344 and 3 Lah. 215 = 77 I. C 541 = A. I. R. 1922 Lah. 390, Overruled.

Tek Chand, J.—S. 11 applies to suits and not to appeals. But the general principles of *res judicata* will apply to appeals, and in applying these general principles, the Courts are not hampered by any technical rules of interpretation such as govern the applicability of a statute. Courts should ascertain the *raisond'etre* of the doctrine and then apply to it the facts of particular case, unfettered by technicalities. It is the spirit of the law and not its letter which is to be the governing factor, the soul of the rule rather than its outward form. The essence of the rule is that the two proceedings should be so independent of each other that the trial of one cannot be confused with the trial of the other. Where two suits, having a common issue, are, by consent of parties or by order of the Court, tried together, the evidence being written in one record and both suits disposed of by a single judgment, it cannot be said that there have been two distinct and independent trials. The test is whether the Judge has applied his mind to the decision of the issue involved in the two suits twice or whether there has been in reality but one trial, one finding and one decision. *Res judicata* is either estoppel by verdict or estoppel by judgment (or record) and there is no such thing as estoppel by decree. The determining factor is not the decree but the decision of the matter in controversy. Where the same property is the subject-matter of two contemporaneous suits between the same parties, in which common issues are involved, and the two suits are tried together and disposed of by a single judgment but two decrees are prepared and an appeal is preferred against one decree only, the Court must be presumed to have consolidated the two suits and passed one judgment and the fact that there is an unappealed decree will not create an estoppel against the hearing of the appeal. The estoppel in such a case would not be created by the decree. It could only be created by the judgment. Further, no anomaly or embarrassment in execution proceedings is likely to arise by there being two conflicting decrees on the records of the Court, for it is well settled that if two or more conflicting decrees happen to be passed regarding the same property in two different proceedings, it will be the last one which will prevail.

Dalip Singh, J.—The principle of *res judicata* by record to apply there is no difference between a decision (judgment) and " an adjudication " (decree). Courts should be reluctant to presume an order of consolidation where none has actually been passed. The point is not whether the court should have consolidated the two suits but whether the appellate Court looking at the actions of the Court below can presume that the Court intended that there should be an order of consolidation. (*Campbell, Addison, Tek Chand, Dalip Singh and Agha Haider, JJ.*) MT. LOCHHMI *v.* MT. BHULLI. **8 Lah. 384 = 104 I C. 849 = A. I. R. 1927 Lah. 289 (F. B.).**

———Where it appears to an appellate Court that there are two decrees arising out of two suits heard together or raising the same question between the same parties, or arising out of two appeals to a subordinate appellate Court, and only one of such decrees is brought before it in appeal, and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred either by the rule of *res judicata*, or at all, by reason of his failure to appeal from the decree which does not prejudice him. A. I. R. 1923 All. 490 and 15 O. C. 22, Foll. (*Stuart, C. J. and Raza, J.*) RAMSUKH DUBE *v.* RAMPAT TIWARI. **4 O. W. N. 297 = 102 I. C. 171 = A. I R 1927 Oudh 575.**

———Where in two connected suits tried and decided together an appeal is filed against one decree but not against the other, the decree not appealed against is not *res judicata* and so does not affect the hearing of the appeal against the other decree. 29 Mad. 333, Foll. ; A. I. R. 1923 P. C. 167, Dist. (*Phillips, J.*) SINNANNA KONE *v.* MUTHUPALANI CHETTY. **92 I. C. 352 = A. I. R. 1926 Mad. 378.**

———Two appeals in same suit—Two decrees passed —Second appeal filed from only one—Appellant not prejudiced by the other—Second appeal is not barred. (*Sulaiman, J.*) RAM NARAIN *v.* NIHAL SINGH. **6 L. R. A. Civ. 222 = 87 I. C. 804 = A. I. R. 1925 All. 488.**

———S. 11 of the C. P. Code, or, at any rate the principle on which that section is based, will prevent an appellate Court from trying a case involving a matter decided finally by a suit heard along with the suit from which the appeal is pending. (*Ashworth, A. J. C.*) PANCHAM SINGH *v.* THAKUR SINGH. **86 I. C. 380 = A. I. R. 1925 Oudh 598.**

———Where a combined judgment was given in two appeals in the lower appellate Court and in the High Court only one appeal was filed against the judgment but it was filed by the principal parties and also the parties to the other appeal were impleaded and where it was objected that the omission to file a distinct appeal against the other appeal should cause the dismissal of the appeal in the High Court. *Held*, that the objection was bad. 21 A. L. J. 465, Foll. (*Mukerji, J.*) BIJAI BAHADUR *v.* PARAMESHWARI RAM. **78 I.C. 1026 = A. I. R. 1924 All. 834.**

———Two decrees—Appeal from one only—No prejudice to appellant in unappealed decree—Appeal is not barred. 33 A. 51, F.B., Dist; 29 All. 730, Foll.; (1908) A. W. N. 211, 33 All. 151, 9 I. C. 67, 35 All. 187 and 18 A. L. J. 40, Overruled. (*Mears, C. J. Banerji, Piggott, Walsh and Ryves, JJ.*) GHANSHAM SINGH *v.* BHOLA SINGH. **21 A. L. J. 465 = 74 I. C. 411 = 45 All. 506 = 4 L. R. A. Civ. 265 = A. I. R. 1923 All. 490 (2) (F. B.).**

———*Finding on an issue is not* res judicata.

There is nowhere a right of appeal against a finding on an issue. The right of appeal given by C.P. Code is always a right of appeal against a decree. The finding on the issue of ownership in *J's* suit did not constitute *res judicata.* (*Mears, C. J. and Piggott, J.*) PEARY LAL *v.* JADO RAI. **20 All. L. J. 784 = 76 I. C. 618 = A. I. R. 1923 All. 15.**

———Cross-suits—Appeal from one of them only—Unappealed decree acts as *res judicata* as being a former suit. 15 Bom. 104, 29 M. 333 and 195, Diss. (*Mookerjee and Chotzner, JJ.*) ISUP ALI *v.* GOUR CHANDRA DEB. **37 C. L. J. 184 = 74 I. C. 591 = A. I. R. 1923 Cal. 496.**

———Decision in one not affecting decision in the other —Failure to appeal from one is no bar to appeal from the other. (*Martineau and Campbell, JJ.*) YUSUF ALI *v.* ALI BHOY. **83 I. C. 776 = A.I.R 1923 Lah. 8.**

———*A* sued *B* and *B* filed another suit against *A*. The question at issue in the two suits was the same. Both the suits were tried together. But separate judgments were given.

Held, in an appeal from the judgment in one suit, that the judgment in the other suit which had not been appealed against operated as *res judicata.* (*Chatterjee and Pearson, JJ.*) GANGADHAR KALWAR *v.* SEKALE TELINI. **34 C. L. J. 281 = 27 C. W. N. 141 = 64 I. C. 574 = A. I. R. 1921 Cal. 291.**

———Same question directly and substantially in issue in both suits—Appeal against one decree only—Decree unappealed is a bar. (*Leslie Jones and Wilberforce, JJ.*) MUHAMMAD JAN *v.* DULICHAND. **3 Lah. L. J. 473 = 74 I. C. 583 = A I. R. 1921 Lah. 255.**

—S. 11—Connected or cross appeals—Consolidated decree.

———Where two suits were instituted against the same defendants for recovery of arrears of rent for different holdings at different rentals and the suits were tried together and on plaintiff's consent, only a decree for consolidated rent was passed, as the Court held that the lands covered by the two suits formed one holding and the other suit was dismissed by the trial Court but was set aside on appeal and where the defendant preferred a second appeal.

Held, that plaintiff having not appealed against the decree for consolidated rent was barred by *res judicata* and also on the ground of estoppel since he had accepted to take the decree for consolidated rent. 33 C. 1101, Diss. (*Kulwant Sahay, J.*) DHANI SINGH *v.* SRI CHANDRA CHOOR DEO. **75 I. C. 570 = A. I. R. 1924 Pat. 823.**

—S. 11—Connected or cross appeals—Copies of decrees.

———Two appeals from a decree disposed of by one judgment and two decrees—Appeal against that judgment without filing copies of both decrees is bad. (*Scott-Smith and Harrison, JJ.*) MUHAMMAD DIN *v.* M. ZEB-UN-NISSA. **3 Lah. 215 = 77 I. C. 541 = A. I. R. 1922 Lah. 390.**

—S. 11—Connected or cross-appeals—Cross-objections.

———Where the cross-objections filed by one party were dismissed without going into the merits of the case on the ground of their being filed after the dismissal of the appeal and an appeal was filed on the same points as the cross-objections.

Held, that the appeal was not barred. (*Daniels, J.*) PRABHU DAYAL *v.* MURLI DHAR. **22 A. L. J. 365 = 78 I. C. 677 = 5 L. R. A. Civ. 298 = A. I. R. 1924 All. 867.**

—S. 11—Connected or cross suits—Decision of one.

———Where, in both of the cross-suits between the same parties the question at issue arising out of the same transaction is the same, and one is decided before the other, the decision in the suit decided first is *res judicata* against the other. (*Daniels, J.*) SUNDAR LAL KAPOOR CHAND *v.* BHAWAN PRASAD KAMTE PRASAD. **96 I. C. 694 (All.).**

———Where in two suits the lands in dispute are different but the issue as to defendant's title to the lands is raised in both and decided in one, that decision is *res judicata* as to the issue of title in the other suit. (*Rutledge, C. J. and Brown, J.*) V. P. R. V. CHOKALINGAM CHETTIAR *v.* MAUNG THA O. **4 Rang. 8 = 95 I. C. 104 = A. I. R. 1926 Rang. 122.**

—S. 11—Connected or cross-appeals—Dismissal of one.

———*Principle applies to appeals.*

The question of *res judicata* is not confined only to the provisions of S. 11. 11 I. A. 37, Ref. Two cross-suits were tried together with common issues but two separate decrees were drawn up and also two judgments were written one relying on the other. Appeal from one decree was dismissed.

Held, that the appeal from the other decree cannot be heard, the subject-matter of the latter appeal being already decided in the prior appeal. 33 All. 15 (F. B.), Foll. (*Robinson, C. J. and Brown, J.*) ANWAR ALLI SOWDAGAR *v.* AMEER ALLI SOWDAGAR. **2 Rang. 633 = 84 I.C. 894 = A. I. R. 1925 Rang. 104.**

———There were two decrees, one dismissing plaintiffs' claim and another decreeing defendants' counter-claim. Plaintiffs filed two separate appeals. The correctness of defendants' accounts was the decisive question in both appeals. The appeal from decree allowing defendants' counter-claim was dismissed as barred by time.

Held, that the other appeal was barred by *res judicata*. (*Leslie Jones and Broadway, JJ.*) GHAMIYA LAL *v.* ROSHAN LAL. **4 Lah. L. J. 344 = A. I. R. 1921 Lah. 271.**

—S. 11—Connected or cross suits—Pre emption.

———Where rival pre-emptors sue for pre-emption and the suit of one of them is dismissed, the failure on the part of the vendees or the remaining pre-emptors to appeal from the decree does not debar them from appealing against the decrees passed in their own suits. (*Lindsay and Sulaiman, JJ.*) MT. CHAMMUN KUARI *v.* JAGOTBALI. **101 I. C. 518 = A. I. R. 1927 All. 540.**

———Suit for pre-emption by rival pre-emptors *S* and *K*—Su t by *S* dismissed and that of *K* decreed—*S* appealing against the dismissal of the suit—No appeal filed against decree in *K's* suit—Appeal by *S* is barred by *res judicata*. 85 P.R. 1905 held to be no longer good law. A.I.R. 1924 Oudh 311; A.I.R. 1925 Rang. 104; A. I. R. 1924 Pat. 823; A. I. R. 1923 All. 490 (F. B.) and A. I. R. 1923 Cal. 496, Rel. on. (*Addison J.*) SULAIMAN *v.* PARTAB. **8 Lah. L. J. 136 = 27 P. L. R. 203 = 93 I.C. 1014 = A.I.R. 1927 Lah. 98.**

———Suit for pre-emption by *A* and *B*—*A's* suit dismissed by drawing lots, *A* and *B* having equal rights—Subsequently *B's* suit dismissed, sale being not liable to pre-emption—B can succeed in appeal without appealing against dismissal of suit against *A*. 33 All. 51 and A. I. R. 1923 All. 490 (F. B.), Dist. (*Stuart, C. J. and Raza, J.*) BAHRAICHI *v.* TIRBENI SINGH. **4 O. W. N. 143 = 100 I. C. 450 = A. I. R. 1927 Oudh 106.**

—S. 11—Connected or cross-appeals—Preliminary and final decree.

———Where during pendency of appeal from preliminary decree in a mortgage suit an appeal from final decree was presented but was dismissed for want of prosecution:

Held, that the appellate Court is not, by such dismissal, debarred from granting, in the appeal before it, a relief inconsistent with the final decree. 36 All. 532 (F. B.), Foll. (*Mears, C. J. and Lindsay, J.*) GOKUL KALWAR *v.* CHANDER SEKHAR. **48 All. 611 = 24 A. L. J. 769 = 96 I. C. 1 = A. I. R. 1926 All. 665.**

—S. 11—Connected or cross-appeals—Two appeals necessary.

———Two pre-emption suits were filed by *L* and *A* with regard to the same property and in connection with the same transfer: they were jointly tried, issue being the same, and identical decrees were passed in both. Both were parties to both the suits. The decrees were to the effect that *L* was to pre-empt and deposit a certain amount and on his failure *A* was allowed to pre-empt. *L* appealed from the decree in his own suit but not from the decree in the suit in which he was defendant.

Held, that the decree in *A's* suit which had become final barred the appeal. 20 O. C. 290 Dist. (*Dalal, J. C.*) LACHMI KUAR *v.* UMRAO SINGH. **11 O. L. J. 22 = 81 I. C. 333 = A. I. R. 1924 Oudh 311.**

———Where an order dealt with two separate cases, two appeals are necessary, although in the Trial Court, Counsel received one fee for the two cases which he therefore considered to have been consolidated. But in a proper case, the appellant may be permitted to rectify the error by putting in a properly stamped appeal. (*Scott-Smith and Wilberforce, JJ.*) DEVI DITTA MAL *v.* OFFICIAL LIQUIDATOR, AMRITSAR BANK, LTD. **53 P. L. R. 1921 = A. I. R. 1921 Lah. 346.**

—S. 11—Co-plaintiffs.

———Where a partition of a co-sharer village took place and the present plaintiffs and defendant lambardar were on the same side and continued to be joint and co-sharers in the same mahal, even after the partition.

Held, the rate at which the profits payable to the out going co-sharers was calculated in the partition proceedings is not *res judicata* as between the plaintiffs and defendant *inter se* in a subsequent action for share of profits. 42 All. 309, Foll. (*Walsh, Ag. C. J., Sulaiman, J.*) KARAN SINGH *v.* RAM SAHAI. **83 I. C. 231 = A. I. R. 1925 All. 246.**

———Res judicata *between—Same principles as for* res judicata *between co-defendants apply.*

The main tests to be applied are whether there was active controversy between the plaintiffs and whether that adjudication was necessary to enable the Court, to grant any relief against the defendants. (*Kumaraswamy Sastri, J.*) SHYAMA BHAI *v.* PURUSHOTHAMADOSS. **21 M. L. W. 551 = 90 I. C. 124 = A. I. R. 1925 Mad. 645.**

———Where there is no conflict of interest between the co-plaintiffs, the decision cannot be held binding as *res judicata* on their successors. (*Dawson Miller, C. J.*

and Jwala Prasad, J.) MAHARAJA PRATAP UDAINATH SAHI DEO *v.* GANESH NARAIN SAHI.
1921 P. H. C. C. 369 = 70 I. C. 232 = A. I. R 1921 Pat. 218.

—S. 11—Directly and substantially in issue—Absence of evidence.

———Where a particular issue does not arise on the pleadings, or in any case is so indistinct that it does not indicate that the parties knew that they had to adduce any evidence on it, any finding on such issue does not operate as *res judicata*. (*Mukerji, J.*) LALLU SINGH *v.* RACHUNANDAN. **85 I. C. 690 = A. I. R. 1925 All. 794.**

———Even if a particular matter be not included in a formal issue, if it is directly and substantially in issue between the parties, and if there be a decision thereon, it will operate as *res judicata*. (*Suhrawardy and Graham, JJ.*) RAHINI NANDAN CHAUDHURI *v.* JADUNANDAN CHAUDHURI. **30 C. W. N. 873 = 97 I. C. 73 = A. I. R. 1926 Cal. 1022.**

—S. 11—Directly and substantially in issue—Cause of action recurring.

———Even if the cause of action for a suit is a recurring one, every matter decided in a previous suit may be *res judicata* which was substantially and directly in issue. (*Mullick, A. C. J. and Kulwant Sahay, J.*) DEBI PRASAD *v.* JALDHAR MAHTON.
1926 P. H. C. C. 113 = 94 I. C. 553 = A. I. R 1926 Pat. 288.

—S. 11—Directly and substantially in issue—Cess suit.

———In the Bengal Cess Act in almost every important section stress is laid upon the fact that the cess is for the year that is current. So there cannot be *res judicata* in regard to the amount of cess, unless it is first proved that the two years, which are to be compared one with the other fall under the same re-valuation. (*Foster, J.*) RAJA DHAKESHAR PRASAD NARAYAN SINGH *v.* RAMDARNARAYAN SINGH. **A. I. R. 1927 Pat. 58.**

—S. 11—Directly and substantially in issue—Different issues.

———Where a suit brought for recovery of possession of the property on the ground that the plaintiff was the proprietor was dismissed and another suit was brought by the plantiff as a mortgagor for redemption of the said property,

Held, that the decision in the prior suit cannot operate as *res judicata* because the matter involved in the two is essentially different. 35 Bom. 507, Rel. on. (*Shadi Lal, C. J. and Agha Haider, J.*) ALI AHMED *v.* KHAN MAHOMED. **120 I. C. 420 = A. I. R. 1929 Lah. 833.**

———A suit by plaintiff for possession of his share after partition is not barred by the dismissal of his prior suit for recovery of specific plot of the land based on his exclusive title. A. I. R. 1923 Mad. 257, Dist. (*Waller and Madhavan Nair, JJ.*) SOUNDARAJALU *v.* DORAISAMI. **24 M. L. W. 453 = 1926 M. W. N. 724 = 98 I. C. 524 = A. I. R. 1926 Mad. 1128.**

———Before the principle of *res judicata* can be applied it must be shown that the matter for decision had been directly and substantially in issue in a previous suit between the same parties. Where in the latter case the question in issue is the right to sell and in the previous case it was the right to mortgage.

Held, that different considerations apply in the two cases and that the principle does not apply. 15 O.C. 91, Ref. (*Neave, A. J. C.*) GANESH *v.* SURAJ BUKHSH SINGH. **2 O. W. N. 944 = 91 I. C. 1021 = A. I. R. 1926 Oudh 139.**

———In a previous suit by *T* against *C*, *B*, and others, for the enforcement of an easement, the question directly and substantially in issue was whether *T* was a tenant under *B*. *B* subsequently sued for ejectment of *T*, or in the alternative, for rent.

Held, that the questions for investigation in the later suit were essentially distinct in character and if at all they arose in the previous suit they arose not distinctly and substantially but incidentally and collaterally. 30 C. L. J. 13 and 31 C. L. J. 507 Foll. (*Mukerji, J.*) S. M. TARITBARANI DASI *v.* BASUMATI DEVI.
85 I. C. 953 = A. I. R. 1925 Cal. 985.

———Decision that will was "wholly valid" does not bar question as to validity of its provisions regarding succession to the shebaitship, when the only question in the previous case was about the extent of bequest that operated under the will. (*Suhrawardy and Duval, JJ.*) PROMOTHO NATH MUKERJEE *v.* ANUKUL CHANDRA BANERJEE. **40 C. L. J. 564 = 85 I. C. 875 = 29 C. W. N. 17 = A. I. R. 1925 Cal. 225**

———Rejection of claim by reversioners for cancellation of gift by widow is no bar to claim as reversioners after her death. The validity of the deed of gift and its effect are distinct matters. (*Ashworth, A. J. C.*) MT. KUSAM DEI *v.* HAR DATTA. **26 O. C. 98 = 74 I. C. 459 = A. I. R. 1924 Oudh 129.**

———Where in a previous suit by defendant against plaintiff, the former's claim to let out the water on his land through a particular opening, was denied and in the present suit the plaintiff claimed a prescriptive right to a flow of water from the defendant's land, to his own, *held*, that the issues in the two suits were not the same and the present suit is not barred by *res judicata*. (*Dawson Miller, C.J. and Mullick, J.*) MT. SARDAN *v.* PHUDO SAHU. **4 P. L. T. 81 = 69 I. C. 947 = 1922 P. H. C.C. 305 = 2 Pat. 110 = A. I. R. 1923 Pat. 65.**

———*Issue in former suit different from that in the present suit—Suit is not barred.*

The plaintiff's wife filed a suit for arrears of maintenance according to agreement that she was to live separate and receive maintenance, if maltreated by husband. She alleged that her husband had turned her out; but the Court found that he had not done so, and that if the meaning of the agreement was that she was free to leave her husband at any time, then the agreement was not enforceable at law. The wife went to live with her husband but was soon turned out and she filed the present suit for maintenance.

Held, the facts in the former suit were different. It was found there that the wife had left her husband's house for no reason, and it was held that, if she set up an agreement under which she could do that, then any such agreement was contrary to Mohammadan law. That proposition does not govern the present case and therefore there is no *res judicata*. (*Simpson, A. J. C.*) BANNEY SAHEB *v.* ABIDA BEGAM.
25 O. C. 157 = 69 I. C. 778 = 10 O. L. J. 13 = A. I. R. 1922 Oudh 251.

———Where the prior judgment decides only that according to the custom found to exist, a son by a "kept wife" inherits equally with a son by a wedded wife, it cannot be held to adjudicate on the question whether under Hindu Law the plaintiff was legitimate or entitled to succeed to his father's property. (*Leslie Jones and Broadway, JJ.*) INDAR SINGH *v.* THAKER SINGH.
2 Lah. 207 = 63 I. C. 387 = 3 L. L. J. 317 = 94 P. L. R. 1921 = A. I. R. 1921 Lah. 20.

—S. 11—Directly and substantially in issue—Different subject-matter.

———Alluvial land in present suit not the same in previous suit but newly formed while old land disappeared—There can be no *res judicata* or estoppel—Evidence Act, S. 115. (*Stuart, C. J. and Raza, J.*) SHIVRAM LAL *v.* GANGASHANKER. **12 Rev. Dec. 51 = 111 I. C. 370 = A. I. R. 1929 Oudh 15.**

———Where the groves in later suit are different from the grove which formed the subject of the previous litigation and it could not be said that the matter in issue in later suit between the parties was directly and substantially in issue between them in the former litigation. *Held* S. 11 did not apply. (*Neave, J.*) BHAUN PRATAB SINGH *v.* BHAGWAN SINGH. **5 L. R. A. Civ. 406 = 85 I. C. 76 = A. I. R. 1924 All. 922.**

———A prior suit determining a question of title regarding a certain land of which the present disputed land does not appear to form part, does not bar a subsequent suit between the same parties in respect of the land in dispute. (*Walmsley and Ghose, JJ.*) ANANTRAM BHATTACHARJEE *v.* HEM CHANDRA KAR. **50 Cal. 475 = 72 I. C. 1041 = A. I. R. 1923 Cal. 379.**

—S. 11—Directly and substantially in issue—Different value.

———*Value in previous suit one-fourth of subsequent suit—Decision is not* res judicata.

If in previous suit the value of the property included was one-fourth of the property included in the second suit the decision in previous suit cannot be *res judicata* in subsequent suit. (*Dalal, J.*) NAKCHED *v.* SUKHDEO. **124 I. C. 714 = A. I. R. 1930 All. 430.**

—S. 11—Directly and substantially in issue—Dismissal for want of cause of action.

———Where there is no cause of action, the Court has no jurisdiction to try a case and is not competent to decide other issues. Under S. 11 the bar arises only where the issue has been directly and substantially raised in a former suit. Where there is no cause of action, no matter in the plaint can be directly and substantially in issue. Therefore suit dismissed on the ground that there is no cause of action is not a bar under the principles of *res judicata*. (*Dalal, J.*) MT. WAHIDAN *v.* MT. ALIMAN. **118 I. C. 711 = A. I. R. 1929 All. 844.**

———*Prayer for declaration leading up to the main relief claimed,* viz., *of possession—Dismissal of suit on failure of main relief—Declaration cannot be deemed to have been refused.*

Where the declaration which was claimed in the previous suit in the prayer was not a declaration under S. 42 of the Specific Relief Act but a declaration which led up to the main relief claimed in the suit, namely, possession.

Held, that the prayer for declaration was merely an argumentative step towards the only decree sought, *viz*, possession and the Court was not entitled to make a declaration with regard to this prayer in the plaint after the failure of the sole cause of action, and hence the refusal of the relief cannot "be deemed to have been refused" under Expl. (5). (*Chatterjea and Cuming, JJ.*) NRIPENDRA NATH BHOWMIK *v.* BASANTA KUMAR LAHIRI. **29 C. W. N. 861 = 89 I. C. 207 = A. I. R. 1925 Cal. 1195.**

—S. 11—Directly and substantially in issue—Estoppel.

———Where the defendants successfully pleaded in the Revenue Court that the plaintiff was not entitled to maintain a suit for ejectment in that Court,

Held, that they cannot be permitted to resist the suit subsequently filed in the Civil Court on the ground that the Civil Court has no jurisdiction to try the suit, 18 I.

C, 875, Foll. (*Iqbal Ahmad, J.*) KALI CHARAN *v.* BHOLI BAKHSH. **8 L. R. A. Rev. 283 = 105 I. C. 639 = A. I. R. 1927 All. 711.**

—S. 11—Directly and substantially in issue—Execution of deed.

———*Execution of certain kabulyat by defendant, a material issue in prior suit—Plaintiff failing to prove the same there—Admission in Kabulyat cannot be proved in subsequent suit.*

Where the question whether the defendant executed a certain kabulyat in favour of the plaintiff was a material fact in issue in a previous suit and it was decided then that the plaintiff failed to prove the same there.

Held, that in a subsequent suit plaintiff is not entitled to prove and rely on admissions contained in the kabulyat. (*Cuming and Page, JJ.*) KERAMAT ALI KHAN *v.* KRISHNA NANDI. **97 I. C. 291 = A. I. R. 1926 Cal. 1228.**

—S. 11—Directly and substantially in issue—Final adjudication.

———*Suit by reversioner to set aside alienation by widow—Issue of heirship specifically raised and decided—Subsequent suit by same person on inheritance opening by death of last female owner—Issue of heirship is* res judicata.

If in a previous suit brought by a person claiming to be next reversioner on the ground of an illegal relationship it is held that there is no relationship between him and the deceased and on that finding the alienation made by the female owner was not declared as invalid against the reversioner, it will not be open to the same man when inheritance opens by the death of the last female owner who intervened between him and the last male owner, to contend that previous finding on the issue of heirship specifically raised and decided is not binding. Similarly, if the Court held that the alienation was invalid but refused a decree to the plaintiff on the ground that he was no reversioner it is not permissible for the same party to contend that he is the immediate heir when the last limited owner dies. But in such case if it is held that the plaintiff was the reversionary heir and on such a finding a decree is awarded that the alienation was not binding on the estate, it is not open to the defendant or a person claiming through heir to contend in the subsequent suit by the same reversioner, for possession on the death of last female owner that he was a stranger to the family. 44 Bom. 321, Dist. (*Fazl Ali and Chatterji, JJ.*) SAKALDIP SINGH *v.* IMRIT BARHI. **10 P. L. T. 630 = 120 I. C. 292 = A.I.R. 1930 Pat. 71.**

———Any matter arising in a previous redemption suit which was dismissed for failure to pay decretal amount, and decided in that suit, cannot be re-opened in a subsequent redemption suit. 43 Bom. 334 and A. I. R. 1925 P. C. 63, Rel. on; and A. I. R. 1922 All. 377, Not Foll. (*Boys and Ashworth, JJ.*) RAGHUNATH SINGH *v.* SHEO PARTAP SINGH. **1929 A. L. J. 761 = 119 I. C. 525 = A. I. R. 1929 All. 409.**

———A non-agriculturist purchasing property from a mortgagor—Suit for redemption before the expiry of the period—Dismissal of the suit principally on the ground of hollowness and fraudulent nature of the deed though other issues decided—Plaintiff suing again for redemption after expiry of the period—Suit was held barred by the rule of *res judicata*. 24 Cal. 900 and 38 Mad. 158, Foll; 17 All. 174, Cons. (*Patkar, J.*) DINKAR *v.* ANANT. **30 Bom. L. R. 902 = 113 I. C. 155 = A. I. R. 1928 Bom. 349.**

———Where a Court having the question before its mind decided that the issue did arise, that decision would be as much *res judicata* as the final determination of the issue on the merits. (*Woodroffe and Walmsley, JJ.*) MIDNAPORE ZEMINDARI CO., LTD. *v.* NARES NARAIN ROY. **33 C.L.J. 317 = 63 I. C. 161 = A. I. R. 1921 Cal. 368.**

—S. 11—Directly and substantially in issue—Foreign law.

———If the matter was formerly in issue and has become *res judicata* a subsequent suit to agitate the same matter cannot be maintained, just as a defence raising the same issue cannot be maintained. (*Lord Buckmaster.*) STEPHENS & CO. *v.* ALLEN. **A. I. R. 1921 P.C. 231.**

—S. 11—Directly and substantially in issue—Incidental finding.

———S. 149 (3)—Decision under S. 149 (3), B. T. Act does not decide finally substantial rights of parties—Incidental decision on question of title does not operate as *res judicata.* (*Mukerji and Graham, JJ.*) KHETRA MOHAN SAHA *v.* AKTUL CHANDRA DAS. **A. I. R 1927 Cal. 431 = 100 I. C. 427.**

———Some of the co-shebaits of a deity filed a suit against other shebaits for a scheme for the better management of the debuttar properties of the deity. One of the defendants denied the debuttar character of the properties.

Held, that the decision of the question of debuttar was only incidental to the suit, and did not amount to *res judicata.* (*Chatterji and Cuming, JJ.*) SRI SRI GOPAL JEW THAKUR *v.* RADHA BINODE MONDAL. **41 C.L.J. 396 = 88 I. C. 616 = A. I. R. 1925 Cal. 996.**

———The mere fact that the petition in the suit itself, to have the property sold in a particular order is disallowed is no bar to the executing Court making such an order in the course of the execution. (*Schwabe, C.J, and Waller, J.*) RAGHAVACHARIAR *v.* DUVVURU KRISHNA REDDI. **19 M. L. W. 23 = 83 I. C. 918 = 1924 M. W. N. 134 = A. I. R. 1924 Mad. 509 = 46 M. L. J. 32.**

———In order that an incidental finding in one proceeding shall be *res judicata* in another, it is essential that the issue in the second proceeding should have been raised and decided clearly in the first. (*Oldfield and Ramesam, JJ.*) P. K. VATTOLI KALANDAR *v.* K. V. PUTHOORAM KALANDAR. **14 M. L. W. 702 = 69 I. C. 570 = 1921 M. W. N. 754 = A. I. R. 1921 Mad. 694 = 41 M. L. J. 437.**

—S. 11—Directly and substantially in issue—Interpretation of deed.

———The vendors had failed to deliver possession to the purchaser and he was compelled to bring a suit. The plaintiff based his claim very clearly on his proprietary title as purchaser under the sale-deed. The defendants in their written statement did not contest the nature of the deed as drawn, but pleaded however that the contract between the parties had been one of the usufructuary mortgage, and alleged that the plaintiff had fraudulently altered its terms and got a deed drawn up which did not represent the real contract between the parties. The suit was decided in plaintiff's favour.

Held, it was doubtful whether this decree would operate as *res judicata* on the question whether the deed was a sale or mortgage, in a subsequent suit. (*Ryves and Daniels, JJ.*) BISHAMBARNATH *v.* MUHAMMAD UBAID ULLAH KHAN. **45 All. 581 = 77 I. C 572 = 21 A. L. J. 503 = 4 L. R. A. Civ 433 = A. I. R. 1923 All. 586.**

—S. 11—Directly and substantially in issue—Interpretation of wajib-ul-arz.

———The present plaintiff and defendant were parties to a previous suit in which they figured as rival pre-emptors. In that suit a certain interpretation of the *wajib-ul-arz* was adopted.

Held, that that interpretation was binding between the parties in the later suit in which one of them was the vendee and the other was the pre-emptor. (*Lindsay and Kanhaiya Lal, JJ.*) JAGAT NARAIN *v.* NAGESHWAR PRASAD. **6 L. R. A. Civ. 296 = 88 I. C. 133 = A. I. R. 1925 All. 663.**

—S. 11—Directly and substantially in issue—Landlord and Tenant.

———It is plainly not open to the landlord, who was a party to the previous suit, to take up a position inconsistent with the decision in the previous litigation which was pronounced in his presence, *e.g.*, that the tract then in dispute was covered by the lease of one of his two tenants and not that of the other. Where the lessee landlord could not have succeeded in the previous suit except on the footing that the tract was included in his lease and not in that of his rival it is not open to the plaintiff to have the rent and premium assessed on any portion of those lands on the basis that they are not covered by and subject to the operation of the grant in his favour. (*Mukerjee and Rankin, JJ.*) BHUPENDRA KUMAR CHAKRABURTY *v.* SURAJI KANTA RAI CHOWDHURY. **38 C. L. J. 291 = 76 I. C. 917 = A. I. R. 1924 Cal. 128.**

—S. 11—Directly and substantially in issue—Mortgage suit.

———The right to redeem is in issue in the mortgage suit for sale and is therefore *res judicata* when a decree in suit is obtained. The mortgagor cannot bring another suit for redemption. Old Law under Transfer of Property Act and new law under C. P. Code compared. Case-law fully discussed : 25 Mad. 300, (F. B.) Foll. (*Wallace and Madhavan Nair, JJ.*) ELLARAYAN *v.* RANGASWAMI. **49 Mad. 691 = 25 M.L.W. 258 = 96 I. C. 607 = A. I. R. 1926 Mad. 816 = 50 M. L. J. 612.**

———Final decree for sale in mortgage suit cannot bar redemption suit. (*Devadoss, J.*) NAKONDU NAGASAMI IYER *v.* THIRUKONDA ELLARAGAN. **A. I. R. 1925 Mad. 1191 = 86 I. C. 527.**

—S. 11—Directly and Substantially in issue—Necessary condition.

———Decision on a point not directly and substantially in issue cannot operate as *res judicata* in a subsequent suit. (*Mohiuddin, A. J. C.*) CHAMPAT GHAMBHIRJI *v.* BALA SAHEB SANSTHAN. **A.I.R. 1928 Nag. 169 = 113 I. C. 225.**

—S. 11—Directly and substantially in issue—Necessary decision.

———Decision on issue in previous suit, not necessary for decree does not bar the issue in subsequent suit. A. I. R. 1922 P. C. 241 and A. I. R, 1924 Mad, 469 Rel. on. A. I. R. 1924 P. C. 144; Expl. and Dist.; A. I. R. 1924 Oudh 625, Dist, (*Wazir Hasan and Misra, JJ.*) CHANDRIKA SINGH *v.* CHOKHE SINGH. **6 O.W.N. 1320 = 122 I.C. 610 = 4 Luck. 404 = A. I. R. 1930 Oudh 124.**

—S. 11—Directly and subtantially in issue—Necessary finding.

———The decree, passed in a partition suit in which for the purpose of giving relief to the plaintiff, if a question has to be decided as between the different parties, whether they are arrayed as plaintiff or defendant, must be binding on all the parties: 32 All. 469 and A.I.R. 1914 P.C. 31, Foll.; A.I.R. 1922 All. 19 and A.I.R. 1923 Bom. 203, Dist. (*Banerji and King, JJ.*) EJAZ AHMAD *v.* SAGHIR BANO. **1929 A. L. J. 883 = 118 I. C. 175 = 51 All. 850 = A. I. R. 1930 All. 287.**

———A dispute regarding breach of contract in taking delivery of goods was referred to arbitration—Award was filed in Court of execution taken out—Deposit of amount under award was made in Court under protest—Suit by purchaser for declaration that award is invalid—Suit was decided in favour of purchaser but important finding was in favour of seller—Findings as to breach of contract by purchaser was necessary for decision in that case but was not substantially in issue—seller sued for damages for breach of contract—Suit held not barred by *res judicata* and period after submission of matter to arbitration to final decision in previous suit was suspended while computing limitation for subsequent suit. 12 M.I.A. 244 and A.I.R. 1916 P.C. 96, Foll.; A.I.R. 1926 Cal. 65; A.I.R. 1924 Cal. 600; A.I.R. 1921 Lah. 71 and 43 Mad. 845, Ref. (*Lort Williams, J.*) ABDUL RAHIM OOSMAN & CO. *v.* OJAMSHEE PURSHOTTAMDAS. **56 Cal. 639 = 120 I. C. 710 = A. I. R. 1930 Cal. 5.**

———A judgment operates by estoppel as regards all the findings which are essential to sustain the judgment: A.I.R. 1921 Cal. 750, Foll. (*Fazl Ali and Chatterji, JJ.*) SAKALDIP SINGH *v.* IMRIT BARHI. **10 P. L. T. 630 = 120 I.C 292 = A.I.R. 1930 Pat. 71.**

———A useful test for considering whether a finding is necessary for the decision of a case, is to see whether an appeal would lie against that finding, (*Fazl Ali and Chatterji, JJ.*) SAKALDIP SINGH *v.* IMRIT BARHI. **10 P. L. T. 630 = 120 I. C. 292 = A.I.R. 1930 Pat. 71.**

———Section 11, though not exhaustive, is binding as far as it goes, and, according to that section there is no bar of *res judicata* unless there is a final decision. A finding in the former suit in order to have the authority of *res judicata* must have been necessary to the determination of that suit. (*Zafar Ali, J.*) BISHAN SINGH *v.* JIWAN SINGH. **A. I. R. 1927 Lah. 804 = 102 I. C. 22.**

———Prior suit was for refund of tax and declaration of right of free irrigation—Refund was decreed—Extent of land entitled to free irrigation also was declared —When a subsequent suit in respect of other lands is laid—Finding in prior suit is not incidental and second suit is barred. (*Devadoss, J.*) VENKATARAMANAYYA *v.* SECRETARY OF STATE. **38 M. L. T. 374 = 1927 M. W. N. 116 = 101 I. C. 648 = A. I. R. 1927 Mad. 1131.**

———If an issue has been directly raised and decided, and is not manifestly incidental or irrelevant, the Court which is considering whether that decision amounts to *res judicata* should not import nice questions as to whether the issue had been absolutely necessary to the determination of the suit; it is sufficient to find that the Court and the parties thought so and proceeded on that assumption. (*Jackson, J.*) OBLA SUBBIER *v.* RAMASWAMY KONAR. **25 M. L. W. 797 = 103 I. C. 90 = A. I. R. 1927 Mad. 643.**

———An estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or ground work in other words, a judgment operates by way of estoppel as regards all the findings which are essential to sustain the judgment, though not as regards findings which did not form the basis of the decision or were in conflict therewith. A. I. R. 1924 Cal. 600, Foll. (*Suhrawardy and Graham, JJ.*) NAZOD MEAH *v.* MAZAR ALI. **43 C. L. J. 501 = 95 I. C. 1011 = A. I. R. 1926 Cal. 1003.**

———In order that a decision in a previous suit on an issue should operate as *res judicata* it is not necessary that the decision of the issue should have been the basis of the decree. It is enough that the

issue had been finally heard and determined and that it arose directly and substantially (and not incidentally or collaterally), for determination *i.e.*, that it was necessary for the determination of the suit though it may not have been ultimately made the basis of the decree. If the determination of the issue is inconsistent with the decree, it cannot be said that it was necessary for the determination of the suit, and such a finding will be treated as unnecessary and will not operate as *res judicata*. It matters not that the defendant is described as *pro forma* defendant if there was a real contest, and if the contest was opened by the defendant and not the plaintiff. (*Case law discussed*). (*Mukerji, J.*) S. M. TARITBARANI DASI *v.* BASUMATI DEVI. **85 I. C. 953 = A. I. R. 1925 Cal. 985.**

———In the previous suit by the plaintiff under O. 21, R. 63 of the Code of Civil Procedure, *B* was added as defendant and after setting out the sale by the latter to the plaintiff, the plaint asked for a declaration that the properties belonged to plaintiff and were not liable for the decree in execution of which they were attached.

Held, that it cannot be said that the question was not in issue between the plaintiff and *B* merely by reason of the fact that *B* admitted plaintiff's claim, which was disputed successfully by the attaching creditor, and that the decision of the question against the plaintiff in the previous suit was *res judicata*. (*Phillips and Odgers, JJ.*) CHINNA KOZHANDAI NAINAR *v.* ANANTA VIJAYA NAINAR. **85 I. C. 689 = 20 M. L. W. 979 = A. I. R. 1925 Mad. 319.**

———The finding which is the real ground of decision in the case operates as *res judicata* even though there may have been other issues on which the case might equally well have been decided. 5 O.L.J. 647 and A.I.R. 1924 P. C. 144 Foll. (*Daniels, J.C.*) MAHANT RAM DAS *v.* BABUAIN BHAGWAN KUNWAR. **12 O. L. J. 248 = 88 I. C. 985 = 2 O. W. N. 292 = 29 O. C. 93 = A. I. R. 1925 Oudh 390.**

———Where the plaintiff had excluded certain question by the statement of his pleader and the first Court had therefore expressly stated that it could not decide it but the defendant expressly urged in appeal that the Judge was wrong in not deciding that question even though his action was based on the plaintiff's adviser's statement and he asked the lower appellate Court expressly to decide it and the Court did decide it.

Held, that the question was necessary for the decision of the suit and therefore the decision thereon operated as *res judicata*. It was immaterial that the Court did not refer to that question in its judgment. (*Sir John Edge*) MIDNAPUR ZAMINDARI CO. *v.* NARESH NARAYAN ROY. **26 Bom. L. R. 651 = 80 I. C. 827 = 51 Cal. 631 = 35 M. L. T. 169 = 51 I. A. 293 = 23 A. L. J. 76 = 5 L. R. P. C. 137 = 29 C. W. N. 34 = 20 M. L. W. 770 = 1924 M. W. N. 723 = 6 P. L. T. 750 = 3 Pat L. R. Civ 193 = A. I. R. 1924 P. C. 144 = 47 M. L. J. 23.**

———Estoppel is not confined to the judgment but extends to all facts involved in it as necessary steps or ground work, in other words, a judgment operates by way of estoppel as regards all the findings which are essential to sustain the judgment though not as regards findings which did not form the basis of the decision or were in conflict therewith. The rule against reagitating matter adjudicated is subject generally to this restriction—that however essential the establishment of particular facts may be to the soundness of a judicial decision, however, it may proceed on them as establish ed, and however binding and conclusive the decision may as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties and that either may again litigate them for any other purpose as to which they may come in question provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object. If both parties invoked the opinion of the Court upon the question, if it was raised by the pleadings and argued, the conclusion cannot be supported that the judgment upon it was *ultra vires*, merely because an issue was not framed which strictly construed embraced the whole of it. Where a defendant is entitled to set up in the same answer as many defences as he has if a judgment is entered in his favour which contains no provision that it shall be without prejudice or any like limitation or restriction the estoppel raised by it will extend to every matter or fact in issue actually found by the Court in favour of the defendant. (17 All. 174, Diss.) (*Mookerjee and Suhrawardy, JJ.*) DWIJENDRA NARAIN ROY *v.* JOGES CHANDRA DE. **79 I. C. 520 = 39 C. L. J. 40 = A. I. R. 1924 Cal. 600.**

———Where a pro-note was executed on account of interest due on the mortgage in question and the suit on the pro-note could not have been decreed unless mortgage was found to be a valid mortgage, and in order to determine the validity of the consideration for the pro-note it was necessary for the court in the previous suit to determine the validity of the mortgage. *Held*, that the question of the validity of the mortgage was directly and substantially in issue in the previous case, and the finding that no undue influence had been established and that the consideration was proved operates as *res judicata* in the later suit. (*Martineau and Moti Sagar, JJ.*) NANAK CHAND *v.* MIR MUHAMMAD KHAN. **75 I.C. 1048 = A.I.R. 1924 Lah. 702.**

———In a previous suit for the establishment of right to part of the property comprised in a sale deed, the sale-deed was declared as fictitious and nominal. In a subsequent suit between the same parties to recover possession of some other part of the property in the sale-deed, the validity of the sale-deed was in issue.

Held, the decision in the prior suit was *res judicata* and could not be re-agitated, as the determination of this issue was necessary for the disposal of the previous suit. (13 Bom. 25, Ref. 7 I. C. 388, Not Foll. (*Banerji and Gokul Prasad, JJ.*) KEDAR NATH SINGH *v.* SHEO SHANKAR. **76 I. C. 370 = 45 All. 515 = 21 A. L. J. 421 = 4 L. R. A. Civ. 512 = A. I. R. 1923 All. 613 (2).**

———The estoppel of a judgment extends to all facts involved in it as necessary steps on the groundwork upon which it must have been founded; in other words, a judgment operates by estoppel as regards all the findings which are essential to sustain the judgment. If the question was raised by the pleadings and argued, if both parties invoked the opinion of the Court thereupon, the Court cannot come to the conclusion that the judgment upon it was *ultra vires*, merely because an issue was not framed which, strictly construed, embraced the whole of it, regard must be had rather to the substance than to the form of action. (*Mookerjee, A. C. J. and Fletcher, J.*) MIDNAPUR ZEMINDARI CO., LTD. *v.* JOGENDRA KUMAR. **33 C.L J. 186 = 62 I. C. 491 = A. I. R. 1921 Cal. 750.**

———Plaintiffs reversioners of last male-holder, sued for declaration that an adoption by the widow of the last male holder will not affect their reversionary rights. The question of plaintiffs' relation with the last male

holder was raised and decided in the suit. Subsequently the widow made a gift of the property to another person and the plaintiffs again sued for declaration that the gift will not affect their reversionary interest.

Held, that the decision on question of plaintiff's relationship in the previous suit was *res judicata*. (*Shadi Lal, C. J. and Leslie Jones, J.*) INDRAJ *v.* RANJI LAL. **59 I. C. 808 = 39 P. L. R. 1921.**

———In the previous suit, the plaintiff sued the defendants in ejectment as trespassers and the latter pleaded that neither the plaintiffs nor the predecessor-in-title were owners of the property and the defendants were usufructuary mortgagees from some third persons, the real owners. Both the lower Courts found against the defendant but plaintiff's suit was dismissed on the ground that the mortgage was by plaintiff's predecessor. In the present suit for redemption the defendant pleaded that the finding in the prior suit that they were mortgagees from the plaintiff's predecessor was not *res judicata*. *Held*, that the finding was *res judicata* though it was not the basis of the decree. 18 Cal. 647, Not approved. (*Sadasiva Aiyar and Spencer, JJ.*) MUTHU PILLAI *v.* VEDA VYSACHARIAR. **60 I. C. 397 = 12 L. W. 277.**

—S. 11—Directly and substantially in issue—No adjudication.

———A stray remark made by the arbitrators, which is not incorporated in the operative portion of the award, does not amount to a fresh adjudication which would supersede a previous decree. (*Sulaiman and Kennedy, JJ.*) MADAN MOHAN *v.* NARAIN SINGH. **117 I.C. 361 = 1929 A. L. J. 540 = A. I. R. 1929 All. 521.**

———Where both parties in a dispute about land set forward certain measurements before the Commissioner appointed to measure the land decreed, and after some dispute about it, came to an arrangement by which the length of the measuring rod was taken as of more than the Nalkarsha rod and the plaintiff got more than they were entitled.

Held, in a subsequent suit, that as the question of the length of rod was not a point in issue and there was no adjudication thereon, the principle underlying S. 11, C. P. C., does not apply. (*Walmsley and Suhrawardy, JJ.*) SURDHANI DATTA *v.* SITTO SHEIK. **71 I. C. 378 = 27 C. W. N. 280 = 38 C.L.J. 17 = A. I. R. 1922 Cal. 311.**

—S. 11—Directly and substantially in issue—Obiter dictum.

———Observation not arising out of the issues which were before the Court for decision are not binding as *res judicata*. (*Mukerji and Dalal, JJ.*) BEHARI LAL *v.* SHIV NARAIN. **22 A. L. J. 866 = 5 L. R. A. Civ. 697 = 84 I. C. 631 = 47 All. 17 = A. I. R. 1924 All. 884.**

—S. 11—Directly and substantially in issue—Plea abandoned.

———Where assignors who had applied to set aside the sale on the ground, among others, that the sale was held without taking the permission of the Court which appointed the receiver, had subsequently abandoned that ground, their assignee, could not urge that ground again by way of defence to a suit. (*N. R. Chatterjee and Pearson, JJ.*) JAGADISH CHANDRA DEO DHALAL DEB *v.* BHUBANESHWAR MITRA. **27 C. W. N. 38 = 37 C. L. J. 265 = 76 I. C. 241 = A. I. R. 1923 Cal. 121.**

—S. 11—Directly and substantially in issue—Probate case.

———In a proceeding for grant of letters of administration, the question before the Court is one of representation to the estate and not of distribution, and it is only for the purpose of determining the question of representation that the Court is called upon to decide whether the applicant would be entitled to the whole or any part of estate of the deceased within the meaning of S. 23 of the Probate and Administration Act, and that such a finding is not *res judicata* in a suit in which the question of title to the properties has to be determined. 1918 P. R. 53, Foll.; 43 C. 694, Exch.; 38 B. 309, Diss. (*Pratt and Duckworth, JJ.*) MG. TUN YIN *v.* MA SEIN YIN. **68 I. C. 671 = 11 L. B. R. 331 = 1 Bur. L. J. 59 = A.I.R. 1923 Rang. 9.**

—S. 11—Directly and substantially in issue—Pro forma defendant.

———A finding against a defendant who was joined only as a *pro forma* party and against whom no relief was claimed cannot operate as *res judicata*. One *R* sold some of his land to one *G. S* as *R's* reversioner sued for possession of the land after the death of *R* on the allegation that the sale was without necessity and consideration. *S* also claimed possession on the ground that *D*, widow of *R's* son, had remarried. *D* was joined as a *pro forma* defendant. The Court held that as a matter of fact no remarriage had taken place. Later *D*, in whose name *R's* lands were mutated, got notices of ejectment issued to *S*. *S*, failing in suits to contest the notices, instituted a suit for possession of property left by *R* against *D* who, it was alleged, had remarried and thereafter executed deed of relinquishment in *S's* favour with respect to property left by *R*. *D* contended that question of remarriage in the previous suit was decided against *S* and could not therefore be reopened.

Held, that the decision in the previous suit on the question of the marriage did not operate as *res judicata*, as the matter was not directly and substantially in issue between the same parties. 12 Cal. 580; 27 All. 59; and 25 Bom. 589; Rel. on. A. I. R. 1925 Mad. 1025; A. I. R. 1926 Cal. 80; A. I. R. 1921 Mad. 694; and A. I. R. 1923 All. 613; Dist. (*Bhide, J.*) DOGAR SINGH *v.* MT. DHANTI. **10 Lah.L.J. 239 = 110 I.C. 394 = A. I.R. 1928 Lah. 493.**

—S. 11—Directly and substantially in issue—Question not in issue.

———Where a prior suit for share of profits was decreed and no question of right to partition was raised or decided,

Held, in a subsequent suit that the question of partition was not *res judicata*, but the Court added a declaration to the decree by which decree-holder could execute the decree without resorting to a suit for share of yearly profits. (*Lord Blanesburgh.*) SUBHAN ALI *v.* IMAMI BEGAM. **21 N. L. R. 117 = 52 Cal. 971 = 30 C. W. N. 122 = 23 A. L. J. 667 = 52 I.A 294 = 1925 M. W. N. 535 = 88 I. C. 347 = A. I. R. 1925 P. C. 184 = 50 M. L. J. 136 (P.C.).**

———A Hindu woman cannot in a suit on a mortgage of the property executed by herself deny that she had power to alienate the property and, therefore, the question of her power to alienate it is not in issue in the suit so as to bar it from being agitated by her heirs in a subsequent suit for possession after her death. (*Dawson Miller, C.J. on difference between Das, J. and Foster, J.*) HITENDRA SINGH *v.* RAMESWAR SINGH. **4 Pat. 510 = 88 I. C. 141 = 87 I. C. 849 = 6 P. L. T. 634 = A. I. R. 1925 Pat. 625.**

———Where in the previous suit the only question directly and substantially in issue was the validity of the mortgage, and the question of the amount which the mortgagor or his son may be called upon to pay in the event of a suit for sale being brought by the mortgagees on the basis of the mortgage-deed, could not and was not directly and substantially in issue in the previous suit. *Held*, any decision as to the exact amount of mortgage payable in either of the two events would have been premature and hence the question of the rate of interest being excessive could not be *res judicata*. (*Simpson and Wazir Hasan, A. J. Cs.*) BASANT RAI *v.* KESHO RAM. **9 O. L. J. 612 = 74 I. C. 346 = A. I. R. 1923 Oudh 139 (c.)**

– S. 11—Directly and substantially in issue—Question of title.

———Plaintiff sued to recover possession of a tank with its banks on declaration of his title therein alleging that it was not the niskar property of the defendant but part of his *mal* property. The tank and its banks were recorded in the Record-of-Rights as held by defendant 1 in niskar right. The plaintiff had prior to this suit instituted a suit under S. 106 for correction of the entry alleging that it was his *mal* property but failed therein.

Held, that the decision in the suit under S. 106 operated as a bar to the present suit. Case-law considered. (*Mukherji and Mallick, JJ.*) CHANDI CHARAN LAW *v.* LAL BEWA. **49 C. L. J. 285 = 33 C. W. N. 623 = 120 I. C. 147 = A. I. R. 1929 Cal. 385.**

———Though one and the same person can combine in himself the status of an occupancy raiyat and a raiyat at a fixed rent still decision as to status is no bar to the consideration of the question as to fixity of rent. (*Suhrawardy and Mukerji, JJ.*) RAJMOHINI DASI *v.* NAGENDRA KUMAR. **94 I. C. 310 = A.I.R. 1926 Cal. 887.**

———In the first suit the plaintiff sued for a declaration of his title and recovery of possession of two plots. His title was declared to these plots, but it was held that he could not recover possession in that suit from a co-sharer but that his remedy lay in a suit for partition. In the second suit he was suing for partition of these plots and some others having been deprived of possession by the defendants.

Held, that as in order to decide the first suit it was necessary to decide his title to the share in the whole property the question of the plaintiff's title to these plots also must be held to be *res judicata* as between the parties. (*Suhrawardy and Cuming, JJ.*) RAJENDRA NATH DATTA *v.* SHRIMATI BHABINI DASI. **87 I. C. 811 = A. I. R. 1926 Cal. 80.**

———Where a suit is brought by a person as the nearest reversioner against a rival claimant and he obtains a decree for possession of property and the rival claimant either during the pendency of the suit or soon afterwards redeems a usufructuary mortgage existing on the property in suit and obtains possession, the rival claimant, in a subsequent suit brought by himself, cannot raise the defence as against the plea of *res judicata* raised by the successful reversioner that the redemption having taken place subsequent to the institution of the previous suit the decision in that suit does not operate as *res judicata* because on the question of title the decision is clearly *res judicata* and the rival claimant cannot be allowed to go behind it by pleading the subsequent redemption for the simple reason that he had no title to redeem. (*Wazir Hasan, A. J. C.*) BONDAI MISER *v.* RAM PRASAD MISER. **2 O. W. N. 710 = 90 I. C. 569 = A. I. R. 1925 Oudh 607.**

———Where the plaintiff sued for his share of a certain amount deposited in Court on account of a mortgage decree in favour of two other persons, on the ground that he had purchased the whole rights of one of them, *Held*, that he was not debarred from suing on the same ground for his share in sums that were subsequently deposited to the account of his vendor.

Held also, that the decree in the first suit would be *res judicata* so far as it decided about the grounds on which he claimed a share in the amounts deposited. (*Pullan, A. J. C.*) LALTU *v.* BAJRANGI LAL.

28 O.C. 2 = 84 I. C. 263 = A. I. R. 1925 Oudh 303.

———*Decision in rent suit on question of title—Suit for possession by receipt of rent.*

The plaintiff brought a suit for decree for possession of land upon a declaration being made that he was entitled to receive rent at a certain rate from defendant No. 2 upon a finding and a declaration that the plaintiff was a tenant under defendant No. 1 in respect of the land under claim. The defendant No. 2 was in possession of the land holding under defendant No. 1. Plaintiff claimed that he took a settlement of the land from defendant No. 1 and that therefore the defendant No. 2 was bound to pay the rent to him previously paid to the defendant No. 1 by him. In previous rent suit by the plaintiff against the defendant No. 2 the latter had put forward the defence that he held the land not under the plaintiff but under the defendant No. 1 who was no party to that suit and had succeeded. *Held* that the decision in the previous rent-suit on the question of the plaintiff's title was no bar to the present suit even though the question of title had to be investigated in that suit by reason of the fact that defendant No. 2 was previously on the land. (*Greaves and Ghose, JJ.*) GOPINATH *v.* BHAJAHARI DAS.

68 I. C. 472 = A. I. R. 1923 Cal. 327 (2).

—S. 11—Directly and substantially in issue—Rent suit.

———Liability for rent is a recurring liability and, therefore, a suit for rent at a certain rate for certain years is not barred by reason of a decision in a previous suit for rent allowing a different rate for previous years. (*Raza, J.*) RAM HARAKH *v.* SPECIAL MANAGER, COURT OF WARDS. **3 O. W. N. Sup. 313 = 98 I. C. 77 = A. I. R. 1927 Oudh 32.**

———The plaintiffs sued for the rent for certain years at the rate of Rs. 8 per annum. The defendant alleged that the rent was Rs. 6 per annum and relied upon a previous rent decree for rent for previous years. First appellate Court passed a decree at the rate as alleged by the defendant holding that the previous decree was in presence of both the parties and although the plaintiff had claimed rent at the rate of Rs. 8 per annum it was decreed at the rate of Rs. 6 as alleged by the defendant and the plaintiff was concluded by this decree.

Held that the lower Court was entirely wrong in holding that the previous decree was conclusive evidence as between the parties as to the rate of rent at the date of that suit. The decree only stated that the rent for the years involved in that suit was decreed at a particular rate per year. This does not mean that the issue or question as to what was the yearly rental was tried and determined in the suit. It would be for the Court to consider the circumstances and events both prior and subsequent to the former suit to enable it to judge for itself the rentals rightly due to the plaintiffs for the years in the subsequent suit. (*Cuming and Mukerji, JJ.*) BENI MADHAB *v.* SARBANANDA. **43 C L. J. 135 = 95 I. C. 130 = A. I. R. 1926 Cal. 698.**

———The essence of the doctrine of *res judicata* is that where a material issue has been tried and determined between the same parties in a proper suit and in a proper Court as to the status of one of them in relation

to the other or as to the right or title claimed by one of them against the other the same question cannot be agitated by them again in another suit. In the case of suits for rent or other recurring liability, the causes of action for suits for successive periods are different. In the case of such suits for the doctrine to apply, it will have to be shown that the question of right or liability, not merely for the period in the previous suit but that for all times or once for all was directly and substantially in issue and was tried and determined. If a direct issue on the point was raised and decided the decision would be *res judicata* in respect of any suit for a subsequent period. If the decision falls short of that requisite and if the general question was gone into and decided merely for the purpose of deciding the right or liability for the period involved in the suit, then the issue was raised not directly and substantially but collaterally or incidentally. In a suit for rent, no issues need be framed, but where issues are framed, the non-existence of a direct issue of this character has to be seriously taken into account in determining whether the question of right or liability for all times was really directly and substantially in issue. (*Suhrawardy and M. N. Mukerji, JJ.*) GNANADA GOBINDO *v.* NALINIBALA DEBI. **43 C.L J. 146 = 30 C. W. N. 593 = 94 I. C. 837 = A. I. R. 1926 Cal. 650.**

———In a suit filed by a person against another who denies that the relation of landlord and tenant existed between him and the plaintiff, it is open to the Court to implead the person to whom the payment of rent is alleged to have been made by the defendant. But if any question of title is decided between the plaintiff and a third party so added, that decision does not operate as conclusive, and a suit by the defeated party to establish his title can lie in the Civil Court. (*Kanhaiya Lal, J.*) SALAMAT ALI *v.* GUJ KUMAR CHAND.

85 I. C. 302 = A. I. R. 1925 All. 574.

———A previous decree in a rent suit without the judgment cannot amount to more than a strong piece of evidence regarding the amount of rent realized from year to year. (*Newbould, J.*) ABDUL KARIM CHOWDHURY *v.* PROSANNA KUMAR NATH. **85 I. C. 770 = A. I. R. 1925 Cal. 1116.**

———Where in a rent suit the title of a person is in issue for the purpose of determining his share in the rent, the decision on the issue operates as *res judicata*. (*Suhrawardy and Duval, JJ.*) GOPAL CHANDRA DUTT *v.* SURENDRA NATH DUTT.

85 I. C. 804 = A. I. R. 1925 Cal. 1004.

———As regards rent suits the decision as regards the rent for one year precludes question as to rent for following years. (*Devadoss, J.*) GOVINDOSS KRISHNADOSS *v.* P. MANIKYANAVANIM VARU. **82 I. C. 990 = A. I. R. 1925 Mad. 378.**

———Plaintiff sued the defendants for arrears of rent in 1915 on the allegation that they held the disputed land under him as his tenants. The defendants pleaded that they were not tenants under the plaintiffs and set up a title in themselves. The Court came to the conclusion that the plaintiff had failed to prove the relationship of landlord and tenants between the parties and in this view dismissed the suit for rent. The plaintiff then instituted another suit to eject the defendant on the allegation that they were trespassers. *Held*, that the previous decision does not operate as *res judicata*. That decision is conclusive upon one point and one point alone, namely, that the defendants were not the tenants of the plaintiff during the years for which rent was then claimed. No other questions were essentially in dispute at that stage and they cannot rightly be regarded as matters directly and substantially in issue in the suit and finally decided therein. (*Mookerjee and Chotzner, JJ.*) SYAM LALL NASUA *v.* BRINDABAN CHANDRA. **72 I. C. 655 = A. I. R. 1924 Cal. 460.**

———The decision in a previous rent-suit that rent was payable as Bhauli rent, does not operate as *res judicata* in a suit for the rent of the subsequent years at the cash rent system The previous decision is merely presumptive evidence of the rent of future years and the presumption may be rebutted. (*Ross, J.*) PARMESHWAR PRASAD SINGH *v.* NARSING RAI. **1 Pat. L. R. 109 = 72 I. C. 138 = A. I. R. 1924 Pat. 371.**

———The doctrine of *res judicata* is not a question but the application of the special rule stated in S. 52 (3), Madras Estates Land Act. under which *muchilikas* decreed for any revenue year remain in force, until the beginning of the year for which fresh ones are exchanged or decreed, and there is no reason for restricting the scope of the general reference to *muchilikas* decreed to those decreed by any particular description of Court. (*Lord Shaw.*) RATHAKRISHNA AYYAR *v.* SUNDERSWAMY IYER. **16 M. L. W. 18 = 45 Mad. 475 = 74 I.C. 584 = 31 M. L. T. (P.C.) 31 = 49 I. A. 211 = 27 C. W. N. 1 = 20 A. L. J. 937 = 36 C. L. J. 450 = A.I.R. 1922 P. C. 257 = 43 M. L. J. 323.**

———So far as the rents of the years which were in contest in the previous suit were concerned, the decision no doubt is an absolute bar under the doctrine of *res judicata* to any suit for the rents of those years. But so far as the rents or rates of rent of subsequent years are concerned, that judgment cannot be held to be an absolute bar, so as to prevent the parties from raising the question in a subsequent suit. The prior decision may be taken to determine the rent claimed in that suit and to give rise under S. 51 of the Bengal Tenancy Act to the presumption that the rents for subsequent years remained the same. 3 P.L.J. 372, Dist.; 6 C.W.N. 589, Foll. (*Ross, J.*) MANNOO LAL CHAUDHURY *v.* LALJI CHAUBE. **77 I. C. 334 = A. I. R. 1922 Pat. 213.**

———Where in a previous suit the plaintiff sued defendant for rent for certain period on the allegation that defendant was plaintiff's tenant during that period and where plaintiff's suit was dismissed on the ground that plaintiff had not established the relationship of landlord and tenant,

Held, that the decision in the suit was conclusive only on one point, *viz.*, that there was no relationship of landlord and tenant between the parties during the years in question and that if plaintiff made out his title he could bring a fresh suit for the ejectment of the defendant on the ground that he was not plaintiff's tenant. (*Mukerjee, Ag. C.J. and Fletcher, J.*) MRIGENDRA NATH *v.* KRISHNA CHANDRA. **33 C. L. J. 334 = 61 I. C. 201 = A. I. R. 1921 Cal. 355.**

———Where in a rent-suit the question raised is whether the defendant is liable for the rent claimed, and the question of title is decided incidentally, that decision does not operate as *res judicata* in a subsequent suit for declaration of title and recovery of possession. (*N. R. Chatterjee and Panton, JJ.*) DURIGAPADA DALAL *v.* MANINDRA NATH MAL. **63 I. C. 762 (Cal.).**

———*Suit for enhancement of rent—Prior decision—Effect of.*

In a suit for enhancement of rent the question of the rate of rent is an issue which must necessarily be decided by the Court, and the Court's decision on that point would operate as *res judicata* in a subsequent suit for rent in which the same question is in issue. (*Newbould, J.*) KIRAN CHANDRA *v.* BONO BEHARI DUTTA. **59 I. C. 752 (Cal.).**

—S. 11—Directly and substantially in issue—Set off.

———Where pro-note was the subject-matter of the former suit and no set off was formally claimed in the previous suit and the defendants' liability for the sums now in suit could only have been asserted and tried if there had been a formal set off,

Held, since the pleas in the first suit were not explicitly recorded it cannot be said with certainty that liability for the particular sums now in dispute was directly in issue in the other suit. (*Campbell, J.*) BAIJ NATH *v.* RADHA RAN SHAM LAL. **84 I. C. 382 = A. I. R. 1923 Lah. 146.**

—S. 11—Directly and substantially in issue—Scheme suit.

———Generally speaking, the cause of action in respect of a claim for the modification of a scheme is or should be the defective or unsatisfactory nature of the scheme in force, as discovered or disclosed in the light of the events and experience during the period that has elapsed since the last modification and therefore a suit in respect of the period subsequent to the previous suit is not barred by *res judicata*. Any evidence relating to matters previous to the date of the institution of the previous suit cannot however properly be the basis of a cause of action, yet, evidence of matters relating to the management during the earlier period might also be taken into consideration in the light of the subsequent events in coming to a conclusion with regard to the modifications to be made in the scheme of management and also with regard to the removal of the defendants from the office of trusteeship. (*Kumaraswami Sastri, Madhavan Nair and Srinivasa Aiyangar, JJ.*) S. VEERARAGHAVA ACHARIAR *v.* V. PARTHASARATHY IYENGAR. **1925 M. W. N. 505 = A. I. R. 1925 Mad. 1070 (F.B.).**

—S. 11—Directly and substantially in issue—Unnecessary decision.

———In a suit for resumption of a muafi holding subsequent to its transfer the revenue Courts held that the holding was liable to resumption. They decided, however, that as the holding had been held for a long time and by two successors to the original grantor, the holding should be deemed to be a holding in proprietary right under S. 107, Oudh Rent Act. The transferees brought a suit for a declaration that they had obtained the title of the transferor as under-proprietor.

Held, that the suit was not barred by the rule of *res judicata* owing to the decision of the revenue Court as the matter in civil suit was the relief by way of declaration of rights which had arisen in favour of the plaintiff by the effect of rule of equity embodied in S. 43, Transfer of Property Act, and arising out of the declaration granted by the Court of revenue. The matter was not only not within the exclusive jurisdiction of the Court of revenue but was not at all within its jurisdiction and did not arise for determination in those proceedings. (*Stuart, C. J. and Wazir Hasan, J.*) BALBHADDAR SINGH *v.* KUSEHAR DAS. **5 O. W. N. 487 = 3 Luck. 636 = 10 L. R. A. Rev. 38 = 110 I. C. 357 = A. I. R. 1928 Oudh 344.**

———In an appeal against an order declaring that the suit abated on account of the death of the defendant also in respect of the prayer for a scheme for management under S. 92, an application was made for appointing a receiver. In the course of the hearing, the Court remarked that it was doubtful if on the plaint as it stood, the suit had not abated. At the hearing of the appeal itself from the order,

Held, that the order on the receiver application was not *res judicata* because the decision was not necessary, and that there was really no decision on the question involved in the appeal. 6 All. 269 ; 48 Cal. 499 ; A. I. R. 1924 P. C. 202, Dist. (*Phillips and Krishnan, JJ.*) ARUMUGA THAMBIRAN *v.* NAMASIVAYA PANDARA SANNADHI. **48 Mad. 688 = 22 M. L. W. 130 = 91 I. C. 109 = 1925 M.W.N. 569 = A. I. R. 1926 Mad. 162 = 49 M. L. J. 324.**

—S. 11—Directly and substantially in issue—Unnecessary finding.

———It depends upon the facts and circumstances of each case whether an issue, which logically may be unnecessary for the decision of a case, is or is not sufficient to constitute *res judicata* in the legal sense ; it is for the Court, which decided the original suit to decide what was necessary to be decided for the purposes of that suit. And if a Court has chosen to decide more than what logically may be necessary, for the purposes of the suit its finding may none the less be *res judicata*. A. I. R. 1924 P.C. 144, Rel. on ; 8 A.L.J. 409, Ref. (*Dalip Singh, J.*) SRI RAM *v.* UMRAO SINGH. **31 P.L.R. 406 = A. I. R. 1930 Lah. 690.**

———It is well established that a finding on an issue not necessary to the determination of a suit cannot operate as *res judicata*. So also, where the plaintiff in the former suit having obtained a decree for perpetual injunction as prayed for could not appeal from an issue decided against him, the finding on such issue cannot operate as *res judicata*. 57 P.R. 1907 and 56 P.R. 1904, and A.I.R. 1922 P.C. 241, Rel. on ; A. I. R. 1924 P. C. 144, Dist. (*Shadi Lal, C.J. and Tapp, J.*) JHANDA SINGH *v.* KESAR SINGH.
30 P.L.R. 744 = 120 I.C. 795 = A.I.R. 1930 Lah. 149.

———In an ejectment suit, where Court passes a decree for rent only, the finding as to title need not be incorporated in the decree. 6 Cal. 319 (F.B.), Diss. from; 18 Cal. 647 and 40 Cal. 29, Ref. ; 44 Bom. 321, Rel. on. (*Mirza and Baker, JJ.*) ICHHALAL JOG MOHAN DAS *v.* ANJIBAI ZUJYA. **30 Bom. L.R. 1602 = 114 I.C. 272 = A. I. R. 1929 Bom. 32.**

———Issue raised by parties even improperly and decided is *res judicata*. A.I.R. 1924 P. C. 144 and 28 All. 727 (P. C.) Foll. (*Mears, C.J. and Dalal, J.*) JAGDEO MISIR *v.* MAHABIR TEWARI. **102 I.C. 28 = A. I. R. 1927 All. 803.**

———When a matter directly and substantially in issue in a subsequent suit has been directly and substantially in issue in a previous suit and has been finally heard and decided between the same parties, the issue cannot be re-opened in a subsequent suit notwithstanding the fact that the previous suit could have been decided independently of the decision upon that issue. A.I.R. 1924 P.C. 144, Foll. (*Stuart, C.J. and Raza, J.*) GAJADHAR LAL *v.* SECRETARY, HUSAINABAD TRUST. **4 O. W. N. 307 = 101 I.C. 522 = A.I.R. 1927 Oudh 625.**

———Where the previous suit before the revenue Court was a suit brought by the plaintiff for the determination of the amount of rent to be paid by third parties on the allegation that these third parties were his ex-proprietary tenants, and they replied that they did not base their tenancy upon an agreement with the plaintiff, but that they were holding from *S* who was a tenant of the plaintiff, and *S* intervened and took the same position.

Held, that it was not necessary for the purpose of the decision of that suit to determine whether *S* was a benamidar of the plaintiff and therefore that finding to that

effect was not *res judicata* in a subsequent suit by the plaintiff against *S* for possession. (*Stuart and Daniels, JJ.*) SHANKAR KUNBI *v.* MOQIM ALI KHAN. **88 I.C. 927 = A.I.R. 1926 All. 77.**

———*Unnecessary finding is not* res judicata.

The main question in the previous suit was whether the plaintiff was a co-parcener with a certain person. The Court decided two points (1) that the pedigree set up by the plaintiff was not proved, and (2) that the plaintiff was not a co-parcener with the person in question.

Held, that as the question as to the exact relationship of the plaintiff with the person in question was not essential to the decision of the previous suit, the finding was not *res judicata* in a subsequent suit on that question. (*Dalal, J.C.*) RAM BALI *v.* RAM ASRE.
12 O.L.J. 105 = 86 I.C. 686 = A.I.R. 1925 Oudh 386.

———The dismissal of a previous suit for ejectment for want of notice does not make the question of the defendant's status *res judicata* in a subsequent suit for the same relief, though that question may have been decided in the previous suit. 18 Cal. 647 and 40 Cal. 29, Foll. (*Baker, J.C.*) MST. GIRJABAI *v.* PURUSHOTTAMDAS. **78 I.C. 147 = A.I.R. 1924 Nag. 333.**

———Decision on an issue, which is not necessary for the determination of the real question in controversy between the parties, does not operate as *res judicata*. (*Walsh and Ryves, JJ.*) REKHAL DAS *v.* MT. SHEOBAI. **21 A.L.J. 393 = 74 I.C. 656 = 45 All. 466 = 4 L.R.A. Civ. 532 = A.I.R. 1923 All. 495.**

———The real point at issue in the previous suit was whether the mortgage was for necessity or not. It was found as a fact that the mortgage was for necessity and there was no necessity to arrive at any decision upon the question whether *M* was lawfully adopted son of *A*, though a decision was given.

Held, it is doubtful whether it can be said that the question of adoption was directly and substantially in issue in that suit within the meaning of S. 11, C.P. Code. (*Scott-Smith and Fforde, JJ.*) MEHAN SINGH *v.* KEHAR SINGH. **6 Lah. L. J. 39 = 75 I. C. 317 = A.I. R. 1923 Lah. 523.**

———A finding not necessary to the determination of the suit is not one against which a party could have appealed. It is not a matter directly and substantially in issue which was heard and finally decided and is not *res judicata* in a subsequent suit. (*Campbell, J.*) SOHAN SINGH *v.* JAWAL SINGH. **73 I. C. 854 = A. I. R. 1923 Lah. 248.**

———Where the decision as to ownership was not the basis or any part of the basis of the decree, and the final decision of the whole case, that is the decree would have been exactly the same if the decision on the point had been exactly the contrary,

Held, the matter was not "directly and substantially in issue" in the former proceedings and therefore the question of ownership of the property does not operate as *res judicata* in these proceedings. (*Hallifax, A.J.C.*) GOVINDA *v.* LUXMAN. **82 I. C. 516 = A.I.R. 1923 Nag. 139.**

—S. 11— Execution proceedings—Applicability of res judicata.

———The doctrine of *res judicata* as embodied in S. 11 does not, in terms, apply to orders passed in execution proceedings, though the principle of *res judicata* is applied to preclude one of the parties to the execution proceedings from raising a question which had been previously raised and decided between the parties or should be taken to have been raised and decided between the parties. But a question arising in a regular suit between the parties, otherwise maintainable, cannot be held to be barred by the rule of *res judicata* only because such question could have been possibly raised at some stage of the execution proceedings between the parties. (*Sen and Niamatullah, JJ.*) RAM CHARAN SAHU *v.* SALIK RAM SAHU. **121 I. C. 702 = A. I. R. 1930 All. 628.**

———The principle of *res judicata* applies in execution proceedings. A.I.R. 1926 Oudh 291 ; A.I.R. 1921 P. C. 11 ; A.I.R. 1926 All. 71; A.I.R. 1924 Bom. 495 and A. I. R. 1924 Mad. 673, Rel. on. (*Raza and Pullan, JJ.*) BALKRISHNA *v.* DEBI PRASAD. **7 O. W. N. 363 = 123 I. C. 881 = A. I. R. 1930 Oudh 305.**

———Explanation 4 to S. 11 applies to execution proceedings. 11 I.A. 37 ; A.I.R. 1922 Pat. 289 ; A. I. R. 1925 P.C. 55, Cons ; 37 All. 589, Dist. (*Otter and Heald, JJ.*) DAW OHN BWIN *v.* U BA. **A. I. R. 1930 Rang. 213.**

———*Principle applies to execution proceedings.*

S. 11 is not exhaustive, but the principle underlying it applies to orders passed in execution in the same suit. (*Sulaiman, Ag. C. J. and King, J.*) RAM KISHUN *v.* LALTA SINGH. **51 All. 346 = 26 A. L. J. 1160 = 112 I. C. 534 = A. I.R. 1928 All. 527.**

———*Devadoss, J.*—That the principle of constructive *res judicata* applies to orders in execution is well settled. 40 Mad. 1016 and 8 Cal. 51, Ref. In the case of legal representatives of the judgment-debtor, when notice goes to them to show cause why the decree should not be executed the Court does not decide whether certain property was the property of the deceased judgment-debtor or not and, therefore, an objection that the property sought to be proceeded against did not belong to the judgment-debtor can be raised by the legal representatives and is not barred on the ground of constructive *res judicata.* (*Ramesam and Devadoss, JJ.*) SUBRAMANIA AYYAR *v.* SWAMINATHA CHETTIYAR. **28 M. L. W. 885 = 114 I. C. 545 = A. I. R. 1928 Mad. 746.**

———There is no absolute rule of *res judicata* applying to execution proceedings, and it cannot be held that a man is debarred from defending his action under R. 89 because he desisted from his action under R. 58 of O. 21. (*Jackson, J.*) GOVINDASAMI NAICKER *v.* PERUMAL RAJA. **25 M. L. W. 106 = 38 M. L. T. 30 = 99 I. C. 893 = 1927 M. W. N. 53 = A. I. R. 1927 Mad. 327.**

———*Principle applies to execution proceedings.*

The provisions of S. 11 of the Code of Civil Procedure are not expressly made applicable to execution proceedings, but the principles are applicable and if a point has been directly or by implication decided in any particular execution proceeding the point cannot be raised subsequently. The transferee of a decree applied under Order 21, Rule 16 for the substitution of his name. A definite order of substitution of name was passed by the executing Court. Later on the judgment-debtor applied to the Court that the money deposited by him may not be paid to the decree-holder on the ground that the decree-holder was not a rightful transferee. This application was not granted.

Held, that under the circumstances the question of the validity of the transfer of the decree was *res judicata* and could not be re-agitated.

Per *Mukerjee, J.*—It was incumbent on the judgment-debtor when he received the notice of the application for execution made by the assignee of the decree-holder to have come forward and raised any objection that he may have had to the execution of the decree by the assignee. 11 A. L. J. 815; 14 A. L. J. 370, Foll.; 13 A. L. J. 162, Dist. (*Mukerji and Dalal, JJ.*) DWARKA DAS *v.* MUHAMMAD ASHFAQULLAH. **47 All. 86 = 22 A. L. J. 928 = 5 L. R. A. Civ. 744 = 80 I.C. 722 = A. I. R. 1925 All. 117.**

———S. 11 only mentions suits and not execution cases. But it is firmly established that the principles of the section apply to execution proceedings. (*Das and Kulwant Sahay, JJ.*) RAM LAL MALIK *v.* DEODHARI RAI. **2 Pat. 771 = 5 P. L. T. 7 = 74 I. C. 781 = A. I. R. 1924 Pat. 265.**

———*Constructive* res judicata—*Point necessarily involved in suit must be taken to have been decided by implication — Execution proceedings—Principle of S. 11 applies.*

Where the point as to whether the defendant was or was not an agriculturist was necessarily involved in the suit, though there was no express decision, as the point was not in dispute between the parties, it must be taken to have been decided by necessary implication. The provisions of S. 11 of the C.P.Code. would not have any application to execution proceedings, but the principle underlying that section would necessarily govern such proceedings and it is obvious that any fact which is decided in the suit expressly or by necessary implication cannot be challenged in execution proceedings. (*Shah, Ag. C. J. and Crump, J.*) MULJI PURUSHOTTAM THAKKAR *v.* GOVERDHANDAS TRIBHUWANDAS. **24 Bom. L. R. 1291 = 76 I. C. 148 = A. I. R. 1923 Bom. 36.**

———If an order has been made which directly or by implication determines the rights of the parties to an execution proceeding, the fact that the decree-holder does not choose to proceed with the execution and the case is struck off does not entitle any party to re-open the question upon which there has been a previous adjudication. Though S. 11 does not apply to such a case, such a decision becomes final between the parties upon general principles of law. 17 C. W. N. 113, Foll. (*Batten, J. C.*) MT. PURA *v.* BEHARI LAL. **7 N.L.J. 163 = 68 I.C. 239 = A.I.R. 1923 Nag. 1 (b).**

———*Execution*—Res judicata, *principle of, applies to execution.*

Where the Court, decided after due notice upon the judgment debtors that the execution was in order and that it should proceed,

Held, that the order is binding upon the judgment-debtors. It is an order deciding as between the parties that the execution was not barred by limitation. Such an order operates as *res judicata* and whether right or wrong, the order cannot be challenged in subsequent execution proceedings. (*Jwala Prasad and Bucknill, JJ.*) GOUR CHANDRA RAY *v.* JANARDAN PRASAD THAKUR. **4 P. L. T. 204 = 68 I. C. 337 = A.I.R. 1923 Pat. 180.**

———The provisions of S. 11 do not apply to execution proceedings. (*Brown, A. J. C.*) MOUNG SO *v.* DEVIGYAN. **4 U. B. R. 132 = 70 I. C. 530 = A. I. R. 1923 Rang. 119 (2).**

———Per *Walsh, J.*—An interlocutory judgment in one stage of a judicial proceeding is binding upon the parties at a subsequent stage thereof. The binding form of such judgments depends not upon S. 11 but upon general principles of law. If it were not binding there would be no end to litigation.

Per *Wallach, J.*—The principle of constructive *res judicata* enunciated in Ex. IV of S. 11 is not applicable to execution proceedings. (*Walsh and Wallach, JJ.*) PHUL CHAND *v.* KANHAIYALAL. **44 All. 130 = 19 A. L. J. 923 = 65 I. C. 295 = A. I. R. 1922 All. 247.**

———*Special rules in explanation to S.* 11 *do not apply.*

Although the doctrine laid down in S. 11 of the C. P. Code, relating to *res judicata* may be applied and rightly applied in certain proceedings in execution arising out of the same judgment, so as to put an end to litigation and may possibly be applied in certain cases where separate suits have been brought raising points which have already been decided in execution cases, fought between the same parties, still it cannot be thought that the special rules laid down in the explanation to that section which go beyond the ordinary doctrine of *res judicata* ought to be applied generally in execution cases. *Kalyan Singh* v. *Jagan Prasad*, 37 All. 589, Referred to. *Gantayet* v. *Gajapati Vasudeva Devu*, 24 Mad. 681, Referred to. (*Dawson Miller, C.J. and Adami, J.*) PRITHI MAHTON *v.* JAMSHED KHAN. **67 I. C. 656 = 1 Pat. 593 = 3 Pat. L.T. 403 = 1922 P. H. C. C. 185 = A. I. R. 1922 Pat. 289.**

—S. 11—Execution proceedings—Application for final decree.

———Where in an application praying for a final decree for sale and for certain reliefs connected with execution, it was held that as owing to the failure to bring on record the representatives of a certain party, the mortgaged properties could not be brought to sale, there was no use in granting a final decree and the whole application was dismissed.

Held, that this finding that execution could not issue for the sale of the mortgaged properties was *res judicata* in a subsequent application for execution. (*Sadasiva Aiyar and Coutts Trotter, JJ.*) K. NARAYANA CHETTIAR *v.* E. SREENIVASA AIYANGAR. **62 I. C. 856 = 14 M. L. W. 18 = A. I. R. 1921 Mad. 461.**

—S. 11—Execution proceedings—Construction of decree.

———Although an executing Court is entitled to interpret a decree, still, where on the finding arrived at it is not necessary for it to do so in order to dispose of the execution application before it, any opinion expressed by it will not be an adjudication binding on the parties. 57 I. C. 177, Foll. (*Addison, J.*) GULAB SINGH *v.* MAHMUD KHAN. **118 I. C. 399 = 30 P. L. R. 323 = A. I. R. 1929 Lah. 437.**

———Where on an application for execution it was decided that the decree as it stood was not executable, the order is binding on the decree-holder as *res judicata* and no further application for execution would lie unless the decree had been made absolute and executable. (*Oldfield and Seshagiri Aiyar, JJ.*) RAMALINGA ROWTHAN *v.* SHEIK IBRAHIM SAHIB. **59 I.C. 161 = 12 M. L. W. 34.**

—S. 11—Execution proceedings — Decision binding.

———Decision that order on application to set aside execution sale is under S. 47 is binding on the parties so far as the proceedings taken on that application are concerned. (*Shah, Ag. C. J. and Fawcett, J.*) GADIGAPPA CHANBASAPPA *v.* SHIDAPPA GURUSHADAPPA. **26 Bom. L. R. 817 = 48 Bom. 638 = 83 I. C. 155 = A. I. R. 1924 Bom. 495.**

———Where at one stage of an execution proceeding an order is made disallowing the objections of the judgment-debtor the order is binding in all subsequent stages of the same execution. 42 Cal. 440, Ref. (*N. R. Chatterjee and Panton, JJ.*) KSHITINDRA MOHAN ROY *v.* NAWAB KHAJEE HABIBULLA BAHADUR. **64 I. C. 724 (Cal.).**

—S. 11—Execution proceedings; Different subject-matter.

———A decision in execution proceedings that certain property is liable for payment of decree cannot operate as *res judicata* when the liability of another property is to be considered. (*Sulaiman and Mukerji, JJ.*) BINDA PRASAD *v.* RAJ BALLABH. **48 All. 245 = 24 A. L. J. 273 = 91 I. C. 785 = A. I. R. 1926 All. 220 (b).**

———Where the prior execution proceeding related to a portion of the plaintiff's claim which had been decreed and the later suit was in respect of a liability which was not decided in the earlier suit. *Held* that the decision in the earlier suit did not operate as *res judicata*. (*Mukerji and Bennet, JJ.*) RAM NARAIN *v.* RAM PRASAD. **1930 A. L. J. 913.**

—S. 11—Execution proceedings—Erroneous decision.

———*Decision that former execution petition was invalid is* res judicata.

Where a Court erroneously decides that a former execution application was not made to the proper Court, the decision is *res judicata* between the parties. (*Sadasiva Aiyar and Napier, JJ.*) DOORVAS SESHADRI AIYAR *v.* GOVINDASWAMI PILLAI. **63 I. C. 189 = 1921 M. W. N. 344 = 13 M. L. W. 529 = A. I. R. 1921 Mad. 315 = 40. M. L. J. 556.**

—S. 11—Execution proceedings—Erroneous order.

———The application was for form C to be sent to the Collector for sale of the property mortgaged and no inventory of the property was needed as the decree showed what property was to be proceeded against. Nevertheless the Court passed the following order :— "Decree-holder No. 2 in person. There is no inventory of the property at the foot of the application in accordance with order and it is rejected as such with costs on applicant." The decree-holder acquiesced in this order, that is he did not appeal against it.

Held, that though the order of rejection was a wrong one, nevertheless the Munsif had jurisdiction to decide that the application was not according to law; and that the order was final and could not be questioned in subsequent execution proceedings and therefore the application can be of no avail to have limitation for further application.

Held, further, that the fact that the order of the Munsif was passed against the decree-holder without any notice having been issued to the judgment-debtor was immaterial. (*Batten, J. C.*) BEHARI LAL *v.* JAGANNATH. **8 N. L. J. 91 = 72 I. C. 473 = A. I. R. 1923 Nag. 236.**

—S. 11—Execution proceedings—Estoppel.

———It is inequitable that a decree-holder should be able to put in an application stating that a certain sum was due under a decree and asking for the arrest of a judgment-debtor under that application and when that amount is paid up to put in another application for a further sum. Where in an application made for the execution of a decree, interest was inserted and then scored out and the deletion was accepted by the decree-holder, that amounts to waiver of the claim to interest and the decree-holder is not entitled to make another application to execute decree for interest. (*Brown, J.*) A. R. S. SUBRAMANIAN CHETTYAR *v.* K. MOOSA. **119 I. C. 223 = A. I. R. 1929 Rang. 182.**

———The delivery of symbolical possession to a decree-holder, even in cases in which actual possession should have been given, puts an end to the adverse possession of the judgment-debtor who is in actual possession of the property and effectually vest the property in suit in the decree-holder so as to give him a fresh cause of action for recovery of actual possession from the judgment-debtor. The operation of this rule is restricted to judgment-debtors. Symbolical possession wrongly given to a decree-holder does not give him a fresh starting point against persons who are not bound by the decree. A person who is a party to certain legal proceedings is not entitled to question the legality of the procedure adopted in such proceedings, except in the manner authorised by law and that is by appeal to a higher Tribunal, but if he allows wrong procedure to be followed without effective protest he must be deemed to have acquiesced in it and, therefore, to be bound by it. The general principle of estoppel similar to *res judicata* will apply to a case like this. (*Jai Lal, J.*) HARBHAGWAN *v.* TAJA. **26 P. L. R. 546 = 89 I. C. 596 = A. I. R. 1926 Lah. 35.**

———In execution of a decree a debt due by the defendant to the judgment-debtor was attached. The defendant contended that the debt was much smaller than the amount stated in the execution proceedings. Under O. 21, R. 66, an order for the issue of a proclamation of sale of the debt was made and the debt was purchased by the plaintiff. Subsequently the plaintiff sued to recover the full amount of the debt, the defendant put forth the same objection that the amount due from him was much smaller than that claim.

Held, that the order passed by the executing Court was referable to O. 21, R. 66, and that the defendant was not thereby precluded from showing what was actually due from him in the subsequent suit. (*Shah and Fawcett, JJ.*) CHUNNILAL JIVANLAL SHAH *v.* PIRA MIYAJI GHANCHI. **101 I. C. 335 = 29 Bom. L. R. 285 = A. I. R. 1927 Bom 234.**

—S. 11—Expls. 4 and 39—Execution proceedings—Executability of decree.

———Where the decree holder applies for the transfer of a decree to another Court for execution and the judgment-debtor raises objections as regards the executability of the decree the proper Court to decide such objections is the Court which transfers the decree and not the Court to which the decree is transferred; because if the judgment-debtor after receiving notice to show cause why the decree should not be transferred, does not raise all his objections to executions, he will be precluded from doing so in a later execution petition on the ground of constructive *res judicata*. A. I. R. 1924 Mad. 673 ; A. I. R. 1926 Mad. 411 ; (1928) M. W. N. 152, Rel. on ; 8 Cal. 51 and A. I. R. 1921 P. C. 23, Ref.; 43 Cal. 903 and A. I. R. 1927 P. C. 73, Dist. (*Madhavan Nair and Jackson, JJ.*) S. N. SUBRAMANIAN CHETTIAR *v.* RAMANADHAN CHETTIAR. **116 I. C. 113 = 29 M. L. W. 246 = 1929 M. W. N. 36 = A I. R. 1929 Mad. 199.**

———Although orders in execution proceedings operate as *res judicata*, nevertheless the fact that execution has been ordered as regards a certain sum does not operate as *res judicata* with regard to the amount due under the decree. (*Brown, J.*) KO MAUNG NGE *v.* LALMAW. **120 I. C. 664 = A. I. R 1929 Rang. 172.**

———Waiver of objection as to, by judgment-debtor creates *res judicata*.. 31 Cal. 822 and A. I. R. 1921 P. C. 23, Appl. (*Madhavan Nair and Jackson, JJ.*) KALIYA PERUMAL NAIDU *v.* SUBRAMANIAN CHETTIAR. **27 M. L. W. 20 = 1928 M. W. N. 67 = 109 I C. 866 = A. I. R. 1928 Mad. 203.**

———When an application is made for execution of a decree and notice of the application is served on the judgment-debtors, they are bound to appear and show cause why the decree should not be executed. If they fail to appear and show cause, and if on such failure an order *ex parte* should be made by the Court directing execution, then the question of the executability of the decree should, according to the law of constructive *res judicata*, be regarded as having been decided by the Court in favour of the decree-holder and the rule of constructive *res judicata* will be available even if the parties are not personallly served. All that is necessary under the law is that they should be properly served, served according to the rules relating to service. (*Srinivasa Ayyangar, J.*) SUNDARARAJULU NAIDU *v.* NARAYANASWAMI NAIDU. **39 M. L. T. 34 = 103 I.C. 825 = 26 M. L. W. 481 = A. I. R. 1927 Mad. 813.**

———The fact that when notice under O. 21, R. 16 was given to the judgment-debtor of the application for execution, he failed to file any objection as to its executability before the decree was transferred for execution, does not prevent him from raising an objection to the right of the transferee of decree to execute the decree before the Court to which the decree has been transferred for execution. 12 C. L. J. 312. Dist. (*Adami and Allanson, JJ.*) RAM SEWAK LAL *v.* SATRUHAN DEO SAHAI. **8 P. L. T. 163 = 101 I. C. 616 = A. I. R. 1927 Pat. 170.**

———Where a preliminary decree under O. 34, R. 4 is as such incapable of execution unless made absolute under O. 34, R. 5, but the judgment-debtor fails to raise such objection at the first application for execution he is precluded from taking the objection at a later stage of execution proceedings. (*Zafar Ali and Martineau, JJ.*) BANU RAM *v.* PARAS RAM. **7 Lah. L. J. 397 = 92 I.C. 254 = 26 P. L.R. 784 = A. I. R. 1925 Lah. 640.**

———*J. D.* can plead at a later stage non-executability though not previously pleaded where assignee of *D. H.* was benamidar of *J.D.* (*Spencer and Venkatasubba Rao, JJ.*) SHRIRAM ROW *v.* BAPAYYA. **18 M.L W. 453 = 75 I. C 845 = A. I. R. 1924 Mad. 189.**

—S. 11—Execution proceedings—Ex parte order.

———If after notice to the other party, the execution Court passes an order for sale and the order is not appealed against, any subsequent application to re-consider the order is barred by *res judicata*. 8 Cal. 51 (P.C.) and A.I.R. 1923 Mad. 649, Foll. (*Curgenven and Anantha Krishna Iyer, JJ.*) SHRI RAM RAGHAVACHARIAR *v.* NARASIMHA NAIDU. **113 I. C. 92 (Mad.).**

———A previous *ex parte* order for execution passed on service of proper notice to the judgment-debtor, which raised a question about the executability of the decree operates as *res judicata* and the judgment-debtor cannot at a subsequent application raise the plea that the decree is not executable and that the previous application was barred by limitation. A.I.R. 1924 Mad. 1 (F.B.), Dist. (*Madhavan Nair, J.*) (CHALLA) SUBBARAYADU *v.* (THOOMAR) BAPAYYA. **98 I.C. 702 = A.I.R. 1927 Mad. 149.**

—S. 11 — Execution proceedings— Heard and finally decided.

———*Objection to application for execution once adjudicated as without force, operates as* res judicata.

Where the objection against execution application is raised on the ground of limitation and there is an adjudication between the parties it being held that the objection is without force, a fresh objection is barred by the principle of *res judicata*, when there has been no appeal from the order. (*Srivastava, J.*) DRIGBIJAI SINGH *v.* BHAGWAN DAS. **6 O.W. N. 1064 = A. I. R. 1930 Oudh 65.**

———*Execution disposed of in default—Decision is not* res judicata.

A darkhast disposed of for default of appearance as the plaintiff's pleader was absent cannot be said to have been heard and decided on merits. The decision in the previous darkast passed without hearing the plaintiff or his pleader cannot be challenged except in a subsequent darkhast and it does not operate as *res judicata*. (*Patkar and Murphy, JJ.*) LAKSHMIBAI ANANT *v.* RAVJI BHIKAJI. **31 Bom. L.R. 400 = 118 I.C. 700 = A.I.R. 1929 Bom. 217.**

———The execution Court has no jurisdiction to entertain a second application of objection to the attachment and sale, when one has failed. It is immaterial that the grounds are different. A.I.R. 1922 Pat. 289 and 21 Bom. L. R. 344 held *obiter*; A.I.R. 1924 P.C. 202, Rel. on. (*Tek Chand, J.*) NANAK CHAND *v.* BOOTA SINGH. **117 I.C. 816 = A. I. R. 1929 Lah. 470.**

———Where a Court finds that the point as to whether anything is still due under a decree is not raised and decided by an appealable or judicial order in an execution proceeding, a mere order passed on an application to bid at the same execution proceeding does not operate as *res judicata*. (*Kumaraswami Sastri and Walsh, JJ.*) ULAGANATHA MUDALIAR *v.* ALAGAPPA MUDALIAR. **122 I. C. 161 = A. I. R. 1929 Mad. 903.**

———Where an application in execution proceedings that the judgment-debtor belonged to an agriculturist caste was dismissed and no appeal or revision was preferred against it, the same question cannot be raised in an objection under O. 21, R. 90, as the principle of *res judicata* applies to the case. (*Jai Lal, J.*) DHANNU RAM *v.* UMAR. **110 I. C. 337 (Lah.).**

———*Dismissal of a former objection to attachment—It is a bar to fresh objection.*

Rule 63 renders the dismissal of the former objection to attachment, in default or on merits, a bar to the entertainment of a fresh objection. 41 All. 623; A.I.R. 1921 Oudh 54; 45 Cal. 785; A.I.R. 1922 Cal. 166, Foll. (*Martineau, J.*) KISHEN PARSHAD *v.* PUNJAB NATIONAL BANK, LTD. **26 P.L.R. 151 = 105 I. C. 693 = A. I. R. 1927 Lah. 872.**

———Where an order releasing property from attachment is not appealed against, the order becomes final and so fresh application for the attachment of the same property does not lie. A.I.R. 1921 Bom. 208; A.I.R. 1924 All. 808; 25 C.W.N. 555 and A.I.R. 1922 P.C. 341, Foll. (*Zafar Ali, J.*) PARMA NAND *v.* MT. RAJ DEVI. **28 P.L.R. 607 = 9 Lah.L.J. 193 = 100 I. C. 23 = A. I.R. 1927 Lah. 852.**

———*Objection once decided cannot be again raised in execution of the same decree.*

An objection which has been disposed of finally by an order in execution proceedings is not to be entertained a second time in execution proceedings relating to the same decree. A.I.R. 1926 Oudh 291, Rel. on. The binding force of such an order does not depend upon the provisions of the C.P. Code, relating to *res judicata* but upon the general principles of law. 6 All. 269, Foll. (*Coldstream, J.*) SM. RAJ KUMARI *v.* GURUBAKHSH SINGH. **99 I.C. 1006 = A. I. R. 1927 Lah. 179.**

———Plaintiff and defendant both objected to the attachment of a plot of land in execution of a decree, each contending that the site belonged to him and it was decided that the site belonged to the defendant as owner in a suit by plaintiff for possession on the ground of his subsequent purchase from the vendor, Municipality.

Held, that the question of title was *res judicata* by reason of the executing Court's decision even though the Municipality was not a party to those proceedings. (*Harrison, J.*) MUKUND LAL *v.* MT. LORINDI BAI. **7 Lah.L.J. 198 = 92 I.C. 131 = 26 P.L.R. 171 = A. I. R. 1927 Lah. 112.**

———Where a Court executing decrees decided a question raised in the course of execution proceeding relating to the true construction to be placed on a decree or order, that decision becomes final between the parties as an interlocutory order in the suit and the matter cannot be re-opened in a subsequent execution proceeding. 6 All. 269 (P. C.), Foll. (*Kanhaiya Lal and Boys, JJ.*) MOHAMMAD YUSAF *v.* MT. AMTUL HABIB. **95 I. C. 31 (All.).**

———Decree-holder applied for partial execution of the decree but subsequently applied for amendment for executing the entire decree. The judgment-debtor objected to the amendment but his objection was overruled and amendment was allowed. No appeal was made by the judgment-debtor from the order allowing amendment.

Held, that judgment-debtor was precluded from raising the same question in subsequent execution proceedings. (*Cuming and B. B. Ghose, JJ.*) UPENDRA NATH BOSE *v.* K. P. DUTT. **53 Cal. 582 = 43 C.L.J. 596 = 96 I. C. 562 = A.I.R. 1926 Cal. 1019.**

———The decree-holder in a Small Cause suit applied for attachment of a debt alleged to be due by one *K* to the judgment-debtor. Notice of that application was served upon *K* as garnishee who appeared and put a counter-statement in which he alleged, that the debt had never been due to the judgment-debtor, that it had been assigned and he had promised to pay the assignee, and that the amount of the debt was not Rs. 350 but Rs. 300. The District Munsif passed an order in these words "Attachment is confirmed". In due course the debt was brought to sale and was purchased by the present plaintiff, who was himself the decree-holder. The plaintiff then sued to recover the debt, and the garnishee raised the same defence.

Held, the garnishee not having proceeded, when the claim was decided against him in execution, under O. 21, R. 63, the matter was *res judicata*. (*Schwabe, C. J. and Wallace, J.*) SUBBIER *v.* MOIDEEN PITCHAI. **17 M.L.W. 582 = 72 I.C. 558 = 32 M.L.T. 304 = 1923 M.W.N. 282 = A.I.R. 1923 Mad. 562 = 44 M.L.J. 588.**

———If an executing Court expressly decides a point *inter partes* that decision becomes final according to the general principles of law, though the question whether the law of *res judicata* applies would be irrelevant, as the term refers to a matter decided in another suit. But where there has been no express adjudication on a point; it would not operate as a bar. (*Gokul Prasad and Sulaiman, JJ.*) SHEO MANGAL *v.* MT. HULSA. **44 All. 159 = 65 I.C. 377 = 19 A.L.J. 954 = A.I.R. 1922 All. 413.**

—S. 11—Execution proceedings — Interlocutory order.

———An appeal need not be preferred against every order in execution proceedings. It is open to the party aggrieved to challenge by an appeal against the final order which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings. 36 Cal. 422, Foll. A person obtained a decree for realization of money by sale of certain property of judgment-debtor. He applied for execution but the Court held that the decree was preliminary and could not be executed. He then applied to have the decree made final and at the same time protested that the decree as it stood was capable of execution. The application for final decree was held as time barred. He preferred an appeal in which he again reiterated his plea that the decree could be executed.

Held that he could urge the plea though he did not

appeal from the order of the executing Court disallowing execution. (*Shadi Lal, C.J. and Broadway, J.*) NATHU MAL *v.* MOHAN SINGH.
100 I. C. 653 = A.I.R. 1927 Lah. 232.

———An interlocutory order passed in execution proceedings is final in respect of a matter decided by it whether such matter is raised again in subsequent, or in continuation of the same proceedings. 40 Mad. 1016 and 1920 P.H.C.C. 109, Dist.; 6 All. 269 (P.C.) and 48 Cal. 499 (P.C.), Foll. (*Stuart, C.J. and Wazir Hasan, J.*) RAGHUBAR SINGH *v.* GOKARAN.
1 Luck. 171 = 13 O.L.J. 111 = 3 O.W.N. 241 = 93 I. C. 833 = A.I.R. 1926 Oudh 291.

—S. 11—Execution proceedings—Legal representatives.

———An order refusing an application in execution proceedings for substitution under O. 22 does not operate as *res judicata* as against an application for execution under O. 21, R. 16. (*Dalal and Wazir Hasan, A. J. Cs.*) KALIMUDDIN *v.* TATA INDUSTRIAL BANK, LUCKNOW. **2 O. W. N. 352 = 12 O. L. J. 538 = 29 O. C. 98 = 88 I. C. 1016 = A. I. R. 1925 Oudh 417.**

—S. 11—Execution proceedings—Limitation.

———In a previous application for execution notice of the application was offered to the judgment-debtor but he refused to sign it. No steps were taken to serve the notice according to the provisions of O. 5, Rr. 17 and 19. The Court, however, considered it as sufficient notice.

Held, that the notice was not properly served and as the judgment-debtor was not given opportunity to argue that the application was time barred, the application would not be step-in-aid of execution and the question of limitation would not be *res judicata* in subsequent application. (*Bhide, J.*) FARANGU *v.* HARIKISHAN.
30 P.L.R. 38 = 119 I. C. 321 = A.I.R. 1929 Lah. 334.

———*Order allowing execution to issue operates as* res judicata *on the question that the application was time barred—Subsequent dismissal of execution application does not imply that the order ceased to have effect.*

Orders in execution operate as *res judicata* : 8 Cal. 51 (P. C.), Foll. When an application is made to a Court for execution, notice is ordered to judgment-debtor to show cause why the decree should not be executed against him. If the judgment-debtor does not show cause the Court orders execution of the decree either against the person or against his property according to the terms of the decree. The implication of that order is that the applicant has a right to execute the decree and that it is an executable decree and that it is not barred by limitation, and that the judgment-debtor is liable to satisfy the decree. In the absence of opposition by the judgment-debtor, the Court is not bound to write an order *in extenso* on any of the above points. It is only when the judgment-debtor opposes the application for execution and urges certain grounds, that the Court is called upon to consider the grounds and give its decision and its reasons. The order of the Court "execute" or "attach" implies that the Court has considered all that need be considered before execution could issue. The order that execution will proceed implies that the execution of the decree was not barred and that the decree was an unsatisfied decree, and therefore a contention that there was no decision on the point of limitation cannot be upheld in the teeth of the order that execution will proceed. 37 Mad. 462, Foll. Where execution is ordered the subsequent dismissal of the execution application, either for want of prosecution or owing to inability of the process of the Court to reach the judgment-debtor or his property, does not imply that the order passed on the application ceased to have effect. (*Devadoss and Jackson, JJ.*) LAKSHMANAN CHETTY *v.* PALANIAPPA CHETTY.
116 I. C. 363 = A. I. R. 1928 Mad. 1052.

———There was a mortgage decree passed on 21st August, 1921. First petition in execution was filed on 20th March, 1925. Court directed issue of notices under O. 21, R. 22, with special mention of question of limitation. Service was found defective and substituted service was allowed and decree-holders were ordered to take further steps. Execution proceedings were dismissed for failure of decree-holders to do so. In a later execution the property was sold. The judgment-debtor applied under S. 47 contending that the execution was time barred. The trial Court held that, as the objection was not taken in the first execution case, it was *res judicata*.

Held, that there was no adjudication in the previous proceedings that execution was not barred by limitation and the lower Courts were wrong in holding that the question was *res judicata* and that the judgment-debtor was entitled to raise the question of limitation and have it decided. 14 C. W. N. 114, Foll. ; A. I. R 1924 Pat. 122, Dist.; 8 Cal. 51 (P.C.). Ref. to. (*Das and Ross, JJ.*) RICHHARAM *v* PASUPATI BANERJI.
7 Pat. 465 = 9 P. L. T. 805 = 112 I C. 265 = A. I. R. 1928 Pat 471.

———Where all that is implicitly decided is that a previous execution petition was not barred by the 12 years rule, that decision cannot for ever remove the operations of S. 48 out of the way of all future execution petitions. (*Wallace and Madhavan Nair, JJ.*) DAKSHINAMURTHY PILLAI *v.* VEDAMURTHY MUDALIAR. **103 I. C. 311 = A. I. R. 1927 Mad. 842 = 53 M. L. J. 440.**

———When execution has been allowed to proceed at a time when it was possible for the judgment-debtor to have alleged that the right to execute the decree was barred by limitation and such question was either decided affirmatively in favour of the decree-holder or not raised at all by the judgment-debtor, it is not open to the judgment-debtor to raise the question of limitation at a subsequent period. 8 Cal. 51 (P. C.) and A. I. R. 1921 P. C. 23, Foll. (*Stuart, C.J. and Raza, J.*) MT. FATIMA BEGAM *v.* RANJIT KHAN. **1 L. C. 543 = 105 I. C. 545 = A. I. R. 1927 Oudh 488.**

———The plea that a previous application for execution was barred by limitation and hence the subsequent application was not valid should be raised at the earliest possible opportunity. A. I. R. 1924 Mad. 673, Rel. on. (*Jackson, J.*) V. BHADRAYYA *v.* P. JAGGARAJU.
22 M. L. W. 747 = 1926 M. W. N. 33 = 91 I. C 1017 = A. I. R. 1926 Mad. 177.

———Failure to plead bar of limitation when execution was proceeded with bars the plea at a subsequent stage. 48 I. A. 45 (P. C.), Foll. (*Stuart, C. J. and Wazir Hasan, J.*) RAGHUBAR SINGH *v.* GOKARAN.
1. Luck. 171 = 13 O. L. J. 111 = 3 O. W. N. 241 = 93 I. C. 833 = A. I. R. 1926 Oudh 291.

———Where judgment-debtor does not challenge by way of appeal, review or revision, a wrong order of an executing Court ordering issue of notice after a lapse of twelve years, he is precluded from challenging the order at any subsequent stage of the execution proceedings on principles analogous to those of *res judicata.* (*Kinkhede, A. J. C.*) KHAIRULLA *v.* SETH DHANRUPMAL.
22 N. L. R. 67 = 80 I.C. 905 = A. I. R. 1925 Nag. 82.

———Even in an application for transfer of a decree the judgment-debtor can plead limitation and he ought to do so. If he fails the point is barred by constructive *res judicata*. (*Phillips and Odgers, JJ.*) K. RAJITHAGIRIPATHY *v.* BHAVANI SANKARAN.

19 M. L. W. 650 = 1924 M. W. N. 527 = 47 Mad. 641 = 80 I. C. 103 = A. I. R. 1924 Mad. 673 = 47 M. L. J. 4.

———On the 10th November, 1910, an instalment order was passed against the appellant whereby he had to pay a certain sum in 14 instalments. A number of these instalments were paid and then there was default. In 1921 the decree-holder applied for execution of the decree. In that execution case the judgment-debtor filed an objection contending that the execution was barred by limitation. The hearing of this objection in the execution case was fixed for the 8th April, 1921. Upon that occasion the judgment-debtor did not appear in support of his objection and as there was nothing before the Court to show that the execution case was barred by limitation the Court dismissed the objection for default and on the same day passed an order that the decree-holder should take further steps and directed the case to be put up again on the 11th of the month for orders. On the 12th of the month no steps having been taken by the decree-holder his execution was dismissed for default. The next execution case was filed in September following that is to say well within three years of the last execution case. The appellant again objected that the case was barred by limitation on the ground that the previous execution case in which his objection was dismissed was itself barred by limitation.

Held, that the objection was no longer maintainable. 8 Cal. 51 and 24 All. 282, Foll.; 28 Cal. 122 and 14 C. W. N. 114, Dist. (*Dawson Miller, C. J. and Kulwant Sahay, J.*) JAGO MAHTON *v.* KHIRODHAR RAM.

2 Pat. 759 = 2 Pat. L. R. 163 = 74 I. C. 130 = A. I. R. 1924 Pat. 122.

———If the judgment-debtors have notice to appear and if they know that the issue then to be decided by the Court is the question of limitation, their failure to oppose the application precludes them afterwards from questioning the decision. It is not a question of *res judicata* at all. It is a decision in the very litigation upon the same application. (*Walsh and Ryves, JJ.*) MAHAMADI BEGAM *v.* UMDA BEGAM. **66 I.C. 751 = A .I. R. 1922 All. 100 (1).**

———The dismissal of an application for execution as out of time does not prevent the executing plaintiff from filing another Darkhast and seeking to bring it within limitation on grounds which were not before the Court when the previous Darkhast was filed. The doctrine of *res judicata* cannot be extended to that length. (*Macleod, C. J. and Shah, J.*) RAMCHANDRA VENKATESH SHOLAPURE *v.* SHRINIVAS KRISHNA KULKARNI.

24 Bom. L. R. 97 = 66 I. C 940 = 46 Bom. 467 = A I. R. 1922 Bom. 238.

———In 1904 a decree was passed in a mortgage suit. Within three years an application for order for sale of property was made, but was dismissed. Within three years of the latter application, similar application was made but was dismissed as no final decree was made as required by the new Civil Procedure Code. Within three years an application for final decree was made which was dismissed for non-payment of process fees. A similar application for final decree was made in time but was withdrawn.

Held, that the applications for final decree were steps-in-aid of execution because they were accepted by the Court as being within time though really out of time; such acceptance gives a fresh start for limitation.

Per *Shah, J.*—An adjudication by Court that a certain application is in time cannot be re-considered when a question that it is out of time is raised at a later stage of execution proceedings. (*Macleod, C.J. and Shah, J.*) GULAPPA RUDRAPPA *v.* ERAVA BASANGOWDA.

46 Bom. 269 = 63 I. C. 844 = 23 Bom. L. R. 1013 = A. I. R. 1922 Bom. 118.

———Where a prior application for execution had been put in and after notice to the judgment-debtors execution had been ordered the objection that it was barred by limitation cannot be raised on a subsequent application. (*Chevis, J.*) KEDAR NATH *v.* RADHA KISHEN.

67 I. C. 56 (Lah).

———Where the plea of limitation was raised *inter alia* in defence to an execution application and the application was granted,

Held, that the plea was barred by *res judicata* although the judgment did not expressly refer to it. (*Lord Moulton.*) RAJA OF RAMNAD *v.* VELUSAMI TEVAR. **48 I. A. 45 = 19 A. L. J. 168 = 23 Bom. L. R. 701 = 33 C. L J. 218 = 25 C. W. N. 581 = 13 M. L. W. 290 = 1921 M. W. N 51 = 59 I. C. 880 = 29 M. L. T. 345 = A. I. R. 1921 P. C. 23 = 40 M. L. J. 197.**

———The judgment-debtor is not competent, after the sale has taken place, to impugn its validity on the ground that the application for execution was barred by limitation at the time it was made where he had notice of this application and by reason of his omission to take objection at the proper stage the order for the issue of the sale proclamation was made. (*Mukerji and Panton, JJ.*) GOVINDA NATH *v.* BASIRUDDIN MANDAL.

34 C.L.J. 163 = 64 I.C. 594 = A.I.R. 1921 Cal. 606.

—S. 11—Execution proceedings—Might and ought.

———The judgment-creditor got a money decree against the judgment-debtor who was arrested in execution. *A* stood surety and executed a bond to pay the entire amount if during execution proceedings judgment-debtor absented himself. On judgment debtor absenting himself, the decree-holder asked the Court to issue a warrant for the attachment of the surety's property. On 10th February, the surety asked for time to settle with the decree holder, but the surety failed to make a settlement and on notice having been issued, stated that he was not a surety at all.

Held, that when the surety asked for time on 10th February to settle with the decree-holder he did not deny liability and the liability became *res judicata*, and the surety was, therefore, still liable to the decree-holder. (*Johnstone, J.*) LAL SINGH *v.* MUHAMMAD AFZAL. **A. I. R. 1930 Lah. 80.**

———Where no point was taken in a previous darkhast that it was not maintainable by the decree-holder on the ground that a receiver was appointed in respect of the decree, that point cannot be raised in subsequent darkhast as it might and ought to have been taken in the previous one. (*Patkar and Murphy, JJ.*) NADIRSHAW JAMSHETJI *v.* PURSHOTAMDAS GANPATDAS.

31 Bom. L. R. 320 = 118 I. C. 694 = A. I. R. 1929 Bom. 279.

———*Objection as to amount in decree not raised in previous proceeding—No bar if raised in subsequent proceeding.*

The mere fact that a judgment-debtor does not in a previous execution proceeding object that the amount for which the execution is taken out is in excess of the decree itself, does not bar the judgment-debtor from raising that objection in subsequent execution proceedings. To hold otherwise implies that the decree is itself superseded by orders in execution : (Case-law Discussed.) (*Kumaraswami Sastri and Walsh, JJ.*) ULAGAPPA MUDALIAR *v.* ALAGAPPA.

122 I. C. 161 = A. I. R. 1929 Mad. 903.

———*Execution of mortgage-decree pending—Purchaser of equity of redemption joined as judgment-debtor without objection from judgment-debtor—Judgment-debtor then has no status to object on ground that purchase was benami for decree-holder.*

Where, during pendency of execution of a decree for sale of mortgaged property, a person purchased equity of redemption and is jointed as the judgment-debtor without any objection from the judgment-debtor, the latter has no status afterwards to object on the ground that the purchase was only benami, the real purchaser being the decree-holder himself. (*Wallace and Madhavan Nair, JJ.*) GOVINDOSS KRISHNADOSS *v.* RAJAH OF KARVETNAGAR. **A. I. R. 1929 Mad. 404.**

———Omission to object to execution application being not in accordance with law operates as *res judicata.* 8 Cal. 51, P. C. Foll. (*B. B. Ghose and Bose, JJ.*) KANAK PROVA DEBI *v.* DHIRENDRA NATH ROY.

32 C. W. N. 1107 = 118 I. C. 337 = A .I. R. 1928 Cal. 861.

———*Limitation—Plea of—Omission to raise in prior E. P.*

Where notice was issued to the judgment-debtor before an order for sale in execution was passed and the judgment-debtor did not raise the plea that execution of the decree was barred, *held*, that the judgment-debtor was barred from raising the same plea in a subsequent execution application. (*Curgenven and Ananthakrishna Aiyar, JJ.*) SRIRAMA RAGHAVACHARIAR *v.* NARASIMHA NAIDU. **113 I. C. 92.**

———*Point raised at one stage of execution proceedings —Judgment-debtor having full opportunity to object but not objecting—Point decided against judgment-debtor—He cannot object at a later stage.*

Where a point has once been expressly decided in the execution department that decision binds the parties in all subsequent proceedings and in cases where a point has not been directly decided but is such as must be deemed to have been necessarily decided before an order of execution was passed the decision has also a similar binding force. 6 All. 269 (P. C.) ; 9 Cal. 51 (P. C.) ; 48 I. A. 45 (P. C.) ; A. I. R. 1925 All. 117, Foll.

Where the decree-holders in pursuance of declaratory decree also asking for injunction expressly applied to get a certain disputed pavement removed and the judgment-debtors had full notice that they had so applied and failed to raise any objections and the Court then ordered execution to issue and through its officer got its order carried into effect, *Held* : it must be deemed by necessary implication that the question of the pavement having been constructed in defiance of the injunction was decided adversely to the objectors who could not subsequently object to the demolition. (*Sulaiman and Daniels, JJ.*) DIP PRAKASH *v.* DWARKA PRASAD.

48 All. 201 = 24 A. L. J. 91 = 6 L.R.A. (Civ.) 606 = 90 I.C. 83 = A. I. R. 1926 All. 71.

———*Judgment-debtor being aware of execution proceedings but not objecting to Court-sale—Sale confirmed —Neither judgment-debtor nor his transferee with notice of Court-sale can subsequently contend that the property was inalienable.*

Under O. 21, R. 92, C.P. Code, where no application is made to set aside a sale or where such application is made and disallowed, the Court is bound to make an order confirming the sale and it thereupon becomes absolute. Under S. 65 where property is sold in execution of a decree and the sale has become absolute the property vests in the purchaser. If the judgment-debtor objects under S. 47 to the sale and his objection is overruled he is bound by the decision of the executing court. If being aware of the execution proceedings and having an opportunity to object he fails to do so he is likewise bound by the order confirming the sale in other words he is in effect in either case a party to the order by which the sale is confirmed equally with the auction purchaser and he cannot go behind it. 9 C. W. N. 972; 26 Cal. 727 ; 34 Cal. 199 and 40 All. 680, Foll.

Plaintiff a transferee from the auction purchaser sued to redeem a mortgage held by the defendant subject to which the property was sold at the auction. The defendant pleaded that the property being an inam land was inalienable and therefore the sale conveyed no title to the auction purchaser and further that subsequent to the auction sale the land was enfranchised by the Government in the name of the judgment-debtor from whom he subsequently purchased the same. The defendant as well as the judgment-debtor had notice of the execution proceedings.

Held, that the defendant must be considered to be bound by the order confirming the sale in favour of the auction purchaser and that it was not open to him to question the validity of the Court.

Held further that the question whether the sale of an unenfranchised inam is absolutely void did not strictly arise. (*Venkatasubba Rao and Madhavan Nair, JJ.*) VUPPULURY SOMASUNDARAM *v.* BHIMISETTI KONDAYYA. **91 I. C. 443 = A. I. R. 1926 Mad. 12 = 49 M. L. J. 401.**

———*Constructive* res judicata—*An objection open to a party in execution proceedings but not taken by him cannot be taken at any subsequent stage of the same proceedings.*

An objection which if taken might have been cured and which has not been taken in the Court below shall not be taken in the Court of appeal. Where at a certain stage of the execution proceedings a certain objection was open to a party and he fails to raise it at the proper time it is not open to him to urge the same at a subsequent stage of the proceedings on the principle of constructive *res judicata.* (*Kinkhede, A. J. C.*) RAGHUBAR PRASAD *v.* SATTOO. **89 I. C. 1009 = A. I. R. 1926 Nag. 164.**

———*Omission by judgment-debtor to challenge liability, where it does not affect decree-holder's position creates no estoppel.*

Omission to raise objections where it in no way affects the position of the decree-holder does not estop judgment-debtor from contesting his liability when he has become aware of his legal position. (*Martineau, J.*) GURANDITTA MAL *v.* FIRM GURDASMAL RAMCHAND. **7 L. L. J. 343 = 91 I. C. 772 = 26 P. L. R. 634 = A. I. R. 1925 Lah. 552.**

———*Execution case dismissed for default—Objection not taken that the objector was not liable for the debt—Objection is not precluded in subsequent execution case.*

Where the former execution case was dismissed for default,

Held, that the contention, that as in the previous execution case the appellant did not take the point that he was not liable for the debt, he could not take it in the present execution, could not be maintained. In the previous execution case, there was no adjudication which could even by implication be held to constitute a decision adverse to the appellant. The principle which was applicable to suits upon a party's failure to raise an issue, which he might have raised, was not applicable to execution cases, but even if it were, the final order in the last execution case was made not in consequence of the conduct of the Appellant but in spite of it. The doctrine of *res judicata* did not apply. (*Mullick and Ross, JJ.*) TIKAIT GAYAN NATH *v.* PANDIT MALHARJI VAIDIYA. **6 P. L. T. 507 = 90 I. C. 276 = 1925 P. H. C. C. 160 = A. I. R. 1925 Pat. 588.**

———*Failure to object at one stage of execution proceedings does not bar objection at later stage.*

A joint decree was transferred by one of the decree-holders after adjustment of the decree by the other decree-holders. The notice served on the latter of the application for execution filed by the transferee did not contain any indication that the Court was going to decide any question regarding settlement of the amount for which the decrees were executable and the properties liable to be sold in execution. The case proceeded *ex parte* as against them.

Held, that they were not estopped in the subsequent proceedings from disputing their co-decree-holders' claims to execute the whole of the decrees against any of the judgment-debtor's properties. 28 M. 355, Rel. on. (*Spencer and Odgers, JJ.*) B. HANUMANTHA ROW *v.* A. KRISHNAMMA. **32 M. L. T. 118 = 70 I. C. 329 = A. I. R. 1924 Mad. 518.**

———*An order passed with notice and not objected to, cannot be questioned afterwards.*

In case of an execution proceedings an application was filed by the decree-holder asking that order on a previous application be set aside and it be restored to file under O. 9, R. 4, C.P. Code. Accordingly the application was restored while challenging a subsequent application for execution the judgment-debtor contended that the application for restoration under O. 9, R. 4, could not be taken into consideration as O. 9, R. 4, was inapplicable to execution proceedings.

Held, that as the order on the application was passed presumably after notice, to the judgment-debtor, it was no longer open to him to question the validity of the order in subsequent proceedings. (*Walsh and Kanhaya Lall, JJ.*) MAHAMAD HADI *v.* DEBI PRASAD. **77 I. C. 871 = A. I. R. 1923 All. 600.**

———If no objection is raised to the executability of the decree with respect to some items contained therein, and the decree is executed, no objection can be raised to its executability with respect to the other items in later application for execution. (*Spencer and Venkatasubba Rao, JJ.*) GOVINDA MENON *v.* KRISHNA MANNADIAR. **17 M. L. W. 566 = 72 I. C. 397 = 1923 M. W. N. 299 = A. I. R. 1923 Mad. 649 = 45 M. L. J. 71.**

———*Decree against dead man—Legal representatives brought on record in execution not pleading abatement—Subsequent suit by legal representative that decree is nullity is not barred.*

Where one of the defendants in mortgage-suit died in January, 1912, after the preliminary but before the final decree, and the legal representative was brought on record in 1916 in connection with application for transfer of the decree and was served with a notice but he did not appear and brought a suit when some of the properties were brought for sale in execution.

Held, his failure to plead abatement in 1916 did not operate as *res judicata*. (*Ayling and Odgers, JJ.*) SAMI MUDALIAR *v.* MUTHIAH CHETTY. **19 M. L. W. 314 = 69 I. C. 465 = 1922 M. W. N. 597 = A. I. R. 1923 Mad. 212 = 43 M. L. J. 293.**

———*Plea that the decree is not capable of execution, not raised at the time of previous execution application is barred by* res judicata.

If a judgment-debtor does not at the time of the first application for execution of the decree raise the objection that the decree was not capable of execution which, he might and ought to have done, he cannot be allowed to take it in later execution proceedings. 6 All. 269, Foll. (*Ryves and Gokul Prasad, JJ.*) DAMBAR SINGH *v.* B. KALLYAN SINGH. **44 All. 350 = 20 A. L. J. 170 = 65 I. C. 799 = A. I. R. 1922 All. 27.**

—S. 11, Expl. 4—Execution proceedings — No adjudication.

———*Earlier order not deciding the point raised in the latter application is not* res judicata.

An order in an earlier execution proceeding will not operate as *res judicata* if there is no adjudication of the point sought to be raised on the latter application. (*Spencer and Devadoss, JJ.*) CANDASWAMY CHETTIAR *v.* MARUDA PILLAI. **18 M. L. W. 652 = 1923 M. W. N. 835 = 76 I. C. 761 = 33 M. L. T. 64 = A. I. R. 1924 Mad. 145.**

—S. 11—Execution proceedings—Notice.

———*Order is not* res judicata *unless passed after notice to parties.*

To give the effect of *res judicata* to an order in execution, it should have been passed after notice to parties. (*Krishnan, J.*) RAMUDU CHETTY *v.* VARADARAJU CHETTIAR. **13 M. L. W. 289 = 62 I. C. 480 = A. I. R. 1921 Mad. 532.**

—S. 11—Execution proceedings—Order with jurisdiction.

———*Court in which suit was filed losing territorial jurisdiction but passing decree—Order directing execution by another Court acquiring such territorial jurisdiction but subordinate to another District Judge is not* res judicata.

Where a decree is passed by a Court within a certain district but that Court loses its territorial jurisdiction, which is transferred to another Court in another district, the latter Court is incompetent to execute the decree without a formal transfer of the decree for execution and an order passed by that Court directing execution without such transfer does not make the matter *res judicata*. (*Ramesam and Devadoss, JJ.*) SUBRAMANIA AYYAR *v.* SWAMINATHA CHETTIAR. **114 I.C. 545 = 28 M. L. W. 885 = A. I. R. 1928 Mad. 746.**

—S. 11—Execution proceedings—Parties and representatives.

———*Hindu Law—Debts—Father—Matter in execution* res judicata *against father—Plea of* res judicata *is also effective against son.*

Execution against father is effective enough to bind the son also and if any matter in execution is *res judicata* against the father, the plea of *res judicata* is operative against the son too, for practically the father represents the son in execution proceedings even where the suit was not framed against him as manager of the family. (*Ramesam and Jackson, JJ.*) SUBRAMANIA PILLAI *v.* VENKATARAMA REDDI. **120 I. C. 375 = 1929 M. W. N. 776 = A. I. R. 1930 Mad. 257.**

———*Assignee of decree applying but application dismissed for want of proof of assignment—Second application held barred as* res judicata*—Assignee retransferring decree to decree-holders—They and their subsequent assigns are bound by decision against first assignee.*

An assignee of a decree applied for execution but his application was dismissed for want of proof of assignment. His second application was held as barred by *res judicata*. He then re-transferred the decree to

C. P. CODE, (1908), S. 11—Execution Proceedings —Parties and representatives.

original decree-holders who assigned the same to others, *Held*, that the original decree-holders are in the position of representatives of the first assignee on re-transfer of the decree, and they and their further assigns are bound by the decision against him. (*Kotval, A. J. C.*) PANDURANG *v.* SAMBHASHEO.

21 N. L. R. 159 = 92 I. C. 47 = A. I. R. 1926 Nag. 200.

——*Judgment-debtor adjudged insolvent—Official Assignee is not a representative of the judgment-debtor.*

A prior decision in execution proceedings to which the defendant was party to the effect that the suit property was liable to be attached in execution of a decree against him, does not bind the Official Assignee appointed in consequence of the defendants' insolvency, as the Official Assignee, cannot be deemed to be the legal representative of the insolvent defendant within the meaning of S. 11 nor can he be deemed to be litigating under the same title as the defendant. 7 A. 752, Foll. (*Phillips, J.*) OFFICIAL ASSIGNEE, MADRAS *v.* AIYU DIKSHITHAR. **88 I. C. 85 = A. I. R. 1925 Mad. 688 = 48 M. L. J. 530.**

—S. 11—Execution proceedings—Prior agreement.

——*Agreement for sale of property by judgment-debtor—Notice of previous petition for execution by attachment and sale reaching judgment-debtor subsequently—Promisee is not prevented from asserting his rights in the execution proceedings.*

Where after a judgment-debtor enters into an agreement for sale of property, notice of a previous application for execution of the decree by attachment and sale of the property reaches the judgment-debtor and the property is subsequently attached and sold in execution of the decree, the promisee under the contract for sale is not precluded by the execution proceedings, on the ground of *res judicata*, from asserting his rights against the auction purchaser. (*Wallis, C. J. and Seshagiri Aiyar, J.*) CHAMIYAPPA THARAGAN *v.* MRS. RAMA IYER. **44 Mad. 232 = 62 I. C. 121 = 1921 M. W. N. 53 = A. I. R. 1921 Mad. 30 = 40 M. L. J. 65.**

—S. 11—Execution proceedings — Proceedings after remand.

——Fresh objection to an application in execution proceedings is not barred where the application has been remitted by superior Court overruling former objection. (*Mukerji and Dalal, JJ.*) SANTI LAL *v.* RAJ NARAIN. **5 L. R. A. (Civ). 565 = 82 I.C. 65 = A. I. R. 1924 All. 804.**

—S. 11—Execution Proceedings—Sale proclamation.

——*Ground of want of attachment available at the time of notice of settlement of proclamation must be urged then and not reserved for later occasions—It operates otherwise as* res judicata.

A party who is sought to be affected by the bar of *res judicata* should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contention against such a decision. Where a question of want of attachment is available to the judgment-debtor, the notice of settlement of proclamation gives him the opportunity of putting forward that ground, and that he must put it forward then, if he wants to do so and should not be allowed to reserve it for later occasion because if the objection succeeds it makes further execution proceedings futile. 40 Mad. 1016, Foll. A. I. R. 1921 P. C. 23 and 8 Cal. 51, Ref. A. I. R. 1924 Mad. 1 (F.B.), Dist. (*Pandalai, J.*) SESHAYYA *v.* SATTI RAJU. **120 I. C. 863 = A. I. R. 1930 Mad. 414.**

C. P. CODE, (1908), S. 11—Execution proceedings —Satisfaction of Decree.

——*Might and ought—Principle applies to execution proceedings though section does not apply.*

If the judgment-debtor fails to appear and plead, at the time the proclamation for sale is settled, that the property attached is not liable to attachment and sale, he cannot be allowed to so plead at any later stage of the execution proceedings. (*Kotval, A. J. C.*) MT. RUKHMABAI *v.* RAMCHANDRA. **21 N. L. R. 23 = 88 I. C. 831 = A. I. R 1925 Nag. 320.**

——*Order under O. 21, R. 66 is not final and cannot be* res judicata.

Order of the Court determining any of the particulars to be stated in the sale proclamation under O. 21, R. 66 is not a final order and the parties are at liberty to re-open the same question in a subsequent execution proceeding. (*Mullick, Ross and Kulwant Sahay, JJ.*) MOHIT NARAIN JHA *v.* THAKAN JHA.

4 Pat. 731 = 6 P. L. T. 843 = 3 Pat. L. R. 118 = 1925 P. H. C. C. 189 = 88 I. C. 332 = A. I. R 1925 Pat. 500 (S. B.)

——*Decision under is not* res judicata *in a later suit.*

Proceedings under O. 21, R. 66 are ministerial proceedings or to be more accurate they are non-judicial or quasi-judicial proceedings. The Court has to decide the properties to be sold and the incumbrances on the property. A decision on any such point is no *res judicata* in a later regular suit. (*Mukerji, J.*) TOTA RAM *v.* GAURI SHANKAR. **5 L. R. A. (Civ.) 218 = 78 I. C. 582 = A. I. R. 1924 All. 480.**

———*Omission to appear to settle terms does not bar plea that property was not liable to attachment.*

Where there is nothing more than the non-attendance at the hearing of an application to settle the terms of a sale proclamation, the non-applicant cannot be taken to be estopped by the principle of *res judicata* thereafter so as to prevent him from pleading that the property was not liable to attachment in execution by reason of that non-attendance. (*Schwabe, C.J. Oldfield and Ramesam, JJ.*) CHIDAMBARAM CHETTI *v.* KANDASAMI GOUNDAN. **46 Mad. 768 = 1923 M. W. N. 571 = 18 M. L. W. 757 = 74 I. C. 155 = A. I. R. 1924 Mad. 1 = 45 M. L. J. 346 (F.B.)**

——*Decision that notice under O. 21, R. 66 is not necessary to a party, bars plea of want of notice as* res judicata *even after sale—C. P. Code, O. 21, R. 66.*

Where a puisne mortgagee who is a *pro forma* defendant asked to be made a party but his prayer was rejected.

Held, he cannot re-agitate the same matter by saying that he was not liable to be evicted as no notice was served upon him under O. 21, R. 66. (*Das and Ross, JJ.*) BAIJNATH SINGH *v.* HARI PRASAD BAL.

1924 P. H. C. C. 209 = 7 P. L. T. 353 = 92 I. C. 326 = A.I.R. 1924 Pat. 628.

——*Settlement of sale proclamation after notice—Court cannot go behind, in subsequent proceedings.*

Where after notice to the judgment-debtors, a sale proclamation was duly settled under O. 21, R. 66, the Court cannot, in subsequent proceedings, go behind that order. (*Das and Adami, JJ.*) WILLIAM MALING GRANT *v.* SURAJMAL MARWARI.

1923 P. H. C. C. 76 = 1 Pat. L. R. 53 = 72 I. C. 860 = A. I. R. 1923 Pat. 134.

—S. 11—Execution proceedings—Satisfaction of decree.

——*Order of satisfaction of decree bars fresh execution application unless set aside.*

When an order of satisfaction of decree is entered by Court in execution and is not set aside, it operates as *res judicata* and bars a subsequent application for execution. (*Shadi Lal, C. J. and Le Rossignol, J.*) MUL RAJ *v.* KISHORE LAL. **94 I. C. 172 = A. I. R. 1926 Lah. 518 (2).**

—S. 11—Execution proceedings—Separate suit.

———*Objection raised in execution proceedings that land of judgment-debtor could not be attached as he was agriculturist dismissed—Separate suit for declaration that judgment-debtor is agriculturist is barred.*

Where an objection by the judgment-debtor that his land could not be attached and sold in execution of decree, he being an agriculturist is dismissed, a separate suit by him for declaration that he is an agriculturist does not lie by reason of S. 47. It is a direct attempt to set aside a decision of the executing Court between the parties to the suit in matter relating to the execution or satisfaction of the decree. (*Addison, J.*) GHERU MAL *v.* UDA. **31 P.L.R. 191 = A.I.R. 1930 Lah. 628.**

———*Previous objection in execution dismissed as premature—Subsequent suit in respect of the same plots is not barred.*

Plaintiffs in the present suit were some of the defendants in a previous suit. That suit was decreed against the other defendants but dismissed as against the present plaintiffs. The decree-holder in that suit started execution proceedings and the present plaintiffs objected as regards execution in respect of their plots but their objections were disallowed as premature. They sued for declaration and also prayed for possession of the same plots in the event it were found they were not in possession. The Courts below dismissed the suit on the ground that it was barred by the provisions of S. 47, C. P. Code. In the lower appellate Court the plaintiffs asked that the plaint in the present suit might be treated as proceedings under S. 47. The Court below refused the prayer on the ground that proceedings under S. 47 were barred by the rule of *res judicata* arising out of the previous order in execution.

Held, that the suit was not barred by the rule of *res judicata* and it should be treated as proceedings under S. 47. (*Wazir Hasan and Raza, JJ.*) TALUQDAR KHAN *v.* KHAIRULNISA. **4 O. W. N. 1045 = 106 I. C. 133 = A. I. R. 1928 Oudh 38.**

———*Order allowing legal representative to execute decree is appealable—Subsequent suit to challenge the order is barred.*

An order passed in execution proceedings that a person is a legal representative is within the jurisdiction of the execution Court and if not appealed against bars a subsequent suit challenging that order. 2 Cal. 131 (P.C.), Rel. on. (*Phillips, J.*) MUSTHABU *v.* NANI. **92 I. C. 377 = A. I. R. 1926 Mad. 536.**

—S. 11—Execution proceedings—Ultra vires order.

———*Order* ultra vires *does not operate as* res judicata *in same proceeding.*

An order of executing Court which is *ultra vires* does not operate as *res judicata* in a subsequent stage of the same execution proceedings. (*Jwala Prasad and Kulwant Sahay, JJ.*) GAJADHAR PRASAD *v.* FIRM MANULAL JAGARNATH. **4 Pat. 440 = 93 I. C. 257 = 7 P. L. T. 456 = A. I. R. 1925 Pat. 807.**

—S. 11—Ex parte decree.

———*Even* ex parte *decision in previous rent-suit involving questions of status and rate of rent operates as* res judicata *as regards these questions.*

If in a previous suit by landlord against the tenant for rent the questions of status and rate of annual rent were directly and substantially in issue; they operate as *res judicata* in subsequent rent-suit between the same parties or the landlord and the tenant's assignees or ransferees, and this is the case even though the decree

in the previous case be *ex parte.* A. I. R. 1927 All. 552; A. I. R. 1925 Mad. 378; 7 O. C. 169, Rel. on. (*Wazir Hasan, C. J. and Srivastava, J.*) BIJAI BAHADUR SINGH *v.* BHAGWAN BAKHSH SINGH. **7 O. W. N. 507 = A. I. R. 1930 Oudh 335.**

———Ex parte *decree acts by way of* res judicata *quite as much as decree passed on proper contest.*

All that S. 11 requires is that the issue has been heard and finally decided. It does not prescribe the method of hearing and the character of decision in order to make it binding in a subsequent suit so that an *ex parte* decree where the Court has not brought its mind to bear properly on the merits of the issue, is as binding by way of *res judicata* as a decree of any other kind. 24 All. 138; 24 All. 282; 7 A. L. J. 401; 12 A. L. J. 206; 12 A. L. J. 1011, Rel. on. (*Dalal, J.*) MT. DULARI *v.* EDWARD THELWAL. **A. I. R. 1929 All. 761 (2).**

———Ex parte *decision operates as* res judicata.

There is no distinction under S. 11 between an *ex parte* decree and a decree which has been contested. (*Ashworth, J.*) HAR GOBIND *v.* GITAM. **119 I. C. 567 = A. I. R. 1929 All. 346.**

———*Adjudication in* ex parte *proceedings operates as* res judicata—*Amount claimed as revenue or rent with interest decreed* ex parte—*Right to receive interest in subsequent suit cannot be* res judicata—*Unless finding in previous suit decides expressly or by necessary implication question of recurring right to receive interest decision cannot be* res judicata *so as to entitle plaintiff to interest on arrears accruing due subsequently—Interest claimed as damages in previous suit—Subsequent default in different circumstances cannot entitle plaintiff to damages.*

Where an issue of law or fact is raised and decided *ex parte* it is settled law that the adjudication will operate as *res judicata* but where a certain amount is claimed as revenue or rent for certain years with interest and is decreed *ex parte* in terms of the prayer all the requirements of the rule of *res judicata* are not necessarily fulfilled in a subsequent contested suit in which the plaintiff's right to receive interest is specifically in question. Unless the finding in the previous suit expressly or by necessary implication decides the question of a recurring right to receive interest as distinguished from a mere award of the interest claimed for the arrears in respect of the years then in suit the previous decision cannot operate as *res judicata* so as to entitle the plaintiff to receive interest on arrears of revenue or rent accruing due subsequently though he is not, apart from *res judicata*, so entitled.

If in the previous suit the interest was claimed as damages and the Court decreed as such it can have no greater effect than to establish the plaintiff's right to interest by way of damages for the default then in question. A subsequent default under different circumstances will not necessarily entitle the plaintiff to damages.

If expressly or by necessary implication the plaintiff's recurring right was affirmed or negatived so as to make such recurring right a matter directly and substantially in issue the decision will operate as *res judicata* even though the causes of action in the two suits may be different. 16 Cal. 300 (F.B.); A. I. R. 1922 Pat. 303 and 26 Bom. 25, Foll. (*Niamatullah, J.*) MAHARAJ SINGH *v.* SRI RAJA SURYAPAL SINGH. **9 L. R. A. Rev. 306 = 113 I. C. 758 = A. I. R. 1929 All. 29.**

———*There is no general proposition that* ex parte *decree for arrears of rent operates or does not operate as* res judicata *in suit for subsequent year's rent—In suit for arrears of rent, defendant pleading that rate claimed* *was higher but no issue framed on rate of rent payable and* ex parte *decree passed—Decree would not operate as* res judicata *against defendant.*

It is not correct to state as a general proposition of law that an *ex parte* decree for arrears of rent operates, or does not operate as *res judicata* regarding the rate of rent in a subsequent suit. The question whether such a decree is *res judicata* or not must be determined with reference to the special facts of each case. In a previous suit for arrears of rent at a certain rate per year, the defendant-tenant raised the plea that the rate payable was lower than what was claimed. But no issue was framed on the point, and the defendant, having remained absent on the day of hearing, an *ex parte* decree was passed against him allowing the whole claim of the plaintiff.

Held, that the *ex parte* decree would not bar the defendant from pleading that the rate claimed was higher in a subsequent suit for rent. A. I. R. 1925 Mad. 378; Mad. C. R. P. 230 of 1924; A. I. R. 1926 Cal. 114, Dist.; A. I. R. 1926 Bom. 49; 16 Cal. 300 (F. B.); 45 I. C. 416; 65 I. C. 581; A. I. R. 1926 Cal. 672, Ref.; A. I. R. 1921 Bom. 87 (F. B.), Rel. on. (*Madhavan Nair, J.*) RAJAH OF VIZIANAGARAM *v.* P. APPALARAJU. **118 I. C. 497 = A. I. R. 1929 Mad. 673.**

———*Suit by second mortgagee.*

Where a second mortgagee filed a suit on his mortgage impleading the prior mortgagee as a party to the suit and specifically stating in the plaint that that prior mortgagee was not entitled to priority, and that prior mortgagee did not appear in that suit, and the property was sold in execution of the decree in that suit, and, subsequently, the prior mortgagee instituted a suit on his prior mortgage. *Held*, that the prior mortgagee had lost his priority by reason of his omission to plead it in the second mortgagee's suit. (*Dalal, J.*) MUSHTAQ AHAMAD *v.* MT. AFZAL BEGAM. **117 I. C. 820.**

———*Decision against a defendant did not appear.*

A decision in a suit against defendant who did not choose to appear is as much binding upon him as on the defendants who appeared and contested. A. I. R. 1926 Cal. 650 and A. I. R. 1925 Cal. 427, Ref. (*Suhrawardy and Graham, JJ.*) AYETONNESSA BIBI *v.* AMJED ALI. **48 C. L. J. 184 = 32 C. W. N. 828 = 115 I. C. 588 = A. I. R. 1928 Cal. 717.**

———*Parties carrying on mutual and common account—Defendant's suit based on it decreed* ex parte *against plaintiff—Subsequent suit by plaintiff based on an account due from defendant is barred.*

The parties carried on a mutual and common account, each being purchaser of some articles from the other. The defendant brought against plaintiff in Small Causes Court a suit on the basis of mutual account which was decreed *ex parte*. In a subsequent suit by plaintiff against the defendant claiming a certain amount due from him on the basis of an account,

Held, that the plaintiff's suit was barred by *res judicata*. A. I. R. 1921 P. C. 11, Foll. (*Iqbal Ahmad and Kendall, JJ.*) NIZAM ULLAH *v.* AHMAD BHAI & CO. **25 A. L. J. 711 = 103 I. C. 365 = A. I. R. 1927 All. 799.**

———*Ex-parte* decree does operate as *res judicata*. (*Wallace, J.*) SUBBA AIYAR *v.* PICHUMANI AIYAR. **24 M. L. W. 260 = 97 I. C. 601 = A. I. R. 1926 Mad. 1144.**

———*Dismissal of application—Matters in subsequent suit to set aside decree, outside scope of R.* 13—*Non-service of summons is not* res judicata.

Where the subsequent suit to set aside an *ex-parte* decree contained matters which could not have been raised in an application under O. 9, R. 13, which had been dismissed.

Held, that the question of non-service of summons was not precluded by *res judicata* in the subsequent suit. (*Greaves and Mukerji, JJ.*) NALINI KANTA MUKHERJI *v.* HARI NIKARI. **41 C. L. J. 281 = 86 I. C. 779 = 29 C. W. N. 325 = A. I. R. 1925 Cal. 663.**

———An *ex parte* decision can operate as *res judicata*, even in rent suits. 16 C. 300 (F. B.) not Foll. (*Devadoss, J.*) GOVINDOSS KRISHNADOSS *v.* P. MANIKYANAYANIM VARU. **82 I. C. 990 = A. I. R. 1925 Mad 378.**

———Ex parte *decree precludes defendant from pleading in execution that he was agriculturist on the date of decree—Deccan Agriculturists' Relief Act, Ss.* 3 (*w*), 7 *and* 12.

Where owing to absence of pleas on the part of defendant the Court passes an *ex parte* decree without examining him and the plaintiff under Ss. 7 and 12, the Court must be deemed to have decided by necessary implication that the defendant is not an agriculturist and therefore in execution proceedings the defendant cannot plead that he was agriculturist at the time of execution of the decree. (*Rupchand Bilaram, A. J. C.*) LAWRENCE PHILLIPS & CO. *v.* M. R. F. NAZARETH. **19 S. L. R. 247 = 78 I. C. 806 = A. I. R. 1925 Sind 86.**

———*Number of defendants—Common interest.*

Where a number of defendants in a case have a common interest and the contest is carried on by some of them *bona fide* against the plaintiff's claim the defendants who are *ex parte* are as much bound by the decision as those who contested. (*Spencer and Devadoss, JJ.*) MEYYAPPAN SERVAI *v.* MEYYAPPAN AMBALAM. **19 M. L. W. 484 = 83 I. C. 985 = 34 M. L. T. 209 = A. I. R. 1924 Mad. 571 = 46 M. L. J. 471.**

———*Res judicata* applies even to *ex-parte* decrees. 4 O. L. J. 522. (*Kendall, A. J. C.*) ASHARFI LAL *v.* DEPUTY COMMISSIONER, GONDA. **11 O. L. J. 448 = 79 I. C. 660 = A. I. R. 1924 Oudh 419.**

———*Rejection of application does not bar a suit to set aside decree as fraudulent and also of proving incidentally non-service of summons.*

The fact that the plaintiff applied and failed to have an *ex-parte* decree set aside under O. 9, R. 13, does not prevent him from maintaining an action for setting aside the decree on the ground of fraud, and incidentally proving, as an index of the fraud that summons was not served on him in the previous suit. 29 Cal. 395, Foll. (*Das and Macpherson, JJ.*) JANKI KUAR *v.* THAKUR RAI. **1923 P. H. C. C. 336 = 75 I. C. 343 = 5 P. L. T. 37 = A. I. R. 1924 Pat. 241.**

———Later suit for declaration that a decree *ex-parte* is void for fraud is untenable if an earlier application to set aside the decree has been dismissed unless fresh grounds of fraud are mentioned. (*Mullick and Bucknill, JJ.*) RAM RUP GOSHAIN *v.* MAHABIR SHAH. **2 Pat. 833 = 74 I. C. 825 = 5 P. L. T. 66 = 2 Pat. L. R. 65 = A. I. R. 1924 Pat. 238.**

———*Plaintiff* ex parte *in previous suit—Decision is* res judicata.

Where the subject-matter of the subsequent suit was directly and substantially in issue in the previous suit and the plaintiffs (defendants in that suit) instead of contesting it were *ex parte*.

Held, the previous suit operated as *res judicata*. (*Campbell, J.*) MIS KHEM *v.* SHARFU. **5 Lah. L. J. 163 = 74 I. C. 577 = A. I. R. 1923 Lah 560.**

—S. 11—Fraud.

———*Subsisting judgment set up as* res judicata—*It can be impeached on ground of fraud and collusion in the same suit—Decree—Setting aside.*

C. P. CODE (1908), S. 11—Fraud.

When a subsisting judgment, order or decree is set by one party as a bar to the claim of other party, it is not necessary for the other party to bring a separate suit to have the same set aside, but it is open to him in the same suit in which it is sought to be used against him to show that it was obtained by fraud or collusion. A. I. R. 1926 Cal. 167, Dist.; 27 Cal. 11; 26 Cal. 591; 21 C. W. N. 594; 24 All. 242; 28 Bom. 639, Ref. (*Mukherji, J.*) JAMIRADDIN *v.* KHADEJANESSA.

114 I. C. 407 = A. I. R. 1929 Cal. 685.

———*Suppression of facts in previous suit—Same facts cannot be used again to defeat the claim of others.*

A party, having acquired an interest in some of the property upon a suppression of the fact that there are other persons with a superior right to it, cannot, in a subsequent suit, use that fact to a defeat a claim for partition of another portion of the same estate. (*Fforde and Campbell, JJ.*) MT. SAHIBZADI BEGAM *v.* MD. UMAR. **8 Lah. 15 = 27 P. L. R. 504 = 96 I. C. 1002 = A. I. R. 1926 Lah. 603.**

———*Court finding in later suit that summons was not served on defendant in former suit—No fraud is established thereby.*

The main allegation in this suit was that the defendant 1 did not receive summons in the previous suit and that the *ex-parte* decree was got fraudulently behind his back. The evidence discussed by the Judge was only the evidence of the service of summons. The finding was non-service,

Held, that is not evidence of fraud and the dogmatic statement that the previous decree was obtained fraudulently does not amount to a proper finding that the decree has no effect because of fraud. If there is nothing to indicate that the Court which tried the first suit had not satisfied itself of the service of summons it must be presumed that the Court was satisfied before the decree was made. (*Ross, J.*) HARNARAIN PANDEY *v.* NAND KESHWAR PANDEY. **71 I. C. 573 = 1 Pat. L. R. 127 = A. I. R. 1923 Pat. 406.**

—S. 11—Heard and finally decided—Absence of finding.

———Certain property which belonged to three brothers *A*, *B* and *C*, was subject to a mortgage and *C* had sold his share to *D*. Then *A* brought redemption suit making both his brothers and *D* as defendants. In that suit *C* pleaded and *D* denied that the sale in favour of *D* was not genuine but *C* afterwards withdrew his plea and no finding was given on the question, and Court gave redemption decree in favour of the three brothers only and not in favour of *D* also. *D*'s representative-in-title then sued for partition.

Held, that the decree in the previous redemption suit, although it was not in favour of *D* also, did not act as *res judicata* as regards the suit for partition. (*Kumaraswami Sastri and Reilly, JJ.*) RAMAKRISHNAYYA *v.* SATYANARAYANA. **116 I. C. 137 = A. I. R. 1929 Mad. 291.**

—S. 11—Heard and finally decided.

———*Principal and agent—Suit for accounts—Decision in—How far* res judicata.

A decision in a prior suit by principals against agents wherein the amounts due by one party to the other were settled in respect of certain transactions bars a subsequent suit by agents against the principals in respect of the same transactions. (*Shadi Lal, C.J. and Addison, J.*) FIRM SAGHRU MAL-HAR CHARAN DAS *v.* FIRM DHANPAT RAI. **7 Lah. L. J. 420 = 92 I. C. 198 = 26 P. L. R. 685 = A. I. R. 1925 Lah. 596 (2).**

—S. 11—Heard and finally decided—Appeal from portion of decree.

C. P. CODE (1908), S. 11—Heard and finally decided—Arbitration.

———*Decree based on same reasoning.*

If a portion of a decree has become *res judicata*, then the rest of the decree based on same reasoning would also become *res judicata* even with reference to the other portion of the decree which alone is brought for review before the appellate Court. Where, therefore, it is decided that a plaintiff is entitled to subrogation and there is no appeal to the lower appellate Court from that portion of the decree of the trial Court, it is not open to the defendant-appellant to appeal against some portion only of the decree in so far as subrogation is allowed and thus call in question the decision of the trial Court. 28 Mad. 67, Rel. on.; 9 Cal. 635 and 6 C. L. R. 267, Ref. (*Anantakrishna Ayyar, J.*) PICHAI KONAR *v.* NARASIMHA IYER.

A. I. R. 1930 Mad. 471 = 58 M. L. J. 343.

—S. 11—Heard and finally decided—Application of rule.

———*Partition Suit—Decision in as to the extent of the liability of a joint family to a creditor*—Res judicata.

In a son's suit for partition against their father, the father's mortgagee also was impleaded as defendant the object being to get their share in the family property released from the burden of the mortgage. This point was fought out in the appellate Court though not in the trial Court, which reduced the rate of interest and held that the whole family property should be liable for the mortgage debt.

Held, that the decision of the appellate Court was complete and final and it would bar a subsequent suit by the mortgagee to recover from the separated property of the father the balance of interest disallowed in the previous suit. A. I. R. 1924 P. C. 144, Rel. on. (*Wazir Hasan, Ag. C. J. and Pullan, J.*) RAJENDRA NATH *v.* MAHABIR PRASAD. **6 O. W. N. 281 = 118 I. C. 766 = 4 Luck. 713 = A. I. R. 1929 Oudh. 275.**

———*Secondary relief claimed and determined by lower Court but not by appellate Court is not* res judicata.

The suit was for declaring a will to be a forgery. The question of its operating as an authority to adopt was also raised and determined by the lower Court. But the High Court, although both the questions were raised before it, only decided on the genuineness of the will.

Held, that the question as to the will being operative as an authority to adopt was not barred by *res judicata*. 24 Cal. 616 (P. C.) and 45 Cal. 442 (P. C.), Foll.

Held, further as the matter was made the ground of attack in the trial Court and was raised in the appellate Court, there was no ground for the applicability of the doctrine of constructive *res judicata* enunciated in Expl. 4.

Per *Seshagiri Aiyar, J.*—A mere ground of attack relating to the main relief should not be regarded as a separate relief, and the refusal to entertain a ground which related to the relief which was adjudicated upon by the judgment, cannot be regarded as a refusal of relief. Therefore, the constructive *res judicata* referred to in Expl. 4 has also no application to the present case. (*Abdur Rahim, O. C. J., Oldfield and Seshagiri Aiyar, JJ.*) VENKATRATNAM *v.* M. KRISHNAMA.

13 M. L. W. 25 = A. I. R. 1921 Mad. 21 (F. B.).

—S. 11—Heard and finally decided—Arbitration.

———*Award of arbitrators*—Res judicata.

X mortgaged his property with possession to *Y* and then to *Z* directing *Z* to pay off *Y*'s debt and obtain possession from him. *Z*, however, did not pay *Y*'s debt. *X* then sued *Y* for redemption, deposited mortgage money in Court and obtained possession from Court. *Y* instead of taking away money deposited in Court alleged that he had received it from *Z* and on the same day *Z* executed a sale deed of his mortgagee rights in favour of *Y*'s son *P*. Disputes then arose between the parties which were referred to arbitration. The agreement to refer to arbitration distinctly referred to the sale of mortgagee rights in favour of *P* and the arbitrators also considered the question of sale, decided that it was fictitious and passed award accordingly. *P* then sued *X* to recover possession on the basis of the sale deed executed in his favour.

Held, that it would be wrong to say that the question of the sale of mortgagee rights was not referred to arbitration. Hence *P*'s suit against *X* was barred by the award of the arbitrators. (*Nanavutty, J.*) BHOJ NATH *v.* SHIVA NANDAN. **7 O. W. N. 541= A. I. R. 1930 Oudh 389.**

—S. 11—Heard and finally decided—Change in law.

———*Point not decided on the prevalent view of the law—No bar in a subsequent suit.*

In a claim suit the defendant pleaded that the sale in plaintiff's favour was fraudulent and voidable under S. 53, T. P. Act and the Court refused to entertain the plea in accordance with the view of the law then prevailing. Subsequently a Full Bench held such plea was open. In a suit by the defendant in the claim suit to have the sale declared fraudulent,

Held, it was not barred by *res judicata* as the question had not been decided at all in the previous suit. (*Wallace, J.*) RAMAKKAL *v.* THIRUMAL PARIPALANA NIDHI, LTD. **85 I. C. 574= A. I. R. 1925 Mad. 1107.**

—S. 11—Heard and finally decided — Cross-objections.

———*Objections raised and decided against in appeal—Same cannot be raised by way of cross-objections.*

The rule allows a respondent to take any cross-objection which he could have taken by way of appeal; it does not allow him to take an objection which he has already taken by way of appeal and which he has been decided against him. (*Daniels, J.*) PARBHU DAYAL *v.* MURLI DHAR. **22 A. L. J. 365=78 I. C. 677= 5 L. R.A. Civ. 298=A. I. R. 1924 All. 867.**

—S. 11—Heard and finally decided—Decision on an issue.

———A party himself raised an issue which was decided in his favour by the trial Court. The issue was again fought out in the appellate Court whose decision was against the party.

Held, that as the issue was raised and fought by the party the decision would be binding on him and he cannot say that because he only raised the issue in the trial Court he is not bound by the consequences that followed in the appellate Court. A. I. R. 1924 P. C. 144, Foll. (*Boys, J.*) KAMELA BIBI *v.* BAQAR HUSAIN. **118 I. C. 168.**

———Where there was nothing to show that issues were framed or that the application for correction of the jamabandi was decided on the evidence duly recorded, held that the order could not be deemed to be *res judicata* in a subsequent proceeding. (*Oakden, S. M. and Smith, J. M.*) MAHABIR SINGH *v.* CHARITTAR SINGH. **13 R. D. 856.**

—S. 11—Heard and finally decided—Decision not on merits.

———*Failure to institute a suit for which permission was given—Subsequent suit if barred.*

Per *Niamatulla, J.*—Where the alleged trustee fails

to institute a suit for which permission is granted to him under S. 5, and consequently an order against him is passed by the District Judge, a regular suit by him for declaration that the property is held by him in private ownership or in the alternative that it is not held in trust which is governed by Act 14 of 1920 is maintainable—*Mukerji, J.*, contra. 30 All. 44; A. I. R. 1925 All. 615, not Applied. (*Mukerji and Niamatullah, JJ.*) MAHADEO BHARTHI *v.* MAHADEO RAI. **51 All. 805= 118 I. C. 513=1929 A. L. J. 653= A.I.R. 1929 All. 506.**

———*Decision to be final—If need be on the merits.*

A decision to be final for the purpose of S. 11 need not be on the merits. (*Wazir Hasan, Ag. C. J. and Pullan, J.*) RAJENDRA NATH *v.* MAHABIR PRASAD. **6 O. W. N. 281=118 I. C. 766=4 Luck. 713= A. I. R. 1929 Oudh 275.**

———*Order of rejection of memorandum of appeal presented by unauthorised vakil —Not* res judicata.

An order of rejection of a memorandum of appeal which has been presented by a vakil not properly authorized according to law cannot operate as *res judicata* in a subsequent proceeding in which an appeal has been filed in proper form but beyond limitation. (*Sen and Niamatullah, JJ.*) MOHAMMAD QAMAR SHAH KHAN *v.* MOHAMMAD SALAMAT ALI KHAN. **1930 A. L. J. 394=121 I. C. 546= A. I. R. 1930 All. 112.**

— *—Dismissal of a suit for mere declaration—Subsequent suit for possession not barred.*

Where a previous suit by plaintiffs was dismissed under the provisions of S. 42, Specific Relief Act because in the opinion of the Judge mere declaratory suit could not be maintained when the plaintiff under the law could have asked for consequential relief.

Held, that the decision cannot operate as *res judicata* in the subsequent suit for possession. (*Tek Chand and Agha Haidar, JJ.*) MD. YAR *v.* MD. YAR. **A. I. R. 1929 Lah. 596.**

———*Withdrawal of suit—If operates as* res judicata.

The basic principle of *res judicata* is that there should have been a final adjudication on merits. The case of withdrawal is analogous to a dismissal in default and as there is no decision on merits there is no *res judicata.* 177 P.R. 1888, Rel. on; 1 Mad. 84; 12 Cal. 563; 10 Mad. 272; A. I. R. 1923 All. 613; and 29 C. L. J. 11, Dist. (*Bhide, J.*) RAMMAL *v.* UPENDRA DATT. **110 I. C. 818=A. I. R. 1928 Lah. 710.**

———*Compromise decree— Setting aside of—Subsequent suit by the decree-holder—Not barred.*

A sonless Gakkar of Jhelum tahsil made a will bequeathing his land in favour of his daughter. She was succeeded by her son. The testator's brother instituted a suit against his minor grandson for possession of the land on the ground that the will was not executed when the testator was of a disposing mind and that he had no power to make a will under custom. The guardian *ad litem* of the minor compromised the suit and gave up the land in favour of the brother. The brother accordingly obtained a compromise decree for possession of the land in question. Later, the minor's suit to set aside this compromise was decreed in his favour. Thereupon, the brother instituted a suit for the land left by the brother on the same allegation as in his first suit.

Held, that the suit by the brother for the land was not barred on the principle of *res judicata.* (*Addison, J.*) FAZAL KHAN *v.* ANWAR. **29 P. L. R. 254= 110 I. C. 550=A. I. R. 1928 Lah. 489**

———*Suit dismissed for want of proper Court-fees- No bar to fresh enquiry.*

C. P. CODE (1908), S. 11—Heard and finally decided—Decision not on merits.

A suit dismissed for want of proper Court-fees cannot be said to have been decided by any competent Court, so as to bar a fresh enquiry. (*Gokar Nath Misra and Srivastava, JJ.*) Saira Bibi *v.* Chandrapal Singh. **5 O. W. N. 897 = 4 Luck. 159 = 114 I. C. 120 = 10 L. R. A. Rev. 211 = A. I. R. 1928 Oudh 503.**

———*Decision based upon interpretation of judgment of Settlement Court—If* res judicata *in a subsequent suit between the parties.*

Where in a previous suit the Court's decision was based entirely upon the interpretation of the judgment of the Settlement Court and the decision was no more than the statement of the legal meaning which the Court attached to the words of the Settlement Court's judgment and decree. *Held*, the decision would not act as *res judicata* in a subsequent suit between parties. (*Stuart, C.J. and Wazir Hasan, J.*) Jagat Jit Singh *v.* Brijmohan Das. **3 Luck 392 = 108 I. C. 98 = 5 O. W. N. 50 = A. I. R. 1928 Oudh 241.**

———*Dismissal of prior suit for non-joinder—Subsequent suit not barred.*

To constitute a matter *res judicata* it is necessary that the matter must have been heard and finally decided in the former suit. But where the former suit is dismissed only on the ground of non-joinder of parties the matter cannot be said to have been heard and finally decided and a subsequent suit based on the same cause of action is not barred. 24 Cal. 616 (P. C.) Foll. (*Cuming and Mullick, JJ.*) Jadu Nath *v.* Amulya Krishna. **46 C. L. J. 118 = 104 I. C. 576 = A. I. R. 1927 Cal. 794.**

———*Decision subject of appeal—No bar.*

Where there has been an appeal the matter is no longer *res judicata* but *res sub judice* and where an appeal is not finally heard and decided any matters therein cannot possibly be said to be *res judicata.* (*Martineau and Dalip Singh, JJ.*) Obedur Rahman *v.* Darbari Lal. **7 Lah. 423 = 27 P. L. R. 663 = 98 I. C. 584 = A. I. R. 1927 Lah. 1.**

———*Dismissal for mis-description of suit property does not bar subsequent suit.*

The dismissal of a suit on the ground of misdescription of property in suit is not a bar to a subsequent suit on the same cause of action either under S. 11 or under O. 2, R. 2. (*Scott-Smith, J.*) Bika *v.* Balande. **78 I. C. 579 = A. I. R. 1925 Lah. 193.**

———*Dismissal under O. 9, R. 3, C.P.C.*

A dismissal under O. 9, R. 3, creates no *res judicata* (*Dalal, J. C. and Neave, A. J. C.*) Mohammad Hasan *v.* Ali Haidar. **12 O. L. J. 1 = 85 I. C. 509 = 28 O. C. 8 = A. I. R. 1925 Oudh 337.**

———*Application for ascertainment of mesne profits—Dismissal of for default or as not pressed in suit—Does not bar a fresh petition.*

The dismissal of an application for ascertainment of mesne profits for default or as not pressed, in a suit in ejectment in which a preliminary decree for possession was passed, does not bar a fresh petition for ascertaining the mesne profits. (16 L W. 198 ; 16 C. L. J. 3, Dist. (*Phillips and Venkatasubba Rao, JJ.*) Ramachandra Raju *v.* Bhujanga Row. **19 M. L. W. 69 = 33 M. L. T. 261 = 79 I. C. 635 = 1924 M. W. N. 115 = A. I. R. 1924 Mad. 473 = 46 M. L. J. 46.**

———*Suit by Hindu widow for declaration that an execution sale was illegal—Dismissal under S. 47, C.P.C.—Does not bar a subsequent suit by reversioner for possession.*

Where a suit by a Hindu widow for declaring that a sale in execution was illegal was dismissed on the ground that the question of sale related solely to execution under S. 244 of Civil Procedure Code of 1882 or S. 47 of 1908.

Held, that there was no adjudication on the merits, as between the widow and the purchaser the suit having been dismissed on a preliminary point and that a suit by the reversioners, after the death of the widow for possession against the auction-purchaser is not barred (*Macleod, C. J. and Shah, J.*) Ganesh Kamchandra Kulkarni *v.* Laxmibai Venkatesh Narayan. **24 Bom. L. R. 249 = 67 I. C. 209 = 46 Bom. 726 = A. I. R. 1922 Bom. 96.**

———*Dismissal of prior suit for nonjoinder.*

A dismissal of a prior suit for the same relief will not operate as *res judicata* in a subsequent suit for the same relief when the prior suit was only dismissed for non-joinder of parties. Explanation 4 to S. 11, Civil Procedure Code, deals only with a case which has been tried on the merits. (*Spencer and Krishnan, JJ.*) Sankaran Nambi *v.* Devaki. **16 M. L. W. 26 = 73 I. C. 491 = 1922 M. W. N. 428 = A. I. R. 1922 Mad. 259 = 43 M. L. J. 572.**

———*Mortgage suit—Failure of plaintiff to appear on the day fixed for appointing a guardian to minor defendant—Dismissal of suit—Fresh suit not barred.*

In a mortgage suit a day was fixed for the appointment of a guardian of a minor defendant. The plaintiff having failed to appear on that day the suit was dismissed. *Held* the order was without jurisdiction and if that is so there is no valid decree which can operate as *res judicata* so as to bar a fresh suit of the plaintiff based upon the mortgage bond in question. (*Jwala Prasad, Ag. C.J. and Das, J.*) Sheikh Abdul Rahman *v.* Shib Lal Sahu. **1922 P. H. C. C. 81 = 63 I. C. 570 = 6 P.L. J. 650 = 2 P. L. T. 572 = A. I. R. 1922 Pat. 252.**

———Mortgage of khoti land with possession—Subsequent sale of equity of redemption to mortgagee in contravention of S. 9, Khoti Settlement Act—Adverse possession by mortgagee after date of sale—Mortgagor obtaining possession by possessory suit but mortgagee again regaining it by suit on basis of sale and title by adverse possession—Suit by mortgagor for redemption is barred by *res judicata.* (*Patkar and Baker, JJ.*) Ahmed Bhouddin *v.* Babu Devji Zujam. **53 Bom. 676 = 31 Bom. L. R. 778 = 122 I. C. 113 = A. I. R. 1930 Bom. 135.**

———*Dismissal for want of evidence.*

Dismissal of a petition owing to failure of petitioner to produce evidence in support of the facts alleged in the petition is a dismissal on the merits and so is binding on the Court as well as the parties. 12 Cal. 563, **Foll.** (*Wallace and Madhavan Nair, JJ.*) Govindoss Krishnadoss *v.* Rajah of Karvetnagar. **A. I. R. 1929 Mad. 404.**

———*Prior suit for possession based on inheritance and agreement—Decree in—Bar of—Subsequent suit based on inheritance barred.*

The plaintiff in a previous suit claimed his share under the Mahomedan Law. His claim was based partly on an agreement but mainly upon inheritance. A decree of Court was passed declaring that he should obtain possession of certain property subject to his making good what had been expended for the benefit of the family in the past. The question of his title was definitely and finally determined under the decree. He did not make any payment under the decree and allowed the decree to become time-barred. Subsequently he sued for the possession of the same property basing his claim upon inheritance under Mahomedan law independently of the decree in the previous suit.

Held, that the latter suit was barred, inasmuch as the question of his title being finally and definitely decided in the previous suit could not be reopened. A. I. R. 1925 P. C. 63, Dist. (*Stuart, C. J. and Wazir Hasan, JJ.*) HADI HUSAIN KHAN *v.* KAZIM HUSAIN. **3 O. W. N. Sup. 287 = 99 I. C. 478 = A. I. R. 1927 Oudh 60.**

———*Construction of grant—When* res judicata.

Where a document has been construed in a suit between the parties that construction even if erroneous, is binding on them in subsequent suits relating to the property not involved in the original suit. (*Odgers, J.*) GURUSWAMI PILLAI *v.* VEERABHADRA. **23 M. L. W. 540 = 95 I. C. 325 = A. I. R. 1926 Mad. 695.**

———*Demise—Dispute as to area—Decision as to*—Res judicata *in subsequent suit.*

Where a fixed parcel of land was demised whose boundaries were known and the only question in the prior suit was what was the area of that parcel, *held* in absence of encroachment, increment, fraud or error when once that question had been answered the decision was binding in all future litigation. (*Mullick and Bucknill, JJ.*) RADHIKA RAMAN *v.* SATNARAIN KOERI. **74 I.C. 961 = A. I. R. 1924 Pat. 307.**

———*Proceedings for letters of administration—Heirship—Decision as to*—res judicata.

In a previous proceeding for letters of administration the present parties were rival claimants. Their evidence was taken at length as in a regular suit and the claim of the respondent was decided against her, she being held to be not the legitimate daughter of the deceased.

Held, the decision in those proceedings barred the present suit for declaration by the respondent that she is the heir of the deceased. (*Pratt and Carr, JJ.*) MAUNG HAMAT *v.* MA HTAY. **1 Rang. 258 = 76 I.C. 494 = A. I. R 1923 Rang. 257.**

—S. 11 — Heard and finally decided— Decision under Specific Relief Act, S. 9.

———Where it was decided in a suit under S. 9, Specific Relief Act, that the plaintiff was not in possession of a certain property from a certain date, the question covered by that finding cannot be re-agitated between the parties and is *res judicata* in a suit for possession on declaration of plaintiff's title. (*Cammiade and S. K. Ghose JJ.*) RAJ GOPAL BHATTACHARJI *v.* SARAT KUMARI DEBI. **114 I. C. 82 = A.I.R. 1928 Cal. 758.**

S. 11—Heard and finally decided—Decision unnecessary—No res judicata.

———Where in a suit for specific performance of a contract of sale of land, relief as to possession was prayed for in the plaint but there was no reference to it in the judgment, *held*, that that relief may be taken to have been refused but the matter was not heard and finally decided within S. 11 and hence no *res judicata* especially when it was found that there was ground to hold that a decision on that relief was not considered to be necessary in that suit. (*Shah, Ag. C. J. and Kincaid, J.*) KRISHNAJI BABAJI HAVAL *v.* SANGAPPA MURIGAPPA WANGI. **27 Bom. L. R. 42 = 86 I. C. 137 = A. I. R. 1925 Bom. 181.**

—S. 11—Heard and finally decided—Declaratory suit.

———*Of the right to redeem—Subsequent suit for redemption—Not barred.*

In a suit by widow of the mortgagor in respect of the mortgage, a decree was passed in favour of the plaintiff, declaring the right to redeem and the right to recover possession on payment of a certain amount and further declaring devolution of the right on the death of the plaintiff, but no period for the payment of the mortgage money was fixed.

Held, that the decree was to be interpreted as purely declaratory in the nature of the plaintiff's right to redeem the mortgaged property leaving it open to the plaintiff to claim actual possession whenever she found it convenient to do so on payment of the mortgage money.

Held, further, that a subsequent suit for redemption was neither barred by the rule of *res judicata* nor by the provisions of S. 47, C. P. Code. (*Wazir Hasan and Gokaran Nath Misra, JJ.*) SURAJ BAKSHA *v.* GANGA BAKSHA. **4 O. W. N. 882 = 105 I. C. 93 = A.I.R. 1927 Oudh 457.**

———*Suit for mere declaration—Subsequent suit for Possession—Barred by* res judicata.

A plaintiff out of possession sued for declaration that he be declared an occupancy tenant ; his suit was dismissed on the ground that he did not substantiate his position as occupancy tenant. He filed another suit for possession against the defendants.

Held, that his suit was barred by *res judicata* and that he could not be allowed to contend in the second suit that the Court should not have gone into the merits in the former suit, as in that suit he would have failed only on the ground that he sued for mere declaration, when he ought to have sued for possession as well. (*Rafique, J.*) KASHI RAI *v.* MT. KALI KUERI. **77 I. C. 756 = A. I. R. 1923 All. 554.**

—S. 11—Heard and finally decided—Effect of.

———*Final decision of an issue.*

An issue which is raised by the parties and tried out between them in the suit before the decree is passed cannot be re-agitated on the execution side. (*Misra, J.*) BABU LAL *v.* MT. SUKHRANI. **13 O.L.J. 813 = 3 O. W. N. 771 = 99 I. C. 211 = A. I. R. 1926 Oudh 613.**

—S. 11—Heard and finally decided—Estoppel.

———*Suit on contract—Plea of contract illegal—Finding contract legal—Operates as a* res judicata *in a subsequent suit.*

Plaintiffs sued the defendants on the basis of an agreement which, according to them, was to import gold into French India from foreign parts. The defendants urged that the contract was for an illegal purpose being one to import gold into British India which was forbidden by law. But in a previous suit by defendants against the present plaintiff and a third person, the present plaintiffs had raised the same objection that the contract was for an illegal purpose and the Court had found that the contract was only to import gold into French India and therefore quite legal.

Held, that the finding in the previous suit would operate as *res judicata* in the present suit and the defendant cannot turn round and urge that in the previous suit he got a decree on an unlawful contract. (*Reilly and Cornish, JJ.*) AMIRCHAND NAGINDAS & CO. *v.* RAOJI BHAI MOTI BHAI. **31 M. L. W. 757 = A. I. R. 1930 Mad. 714 = 58 M. L. J. 613.**

—S. 11—Heard and finally decided—Ex parte order.

———Where the order is an *ex parte* order issued without hearing the opposite party, it cannot operate as *res judicata* and can be reviewed by the successor of the Judge who made such *ex parte* order. A.I. R. 1921 P.C. 11, Dist. (*Percival, J. C. and Rupchand, A. J. C.*) JIWANDAS VIRBHANDAS *v.* KHEMCHAND RAMDA-

116 I. C. 101 = A. I. R. 1929 Sind 110.

—S. 11—Heard and finally decided—Finding not recorded.

———*Issue raised but not decided—Not* res judicata.

The plaintiff in subsequent suit was not sued in the prior suit in the same capacity in which he sued in the later; though he professed to have the capacity of trustee of the suit property and contended that the property in dispute was trust property, he did not contest the suit to the end, and no finding on his contention regarding the nature of property was recorded; and after he ceased to contest the suit it proceeded, as it had begun on the basis that the property concerned was private property.

Held, that the decision in the prior suit that the property was private property is not *res judicata*. (*Reilly, J.*) SUBBIAH CHETTY *v.* NARAYANASWAMI.

103 I. C. 887 = A. I. R. 1927 Mad. 1100.

—S. 11—Heard and finally decided—Forma pauperis.

———*Application for leave —Dismissal —No* res judicata.

Where only the application for permission to appeal *in forma pauperis* is dismissed the issues arising in the appeal not being heard and finally decided, the appeal cannot operate to raise the bar of *res judicata*. (*Shadi Lal, C. J. and Agha Haidar, J.*) ATER MUHAMMAD *v.* ALLAH BAKSH.

A. I. R. 1930 Lah. 501.

———A matter decided behind the back of the judgment-debtor without notice to him may well have been decided in accordance with law, but it cannot be held to be *res judicata*. (*Boys, J.*) NOOR MUHAMMAD *v.* MAHMUD KHAN FAYAZ KHAN. **A. I. R. 1930 All. 699.**

—S. 11—Heard and finally decided—Interlocutory.

———*Judgment when* res judicata.

An interlocutory judgment if it is an adjudication and not merely an opinion, is binding upon the successor of a Judge passing it. 10 All. 162; A. I. R. 1923 Cal. 521; 20 C. W. N. 43; 32 Bom. 432; 16 All. 306; 16 C. L. J. 259; A. I. R. 1921 All. 276; 2 P. L. J. 663; A. I. R. 1923 All. 384; A. I. R. 1924 Cal. 160; and A. I. R. 1921 P. C. 11; Dist.; (1897) A. W. N. 150; 4 L. B. R. 256; 5 S. L. R. 184, and 14 A. L. J. 1171; Doubted and not Appl. 6 All. 269 (P. C.); A. I. R. 1924 Cal. 467; A. I. R. 1922 Cal. 307; 33 Bom. 293; 45 Cal. 111; 13 P. W. R. 1911; and 8 N. L. R. 92, Rel. on. (*Odgers and Curgenven, JJ.*) PARTHASARATHY APPA RAO *v.* VENKATADRI APPA RAO.

113 I. C. 646 = A. I. R. 1929 Mad. 121.

—S. 11—Heard and finally decided—Jurisdiction.

———*Decision as to.*

Where an objection that the Civil Court has no jurisdiction to make a reference is dismissed by the Court on full consideration of authorities, it is not open, on the principle of *res judicata*, to the successor-in-office to go behind the order and to dismiss the original application objection to which was first dismissed on the ground which had previously been decided against the objector. (*Jai Lal and Bhide, JJ.*) ASA NAND *v.* GANESHA RAM. **122 I. C. 724 = A. I. R. 1930 Lah. 836.**

—S. 11—Heard and finally decided—Mortgage suit.

———*Preliminary decree—Death of the mortgagor—Passing of final decree, despite objections from legal representatives—Separate suit if barred.*

Where, after preliminary decree was passed in a mortgage suit for sale, certain persons were brought on record as legal representatives of the deceased mortgagor, who challenged the mortgage for want of consideration and legal necessity but final decree was passed

against them, the Court having refused to go behind the preliminary decree, the final decree would not operate as *res judicata* in a separate suit brought by them for declaration that the decree was not binding on them. (*Banerji and King, JJ.*) KALLOO *v.* NIADAR SINGH.

1929 A. L. J. 425 = 115 I. C. 462 = A. I. R. 1929 All. 252.

———In 1879 mortgagee filed a suit to recover the money due on the mortgage, by the sale of the mortgaged property. The suit ended in a decree and an ineffectual execution application was taken out. In 1926 mortgagor filed a suit to redeem,

Held, that the later suit was not barred by *res judicata*. (Case law discussed). *Mirza and Broomfield JJ.*) BADRUDDIN *v.* SITARAM.

32 Bom. L. R. 933 = A. I. R. 1930 Bom. 401.

—S. 11—Heard and finally decided—Obiter dictum.

———Where a decision has been passed by a Court on an issue which it was not competent to decide, such a finding must be regarded as an *obiter dictum*, and it cannot operate as *res judicata*. A. I. R. 1924 P. C. 144, Dist. (*Pullan, J.*) ABID HUSAIN KHAN *v.* SRI THAKURJI. **107 I. C. 895 = A. I. R. 1928 Oudh 296.**

—S. 11—Heard and finally decided—Not res judicata.

———*Decision on assumed facts.*

In a suit for partition by a mortgagee in possession who was also a co-sharer the Court overlooking the fact that the mortgage-deed provided a period of 25 years for redemption assumed the mortgagee had become the owner of that property.

Held, that the question as to the extinction of the mortgage had not been "heard and finally decided," in the partition suit and a subsequent suit for redemption would not be barred. (*Patkar, J.*) KASHIRAM LAXMAN *v.* MAHESHWAR LAXMAN. **30 Bom. L.R. 1089 = 113 I. C. 384 = A. I. R. 1929 Bom. 116.**

—S. 11—Heard and finally decided—Partition suit.

———Dismissal for default—Subsequent suit not barred. 28 All. 627, Foll. (*Mukerji and Dalal, JJ.*) RADHE LAL *v.* MULCHAND. **46 All. 820 = 80 I.C. 933 = 22 A. L. J. 749 = 5 L. R. A. Civ. 541 = A. I. R. 1924 All. 905.**

—S. 11—Heard and finally decided—Prayer in plaint.

———*Absence in decree—Effect.*

The fact that the personal remedy is asked for in the plaint and that nothing appears about it in the decree, is not enough to say that the plaintiff is for ever after barred from asking for it. 5 M.L.J. 294 and 33 M.L.J. 382, Rel. on. (*Odgers and Curgenven, JJ.*) GOVINDASAMY KOUNDAN *v.* KANDASAMY KOUNDAN.

1927 M.W. N. 330 = 103 I. C. 528 = 39 M. L. T. 22 = A. I. R. 1927 Mad. 779 = 53 M. L. J. 489.

—S. 11—Heard and finally decided—Plea not allowed to be taken.

———Where a plea of non-joinder was not allowed to be raised in a suit on the ground that it was taken at a late stage,

Held, that the plea should be considered to have been taken and to have been decided against the party taking it and it would not, therefore, be open to that party in a subsequent suit to take that plea. (*Cuming and Chakravarti, JJ.*) KARUNAMOY SINHA *v.* TINKARI GHOSE.

91 I. C. 683 = A. I. R. 1926 Cal. 511.

—S. 11—Heard and finally decided—Question not decided.

———*Execution—Objection to—Dismissal for default*—Res judicata.

In execution of a money decree obtained against *X*, a member of a joint Hindu family, a house belonging to the joint family was attached. *X* raised the objection that the house as it belonged to an agriculturist could not be attached, but for default of prosecution the objection petition was dismissed. The house was subsequently sold. The wife and sons of *X* then brought a suit alleging that the house was ancestral property in *X's* hand and that being agriculturist's house it could not be sold in execution.

Held, that the wife of *X* had no personal interest although in the case of a partition between the father and sons she would be entitled to a share.

Held, further, that the suit would not be barred by *res judicata* because the order dismissing the objection petition had not decided whether the house belonged to an agriculturist and because the property being ancestral the father did not represent the sons.

Held, further, that the suit was maintainable as the sons were interested in the property and as they could not raise objection before the execution Court. (*Mukerji and Boys, JJ.*) AIDAL SINGH *v.* KHAZAN SINGH.
A. I. R. 1930 All. 727.

———Decision of the Settlement Officer under S. 104, B. T. Act (8 of 1885), enhancing rent under S. 30 (*b*), when no question was raised as to portion of land being an undivided share, is not *res judicata* in a subsequent suit for recovery of rent with a claim for enhancement under S. 30 (*b*). 29 Cal. 707 (P. C.) and 30 Cal. 339, Ref. (*Rankin, C. J. and Mukerji, J.*) BIR BIKRAM KISHORE MANIKYA BAHADUR *v.* RAJJAB ALI.
33 C. W. N. 1156 = A. I. R. 1930 Cal. 238.

———*Heard and decided—Redemption suit—Mesne profits left open.*

Where, in a suit for redemption, the claim for mesne profits was not adjudicated upon, though prayed for, the question must be deemed to have been left open and a subsequent suit for the profits alone is not barred by *res judicata.* (*Ross and Fazl Ali, JJ.*) KALI PRASAD SINGH *v.* FAUJDAR SINGH. **124 I. C. 94.**

———*Withdrawal of part of the claim in prior suit—Subsequent suit for that not barred.*

Where in the first suit, part of the claim being for a rendition of accounts for a certain period having been deliberately withdrawn, there was no decree affecting that portion of the claim, nor any finding on an issue relating to the right of the plaintiff for accounts against defendants.

Held, that the bar of S. 11 could not be raised to the second suit for the same claim. (*Sen and Niamatullah, JJ.*) RANGACHARYA *v.* GURU REVTE RAMAN ACHARYA. **1929 A. L. J. 229 = 114 I. C. 734 = A. I. R. 1928 All. 689.**

———Where *A* claims her title under *B*, but the title of *B* alone was in question in the previous suit and the adjudication in that suit was subsequent to the title of *A* the adjudication so come to against the alienor *B* subsequent to the alienation to *A* cannot operate as *res judicata* against *A*. (*Wallace and Srinivasa Ayyangar, JJ.*) RANGASWAMI *v.* SUNDARAPANDIA.
110 I. C. 548 = A. I. R. 1928 Mad. 635.

———*Mortgage suit against father and sons—Discharge of sons and decree against father alone—Sons—Subsequent suit by son's property not liable to sale in execution—Not barred.*

Where in a suit by a mortgagee for recovery of the mortgage debt against a Hindu father and his sons the pleader of the mortgagee stated that the sons may be discharged and a simple money decree passed against the father, the statement does not operate either as estoppel or as *res judicata* in a subsequent declaratory suit brought by the sons that the joint family property was not liable to attachment and sale in execution of the simple money decree passed against the father. (*Raza, J.*) MANOHAR LAL *v.* IMDAD ALI.
3 O. W. N. 862 = 98 I. C. 300 = A. I. R. 1927 Oudh 15.

———*Not* res judicata.

Where a particular question in dispute is expressly left open for a separate proceeding, the question does not become *res judicata* in a subsequent suit. (*Jai Lal, J.*) MT. MUL KUAR *v.* DIWAN CHAND.
96 I. C. 302.

———*Question tried as a revenue but not as a Civil Court.*

Where in partition proceedings a question of title was open to a Revenue Officer to be tried as a Civil Court, following the procedure of a Civil Court as the Presiding Officer of such a Court, but he did not try it as a Civil Court, it is not barred by the rule of *res judicata* in a subsequent civil suit. (*Abdul Raoof and Harrison, JJ.*) GANGA SINGH *v.* BHAN SINGH.
91 I. C. 528 = A. I. R. 1926 Lah. 178.

———*Point is not* res judicata.

Where a point is expressly left undecided by the Court in a suit it can be agitated in subsequent suit. (*Lindsay and Kanhaiya Lal, JJ.*) SHIAM LAL *v.* RADHA BALLABH. **48 All. 34 = 88 I. C. 822 = 23 A. L. J. 950 = 6 L. R. A. Civ. 547 = A. I. R. 1925 All. 770.**

———*Lower Court deciding on title and possession—Appellate Court deciding on title alone—No* res judicata *regarding possession.*

Where the decision of the previous suit proceeded in the first Court both on the question of possession and title but the decision of the appellate Court was confined to the question of title alone.

Held, there was no *res judicata* regarding the question of possession. (*Sulaiman and Kanhaiya Lal, JJ.*) GULAB RAI *v.* SUNDAR LAL. **5 L. R. A. Civ. 528 = 86 I. C. 295 = A. I. R. 1925 All. 243.**

———*Mortgagor suing for accounts under one mortgage—Mortgagee putting forth other martgages—Court deciding suit only with respect to one mortgage—Subsequent suit on other mortgages by mortgagee is not barred.*

If a mortgagor executes several mortgages on the same property, and asks for an account on one mortgage under S. 15-D of the Dekkhan Agriculturists' Relief Act, and the mortgagee claims that an account should be taken of all the mortgages existing on the property, so that the mortgagor would not be entitled to redeem except on paying what is due on all the mortgages, and still, if the Court takes an account of the one mortgage only, and decides nothing with regard to the validity of or the existence of other mortgages at the time when the account is taken, a subsequent suit by mortgagee to recover under the other mortgages is not barred under S. 11. (*Macleod, C. J. and Coyajee, J.*) MAHADEO NARAIN *v.* SHRIDHARBHAT GOPALBHAT.
27 Bom. L. R. 488 = 87 I. C. 716 = A. I. R. 1925 Bom. 311.

———*Redemption Suit—Decree not drawn up as per O. 34, R. 7—Subsequent suit for redemption not barred.*

Where it was provided in the previous decree that on plaintiff's failure to pay the money and the Court-fees within the prescribed period the decree could not be executed. But the decree was not drawn up in the manner prescribed by O. 34, R. 7 of the C. P. Code and did not contain any clause that, if payment was not made on or before the date fixed by the Court, the plaintiff should be debarred from all right to redeem or that the mortgaged property should be sold, and where no final decree was passed under R. 8.

Held, another suit for redemption was not barred either by O. 34, R. 7 or by S. 11. (*Scott-Smith and Fforde, JJ.*) ARURA *v.* BUR SINGH.

5 Lah. 371 = 84 I. C. 67 = A. I. R. 1925 Lah. 31.

———Where there is no express adjudication on a particular point there is no *res judicata.* (*Shadi Lal, C. J. and Le Rossignol, J.*) NIHAL SINGH *v.* NARAIN SINGH. **6 Lah. L. J. 45 = 80 I. C. 525 = A. I. R. 1924 Lah. 469.**

———*Plea of occupancy right raised but not decided.*

Where the question of occupancy right was not decided in a previous suit but the same was disposed of on another plea.

Held, that the point was not *res judicata* in a subsequent suit. (*Lord Dunedin.*) MIDNAPORE ZAMINDARI CO. *v.* NARESH NARAYAN ROY.

30 M. L. T. (P. C.) 279 = 64 I. C. 231 = 48 I. A. 49 = 48 Cal. 460 = 14 M. L. W. 265 = A.I.R. 1922 P. C. 241.

———*Provincial Insolvency Act (III of* 1907), *S.* 36 *—Transaction several years old—Insolvency Court refusing to entertain application to set aside—Subsequent suit under S.* 53. *T. P. Act not barred.*

Where a transaction, being several years old could not be questioned by the Insolvency Court under S. 36 the question which the Insolvency Court expressly declined to adjudicate upon, is not *res judicata* in a subsequent suit under S. 53 of the T. P. Act, 15 A. L. J. 661, Ref. to. (*Piggott and Walsh, JJ.*) MT. GAURA *v.* MOHAMMAD ABDUL MAZID.

64 I. C. 523 = A. I. R. 1922 All. 443.

———*Mere suggestion by Court—Not* res judicata.

The mere compliance with a suggestion of the Court to take a proceeding contemplated by a certain enactment is not *res judicata* on the question as to whether that particular enactment applies to the case, where there is no judicial decision on the point. (*Oldfield and Seshagiri Aiyar, JJ.*) VISWANATHA SASTRI *v.* SITALAKSHMI AMMAL. **13 M. L. W. 37 = 61 I. C. 979 = 1921 M. W. N. 181 = A. I. R. 1921 Mad. 126.**

———A decision in a previous suit cannot operate as *res judicata* in a subsequent suit if there was no contest, no issue and no finding *between the parties* although they were ranged on opposite sides. (*Kotwal, A. J. C.*) DOMA *v.* GOVIND. **76 I. C. 635 = A. I. R. 1924 Nag. 124.**

———*A prior suit—not* res judicata *in a subsequent suit.*

In a case where the previous proceeding was confined by statute to the question of possession a subsequent proceeding in which the question of title is raised is not barred by *res judicata.* (*Stuart, J.*) LALMAN *v.* FAZAL MUHAMMAD KHAN. **5 L. R.A. Rev. 132 = 78 I. C. 115 = A. I. R 1925 All. 200.**

—S. 11—Heard and finally decided—Rent suit.

———Ex parte *decree*—Res judicata

Plaintiff in a rent suit claimed rent at the rate of Rs. 16 and the entry in the Record-of-rights of 1918 was in his favour. But in a cess-return filed in 1912 under the Cess Act the jama was Rs. 5-2-5 gandas. The plaintiff in 1917 had sued for rent at the rate of Rs. 16 and had obtained an *ex parte* decree in full.

Held, that the suit in 1917 was *res judicata* and the entry in the Record-of-rights was not rebutted by the cess-return of 1912. (*Cammiade and S. K. Ghose, JJ.*) STHIRA HARI BHATTACHARJEE *v.* SASADHAR KARMAKAR. **33 C. W. N. 507 = 117 I. C. 854 = A. I. R. 1929 Cal. 515.**

———*Decision as to area and rate*—Res judicata *in a subsequent suit.*

Where the Court in the previous suit definitely determines the area of the land in the defendant's possession and the annual rent payable for the same, the determination is general and not limited to the particular years for which rent is claimed and the defendant can only succeed in a subsequent suit by proving that the area and the rent have since altered. (*Greaves and M. N. Mukerji, JJ.*) SIVADASS DATTA *v.* BIRENDRA KRISHNA. **43 C. L. J. 116 = 94 I. C. 844 = A. I. R. 1926 Cal. 672.**

———*Decision in, when* res judicata.

The judgment in a former rent suit does operate as *res judicata* between the parties if the parties are the same, the areas of the lands are the same and the defence is the same, namely, a third party holding certain portion of the whole land 21 Cal. 236, Dist. (*Greaves and Cuming, JJ.*) NABINCHANDRA *v.* GOUR MOHAN. **90 I. C. 756 = A. I. R. 1926 Cal. 369.**

———*Previous suit deciding liability of defendant to pay interest as per* Kabuliat—*Decision* res judicata *in subsequent rent suit.*

In a suit for the recovery of arrears of rent on the basis of a *kabuliat*, the *kabuliat* stipulated that arrears of rent should bear interest at the rate of 75 per cent. per annum. Both Courts below enforced this stipulation and decreed the plaintiff's claim, as it appeared that the respondent had twice before obtained decrees for the arrears of rent on basis of this *kabuliat* with interest at the rate stipulated in 1911 and in 1915.

Held, that the liability of the defendant-appellant to pay interest on arrears of rent at the rate provided for in the *kabuliat* is *res judicata* between the parties. 39 Cal. 848 and 32 Cal. 49, Dist. (*Cuming and Panton, JJ.*) HAMID ALI *v.* MAHOMED NURERJJAMA MEAH.

76 I. C. 444 = A. I. R. 1923 Cal. 361.

———*Issues finally decided—Retrial in the same suit —Barred.*

The retrial of issues that have been finally decided in the same suit is barred by *res judicata.* The plea of *res judicata* still remains apart from the limited provisions of the Code. 6 Cal. 269 (P.C.), Foll. (*Lord Buckmaster.*) G. H. HOOK *v.* ADMINISTRATOR-GENERAL OF BENGAL. **48 Cal. 499 = 48 I. A. 187 = 19 A. L. J. 366 = 23 Bom. L. R 648 = 33 C. L. J. 405 = 25 C. W. N. 915 = 14 M. L. W. 221 = 1921 M. W. N. 313 = 60 I. C. 631 = A. I. R. 1921 P. C. 11 = 40 M. L. J. 423.**

—S. 11—Heard and finally decided—Scope.

———*Rent suit—Decree enhancing rent and holding tenancy to be permanent—Review dismissal of—Observations as to nature of tenancy—If* res judicata.

Where a review against a decree enhancing rent of a tenancy and holding it to be permanent was dismissed holding that the applicant was aggrieved not by decree but by judgment, but the pronouncement regarding permanent nature of the tenancy was however accepted by the Judge as having been based on misapprehension of counsel's argument on the subject, such a judgment cannot be *res judicata* as to the nature of tenancy. (*Lord Blanesburgh*) DHANNA MAL *v.* MOTI SAGAR. **8 Lah. 573 = 54 I. A. 178 = 101 I. C. 355 = 29 Bom. L. R. 870 = 31 C. W. N. 677 = 1927 M. W. N. 481 = 39 M. L. T. 161 = 25 A. L. J. 959 = 28 P. L. R. 658 = 26 M. L. W. 634 = A. I. R. 1927 P. C. 102 = 52 M. L. J. 663.**

———*Question decided in effect though not in express terms—Rule of* res judicata—*Applicability.*

The rule of *res judicata* extends to a question which must be taken to have been decided in effect, though not in express terms. 12 Beng. L. R. 304; *Gregory* v. *Molesworth*, (3 Atkyns, 626) Rel. on. (*Dalal and Wazir Hasan, A. J. Cs.*) BAIJ NATH *v.* RAJJU SINGH **12 O. L. J. 571 = 2 O. W. N. 872 = 91 I. C. 583 = A. I. R. 1926 Oudh 101.**

———*Possibility of appeal being filed and decision upset—If affects finality.*

The mere contingency or possibility that an appeal may be filed from the decision and the appeal court may upset the decision, does not affect the finality of the decision. 6 Bom. 110; and 24 Cal. 46, Dist. (*Rutledge C.J. and Brown, J.*) V. P. R. V. CHOCKALINGAM CHETTIAR *v.* MAUNG THA O.

4 Rang. 8 = 95 I.C. 104 = A.I.R. 1926 Rang. 122.

—S. 11—Heard and finally decided—Setting aside decree.

———*Ground of fraud—Decision as to*—Res judicata.

Although a decree can be set aside on the ground of fraud, if the question has already been agitated between the same parties and decided by a Court of competent jurisdiction the matter is *res judicata* and cannot again be re-opened between the same parties in a subsequent suit. 29 Cal. 395 (P.C.) Dist. (*Dawson Miller, C.J. and Ross, J.*) JANGAL CHOUDHRY *v.* LALJIT PASBAN. **6 P.L.J. 1 = 60 I.C. 124 = 1921 P.H.C.C. 3 = A. I. R. 1921 Pat. 12.**

—S. 11—Heard and finally decided—Setting aside ex parte decree.

———*Application for — Dismissal—If bars a fresh suit.*

Where an application to set aside *ex parte* decree on the ground of wrong information about the date by the applicant's mukhtar was dismissed, *held*, no suit will lie to set aside the decree on the ground of fraud in that the Mukhtar in collusion with the plaintiff wrongly informed him of the date since that matter was already decided on the application though the information given by the Mukhtar was fraudulent. (*Dawson Miller, C.J. and Mullick, J.*) MAHABIR PRASAD CHAUDHRY *v.* CHEDDI SINGH. **1924 P.H.C.C. 155 = 81 I. C. 1035 = A. I. R. 1924 Pat. 769.**

—S. 11—Heard and finally decided—Subsequent reversal.

———A suit was instituted in 1904 to establish title to property attached. Trial judge abated the suit, but the order of abatement was appealed against. In the meanwhile District Judge in proceedings under the Land Acquisition Act paid compensation for part of attached property to decree-holders on the ground that suit having abated attachment was good. But the appellate Court subsequently set aside the order of abatement.

Held, that the District Judge's decision would not be *res judicata*. (*Fforde and Jai Lal, JJ.*) MAHARAJA OF FARIDKOT *v.* ANANT RAM. **10 Lah. 447 = 114 I. C. 62 = A.I.R. 1929 Lah. 1.**

—S. 11—Heard and finally decided—Unnecessary finding.

———*Decision of a trial Court on a particular issue —Appeal disposed on other grounds — The conclusions of the First Court on that issue not* res judicata.

When the judgment of a Court of first instance upon a particular issue is appealed against that judgment ceases to be *res judicata* and becomes *res subjudice*, and if the appellate Court declines to decide that issue and disposes of the case on other grounds, the judgment of the First Court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the Court of appeal. 6 Bom. 110, Appl. (*Cuming, J.*) KARUNA CHARAN *v.* KRISHNA SUNDAR. **90 I. C. 480 = A. I. R. 1926 Cal. 179.**

———*Issue raised and decided but unnecessary—Not* res judicata.

In a previous suit in ejectment which was *inter partes* the Munsif who tried the suit held that the defendants had no right of occupancy but he dismissed the suit on the ground of its being instituted before the expiry of the agricultural year in which the defendants' predecessor died. On appeal that decree of dismissal was affirmed on the second ground.

Held that the decision of the First Court on the first issue would not operate as *res judicata* in a subsequent suit for ejectment. 24 Cal. 616 (P.C.), Rel. on. (*Newbould and Graham, JJ.*) ISWAR SANT *v.* TORENDRA NATH. **42 C. L. J. 560 = 92 I. C. 981 = A. I. R. 1926 Cal. 163.**

When a finding is recorded only to avoid a possible remand and it is not the basis of the judgment the point is not finally determined and is not *res judicata*. (*Krishnan and Odgers, JJ.*) PITCHIREDDI *v.* BHARATASASTRY. **20 M.L. W. 526 = 82 I. C. 485 = 1924 M. W.N. 859 = A.I.R. 1924 Mad. 893 (2) = 47 M.L.J. 532.**

———*Dismissal of suit as not properly framed—Decision on others—Not* res judicata.

Where a suit is properly framed, and the Court decides several issues the decision on each issue is binding upon the parties. But where the Court holds that the suit has framed is not maintainable, the suit should be dismissed on that ground alone, and the Court cannot try the other issues so long as the suit is not properly framed. The decision of the Court on the other issues in such a case will not be *res judicata*. (*Chatterjea and Cuming, JJ.*) SRI SRI GOPAL JEW THAKUR *v.* RADHA BENODE MANDAL. **41 C. L. J. 396 = 88 I.C. 616 = A.I.R. 1925 Cal. 996.**

———A finding not necessary to the relief granted by the decree cannot operate as *res judicata*, (*Daniels, A.J.C.*) OUDH BEHARI LAL *v.* DAL SINGH. **10 O.L.J. 404 = 79 I. C. 666 = A.I.R. 1924 Oudh 205.**

—S. 11—Issue of fact or law.

———*Ambiguous finding—Not* res judicata.

A judgment in a matter of *res judicata* must stand by itself. It decides what it purports to decide no more and no less—If there is any ambiguity as to what it decided which cannot be cleared up without further evidence then it will not be a clear finding and therefore not a case of res judicata at all. (*Schwabe, C. J. and Wallace, J.*) UNNARA *v.* K. P. KUNHI RAMAN. **17 L. W. 322 = 32 M. L. T. 146 = 72 I. C. 582 = A.I.R. 1923 Mad. 514 = 44 M.L.J. 543.**

———*Decision on a question of fact.*

When a Court of law has in any proceeding before it, decided upon evidence or in the absence of evidence, a question of fact, it is not competent to it to allow that question to be again re-opened except in the very restricted terms laid down by the provisions for review of judgment. A. I. R. 1921 P.C. 23; A. I. R. 1924 Mad. 673 and Mad. C.M.A. 467 of 1927, Foll.; A.I.R. 1923 Mad. 487, Not Foll. and 6 All. 269, Ref. (*Wallace and Madhavan Nair, JJ.*) GOVINDOSS KRISHNADOSS *v* RAJA OF KARVETNAGAR. **A.I.R. 1929 Mad. 404.**

———*Prior petition on a question of fact—Dismissal —Subsequent petition on the same question—Barred.*

Where, on a previous petition being dismissed, the petitioner files another petition praying for an apparently different relief, but the relief is such as rests only on the same question of fact as in previous petition, that petition cannot be entertained. (*Wallace and Madhavan Nair, JJ.*) GOVINDOSS KRISHNADOSS *v.* RAJAH OF KARVETNAGAR. **A.I.R. 1929 Mad. 404.**

———*Matter in issue in a prior suit a mixed question of law and fact—If* res judicata *in a subsequent suit.*

Matter directly and substantially in issue in the former suit, namely whether one of the terms upon which a party held his ryoti is that he is liable to pay 75 per cent. per annum interest on arrears of rent, is *res judicata*, whether in deciding it, error was on a point of fact or on a point of law. Though, in order to decide whether the terms of the party's tenancy include a valid and binding term to the effect that he should pay interest on arrears of rent at 75 per cent. per annum in accordance with the kabuliat, the former court had to consider questions of law as well as questions of fact, the matter is not an abstract question of law. (*Rankin, C.J., C. C. Ghose, Suhrawardy, B. B. Ghose and Mukerjee, JJ.*) TARINI CHARAN *v.* KEDAR NATH. **56 Cal. 723 = 48 C.L.J. 327 = 33 C.W.N. 126 = 115 I.C. 593 = A.I.R. 1928 Cal. 777.**

———*Erroneous decision on a question of fact is* res judicata.

A decision on a question of fact, however erroneous it may be, constitutes *res judicata* between parties to the previous suit. (*Suhrawardy and Graham, JJ.*) AYETONNESSA BIBI *v.* AMJED ALI. **48 C.L.J. 184 = 32 C.W.N. 828 = 115 I.C. 588 = A.I.R. 1928 Cal. 717.**

———*Prior decision based on mistake of fact—*Res judicata *in a subsequent suit.*

A decision was wrongly held to be *res judicata* though the parties in the subsequent suit were not the same as in the prior suit. The same question came up for decision again in a third suit. The parties to the second and third suit were the same.

Held, though there is a mistake of fact as regards the parties yet the judges who decided the second suit decided that the matter was *res judicata* between the parties and therefore their decision was final. (*Phillips and Devadoss, JJ.*) JAGGA ROW *v.* GORI BIBI. **17 M.L.W. 521 = 72 I. C. 789 = 1923 M. W. N. 347 = A.I.R. 1923 Mad. 545.**

———*Finding on—When* res judicata.

A finding on a mixed issue of law and fact stands on the same footing as a decision on a question of fact and operates as *res judicata*. A judgment operates as *res judicata* with regard to all the findings that are necessary and essential to the judgment. (*Suhrawardy and Cuming, JJ.*) RAJENDRA NATH DATTA *v.* SHRIMATI BHABINI DASI. **87 I.C. 811 = A.I.R. 1926 Cal. 80.**

A mixed question of law and fact cannot be re-agitated. (*Campbell, J.*) ABDUL QADIR *v.* ILAHI BAKSH. **92 I.C. 769 = A.I.R. 1926 Lah. 251.**

———*Erroneous decision.*

The objection that because a decision is erroneous it cannot operate as *res judicata* is untenable. (*Kinkhede, A.J.C.*) TARIABAI *v.* RANGNATH. **9 N.L.J. 183 = 96 I.C. 963 = A.I.R. 1926 Nag. 476.**

———*Decision of.*

The fact that in the subsequent suit the property which is the subject-matter of the dispute is not identical with the property which was in dispute in the previous suit is immaterial. S. 11 of the C. P. Code makes not only the decision of a suit *res judicata* but even the decision of an issue alone if other necessary conditions are present. (*Wazir Hasan, A.J.C.*) GAURI MISRA *v.* MOHAN. **80 I. C. 847 = A. I. R. 1925 Oudh. 118.**

———*No distinction for purposes of* Res judicata.

The section draws no distinction between an issue of fact and an issue of law. An issue of law operates as *res judicata* in the same way as an issue of fact. In both cases however, the matter must have been directly and substantially in issue in a former proceeding between the same parties or their representatives in interest. (*Dass and Kulwant Sahay, JJ.*) RAMALAL MALIKAND *v.* DEODHARI RAI. **2 Pat. 771 = 74 I. C. 781 = 5 P. L. T. 7 = A. I. R. 1924 Pat. 265.**

———*Subsequent suit for different relief.*

Where a decision proceeds on certain view of law and that view is found to be erroneous, it cannot have the force of *res judicata* in a subsequent proceeding for a different relief, on the principle that a decision cannot alter the law of the land: 41 Bom. 485 and 39 Cal. 848, Foll.; 9 I C. 568 and (1926) A. C. 94, Rel. on.; A.I.R. 1927 All. 297; A.I.R. 1924 Pat. 265 and 37 I. C. 857, Diss. from; A.I.R. 1928 Cal. 777, (F.B.) Ref. (*Tek-Chand and Agha Haidar, JJ.*) TALIAMAND *v.* MUHAMMAD DIN. **A. I. R. 1930 Lah. 907.**

———*Wrong decision on a point of jurisdiction—View taken in upset in a later case by superior Court—Effect.*

Where a Court has decided the question of jurisdiction although wrongly and no objection was raised to its jurisdiction, the question becomes *res judicata* between the same parties in a subsequent suit. A decided case cannot be reopened merely because the view that was taken on a question of law in that case was subsequently upset not in that case but in another case proceeding between different parties, by a superior Court. (*Fawcett, J.*) RAJA RAM *v.* CENTRAL BANK OF INDIA. **28 Bom. L.R. 879 = 98 I.C. 341 = A.I.R. 1926 Bom. 481.**

———*Wrong decision.*

Where a Court is competent to try a suit, the mere fact that the Court through an error in procedure comes to a decision which it is not permitted by law to make does not render its decree a nullity and the decision operates as *res judicata*: 21 Bom. 205; 33 Bom. 479 and A.I.R. 1928 Cal. 777, Rel. on. (*Doyle, J.*) KO PO KAUK *v.* KO MYA. **A. I. R. 1930 Rang. 294.**

———*Wrong decision—Question of law.*

A question of law even when wrongly decided between the parties operates as *res judicata*: 31 Bom. 128 and 33 Bom. 479, Ref. (*Patkar and Baker, JJ.*) AHMED BHAUDDIN *v.* BABU DEVJI ZUJAM. **53 Bom. 676 = 31 Bom. L. R. 778 = 122 I.C. 113 = A. I. R. 1930 Bom. 135.**

———*Prior decision based on error of law.*

An error of law is not a ground for setting aside a previous decree as passed without jurisdiction or for a declaration that it must never operate as *res judicata*. (*Suhrawardy and Garlick, JJ.*) SURENDRA CHANDRA *v.* KEDURESWAR CHOUDHURI. **48 C. L. J. 590 = 115 I. C. 269 = A. I. R. 1929 Cal. 156.**

———*Decision based on erroneous conception of Law.*

A decision based solely on an admission which was based on an erroneous conception of law cannot operate as *res judicata*. (*Pratt, Offg. C. J. and Ormistone, J.*) G. BHANDARI *v.* R. NIHAL CHAND. **Rang. 691 = 117 I. C. 52 = A. I. R. 1929 Rang. 55.**

———Res judicata *does not depend on correctness of decision.*

The question whether decision is correct or erroneous

has no bearing upon the question whether it operates or does not operate as *res judicata*. For this purpose, it is not true that a point of law is always open to a party, S. 11, C. P. Code, says nothing about causes of action, a phrase which always requires careful handling. Nor does the section say anything about points or points of law, or pure points of law. Questions of law are of all kinds and cannot be dealt with as though they were the same. Questions of procedure, questions affecting jurisdiction, question of limitation, may all be questions of law. In any case in which it is found that the matter directly and substantially in issue has been directly and substantially in issue in the former suit and has been heard and finally decided by such Court, the principle of *res judicata* is not to be ignored merely on the ground that the reasoning, whether in law or otherwise of the previous decision, can be attacked on a particular point. What is made conclusive between the parties is the decision of the Court and the reasoning of the Court is not necessarily the same thing as its decision. The object of the doctrine of *res judicata* is not to fasten upon parties special principles of law as applicable to them *inter se*, but to ascertain their rights and the facts upon which these rights directly and substantially depend, and to prevent this ascertainment from becoming nugatory by precluding the parties from re-opening or recontesting that which has been finally decided. (*Rankin, C.J., C. C. Ghose, Suhrawardy, B. B. Ghose and Mukerji, JJ.*) TARINI CHARAN *v.* KEDAR NATH.
56 Cal. 723 = 115 I.C. 593 = 48 C. L. J. 327 = 33 C. W. N. 126 = A. I. R. 1928 Cal. 777.

———*Erroneous decision—When* res judicata.

A decision, however erroneous it may be, on a question of law, may not operate as *res judicata* only in cases where the causes of action are different, but in all other cases it must operate as *res judicata* between the parties: A.I.R. 1927 All. 297; A.I.R. 1921 Bom. 87 (F.B.); and 11 C.L.J. 461; Rel. on.: 32 Cal. 749 and A.I.R. 1925 Cal. 1193 : Dist.: A.I.R. 1924 Pat. 265, Ref. (*Suhrawardy and Graham, JJ.*) AYETONNESSA BIBI *v.* AMJED ALI. **48 C. L. J. 184 = 32 C.W.N. 828 = 115 I. C. 588 = A. I. R. 1928 Cal. 717.**

———*Erroneous decision.*

Decision though erroneous by a competent tribunal of a question of law directly and substantially in issue between the parties in a suit prevents a Court from deciding the same question arising between the same parties in a subsequent suit according to law. There is nothing to limit the matter in issue to an issue of fact: 30 Mad. 461, Diss. (*Boys and Kendall, JJ.*) KHUB LAL *v.* GULZARI LAL. **49 All. 543 = 25 A.L.J. 564 = 8 L. R. A. Rev. 101 = 100 I. C. 601 = A. I. R. 1927 All. 297.**

———*Erroneous decision.*

A Court with jurisdiction to try a matter has jurisdiction to decide it wrongly even against a clear section of a statute and, if it so decides it wrongly, its decision may operate as *res judicata*. (*Ashworth, J.*) RAJA RAM *v.* NARAIN DAS. **8 L. R. A. Rev. 77 = 99 I. C. 528 = A. I. R. 1927 All. 206.**

———*Erroneous decision.*

An erroneous decision on a point of law will, as between the parties to it, but no further, be a sufficient *res judicata* to preclude them from re-agitating it; Statement of Parsons, J., in 22 Bom. 669, Disapproved; 45 Bom. 1260, Foll.; 37 All. 485, (P.C.), Exp. (*Fawcett, J.*) RAJARAM *v.* CENTRAL BANK OF INDIA.
28 Bom. L. R. 879 = 98 I.C. 341 = A.I.R. 1926 Bom. 481.

———*Construction of terms of a document is not a substantial question of law*

The question of the personal liability of the mortgagor is purely one of the construction of the terms of the document and is not a substantial question of law. A. I. R. 1924 All. 559, Appl. (*Findlay, O. J. C. and Prideaux, A.J.C.*) GHULAM ABHAS *v.* GOVINDRAO.
91 I. C. 200 = A. I. R. 1926 Nag. 245.

———*Erroneous decision.*

An erroneous decision on a point of law can be *res judicata*: A. I. R. 1924 Pat. 265, Foll. (*Mullick, A.C.J. and Kulwant Sahay, J.*) DEBI PRASAD *v.* JALDAR MAHTON. **1926 P.H.C.C. 113 = 94 I. C. 553 = A. I. R. 1926 P. 288**

———*Decision of in a case of recurring liability—If* Res judicata *in a subsequent suit.*

A decision on a point of law does not operate as *res judicata* if the cause of action in a subsequent suit is different from that in the former suit as often happens in the cases of recurring liability; but if the cause of action is the same the decision would be *res judicata*. The right to eject a tenant accrues fresh every year. Therefore the previous decision that an ejectment suit was not maintainable in a Revenue Court cannot operate as *res judicata*. 32 Cal. 749, Foll. (*Sulaiman, J.*) GANGA *v.* MAHMUD-UN-NISSA BEGAM.
87 I.C. 789 = A.I.R. 1925 All. 761.

———*Erroneous decision — Subsequent legislative enactment.*

A decided case cannot be re-opened merely because the view that was taken on a question of law in that case is subsequently upset, not in that case, but in another proceeding between different parties, by a superior Court or is superseded by some enactment of the legislature. (47 C. 770 Not Foll. (*Fawcett, J.*) RAJARAM *v.* CENTRAL BANK OF INDIA. **28 Bom. L. R. 879 = 98 I.C. 341 = A. I. R. 1926 Bom. 481.**

———*Decision on—Subsequent change of law—Prior decision not* res judicata *in a subsequent suit.*

Cases must be decided upon law as it stands when the judgment is pronounced, and not upon what the law was at the date of a previous suit ; and if the said law has been altered in the meantime, and the effect of the law has been differently interpreted by the judicial decisions or altered by the statute, the decision on a particular question of law in an earlier suit would not operate as *res judicata* with regard to the same question in a subsequent suit. For instance if in a previous suit it was held that a particular rate of interest in a kabuliyat was penal, but the law is subsequently changed, then in a suit for subsequent rent on the same kabuliyat the previous decision is not *res judicata*; 32 Cal. 749, Foll. ; 1 C. W. N. 687 ; 19 C. L. J. 34 and 31 Bom. 128, Dist. (*Greaves and Mukerjee, JJ.*) NABIN CHANDRA SAHA PODDAR *v.* DUDU MIAR. **30 C. W. N. 83 = 87 I. C. 767 = A. I. R. 1925 Cal. 1193.**

———*Erroneous decision.*

Decision though erroneous on law point may be *res judicata*. (*Kinkhede, A. J. C.*) TULARAM *v.* MT. SUMRATI. **79 I. C. 621 = A. I. R. 1924 Nag. 422.**

———*Limitations—Decision on the ground of not* res judicata.

Decision of a point on the ground of limitation only does not operate, *res judicata*. (*Martineau, J.*) SHANCHI KHAN *v.* KARAM CHAND.
73 I. C. 705 = A. I. R. 1923 Lah. 150 (2).

———*Erroneous decision—Not* res judicata.

A decision on a question of law may be *res-judicata* but an erroneous decision on a question of law cannot be allowed to operate as *res judicata* so as to prevent a Court from deciding the same question on its arising between the same parties in a subsequent suit. (*Broadway and Abdul Quadir, JJ.*) MOTI SAGAR *v.*

DHANNA MAL. **29 P. W. R. 1922 = 72 I. C. 177 = A. I. R. 1922 Lah. 329.**

———*Decision based on a Construction of Statute—If* res judicata.—*Plaintiff's right* to mamul *dues decided by construing statute—Question is not* res judicata.

On a construction of the statute governing the matter plaintiff was held entitled to collect *mamul* rates for certain years. In a subsequent suit in respect of anotber period.

Held, (per Macleod, C. J.; Shah, J. Dissenting and Fawcett, J, Doubting), the question of plaintiff's right was not concluded by *res judicata*.

Per *Macleod, C. J. and Fawcett, J.*—The question may, however, be concluded by the principle *of stare decisis*. (*Macleod, C. J., Shah and Fawcett, JJ.*) SITARAM SAKHARAM *v* LAXMAN VISHNU.

45 Bom. 1260 = 23 Bom. L. R. 749 = 64 I. C. 162 = A. I. R. 1921 Bom. 87.

———*Erroneous decision—*

A decision though erroneous in law operates as *res judicata* 14 C. P. L. R. 109, Foll. (*Kotval, A. J. C.*) LATU *v.* ZIPRI. **61 I. C. 603 (Nag.).**

—S. 11—Judgment in rem.

———Judgments, orders or decrees which come within S. 41 of the Evidence Act partake of a conclusive character for certain limited purposes on the footing of their being judgments *in rem*, because where the parties to a litigation submit a question for the decision of the Court and the Court gives a decision on being so invited that decision binds all the parties for the future. (*Suhrawardy and Mukerji, JJ.*) GANGAPRASAD CHOUDHARI *v.* KULADANANDA ROY.

44 C. L. J. 399 = 30 C. W. N. 415 = 94 I. C. 235 = A. I. R. 1926 Cal. 568.

———*Decisions in probate proceedings.*

Decisions after contest in a probate proceeding are *res judicata* in any subsequent proceeding of any kind against the caveator who contested it. On general principles of the Probate and Administration Act grant of probate by a competent Court binds all contesting parties unless good cause under S. 50 to set it aside is made out. (*Odgers and Wallace, JJ.*) VENKATARATHNAM *v.* SATYAVATI. **34 M. L. T. 141 = 79 I. C. 44 = A.I. R. 1924 Mad. 578 = 46 M. L. J. 383**

—S. 11—Leave to withdraw suit.

———*Subsequent suit not barred.*

A obtained a decree against *B* for payment of money and applied for execution of the same. *B* thereupon instituted a suit for an injunction restraining *A* from executing his decree on the ground that it had been obtained by fraud and during *B's* minority. The trial Court dismissed the suit on merits. On appeal by *B* the Additional District Judge dismissed the suit on the ground that it did not lie in the form in which it was brought and as the relief claimed by *B* was not an effective relief. He however, granted permission to *B* under O. 2, R. 2, to file a fresh suit on the same cause of action. *B* therefore instituted a suit claiming a declaration that the decree had been obtained fraudulently and was a nullity on account of his minority.

Held, that *B's* suit was not barred by O. 2, R. 2, or S. 11, or under any law. The opinion of the Additional District Judge who dismissed *B's* suit owing to a formal defect on the question of fraud was in the nature an *obiter dictum* and therefore not binding on the parties. (*Jai Lal, J.*) GHASI RAM *v.* NANAK CHAND.

A. I. R. 1930 Lah. 634.

———*Grant of by Appellate Court—Decision of First Court not* res judicata.

Where the order of the District Judge on appeal ran

as follows : Ordered that the appeal be allowed and the decree of the Court below be set aside and plaintiff be permitted to withdraw the suit ; permission to file a fresh suit.

Held, that an Appellate Court has power to pass orders under O. 23, R. 1 (37 A. 326, F. B., Foll.) and that the order of the District Judge having set aside the decision of the Munsif that cannot operate as *res judicata*, (1885 A. W. N. 151 and 9 A. L. J. 378, Ref.) (*Ryves, J.*) GAJRAJ SINGH *v.* THAKURJI MAHARAJ RADHA RAMJI. **74 I. C. 894 = A. I. R. 1924 All. 260.**

———*Partition—Suit--Order in contravention of O.* 23, *R.* 1 (4)—*Subsequent suit not barred.*

Where a Court allows a suit to be withdrawn in contravention of Order 23, Rule 1 (4) *i.e.* without the consent of other plaintiffs and grants leave for a fresh suit to be brought on the same cause of action,

Held, that the order is without jurisdiction and the suit must be deemed not to be withdrawn. A fresh suit for partition is however maintainable as the cause of action is a recurring one. A. I. R. 1922 Pat. 44, Dist. (*Jwala Prasad and Ross, JJ.*) MT. RAM DEI *v.* MT. BAHU RANI. **1 Pat. 228 = A. I. R. 1922 Pat. 489.**

———*Order granting—If can be questioned in a subsequent suit.*

Per *Mullick, J.*—The Court trying a subsequent suit is not competent to enter into the question whether the Court which granted the permission to bring a fresh suit had properly made such order. 48 Cal. 138 (F.B.), Foll. ; 44 Cal. 367 ; 1 P. L. T. 300 reported (1920) P. H. C. C. 232, Diss. (*Dawson Miller, C. J. Mullick and Jwala Prasad, JJ.*) RAJ KUMAR MAHTON *v.* RAM KHELAWAN SINGH.

1922 P. H. C. C. 17 = 64 I. C. 337 = 3 Pat. L. T. 80 = 1 Pat. 90 = A. I. R. 1922 Pat. 44.

—S. 11—Litigating under the same title—Different titles.

———*Title of Reversioner and owner—Distinct.*

The position of a reversioner is distinct from that of the owner and the two titles are entirely different. Therefore when the previous suit by a party was in the capacity of reversioners of their father and in the second suit they claim as owners they cannot be said to be litigating under the same title so as to make the previous suit as *res judicata*. (*Shadi Lal, C. J. Agha Haidar, J.*) QASIM ALI *v.* PUNNONLAL.

120 I. C. 532 = A. I. R. 1930 Lah. 284.

———A suit by the plaintiff as owner is not barred because of a previous suit by him as expectant reversionary heir, as he cannot be said to be litigating under the same title. (*Shadi Lal, C. J. and Agha Haidar J.*) QASIM ALI *v.* PURAN MAL. **117 I. C. 68.**

———In the prior suit, *A* as proprietor sued *B* and *C* as thekadars for arrears of rent. In that suit it was decided that *B* was thekadar and the suit was dismissed as against *C*. The relation between *B* and *C* was left open in the suit. The second suit was by *C* as thekadar against *A* as raiyat, and *B* as witness said that *C* was entitled to receive rents from tenants.

Held, that the parties in the two suits were different, the issues were different and the parties who were common to the suits were litigating under different titles and thus the former suit was not *res judicata*. (*Kulwan Sahay and Macpherson, JJ.*) BIBI WASILAN *v.* MIR SYED HUSSAIN. **8 Pat. 107 = 117 I. C. 67 = A. I. R. 1929 Pat. 173.**

———*Prior suit as Reversioner—Subsequent suit as owner—Not barred.*

Where the plaintiffs were suing in the previous suit as reversioners who challenged the alterations made by the owner, and where in the next suit he sued as the owner himself, the judgment in the first suit cannot operate as *res judicata* in the latter because while the plaintiff's title in the former suit was based upon the residuary interest he had in the property which was the subject of alienation, in the other the plaintiff's title as owner was totally different from the former. (*Shadi Lal, C.J. and Agha Haider, J.*) QASIM ALI *v.* PURAN CHAND. **117 I. C. 68.**

———Where a Mahomedan widow was in possession of her husband's estate in lieu of dower and a suit was brought by the nephew for possession of his share and was decreed on payment of a certain sum within certain time and on his failure to pay anything he was kept out of possession, a subsequent suit by the daughter of the deceased nephew claiming her share of the property is not barred by *res judicata*. A. I. R. 1925 P. C. 63, Foll. (*Mears, C. J. and King, J.*) MT. NAWASI BEGAM *v.* MT. DILFAROZ BEGAM. **48 All. 803 = 24 A. L. J. 910 = 98 I. C. 978 = A. I. R. 1927 All. 39.**

———*Prior suit as donee—Subsequent suit as heir—Not barred.*

The plaintiff with his brother brought a suit in 1910 for redemption of a mortgage as donees under a gift deed by widow of the original mortgagor. The plaintiff was then a minor. Plaintiff's pleader filed an application to the effect that a compromise had been arrived at and the suit should be dismissed and thereupon the Court passed an order "Compromised, dismissed with costs." Subsequently the plaintiff became an heir of the mortgagor and sued for redemption in 1923 in that capacity.

Held, that the earlier suit of 1910 being brought in an entirely different right was much the same as if it was brought by a different person. Consequently it could not be binding on the plaintiff as regards his suit of 1923. (*Martin, C. J. and Madgavkar, J.*) BASANGAUDA *v.* RUDRAPPA. **28 Bom. L. R. 1507 = 99 I. C. 814 = A. I. R. 1927 Bom. 87.**

———*Prior suit contested in private capacity—Subsequent suit in public capacity—No bar.*

In order to hold that a particular decision operates as *res judicata*, it is necessary to prove that the decision arrived at in the previous suit was between the same parties, and that they were litigating under the same title. Where therefore certain persons were contesting a previous case in their own private capacity, but contested the subsequent suit in their public capacity as representing the public of a particular place, it cannot be held that the decision in the previous litigation constitutes *res judicata* in the subsequent suit. (*Misra, J.*) HARI KISHEN *v.* RAGHUBAR DAYAL. **1 Luck. 489 = 13 O. L. J. 696 = 97 I. C. 853 = 3 O. W. N. 645 = A. I. R. 1926 Oudh 578.**

———*Mortgage suit--Question of Title decided against Legal Representative of the mortgagor—Subsequent suit by them for declaration of title—If barred.*

Where a mortgage suit was brought by mortgagee against a widow as legal representative of her deceased husband (mortgagor) for a mortgage decree, and the widow in her written statement claimed that the plaintiff was not entitled to a mortgage decree for the whole land, and on the pleadings the Court framed an issue; "Is the plaintiff entitled to have a decree on the mortgaged properties in Ex. A."

Held, that as the widow was not sued in her personal capacity and could not be sued in this capacity unless she had joined in the mortgage or consented to it, and as it is not open to the Court in mortgage suits to go into questions of title or claims of parties which are adverse to the title of the mortgagor, the Judge, in so far as he purported to go into the question of title to the property mentioned in the mortgage, was going beyond what he was legally entitled to do and therefore a decree passed in the suit is not *res judicata* in a subsequent suit by the widow for declaration that she was owner of half of the mortgaged land. (*Rutledge, C. J. and Carr, J.*) U. CHIT SU *v.* MA HPU. **5 Bur. L. J. 114 = 98 I. C. 164 = A. I. R. 1926 Rang. 191.**

———Where the relief claimed by plaintiffs in the previous suit was based on a right inherited by them from their father, but the title upon which the plaintiffs instituted the second suit was a title not derived from their father but a title which they claimed as having devolved upon them as reversionary heirs of the last full owner,

Held, the principle of *res judicata* cannot apply as the two suits were not litigated under the same title. (*Chatterjee and Cuming, JJ.*) NRIPENDRA NATH BHOWMIK *v.* BASANTA KUMAR LAHIRI. **29 C. W. N. 861 = 89 I. C. 207 = A. I. R. 1925 Cal. 1195.**

———*Person added as legal representative of deceased party—Decision is not binding on him in personal capacity.*

Where a party was only added as a legal representative in the previous litigation and it was not open to him as such to raise any defences personal to himself.

Held, that he can subsequently raise objections personal to himself. (*Krishnan and Coleridge, JJ.*) G. AKKAMMA *v.* N. VENKATAPATHI. **75 I. C. 623 = A. I. R. 1925 Mad. 59.**

———*Identity of causes of action immaterial.*

Where the title set up in a previous suit was a title based upon the property in suit being treated as *waqf* property in which plaintiff was interested like others in offering prayers, *held*, a suit claiming personal title as the heir of a certain person is not barred, capacity being different in the two suits. The fact of the identity of the causes of action in the two suits is immaterial. (*Kanhaiya Lal and Mukerji, JJ.*) KANHAIYA LAL *v.* ASHRAF KHAN. **46 All. 230 = 78 I. C. 402 = 5 L. R. A. Civ. 177 = A. I. R. 1924 All. 355.**

———*Prior suit in individual capacity—Subsequent suit in a representative capacity.*

Where a person claimed relief in the former suit in his individual capacity and in a subsequent suit he is proceeded against in his representative capacity in respect of the same subject-matter, the subsequent suit is not barred. (*Broadway and Abdul Qadir, JJ.*) SITA RAM *v.* GHANNO. **69 I. C. 528 = A. I. R. 1924 Lah. 275.**

———*Decision between parties in different capacity.*

The decision of Court prior to Deceased Brother's Widow's Marriage Act (7 Edw. & C. 47) that the widow had no *locus standi* to apply for Letters of Administration to the estate of her first husband's brother whom she married in 1916 after the former's death was held not to be *res judicata* and not to debar her from presenting a fresh application in 1923 for Letters of Administration since the parties to the two applications were really not the same in the legal sense. A. I. R. 1924 Pat. 265; 11 C. L. J. 461, Dist. (*Bucknill, J.*) ADELAIDE CHRISTIANA LISH *v.* DAVID LISH. **1924 P. H. C. C. 138 = 83 I. C. 951 = 2 Pat. L. R. 125 = 6 P. L. T. 303 = A. I. R. 1924 Pat. 624.**

———*Pre-emption suits—Parties not claiming under the same title—Erroneous view of law—No* res judicata *arises.*

In a previous suit a decision was given in favour of plaintiff pre-emptor, though a descendant of a remote ancestor of vendor, that he was entitled to inherit vendor's property. When the vendor again sold another property, plaintiff and another pre-emptor filed suits. The suit of the latter was decreed and upheld in appeal and in view of the decision the trial Court dismissed plaintiff's suit and the appellate Court decided on merits that the previous judgment was not of binding effect in determining plaintiff's status as a pre-emptor as it held the decision was wrong. *Held*, on the one hand, plaintiff and vendor *pro forma* defendant in the first case and on the other plaintiff and the present vendees in this suit, both suits, being pre-emption suits, cannot be said to be parties litigating under the same title. As the vendees did not claim under the vendor, plaintiff did not and could not challenge vendee's right to own and possess the land in suit and his claim would therefore amount to asking the vendees to re-transfer in his favour the land in suit in virtue of the decision in previous suit. (*Campbell J.*) AHMAD KHAN *v.* GAWAHAR SINGH. **84 I. C. 257 = A. I. R. 1923 Lah. 16.**

———The plaintiff's father brought a suit asking for cancellation of a sale and for possession of the fields in dispute. The suit was dismissed. The next suit was brought by the plaintiff claiming possession of the same land contending that the defendants were not entitled to retain possession of this property as their title was not supported by a registered deed of sale, and the sale was not for necessity.

Held, that the question of *Res judicata* does not arise in this case though so held by the Trial Court. (*Prideaux, A. J. C.*) SAMPAT *v.* MOTILAL. **71 I. C. 808 = A. I. R. 1923 Nag. 177.**

———*Sale to tenant of proprietary right set aside and possession given to landlord in execution—Suit thereafter by tenant for occupancy rights not barred.*

Where a sale of proprietary right in land in favour of the tenant having been set aside, the tenant (vendee) sues for occupancy rights; *Held*, the suit is not barred by S. 11 as the plaintiff is not suing under the same title, nor is it barred by S. 47, because the suit is under a different title and no objection could be taken in execution proceedings beforehand. (*Chevis and Abdul Qadir, JJ.*) RANI SURAJ KAUR *v.* NAGINA SINGH. **4 L. L. J. 400 = 67 I. C. 485 = A. I. R. 1922 Lah 44.**

———*Prior suit in private capacity—Subsequent suit under S. 92, C. P. Code not barred.*

A previous suit cannot operate as *res judicata* in the subsequent suit, where the plaintiffs now sue not in their individual capacity but under S. 92 of the Code, as representing all those who are directly interested in the maintenance of the charities while in the previous suit their claim was in their individual capacity. (*Spencer and Devadoss, JJ.*) GOPA NATARAJA CHETTY *v.* RAJAMMAL. **16 M. L. W. 122 = 69 I. C. 15 = 1922 M. W. N. 464 = 31 M. L. T. 125 = A. I. R. 1922 Mad. 394 = 43 M. L. J. 448.**

—S. 11—Litigating under the same title—Jus tertii.

——*Plea of—Decision thereon is not* res judicata.

It cannot be said for the purpose of S. 11 that the decision on a plea of *jus tertii* is a decision between the parties litigating under the same title when the *jus tertii* is put forward and actually relied on in a later case by the third person. All that can be said is that in the former suit it was raised as a defence. It cannot be said that the defendant was actually relying upon that title or litigating under it. (*Kumaraswami Sastri and*

Ramesam, JJ.) JAGANNADHAM *v.* VENKATASUBBA RAO. **50 Mad. 877 = 26 M. L. W. 115 = 104 I. C. 468 = A. I. R. 1927 Mad. 844 = 53 M. L. J. 864.**

—S. 11—"Litigating under the same title"—Meaning.

———The word "litigating under the same title" mean that the demand should have been of the same quality in the second suit as in the first. (*Mukerji and Mallick, JJ.*) ABDUL GANI *v.* NABENDRA KISHORE ROY. **33 C.W.N. 876 = 57 Cal. 258 = A.I.R. 1930 Cal. 47.**

———The term "title" refers to the capacity or interest of a party, that is to say whether he sues or is sued for himself, in his own interest or for himself as representing the interest of another or as representing the interest of others along with himself. It has nothing to do with the particular cause of action on which he sues or is sued. (*Ashworth, J.*) RAFIQ-UN-NISSA BIBI *v.* ABDUL SHAKUR KHAN. **116 I. C 738 = A. I. R. 1929 All. 400.**

—S. 11—Litigating under the same title—Same title.

———*Partition suit—Decision that certain property is common—Assignee from one of the parties—If can question.*

The former suit was for partition by one of several members of the two branches of a deceased Mahomedan against the other members of that branch and against *S* a member of the other branch. In that suit certain property was decided to belong to the common ancestor and the share of the plaintiff was ascertained. The subsequent suit was brought by *S* together with *X* and *Y*, two other members in his branch, for partition of their share. Before bringing this suit *S* had also acquired the shares in the suit property of *P* another member of his branch.

Held, that the decision in the previous suit was binding on the parties to that suit; and although *X* and *Y* were not parties to the previous suit, they were not interested in denying that the property belonged to the common ancestor. Hence their presence in the later suit made no difference. Further even so far as the right of *S* as assignee of *P* the principle of *res judicata* would apply for although now *S* sued in the capacity of *P*'s assignee, the rights of both *S* and *P* were based on inheritance from the common ancestor. (*Boys and Bennet, JJ.*) SAKINA BIBI *v.* SAIRI BIBI. **A. I. R. 1929 All. 500.**

———*Suit by one Reversioner—Decision* res judicata *in suit by other reversioners.*

The decree in favour of a reversioner in a former suit operates as *res judicata* in the subsequent suit brought by other reversioners against the same defendants if they have a right in common arising out of the same cause of action and are, therefore, litigating under the same title in the later suit. (*Zafar Ali, J.*) UMRA *v.* BARKAT ALI. **110 I. C. 725 = A. I. R. 1928 Lah. 371.**

S 11—Might and Ought.

Alternative claims and reliefs.
Cause of action.
Constructive res judicata.
Defence.
Failure to plead.
Grounds of attack.
Knowledge of facts.
Mesne profits.
Mortgage suit.
Omission to plead.
Partition.

Relief not claimed.
Scope of the rule.
Set off.
Suit based on custom.
Suit on title.

—S. 11—Might and ought—Alternative claims and reliefs.

———*Alternative cause of action—Omission to sue on effect.*

A person is not bound to sue on an alternative cause of action and failure to so sue in the former suit does not bar subsequent suit. (*Kinkhede, A. J. C.*) GANGAPRASAD *v.* KODULAL. **103 I. C. 888 = A.I.R. 1927 Nag. 322.**

———*Suit on title against defendant decreed—Plaint—Possession under decree and subsequent dispossession by defendant—Plaintiff suing again for possession—Defendant pleading thekadari rights of possession—Plea of defendant not barred.*

Plaintiff obtained a decree for possession on the basis of title of the suit property against the defendants and took possession under the decree, but he was dispossessed by the defendants. Plaintiff sued again for possession. The defence was that the plaintiff was not entitled to actual possession by ejectment of the defendants for the reason that the defendants were entitled to continue in actual possession of the property in suit by virtue of the rights of a thekadar:

Held, that this plea in defence was not *res judicata* as the title on which the relief for possession in the prior suit was founded was proprietary title and to resist the same on the basis of thekadari rights would have been of no avail whatsoever, and an inquiry into and determination of such a plea in the prior suit would have introduced the greatest confusion in the trial of the proper issue as to the proprietary title of the plaintiff, and as the Court trying the previous suit could not have entertained a plea based on tenancy for want of jurisdiction. (*Wazir Hasan and Pullan, JJ.*) HANWANT RAM *v.* RAM HARAKH. **1 L. C. 277 = 103 I.C. 802 = A.I.R. 1927 Oudh 341.**

———*Pre-emption suit—Pre-emptor if bound to set up his own title in the alternative.*

In a pre-emption suit the plaintiff is not bound to plead alternatively that he is the sole owner of the property in suit and that the vendor has no title in it and his having not done so would not operate as a decision against his title under the law of *res judicata.* An alternative cause of action for an alternative relief is not a matter which should be made a ground of attack within the meaning of Expl. IV. (*Ashworth, J.*) ABID HUSAIN *v.* SHAFI HUSAIN. **96 I. C. 71 = A.I.R. 1926 Oudh 545.**

———*Suit to set aside sale on ground of non-receipt of consideration—Finding that consideration was partly paid—Subsequent suit for balance of purchase money not barred.*

Where, to ask for a certain relief in a suit would embarrass the trial of the suit or would place the plaintiff in a false position, the plaintiff will not be bound to ask for that relief in the same suit but can bring another suit for the purpose. In the previous suit, the plaintiff asked for the setting aside of a sale deed executed by her on the ground that she had not received any consideration therefor. The Court found that she had received a part of the consideration money but held that on her returning the same within a certain time she was entitled to get back the property. The plaintiff then brought another suit for the recovery of the balance of the purchase money after deducting the

sum which she had been held to have received.

Held the subsequent suit was not barred by limitation. (*Mukerji and Boys, JJ.*) KANDHIAH SINGH *v.* KUNDAN. **47 All. 561 = 87 I.C. 257 = 23 A. L. J. 461 = A.I.R. 1925 All. 486.**

———*Claim for the whole—Failure to claim a share in the alternative—Effect.*

Where a person failed to assert in the alternative a claim to share and his claim for the whole is dismissed he or his heirs are precluded from claiming the share. A. I. R. 1923 Mad. 257, Foll. (*Spencer, Offg. C. J.*) MAHOMED ESUF ROWTHER *v.* SULTAN ABDUL KADAR. **34 M. L. T. 147 = 78 I.C. 1055 = 1924 M. W. N. 569 = A.I.R. 1924 Mad. 711 = 47 M. L. J. 20.**

———*When should be pleaded—Test.*

The test, whereby to determine whether the subsequent claim ought to have been matter of attack in the previous suit is this; are the matters so dissimilar that their union might lead to confusion. Where the plaintiff might have, in the former suit, put in the claim, that he made in the subsequent suit as an alternative claim, and if he did so, there would have been no confusion, and all questions relating to his title in the property would have been completely and finally determined. *Held*, he ought to have made the claim that he made in the subsequent suit as a ground of attack in the former suit, and for this reason, the subsequent suit must be held to be *res judicata.* Where plaintiff claims title to certain property, in proving his title to that property he ought to put forward all means of attack in his armoury. S. 11 omits all references to the cause of action. A plaintiff's cause of action is a very different thing from his title; the one being something done contrary to a person's interest which obliges him to seek the aid of the Court, the other being the proof that that something affords him a valid ground for relief. 20 Cal. 79; 25 Bom. 189, Foll. (*Moung Kin, J.*) MOUNG BA THOW *v.* MA HNIT. **11 L. B. R. 451 = 72 I.C. 14 = 2 Bur. L. J. 34 = A. I. R. 1923 Rang. 122.**

———*First suit under the Deccan Agriculturists' Relief Act (XVIII of 1879), S. 10-A, for a declaration that a sale was in reality a mortgage—Second suit for specific performance of an agreement to re-sell is not barred.*

The plaintiff sold the suit property to the defendant in 1906, and the defendant executed in his favour a "Satekhat" to re-sell the property to him at any time within twelve years. In 1911 the plaintiff filed a suit claiming to redeem the property alleging that the sale of 1906 was in reality a mortgage, and seeking the protection afforded by S. 10 of the Deccan Agriculturists' Relief Act. The suit failed. Subsequently the plaintiff sued for specific performance of the "Satekhat."

Held, that the second suit was not barred by *res judicata.* It was not incumbent on the plaintiff to sue in the alternative for specific performance in his redemption suit and therefore it was not necessary to determine in this suit whether he could have done so. The two suits were mutually inconsistent and if the plaintiff failed in proving the mortgage, he still had a number of years left, under the 'Satekhat,' within which he could have sued to get back the property on payment of the consideration mentioned in the 'Satekhat.' (*Macleod, C. J. and Shah, J.*) DOLA KHETAJI VAHIVATDAR *v.* BALYA KANOO PATEL. **24 Bom. L. R. 236 = 66 I. C. 815 = 46 Bom. 803 = A. I. R. 1922 Bom. 29.**

—S. 11—Might and ought—Cause of action.

———*Previous claim as kittima operates as a bar to a suqsequent suit on the claim as apatitha.*

The causes of action based on an apatitha claim and based on a kittima claim are distinct, but they are not so dissimilar that their union in one suit might lead to confusion. The adjudication of the latter claim in a previous suit operates as a bar to bringing a subsequent suit on the former claim: 20 Cal. 79 (P. C.); 2 L. B. R. 224; 25 Bom. 189; 31 Mad. 385 and A. I. R. 1925 P. C. 55, Ref. (*Rutledge, C. J. and Brown, J.*) MAUNG BA THEIN *v.* MA THAN MYINT. **5 Rang. 565 = 105 I. C. 586 = A. I. R. 1928 Rang. 9.**

———*Prior suit for damages for non-delivery—Dismissal—Bars a suit for delivery of goods.*

Where the defendant Railway Company had failed to deliver certain parcels consigned by the plaintiff and the plaintiff filed suits for damages for non-delivery which suits had failed.

Held that a subsequent suit for delivery of goods was barred. (*Daniels and Neave, JJ.*) MOGAN LAL *v.* G. I. P. RY. **22 A. L. J. 745 = 83 I. C. 969 = 5 L. R. A. Civ. 580 = A. I. R. 1924 All. 849.**

—S. 11—Might and ought—Constructive res judicata.

———*Interlocutory proceedings—Applicability to.*

The principle of *res judicata* in S. 11, Expl. 4, applies to interlocutory proceedings in the same suit. (*Kemp and Murphy, JJ.*) RAOJI NARAINJI *v.* RATANSI KANJI. **A. I. R. 1930 Bom. 431.**

———*Subject-matter not the same—Not applicable.*

By a decision under S. 104, Ben. Ten. Act, enhancement of rent was made on the ground of rise in the value of crops before 1898. In the suit under S. 30-B of the Act, enhancement was sought on the ground of rise in value of crops after 1898. The defence opposed enhancement on the ground that their jama was not a holding. This plea was not heard and finally decided in the previous suit.

Held, that even if the question might and ought to have been made a defence in the former proceeding, the matter is not *res judicata* as the subject-matter of the S. 104 proceeding is not the same as that of the present suit, and the defendants are not barred from raising their defence to the claim for enhancement on the ground of constructive *res judicata*: 24 Cal. 711, Appr. A. I. R. 1925 P. C. 55, 29 Cal. 252 (P.C.), Ref. (*Mitter, J.*) BIR BIKRAM KISHORE *v.* RAJJAH. **116 I. C. 637 = A. I. R. 1929 Cal. 201.**

———Where a matter which ought to have been made a ground of defence in the previous suit was not so made, it must be presumed that the matter was constructively in issue in that case and as such is *res judicata* in the subsequent suit: 12 P. R. 1915, Foll. (*Dalip Singh, J.*) MUHAMMAD HUSSAIN *v.* GHULAM BI. **117 I. C. 805 = 11 L. L. J. 97.**

———*Validity of will disputed in prior suit—Subsequent suit against a specific provision of the will not barred.*

A suit was brought by *S* against *P* to recover certain funeral expenses of the testator on the basis of his will which made provision for his funeral expenses. In this suit the validity of the will was disputed. The will also contained a provision for "election" under certain conditions which was now in dispute in another suit brought by *P* against *S*.

Held, that in the previous suit the validity of the whole will was in dispute but the specific plea against the provision for election in the will was not necessary in that suit and hence that suit did not operate as constructive *res judicata* against the present suit. (*Addison and Bhide, JJ.*) KISHAN CHAND *v.* NARINJAN DAS. **113 I. C. 298 = 10 Lah. 389 = 30 P. L. R. 562 = A. I. R. 1928 Lah. 967.**

———*Execution—Order for substitution of Legal Representative—Substitution not contested—Subsequent objection for Execution barred.*

When in execution the creditor applied for substitution of the names of the brothers of the debtor as legal representatives in place of the debtors and notices were issued. Notices were refused and the Court made an *ex parte* order substituting their names.

Held, that the Court by ordering their names to be substituted in fact decided in favour of the executability of the decree against the assets of the deceased in their hands. This order had therefore the force of a decree within the meaning of S. 47 and fixed them with liability to satisfy the decree as the legal representatives of the deceased debtor out of such property as might be proved to be his assets in their hands, and on the principle of constructive *res judicata* they are debarred from raising any objection to the execution of the decree on the ground that they were not the legal representatives of the deceased debtor and should not have been brought on record as such: Case law Referred. (*Kinkhede, A. J. C.*) TANIABAI *v.* RANGANATH. **9 N. L. J. 183 = 96 I. C. 963 = A. I. R. 1926 Nag. 476.**

———*Irrelevant Pleas.*

Plea not directly relevant for the decision of the question raised in the suit need not be raised and in such a case there is no bar of constructive *res judicata* (*Madhavan Nair, J.*) P. MANICKYAM *v.* KODIMANGI. **1924 M. W. N. 666 = 21 M. L. W. 204 = A. I. R. 1925 Mad. 226.**

———*Applicability to execution proceedings.*

In regard to execution proceedings what is binding upon the parties is the point actually decided. The principle of Explanation IV of S. 11 has no direct application but in determining the exact effect of the point decided on the subsequent proceedings the principle cannot be altogether ignored. Where point of limitation was not raised in previous proceeding.

Held it could not be raised in another proceeding on same application. (*Shah, Ag. C. J. and Fawcett, J.*) GADIGAPPA CHANDRASAPPA *v.* SHIDEPPA GURISHEDAPPA. **48 Bom. 638 = 26 Bom. L. R. 817 = 83 I. C. 155 = A. I. R. 1924 Bom. 495.**

—S. 11—Might and ought—Defence.

———*Which could not be raised in Execution.*

Revenue from one of the co-sharers brought a suit for his share of the revenue and it was decreed that the amount payable every year should be recovered through Court if unpaid. Amounts remained unpaid twice and the same was realised in execution notwithstanding the objection by the managing Jagirdar that the Revenue was remitted by Government. In a subsequent suit for recovery of the revenue remitted and for declaration that the co-sharer was not entitled to his share for that period it was pleaded that it was barred under Ss. 11 and 47.

Held, that the suit was not barred under S. 47 or under S. 11 as neither the declaration nor refund could be claimed under previous decree. (*Madgavkar, J.*) RAGHO RAVJI BHARADE *v.* GOPAL JANARDAN. **54 Bom. 162 = 31 Bom. L. R. 1415 = A. I. R. 1930 Bom. 132.**

———*Prior suits for Redemption and on trespass—Right to specific performance available but not raised—*

Subsequent suit not barred.

The failure of a party to plead in defence of a suit against him for redemption and another for damages for trespass that he was entitled to specific performance against the plaintiff in respect of these properties does not bar a suit for specific performance at his instance for, though he might have taken such plea, it was not obligatory upon him to do so; A. I. R. 1924 Mad. 271 (F. B.), Expl. (*Venkatasubba Rao and Madhavan Nair, JJ.*) PACHAN *v.* KUNHANDI.

A. I. R. 1930 Mad. 539.

———*Defendant in possession must resist claim on all possible grounds.*

A defendant in possession is bound to resist a claim on all grounds that it is possible for him on his knowledge at the time to bring forward. 11 M. I. A, 50, Foll. (*Shadilal, C. J. and Le Rossignol, J.*) ROSHAN *v.* NIGAHIA. **7 Lah. 40 = 27 P. L. R. 209 = 94 I. C. 27 = A. I. R. 1926 Lah. 162.**

———Ex parte *decree—Rent suit—Omisiion to raise defence—B. T. Act, Ss.* 29 *and* 147—*Effect of.*

Ex parte decree in prior suits in which no issue was raised as to the rate at which the rent was payable by defendant and there was no decision with regard to such rate do not operate as *res judicata* in favour of the plaintiff's landlords. 16 Cal. 300, Ref. Even though the defendant did not take in the previous rent suits the defence under S. 29 of the B. T. Act he can raise it in a subsequent suit for rent as there cannot be an estoppel against a statute. (*Suhrawardy and Cuming, JJ.*) NAFAR CHANDRA PAL CHOUDHURY *v.* BHUSI MALLA. **65 I.C. 581.**

—S. 11—Might and ought—Grounds of attack.

———*Former suit in ejectment finding that they were co-sharers—Second suit to prevent defendants from obstructing joint user—Not barred.*

Where a former suit by plaintiffs against the defendants, on the ground that the latter were trespassers, was dismissed on the finding that both the parties were co-sharers in the property, a second suit by plaintiffs recognizing the defendants to be co-sharers but contending that they were not entitled to build upon the joint land so as to exclude the plaintiffs from using it along with the other co-sharers is not barred inasmuch as, although, the matter forming the ground of attack in the second suit might have been made a ground of attack in the former, the plaintiffs were not bound to do so. (*Shadi Lal, C. J. and Broadway, J.*) ABIDUDDIN *v.* BISHARAD ALI. **8 Lah. 308 = 103 I. C. 494 = 28 P. L. R. 432 = A. I. R. 1927 Lah. 505.**

———*Fresh legal relation.*

A previous suit for possession against the defendants as trespassers was dismissed as it was found that the defendants were in possession for more than 12 years as tenants. A subsequent suit after giving the requisite notice was brought against the tenants.

Held, that the legal relation put forward in the subsequent suit being different from what was alleged in the previous one the subsequent suit was not barred because it could not be said of any matter that it ought to have been set up as a ground of attack in the former suit if its introduction would have been incongruous to the matter of that suit: 29 All. 331 (P. C.) and 35 All. 227 (P. C.), Ref. (*Mukerji and Guha, JJ.*) RAJANI KANTA SAHA *v.* ARJUN CHANDRA CHAKRAVARTY. **51 C. L. J. 571 = A. I. R. 1930 Cal. 588.**

———*U. P. Land Revenue Act, S.* 111—*Partition of Mahal—Failure to raise all grounds—Effect.*

The law clearly imposes a duty upon each co-sharer to put foward any ground of claim or defence involving a

question of proprietary title in the matter of the partition of the mahal. It follows, on general principles, that if a co-sharer omits to make any objection, which he is required by law to make, it must be deemed that he had made it and that under Cl. (*c*) of sub-S. (1) of S. 111 it must further be deemed that the Collector had proceeded to inquire into the merits of the objection and had decided them within the meaning of sub-S. (3) of the same section. (*Dalal and Wazir Hasan, A.J.Cs.*) BAIJ NATH SINGH *v.* RAJJU SINGH. **12 O.L.J. 571 = 2 O.W.N. 872 = 91 I.C. 583 = A.I.R. 1926 Oudh 101.**

———*A ground of attack which must have been but was not referred to in plaint cannot be the basis of another suit.*

Where the plaintiffs in a previous suit based their claim on nearness of kin, but did not mention the family custom but for the proof of which, the nearness could not be proved and the suit therefore failed.

Held, that they cannot bring a fresh suit basing their claim on the family custom. (*Lord Phillimore.*) FATEH SINGH *v.* JAGANNATH. **52 I. A. 100 = 6 L. R. P. C. 50 = 91 I. C. 280 = 12 O. L. J. 117 = 2 O. W. N. 25 = 47 All. 158 = 27 O. C. 334 = 27 Bom. L. R. 725 = 29 C. W. N. 749 = 23 A. L. J. 739 = 22 M. L. W. 58 = A. I. R. 1925 P. C. 55 = 48 M. L. J. 64 (P. C.).**

———*Immoral debts.*

First suit for declaration that debts were not binding on ground of no necessity—Second suit to avoid sale for those debts on ground of immorality is barred, because the present kind of attack, namely, that the debts were tainted with immorality ought to have been made a ground of attack in the previous suit if the plaintiff wanted to avoid the sale of family property. (*Gokul Prasad and Stuart, JJ.*) BADRI PRASAD *v.* MOHAR SINGH. **65 I. C. 511 = A. I. R. 1923 All. 231.**

———*Terms of puttah.*

The decision of the question as to the proper terms of a *puttah* in respect of one *fasli* is *res judicata* for subsequent *faslies* also. Any ground of attack or defence which by virtue of the Expln. 4 to S. 11 of the C. P. Code is deemed to have been directly and substantially in issue in a suit, must also be deemed to have been heard and finally decided adversely to the party who failed to raise it. 37 Mad. 70 F.B., Foll. (*Sadasiva Aiyar and Napier, JJ.*) KUPPUSWAMI MUDALI *v.* B. SUBBA NAIDU. **62 I. C. 501 = 13 M. L. W. 307.**

———*Inconsistent grounds.*

Before any argument can be advanced on the language employed in Expln. 4 of S. 11, it must be established to the satisfaction of the Court that the matter not only might have been made a ground of defence or attack in such former suit but further that it ought to have been so made.

Where the evidence in support of one ground is such as might be destructive of the other ground, the two grounds need not be set up in the same suit. 35 Bom. 507, Foll. (*Das and Adami, JJ.*) RAMAN CHOUBEY *v.* BACHA MISIR. **60 I.C. 393 = 2 P.L.T. 285 = A.I.R. 1921 Pat. 326.**

—S. 11—Might and ought—Knowledge of facts.

———*Pre-emption suit against one only of the alienees—Mistake of fact—Decree—Resistance of alienees not impleaded—Subsequent suit for possession or refund.*

The pre-emptor impleaded in his suit one of the four brothers—alienees of the property purchased due to a mistake of fact. His suit was decreed, and the entire consideration having been realised by the alienee who was impleaded, he was given formal possession. But the pre-emptor's application for mutation was resisted by the three brothers of the alienee, who were not impleaded and their objection was allowed except for 1/4 share of the alienee who was impleaded. The present suit was brought for the possession of the property released in favour of the three brothers or in the alternative for a proportionate refund of the pre-emption money. It was found that the four brothers were separate.

Held, S. 11 has obviously no application and the suit was not barred. (*Kanhaiya Lal, J.*) RAM BALI SINGH *v.* SHIAM SUNDER MISIR.

A. I. R. 1922 All. 475.

——*Grounds of attack.*

The defendants in the subsequent suit were the plaintiffs in the previous suit, which was for the recovery of possession of the suit properties. The claim in the previous suit was based on the ground that the properties belonged to *G*, and *G* had released his rights in plaintiffs' favour. In second appeal in that suit it was found that *G* and his wife *A* jointly owned the properties and the lower Court was ordered to join the daughters of *G* and *A* and pass a decree for joint possession, and the lower Court passed a decree accordingly. In the subsequent suit the question was whether the daughters of *G* and *A* would be prevented from claiming any interest in the properties by virtue of an arrangement brought about by *G* after the death of *A*.

Held, that the point as to the arrangement ought to have been raised in the previous suit and it was *res judicata*: A.I.R. 1925 P.C. 184, Dist. (*Devadoss and Sundaram Chetty, JJ.*) MARIMUTHU GOUNDAN *v.* MUNIAMMAL.

24 M. L. W. 812 = 99 I. C. 525 = A.I.R. 1927 Mad. 120.

——*Status of defendants.*

In a suit for ejectment, the defendants contended that they were not under-raiyats but occupancy raiyats. It appeared that in a previous suit the plaintiffs had unsuccessfully sought to eject the defendants as trespassers. The status of the defendants was however left open in that suit.

Held that the decision as to the status of the defendants ought to have been decided in the previous suit and that the later suit was barred by *res judicata*. (*S. K. Ghose, J.*) HARA CHANDRA MISTRY *v.* BHAGABAT MANDAL. **34 C.W.N. 442.**

—S. 11—Might and ought—Mesne Profits.

——*Suit for possession and mesne profits —Decree silent as to mesne profits—Subsequent suit.*

In a suit for possession of certain land and future mesne profits a decree was obtained for possession of the land. On execution of the decree, decree-holder obtained possession of the land and then brought a suit for mesne profits for the period between the date of the prior suit and the date on which he obtained possession of the land through Court in execution of the decree obtained in previous suit. A preliminary objection was raised that the claim for mesne profits was barred by S. 11, as there was a prayer in the previous suit for future mesne profits and as the decree in that suit was silent in regard to mesne profits.

Held, that the suit was not barred by S. 11. 41 Mad. 188; 40 All. 292, Foll.; 44 Bom. 954, Diss from. (*Mitter, J.*) BIPUL BEHARI *v.* NIHIL CHANDRA.

33 C.W.N. 943 = A.I.R. 1929 Cal. 566.

——*Redemption suit.*

Mesne profits from the date subsequent to the decree when the money is paid into Court by the mortgagor cannot be had in the redemption suit itself. Where the redemption suit, a claim for mesne profits is withdrawn a subsequent suit for mesne profits from the date of payment after the decree up to the date of delivery of possession is not barred by O. 23, R.1 or O. 6, R. 1 or S.11 of the C. P. C. 14 C. W. N. 1001, Foll. (*Rankin and Mukerjee, JJ.*) SUDHANYA KUMAR BOSE *v.* SUSHILABALA BOSE.

85 I. C. 547 = A. I. R. 1926 Cal. 178.

——*Suit for possession—Future profits not claimed—Subsequent suit if barred.*

Where, in a suit for possession, future mesne profits have not been claimed, a subsequent suit for the same is not barred as both in Section 11 as well as Order 2, Rule 2, the issues and claims referred to are those arising out of the cause of action and not those arising out of some possible future cause of action. (*Dawson-Miller, C.J. and Foster, J.*) RAMJANAM SINGH *v.* KHUB LAL SINGH.

6 P.L.T. 78 = 80 I. C. 710 = A.I.R. 1925 Pat. 145.

——*Omission to sue for in a suit for possession — Effect.*

Omission to sue for mesne profits prior to the date of the suit where plaintiffs sue for possession of immoveable property does not bar the second suit against the same defendants for those mesne profits. (*Macleod, C. J. and Shah, J.*) RAMCHANDRA ADARAM AGARWALA *v.* LODHA GOURI BHADBHUNJI

26 Bom. L.R 288 = 80 I. C. 259 = A. I. R. 1924 Bom. 368.

—S. 11—Might and ought — Mortgage suit—Contribution.

——*Claim to—If can be raised in a redemption—Suit.*

When a suit for redemption is instituted there is no cause of auction for claiming proportionate amount from those who represent the equity of redemption in part of the property mortgaged, other than that belonging to the plaintiffs in the redemption suit. The claim to contribution can only be made after the entire mortgage-money has been paid off. So the plaintiffs in the redemption suit redeeming the whole mortgage and claiming possession of the part for which the equity of redemption is held by them, but not claiming possession of the property for which the equity of redemption is held by the defendants in the subsequent contribution suit, are not barred from claiming contribution in a subsequent suit by *res judicata*. (*Niamatullah and Bennet, JJ.*) SABIR HUSAIN *v.* RIASAT GHANS.

1929 A.L.J. 1162 = A. I. R. 1929 All. 696.

——*Final decree for sale cannot bar redemption suit.*

In a suit by the mortgagee for sale the question whether the mortgagor has the right to redeem is not put in issue. In such a suit the questions for determination are whether there is a mortgage and what is the amount due to the mortgagee. So, where a final decree for sale is passed in a suit on mortgage, but it is not executed for more than 3 years, S. 11 cannot bar a subsequent suit for redemption by the mortgagor. 43 Bom. 334, Foll. (*Devadoss, J.*) N. NAGASAMI IYER *v.* T. ELLARAGAN. **86 I. C. 527 = A. I. R. 1925 Mad 1191.**

—S. 11 & O. 34, R. 7—Might and ought—Mortgage suit—Mesne profits.

——*Between date fixed in R. 7 of O. 34 and actual delivery of possession.*

A mortgagor suing for redemption must bring into account all moneys due to either party in connexion with the mortgage up to the day fixed under R. 7. But he is neither obliged, nor is he entitled to have any items of later date, *e.g.*, mesne profits of the period between this

date and the actual delivery of possession brought into account, for which therefore a separate suit is maintainable. 14 C.W.N. 1001, Rel. on. Mesne profits accruing after the date of payment made according to a decree passed under O. 34, R. 7 can be the subject of a separate suit. (Case-law fully discussed.) (*Simpson, A. J. C.*) ABU JAFAR *v.* RAGHOINDRA PARTAB SAHAI.
2 O.W.N. 826 = 91 I.C. 258 = A.I.R. 1926 Oudh 113.

—S. 11, Expl. 4 — Might and ought — Mortgage suit—Omission to plead.

———*Properties not covered by mortgage included in suit and obtained delivery of in execution of decree—Mortgagee cannot sue on the ground that properties were not included in the mortgage.*

Where mortgagor includes certain properties in his suit for redemption and obtains delivery of them in execution of redemption decree, the mortgagee cannot bring a subsequent suit on the ground that some of the properties so delivered were not comprised in the mortgage and were wrongly delivered, S. 11, Cl. 4 is a bar to such suit. 22 All. 442, Dissented from. (*Devadoss, J.*) U. PEDA APPALA NAIDU *v.* U. APPALA NAIDU.
87 I.C. 711 = A.I.R. 1925 Mad. 1148.

– S. 11—Might and ought—Mortgage suit—Original consideration.

———*Suit on subsequent mortgage—Mortgage held invalid—Failure to fall back on original consideration—If bars a suit on prior mortgage.*

Where a subsequent mortgage is substituted for a prior mortgage and the mortgagee sues on the subsequent mortgage, but the subsequent mortgage is held to be invalid for want of legal attestation, mortgagee's failure to fall back on the prior mortgage in the same suit does not bar a second suit on the prior mortgage if he was ignorant of the defect in the second mortgage at the institution of the first suit, (*Kinkhade, A.J.C.*) VENKAT RAO *v.* GANPAT. **98 I. C. 695 = A.I.R. 1927 Nag. 83.**

—S. 11—Might and ought—Mortgage suit—Paramount title.

———*Plea of* res judicata *in respect of.*

The plea of *res judicata*, in respect of a paramount title cannot be set up against a person who happens to be a party in a mortgage suit in a different capacity unless the paramount title has been expressly the subject of controversy and there has been an actual decision in respect of it. 33 Cal. 425 ; 40 All. 584 ; A.I.R. 1920 P.C. 81 and A. I. R. 1929 Oudh 463, Rel. on. (*Stuart, C.J. and Srivastava, J.*) MEHDI ALI *v.* WALAYAT HUSAIN KHAN. **7 O.W.N. 25 = 121 I.C. 277 = A.I.R. 1930 Oudh 97.**

———Where in a mortgage suit brought for realization of the mortgage security, and the barring of the equity of redemption a party, who is impleaded as defendant by virtue of his interest in the equity of redemption and not in his other distinct capacity as possessing a paramount and independent title to the mortgaged property does not appear and the claim is decreed, he is not precluded by *res judicata* from setting up his independent and paramount title in a subsequent suit. 38 C. L. J. 183, Dist. ; 12 Cal. 414 ; 8 C.W.N. 365 ; 23 C. L.J. 587 ; 40 All. 584 ; A.I.R. 1927 Mad. 301 ; 20 Cal. 79 ; A. I. R. 1924 Cal. 138 ; A. I. R. 1920 P. C. 81. Ref. (*Cuming and Pearson, JJ.*) ASMATULLAH PRAMANIK *v.* GAMI PRAMANIK. **33 C. W. N. 659 = A.I.R. 1929 Cal. 672.**

———*Decision as to—When* res judicata.

As a general rule a paramount title cannot be drawn in controversy in a mortgage action. But if a defendant in a mortgage suit sets up a paramount title and without objection goes to trial upon that issue, neither party can afterwards say that the issue was irrelevant, 12 Cal. 414 Rel. on. (*Das and Rowland, JJ.*) SADHU BEHERA *v.* DIBAKAR TARAI.
10 P.L.T. 645 = 121 I. C. 353 = A.I.R. 1929 Pat. 678.

———*Defendant's failure to establish his priority—Decision* res judicata.

Where a plaintiff in a mortgage action alleges a distinct case in his plaint in derogation of the priority which may be claimed by the defendant and seeks in his suit to displace that prior title and postpone it to his own, it is incumbent upon the defendant to establish his priority, and if he fails to do so, he will not be allowed to try that question in a subsequent suit of his own. (*Das and Rowland, JJ.*) SADHU BEHERA *v.* DIBAKAR TARAI. **10 P.L. T. 645 = 121 I.C. 353 = A. I. R. 1929 Pat. 678.**

———*Deft. if should set up such title.*

There is no rule of law that a defendant being a subsequent incumbrancer or the purchaser of the equity of redemption is bound to set up as a defence that he has also a paramount title. If in such a suit he does not invite the Court to decide the question of his priority, he will not be precluded from raising the question of his priority in a suit of his own. A. I. R. 1920 P. C. 81, Rel. on ; A. I. R. 1916 P. C. 18. Expl. and Rel. on. A. I. R. 1924 Cal. 138 Dis, from; 8 C. W. N. 365, Expl. 24 All. 429, Dist. (*Das and Rowland, JJ.*) SADHU BEHERA *v.* DIBAKAR TARAI.
10 P. L. T. 645 = 121 I. C. 353 = A. I. R. 1929 Pat. 678.

———*Vendee from the mortgagor before and after mortgage—If bound to set up his prior title.*

Where a portion of the mortgaged property was sold to a person prior to the mortgage and another portion was sold to the same person subsequent to the mortgage and the mortgagee in his suit to enforce the mortgage impleaded the purchaser only as subsequent purchaser without attacking his prior purchase and obtained an *ex parte* decree, the purchaser will not be debarred from raising his prior title by a subsequent suit. A. I. R. 1920 P. C. 81. A.I.R. 1923 Pat. 290 and 1 Pat. L. T. 629, Rel. on.; A. I. R. 1924 Cal. 138 and 19 C. W. N. 942. Doubted and Dist. (*Courtney Terrel, C. J.*) KOI SAHU *v.* ATUL KRISHNA.
9 Pat. 118 = 119 I. C. 829 = A. I. R. 1929 Pat. 333.

———*—Person setting up joined but not raising the question—Effect.*

There is a difference between mortgagor's suit for redemption and possession and mortgagee's suit for sale. In a suit by mortgagee for sale, a person claiming adversely both to the mortgagor and mortgagee may be joined but such person is not bound to raise the question relating to the paramount title; A. I. R. 1924 Cal. 138, Diss. from ; 9 M. L. T. 173, Dist.; A. I. R. 1927 Mad. 301, Affirmed. (*Ramesam and Odgers, JJ.*) VENKATANARAYANA *v.* T. RAMANNA. **106 I. C. 574 = A. I. R. 1927 Mad. 945.**

———*—Person claiming party to mortgage suit but not asserting his title—Effect.*

A person claiming adversely to the mortgagor and mortgagee is not a necessary party to a mortgage suit but if he is made a party, the Court has discretion whether to adjudicate on his title or not and therefore if such party fails to assert his title he is not barred by S. 11, Expl. 4, from doing so in a subsequent suit. Case-law discussed. (*Devadoss, J.*) RAMANNA *v.* VENKATANARAYAN. **25 M. L. W. 238 = 38 M. L. T. 20 = 99 I. C. 468 = A. I. R. 1927 Mad. 301 = 52 M. L. J. 52**

C. P. CODE (1908), S. 11—Might and Ought — Mortgage suit—Paramount title.

——— *Effect.*

The rule that a question of paramount sale cannot be investigated in a mortgage suit is subject to exception. 5 C. L. J. 95, Ref. The plaintiff had a two fold character. As purchaser of equity of redemption, he was properly before the Court; as a settlement holder from the superior landlord, he could set up a defence that the mortgage could not be enforced against the property in his hands. He did not take that defence and the result was that a decree was made for sale of the mortgaged property in his presence. The decree is operative against him and he would not be allowed to challenge it in a separate suit. 8 C. W. N. 365, Foll. (*Mukerjee and Chotzner, JJ.*) SRIMANTA SEAL *v.* BINDUBASINI DASI. **76 I. C. 517 = 38 C. L. J. 183 = A. I. R. 1924 Cal. 138.**

———If a person joined as defendant in a mortgage suit has a title paramount to that of the mortgagor he is not bound to set up such a title by way of defence to the mortgage suit, and his omission to do so will not therefore render the question of his title *res judicata* against him. (*Prideaux, A. J. C.*) HEMRAJ *v.* SURYABHAN. **78 I. C. 118 = A. I. R. 1924 Nag. 408.**

—S. 11—Might and ought—Mortgage suit—Prior and Puisne mortgagees.

———*Suit by Puisne mortgagee—Decree in—When* Res judicata.

Under O. 34, R. 1, a prior mortgagee is not a necessary party to a suit for sale brought by the puisne mortgagee and whether he is a party or not his rights are unaffected by any decree which may be passed in enforcement of the puisne mortgage. Under these circumstances unless the prior mortgage is made a party to the suit of the puisne mortgagee and his rights are attacked and adjudicated upon adversely to him with reference to his prior mortgage the question of *res judicata* cannot arise in a subsequent suit between the same parties or those claiming through them, A. I. R. 1920 P. C. 81, Rel. on. (*Niamatullah and Bennet, JJ.*) RAM PARTAB PANDEY *v.* LALU PANDEY. **A.I.R. 1930 All. 163.**

—S. 11—Might and ought—Mortgage suit—Prior mortgagee.

———*Plea of* res judicata *against—When arises.*

To raise the plea of *res judicata* against prior mortgage it is necessary for the subsequent mortgagee as plaintiff in the former suit to allege a distinct claim in the plaint in derogation of the prior mortgage, 20 All. 110 (F. B.), 10 A. L. J. 149; 34 All. 599; and 39 Cal. 527 (P. C.), Foll. A. I. R. 1920 P.C. 81, Dist. (*Dalal, J.*) MUSHTAQ AHMAD *v.* AFJAL BEGAM. **117 I.C. 820 (All.).**

———*Made a party—Compromise between the mortgagors and the subsequent mortgagee alone—Effect.*

A, a mortgagee sued the mortgagors and *B*, a prior charge-holder on the property. The suit ended in a razinama decree, and although *B* was not a party to the razinama, showed his willingness to the decree being based on the razinama without trying to make any provision for his charge. The decree provided that the mortgagors should pay certain amount of money to *A* and further a charge was created in favour of *A* on some of the property.

Held; that the decree was not on the mortgage on which *A* sued but it created only a new charge in favour of *A*. And although *B* did not object to that decree being passed, *B* was not debarred from enforcing his charge which was prior to *A*'s. (*Jackson and Reilly, JJ.*) ARUMUGASAMY NADAR *v.* K. G. MANIAGARAR. **29 M. L. W. 609 = 117 I. C. 302 = A. I. R. 1929 Mad. 379 = 56 M. L. J. 295.**

C. P. CODE (1908), S. 11—Might and Ought—Mortgage suit—Prior Mortgagee.

———*Prior Mortgagee who is also puisne mortgagee impleaded in suit by mesne mortgagee as subsequent mortgagee—No contest as to prior mortgage—Prior mortgagee's rights are not barred by* res judicata—*C. P.C., O. 34, R. 12.*

If a prior mortgagee with a paramount title who is also a puisne mortgagee is impleaded in a suit by a mesne mortgagee as a subsequent transferee and there is no contest in that suit regarding the prior mortgage, the right of the prior mortgagee is not lost to him. If, however, there is controversy about the prior mortgage and that controversy is decided against him whether by actual decision or in default, his remedy is barred as *res judicata*. A. I. R. 1920 P.C. 81 and A. I. R. 1929 Oudh. 88 Foll. (*Misra and Pullan, JJ.*) ABDUL WAHID *v.* ALI HUSAIN. **4 Luck. 250 = 6 O.W.N. 1 = 115 I.C. 833 = A.I.R. 1929 Oudh 463.**

———*Rights of—Not impugned in a suit by the puisne mortgagee—No* res judicata.

The puisne mortgagee brought a suit on his mortgage and impleaded the prior mortgagee who had obtained a decree on his own mortgage. The rights of the prior mortgagee as decree-holder were not impugned by the puisne mortgagee and hence they were not put in issue and a decree was passed. The prior mortgagee in execution of his decree himself purchased the properties. In execution of the decree of the puisne mortgagee he applied under O. 21, R. 66, objecting to the sale of the properties purchased by him.

Held, that his claim was not barred by *res judicata* 47 Cal. 662 (P.C.), Rel. on. (*Wallace and Madhavan Nair, JJ.*) THARFEKUTTI HAJI *v.* M. ISANAN. **99 I.C. 658 = A. I. R. 1927 Mad. 431.**

———*Impleaded in a suit by puisne mortgagee—If bound to set up his prior charge.*

If the prior mortgagee is impleaded in a suit by the puisne mortgagee without his priority being recognised, he is bound to set up his prior charge as a ground of defence under Explanation 4, S 11 C.P.C. to the suit. Otherwise the mortgagee will obtain a decree entitling him to bring the entire property to sale and not merely the equity of redemption. (*Daniels, J.*) KUNDAN LAL *v.* JAGAT RAM. **75 I. C. 108 = A. I. R 1924 All. 927.**

———*Priority set up but negatived—Objection in Execution proceedings—If can be raised.*

Where the third mortgagee sued second mortgagee and claimed priority by subrogation due to discharging first mortgage and second mortgagee simply asserted his mortgagee rights and pleaded discharge but an issue as to second mortgage being genuine was wrongly framed and decided against him while the decree exempted expressly only the rights of other defendants.

Held, the decree destroyed the rights of the second mortgagee though plaintiff failed to prove priority by subrogation and the decree only purported to pass the right of the mortgagor on date of third mortgagee but this destruction of rights applied only to property with respect to which second mortgagee specifically asserted his rights and not other property though covered by the same second mortgagee. (*Spencer and Venkatasubba Rao, JJ.*) P. SAMI GURUKAL *v.* THIRUPATHIYA PILLAI **72 I.C. 798 = 18 M.L.W. 288 = A.I.R. 1924 Mad. 193.**

———*Prior mortgagee impleaded by puisne mortgagee asserting himself to be prior—Deft. filing written statement only—Decree operates as* **res judicata.**

Defendant puisne mortgagee made plaintiff prior mortgagee a party to his mortgage suit and set up a plea that he was the prior mortgagee. Plaintiff did nothing beyond making a written statement, to prove that he was prior mortgagee. Decree directed that, in the event the defendants in that suit including the present plaintiff failed to pay the decree amount, the property be sold.

Held, the decree operated as *res judicata* against plaintiff in his suit on his mortgage. (*Das and Kulwant Sahay, JJ.*) LAL BIHARI SINGH *v.* GUR PRASAD SINGH. **4 P.L.T. 108 = 71 I.C. 948 = 1923 P.H.C.C. 118 = 1 Pat. L. R. 238 = 2 Pat. 435 = A. I. R. 1923 Pat. 290.**

—S. 11—Might and ought—Mortgage suit—Redemption.

———*Prior suit for sale before T.P. Act—Decree unexecuted—Subsequent suit for redemption not barred.*

A decree obtained by the mortgagee before the Transfer of Property Act came into force, to recover the mortgage-debt by sale of the mortgaged property, which remains unexecuted does not bar a subsequent suit by the mortgagor instituted within the period of limitation to redeem the mortgage, on the ground of *res judicata*. 16 Bom. 134; A. I. R. 1923 Bom. 300; 39 Bom. 41; 43 Bom. 334; 43 Bom. 703 and A. I. R; 1928 Bom. 67, Ref. 7 Bom. 467; 10 Bom. 461 (P. C.). 13 Bom. 567; 23 Bom. 592 and 39 Mad. 896, Dist. (*Mirza and Broomfield, JJ.*) BADRUDDIN ABDUL RAHIM MUKHARI *v.* SITARAM VINAYAK APTE. **A. I. R. 1930 Bom. 401.**

———*Decree in*—Res judicata.

A mortgaged land originally belonged to two widows and on their death was mutated in favour of the village proprietary body including the mortgagee. A suit contesting the mortgage being dismissed, some members of proprietary body filed a suit for redemption. A preliminary decree was granted but was not executed. On partition taking place the land under mortgage fell to certain persons who instituted suit for redemption. The defendant mortgagee pleaded that entire village proprietary body were not entitled to succeed the widow and claimed a charge on property.

Held, that the previous suit operated as *res judicata* both as regards right to redeem and amount due on mortgage. The right of the proprietary body to succeed to the estate of the widow was never questioned by the mortgagee in the previous suit and this ought to have been made a ground of defence in previous suit and would be deemed to be finally decided against the mortgagee. (*Shadi Lal, C. J. and Tapp, J.*) JIN DIAL *v.* HARNAM. **121 I. C. 180 = A.I.R. 1930 Lah. 423.**

—S. 11—Might and ought—Mortgage suit—Separate money bond.

———It cannot be contended that a mortgagee holding a separate money-bond against a mortgagor is under any obligation to enforce the money bond along with the mortgage, or even to refer to its existence in his plaint seeking to enforce the mortgage. 38 Mad. 927 and 39 Bom. 138, Dist. (*Madhavan Nair, J.*) RAJAGOPALACHARIAR *v.* THIAGARAYA MUDALI. **86 I.C. 481 = A. I. R. 1925 Mad. 991.**

—S. 11, Expl. 4—Might and ought—Mortgage suit—Sub-mortgagee.

———It is not incumbent on the sub-mortgagee to claim payment in a redemption suit by a puisne mortgagee. By failing to do so he risks his own security but he cannot be barred from bringing a suit against his own mortgagor to recover the sum advanced by him. The first suit does not also operate as *res judicata* when the

matter in issue (that the sub-mortgage was fictitious) in the suit was not brought to the knowledge of the sub-mortgagee whose presence was not compulsory at the hearing. 15 Bom. 692 and 28 All. 638, Dist. (*Pullan, J.*) JAGANNATH *v.* SHEO SHANKAR. **6 O. W. N. 851 = A.I. R. 1929 Oudh 455.**

—S. 11, Expl. 4 and S. 47—Might and ought—Mortgage suit—Prior and subsequent mortgage.

———*Sale under prior mortgage—Deposit by subsequent mortgagee and application to reserve rights under his mortgage—Latter prayer rejected—Suit on his mortgage is not barred.*

The plaintiff had deposited Rs. 4,500 to release from Court Sale, held under a previous mortgage, the property included in his hypothecation bond. His application to reserve his rights thereunder had been rejected but he preferred no appeal. He instituted a suit later on for the recovery of the same. *Held* there was no bar to the suit either under S. 11 or S. 47 of the C. P. Code. S. 47 does not apply because the question raised in the suit cannot be said to relate to the execution discharge or satisfaction of a decree. S. 11 (Expl. 4) does not apply because in the previous suit on a prior mortgage, all that the present plaintiff as defendants in that suit, could have done was to bring to the notice of the Court his own hypothecation bond and this was done; no further relief could have been asked from him. *Sri Gopal* v. *Pirthi Singh* (24 All. 429), Dist. (*Abdul Raoof and Abdul Qadir, JJ.*) RAHIM-UD-DIN *v.* SHAFGAL ULLAH. **81 I. C. 301 = A. I. R. 1922 Lah. 358.**

———*Prior suit in ejectment by purchaser from prior mortgagee—No bar to a suit by the subsequent mortgagee for redemption.*

Whilst in a suit for foreclosure, a subsequent mortgagee must be prepared to pay the money or be foreclosed, he need not seek to redeem in a suit for ejectment. The mere existence of a right to redeem is not a defence to a suit for ejectment. A prior suit for ejectment by purchaser from the prior mortgagee against the subsequent mortgagee is no bar to a suit by the subsequent mortgagee for redemption against the purchaser from the prior mortgagee. 13 Bom. L. R. 895, Rel. on. (*Mittra, A. J. C.*) BALIRAM *v.* NARAYAN. **17 N. L. R. 33 = A. I. R. 1921 Nag. 69.**

—S. 11, Expl. 4—Might and ought—Mortgage suit—Sufficiency of deposit.

———If a mortgagee admits as a fact in proceedings under S. 84 of the T. P. Act that the deposit was of the full amount due on the date it was made, but refuses to receive it on some other ground, he cannot in a suit on the mortgage subsequently, be heard to say that the deposit was insufficient. He will, in such a suit be entitled only to the amount deposited and will have to bear the costs of the mortgagor in the suit. (*Hallifax, A.J. C.*) KESHORAN *v.* BHANGILAL. **67 I. C. 324 = A. I. R. 1922 Nag. 174 (175).**

—S. 11 and O. 22, R. 4—Might and ought—Mortgage suit—Two capacities.

———Where in a suit on a mortgage, certain persons who had purchased the mortgage property in execution of a simple money decree, and who happened to be also the heirs and legal representatives of the mortgagor, were made parties as such heirs and failed to plead their purchase, *held* that they cannot subsequently claim to redeem the properties by a separate suit subsequently. (*Ryves and Gokul Prasad, JJ.*) RAM LALAN SINGH *v.* HARAKH NARAIN. **20 A.L.J. 641 = 73 I.C. 920 = A. I. R. 1922 All. 463.**

C. P. CODE (1908), S. 11—Might and ought—Mortgage suit—Two mortgages.

——*Suit on one—If a bar to a suit for accounts by the mortgagors.*

A person held two mortgages one for Rs. 35,000 and the other for Rs. 20,000 over the same property. The mortgagee admitted having received Rs. 48,000 from Insurance Company which sum was less than the sum alleged by the mortgagor to be due on the policy. The mortgagee sued on the smaller mortgage and got a decree. Subsequently the mortgagor sued for accounts.

Held, that the latter suit was not barred by *res judicata* as it was impossible to say that in the suit on the smaller mortgage an adjustment of accounts on the larger mortgage might and ought to have been in issue between the parties and the whole matter in issue in the subsequent suit could be decided in the earlier suit on the smaller mortgage. 16 Cal. 682 and 30 All. 36, Dist. (*Rutledge, C. J. and Brown, J.*) MA KYIN AIN *v.* A. R. M. A. L. A. CHETTYAR FIRM.

A. I. R. 1930 Rang. 197.

——A subsequent suit by a simple mortgagee for his mortgage money is not barred, by reason of a prior suit by the mortgagor for possession and redemption of that property from the same mortgagee as usufructuary mortgagee, on the ground that the mortgagee should have put forth his mortgage in the previous suit. 60 P. W. R. 1917 relied on. (*Martineau, J.*) RELU MAL *v.* MASITI. **87 I. C. 237 = A. I. R. 1925 Lah. 516.**

——Suit on latter mortgage does not bar subsequent suit on former one. (*Maung Kin, C. J.*) MAMYIT *v.* SHARMA. **69 I. C. 897 = 10 L. B. R. 360.**

—S. 11—Might and ought—Omission to plead—Applicability.

——Decision in a previous rent suit whether *ex parte* or not operates as *res judicata* in a subsequent rent suit even for a different period if any question which arises in the suit or which if objections were taken by a party ought to have been decided has been decided thereby. (*Suhrawardy and Duval, JJ.*) SHIB CHANDRA TALUKDAR *v.* LAKHI PRIYA GUHA.

40 C. L. J. 507 = 85 I.C. 123 = 29 C. W. N. 253 = A. I. R. 1925 Cal. 427.

—S. 11—Might and ought—Omission to plead—Attack.

——A mortgage was executed by a Hindu widow. A suit for possession brought by the reversioner during the widow's life-time, against the mortgagee on the ground that the mortgagor was only the mistress of the previous full owner's father aud was not the full owner's true mother, and so was not entitled to succeed to his estate was dismissed on the ground that the woman was his true mother and that the suit was premature.

Held, that in a subsequent suit after the mortgagor's death, the plea that the mortgagor had no right to the property as she had been only the step-mother of the previous owner could not be raised. (*Sulaiman, J.*) RAM PRASAD *v.* BABULAL SONAR.

6 L. R. A. Civ. 182 = 86 I. C. 849 = A. I. R 1925 All. 417.

——Where the brother of a Hindu trustee fails in a suit against the widow of the deceased, wherein he claimed to succeed to the deceased's property by right of survivorship, it is not open to him afterwards to dispute the title of the widow as the legal representative of her husband in other proceedings. (*Phillips and Odgers, JJ.*) KOTHANDARAMASWAMI NAIDU *v.* PAPPAMMAL. **79 I. C. 891 = A. I. R. 1925 Mad. 218.**

—S. 11—Might and Ought—Omission to plead—Award.

——*Failure to object under Sch. II, R.* 15—*Effect.*

C. P. CODE (1908), S. 11—Might and Ought—Omission to plead—Defence.

Where no objection is taken to an award under Sch. II, and a decree is passed in accordance with its terms, the decree is binding on the parties thereto and cannot be subsequently treated as nullity because the arbitrators had wrongly decided a mixed question of fact and law which had arisen before them. 36 All. 69; 29 Cal. 167, Rel. on. (*Sulaiman and Kennedy, JJ.*) MADAN MOHAN *v.* NARAIN SINGH. **117 I. C. 361 = 1929 A.L.J. 540 = A.I.R. 1929 All. 521 (524).**

—S. 11—Expl. 4—Might and ought—Omission to plead—Co-defendants.

——*Pre-emption suit—Constructive* res judicata.

A sued *B*, one of two vendees *B* and *C*, for preemption and got possession of the whole property sold. *C* then sued for recovery of his half share making *B* also a defendant and got possession. *A* then sued *B* for recovering half the price paid by him.

Held, that the suit by *A* for refund of half the price was not barred by constructive *res judicata* simply because of his failure to claim the refund in the suit by *C* for recovery of his half share in which *B* also was a defendant. (*Tekchand, J.*) GURDAS MAL *v.* RAM BHEJA MAL. **117 I. C. 229 = A. I. R. 1929 Lah. 294.**

—S. 11—Expl. 4—Might and ought—Omission to plead—Defence.

——The failure by a defendant to raise a ground of defence which he cannot lawfully raise in a particular suit does not debar him from subsequently suing on that ground. (*Dalal, J. C.*) GANESH PRASAD, *v.* JOT SINGH. **87 I. C. 1017 = A. I. R. 1925 Oudh 719.**

——*Fraud.*

Where a matter is constructively in issue, it need not be heard and finally decided by Court in order to constitute *res judicata*. Where a plea of fraud might have been raised in the prior suit but was not, *held*, that the same was constructively an issue in the prior suit and constituted *res judicata* for purposes of the later suit, 12 P. R. 1915, Foll. (*Dalip Singh, J.*) MAHOMED HUSAIN *v.* GHULAM BI. **11 Lah L. J. 97 = 117 I. C. 805.**

——*Jurisdiction.*

Where a Court has decided the question of jurisdiction, although wrongly, and no objection was raised to its jurisdiction the question become *res judicata* between the same parties in a subsequent suit. (*Fawcett, J.*) RAJARAM *v.* CENTRAL BANK OF INDIA.

28 Bom. L. R. 879 = 98 I. C. 341 = A. I. R. 1926 Bom. 481.

——*Invalidity of sale.*

Where in a prior pre-emption suit it was open to the defendant to plead that there was in fact no sale but the defence was not raised and the suit for pre-emption was decreed and subsequently a fresh suit was instituted by the defendant to recover the property from the vendee. *Held*, that the suit was barred by cl. (4) to S. 11, C. P. Code. (*Sulaiman and Kendal, JJ.*) GANGA PRASAD *v.* BENI PRASAD. **1930 A. L. J. 601.**

——*Lessor and Lessee—lessee also heir to the leased property—Suit on the lease—Failure to assert title as heir—Subsequent suit as heir—Barred.*

A widow and executrix of her husband's property conveyed a piece of land to *R*, who leased it to *V*. One of the sons of the widow *R*. sued *V* in ejectment. *V* was *held* estopped under S. 116, Evidence Act, and the sale to *R* conveyed only the widow's interest. In appeal *V* filed a petition that he has already delivered possession to *R* and that the order in appeal should be so framed as not to affect his title as of the next kin of the father—Petition was dismissed. In a subsequent suit by *V* to recover his share as heir,

Held. that apart from the effect of S. 116, *V* was prevented from obtaining the relief sought by him in the subsequent action. (*Lord Russell of Killowen.*) JOHN AGABEG VERTANNES *v.* JAMES GOLDER ROBINSON.
57 I.A. 208 = 34 C. W. N. 720 = A. I. R. 1930 P. C. 224.

——*Prior suit to set aside sale—Plea that mortgage is void not raised—Subsequent suit is barred.*

N transferred his minor son's property by way of mortgage to *M*, who obtained a decree on foot of the mortgage deed and took out execution of the decree. The minor's sister *F* brought a suit as the minor's next friend to have the decree set aside. The suit was dismissed. The minor after attaining majority filed a suit alleging that *N* had no authority to transfer the house by way of mortgage and that the transaction was wholly null and void.

Held, that the previous suit by *F* was *res judicata*. It was open to *F* to raise the plea in that suit that the mortgage was void. As *F* did not raise the plea and her suit was dismissed the plea could not be raised in the subsequent suit. (*Jai Lal and Agha Haider, JJ.*) UMAR DIN *v.* MIRZAMAN. **31 P. L. R. 123 = A. I. R. 1930 Lah. 654.**

——*Lease of the right to receive the offerings—Suit for lease amount—Decree—Subsequent suit for another period—Plea, such right not transferable.*

Held : that the case came within the purview of S. 11 that the defendants ought to have taken the plea in the former suit and they having failed to do so were barred from raising such a plea, and that the mere fact that the suit was for a different period could not make any difference. (*Ashworth and Iqbal Ahmad, JJ.*) BALMUKUND *v.* TULA RAM. **50 All. 394 = 26 A. L. J. 185 = 113 I. C. 242 = A. I. R. 1928 All. 721.**

——*Suit for possession—Deft. not setting up his usufructuary mortgagee—Effect.*

In a suit by *T* for recovery of her one-fifth share of the inheritance, *M* in that suit in his defence did not set up his usufructuary mortgage. The result was that the suit of *T* was decreed for possession. *M*, then, brought a suit for recovery of possession against *T*, on the ground that he was entitled to possession of this share as a mortgagee.

Held.: that the suit was barred as *res judicata* as *M* might and ought to have set up in defence his usufructuary mortgage in the previous suit. (*Mukerji and Bennet, JJ.*) MT. TAMIZUN NISSA BIBI *v.* MUHAMMAD HUSAIN. **50 All. 306 = 113 I. C. 745 = A.I.R. 1928 All. 714 (715).**

——*Deed of gift by a Hindu widow in favour of reversioners—Decree for cancellation—Finality of.*

Where a decree cancelling a deed of gift executed by a widow in favour of reversioners is passed, the finality of the decree must be effective in respect of all the rights of the reversioners in so far as the power of alienation is concerned irrespective of the fact whether they profess to hold the property in suit by virtue of the deed of gift or whether the right to hold the same devolved on them by way of inheritance. (*Wazir Hasan and Raza, JJ.*) DURGA PRASAD *v.* JAGAT JIT SINGH.
3 Luck. 487 = 5 O. W. N. 265 = 112 I. C. 169 = A. I. R. 1928 Oudh 359.

——*Prior suit for possession on basis of gift decreed —Subsequent suit questioning donor's right to make gift is barred.*

Where a prior suit for possession is decreed on the basis of a gift, a subsequent suit questioning the title of the donor to make a gift is barred as that question not only might but ought to have been taken in the previous litigation. (*Wazir Hasan, J.*) NANAKBAKSH *v.* SURESH DAT. **1 L. C. 78 = 101 I. C. 812 = A. I. R. 1927 Oudh 234.**

——*Plea that ought to have been raised barred.*

A, brother of deceased, applied for letters of administration on the ground that the deceased was a Mahomedan. *B*, deceased's wife objected but did not raise the plea that the deceased was not a Mahomedan but a Buddhist and letters were granted to *A*. Subsequently, *A* sued *B* for possession of certain properties.

Held that it was not open to *B* to plead that the deceased was not a Mahomedan but a Buddhist. (*Heald and Cunliffe, JJ.*) MA GALE *v.* MAUNG SHWE.
6 Bur. L. J. 26 = 101 I. C. 327 = A. I. R. 1927 Rang. 333.

——*Suit by reversioner—Plea plaintiff not the next reversioner not taken—If a bar in subsequent suit.*

In a previous suit brought by the plaintiff as next reversioner against a Hindu widow and against transferees from her, the widow and those transferees had failed to adopt the plea that the plaintiff was not the next reversioner. Subsequently the sons of the plaintiff in the previous suit brought another suit against the widow and transferees of some other portions of the estate from her.

Held that the defendants in the subsequent suit were not debarred from raising the plea that the plaintiffs in that suit were not the next reversioners. 19 A. L. J. 749, Dist. (*Boys and Ashworth, JJ.*) KALI CHARAN *v.* BAGESHRA KUNWARI. **89 I. C. 374 = 47 All. 929 = 23 A. L. J. 653 = A. I. R. 1925 All. 585.**

——*Suit for money—Reduction of plaintiff's claim not claimed bars subsequent suit therefor.*

The omission by defendant to claim a reduction in the amount for which he is being sued which reduction the defendant can lawfully claim, debars him from suing for the amount subsequently. (*Dalal, J. C.*) GANESH PRASAD *v.* TOT SINGH. **87 I. C. 1017 = A. I. R. 1925 Oudh 719.**

——*Plea not taken in previous suit—Different subject-matter—Effect.*

A obtained a decree against the estate of *B* and in execution of the same purchased an undivided share in a house alleged to have belonged to *B*. Afterwards *A* brought another suit against *C*. *A*'s nephew and D, *A*'s brother's wife for rent of the purchased share. The defence was that *A* did not purchase the share but there was no plea that the purchased share did not belong to *B* and this suit was decreed. Subsequently in a suit brought by *C* against *A* for possession of the share purchased by *A* on the ground that the share did not belong to *B*,

Held that the question as to the ownership of *B* in the share purchased by *A* was *res judicata* between the parties and the fact that the subject-matter of the previous suit was different to that of this suit did not matter. (*Campbell, J.*) THAKUR DAS *v.* BRIJ LAL. **73 I. C. 457 = A. I. R. 1924 Lah 423.**

——Where it was found that the previous suit would certainly have been defeated by the pleas put forth in the subsequent suit had they been established,

Held those pleas were barred in the subsequent suit by Explanation IV. (*Le Rossignol and Harrison, JJ.*) NABI BAKHSH *v.* MUHAMMAD SALAM ULLAH.
5 L. L. J. 251 = 24 P. W. R. 1923 = 72 I. C. 91 = A. I R. 1924 Lah 83.

——*Plea that minor was not properly represented in a previous suit.*

The minor's next friend had brought a suit to set aside the sale that was held in execution of a decree against the minor and where it would certainly have been a proper ground to take in that suit that the decree was itself null and void so that the sale would also be null and void; but no such plea was put forward. *Held* the ground that the minor was not properly represented in the suit in which the decree was passed was a ground that might and ought to have been put forward in the previous suit and that not having been done, the decision in the previous suit constitutes the question *res judicata* under explanation 4 of S. 11. 21 Mad. 91; 46 Mad. 135, Foll. (*Krishnan and Waller, JJ.*) MALLAYYA *v.* PONNAMMA. **47 Mad. 476 = 19 M. L. W. 410 = 34 M. L. T. 295 = 77 I. C. 628 = A. I. R. 1924 Mad. 608 = 46 M. L. J. 291.**

———Where a purchaser of part of the mortgaged property was a party to the mortgage suit and could have pleaded that the mortgagor had mortgaged property to which he had no title, a separate suit by him for declaration, that the decree-holder-auction-purchaser is not entitled to that part does not lie. Up till the confirmation of the sale, there could be no question as to the mortgagee being considered to have lost his title as mortgagee and acquired the title of auction-purchaser. 31 All. 82, Dist. (*Stuart, J.*) PANDIT SADANAND PANDEY *v.* SHEIKH TUFAIL AHMAD. **79 I. C. 486 = A. I. R. 1923 All. 115.**

———*Failure to plead discharge.*

Suit by creditor against debtor—The debtor was *ex parte*—Decree was passed and money recovered—Debtor then brought a suit for refund on the ground money had already been paid to the agent of the creditor-*Held* he could not recover owing to his failure in former suit to take advantage of the plea of discharge which was open to him. (*Oldfield, J.*) KULANDAIVELU PILLAI *v.* RAMASWAMI NAICKER. **17 M. L. W. 448 = 1923 M. W. N. 235 = 72 I. C. 770 = A. I. R. 1923 Mad. 551 = 44 M. L. J. 495.**

———Where it was open to the plaintiffs in their defence in the former suit to claim in the alternative that they had a vested right in half the property in suit, but they were content to plead a partition whereby they became owners of the whole and in the result their defence failed and it was held that the property belonged to their father,

Held, that this decision was necessarily inconsistent with the alternative defence that might and ought to have been raised. 13 C. W. N. 513, Foll. (*May Oung, J.*) MAUNG NO *v.* MAUNG PO THEIN. **1 Rang. 363 = 2 Bur. L. J. 109 = 76 I. C. 612 = A. I. R. 1923 Rang. 239.**

—S 11—Might and ought—Omission to plead—Effect.

———When a matter which ought to have been raised was not raised it must be held to be a matter which also must have been heard and finally decided in the previous suit. (*Suhrawardy and Duval, JJ.*) SHIB CHANDRA TALUKDAR *v.* LAKHI PRIYA GUHA. **40 C. L. J. 507 = 29 C. W. N. 253 = 85 I. C. 123 = A. I. R. 1925 Cal. 427.**

—Ss. 11 and 21—Might and ought—Omission to plead—Jurisdiction.

———Where, in a mortgage suit the defendant raised a plea that the court had no jurisdiction, but did not bring to the notice of the Court S. 5 of Bengal Regulation III of 1872 which also barred the jurisdiction of the court, and the question was decided against the defendant, *held* that the court had jurisdiction to decide whether it

has jurisdiction to entertain the suit, and that its decision on the point is final and conclusive in all collateral enquiries. Where the want of jurisdiction is not apparent on the face of the proceedings but the absence of jurisdiction depends on a fact in the knowledge of a party, then, if he does not bring that fact forward but allows the court to proceed with the judgment he ought not to be permitted to impeach the jurisdiction in any collateral proceeding. (*Das and Adami, JJ.*) DWARAKA PRASAD MARWARI *v.* JAI BARHAM. **67 I. C. 686 = A. I. R. 1922 Pat. 322.**

—Ss. 11 and 21—Might and ought—Omission to plead—Objection to place of suing.

Section 11 creates what may be called a statutory waiver of the objection to jurisdiction so far as it relates to the place of suing and where there was no consequent failure of justice the validity of a decree passed in such suit cannot be challenged by a separate suit. 43 Mad. 675 (F. B.), Rel. on; A. I.R. 1925 Mad. 117, Foll. and A. I. R. 1919 P. C. 150, Expl. (*Zafar Ali and Addison, JJ.*) PURUSHOTTAM DAS NATHU RAM *v.* RADHA KISHAN. **11 L. L. J. 306 = 120 I. C. 279 = A. I. R. 1929 Lah. 449.**

—S. 11—Might and ought—Omission to plead—Invalidity of contract.

———When the plaintiff sued the judgment-debtor for specific performance of the contract to sell, it was open to the latter to plead that the agreement was void because the property was under attachment or in the hands of the Collector at the time. Explanation IV of S. 11 of the Civil Procedure Code will bar him from taking that plea in a subsequent suit, and it will equally bar the appellant who claims under him and is litigating under the same title. (*Hallifax, A. J. C.*) AMOLAK SAO *v.* MAHIPATRAO. **66 I. C. 850 = A. I. R. 1922 Nag. 81.**

—S. 11—Might and ought—Omission to plead—Legal bar.

———*Failure to plead in previous suit—If can be raised in subsequent suit.*

Where the law forbids a certain thing being done in suit, no amount of failure by a defendant in previous suit to plead, the positive bar created by legislature will prevent its being taken up in a subsequent suit. (*Walsh and Ashworth, JJ.*) MANOHAR LAL *v.* BALDEO SINGH. **49 All. 918 = 25 A. L. J. 582 = 8 L. R. A. (Rev.) 225 = 103 I. C. 379 = A. I. R. 1927 All. 505.**

—S. 11—Might and ought—Omission to plead—Question of title.

———*U. P. Land Revenue Act, Ss.* 111 *and* 233.

The objection raising the question of title under S. 111 cannot be availed of after the tarz taqsim is prepared. And so a suit instituted to set aside a sale which took place subsequent to the preparation of the tarz taqsim cannot be barred by *res judicata* because the question of title was not raised in the partition proceedings, nor can such a suit be barred under S. 233 (*k*) provided the suit does not disturb the partition or union of mahals. 23 All. 291, Dist. (*Dalal, J.*) DEBI PRASAD *v.* SHAMSHER KHAN. **10 L.R.A. (Rev.) 295 = 118 I. C. 45 = A. I. R. 1929 All. 463.**

———*Wagering contract by members of joint family—Minor members.*

The plaintiffs were sued as members of a joint Hindu family. An *ex parte* decree was passed against them by the High Court. Subsequently they sued to set aside the attachment in execution of that decree on the ground that the agreement on which they were formerly sued was a wagering contract and contrary to public policy.

Held, the suit was barred by *res judicata*.

Obiter. Different considerations would apply if the suit had been brought by the minor plaintiffs on the ground they were not properly represented in the former suit. (*Le Rossignol and Harrison, JJ.*) RAM RATAN *v.* THE FIRM HURSUKH ROY CHHOG MAL. **69 I. C. 783 = A. I. R. 1924 Lah. 26. 43 P. L. R. 1922 =**

———*Plea that might have been raised.*

The fact that plaintiffs might have raised a certain plea in the alternative in a former suit but which it cannot be said they ought to have so raised, does not preclude a fresh suit in respect of the plea. (*Chevis, J.*) GIRDHARI LAL *v.* MT UMDAJAN. **3 L. L. J. 215 = 63 I. C. 717 = A. I. R. 1921 Lah. 17.**

—S. 11—Might and ought—Partition.

———*Preliminary decree—Point concluded by—Final decree.*

Though the institution of a suit for partition, whether resulting in consequential judgment or not effects severance in status, where the preliminary decree for partition in a subsequent suit proceeds on a clear finding that the family was still joint till the institution of the latter suit, it is not open to the plaintiffs to go behind the preliminary decree and claim during final decree proceedings that there had been separation prior to the latter suit. A. I. R. 1917 P. C. 35, Ref. (*Courtney Terrell, C. J. and Kulwant Sahay, J.*) JYOTIBATI *v.* LACHHMESHWAR. **A. I. R. 1930 Pat. 260.**

———*Two lands kept undivided—Suit for partition of one—Another not included—Subsequent suit to recover share in other.*

Members of a joint family partitioned part of the property among themselves in 1875 and kept undivided two pieces of land which were left in the possession of defendants, one in that of defendants 1 to 4 and the other in that of 5 to 6. Defendants 1 to 4 sued plaintiffs and defendants 5 to 6 for partition of the piece of land in possession of defendants 5 and 6. The plaintiffs raised a plea of inclusion of the other piece of land. The point was left undecided. Then subsequently a suit was brought by the plaintiffs to recover their share in the land in possession of defendants 1 to 4. It was contended that the suit was barred by *res judicata*.

Held, that the suit was not barred by *res judicata* under S. 11 (4) for the plaintiffs could not be said to be compelled to bring the land in suit for partition in previous suit where the suit was brought by tenants-in-common to recover their share. 20 Cal. 79 (P. C.) ; 7 Bom. 182, Dist. (*Baker, J.*) MALHARI VAMAN *v.* VINAYAK RAO. **31 Bom. L. R. 640 = 119 I. C. 779 = A. I. R. 1929 Bom. 323.**

———*Prior partition suit on the basis of an agreement—Rights of defendant* inter se *setting up independent right—Vague finding as to—Subsequent suit on a different claim—Effect.*

Where in a suit for partition the defendants pleaded an independent right and the suit was dismissed without a definite finding as to their rights *inter se*.

Held, in a subsequent suit for partition as among co-defendants that the decision in the prior suit did not operate as *res judicata*. (*Brown, J.*) MA SHIN *v.* MAUNG HAN. **7 Rang 80 = 117 I. C. 587 = A. I. R. 1929 Rang. 162.**

———*Prior partition suit—Subsequent suit in respect of after acquisitions.*

In a prior suit for partition in 1904 a house mortgaged to the family by one *S*. was not included. Court ordering in 1910 that *S*'s house on possession being taken should be divided half and half, plaintiff sued in 1922 to recover a half portion of the house recovered from the debtor.

Held, that the suit was not barred by *res judicata*. The house was not included in the plaint in the previous suit. It was a subsequent acquisition by defendant 1 on behalf of the family, and in the decree passed by the trial Court partition could not have been and was not in fact ordered with regard to the plaint house. (*Patkar and Baker, JJ.*) GOVINDDAS *v.* GANPATDAS. **30 Bom. L. R. 912 = 113 I. C. 173 = A. I. R. 1928 Bom. 365.**

———*Partition suit—Omission to include all properties—as a bar.*

In a partition all the properties of the family should be included. It is not open to a member of the joint family to ask for a partition of a certain item and leave the rest except in cases where some of the items could not be divided by reason of their being in possession of usufructuary mortgagees or being under a long lease or set apart for maintenance of a widow or some member of the family or some other reasons. It is not left to the option of the plaintiff in a partition suit to ask for relief in respect of certain properties and then to say that he would ask for partition of the other properties at some future time when the circumstances above adverted to are not present. When parties are ignorant as to the existence of some family property and divide the property that is known to them and if afterwards it be discovered that some property belonging to the joint family has been left undivided, there could be no omission to sue within the meaning of R. 2 of O. 2 unless the plaintiff was at some time prior to the suit aware or informed of the claim or of the facts which would give him a cause of action, and therefore it cannot be said that he ought to have included it in the previous suit. (*Devadoss, J.*) SUBRAMANIAN *v.* LAKSHMINARASAMMA. **98 I. C. 538 = 38 M. L. T. 82 = A. I. R. 1927 Mad. 213.**

———*Alienee from Hindu father.*

Father alienating some properties — Son getting decree declaring the sale not binding on him and for recovery of his share after father's death—Alienee subsequently suing for general partition-Matter is *res judicata* as regards properties sold, but the alienee can get other properties as substitute. (*Phillips and Ramesam, JJ.*) SOWRIMUTHU *v.* PACHIA PILLAI. **49 Mad. 483 = 91 I. C. 868 = 1925 M. W. N. 844 = A. I. R. 1926 Mad. 241 = 49 M. L. J. 679.**

———*Co-sharer—Failure to set up proprietary rights—Effect.*

Where a co-sharer has been in possession of a plot of land under an irredeemable mortgage it is incumbent on him during the course of partition proceedings to set up his proprietary rights with regard to the plot and if he does not raise such a title then it is no more open to him to raise it in a Civil Court after the partition proceedings have become complete and final. 20 O. C. 336, Foll. (*Gokaran Nath Misra, J.*) BADRI DIN *v.* MUNESHWAR BAKHSH SINGH. **1 Luck. 210 = 13 O. L. J. 260 = 96 I. C. 75 = A. I. R. 1926 Oudh 509.**

———*Suit for—Different causes of action.*

A prior suit by the plaintiff for partition under a partition deed and a will was dismissed. The plaintiff brought the present suit after the death of his father for partition of joint family property.

Held, that the plaintiff's subsequent suit was not barred by *res judicata* because the cause of action in the

C. P. CODE (1908), S. 11—Might and Ought—Partition.

prior suit was the partition deed executed by his father and there was no obligation on him to sue in the alternative for a partition of the property as joint family property, though he certainly might have done so if he liked. (*Macleod, C. J. and Crump, J.*) MAHADEVAPPA *v.* KASHIRAO. **77 I. C. 92 = 25 Bom L. R. 797 = A. I. R. 1923 Bom. 467.**

——*Claim that ought to have been, but not, raised in partition proceedings—Effect.*

A separate suit is not maintainable if the claim in respect of which the suit was filed is a matter which should have been dealt with in partition proceedings. (*Macleod, C. J. and Shah, J.*) GULABCHAND CHHOTIRAM MARWADI *v.* RAMNATH CHHOTIRAM MARWADI. **64 I. C. 995 = 46 Bom. 327 = 23 Bom. L. R. 1171 = A. I. R. 1922 Bom. 119.**

——*Partition decree—Unnecessary final decree—Failure to appeal—Binding in execution.*

A decree in a partition suit was passed on the 10th January, 1910, the plaintiff being under the impression that the decree in a partition suit was a preliminary decree and required a further decree to make it final, applied to the Court, on 23rd October, 1912, to have the decree made final, and the decree was made final on the 10th of February 1913, erroneously.

Held, that an application for execution presented on 8th October, 1913, was within time. The defendant not having appealed from the order of the 10th February, 1913, it was not open to the defendant to contend that the application for final decree and the order made on that application were not made in accordance with law. 8 Cal. 51 (P. C.); 15 Bom. 242 and 44 Bom. 227 Foll. (*Macleod, C. J. and Fawcett, J.*) DAYABHAI CHUNILAL GHANCHI *v.* BAI UJAM. **61 I. C. 159 = 45 Bom. 952 = 23 Bom. L. R. 308 = A. I. R. 1921 Bom. 260.**

——*Co-sharer—Suit for possession on allegation of partition—Allegation found against—Subsequent suit for partition whether barred.*

Plaintiff and defendant were co-sharers in a holding. Plaintiff sued for possession of a specific portion of the holding on the allegation of a prior amicable partition between the parties. This allegation was found against and plaintiff was given a decree for a half share in the plaint portion of the holding. Subsequently plaintiff sued for a partition of the whole holding. *Held*, that the suit was not barred by S.11, Expln. 4, C.P. Code. *Held*, further that the objection to the suit fell under O.2, R. 2 (3), rather than under S. 11, Expl. 4, but as the cause of action for the two suits were different, O. 2, R. 2 also did not bar the second suit. 2 Cal. 152; 20 Cal. 385 and 5 Bom. 27, Ref. (*Twomey, C. J and Robinson, J.*) MAUNG LU THA *v.* MAUNG PA U. **11 L. B. R. 1 = 64 I. C. 174 = A. I. R. 1921 L. B. 13.**

—S. 11—Might and ought—Relief not claimed.

——*Mahomedan widow in possession in lieu of dower—Suit by one of the heirs for his share—Omission to claim interest on dower—Claim barred.*

Where a Mahomedan heir sues for recovery of his share the widow of the deceased, who is in possession of her husband's estate in lieu of her dower, and the widow does not claim interest on the dower debt the claim to such interest is barred by the decree passed in such suit and her legal representative cannot claim the same in a subsequent suit A. I. R. 1927 All. 39, Affirmed. (*Lord Blanesburgh.*) MT. NAWASI BEGAM *v.* MT. DILAFROZ BEGAM. **57 I. A. 181 = 34 C. W. N. 653 = 1930 A. L. J. 873 = A. I. R 1930 P. C. 177.**

——*Previous suit confined to a particular right—Plea claiming general right in subsequent suit.*

C. P. CODE (1908), S. 11—Might and Ought—Relief not claimed.

Where in a suit by Hindus against a Government Order denying them the right to play music at the "medai" during the "Mari Amman" festival, the right was granted by the Court, they are not precluded by constructive *res judicata* from claiming, in a subsequent suit, a general right to play music in the public street during the festival since it was not incumbent on the Hindus to claim such general right in the former suit. (*Wallace and Anantakrishna Ayyar, JJ.*) JAFFAR HUSAIN KHAN *v.* KRISHNAN SERVAI. **1930 M. W. N. 520 = 31 M. L. W. 845 = A. I. R. 1930 Mad. 701 = 58 M. L. J. 703.**

——*Prior suit by transferee of pronote against executant and assignor dismissed—Second suit by transferee against assignor alone for damages is barred.*

A subsequent suit for damages brought by the transferee of a pronote against the holder of the note, who has transferred it in his favour, is barred by the rule of *res judicata*, when he has already claimed a relief against the holder of the note by impleading him as a defendant along with the executant of the note in a suit previously brought against them for recovery of the money due under the promissory note, and that relief has been refused to him. 4 Cal. 190; 12 Beng. L. R. 304; 20 Cal. 79 (P. C.) and A. I. R. 1925 P. C. 55, Rel. on.; A. I. R. 1929 Oudh 88, Expl. (*Wazir Hasan, Ag. C. J., Misra and Pullan, JJ.*) KEDAR NATH *v.* BALDEO PRASAD. **6 O. W. N. 191 = 116 I.C. 200 = 4 Luck. 603 = A. I. R. 1929 Oudh 172. (F. B.).**

——*Suit by one alienee from members of joint family impleading another alienee of other items—Latter is not bound to enforce his remedy in the same suit.*

It cannot be contended that, because one alienee brings a suit to recover property demised to him by members of a joint family, another alienee who is made a party is bound to enforce his remedy in that same suit, and he is not, therefore, barred from subsequently suing for the same. (*Phillips and Odgers, JJ.*) HARI SAHIB *v.* SIVAJI RAJA SAHIB. **97 I. C. 783 = A. I. R. 1927 Mad. 61.**

——*Relief claimable in prior suit but not claimed—Barred.*

It is the policy of the Code of Civil Procedure, 1908, as it was the policy of the Code of Civil Procedure, 1882, that parties should not have the right to split up a cause of action against defendants and claim a decree on it in a later suit when they might have claimed the same on it in a previous suit. Where, in a previous suit on a mortgage bond, the plaintiff omitted to claim relief against the person and other property of the defendants,

Held, that they cannot claim that relief in a subsequent suit relating to the same bond. (*Sir John Edge.*) SOURENDRA MOHAN *v.* HARI PRASAD. **24 A.L.J. 33 = 91 I. C. 1033 = 1926 M.W.N. 49 = 5 Pat. 135 = 7 P.L.T. 97 = 28 Bom. L. R. 1126 = 30 C.W.N. 482 = 52 I. A 418 = 42 C.L.J. 592 = A.I.R. 1925 P. C. 280 = 50 M.L.J. 1**

——*Suit for specific performance—Claim for possesssion.*

In a suit for specific performance of a contract of sale though a claim for possession might be made it is not obligatory upon the plaintiff to make such a claim. (*Shah, Ag. C. J. and Kincaid, J.*) KRISHNAJI BABAJI HAVAL *v.* SANGAPPA MURIGAPPA WANGI. **27 Bom. L. R. 42 = 86 I. C. 137 = A. I. R. 1925 Bom. 181.**

——*Counter-claim—Omission to claim standard rent—Subsequent suit—Bombay Rent Act, 1918.*

The present defendant had made a counter-claim in the suit in the High Court in which he prayed that 'it may be declared that the defendant is a monthly tenant of the plaintiff at a monthly rental of Rs. 185." In this suit he contended that he was liable to pay only Rs. 150 and not Rs. 185, per month under the Bombay Rent Act (1918),

Held, it was not only relevant but necessary for the defendant to plead in the first suit that he was liable to pay not Rs. 185 but only Rs. 150 as a standard rent, under the Rent Act. It does not appear to be open now to the defendant after having obtained a declaration and the further relief by way of injunction on a certain footing, to say that it is still open to him to claim the benefit of the Rent Act after having by necessary implication given up what he might have been entitled otherwise to claim in this Court when he made his counter-claim. (*Shah, Ag. C. J. and Crump, J.*) FATMABAI *v.* FRAMROZ ARDESHIR. **24 Bom. L. R. 1281 = 70 I. C. 103 = A. I. R. 1923 Bom. 145.**

———*Suit for mere declaration—Subsequent suit for possession barred.*

Where the plaintiffs in a previous suit prayed only for declaration and did not ask for possession which they were entitled to and ought to have asked,

Held, that their failure to do so clearly precludes them from asking for it afterwards under R. 2, O. 2 of the C. P. Code and makes the question of their right to that possession *res judicata* against them under Expl. IV of S. 11 of the C. P. Code. (*Hallifax and Prideaux, A. J. Cs.*) SUBHAN ALI *v.* IMANI BEGAM. **4 N. L. J. 192 = 65 I. C. 194 = 21 N. L. R. 124 = A. I. R. 1922 Nag. 129.**

———*Mortgage suit on failure to pay principal and interest—Omission to claim personal decree —Effect.*

Where the cause of action is the failure to repay the principal and interest due under the bond and the relief claimable is both against the property hypothecated and against the executants of the bond on their covenant to repay, if the mortgagees omitted to sue for a personal decree against the mortgagors on the covenant, they could not afterwards sue for that which was omitted. (*Dawson Miller, C. J. and Bucknill, J.*) HARI PRASAD SINGHA *v.* SOURENDRA MOHAN SINHA. **1 Pat. 506 = 3 P. L. T. 709 = 66 I. C. 945 = A. I. R. 1922 Pat. 450.**

———*Mortgage suit—Counter-claim arising out of the mortgage transaction not raised.*

Where a mortgage has ripened, all claims relating to the mortgage between parties thereto, must be determined in one suit, whether for sale, foreclosure or redemption. Where in a mortgage suit, the defendant omits to put forward a counter-claim due to him by the mortgagee, arising out of the mortgage transaction, a separate suit for such recovery is barred. (*Sadasiva Aiyar and Spencer, JJ.*) AMSENAMMAL *v.* MEENAKSHI. **60 I. C. 226 = 12 M. L. W. 173.**

—S. 11—Might and ought—Scope of the rule.

———*Test of.*

The test to be applied in order to determine whether a matter ought to have been made a ground of attack in a previous suit is whether the matters are so dissimilar that their union might lead to confusion. 25 Bom. 189, Foll. (*Tapp, J.*) MT. SAID KHANAM *v.* SAID MUHAMMAD. **A. I. R. 1930 Lah. 487.**

———Explanation IV, S 11 cannot be given effect to bar a suit, unless all the requisite conditions laid down in the body of the section are also fulfilled. (*Wallace and Sundaram Chetty, JJ.*) S. L. RENGIER *v.* RAMIA SANTHU. **A. I. R. 1930 Mad. 264.**

———*Suits by sub-mortgagee.*

Where failure to plead a specific cause of action, either as the sole course or as an alternative course, is due to a wrong view of the law, Expln. IV will certainly apply. Where such failure, however, is due to the plaintiff having an honest belief as to a fact or series of facts, being sufficient to entitle him to the relief claimed, it will seldom be held that he was bound to raise a different cause of action or an alternative cause of action. Each case must be decided on its merits. Where a person, who was a sub-mortgagee, at first wrongly sued as an assignee of the mortgagee and his suit was dismissed, another suit by him on the basis that he was a sub-mortgagee will be barred by Expln. IV. (*Ashworth, J.*) RAFIQUNNISSA BIBI *v.* ABDUL SHAKUR KHAN. **116 I.C. 738 = A. I. R. 1929 All. 400.**

———*Different causes of action.*

Where the first suit was based on the allegation of dispossession in respect of a certain plot, a subsequent suit for allotment of a plot of land in lieu of maintenance is not barred for though the claim put forward in the second suit might have been made a ground of attack in the previous suit, it is not such that it ought to have been made a ground of attack and plaintiff was not bound to put forward the claim as a ground of attack. The only right claimed in the former suit was the recovery of certain land from a trespasser and it was not necessary for the final determination of that right that the plaintiffs should have asked the Court to adjudicate upon his right to a plot of land in lieu of maintenance, the second suit cannot therefore be said to be barred by the rule of *res judicata*. 20 Cal. 79 (P.C.) and 35 Bom. 507, Rel. on ; 22 Mad. 323 and 23 Mad. 629, Ref. (*Shadi Lal, C. J. and Hilton, J.*) PURSHOTTAM SINGH *v.* BALWANT SINGH. **11 Lah. 99 = 121 I. C. 428 = A. I. R. 1929 Lah. 872.**

———Whether a particular matter should have been made a ground of defence or attack must depend upon the particular facts of each case. (*Shrivastava, J.*) DEO DATT *v.* RAJ BOLI. **5 O. W. N. 653 = 112 I. C. 266 = A. I. R. 1928 Oudh 411.**

———*Questions that ought to have been raised in prior suit—Tests—Plea of tenancy in severalty found against in prior suit—*Res judicata.

Where in a suit for rent the defence was that there was a division of the tenancy with the consent and knowledge of the landlord and that the defendants were not jointly but severally liable for the rent, the plaintiffs obtained two *ex parte* rent decrees jointly against all the defendants in respect of the entire rent,

Held, that the defendants were debarred from setting up tenancy in severalty.

Per *Suhrawardy, J.*—No hard and fast rules obtain as to what questions should be recorded as questions that ought to have been raised in the previous suit. But there are several tests which have been applied from time to time when such questions have had to be decided. One of the tests is whether by raising the questions the previous decree could have been in any way varied or affected or have been defeated. (*Suhrawardy and Duval, JJ.*) SHIB CHANDRA TALUKDAR *v.* LAKHI PRIYA GUHA. **40 C. L. J. 507 = 85 I. C. 123 = 29 C.W.N. 253 = A. I. R. 1925 Cal. 427.**

———*Discretionary point.*

Explanation IV to S. 11 would not apply to a point which the Court may or may not decide in its discretion. (*Devadoss and Sundaram Chetty, JJ.*) MARIMUTHU GOUNDAN *v.* MUNIAMMAL. **24 M. L. W. 812 = 99 I. C. 525 = A. I. R. 1927 Mad. 120.**

———*Order on summons for directions under Bombay*

High Court Rules (Original Side), 130, 131—*Trial Court's jurisdiction not necessary to decide—Question of jurisdiction—If* res judicata.

The only way in which a matter at issue between the parties can be held to be *res judicata* when it has not been actually decided by the Court is under S. 11, Explanation IV, of the C. P. Code. On a summons for directions under Rr. 130 and 131 of the Bombay High Court Rules (Original Side), it is not necessary to decide whether the Court which is to try the suit has jurisdiction to try the suit as between the defendant and the third party. Hence the mere fact that on such summons for directions, the liability between the third party and the defendant is directed to be tried at the trial does not necessarily make the question of the trial Court's jurisdiction *res judicata*. (*Macleod, C. J. and Heaton, J.*) KARIM ELAHI *v.* SHER AHMED. **45 Bom. 24 = 59 I. C. 28 = A. I. R. 1921 Bom. 195.**

—S. 11—Might and ought—Set off.

———*Failure to plead set off or counter-claim.*

Where a person who could put forward a counter-claim or plead an equitable set off does not do so, his subsequent suit for such a claim, or claim to set off would not be barred by reason of his not having put it forward in the suit against him. A. I. R. 1925 Mad. 830; 28 M. L. J. 513, Rel. on; 23 Cal. 79 (P. C.), and A. I. R. 1925 Cal. 427, Dist. (*Devadoss, J.*) CHANDRAMOULI *v.* SATYA NARAYANA. **24 M. L. W. 282 = 97 I. C. 488 = A. I. R. 1926 Mad. 1020.**

———*Suit by agent against principal—Cross-claim for damages—Failure to raise—Effect.*

Where in a suit by an agent against the principal, the principal had a claim for damages against the agent in respect of a certain transaction but failed to have the issue tried but the agent gave credit for a certain sum in respect of that transaction and a decree was passed on the footing that the principal was entitled to that credit,

Held, that the decree did not preclude the principal from maintaining another action for damages. (1841) 8 M. & W. 858 and (1871) L. R. 6 Q. B. 687, Foll. (*Venkatasubba Rao, J.*) GOVINDA RAO *v.* NATADU RUDRAYYA. **1925 M. W. N. 228 = 90 I. C. 465 = A. I. R. 1925 Mad. 830 = 49 M. L. J. 14.**

—S. 11—Might and ought—Suit based on custom.

———*Custom not alleged—Suit dismissed—Second suit alleging custom is barred.*

A former suit was for declaration that the deed of gift by widow in favour of her daughter's son was void. The plaintiffs were only remote reversioners and as remote reversioners cannot sue in presence of the next reversioner unless there is a special custom that all branches of the family take equally as reversioners, the plaintiffs should have alleged that custom in their plaint, which they did not, during the pendency of the suit and before any evidence had been taken the widow died. Thereupon the plaintiffs made an application to be allowed to amend their plaint. They said that owing to her death they had become entitled to institute a suit for possession and that in order to show that right it was now necessary for them to plead the custom. They also asked to be allowed to sue for possession. The learned Subordinate Judge refused to allow the amendmend of the plaint and as without the amendment, the plaintiffs had no *locus standi* the suit was dismissed. On a second suit by the same plaintiffs for the same relief, *held*, that the suit was barred. (*Dalal and Simpson, A. J. Cs.*) FATEH SINGH *v.* JAGANNATH BAKSH. **10 O. L. J. 132 = 74 I. C. 549 = A. I. R. 1923 Oudh 242.**

—S. 11—Might and ought—Suit on title.

———*Causes of action arising out of the same title—One cause of action decided in an independent suit—Second suit on the other cause of action if barred.*

Where causes of action although relating to different details, *viz.*, in the previous suit the materials of the house, and in the second suit the site of the house, both arose out of precisely the same title, *viz.*, that the plaintiff had acquired the property under the sale-deed of a certain date,

Held, that decision in the previous suit operated as *res judicata* and the second suit was barred. 2 N. L. R. 94; 36 Bom. 189; and 26 Mad. 760, Dist. (*Findlay, J. C.*) PAIKU *v.* MT. KAMALJI. **106 I. C. 861 = A. I. R. 1928 Nag. 112.**

———*Prior suit on the basis of a reversionary right—Subsequent suit as heir—If barred.*

The plaintiff brought a suit to recover certain property alleging that he was the reversionary heir of one *V*. The property had been in the possession of *N*, a female relation of *V*. Plaintiff's suit to recover the property from the defendants who were in possession was brought after *N*'s death. The suit was dismissed. Again a suit was brought to recover the same property from the same defendants on the ground that the plaintiff was the heir of *N* who had been in possession of the property.

Held, that the second suit was barred under S. 11, Expl. IV, as the plaintiff might and ought to have put forward both his titles in the previous suit. (*Phillips, J.*) RAMAIAH *v.* LAKSHMI NARAYAN. **23 M. L. W. 13 = 1926 M. W. N. 126 = 91 I. C. 660 = A. I. R. 1926 Mad. 234 = 49 M. L. J. 701.**

———*Alternative ground of title not pleaded in previous suit—Effect.*

When the later suit is based on a different title and a different cause of action, even though it might have been open to the plaintiff to have set up a title as an alternative ground of attack in the previous suit, that omission cannot operate to deprive him in the later suit to set up that title in regard to property which was not in dispute in the previous suit. (*Kanhaiya Lal and Sulaiman, JJ.*) L. CHHOTEY LAL *v.* CHANDRA BHAN. **45 All. 59 = 80 I. C. 1041 = A. I. R. 1923 All. 176.**

———*First suit on title by purchase—Second suit on title by inheritance—Second suit is barred.*

The first case was for possession against the defendant as owner on the strength of plaintiff's title by purchase, the second case was again for possession on the strength of plaintiff's title as owner by inheritance. In both cases plaintiff was litigating under the same title, namely, his ownership. *Held*, he should have combined the two claims in the first suit (*Krishnan and Ramesam, JJ.*) MUHAMMAD ROWTHER *v.* ABDUL RAHMAN. **1922 M. W. N. 845 = 72 I. C. 207 = 17 M. L. W. 188 = 32 M. L. T. 82 = 46 Mad. 135 = A. I. R. 1923 Mad. 257**

—S. 11—Minors.

———*Minority—If precludes the operation of*—Res judicata.

The minority of the defendants at the time of prior decision does not preclude the operation of *res judicata* against them provided that some of the defendants had identical interests with theirs. A. I. R. 1927 P. C. 56, Rel. on. (*Ashworth, J.*) HAR GOBIND *v.* GITAN. **119 I. C. 567 = A. I. R. 1929 All. 346.**

———*Applicability of doctrine to*

The mother of a minor illegitimate son claimed maintenance till minor attained majority or during the lifetime of plaintiffs. The decree was passed allowing maintenance till majority only. No plea was raised as to the maintenance of the minor after majority. *Held*, a second suit by the minor on attaining majority for future maintenance would not be barred. (*Devadoss and Walsh, JJ.*) RATHINASABAPATHY ODAYAR *v.* GOPALA ODAYAR. **29 M. L. W. 696 = 121 I. C. 126 = A. I. R. 1929 Mad. 545 = 56 M. L. J. 673.**

——*Minor not properly represented in former suit.*

Where there was no proper appointment of a guardian *ad litem* and, therefore, the minor was not properly represented in the former suit, the decree passed in the suit does not operate as *res judicata*. A. I. R. 1922 All. 91 and A. I. R. 1924 All. 751, Rel. on. (*Lindsay and Sulaiman, JJ.*) RATTAN CHAND *v.* RAM KISHAN MURARJI. **26 A. L. J. 777 = 114 I.C. 743 = A.I.R. 1928 All. 447.**

——*Previous suit through next friend—Subsequent suit—When barred.*

A subsequent suit by a person must be considered to be barred by *res judicata* on account of a previous suit wherein he was represented by a next friend unless the plaintiff is able to establish that his interests were so grossly neglected by his next friend in the previous suit as to render the decision of the question against him nugatory in the subsequent suit. (*Stuart, C.J. and Raza, J.*) TALUMUN BEGUM *v.* MARYAM. **4 O. W. N. 748 = 105 I. C. 59 = A. I. R. 1927 Oudh 354.**

——*Application by guardian* ad litem *to be discharged on the ground of minor's attaining majority—No notice to minor served—Order that minor had attained majority is not* res judicata.

Where an order is passed merely on the application of the guardian *ad litem* to be discharged on the ground that the minor had attained majority without notice to the minor, he is not bound by such an order and can in a subsequent suit show that he was minor. (*Das and Adami, JJ.*) GANGANAND SINGH *v.* RAMESHWAR SINGH BAHADUR. **6 Pat. 388 = 102 I.C. 449 = 8 P. L. T. 730 = A.I.R. 1927 Pat. 271.**

——*Prior suit by minor's guardian to recover property from vendee sold in excess of that sanctioned by Court dismissed—Fresh suit by minor after majority—If barred.*

Where a portion of a minor's property was sold by his guardian to discharge the debts of his father with permission of the Court but the vendee took possession of an area in excess of the land sold and the guardian, on her behalf and on behalf of the minor, sued the vendee for the excess when the Court refused to adjudicate on the plea, that the sale by the minor's guardian in excess of the land sanctioned by the Court was entirely without authority, on the ground that it had been raised too late and that the plaintiff could bring a separate action upon it and dismissed the suit, and the decision was not appealed against.

Held, that the previous litigation is not binding on the minor and he is not estopped by it from bringing a suit for recovery of the excess land taken possession of by the vendee. (*Le Rossignol and Fforde, JJ.*) LABH SINGH *v.* SHAHBAN MIR. **7 Lah. 129 = 95 I.C. 342 = 27 P. L. R. 310 = A.I.R. 1926 Lah. 289.**

——*Defence open to but not raised by guardian.*

The omission of the guardian to raise any other defence on behalf of his ward which he might and ought to have raised does not preclude the ward from raising that defence in a subsequent suit, otherwise the minor would be made to suffer for the laches of his guardian. (*Wazir Hasan and Neave, A. J. Cs.*) RAMESHWAR BAKSH SINGH *v.* MT. RIDH KUER. **87 I. C. 238 = A. I. R. 1925 Oudh 633.**

——*Unnecessarily joined in a prior suit—No bar to subsequent suit.*

The mere fact that the respondent who was quite an unnecessary party was joined when minor as plaintiff by his mother in her suit, will not make the decision against her, *res judicata* against her son. (*Ryves and Gokul Prasad, JJ.*) NARAIN SINGH *v.* RAJ KUMAR SINGH. **44 All. 428 = 66 I. C. 62 = 20 A. L. J. 251 = A. I. R. 1922 All 217.**

—S. 11—Miscellaneous proceedings—Administration.

——*Point of genuineness of will raised and decided—Question cannot be raised in subsequent litigation between parties.*

Where a legatee under a will applies for grant of letters of administration and is opposed by a party as heir of the deceased, on the ground that the will was mere forgery and the Court decides in favour of the will being genuine and grants the letters of administration it is not open to that person to raise the question of genuineness of the will in a subsequent litigation between the legatee and himself. (*Misra and Raza, JJ.*) FAQIR BUKSH SINGH *v.* UDERAJ SINGH. **6 O.W.N. 624 = 119 I.C. 456 = A.I.R. 1930 Oudh 29.**

——*Declaratory decree incapable of execution—Subsequent suit for distribution of shares.*

Where in an administration suit, a declaratory decree is passed, it is not capable of execution and another suit praying that the shares declared by the previous decree be distributed is not barred by *res judicata*. English and Indian Case-law discussed. (*Maung Kin, J.*) MAUNG PO THIN *v.* KO. THA YE. **11 L.B.R. 60 = 64 I.C. 813 = A. I. R. 1921 L. B. 22.**

—S. 11—Miscellaneous proceedings—Amendment of decree.

——*Successive applications for amendments—Maintainability.*

A Court is competent to entertain successive applications for amendment of clerical or arithmetical mistakes in judgments or decrees and a decision on a prior application of this kind does not operate as *res judicata* in subsequent applications, but if an application for amendment has been heard and disposed of on the merits, the Court will not, except in exceptional circumstances, entertain a subsequent application for substantially the same relief. 39 Cal. 265, Foll. (*Tek Chand, J.*) MT. ATMA DEVI *v.* MT. SHIB DEVI. **107 I. C. 390 = A. I. R. 1928 Lah. 244.**

—S. 11—Miscellaneous proceedings—Arbitration.

——*Arbitration—Award—Suit impeaching—Final decree in terms of award pending suit.*

An arbitrator gave no indication in his award that it was only a preliminary stage to the final decision to be given by him. On the other hand he framed issues and gave decision on them. And although he did not state that so many rupees were to be paid by one of the party to the other he gave sufficient indications as to how the liabilities were to be assessed. Plaintiff brought his suit impeaching this award ; and after the institution of the suit the arbitrator purported to give his final award and a decree was made in terms of it.

Held, that the suit was not premature since the award could not be said to be merely a preliminary award, and the subsequent conduct of the arbitrator could not vitiate the suit already instituted.

Held, further, that the decree passed in terms of the final award could not operate as *res judicata*. (*Mukerji and Bennet, JJ.*) SHANKAR LAL LACHMI NARAIN *v.* PHUL CHAND FATEH CHAND. **1930 A.L.J. 1147 = A.I.R. 1930 All. 584.**

———*Principle of finality of adjudication—Application to adjudication by the arbitration Court.*

The principle of finality of adjudication is not limited to the final adjudication of matters in issue in a suit. It applies equally to an adjudication by the arbitration Court of objections to an award falling within the purview of Arbitration Act. And the mere fact that no evidence was led at the date fixed for hearing would not prevent the principle of finality of adjudication from applying. And the discovery of additional evidence of mis-representation would not entitle the plaintiff to have the matter retried. A. I. R. 1925 Sind 42; 13 M. I. A. 160; 12 Cal. 563; *Marriat* v. *Humpton*, 7 T. R. 269, Rel. on. (*Aston, A. J. C.*) ISRIBAI *v.* PEVIBAI.

121 I. C. 164 = A. I. R. 1930 Sind. 195.

———*Application to file award registered as suit, abated for non-joinder of representatives—Second suit to recover money due.*

Where a person makes an application to file an award, and it is registered as a suit, but the suit abated for plaintiff's failure to join deceased defendant's representatives, a second suit to recover the money due under the award is not barred *res judicata*. 45 Bom. 329, Appl. (*Macleod, C.J. and Coyajee, J.*) ABDUL AZIZ SHEIKH *v.* CHANDU SONU KHODKE. **27 Bom. L. R. 652 = 89 I. C. 68 = A. I. R. 1925 Bom. 418.**

—S. 11—Miscellaneous Proceedings—Certificate officer—Court of Wards.

——*Bengal Public Demands Recovery Act* (1919), *S.* 57.

A Certificate Officer, who is a mere agent for speedy and summary recovery of rents due to an estate under the management of the Court of Wards and on whom certain powers of a Civil Court have been conferred, is not a Court exercising special jurisdiction. And so any decision arrived at by a certificate officer cannot operate as *res judicata* on any question raised in the Civil Court. A.I.R. 1927 Cal. 421, Ref. (*B. B. Ghose and Bose, JJ.*) DWARKANATH MANDAL *v.* SRIGOBINDA CHOUDHURI. **112 I. C. 71 = A. I. R. 1929 Cal. 130.**

—S. 11—Miscellaneous proceedings—Income-tax.

———When in a previous year of assessment a decision is arrived at after investigation and enquiry, that certain amounts standing in the name of certain ladies in the petitioner's accounts, were stridhanam amounts belonging to them, and as such the interest paid in respect of the said amounts, is held to be a valid deduction, it is still open to the income-tax authorities to reopen the question of the ownership of the amounts in a subsequent year of assessment, and the authorities not constituting a Court, are not barred by principle of *res judicata*. Case-law discussed. (*Kumaraswamy Sastri, Curgenven and Walsh, JJ.*) SANKARALINGA NADAR *v.* COMMISSIONER OF INCOME-TAX, MADRAS.

31 M.L.W. 738 = A.I.R. 1930 Mad. 209 = 58 M.L.J. 260 (F.B.).

—S. 11—Miscellaneous proceedings—Insolvency.

———Where an application made by a debtor for insolvency was rejected as also the application made by one of the creditors for the adjudication as insolvent of the debtor whereupon another creditor made a similar application.

Held, that the dismissal of the previous application did not operate as *res judicata* in the later proceeding though the second applicant was a party to the first application. (*Kulwant Sahay and Macpherson, JJ.*) CHAUTHMAL BAGIRATH *v.* KHEM KARAM DAS.

107 I.C. 842 = A.I.R. 1928 Pat. 116.

———*Odgers, J.*—Decision under S. 7 of the Presidency Towns Insolvency Act is *res judicata*. (*Schwabe, C.J., and Odgers, J.*) DORAIAPPA IYER *v.* OFFICIAL ASSIGNEE OF MADRAS. **15 M.L.W. 368 = 65 I.C. 244 = 1922 M.W.N. 77 = A.I.R. 1921 Mad. 456 = 42 M.L.J. 141.**

—S. 11—Miscellaneous proceedings—Land acquisition.

———*Decision in land acquisition case—If* res judicata.

A prior decision in land acquisition case, though between the same parties and in respect of adjacent land, is not *res judicata* if land is acquired under different notification. (*Broadway and Skemp, JJ.*) NARSINGH DAS *v.* SECRETARY OF STATE. **112 I.C. 797 = A.I.R. 1928 Lah. 263.**

———*Decision as to title—Land acquisition proceedings.*

Where a dispute as to the title to receive the compensation has been referred to the Court under the Land Acquisition Act, a decree therein renders the question of title *res judicata* in a suit between the parties to the dispute or those claiming under them. 23 Cal. 526, (1896); 17 C.W.N. 935, (1910); 15 C.W.N. 1021, s. c. 13 C.L.J. 547 (1911), Diss.; L. R. 43 I. A. 91 s.c. I.L. R. 43 Cal. 694; 20 C.W.N. 738 (1916); (1909) A. C. 623, Foll. (*Mookerjee and Chotzner, JJ.*) SYED ABDUL ALIM ABED *v.* BADARUDDIN AHMED.

28 C.W.N. 295 = 86 I.C. 1023 = A.I.R. 1924 Cal. 757.

—S. 11—Miscellaneous proceedings—Legal representative.

———*Question under C. P. Code, O. 22, R. 5.*

Once the question as to a legal representative is decided by a Court under O. 22, R. 5, it cannot be re-adjudicated upon in a regular suit separately. 28 All. 109, Disapproved. (*Walsh and Dalal, JJ.*) RAJ BAHADUR *v.* NARAYAN PRASAD. **48 All. 422 = 24 A.L.J. 546 = 94 I.C. 157 = A.I.R. 1926 All. 439.**

———*Rejection of an application to be brought on record as legal representative—Order if* res judicata.

An order rejecting an application to be brought on the record as the legal representative of a deceased appellant, is not a decree and does not constitute *res judicata*. 43 Mad. 812, Dissented from. 13 N.L.R. 32 and 37 All. 272, Foll. (*Kotval, A.J.C.*) MT. LAXMI *v.* GANPAT. **17 N.L.R. 45 = 62 I.C. 303 = A.I.R. 1921 Nag. 23.**

—S. 11—Miscellaneous proceedings—Probate.

———*Decision in probate proceedings as to relationship of parties operates as* res judicata.

The terms of S. 11 are not to be regarded as exhaustive. The binding force of a judgment in probate proceedings depend not upon S. 11 but upon the general principles of law. The rule of *res judicata* though may be traced to an English source it embodies a doctrine in no way opposed to the spirit of the law as is expounded by the learned Hindu commentators. The application of the rule of *res judicata*, therefore, by the Courts in India should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law.

Where a question of relationship of parties had been decided in a previous probate proceeding, a subsequent suit between the same parties involving the same question is barred. 6 All. 269 (P.C.); A.I.R. 1921 P. C. 11; A.I.R. 1922 P.C. 80 and A.I.R. 1916 P. C. 78, Rel. on. (*Lord Darling.*) KALIPADA DE *v.* DWIJAPADA DAS.

1930 A.L.J. 70 = 121 I.C. 200 = 51 C.L.J. 142 = 34 C.W.N. 201 = 1930 M.W.N. 355 = 32 Bom.L.R. 505 = 31 M.L.W. 182 = 7 O.W.N. 119 = 57 I.A. 24 = A.I.R. 1930 P.C 22 = 58 M.L.J. 171.

———The question of *res judicata* is not a rule of technicality but is based upon general principles of law which must be given effect to for the purpose of giving finality to judicial decisions.

If a matter has been fought out in a Court having jurisdiction to decide that matter, the decision on that matter would operate as *res judicata* although the Courts might not be the same. Consequently where a question of relationship of parties has been decided in a previous probate proceedings, a subsequent suit between the same parties involving the same question is barred. 43 Cal. 694; A. I. R. 1922 P. C. 80 and 38 Bom. 309, Rel. on; 15 C. W. N. 1021, Diss. from (*B. B. Ghose and Panton, JJ.*) DWIJAPADA DAS *v.* KALIPADA DE. **31 C.W.N. 898 = 100 I.C. 510 = 46 C.L.J. 596 = A. I. R. 1927 Cal. 421.**

———Where an application for probate by a legatee has been dismissed for default, the legatee's heirs can nevertheless plead the existence of the will as a defence to a suit for the property which they claim as belonging to them under the will. 14 C.W.N. 924, Foll. (*Kumaraswami Sastri, J.*) GANSHAMDOSS NARAYANDOSS *v.* SARASWATHI BAI. **21 M. L. W. 415 = 87 I.C. 621 = 1925 M.W.N. 285 = A. I. R. 1925 Mad. 861.**

———The order passed on compromise in previous probate proceeding cannot operate as a bar to an application for probate of the same will. (*Newbould and B. B. Ghose, JJ.*) BROJO LAL BANERJEE *v.* SARAJUBALA DEBI. **51 Cal. 745 = 84 I.C. 154 = A.I.R. 1924 Cal. 864.**

—S. 11—Miscellaneous proceedings—Review.

———An application in review is not a suit and the rejection does not amount to a decision which bars a fresh suit. (*Pullan, J.*) RAM KIRAT *v.* GAJADHAR SHUKLA. **7 O.W.N. 153 = A. I. R. 1930 Oudh 112.**

—S. 11—Miscellaneous proceedings Same proceedings.

———An order made at an earlier stage in the same proceedings is binding upon the Court at a subsequent stage. 6 All. 269 (P. C.), Foll. (*B. B. Ghose and Panton, JJ.*) JOGENDRA NATH MAITI *v.* RAM GOPAL DAS. **45 C.L.J. 462 = 103 I.C. 639 = A.I.R. 1927 Cal. 616.**

———A decree-holder consented to the appointment of receiver of judgment-debtor's property but shortly after such appointment he applied for receiver's discharge. His application was dismissed.

Held, that this decision operated as bar to the trial of a second application for receiver's discharge. The binding force of such a judgment depends not upon S. 11 but upon general principles of law. 11 I. A. 37; 48 I. A. 187, Affirmed. (*Lord Shaw.*) RAMESHWAR SINGH BAHADUR *v.* HITENDRA SINGH. **5 Pat. L. T. 491 = 81 I.C. 576 = 20 M.L.W. 456 = 35 M.L.T. 182 = 22 A.L.J. 968 = 5 L.R.P.C. 175 = 26 Bom. L.R. 1153 = 40 C.L.J. 431 = 29 C.W.N. 413 = 3 Pat. L.R. Civ. 180 = A.I.R. 1924 P.C. 202 = 47 M.L.J. 286.**

—S. 11—Miscellaneous proceedings — Succession certificate.

———In the previous case, an application by an adopted son for a succession certificate was dismissed by the lower Court on the ground that there was no valid authority to adopt and no valid taking in adoption. The decision was confirmed by the High Court on the ground that no inquiry need be held in miscellaneous petitions into intricate questions of law and fact.

Held, that as there was no final adjudication on the validity of the adoption, the question was not *res judicata*. (*Spencer, O.C.J. and Kumaraswami Sastri, J.*) MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **48 Mad. 1 = 93 I.C. 705 = A.I.R. 1925 Mad. 497.**

———Decisions under the Succession Certificate Act, S. 25 are not *res judicata*. (*Scott-Smith and Fforde, JJ.*) MURLI DAS *v.* ACHUT DAS. **5 Lah. 105 = 92 I.C. 138 = A.I.R. 1924 Lah. 493.**

—S. 11—Parties and representatives—Adopted son.

If in a litigation a decision, fair and square, is obtained against the adoptive mother, to the effect that she possessed no authority to adopt, that decision must be considered to be binding upon the adopted son by virtue of Expl. 6, S. 11, C. P. Code. Case-law discussed. (*Gokar Nath Misra, J.*) ABDUL HALIM KHAN *v.* SOADAT ALI KHAN. **1 L.C. 733 = 108 I.C. 817 = A.I.R. 1928 Oudh 155.**

—S. 11—Parties and representatives— Auction purchaser.

———*If binds.*

(*Obiter.*)—Findings in a mortgage suit may be said to be binding on the auction purchaser purchasing property in execution of the mortgage decree though he is not a party to the mortgage suit as he in a sense represents the mortgagor and the mortgagee and so claims under the judgment-debtor. A.I.R. 1922 Pat. 63, Rel. on. (*Chari, J.*) MA SAW TINT *v.* ABDUL BARI. **119 I. C. 222 = A. I. R. 1929 Rang. 183.**

———*Auction purchaser of puisne mortgagee's right subject to prior mortgage—If can question prior mortgage in a subsequent suit.*

A purchaser in execution of puisne mortgagee's decree against the mortgagor and his sons, who in the suit had done nothing to affirm a first mortgage on the property and where the validity of the first mortgage was not in question in the puisne mortgagee's suit, is not debarred from challenging the validity of the first mortgage as the sons would themselves have done, in a suit by first mortgagee to enforce his mortgage, though the sale to purchaser was subject to first mortgage. 31 All. 583 and *Dickinson* v. *Burrell*, 1 Eq. 337, Rel. on. (*Kumaraswami Sastri, J.*) ALIMSA SAHIB *v.* SUPPU GOUNDAN. **111 I. C. 909 = A. I. R. 1928 Mad. 557.**

———An execution purchaser is the representative of the judgment-debtor so as to bring him within the rule of estoppel and the principle of *res judicata*. A. I. R. 1922 Pat. 63, Foll. (*Das and Foster, JJ.*) MAHARAJ BAHADUR SINGH *v.* A. H. FORBES. **1926 P. H. C. C. 249 = 97 I. C. 205 = A. I. R. 1926 Pat. 478.**

———The auction-purchaser is the representative of the judgment-debtor and seems to be on the same footing as the person claiming under him. A person claims through or under another when he derives his title through that other either by assignment, inheritance or succession or when he holds a subordinate title granted by the other, and except in cases specially provided for by state or common law he can have no better title than the person through or under whom he claims and to such a case S. 11 of the Civil Procedure Code applies. (*Dawson Miller, C. J. and Coutts, J.*) KALI DAYAL *v.* UMESH PRASAD. **1922 P. H. C. C. 33 = 65 I. C. 266 = 1 Pat. 174 = 3 P. L. T. 506 = A. I. R. 1922 Pat. 63.**

—S. 11—Parties and representatives—Benamidar.

———*Proceedings by or against.*

In a proceeding by or against the benamidar the person beneficially entitled is fully affected by the rule of *res judicata*. 46 Cal. 566, Foll. (*Martineau and Moti Sagar, JJ.*) NANAK CHAND *v.* MIR MUHAMMAD KHAN. **75 I. C. 1048 = A.I.R. 1924 Lah. 702.**

—S .11—Parties and representatives—Insolvency.

———Where a mortgagor dies and his property devolves upon an insolvent over whose estate a receiver has been appointed, a decree for foreclosure in favour of the mortgagee in a suit to which the receiver has not been made a party is not *res judicata* againste him even though he has been heard on petitions and objections against the decree. (*Lord Salvesen.*) KALA CHAND *v.* JAGANNATH. **54 Cal. 595 = 54 I. A. 190 = 29 Bom. L. R. 882 = 31 C. W. N. 741 = 101 I. C. 442 = 45 C. L. J. 544 = 25 A. L. J. 621 = 1927 M. W. N. 485 = 39 M. L. T. 5 = 26 M. L. W. 268 = A. I. R. 1927 P.C. 108 = 52 M. L. J. 734 (P. C.).**

———Decision against insolvent after insolvency does not preclude pleas in bar as against Official Assignee who is not made a party. (*Kumaraswamy Sastri, J.*) VENKATESWARULU *v.* LINGAYYA. **20 M. L. W. 63 = 83 I. C. 930 = 1924 M. W. N. 491 = 47 Mad. 633 = A. I. R. 1924 Mad. 689.**

—S. 11—Parties and representatives—Judgment-debtor and decree-holder.

———The judgment against a creditor who sought to attach the property cannot operate as *res judicata* as against the judgment-debtor in a suit brought by him against the claimant. 11 Bom. 114, Dist. (*B. B. Ghose and Roy, JJ.*) RUKEYA BANU *v.* NAZIRA BANU. **55 Cal. 448 = 32 C. W. N. 248 = 105 I. C. 647 = A. I. R. 1928 Cal. 130.**

—S. 11—Parties and representatives — Legal representative.

———The whole policy of the Code is that if the proceeding originally instituted is right and proper any decision obtained therein is binding on all persons on whom the interest or right may devolve pending the disposal of the proceedings. (*Srinivasa Aiyangar and Reilly, JJ.*) VISWANATHASWAMI DEVASTHANAM *v.* KOODALINGA NADAN. **1927 M. W. N. 743 = 108 I. C. 401 = A. I. R. 1928 Mad. 246.**

———Where in a suit for recovery of share against a Mahomedan widow in possession of her husband's estate in lieu of dower, she does not claim interest on the dower debt, the claim to interest is barred by the decree in the suit. (*Mears, C.J. and King, J.*) MT. NAWASI BEGAM *v.* MT. DILFAROZ BEGAM. **48 All. 803 = 24 A. L. J. 910 = 98 I. C. 978 = A. I. R. 1927 All. 39.**

———*Hindu Law—Widow—Decision against—Suit by daughter.*

Where after the death of three brothers a compromise was entered into between two widows dividing property equally and thereupon a third person sued to obtain a declaration that the brothers formed a joint Hindu family and that on the death of the widow of one of them the reversioner was entitled to succeed to the same and the same was decreed. *Held*, that the other widow having been a party to the declaratory suit by the reversioner it is not open to her daughter to say that she was entitled to take on the death of the other widow in preference to the reversioner. The judgment in the previous case operated as *res judicata.* (*Mukerji and Niamatullah, JJ.*) PREMAVATI *v.* JAINTI PRASAD. **27 A. L. J. 518 = 119 I. C. 446.**

—S. 11—Parties and representatives—Lessor and lessee.

———A previous decision in a suit by the lessee against a third person cannot operate as *res judicata* in a subsequent suit by the lessor against the same person as the lessee does not occupy a representative capacity and the lessor cannot be said to be a person claiming through his lessee. 11 C.L. R. 122 and 12 Cal. 580 (F.B.), Rel.

on. (*Fawcett and Patkar, JJ.*) SHRIPADBHAT ANANTABHAT *v.* RAMA BABAJI. **29 Bom. L.R. 274 = 101 I. C 340 = A. I. R. 1927 Bom. 270.**

———Plaintiffs sued for a declaration that the defendants had no right of easement. The defendants were the representative tenants of the village, the villagers of which claimed the right of easement. The proprietors of the village were not parties to the suit. The defence which was based on a grant alleged to have been made by the proprietors of the village was upheld.

Held, that suit by plaintiffs against the proprietors of the village for a declaration of their niskar rights and for confirmation of their possession in that right was not barred by the previous suit. (*Cuming and Chakravarty, JJ.*) MOHENDRA NATH *v.* NABDWIP CHANDRA. **43 C. L. J. 180 = 94 I. C. 5 = A. I. R. 1927 Cal. 97.**

———A decision as to ownership of land obtained by plaintiff, in a former suit against defendant's lessor, is at least a strong piece of evidence as against the defendants in a subsequent suit, on the question as to whom the rent is payable. 15 All. 108, Dist. ; 28 C. L. J. 223 and 33 Mad. 459, Doubted ; 30 Cal. 556 (P.C.), Ref. (*Suhrawardy and Cuming, JJ.*) PURNA CHANDRA THAKUR *v.* RAMESH CHANDRA ACHARJYA CHOWDHURY. **87 I. C. 753 = A. I. R. 1925 Cal. 1218.**

———A lessee who claims under a title previously created by a lessor is not bound by a subsequent finding between the lessor and third parties. 40 Mad. 389; 14 L. W. 587, Foll. (*Krishnan, J.*) NALLAMUTHU PADAYACHI *v.* SRINIVASA AYYAR. **19 M. L. W. 369 = 83 I. C. 965 = 34 M. L. T. 160 = 1924 M. W. N 378 = A. I. R. 1924 Mad. 576.**

———A lessor as such cannot be held to be a person claiming under the lessees within the meaning of S. 11. A suit between the lessee of the zamindari and the tenants *for theerva* is not *res judicata* against the lessor in a subsequent suit even for the same period as the first suit and even when the lessee has surrendered his terms before expiry of the lease. The effect of a surrender of his lease by the lessee is to determine the tenancy and to let in the landlord's rights. (*Napier and Krishnan, JJ.*) RAJESWARA SETHUPATHI *v.* RAMANATHASWAMI. **44 Mad. 514 = 63 I.C. 205 = A. I. R. 1921 Mad. 306 = 41 M. L. J. 288.**

—S.11—Parties and representatives—Licensor and licensee.

———Since the transferee of a grantor of a license is not bound as such by the license under S. 59, Easements Act, it follows that the transferee is also not bound by the result of a previous litigation between the grantor and the grantee, if the claim of the grantor has failed by reason of his failure to prove the ground on which he sought ejectment. (*Wazir Hasan, Ag. C. J. and Raza, J.*) BHAJJA *v.* CHUTTAN. **7 O. W. N. 468 = A. I. R. 1930 Oudh 203.**

—S. 11—Parties and representatives—Lis pendens transfer.

———When property is surrendered *pendente lite* between the preliminary decree and the final decree the alienee deriving his title under such surrender is bound by the terms of the preliminary decree and it is not open to him to re-open questions already decided in the suit and he cannot sue also for the establishment of his title. (*Baker, J. C.*) LACHIRAM *v.* BHOLU. **22 N. L. R. 110 = 82 I. C. 452 = A. I. R. 1925 Nag. 132.**

—S. 11—Parties and representatives—Mortgagor and mortgagee.

———On a mortgage having been created in respect of an estate in fee simple the legal estate at once vests in the mortgagee and the mortgagor is left with nothing more than an equitable interest which is popularly described as equity of redemption. It therefore follows that the two interests, that of mortgagor and of mortgagee are distinct and a decision against mortgagor in his capacity as mortgagor is not *res judicata* against mortgagee. (*Hasan and Misra, JJ.*) MOHAMMAD JAIMUR KHAN *v.* RAGHUNATH SINGH.

1 Luck. 25 = 3 O. W.N. 55 = 13 O. L. J. 323 = 91 I. C. 1015 = A. I.R. 1926 Oudh 1.

——A mortgagee filed a suit for possession which was resisted by a stranger on the ground that the land belonged to him and not to the mortgagor. The suit was decreed in mortgagee's favour. Subsequently the son of the mortgagor brought a suit for redemption. The stranger in the earlier suit also was a party and raised the same plea of ownership.

Held, that the mortgagee sued in the previous suit as representing the estate and in the latter suit the plaintiff mortgagor was really claiming through the mortgagee and therefore the defendant was debarred from raising the same plea which had been adjudicated upon once before. (*Macleod, C J. and Crump, J.*) BAPUJIRAO RAOJIRAO *v.* RAGHUNATHRAO JOTYAJIRAO.

74 I. C. 285 = A. I. R. 1924 Bom. 299.

—S. 11—Parties and representatives—Purchaser of hypotheca.

——Where a suit by a mortgagee to enforce his mortgage as against a purchaser of the hypotheca was dismissed on the ground that the mortgage had been paid off and where a suit was subsequently filed by the plaintiff to enforce the mortgage against a person who had purchased the hypotheca from the defendants in the previous suit but prior to the institution of that suit.

Held, that the decision in the prior suit was not *res judicata* and did not bar the subsequent suit. 41 M. L. J. 392, Foll. (*Madhavan Nair, J.*) DURAICHAMI TEVAR *v.* ADIMUTHU NADAN. **20 M. L. W. 740 = 84 I. C. 995 = A. I. R. 1925 Mad. 358 = 47 M. L. J. 728.**

——*Declaratory decree—Rights acquired prior to—If affected.*

N a minor on attaining majority repudiated a mortgage of his property executed by his mother *S* in favour of *K* as his certificated guardian and himself mortgaged a portion of the property to *D*. *K* brought a suit against *N* and *S* for a declaration that his mortgage was binding on *N* and obtained a decree. He then brought a suit for sale on the mortgage.

Held, (1) that *D* who claimed under *N* was entitled to repudiate the mortgage of *K*; (2) that the decision in the declaratory suit operated as *res judicata* in the mortgage suit and was binding on all persons claiming through him under transfers made after the suit but not on *D* because the mortgagee rights of *D* having come into existence before the delaratory decree were not affected by it and the property could only be sold in execution of decree on *K's* mortgage subject to these rights. (*Kanhaiya Lal and Mukerji, JJ.*) KISHORI RAMANJI *v.* DULEY RAM. **22 A. L. J. 155 = 78 I. C. 226 = 5 L. R. A. (Civ.) 77 = A. I. R. 1924 All. 474.**

——*Lessor and lessee*

A person holding under a lease granted before a suit is not bound by the decision against his lessor in that suit if he is not a party to it. 33 Mad 459, Dist. 8 All. 324; 32 Cal. 357; 35 Bom. 297; 40 Bom. 679 and 36 California 489, Foll. (*Oldfield and Ramesam, JJ.*) ANAKKARAN PUTHIYAVALLAPIL MUSSAN HAJI *v.* THIYAN THAVARA KORAN. **14 M. L. W. 387 =**

1921 M. W. N. 679 = 65 I. C. 979 = A. I. R. 1921 Mad. 708 = 41 M. L. J. 392.

—S. 11—Parties and representatives—Reversioner.

——In a suit against a widow to enforce a mortgage by her, if there is a finding that the debt was binding on the estate and the sale proclamation states that the debt for which the property was being sold was for necessity and the whole right of the defendant was being sold in execution, then it is the most proper construction of the proceedings in the suit and execution that the whole property was intended to pass to the purchaser. The widow would in such a case sufficiently represent the estate as to attract the doctrine of *res judicata.* (*Ramesam and Venkatasubba Rao, JJ.*) SANYASI *v.* RAMCHANDRA RAO. **1926 M. W. N. 319 = 51 M.L.J. 73 = 95 I.C. 691 = A. I. R. 1926 Mad. 692.**

——*Decrees against widow.*

Where the widow was quite competent to represent the estate and from the nature of the defence put forward and the questions tried, it was abundantly clear that not only she represented the estate but the trial was fairly and honestly conducted.

Held, that the result of the litigation was binding on the reversioners. 40 All. 593 (P. C.), Foll. If a Court is satisfied that the former trial was fair and honest, the mere fact that the reversioner considers that the evidence adduced by the widow in the previous action is insufficient, or that he would have in similar circumstances produced more or better evidence, does not in the least, affect the question. 40 All. 593 (P. C.), Foll.; 42 Bom. 69 Dist. Before applying the principle of *res judicata* to judgments to which limited owners are parties, the Court should take care to be satisfied that the decrees relied on are untainted by fraud or collusion and that the necessary and proper issues were raised, tried, and decided in the suits which led to them. 42 B. 76, Dist. Whether the widow represented the inheritance, may be gathered from the nature of the defence put forward, and the issues raised, tried, and decided in the former suit. The mere allegation that she did or did not, would be of little value. Was the suit based upon a mere personal cause of action by or against the widow? Was it a ground personal to the female heir that was taken in the previous suit? Was it a claim by or against the vidow personally or the inheritance which she represented? To decide these questions the Court must examine the averments, the issues and the findings in the previous suit. If the contentions raised are those connected with the inheritance and the trial was with reference to them, the widow must be held to be representing the estate even though litigation may have arisen out of her own acts; if not the litigation must be deemed personal to her and not binding upon the reversioners. (*Spencer and Venkatasubba Rao, JJ.*) RAJAGOPALAN *v.* RAMAMURTHY. **18 M. L. W. 491 = 73 I. C. 284 = A. I. R. 1924 Mad. 301.**

——*Decree against daughter.*

A decision against daughters in a suit for partition by vendee of one of the daughters, to which reversioners were not made parties, does not operate as *res judicata* against them as they are not bound by it. (*Stuart, J.*) SITA RAM *v.* REWA RAM. **71 I. C. 390 = A. I. R. 1923 All. 366.**

——Previous suit by a Hindu widow for recovery of possession in her own right which she enjoyed for many years and from which she was dispossessed does not operate as *res judicata* against a reversioner to recover possession of the property. (*Greaves and Cuming, JJ.*) SASHI KUMAR SORKHEL *v.* CHANDRA KUMAR SAMADDAR. **35 C. L. J. 348 = 68 I. C. 322 =**

A. I. R. 1923 Cal. 204.

—S 11—Parties and representatives—Scope.

———*Person party to suit but omitted in formal order by oversight—Bar of* res judicata.

Where a person is actually a party to the proceeding but his name is omitted from the formal order merely by an oversight, he cannot claim that the rule of *res judicata* does not apply to him inasmuch as he was not a party to the original trial. (*Lord Darling.*) KALIPADA DE *v.* DWIJAPADA DAS.

1930 A. L. J. 70 = 121 I. C. 200 = 51 C. L. J. 142 = 34 C. W. N. 201 = 31 M. L. W. 182 = 7 O. W. N. 10 = 32 Bom. L. R. 505 = 1930 M. W. N. 355 = 57 I. A. 24 = A. I. R. 1930 P. C. 22 = 58 M. L. J. 171 (P.C.).

———*Suit dismissed on the ground that a person had no right to continue suit—If* res judicata *against his sons.*

A suit which is dismissed on the ground that plaintiff has no right to continue the suit cannot operate as *res judicata* in favour of the sons of the plaintiff. (*Sulaiman and Niamatullah JJ.*) ABHOY RAM *v.* JHANDA.

1929 A. L. J. 1100 = 121 I. C. 102 = A. I. R. 1929 All. 910.

———*Decree passed against deceased's estate—Estate sufficiently represented—Decree will bind all legal representatives as such.*

If a deceased person's estate is represented sufficiently for an effective decree to be made against it, that decree, so long as it stands, will bind all the deceased's legal representatives in their capacity as such, whether they are on the record of the proceedings or not. (*Reilly, J.*) ABDULLA SAHIB *v.* VAGEER BEEVI AMMAL.

117 I. C. 138 = A. I. R. 1928 Mad. 1199.

———*Landlord and tenant.*

The question as to what villages were included in the tenure in question was decided between the landlord who was the decree holder and the tenant. Plaintiff who possessed a subordinate interest in the tenure sued the landlord for setting aside the sale of the tenure in execution.

Held, that the decision cannot be held to be *res judicata*; (*Ross and Fazal Ali, JJ.*) BALDEO DAS *v.* NILMANI NATH. **8 Pat. 122 = 9 P. L. T. 627 = 113 I. C. 681 = A. I. R. 1928 Pat. 615.**

———*Addition of unnecessary parties in subsequent suit —Effect.*

If in a subsequent suit parties who were not necessary parties in the previous suit are added, the fact of such addition does not prevent *res judicata* from applying. (*Kulwant Sahay and Macpherson, JJ.*) NATHUNI SAHU *v.* BHAGWAN GIR. **7 Pat. 840 = 9 P. L. T. 493 = 115 I. C. 235 = A. I. R. 1928 Pat. 436.**

———Where some new parties are added to a subsequent suit in addition to all the parties to the prior suit, the decision in the previous suit is not *res judicata.* (*Dalip Singh, J.*) DILA RAM *v.* BIDHYA DHAR.

100 I. C. 849 = A. I. R. 1927 Lah. 259.

———Plaintiff sued the first defendant and purchasers through him for setting aside a sale in favour of first defendant. The sale-deed was held valid as between first defendant and plaintiff and the suit was dismissed. In appeal plaintiff joined the subsequent purchasers as respondents but not the defendant 1.

Held, that the finding as to validity of sale deed was *res judicata* as between plaintiff and defendant 1 and also as against the subsequent purchasers. (*Sir John Wallis.*) V. P. R. V. CHOCKALINGAM CHETTY *v.* SEETHAI ACHE. **27 M. L. W. 1 = 107 I. C. 237 = 1928 M. W. N. 20 = 4 O. W. N. 1231 = 47 C. L. J. 136 = 32 C. W. N. 281 = 30 Bom. L. R. 220 = 6 Rang. 29 = 26 A. L. J. 371 = A. I. R. 1927 P. C. 252 = 54 M. L. J. 88 (P.C.).**

———*First suit by shebaits for framing a scheme—Second suit by gods themselves through one member of the dedicators's family against other members for declaration that the properties are debuttar.*

The prior suit was instituted by *G* and *R L*. In the plaint the plaintiffs were described as "Sri Sri Iswar Gopal Jiu Thakur's shebaits. *G* and *R L* were defendants in the subsequent suit. The defendants in the prior suit were the other members of the family, and they included *N* and *R B*. The defendants also were described as "Sri Sri Iswar Gopal Jiu Thakur's shebaits" and the prayer was that all the properties being debuttar properties of Sri Sri Iswar Gopal Jiu Thakur established by the said Peary Lal Mandal and Moni Mohan Mandal, a scheme may be framed for the preservation, and for the efficient performance of the daily and periodical shebas of Sri Sri Iswar Gopal Jiu Thakur and the festivals, etc." Subsequent suits were by the plaintiffs: (1) Sri Sri God Gopal Jiu Thakur; and (2) Sri Sri god Shambuth Nata Shib Thakur, represented by the shebait *N R B* was the contesting defendant and the prayer was for a declaration that the properties in suit are owned and possessed by the plaintiff Thakurs as debuttar properties.

Held, that the prior suit was not *res judicata* as regards the subsequent suit because the prior suit was not between the same parties as those in the subsquent suit. 2 I. A. 283, Appl. (*Sir Lancelot Sanderson.*) RADHA BINODE *v.* SRI GOPAL JIU.

54 Cal. 770 = 54 I. A. 238 = 101 I. C. 873 = 29 Bom. L. R. 961 = 1927 M. W. N. 448 = 25 A. L. J. 681 = 45 C. L. J. 605 = 26 M. L. W. 85 = 31 C. W. N. 1063 = A. I. R. 1927 P. C. 128 = 53 M. L. J. 123 (P.C.).

———*Parties not the same—Suit is not barred.*

Where the prior suit was between *A* and *B* and the subsequent suit was between *A* on the one hand and *B* and other persons interested in the result of the suit.

Held, that the parties in the two suits not being the same, the subsequent suit was not barred. 26 Cal. 428 (F. B.) and 12 P. R. 1903, Dist. (*Tekchand and Agha Haidar, JJ.*) GANGA RAM *v.* MAHOMED HUSAIN.

9 L. L. J. 270 = 103 I. C. 858 = 28 P. L. R. 683 = A. I. R. 1927 Lah. 900 (2).

———There can be no *res judicata* where the parties in the subsequent litigation ranged on the opposite sides claim through the same person. (*Wazir Hasan and Neave, A. J. Cs.*) MT. RAJ DULARI *v.* MT. CHANDESAR DEI. **78 I. C. 65 = A. I. R. 1925 Oudh 164.**

———*Public right—Decision in a prior suit*—Res judicata.

Where the ownership of a well and certain adjoining strips of land were in dispute between the trustees of a mosque and a municipality and was decided against the former, they cannot in a subsequent suit by the public set up their right to it. (*Walsh and Ryves, JJ.*) RAM CHAND *v.* MAULA BAKSH. **46 All. 110 = 79 I. C. 310 = 21 A. L. J. 882 = 4 L. R. A. Civ. 583 = A. I. R. 1924 All. 178.**

———So far as plaintiffs were concerned it was held in a previous suit that they had agreed to the alienation which had been for their benefit and could not question it, that they could under no circumstances inherit any of the estate left by the widow and that, should they survive her, another reversioner plaintiff's cousin would be entitled to take that portion that had been alienated and that portion which had not been sold. Plaintiff brought a subsequent suit to the effect that this sale should not affect his reversionary rights. This was dismissed in 1913. Plaintiff with his two younger brothers again brought a suit for a portion of this land which was not alienated after the death of the widow.

Held, the question is clearly *res judicata* as between them and the widow and her successors. (*Martineau and Harrison, JJ.*) MAULA BAKSH *v.* MT. JIWI.

85 I. C. 202=A. I. R. 1923 Lah. 556.

———*Representative suit—Suit by Karnavan of a Malabar Tarwad—Dismissal—Subsequent suit raising the same question by junior member—Bar.*

Where the very question raised in the suit was raised in a previous suit to which the predecessors-in-interest, were parties, and a decision was given therein.

Held, that that decision will operate as *res judicata*.

A judgment in a matter of *res judicata* must stand by itself. It decides what it purports to decide, no more and no less. If there is any ambiguity as to what it decided, which cannot be cleared up without further evidence, then it will not be a clear finding and therefore not a case of *res judicata* at all. (*Schwabe, C. J. and Wallace, J.*) UNNARA *v.* KUNHI RAMAN.

**17 M. L. W. 322=72 I. C. 582=32 M. L. T. 146=
A. I. R. 1923 Mad. 514=44 M. L. J. 443.**

———*Defendants in subsequent suit not parties to provious proceeding—Suit is not barred.*

Defendants got certain property sold in execution of a money-decree. Plaintiffs sued for possession on the ground that the sale was not binding on them inasmuch as an injunction was issued to the Munsiff to stay the execution, and the Munsiff nevertheless, confirmed the sale ; that when he applied for a review of the order confirming the sale, the application was rejected with an order that a regular suit was necessary.

Held, the question whether suit can lie is not *res judicata* as the defendants were not parties to or heard in the proceedings in which the order was passed. (*Kotval, A. J. C.*) BRIJMOHAN SINGH *v.* KASTUR CHAND. **68 I. C. 693 - A. I. R. 1922 Nag. 189.**

———*Evidence Act, S.* 41—*Judgments not* inter partes.

Per *Full Bench.*—It is open to a party to assert as against a third person a title which has been definitely negatived in a previous suit against a contesting claimant. Plaintiff brought a suit against two other persons for a declaration that he was entitled to the Asari Sheriff and to recover from the Government the emoluments of the officer and it was held in that suit that the plaintiff did not prove title to the office and the suit was dismissed. Then the plantiff brought another suit against the Government to recover a sum of money alleged to be due to him as the person entitled to the Asari Sheriff and to perform the services connected therewith. The Government was paying the sums to the successful party in the previous litigation.

Held, that the judgment in the previous suit was not a bar to the second suit. 33 Mad. 483 and 36 Mad. 141, Overruled. 18 C. W. N. 954, Foll.

Per *Kumaraswamy Sastri, J.*—S. 11, C. P. Code, codifies the law in British India as regards the plea of *res judicata* and.though the principle has been applied to proceedings other than suits (*e.g.* execution proceedings), the essentials required by the section as to identity of the questions involved and parties has not been lost sight of. (*Wallis, C.J. Spencer and Kumaraswami Sastri, JJ.*). SECY OF STATE *v.* AHMAD BADSHA SAHIB.

**44 Mad. 778=67 I. C. 971=41 M. L. J. 278=
14 M. L. W. 188=14 M. L. W. 128=
1921 M. W. N. 576=A. I. R. 1921 Mad. 248=
41 M. L. J. 223 (F.B.)**

—S. 11—Parties and represen tatives--Wrong representative.

———Where a person brings a suit and obtains a decree to the extent of the assets against a supposed legal representative of a deceased debtor, who is subsequently found not to be so, a fresh suit on the same cause of action against the real legal representatives is not barred. (*Kulwant Sahay, J.*) MT. NANABATI *v.* BHAIO CHAUDHRY. **9 P. L. T. 807=
108 I. C. 558=A. I. R. 1928 Pat. 362.**

—S. 11—Plea of.

———A plea in bar can be allowed to succeed only where the law expressly provides for it or the implication is so irresistible that its provisions are inconsistent with a contrary hypothesis. (*Mukerji and Niamatulla, JJ.*) MAHADEO BHARTHI *v.* MAHADEO RAI.

**1929 A. L. J. 653=118 I. C. 513=
51 All. 805=A. I. R 1929 All. 506.**

———*Construction.*

A plea in bar of legal rights should be given effect to only on strictly construing the pleadings and the decision in the previous suit. (*Niamatullah, J.*) MAHARAJ SINGH *v.* SRI RAJA SURYAPAL SINGH.

**9 L. R. A. Rev. 306=113 I. C. 758=
A. I. R. 1929 All. 29.**

———*Waiver.*

The bar of *res judicata* is one which does not affect the jurisdiction of the Court but is a plea in bar, which a party is at liberty to waive. (*Suhrawardy and Garlick, JJ.*) RAJANI KUMAR *v.* AJMADDIN BHUIYA.

**48 C. L. J. 577=114 I. C. 129=
A. I. R. 1929 Cal. 163.**

———*In second appeal.*

The mere fact that a point is *res judicata* does not make it allowable in second appeal, if it has not been taken in the written statement of the defendant, nor has any issue been raised on it nor has it been discussed in that light by lower Courts. (*Ananthakrishna Ayyar JJ.*) KRISHNA BHATTA *v.* GOVINDA BHATTA.

A. I. R. 1929 Mad. 775.

———*In second appeal.*

The question of *res judicata* can be raised in appeal and if a decision is come to in prior suit before the disposal of latter suit even in appellate stage, the bar of *res judicata* is applicable ; 11 All. 148 ; A. I. R. 1924 Pat. 823 ; A. I. R. 1923 Cal. 496 and 33 All. 51 (F. B.), Rel. on : 16 Cal. 233 and 33 Cal. 1101, Not Appr. (*Kulwant Sahay and Macpherson, JJ.*) BIBI WASILAN *v.* MIR SYED HUSSAIN. **8 Pat. 107=117 I. C. 167=
A. I. R. 1929 Pat. 173.**

———*Under general principles of law.*

The plea of *res judicata* is not confined to the provisions of S. 11, but may be invoked under general principles of law : A. I. R. 1921 P. C. 11 and A. I. R. 1922 P. C. 80, Foll. (*Fforde and Campbell, JJ.*) MT. SAHIBZADI BEGUM *v.* MD. UMAR. **8 Lah. 15=
27 P. L. R. 504=96 I. C. 1002=
A. I. R. 1926 Lah. 603.**

———*Plea if limited to judgment of Court of concurrent jurisdiction — Applicability to that of exclusive jurisdiction.*

S. 11 of the Code is not exhaustive and the plea of *res judicata* is not limited to a judgment of a Court of a concurrent jurisdiction being pleaded as a bar to the subsequent suit which dealt with in S. 11, but it extends also to a judgment of a Court of exclusive jurisdiction : *The Dutchess of Kingston's* case, (1776) 2 Sm. L.C. 754 6 All. 269 (P. C.) and 48 Cal. 499 (P. C.), Foll. 12 A L. J. 853, Dist. (*Kennedy and Rupchand Bilaram, A. J. C.*) VELJI DAYALJI *v.* FIRM OF NANDLAL.

21 S.L.R. 23 = 94 I. C. 423 = A. I. R. 1926 Sind 236.

———*In revision.*

Point as to *res judicata* not raised in the Court below cannot be raised in revision. (*Krishnan, J.*) RAMUDU CHETTY *v.* VARADARAJA CHARIAR.

13 M. L. W. 289 = 62 I. C. 480 = A. I. R. 1921 Mad. 532.

—S. 11—Prior decision—Award.

———*When a bar to a suit.*

Where an award has replaced the original rights of the parties, it is of itself a good defence to an action based on those rights; but where an award has merely ascertained and defined those rights, not only the award but also its performance must be established to complete the defence: 11 Bom. L. R. 20, Dist.; *Allen* v. *Milner*, (1831) 2 Cr. & J. 47, Appl.; *Commings* v. *Heard*, (1869) L.R. 4 Q.B. 669, Not Appl. (*Shah and Fawcett, JJ.*) SWAMIRAO KONHER NADGIR *v.* CHANNAPPA UPPINA HUBLI. **29 Bom. L. R. 301 = 101 I. C. 398 = A. I. R. 1927 Bom. 237.**

—S. 11—Prior decision—Custom.

———A finding in the previous suit *inter partes* as to the existence or non-existence of a custom of pre-emption ought to bind the parties to that litigation in a subsequent suit; of course, it would be open to either party at a subsequent stage to show that the custom has ceased to exist or has in any other way been abandoned: A. I. R. 1924 All. 321 (F. B.), Ref. to. (*Sulaiman and Mukerji, JJ.*) DEONATH SINGH *v.* TILAKDHARI SINGH. **94 I. C. 463 = A. I. R. 1926 All. 420.**

—S. 11—Prior Decision—Competent Court.

———*Decision by same officer in different capacities—Small cause suit and original suit—Applicability.*

A judgment does not operates as *res judicata* where the munsiff in his capacity of an officer hearing a suit of small cause Court nature is not competent to try the later suit. Apart from his capacity as an officer trying suits of a Small Cause Court nature he may be competent to try the later suit but the combination of two functions in the same office does not affect the question of competency. (*Stuart, J.*) SHAKIRA BIBI *v.* NANDAN RAI **66 I. C. 613 = A.I.R. 1922 All. 241.**

—S. 11—Prior decision—Damages.

———In a suit for damages for occupation of property after the expiry of notice to quit the same, where such relief was sought but not granted in a previous ejectment suit between the same parties:

Held, that it was not competent to the Court to grant damages for the period between the expiry of the notice and the passing of decree in the prior suit. (*Adami, J.*) BULAK CHAND *v.* PADUMCHAND.

104 I. C. 190 = A. I. R. 1927 Pat. 395.

—S. 11—Prior decision—Declaratory suit.

———Dismissal of suit for a declaration that an alienation by a widow is not binding on the reversioner bars his subsequent suit for possession after the widow's death. (*Chevis, J.*) NAWAB *v.* PUNJABA.

4 L. L. J. 442 = 59 I.C. 946 = A. I. R. 1921 Lah. 187.

—S. 11—Prior decision—Decree.

———Where a suit was filed on a prior decree, *held* that so long as the decree was in force the Court should give effect to it and should not ignore it and go into the questions decided by it. (*Ross, J.*) JHUMAK SINGH *v.* MAHINDRA SINGH. **71 I. C. 560 = A. I. R. 1924 Pat. 165 (166).**

———Parties to a suit are bound by the decree passed therein and they cannot in a subsequent suit go behind the decree. (*Banerji and King, JJ.*) RAM NARAYAN DAS *v.* SHRI RADHA BALLABJI. **114 I. C. 871.**

—S. 11—Prior decision—Incidental finding.

———In a previous rent suit, the Court found that the landlord had failed to prove that a certain plot appertained to the disputed holding of the tenants. It was also remarked that the evidence adduced by the landlord to identify the land as included in the kabala was neither sufficient nor reliable. In a subsequent suit for declaration of title to that plot by the landlord:

Held, that the previous decision regarding title was incidentally arrived at in the course of the determination of the principal case regarding the right to recover rent and as such was not *res judicata*: 11 Cal. 301 (P. C.), Rel. on. (*Suhrawardy and Jack, JJ.*) MUKTAKESHI DASI *v.* MANILAL JANA. **57 Cal. 371 = A. I. R. 1930 Cal. 579.**

—S. 11—Prior decision—Jurisdiction.

———The plaintiffs sued for certain inam lands. When the case was first tried, the first District Munsif held that he had no jurisdiction to try the suit, as the matter fell within the purview of S. 21 of Madras Act III of 1895. This was on the first issue "whether the lands in dispute are service inams, and whether this Court has no jurisdiction to entertain a suit with respect to the same." The D. J, considered both these points and found that the lands in question were service inams, and as the plaintiffs did not rely on any right to an office or its emoluments, the Civil Court had jurisdiction to entertain the suit, and remanded the suit to the District Munsif for disposal. The Munsif came to the conclusion that the alienation in favour of the plaintffs was void and not enforceable. On appeal the Subordinate Judge held, disagreeing with the District Judge remanding the suit, that thay were village service inams. It was contended that the Subordinate Judge had no jurisdiction to review the finding of the District Judge in his order of remand as to the character of those inams.

Held, that the plaintiffs had the opportunity to appeal against such of the finding of the District Judge, as determined the character of of the inams, and that not having done so they would be concluded by that finding, it being a finding on a preliminary point but, what the District Judge really intended to do and the important part of his remand order was only the finding as to the jurisdiction. (*Odgers, J.*) SUBBAYYA *v.* SETTIPALLI RAMAYYA. **22 M. L. W. 225 = 91 I. C. 666 = A. I. R. 1925 Mad. 1046 = 51 M. L J. 131.**

—S. 11—Prior decision—Jus tertii.

———In a previous rent suit the defendant-tenant pleaded *jus tertii* and his plea was upheld. The landlord brought a suit for declaration of title against the tenant without making the third party a defendant.

Held, that the decision in a rent suit with reference to title is not *res judicata* in a subsequent declaratory suit. It is immaterial whether the third party under whom the defendants claimed to have held the land was made a party, or not: 26 Cal. 428, (F.B.) Rel. on 12 C. L. R. 38; 10 C. W. N. 820 and 12 I.C. 9, Not Foll. 13 I. C. 40, Dist. (Case law Referred), (*Suhrawardy and Jack, JJ.*) MUKTAKESHI DASI *v.* MANILAL JANA. **57 Cal. 371 = A. I. R. 1930 Cal. 579.**

—S. 11—Prior decision—Landlord and tenant.

———Some of the co-sharers in a mahal in a suit to recover the arrears of rent obtained an *ex-parte* decree. Some years later they instituted a suit again for recovery of rent of the same holding for subsequent years. The defence was that the lambardars had all along been collecting the rents in respect of the patti in which the holding was situated and that the rent had been paid to them in good faith.

Held, that the decision in the previous suit operated as *res judicata* in respect of the question whether for the

C. P. CODE, (1908), S. 11—Prior decision—Landlord and tenant.

years in respect of which that suit was brought the plaintiffs were entitled alone to sue for the rent of the holding, and that they were bound to regard the plaintiffs as their landlords by reason of the decree in the previous suit and that therefore they were not entitled to invoke any presumption that the lambardars are entitled to collect rents in view of the decision in the previous suit. (*Ashworth, J.*) SURDAR SINGH *v.* MT. BALKHER. **98 I. C. 981 = A. I. R. 1927 All. 145.**

——*Previous decision as to the question of the area of tenancy is* res judicata.

A previous decision as to the question of the area of tenancy is *res judicata* in a subsequent suit between the parties: 21 Cal. 236 Not Foll. 1 Cal. 202, Foll. (*Cuming and Gregory, JJ.*) BENGARAM CHANGA *v.* BEJOY GOVINDA. **91 I. C. 738 = A. I. R 1926 Cal. 513.**

—S. 11—Prior decision—Mesne profits.

——It is certainly a point for consideration whether, when a relief for *pendente lite* and future mesne profits was specifically claimed in the plaint and it was not granted, intentionally or owing to an oversight, that relief cannot be deemed to have been refused within the meaning of Expl. (5) to S. 11. (*Lindsay and Sulaiman, JJ.*) RAMCHARAN SAHU *v.* GOGA. **49 All. 565 = 25 A. L. J. 425 = 102 I. C. 96 = A.I.R. 1927 All. 446.**

—S. 11—Prior decision—Mortgage.

——*Successive redemption suits in respect of different mortgages over the same property.*

Where the first suit is to redeem one mortgage, it does not bar a suit to redeem a mortgage of a different date though the property sought to be redeemed and the principal amount of the mortgage are identical. For instance if a mortgagor, who sought to redeem a specific mortgage fails in the suit, because the mortgage is not proved, he is not thereby precluded from seeking to redeem the same property from another specific mortgage. The dismissal, of a former suit brought to redeem an invalid mortgage, is really no bar to a subsequent suit in which a different mortgage, which subsequently sprang into existence by the operation of the statute of limitation, is sought to be redeemed. (Case-law discussed.) (*Wallace and Sundaram Chetty, JJ.*) S. L. RENGIER *v.* RAMIA SANTHU. **A.I.R. 1930 Mad. 264.**

——*Obiter* if a suit for redemption is brought by the mortgagor even though he had no right then to redeem and the suit is dismissed, the decision operates as *res judicata* in the subsequent suit for redemption brought when the mortgagor acquires such a right. (*Stuart, C. J. and Raza, J.*) RUGHU SINGH *v.* DEPUTY COMMR. **7 O. W. N. 209 = 122 I. C. 769 = A. I. R. 1930 Oudh 270.**

——*Prior decree for redemption—Non-payment of sum fixed—If a bar to a fresh suit.*

The fact of a previous redemption suit being brought and being dismissed for failure of the mortgagors to pay the sum decreed for redemption will not operate under the rule of *res judicata* to prevent the bringing of a subsequent suit for redemption. 24 All. 44 (F.B.); A.I.R. 1922 All. 377, Foll. (*Boys and Ashworth, JJ.*) RAGHUNATH SINGH *v.* SHEOPARTAP SINGH. **1929 A. L. J. 761 = 119 I. C. 525 = A.I.R. 1929 All. 409.**

——*Transfer of Property Act, S. 60—Redemption suit—Dismissal for default under 1859 Code if a bar to second redemption suit.*

The dismissal of a suit for redemption for default under S. 127. C. P. Code of 1859, is not an order extinguishing the right of redemption under S. 60, T. P. Act, and does not bar a second suit for redemption of the mortgage. And this rule holds good even where the previous suit was dismissed before the Transfer of Property Act was made applicable to the province: 39 Bom. 41; 40 Bom. 248: A. I. R. 1928 Bom. 67; 13 M. I. A. 404; 22 W. R. 172 and 43 Bom. 334, Rel. on; 13 Bom. L. R. 658 and 15 Cal. 422 (P.C.), Dist. (*Patkar, J.*) KASHIRAM LAXMAN KADAM *v.* MAHESWAR LAXMAN GONDHALEKAR. **30 Bom. L. R. 1089 = 113 I. C. 384 = A.I.R. 1929 Bom. 116.**

C. P. CODE, (1908), S. 11—Prior decision—Mortgage.

——*Redemption suit—Mortgagor failing to comply with preliminary decree—Second redemption suit during the continuance of first suit maintainability.*

A mortgagor, who has failed to comply with the terms of a decree in a redemption suit filed by him, is not entitled during the continuance of that suit, or before the final decree in that suit has become incapable of execution, to maintain a second suit for redemption of the same mortgage: 24 All. 44 and A. I. R. 1922 All, 377, Dist. (*Iqbal Ahmad, J.*) ABDUL KARIM *v.* DURGA PRASAD. **100 I. C. 324 = A.I.R. 1927 All. 305.**

——*Previous decree directing mortgagee to withdraw mortgage money deposited by mortgagor and to deliver property to mortgagor—Subsequent suit for redemption is barred.*

In the previous suit a decree was passed directing the mortgagee to take the mortgage money which had been deposited in Court by the mortgagor and to deliver the property to the mortgagor. The mortgagor applied for delivery of the property. Afterwards he gifted the property to the plaintiff. The application for the delivery of the property was subsequently dismissed. The plaintiff brought another suit to redeem the property,

Held, that the decree in the previous suit was not one under C.P. Code, O. 34, R. 7 but was a combined decree under O. 34, R. 8 and, as under it the mortgagee was permitted to withdraw the money that had been already deposited in Court, it had the effect of extinguishing the mortgage and a second suit for redemption was barred. (*Mukerji, J.*) THAKUR RUDRAPAL SINGH *v.* MATABADAL SINGH. **6 L. R. A. Civ. 241 = 85 I. C. 480 = A. I. R. 1925 All. 484.**

——Where a suit for redemption has been instituted and a decree for redemption has been passed therein but not executed, a subsequent suit is not maintainable for the redemption of the same mortgage. 25 Mad. 300, and 39 Mad. 896, Foll. 43 Bom 334, Diss. (*Dalal, J.C. and Wazir Hasan, A.J.C.*) NARAYAN *v.* GAYA DIN. **28 O. C. 212 = 87 I. C. 290 = A.I.R. 1925 Oudh 696.**

——*Deccan Agriculturists' Relief Act.*

If a mortgagor brings a redemption suit and obtains a decree *nisi*, which entitles him on payment of a certain sum by a certain time to get back the property and nothing further is done, and no attempt is made to get back the possession and no order is made barring the mortgagor to redeem, then a second suit can be brought for redemption and the same would not be barred either by S. 11, or section 47 of the C. P, Code, even though the suit is under Deccan Agriculturists Relief Act. Whether a decree made under the Deccan Agriculturists Relief Act in a mortgage suit is a decree *nisi* or a decree which puts an end to the mortgage will always be a question for decision in each case when it comes before the Court. 43 Bom. 334 F. B., Foll. (*Macleod, C.J. and Crump, J.*) RAMCHANDRA LAXMAN *v.* BALBHIM BABAJI. **25 Bom. L. R. 211 = 72 I. C. 315 = A. I. R. 1923 Bom. 287 (2).**

——*Successive suits for redemption.*

When a preliminary decree in a redemption suit, stated that if the payment be not made at a certain date, the plaintiff would forfeit his right to redeem. *Held*, that the condition was illegal and a second suit was not barred. The right of redemption could not be extinguished by preliminary decree but could only be extinguished by a final decree. (93 P. R. 1908 Foll.) (*Campbell, J.*) SUNKA *v.* JARU. **75 I. C. 919 = A. I. R. 1923 Lah. 680.**

———*Successive suits for redemption.*

In a suit for redemption by the plaintiffs to redeem a simple mortgage, the Court gave a decree for redemption on payment of certain amount in default of which the suit was to stand dismissed. The money was not paid and the defendants recovered their costs. The plaintiffs brought a suit to redeem the same mortgage; *Held*, the interpretation of the decree was that the dismissal of the former suit left the parties in the same position which they occupied before the suit was brought and the plaintiffs could sue for redemption. (*Ryves and Stuart, JJ.*) HARI RAM *v.* INDRAJ. **44 All. 730 = 69 I.C. 167 = 20 A.L.J. 631 = A.I.R. 1922 All. 377.**

———*Decree for redemption of mortgage—Second suit for redemption is barred.*

A second suit for redemption does not lie. Ramji *v.* Pandharinath [1918] (21 Bom. L.R. 56) Referred to. (*Macleod, C.J. and Shah, J.*) KUSHABA RAMJI THOKE *v.* BUDDHAJI SAKHARAM THORAT. **46 Bom. 348 = 64 I.C. 1004 = 23 Bom. L. R. 1176 = A. I. R. 1922 Bom. 127.**

———*Decree for sale—Purchase — Decision of suit after mortgage but before purchase is not* res judicata.

A purchase in auction-sale in execution of a mortgage decree for sale as also the proceedings in which the decree was obtained are a part of the working out of the rights of the mortgagee under his mortgage. The rights of the purchaser are not therefore affected by *res judicata* by the decision in a suit subsequent to the mortgage though previous to the purchase. (*Oldfield and Venkatasubba Rao, JJ.*) RAYABHARAM SARAMMA *v.* DEVAPURAJALA GANGAYYA. **77 I. C. 922 = A. I. R. 1922 Mad. 390 (1)**

—S. 11—Prior decision—Res judicata.

———*Order for costs—No appeal—Effect.*

An order for costs was passed by the Privy Council against one *G*. On an application being made for the execution of that order, a decree was drawn by the High Court giving the different items of costs. After the decree, embodying the order of the Privy Council, had been drawn, the Subordinate Judge had decided on another application for execution by the same decree-holder that *G* was not liable to pay the item (a) of the costs. *Held*: As the Subordinate Judge's order was passed after the decree embodying the order of the Privy Council had been drawn up by the High Court and as no appeal was preferred from it, the order became final and operated as *res judicata*. (*Martineau, J.*) GOPI CHAND *v.* LALA BANERSI. **12 P.W.R. 1923 = A. I. R. 1922 Lah. 361.**

—S. 11—Prior decision—Record-of-rights.

———The effect of the publication of the Record-of-Rights is not to sweep away all previous decisions between the parties. Such a consequence would not follow, even if the entry in the Record-of-Rights has the effect of a decision in a suit between the parties. Hence where a decision operates as *res judicata* its effect is not destroyed by the subsequent publication of the Record-of-Rights. (*Mookerjee, A.C.J. and Fletcher, J.*) JALADHAR BHOWMIK *v.* BIRENDRA NATH. **35 C. L. J. 200 = 60 I. C. 389 = A.I.R. 1921 Cal. 761.**

—S. 11—Prior decision—Remand.

———*Appeal—Order of remand by the Judge—If binding on his successor.*

Lower Appellate Court remanded case directing one of several documents in question to be admitted When the case came up again before the successor of the Judge who passed the first order of remand, the latter, made a second order of remand directing that all the documents should be admitted.

Held, that the successor was not bound by the first order of remand and the second order of remand passed by him was proper. (*Misra and Pullan, JJ.*) QADIRUNNISSA *v.* QUTBUL HUDA. **116 I. C. 55 = A. I. R. 1929 Oudh 398.**

—S. 11—Prior decision—Reversal.

———*Appeal—Reversal and remand—Orders passed by the Lower Court in the meantime—If* Res judicata.

The decision of a Court though not appealed from does not operate as *res judicata* where the appellate Court passes an order for fresh trial substantially reversing the unappealed order in an appeal from a different decision in the same suit. (*Stuart and Ryves, JJ.*) KESHRI *v.* BHAWANI RAI. **76 I. C. 473 = A I. R. 1923 All. 456.**

—S. 11—Prior decision—Scope.

———*Prior suit in form one between private parties but in effect between trust and defendant—Effect.*

Plaintiff filed a suit claiming the suit land, in the first instance as his own, but, in the course of the trial, he made an admission that the land was trust property. The Court recording the admission held that it was trust property and that both the plaintiff and the defendant were jointly entitled to its management.

Held, that although in form this was a suit between two private persons, it was in effect and substance a right claimed by the plaintiff on behalf of the trust against the defendant. It was a litigation between the trust on the one hand and the defendant on the other and the defendant was bound by that decision. (*Venkatasubba Rao and Reilly, JJ.*) JAGANNATHA RAO PANTULU *v.* RAMACHARULU. **116 I. C. 142 = A. I. R. 1929 Mad. 687.**

———*'Former suit'—What is.*

A suit decided earlier though filed later is former suit within S. 11. (*Kulwant Sahay and Macpherson, JJ.*) BIBI WASILAN *v.* MIR SYED HUSSAIN. **8 Pat. 107 = 117 I. C. 167 = A. I. R. 1929 Pat. 173.**

———*Two or three issues in a suit — One or some of them decided—Second suit on same grounds but some more reliefs claimed—Finding in the former suit if* res judicata.

The finding of a Court on a point or some points in controversy in former suit when there were more issues in the suit and disposing the suit on that finding operates as *res judicata* in a later suit brought on the same grounds with some more reliefs added to them.

Mukerji, J.—Where only one particular issue is identical in two different suits, one filed after the other, a question would arise whether the decision on the issue arrived at in the former suit would operate or not as *res judicata*. But where the two suits are identical, the failure of the first suit must bar the trial of the second suit even if no issues were raised in the former suit A.I.R. 1925 P.C. 63, Dist. (*Walsh and Mukerji, JJ.*) MAJIDAN *v.* SABIR ALI. **107 I. C. 674 = A.I. R. 1928 All. 62.**

———*Decision holding prior decision* res judicata *is conclusive.*

A previous decision holding that a decision prior to that on a point of law was or was not *res judicata* between the parties, is conclusive between the parties. 19 C. W. N. 1280, Rel. on (*Suhrawardy and Graham, JJ.*) AYETONNESSA BIBI *v.* AMJED ALI.

C. P. CODE, (1908), S. 11—Prior decision—Scope.

48 C. L. J. 184 = 32 C. W. N. 828 = 115 I. C. 588 = A. I.R. 1928 Cal. 717.

——*Previous judgment upon merits after hearing some evidence on both sides is* res judicata.

Where the subject-matters of the two suits were the same and where the Court decided the previous case after both sides had given certain amount of evidence and wrote a judgment upon the merits dismissing the suit in plaintiff's absence and no appeal was preferred against that judgment.

Held, that it cannot be alleged that previous judgment has no worth because the decree in the suit was nothing more than a dismissal for default and that the matter was *res judicata*. (*Suhrawardy and Duval, JJ.*) TARACHAND *v.* GOBINDA CHANDRA.

A. I. R. 1928 Cal. 271.

——*Prior suit claiming exclusive use of water — Rights to surplus water only upheld — Subsequent suit alleging obstruction of flow of surplus water not barred.*

Where in the previous suit the plaintiffs claimed exclusive use of the water that flowed along a particular channel, but their rights were upheld only to surplus water which remained after the defendants' lands had been irrigated, a subsequent suit by the plaintiff stating that the flow of surplus water is obstructed by the putting up of another dam and by further raising the level of the channel, is not barred by *res judicata*. (*Viswanath Sastri, J.*) VEERABHADRAYYA *v.* TANGADU SANYASI

99 I. C. 516 = A. I. R. 1927 Mad. 415.

——*Previous decision in the same suit— Binding nature of.*

A decision given in the same suit in previous proceedings, though not *res judicata* in the proper sense of the term, is binding. (*Stuart, C.J. and Misra, J.*) HAMID HUSAIN *v.* HADI RAZA. **94 I.C. 313 = A. I. R. 1926 Oudh 420.**

——*Divided status.*

Where the parties distinctly put forward the contention that the deceased was divided from them, and on that plea the Court gave a decree against his assets in their hands.

Held, that in the face of that plea and the judgment it was not open to those parties to contend that they and the deceased were undivided in interest and that they succeeded to his property by survivorship. (*Devadoss and Wallace, JJ.*) PONNAPPA REDDI *v.* THIRUVENGADA PILLAI. **22 M. L. W. 455 = 1925 M. W N. 713 = 90 I. C. 509 = A. I. R. 1925 Mad. 1179 = 49 M.L. J. 104.**

——*Rent Court—Decision that* A *is tenant.*

The decision of the Rent Court to the effect that a certain person was the tenant of the land and was liable for the rent does not decide the question of the title to the sale proceeds of the crop in that field so as to bar a claim that another person grew the crop. (*Lindsay and Sulaiman, JJ.*) TOTA *v.* JAGGU.

21 A.L. J. 476 = 4 L.R.A. Civ. 428 = 5 L.R.A. Rev. 47 = A. I. R. 1924 All. 163.

——*Value of decision—Not dependent on pecuniary value.*

The importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute. (*Lord Buckmaster.*) T.B. RAMACHANDRA RAO *v.* A.N.S. RAMCHANDRA RAO.

45 Mad 320 = 67 I.C. 408 = 30 M. L. T. (P C.) 154 = 35 C. L.J. 545 = 16 M. L.W. 1 = 1922 M. W. N. 359 = 26 C.W.N. 713 = 20 A.L.J. 684 = 24 Bom. L. R. 963 = 49 I.A. 129 = A. I. R. 1922 P.C. 80 = 43 M.L.J. 78.

—S. 11—Prior decision—Conflicting decisions.

C. P. CODE, (1908), S. 11—Prior decision—Wrong decision.

——When there are two conflicting decrees, the last should prevail on the ground that in the eye of law it is binding between the parties and the previous decree should be taken as pleaded in the latter suit and not given effect to, or must henceforth be regarded as dead. 31 M.L. J. 219 ; 37 All. 531 ; A. I. R. 1921 Mad. 612 and 1 A.L.J. 416, Rel. on. (*Suhrawardy and Garlick, JJ.*) RAJANI KUMAR *v.* AJMADDIN BHUIYA.

48 C. L. J. 577 = 114 I. C. 129 = A.I. R. 1929 Cal. 163.

——Where there are two decrees operating as *res judicata* ; one as against the plaintiffs and one as against the defendants, it is the latter decree that must prevail over the former because the latter decree shuts out consideration of the former ; 37 All. 531, Foll. (*Ashworth and Iqbal Ahmad, JJ*) AMAR SINGH *v.* GOVIND RAM. **49 All. 606 = 25 A.L. J. 387 = 8 L.R. A. Rev. 122 = 101 I. C. 501 = A.I. R. 1927 All. 717.**

——Out of inconsistent and contradictory judgments *inter partes*, the later judgment must prevail. Prior decree becomes unenforceable after later decree, but where later decree does not cancel prior decree the fruits got in execution of the prior decree are not restored to the judgment-debtor in the prior decree, who was held entitled to prevent further execution only by a still later decision in his favour, on his filing a suit for the purpose. (*Walsh and Ryves, JJ.*) RAM PRASAD *v.* MAHABIR. **46 All. 220 = 79 I.C. 803 = 22 A.L.J. 91 = 5 L.R.A. Civ. 71 = A.I.R. 1924 All. 310.**

——In cases of judgments *inter partes*, the later adjudication should be taken as superseding the earlier whether or not the earlier adjudication was pleaded as a bar to the trial of the suit in which the later adjudication was made, 31 M.L.J. 219 Foll. (*Sadasiva Aiyar and Coutts Trotter, JJ.*) RUKMANI AMMAL *v.* NARASIMHA IYER. **14 M.L.W. 85 = 63 I. C. 730 = 1921 M.W.N. 487 = A. I. R. 1921 Mad. 612 = 41 M. L. J. 54.**

—S. 11—Prior decision—Wrong decision.

——To apply the law of estoppel by judgment it must be seen whether a matter was directly and substantially in issue in the former suit, between the same parties or between the parties under whom they or any of them claim, and whether that has been heard and finally decided. When these conditions are satisfied even an erroneous judgment operates as *res judicata* as regards the matter in controversy. (*Fazl Ali and Chatterji, JJ.*) SAKALDIP SINGH *v.* IMRIT BARHI.

10 P. L. T. 630 = 120 I.C. 292 = A. I. R. 1930 Pat. 71.

——A wrong suit followed by a wrong decree does not bar a correct suit. (*Ramesam and Jackson, JJ.*) AMMAKANNU AYI *v.* MURUGAYYA ODAYAR.

20 M.L.W. 207 = 83 I. C. 324 = 1924 M. W. N. 623 = 47 Mad. 850 = A. I.R. 1924 Mad. 716 = 47 M.L.J. 85.

Question once decided against a party cannot now be allowed to be re-agitated merely because a Special Bench of the Calcutta High Court has enunciated a rule different from what was recognised in previous cases. (*Mookerjee and Panton, JJ.*) ABINASH CHANDRA PAL *v.* KHETRA MOHAN DALLI.

A.I. R. 1923 Cal. 629.

——A wrong decision in a previous suit bars a subsequent suit. A settlement Court in deciding the question of title as between a mortgagor and his mortgagee lost sight of the fact that the mortgagor's right of redemption under the deed in suit had been taken away by proper foreclosure proceedings and declared the mortgagee to have acquired full proprietary rights in the property. *Held*, the decision operated as *res judicata*. 15 Cal. 800 (P.C.) Dist. (*Stuart and Kanhaiya Lal, A.J.Cs.*) TILAK CHANDA *v.* SHAMBHU SINGH.

7 O.L.J. 524 = 2 U.P.L.R. (J.C.) 163 = 60 I. C. 404 = 23 O. C. 269

—S. 11—Rent suits.

———The doctrine of *res judicata* is not applicable to rent suits (*obiter*).

Held, even otherwise, as the two suits related to different jotes, the doctrine was inapplicable. (*Ghose, and Chotzner, JJ.*) DEBI PROSAD BHAKAT *v.* OFFICIAL TRUSTEE OF BENGAL.

37 C.L.J. 314 A.I.R. 1923 Cal. 333 = 72 I. C. 1013.

—S. 11—Rent suit—Ex-parte decree.

———Decree is admissible in a subsequent rent suit to prove rate of rent allowed but is not conclusive—Its value depends on the facts of each particular case. (*Pearson and Chakravarthi, JJ.*) MAHESWARI DEI *v.* GAURHARI MAITY.

91 I. C. 380 = A. I. R. 1926 Cal. 767.

———An *ex parte* decree for rent which was subsequently satisfied can operate as *res judicata* on the question of the parties being landlord and tenant. (*Greaves and Chakravarti, JJ.*) UMEDALI MUNSHI *v.* GOYJADDI MOLLA.

87 I. C. 672 = A. I. R. 1926 Cal. 114.

———An *ex parte* decree may be *res judicata* in some respects but one such, for rent does not do more than affirm that a certain amount is claimed and allowed. There is no *res judicata* as to rate of rent and the same can certainly be contested in a later suit especially when it relates to a later year. (*Mc.Nair, J. M. and Pim, S. M.*) BINDHYACHAL TEWARI *v.* JAI BAHADUR SINGH.

9 L. R. 345 (1) (Rev.).

———In the previous suit for rent filed in revenue Court the defendants sought to get the suit dismissed on the plea that no relation of landlord and tenant subsisted between the parties. The suit was decreed *ex parte*.

Held, that the *ex parte* judgment of the revenue Court established that the relationship of landlord and tenant does exist between the present parties and the decision is *res judicata* in a subsequent suit between same parties on the point of competency of Court. (*Mukerji and Ashworth, JJ.*) MD. KARAMAT ALI KHAN *v.* GANESHI LAL.

49 All. 658 = 25 A. L. J. 467 = 8 L. R. A. Rev. 125 = 101 I. C. 516 = A.I.R. 1927 All. 552.

—S. 11—Rent suits—Terms of puttah.

———The decision as to the proper terms of a puttah in respect of one *fasli* is *res judicata* for subsequent *faslis* also. (*Sadasiva Aiyar and Napier, JJ.*) KUPPUSWAMI MUDALI *v.* SUBBA NAIDU.

62 I. C. 501 = 13 M. L. W. 307.

—S. 11—Representative suit—Applicability.

———S. 11, Explanation VI of the Code of Civil Procedure applies to a common right asserted by certain persons on behalf of themselves and others, but not to rights which are not common but several and distinct. (*Kanhaiya Lal and Dalal, A. J. Cs.*) ZARIF-UNNISA *v.* SHAFIQ-UZ-ZAMAN.

26 O. C. 133 = 75 I. C. 626 = 10 O. L. J. 535 = A. I. R. 1923 Oudh 185.

—S. 11—Representative suit—Bona fides.

———*Meaning of.*

The word "*bona fide*" in Expl. VI could only apply to a litigation where every attempt is made to bring all the persons interested before the Court. The meaning of due care and caution cannot be applied to one who puts forward only his own right as one of a body of persons who have equal rights with himself. (*Devadoss, J.*) KUMARANDY KUDUMBAN *v.* VENKATASUBRAMANIA AIYAR.

101 I. C. 58 = A.I.R. 1927 Mad. 645 = 52 M. L. J. 641.

—S. 11—Representative suit—Corporation.

———*Suit by members of Corporation in personal capacity—Subsequnet suit by Corporation is not* Res judicata.

In deciding whether or not a decision in a previous suit operates as *res judicata* in a subsequent one, the court has to consider the array of parties, the issues raised and the point or points actually decided in the previous litigation.

Certain persons belonging to the guild of priests of a certain temple, describing themselves as "panch pandas" brought a suit against the defendants for the cancellation of a deed of gift of the right to share in the offerings at the temple, executed in their favour by their uncle, a member of the panda guild, and for a perpetual injunction restraining them from acting as pandas at the temple.

Held, that the question in issue in the subsequent litigation, namely the right of the pandas, as a guild or corporation, to receive offerings, and the question whether or not the defendants had been trespassing on that right without any justification, had not been decided in the former litigation and was not *res judicata* in the subsequent suit. (*Piggott and Walsh, JJ.*) RADHA KISHEN *v.* RAM NATH.

18 A. L. J. 150 = 76 I. C. 673.

—S. 11—Representative suit—Fraud.

———*Prior suit in respect of a public Trust—Fraudulent withdrawal—If operates as* res judicata.

Where the trust is a public trust persons interested in it cannot be bound by the result of a prior suit in which no decision was arrived at and which was withdrawn fraudulently. (*Phillips and Ramesam, JJ.*) PICHAI PILLAI *v.* LINGAM IYER.

108 I. C. 199 = A.I.R. 1928 Mad. 268.

—S. 11—Representative suit—Hindu sons.

———A Hindu son, who was in existence at the time his father sold certain ancestral property, brought a suit for recovery of the property sold, but before the suit was decided another son was born. *Held* that such son also acquired a cause of action as regards the same and the first suit not being in a representative character, the second suit by the second son is not affected by the result in the first suit. (19 A. L. J. 978, Ref.) (*Dalal, J. C.*) JANG BAHADUR SINGH *v.* RANI SINGH.

10 O. L. J. 353 = 77 I. C. 353 = 27 O. C. 107 = A. I. R. 1924 Oudh 141.

—S. 11—Representative suit—Interest of estate.

———*Prior suit in the interest of the entire estate—Binding nature of.*

Where a suit is instituted in the interest of the estate and for the benefit of all persons who might come to inherit thereafter, the decree, in the absence of collusion or fraud, would bind not only the plaintiffs but all subsequent successors to the estate. 19 A. L. J. 749, Foll. 33 All. 356, P. C. Ref. A. I. R. 1922. All. 217, Dist. (*Sulaiman, J.*) CHHAJJU *v.* GOKUL.

75 I. C. 593 = A. I. R. 1923 All. 338.

—S. 11—Representative suit—Joint family.

———The circumstances that neither the father of *A*, *B* and *C*, nor *C* himself, who were parties to a prior suit, was described expressly as manager of the family, does not by itself make the decision in the prior suit not binding in a subsequent suit on *A*, *B* and *C* who are members of an undivided family. To such a case the provisions of S. 11, Expln. 6, C. P. Code., apply and the decision in prior suit becomes *res judicata* as against

C. P. CODE, (1908), S. 11—Representative suit—Joint family.

A, *B* and *C*. A. I. R. 1927 P. C. 56 ; 30 Mad. 324 and 22 Mad. 461, Rel. on. (*Ananthakrishna Ayyar, J.*) M. R. SETHURATNAM IYER *v.* CHINNA SOLAN.
122 I. C. 164 = A. I. R. 1930 Mad. 206.

———*Findings arrived at.*

Findings arrived at in a respresentative suit enure to the benefit of the entire family and can be taken advantage of by all the members of the family. Such findings are *res judicata* and cannot be re-agitated. (*Sulaiman and Pullan, JJ.*) RAM SARAN DAS *v.* BHAGWAN SINGH. **A. I. R. 1929 All. 775.**

———A Hindu father fully represents his minor sons in a mortgage suit brought against him and the decree obtained in such suit against the father is binding on the sons, though not made parties to the suit, and acts as *res judicata*. A. I. R. 1914 P. C. 136 ; 34 Bom. 354; Rel. on ; 40 Bom. 248 and 41 Cal. 727 ; Dist. (*Baker, J.*) MADHUSUDAN PANDURANG *v.* BHAGWAN ATMARAM. **53 Bom. 444 = 118 I. C. 788 = 31 Bom. L. R. 395 = A. I. R. 1929 Bom. 213.**

———In the case of a Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he comes of age, and then bring an action, or bring an action by his guardian before ; and in each of these cases, therefore, the Court looks to Explanation 6 of S. 11 of the C. P. Code to see whether or not the leading member of the family has been acting either on behalf of minors in their interest, or if they are majors, with the assent of the majors. A. I. R. 1925 P. C. 272, Ref. (*Lord Phillimore.*) LINGAMGOWDA DAD BASANGOWDA *v.* BASANGOWDA BISTANGOWDA. **51 Bom. 450 = 54 I. A. 122 = 25 M. L. W. 789 = 25 A. L. J. 319 = 31 C. W. N. 570 = 1927 M. W. N. 352 = 4 O. W. N. 424 = 101 I. C. 44 = 29 Bom. L. R. 848 = 45 C. L. J. 504 = 8 P. L. T. 462 = A. I. R. 1927 P. C. 56 = 52 M.L.J. 472 (P.C.).**

———Where a suit is either brought by or against a joint Hindu family the other members of the family must be deemed to be parties to the suit through manager ; 34 All. 549 ; 34 All. 572 ; Foll. (*Sulaiman, J.*) NAGINA RAI *v.* SANGAM RAI. **81 I. C. 737 = A. I. R. 1925 All. 67.**

———Where in a suit for partition by a member of a joint Hindu family all the members of the family are made parties and where all matters in dispute between the members of the family are decided, the suit must be regarded as a suit brought by the plaintiff in his representative capacity under Expl. 6. S. 11 of the C. P. Code, and all matters decided in the suit operate as *res judicata* between the different members of the family. 32 All. 469 and 22 O C. 300 Foll. (*Dalal, J. C.*) NAGESHAR *v.* DARSHAN. **85 I. C. 792 = A. I. R. 1925 Oudh 566.**

———*Suit by or against manager—When binds other members.*

In order to make explanation 6 of S. 11, applicable there ought to be a community of interest claimed on the strength of a common title and the claim must have been made in good faith for the enforcement or defence of that common interest. The common interest may rest on the existence or of a joint family, in which that interest is vested, or may rest on a joint title otherwise derived. Property inherited by right of collateral succession, cannot be treated as joint family property in respect of which the manager as such could sue or be sued so as to bind the rest of the family. 20 O. C. 271, Foll. (*Kanhaiya Lal, J. C.*) HANSLA BAKHSH SINGH *v.* RAJ BAKHSH SINGH. **77 I. C. 1028 = A. I. R. 1925 Oudh 75.**

———*If bound.*

All Hindu co-parceners are bound by the result of a suit brought by a Hindu father for recovery of possession of joint family land. Such suit must be deemed to be a representative suit on behalf of all the co-parceners (*Foster, J.*) HUKUM MAHTO *v.* SANT SAHO. **78 I. C. 19 = A. I. R. 1925 Pat. 308.**

———*Hindu father—Suit by—Representative character—Test.*

But there is a great distinction between cases in which a Hindu father sues in respect of a contract which he is empowered under the Mitakshara Law, as manager to make on behalf of the family and cases in which a father sues in respect of rights in immoveable property, rights which he can only hold in an equal measure with other co-parceners. The question as to whether a Hindu father sufficiently represents all the co-parceners in a given litigation is a question which has to be decided with reference to the circumstances of the case. (*Foster, J.*) HUKUM MAHTO *v.* SANT SAHO. **78 I. C. 19 = A. I. R. 1925 Pat. 308.**

———Managing members of a joint Hindu family can effectively represent the other members of the family in a foreclosure suit although the latter were not impleaded. (*Hallifax, A.J.C.*) JIRJODHAN *v.* MOHANAND. **4 N. L. J. 4 = 62 I. C. 610 = A. I. R. 1921 Nag. 52.**

—S. 11—Representative suit—Leave of court.

———Explanation 6 to S. 11 is not confined only to cases where leave of the Court has been granted under O. 1. R. 8. 43 M. 467 and 31 M. L. J. 26, Ref. (*Ayling and Odgers, JJ.*) CHENRAYA GOUNDAN *v.* ATHAPPA GOUNDAN. **18 M. L. W. 177 = 75 I. C. 336 = 1923 M. W. N. 545 = A. I. R. 1924 Mad. 88.**

—S. 11—Representative suit—Malabar Tarwad.

———Plaintiffs, members of a *Thavazhi*, sued for a declaration that the suit properties belonged to their *Thavazhi*, as *Puthravagasam* properties. It was found that, in a prior suit by the *Karnavan* of the *Tarwad* of which the *Thavazhi* in question was a branch, the plaint though as originally framed was not against the *Thavazhi*, was subsequently amended by making the *Karnavan* of the *Thavazhi* a party defendant and he honestly defended the suit by contending that the suit properties were *Puthravagasam* properties. The contention was found against and the finding was confirmed on appeal to the High Court to which the members of the *Thavazhi* and its *Karnavan* were parties.

Held, that the decision in the prior suit against the *Thavazhi* confirmed as it was by the High Court on appeal, operated as *res judicata*. (*Spencer and Devadoss, JJ.*) ABUVAKHAR *v.* KUNHIKUTTIYALI. **16 M. L. W. 768 = 74 I. C. 27 = 31 M. L. T. 389 = A. I. R. 1923 Mad. 153.**

———The decision against a karnavan when he has litigated in good faith is binding on the tarwad. (1914) M.W.N. 689 Dist. ; 20 Mad. 12, Foll. (*Sadasiva Aiyar and Spencer, JJ.*) KRISHNA MENON *v.* KRISHNA NAIR. **13 M. L. W. 584 = 62 I. C. 598 = A. I. R. 1921 Mad. 520 = 40 M. L. J. 338.**

—S. 11—Representative Suit—Nature of—Construction.

———*Question as to, how decided.*

There is no warrant for the contention that no suit should be considered as having been brought in a representative capacity unless the cause-title makes it plain, or in other words, unless the cause-title shows that the suit is brought in a representative capacity, the suit cannot be treated as one brought in a representative capacity. London Association for Protection of Trade v. Greenlands Ltd. (1916) 2 A. C. 15, Dist; 46 Cal. 877, Foll.

The question whether a suit is brought in a representative capacity or not would only arise when the cause-titile dose not describe the suit as being brought in a representative capacity. In order to decide the question the Court has to see whether the plaintiffs did in substance bring the suit in a representative character or capacity and whether the defendants contested the suit on the larger question affecting the plaintiffs on record as well as others whom they represented, or confined their contest to the plaintiffs' right alone and whether the Court understood the plaint and other pleadings as covering or as raising the larger issue regarding the right of the plaintiffs as well as other persons having the same interest as the plaintiffs and whether the Court allowed the suit to proceed as being a representative suit and whether the Court confined its decision only to the plaintiffs' right or whether its decision covered the interest not only of the plaintiffs but also of all persons whom they represented. (*Kumarasswami Sastri, J.*) SONACHALAM *v.* KUMARAVELU CHETTIAR.

27 M. L. W. 769 = 109 I. C. 199 = A. I. R. 1928 Mad. 445 = 54 M. L. J. 587.

——Where a suit is essentially a representative one the mere addition of a claim for damages does not change the nature or the character of the suit. (*Kumaraswami Sastri and Devadoss, JJ.*) (*Phillips, O.C.J.. Ramesam and Beasley, JJ.*) SONACHALAM PILLAI *v.* KUMARAVELU CHETTIAR. **51 Mad. 128 = 27 M.L. W. 216 = 107 I. C. 625 = A. I. R. 1928 Mad. 77 = 54 M. L. J. 8 (F. B.).**

——Where a party sets up his own individual right which happens to be common to him and others, he cannot be said to be litigating on behalf of the others. It is not necessary that in order to attract the provisions of Expl. VI the suit should be a representative suit, for if it is a representative suit under O. 1, R. 8, no question can arise as to the binding nature of the decision in such suit, nor is it necessary that the party should be sued in a representative capacity. But the person litigating must put forward a right common to him and others not only on his behalf but on behalf of the others as well; if he simply puts forward a right alleged to be common to him and others, that would not make him a representative of the others. (*Devadoss, J.*) KUMARANDY KUDUMBAN *v.* VENKATASUBRAMANIA AIYAR.

101 I. C. 58 = A. I. R. 1927 Mad. 645 = 52 M. L. J. 641.

—S. 11—Representative suit—Objection to.

——*Objections overruled in prior suit—If* res **judicata.**

In a previous suit by the Secretary of Religious Association the defendant objected that the suit was not maintainable under O. 1, R. 8 as the plaintiffs were not 'numerous.' But the Court overruled the objection and held that the suit was maintainable without the aid of that rule. In the subsequent suit the defendant contended that R. 8 was bar to the suit as permission of the Court was not obtained. It was clear from the proceedings of the Executive Committee of the Samaj that the Secretary was authorized to institute the suit and presumably the Executive Committee had authority to so authorize him.

Held, that as the questions raised in the previous and the subsequent suit were different ones, the subsequent suit was not barred by the principle of *res judicata.* (*Suhrawardy and Jack, JJ.*) HRIDAY NATH ROY *v.* AKHIL CHANDRA ROY. **49 C. L. J. 357 =**

A. I. R. 1929 Cal. 445.

—S. 11—Representative suit—Religious endowment.

——In a suit by *B* against *A* for an account of *wakf* property, it was decided that the *wakf* was void. A subsequent suit was brought by *B* against *A* and *C* who was not a party to the previous suit, for declaration that that property was *wakf.*

Held, that the decision in the previous suit not only operates as *res judicata* between *A* and *B* but is also binding as between *B* and *C.* (*Addison and Bhide, JJ.*) HAIDAR HASAN *v.* ANJUMAN MUHAFAZ AUKAL. **113 I.C. 120 = A.I.R. 1928 Lah. 888 (891).**

——Where in the previous commutation proceedings the plaintiff in the subsequent suit was not described as a shebait of the idol, but it was found that he appeared but did not set up any interest adverse to that of the idol but defended the commutation proceedings as a shebait.

Held, that there was effective representation of the idol in the commutation proceedings although the suit was nominally brought against the present plaintiff, as such proceedings were really directed against the debuttar estate. 6 M.I.A. 393, (P. C.), Rel. on. (*Duval and Mitter, JJ.*) BEHARI LALL *v.* GOUR CHANDRA. **101 I. C. 758 = A. I. R. 1927 Cal. 606.**

——Where the suit was one by some of the shebaits of a deity against the other shebaits for proper management of the debuttar property, but one of the defendants disputed the debuttar character of the properties,

Held, that two sets of shebaits were not fighting with each other about the management of the properties, and that the suit was on behalf of the deity. (*Chatteriea and Cuming, JJ.*) SRI SRI GOPAL JEU THAKUR *v.* RADHA BINODE MONDAL. **41 C. L. J. 396 = 88 I. C. 616 = A.I.R. 1925 Cal. 996.**

——*Successive suits claiming certain property as* wakf *property—Maintainability.*

The language of S. 11, Explanation VI is very wide and as a matter of public policy if a claim that a property is *wakf* is fought out on the merits and decided in the negative the persons in possession should not be harassed by succession suit by other persons making similar claim. (*Kanhaiya, J. C. and Daniels, A. J. C.*) SADIQ HUSSAIN *v.* NAZIR HASAN KHAN.

9 O. L. J. 111 = 26 O. C. 82 = 66 I.C. 90 = A. I. R. 1922 Oudh 1.

——*Prior suit under S. 5, Religious Endowments Act—Second suit by public under S. 92, C. P. Code.*

A prior suit under S. 5 of the Religious Endowments Act declaring the defendant to be a duly constituted Mohunt is not a bar to a suit by the public under S. 92, C. P. Code, for administration of the trust, where the public were not made parties to the prior suit. (*Mookerjee and Buckland, JJ.*) SAHAYRAM *v.* KHAGENDRA NANDA. **26 C. W. N. 504 = 63 I. C. 418 = A. I. R. 1921 Cal. 425.**

—S. 11—Representative suit—Reversioner.

——*Fresh cause of action—No bar.*

Where, the relief sought by reversioners against certain widows is a personal one and no declaration has been sought for avoiding any particular transfer and there was no finding that any transfer was or was not for legal necessity, the mere dismissal of a suit for injunction cannot operate as *res judicata* in respect of a suit for possession after the death of the widows. A new cause of action arises in favour of the actual reversioners at the death of the widows and the second suit is not barred. (*Sulaiman and Sen, JJ.*) MUHAMMAD ABDUL KARIM KHAN *v.* BESHAN SAHAI.

1929 A. L. J. 741 = 121 I. C. 387 = A. I. R. 1930 All. 9.

———*Binding nature of.*

It is well settled that a suit for declaration by a reversioner to contest an alienation made by a widow in possession, is a representative suit on behalf of all the reversioners and a decree fairly and properly obtained against the reversioner in such a suit binds not only him but the whole body of reversioners on the one hand and the alienee or his representatives on the other. A. I. R. 1925 P. C. 272 and A. I. R. 1925 Lah. 89, Rel. on. But such decree does not bar suits by reversioner against other alienees and in respect of other portions of the property although a reference is made incidentally to some of these alienations in the previous judgment. (*Harrison and Tek Chand, JJ.*) THAKAR SINGH *v.* UTTAM KAUR. **10 Lah. 613 = 118 I. C. 449 = 30 P. L. R. 328 = A. I. R. 1929 Lah. 295.**

———*Finding as to pedigree in one suit—If a bar in a later suit.*

A finding as to a pedigree produced in a former suit by plaintiffs to prove their relationship as reversioners is not *res judicata* against other reversioners not claiming under plaintiff in the former suit where plaintiff have been held not to be reversioner in that suit. A. I. R. 1924 P. C. 247, Ref. (*Walsh and Dalal, JJ.*) DALEEP MISIR *v.* JADUNATH MISIR. **95 I. C. 178 = A. I. R. 1926 All. 573.**

———On the death of last full owner of the property, a part of the property was recorded as held by his widow although his son survived him. After the death of the son the property which was recorded in his name, being a portion of his father's property, was recorded in the names of his mother and a predeceased brother's widow. The mother executed a deed of gift in favour of her daughter-in-law. A possible reversioner to the estate sued for declaration that the widow had no right to execute a gift. The defence, *inter alia*, was that the widow held adversely to the estate of her husband and had matured in herself an absolute title and was, therefore, competent to execute the deed of gift. This defence succeeded in respect of that portion of the property which had been recorded in the widow's name on the death of her husband. The suit succeeded in respect of that portion of the property which came to be recorded in the name of the widow on the death of her son. After the failure of the reversioner, his brother started a fresh campaign of litigation on the same allegations as had been made by the former plaintiff.

Held, the decree in the previous suit should be treated as concluding the later suit brought by the other reversioner. 19 A.L.J. 749, Foll. (*Mukerji and Boys, JJ.*) BANSIDHAR *v.* DULHATIA. **23 A.L.J. 329 = 87 I.C. 235 = 6 L.R.A. Civ. 303 = 47 All. 505 = A.I.R. 1925 All. 483.**

———A suit by a reversioner to contest an alienation is one brought on behalf of all the reversioners who are bound by a decision therein. (38 Mad. 406, 39 Mad. 634, 41 Mad. 659, Foll.) (*Martineau, J.*) BHARAT SINGH *v.* SHAFI MUHAMMAD. **79 I.C. 484 = A.I.R. 1925 Lah. 180.**

———Explanation 6—Dismissal of suit by certain reversioners for setting aside alienation by sonless proprietor bars another suit for the same purpose by other reversioners who had been co-defendants in previous suit. (*Scott-Smith and Zafar Ali, JJ.*) KHAIR MUHAMMAD *v.* UMAR DIN. **5 Lah. 421 = 84 I.C. 477 = A.I.R. 1925 Lah. 89.**

———*Suit by reversioner during widow's lifetime for declaration—Subsequent suit for possession—Maintainability.*

A suit by a reversioner during the lifetime of the widow is a representative one and enures for the benefit of all the reversioners and is equally operative to the detriment of all. A judgment obtained by the presumptive reversioner that an alienation is good is binding during the lifetime of the widow on the whole body of reversioners; and conversely a decision obtained by the presumptive reversioner against the widow that an alienation is not binding is *res judicata* and cannot be questioned by the widow during her lifetime in any subsequent suit brought by any other reversioner. [38 Mad. 406, (P. C.) and 41 Mad. 659 (F. B.), Foll.] A decision favourable to the reversioner can be used against the widow and therefore the widow who obtains, a judgment in her favour can use it as a protection against the reversioner. (*Venkata Subba Rao, J.*) PALANI GOUNDAN *v.* SUPPIAH GOUNDAN. **22 M.L.W. 170 = 91 I. C. 546 = 1925 M. W. N. 572 = A. I. R. 1925 Mad. 1162 = 49 M.L.J. 143.**

———*Declaratory suit by reversioner in widow's lifetime—Decision—Binding on actual reversioner.*

A declaratory suit by a contingent reversioner is a representative suit on behalf of all reversioners. The cause of action for such a suit is the common injury to the reversionary right. The actual reversioner is, unless and until he gets it set aside, bound by any decree passed in a previous declaratory representative suit by a contingent reversioner. (*Wallace and Jackson, JJ.*) (POGULA) HUSAIN REDDY *v.* YASAGGARI VENKATA REDDY. **20 M.L.W. 552 = 83 I.C. 140 = 1924 M.W.N. 730 = A.I.R. 1925 Mad. 86 = 47 M.L.J. 545.**

———*Alienation by widow—Suit by the immediate reversioner—Decision binds on actual reversioner.*

A decree in a suit by a reversioner for setting aside an alienation by a Hindu widow is binding not only between the reversioner who brought the suit and the alienee, but it also binds the whole body of reversioners and the representatives-in-title of the alienee—it is binding on the whole body of the reversioners because the reversioner who brings the suit does so in a representative capacity for the protection of the estate. No reversioner must be thought to claim though another, but as the reversioner who brings the suit does so in a representative character under Expl. VI to S. 11, C.P. Code. the suit is *res judicata* against all reversioners. (*Banerji, Tudball and Sulaiman, JJ.*) KESHO PRASAD *v.* SHIVA PRASAD OJHA **44 All. 19 = 64 I.C. 248 = 19 A.L.J. 749 = A.I.R. 1922 All. 301 (F.B.).**

———*Decree against immediate reversioner binding on actual reversioner.*

Where a Hindu widow mortgaged the properties of her husband, and on her death the daughter, the immediate reversioner contested the mortgage suit on facts, questioning the mortgage for want of legal necessity, and a decree was passed in favour of the mortgagee, held in a suit by the actual reversioners, in which substantially the same issues were raised, that the suit was barred by S. 11. The principle of *res judicata* is applied rightly so as to bind reversioners by decisions in litigations, fairly and honestly conducted, whether given, for or against Hindu females who represented the estate. (*Mookerjee and Buckland, JJ.*) PRAMATHA NATH BOSE *v.* BHUBAN MOHAN BOSE. **49 Cal. 45 = 64 I.C. 980 = 33 C.L.J. 421 = 25 C.W.N. 585 = A.I.R. 1922 Cal. 321.**

———*Suit by presumptive reversioner for declaration*

—*Decision binds actual reversioner.*

In 1906 a suit was brought by a presumptive reversioner against the widow of the testator for a declaration that the will was fraudulent. The will declared to be valid. On the death of the widow plaintiff, as reversioner, brought the suit for possession of property on the ground that the declaration of the validity of the will in the previous suit was not binding on him.

Held, if a suit for declaration is brought to protect an interest common to the entire reversionary body. Explanation 6 to section 11 is applicable and the decision, if obtained after fair contest, must necessarily bind all the reversioners. A reversioner who may happen to be entitled when the succession opens, cannot claim to have the matter re-agitated. To hold otherwise would be to let in the very mischief which the explanation was enacted to avoid. On grounds of public policy it would be highly mischievous that a question of fact which was decided after full contest as between the reversioners on the one hand and the legatee, the widow, on the other should be liable to be re-opened as between other representatives of the same sets of rival claimants after the lapse of more than twelve years. (*Daniels and Lyle, A. J. Cs.*) NAGESHAR SAHAI *v.* MATA PRASAD. **9 O.L.J. 235 = 69 I.C. 730 = 25 O.C. 189 = A.I.R. 1922 Oudh 236.**

—S. 11—Representative suit—Scope.

———Explanation VI to S. 11 is not controlled by O. 1, R. 8. (Per Full Bench). (*Phillips, O. C. J. and Ramesam and Beasley, JJ.*) SONACHALAM PILLAI *v.* KUMARAVELU CHETTIAR. **51 Mad. 128 = 27 M.L.W. 216 = 107 I.C. 625 = A.I.R. 1928 Mad. 77 (89) = 54 M.L.J. 8 (F.B.)**

—S. 11—Representative suit—Trust.

———*Suit filed with sanction but amended without sanction—Stranger defendants and reliefs not covered by S. 92 added—Suit compromised by some plaintiffs—Suit if representative.*

A suit in respect of trust property was instituted by seven persons with the sanction of Advocate-General. It was subsequently amended without his sanction by adding strangers to the trust as defendants and by adding prayers for relief not covered by S. 92. The suit was later on compromised by six out of the seven plaintiffs.

Held, that the nature of the suit was changed, that it ceased to be one of representative character and the decree based on the compromise, however binding as against the consenting parties, cannot bind the rest of the public. S. 11, Expl. 6, has no application to such a case. (*Lord Sinha, Ameer Ali, Sir John Wallis and Sir Lancelot Sanderson.*) ABDUR RAHIM *v.* SYED ABU MOHAMED BARKAT ALI SHAH. **9 P.L.T. 65 = 108 I. C. 361 = 32 C. W. N. 482 = 27 M.L.W. 339 = 55 I. A. 96 = 26 A.L.J. 464 = 30 Bom.L.R. 774 = 55 Cal. 519 = 48 C.L.J. 55 = 1928 M.W.N. 926 = A.I.R. 1928 P.C. 16 = 54 M.L.J. 609.**

———*Decision against trust in a prior suit—When* res judicata.

When in a suit, where the trust is properly represented, after real and genuine contest a decision is given, it is absurd to hold that persons not parties to the previous suit, although, they may have an interest in the trust, can ask the matter to be re-opened and the question to be retried. (*Venkatasubba Rao and Madhavan Nair, JJ.*) SURYANARAYANA *v.* LAKSHMI NARASIMHAM. **1926 M. W. N. 40 = 91 I. C. 924 = A. I. R. 1926 Mad. 267 = 49 M. L. J. 746.**

———*Suit under S. 92, C. P. Code—Decision—Binding character of.*

A suit under S. 92 is a suit brought by the plaintiffs for themselves and as representatives of the general public. Under S. 11, Explanation 6, all persons interested in the subject matter of such a suit would be bound by the decision in the suit if the provisions of the Explanation are satisfied. (*Newbould and Ghose, JJ.*) SYED ABU MAHAMED BARAKAT ALI *v.* ABDUR RAHIM. **80 I. C. 44 = A. I. R. 1925 Cal. 187.**

———*C. P. Code, S. 92.*

Any decree passed in a suit under S. 92, C. P. Code is binding not only on the trust and the trustees, but also on all the worshippers at the temple. (*Kumarasami Sastri, Madhavan Nair and Srinivasa Iyengar, JJ.*) S. VEERARAGHAVA ACHARIAR *v.* V. PARTHASARATHY IYENGAR. **1925 M. W. N. 505 = A. I. R. 1925 Mad. 1070.**

———*Suit as between co-trustees—Decision in—Binding character of.*

The Shebaits of a trust form a continuing representation of the property of the idol. A decree obtained on behalf of the trust by co-trustee against other co-trustees for the protection of the property either in a suit for rendition of accounts or in a suit for declaration that the property in dispute is trust property, binds not only the trustees who are parties to the suit but also all persons interested in the trust. (*Sulaiman and Kanhaiya Lal, JJ.*) SRI GAT ASHRAM *v.* JAISHTH MADHO. **22 A. L. J. 641 = 80 I. C. 406 = 5 L. R. A. Civ. 410 = 46 All. 651 = A. I. R. 1924 All. 504.**

———Defendant was sued as trustee and manager of an idol, in respect of the income of certain property of the endowment. He did not defend the suit in his fiduciary character but asserted his own personal rights to the property and was unsuccessful. He then brought the present suit again in his personal capacity.

Held, that the suit was not maintainable and was barred under S. 11 of C. P. Code. (*Mears, C. J. and Ryves, J.*) RAM KARAN *v.* RAM NARAINJI. **60 I.C. 74 (All.).**

—S. 11—Representative suit—Widow.

———*Decree against—Binding nature of.*

The decree obtained against a Hindu widow, declaring that after the death of the widow, the property in the widow's possession will be inherited by the last male holder's reversioner, will be binding on the daughter of the widow, if it is not tainted with fraud or collusion. (*Mukerji and Niamatullah, JJ.*) PREMAVATI *v.* JAINTI PRASAD. **119 I.C. 446 = 1929 A. L. J. 518.**

———A suit brought by widow in possession of the whole estate holding as widow's estate to challenge an alleged adoption is a representative suit and all persons having a common interest (namely the reversioners in this case) must be deemed to have been represented through her under S. 11, Explanation 6 of the Code of Civil Procedure. (*Sulaiman and Kanhaiya Lal, JJ.*) SHIB DEO MISRA *v.* RAM PRASAD **46 All. 637 = 22 A. L. J. 690 = 87 I.C. 938 = A.I.R. 1925 All. 79.**

———*Decree against—When binds reversioners.*

Where a Hindu widow, in whom her husband's estate has vested, represents the estate in litigation, to which she is a party, the decision in such litigation, fairly and honestly conducted, given for or against her, will bind the reversioners. (9 M. I. A. 539 (P. C.); 11 Cal. 186 (P. C.); and 40 All. 593 (P. C.) Foll.) The rule of *res judicata* as enacted in S. 11 of the C. P. Code is not strictly applicable, as the reversioners do not claim under the widow; but the principle of *res judicata* applies

C. P. CODE, (1908), S. 11—Representative suit—Widow.

This rule can be applied only if the widow did, as a matter of fact, represent the estate in the prior litigation. The question, in each case, will be whether the estate was properly represented by the widow in the prior suit. If, for instance, she had litigated in assertion of an absolute right, inconsistent with her representative character, she could not, in any sense of the word, be said to have represented the estate, or the interest of the reversioners in such litigation, and a decision given therein, upholding such contention of heirs, would not obviously be held binding on them. 43 Bom. 869; 43 Bom. 249 Foll. Hence in contending that a will alleged to have been left by the husband, was genuine and that she herself was a joint-legatee under it, along with her brother, she is not only not representing the estate or the interests of the reversioners in such litigation, but is setting up a case, in direct opposition to their interests. It cannot, therefore, be held that the decision in the suit that the Will is genuine is binding on the reversioners. (*Wallace and Madhavan Nair, JJ.*) VIRASWAMI *v.* NAYUDAMMA. **91 I. C. 497 = 22 M L. W. 178 = A. I. R. 1925 Mad. 1270 = 49 M. L. J. 430.**

———*Decree against.*

Where the widow has represented the estate in a previous litigation and a decree is passed against the widow, it is valid and binding on the reversioners and will operate as *res judicata* in a subsequent suit by the reversioners. (*Oldfield and Venkatasubba Rao, JJ.*) NACHIKALAI *v.* AIYAKANNU. **16 M L. W. 94 = 1922 M. W. N. 418 = 31 M. L. T. 129 = 70 I. C. 387 = A. I. R. 1922 Mad. 233 = 43 M. L. J. 95.**

———*Decree against.*

A declaratory decree obtained by one reversioner that a certain alienation by the widow was inoperative beyond her lifetime cannot operate as *res judicata* in favour of another reversioner who subsequently sues for possession of the property concerned. (*Rafique and Stuart, JJ.*) DARBARI LAL *v.* GOBIND RAM. **43 All. 558 = 63 I. C. 524 = 19 A. L. J. 514 = A. I. R. 1921 All. 237.**

—S. 11—Res judicata—Administration suit.

———*Order on whom binding—Scheme suit—Maintainability.*

The will of a Hindu testatrix addressed to her grandson directed that out of the income of specific property, he should perform the worship of the family idols but there was no provision for the worship of the idols after the death of the grandson. The balance of the income was to be divided between the representatives of the three branches of her own family. In administration proceedings taken on the death of the grandson it was decided that out of the produce of the houses belonging to the estate be performed and that the surplus be paid equally to the three branches of the family was a party.

Held, (1) There was no gift of the whole property to the idols. (2) The burdens of performing different duties which involved ownership were cast on the grandson appointed by their will. (3) No heritable *shebait-ship* was established. (4) The representatives of the three beneficiaries under the will were entitled to the residue absolutely and in equal shares. (5) As the gift was a private trust the settlment of a scheme under S. 92, C. P. Code (1882) could not be ordered. (6) The order in the administration suit was binding on all the parties and operated as *res judicata*. (*Lord Buckmaster.*) GOPAL LAL SETT *v.* PURNA CHANDRA BASAK. **67 I. C. 561 = 20 A. L. J. 625 = 36 C.L.J. 57 = 49 Cal. 459 = 27 C.W.N. 174 = 24 Bom. L. R. 937 = 49. I. A. 100 = 16 M.L.W. 963 = A. I. R. 1922 P. C. 253 = 43 M. L. J. 116.**

C. P. CODE (1908), S. 13—Decision on the merits —Ex parte decree.

—S. 12—Fresh suit when maintainable.

———Where a person obtains a decree to the extent of the assets, against a supposed legal representative of a deceased debtor, who is subsequently found not to be so, a fresh suit on the same cause of action against the real legal representatives is not barred. (*Kulwant Sahay, J.*) MT. NANUBATI *v.* BHAIO CHOWDHRY. **9 Pat. L. T. 807 = 108 I. C. 558 = A. I. R. 1928 Pat. 362.**

—S. 13—Applicability.

———*Limits of discretion in execution of foreign decrees.*

The expression " may be executed " in S. 44 of the Code gives a discretion to the Court, to which application is made for executing a decree, to refuse to execute it, though the discretion should not be capriciously exercised. That discretion is not with special reference to Ss. 13 and 14. Cases may arise where in the exercise of proper discretion, Courts of law in British India may properly refuse execution of such decrees even apart from the exceptions enumerated in S. 13. However, in practice, no case may arise where the grounds on which the Court may consider it proper to refuse execution in the exercise of its discretion, are not included in one or the other of the very general exceptions engrafted in S. 13. (*Srinivasa Aiyangar, J.*) B. N. KRISHNASWAMY CHETTY *v.* MADHAPPA CHETTIAR. **21 M. L. W. 330 = 86 I. C. 492 = A. I. R. 1925 Mad. 788.**

—S. 13 (b)—Decision on the merits—Ex parte decree.

———*C. P. Code, S.* 13 (*b*).

Unless the judgment is given merely on default and in any case in which, in spite of the default any evidence is taken for the plaintiff, and judgment is given thereon, it may be difficult to say, that it is not a decision on the merits. (*Srinivasa Aiyangar, J.*) KRISHNASWAMY CHETTY *v.* MADHAPPA CHETTIAR. **21 M. L. W. 330 = 86 I. C. 492 = A. I. R. 1925 Mad. 788.**

———Foreign judgment—Suit on promissory note or hundi in the District Court of Colombo—Non-appearance of defendant—Affidavit filed by plaintiff in terms of the plaint—Decree *nisi* under S. 85 of the Ceylon Civil Procedure Code is not decision on merits. L.R. 44 I. A. 6: 40 Mad. 112: 32 M. L. J. 35 (P. C.); I. L. R. 50 Mad. 261; 52 M. L. J. 240 (F. B.) and 26 L. W. 803 Ref. to. (*Odgers and Wallace, JJ.*) P. L. S. FIRM, COLOMBO *v.* SULAIMAN. **30 M. L. W. 349 = 123 I. C. 579 = A. I. R. 1930 Mad. 149 = 57 M. L. J. 459.**

———Defence raised and not adjudicated upon—Decree not on merits—Where defendant does not appear at all decree should be held to be one on merits. (*Phillips and Madhavan Nair, JJ.*) JANOOTHA HASSAN *v.* MAHAMAD OHUTHU. **20 M. L. W. 677 = 47 Mad. 877 = 82 I C. 425 = A.I.R. 1925 Mad. 155 = 47 M.L.J. 356.**

———A judgment of a foreign Court obtained under the rules of that Court which enact that where the defendant is *ex parte* the plaintiff is entitled to a decree merely on proving that the defendant was properly served is not a judgment obtained on the merits of the case and that S. 13. Cl. (*b*) bars a suit on that judgment. A. I. R. 1927 Mad. 265 (F. B.): 40 Mad. 112, (P. C.) Foll: 45 Mad. 496, 47 Mad. 877 Dist.

C. P. CODE (1908), S. 13—Decision on the merits —Ex parte decree.

Curgenven, J.—If the adjudication which the foreign judgment embodies is not conclusive, it cannot be in any intelligible sense an adjudication at all for the purposes of the subsequent litigation. (*Kumaraswami Sastri and Curgenven, JJ.*) ARUNACHALAM CHETTIAR *v.* MD. SALIHU MARAKAYAR.
26 M. L. W. 803 = 107 I. C. 810 = A. I. R. 1928 Mad. 133.

———Under S. 13 (*b*) a foreign decree obtained on default of appearance of the defendant without any trial on evidence is a case where the judgment must be held not to have been given on the merits of the case and no suit lies in British India on such a foreign judgment.

Venkatasubba Rao, J.—(*Krishnan, J.* doubting) There is no distinction between a case in which a decree is given without any trial whatever and a decree in a case in which even though defendant did not appear the matter was tried in full on evidence given by plaintiff and proved his case. 40 Mad. 112 (P.C.), Applied. 47 Mad. 877 ; A. I. R. 1925 Mad. 155 : 82 I. C. 425. Case-law discussed (*Coutts-Trotter, C. J. Krishnan and Curgenven, JJ.*) MD. KASSIM & CO., *v.* SENNI PAKIR. **50 Mad. 261 = 25 M. L. W. 307 = 100 I. C. 555 = 39 M. L. T. 319 = A I. R. 1927 Mad. 265 = 52 M. L. J. 240 (F.B.).**

———A mortgagee brought a suit on his mortgage in the District Court of Colombo. From record it appeared that in that suit on the non-appearance of the mortgagor, the mortgagee's proctor filed an affidavit and the Court passed a decree *nisi* and a decree absolute under Ceylon C. P. Code, Ss. 85 and 86. But in doing so the Court did not strictly adhere to the provisions of Ceylon C. P. Code, .S 180, and Ceylon Evidence Act, S. 68, moreover there was no judgment in the suit.

Held that on a suit brought by the mortgagee in British Indian Court on the foreign judgment, the decision of the Colombo Court was not on merits so as to entitle mortgagee to have a judgment under C. P. Code S. 13 (b). A.I.R. 1927 Mad. 265, (F.B.), Foll.; A.I.R. 1916 P.C. 121, Rel. on ; A. I. R. 1926 Mad 615; A.I. R. 1925 P. C. 203 and A.I.R. 1928 Mad 133, Ref. (*Odgers and Wallace, JJ.*) PALANIAPPA CHETTY *v* NAGAPPA CHETTIAR. **123 I. C. 600 = A. I. R. 1930 Mad. 146.**

———In a case in which there is no appearance and a decree is passed *ex parte*, the decision is still a decision on merits. A. I. R. 1925 Mad. 155, Foll. (*Phillips and Ramesam, JJ.*) NAGOOR MEERA *v.* MAHADU MEERA.
22 M. L. W. 820 = 92 I. C. 491 = A. I. R. 1926 Mad. 259.

—S. 18—Decision on the merits—What is.

———The phrase "the merits of the case" has been used in the Code in contradistinction to a judgment by way of penalty. If without considering the questions, the determination of which is necessary for the decision of the case, the Court because of certain default made by a plaintiff or by a defendant penalizes the party in default by deciding the case against him the decision cannot be regarded as a "judgment given on the merits of the case." A. I R. 1916 P. C 121, Dist. 41 All. 521. Ref. Where a decree was granted to the plaintiff by the foreign Court, not because of the failure of the defendant to comply with any order of the Court, but because the Court, rightly or wrongly was of opinion that the fact that the document on which the suit was based was registered coupled with the omission of the defendant to contest the suit furnished a *prima facie* proof of the genuineness of the plaintiff's claim.

C. P. CODE (1908), S. 13—Jurisdiction—Submission to.

Held, that the judgment could not be said as pronounced without considering the merits of the case. (*Iqbal Ahmad and Kendall, JJ.*) ISHRI PRASAD *v.* SRI RAM. **25 A. L. J. 887 = 105 I. C. 186 = A.I.R. 1927 All. 510.**

—S. 13—Ex parte Judgments.

———*Foreign Judgment granted without taking plaintiff's evidence (but only on his pleadings) is not one on merits.*

A decision on the merits involves the application of the mind of the Court to the truth or falsity of the plaintift's case and therefore though a judgment passed after a judicial consideration of the matter by taking evidence may be a decision on the merits even though passed *ex parte*, a decision passed without evidence of any kind but passed only on his pleadings cannot be held to be a decision on the merits. A. I. R. 1927 Mad. 265 (F. B.). Rel. on A. I. R. 1927 All. 510, Dist. 7 L. B. R. 56, held no authority in view of A. I. R. 1916 P. C. 121. (*Chari, J.*) A. N. ABDUL RAHAMAN *v.* J. M. MOHOMED ALI ROWTHER. **6 Rang. 552 = 116 I. C. 465 = A. I. R. 1928 Rang. 319.**

———An *ex parte* judgment is not necessarily not one on merits within Sec. 13. (*Baker J.*) EPHRAYIM *v.* TURNER MORRISON & CO. **32 Bom. L.R. 1178.**

—S. 13—Finality when appeal is pending.

———Foreign judgment can be final even when an appeal is pending in foreign Court. Pendency of appeal is no bar to action. Stay of execution does not take away finality of foreign judgment. (*Harrison and Addison, JJ.*) HARI SINGH *v.* MAHOMED SAID.
8 Lah. 54 = 102 I. C. 523 = A. I. R. 1927 Lah. 200.

—S. 13—Foreign decrees—Amount awarded by—Rate of exchange.

———Suit for amount awarded by foreign judgment in foreign currency—Rate of exchange is that prevailing on the date of foreign judgment. (*Fawcett, J.*) MADHAVJI VISRAM THACKER *v.* RAMNIKLAL VADILAL.
47 Bom. 487 = 70 I.C. 474 = 25 Bom. L. R 173 = A. I. R. 1923 Bom. 437.

—S. 13—How far binding.

———S. 11 refers to the decision with regard to the issues also. S. 13 speaks only of the matter directly adjudicated upon by the foreign judgment. Although having regard to the language of S. 13, the contention that it refers only to a decree cannot be accepted, still at the same time it cannot be said that every issue decided by the foreign Court is binding upon the British Indian Court. The expression "matter directly adjudicated upon" in S. 13 should be held as undoubtedly to include the right set up, but limited only to the particular relief granted or refused. (*Kumaraswami Sastri and Srinivasa Ayyangar, JJ.*) CHOCKALINGAM *v.* DURAISWAMI. **51 Mad. 720 = 29 M. L. W. 250 = 108 I. C. 305 = A. I. R. 1928 Mad. 327 = 54 M. L. J. 479.**

—S. 13—Irregular service of notice—Validity of foreign decrees.

———Irregularity in the service of notice cannot be raised as a ground for questioning validity of foreign decree. (*Phillips and Madhavan Nair, JJ.*) JANOOTHA HASSAN *v.* MAHAMAD OHUTHU.
47 Mad. 877 = 82 I.C. 425 = 20 M.L.W. 677 = A. I. R. 1925 Mad. 155 = 47 M. L. J. 356.

—S. 13—Jurisdiction—Submission to.

———Execution of power-of-attorney to defend suits in foreign Courts amounts to submission—Person submitting as plaintiff cannot deny jurisdiction as defendant. [37 Mad. 163 and A. I. R. 1925 Mad. 155 Ref.] (*Phillips and Ramesam, JJ.*) NAGOOR MEERA *v.* MAHADU MEERA. **22 M. L. W. 820 = 92 I. C. 491 = A. I. R. 1926 Mad. 259.**

———Execution of power of attorney in favour of another empowering him to conduct litigation in foreign Court amounts to submission to the jurisdiction of that Court. (*Phillips and Madhavan Nair, JJ.*) JANNOO HASSAN *v.* MAHAMMAD OHUTHU. **47 Mad. 877 = 82 I. C. 425 = 20 M. L. W. 677 = A. I. R. 1925 Mad. 155 = 47 M. L. J. 356.**

[*See* infra NAGOOR MEERA *v.* MAHOMED MEERA ED.] **26 M. L. W. 820 = 92 I. C. 491 = A. I. R. 1926 Mad. 259.**

—S. 13—Legal representative not brought on record—Opposed to natural Justice.

———It amounts to denial of natural justice not to bring the legal representatives of a deceased defendant upon the record and a judgment passed without so impleading the legal representative cannot be given effect to against them. (*Harrison and Addison, JJ.*) HARI SINGH *v.* MOHAMMAD SAID. **102 I.C. 523 = 8 Lah. 54 = A. I. R. 1927 Lah. 200.**

—Ss. 13.—Objections to—Foreign Judgment.

———Ss. 13 and 44 should be read together, but it ought not to be forgotten that S. 13 merely lays down a rule of *res judicata* and has nothing to do whatever, with the manner in which the rule of *res judicata* should be enforced. Further, S. 13 merely codifies the rules of international law, with regard to foreign judgments. Unless, therefore, under its provisions a decree that is produced for execution is conclusive, as to the matter directly thereby adjudicated it cannot and ought not to be executed. The judgment-debtor in such cases, is permitted by the very provisions of S. 13 to show how or why it is not conclusive. by showing that the case falls under one of the exceptions enumerated. (*Srinivasa Aiyangar, J.*) KRISHNASWAMY CHETTY *v.* MADHAPPA CHETTIAR. **21 M. L. W. 330 = 86 I. C. 492 = A. I. R. 1925 Mad. 788.**

—S. 13—Office of trusteeship.

———The expression, in S. 13, namely, "the Court of competent jurisdiction," should for purposes of actions relating to the recovery of the office of trusteeship, be held to refer to Courts of the country which have jurisdiction in what may be called the domicile of the trust. (*Kumaraswami Sastri and Srinivasa Aiyangar, JJ.*) CHOCKALINGAM *v.* DORAISWAMI. **51 Mad. 720 = 29 M. L. W. 250 = 108 I. C. 305 = A. I. R. 1928 Mad. 327 = 54 M. L. J. 479.**

—S 13—Proceedings against minor.

———Proceedings against minor defendant without appointing guardian *ad litem* are opposed to natural justice. (*Harrison and Addison, JJ.*) HARI SINGH *v.* MAHOMED SAID. **8 Lah. 54 = 102 I. C. 523 = A. I. R. 1927 Lah. 200 (214).**

—S. 13—Refusal to recognise British law—What is not.

———A foreign judgment must be enforced by the Courts in British India in every case in which the judgment-debtor had voluntarily appeared before the foreign Court which passed the judgment. A suit was brought in British India and was founded on judgment passed by Dholpur Court (foreign Court.) It was pleaded that if the suit upon which the foreign judgment was passed had been brought in British India it

would have been held to be time-barred under the law of limitation in operation in British India, but the Law of Limitation in Dholpur not being the same as the Law in British India the remedy in Dholpur was not time barred.

Held that there had been no refusal to recognise the Law of British India, in this case. A Court which entertains a suit on a foreign judgment cannot institute an enquiry into the merits of the original action or the propriety of the decision. (*Piggott and Stuart, JJ.*) GANGA PRASAD *v.* GANESHI LAL. **46 All. 119 = 79 I. C. 332 = 21 A. L. J. 890 = 4 L. R. A. Civ. 604 = A. I. R. 1924 All. 161.**

—S. 13—Rules of international law.

———The question whether a Court is a Court of competent jurisdiction should be determined not by the rules laid down in respect of the jurisdiction of domestic tribunals but by rules of international law. Under the rules of international law, personal submission to the jurisdiction of a foreign Court gives that Court jurisdiction. (*Srinivasa Aiyangar, J.*) KRISHNASWAMY CHETTY *v.* MADHAPPA CHETTIAR. **21 M. L. W. 330 = 86 I. C. 492 = A. I. R. 1925 Mad. 788.**

—S. 13—Scope.

———Section is not restricted to plaintiff suing on a foreign judgment. (*Kumaraswami Sastri and Srinivasa Aiyangar, JJ.*) CHOCKLINGAM *v.* DORAISWAMI. **51 Mad. 720 = 108 I. C. 305 = 29 M. L. W. 250 = A. I. R. 1928 Mad. 327 = 54 M. L. J. 479.**

———Section 13 applies to plaintiffs as well as defendants. (*Chari, J.*) A. N. ABDUL RAHAMAN *v.* J. M. MOHAHED ALI ROWTHER. **6 Rang. 552 = 116 I.C. 465 = A.I.R. 1928 Rang. 319.**

—S. 13—Transferred decrees.

———The provisions of S. 13 of the C. P. Code, apply to decrees that are transferred to British Courts for execution under the provisions of S. 44. It is therefore open to the Court to which a decree of a foreign Court is transferred for execution to go into the question whether the decree is passed without jurisdiction. 39 Mad. 24 and 40 Bom. 551, Foll. (*Suhrawardy and Cuming, JJ.*) PANCH KARI MAJUMDAR *v.* GIRIDHARIMAL MOHESRI. **98 I.C. 740 = 89 I.C. 347 = 41 C.L.J. 508 = 30 C. W. N 785 = A. I. R. 1925 Cal. 955.**

—S. 13—When conclusive.

———*Foreign judgment—Binding character—Appearance by defendant—Joint petition for postponement of trial for settlement or decree—Trial Postponed—Defendant not appearing on date fixed—Decree.*

In the case of a foreign judgment the defendant first appeared and filed his written statement but when the case came on for trial, he along with plaintiff filed joint petition to the effect that the trial may be postponed with a view to settlement, and if not settled, decree may be passed as prayed for. The trial was accordingly postponed but on the day fixed, defendant did not appear and on plaintiff's statement that the case was not settled, decree was passed.

Held, that the decision was binding on a Court in British India. A. I. R. 1927 Mad. 265 (F.B.); A. I R. 1916 P.C. 121; A.I.R. 1928 Rang. 319 Dist. *Bradshaw* v. *M. Mullan*, (1920) 2 Ir. R. 412, Cons. (*Ramesam and Jackson, JJ.*) MD. MOIDEEN *v.* CHINTHAMANI CHETTIAR. **52 Mad. 503 = 29 M. L. W. 575 = 1929 M. W.N. 353 = 120 I.C. 751 = A.I.R 1929 Mad. 469 = 56 M. L.J. 547.**

———*Decision by competent court.*

Where the subject-matter is a *res* so situated as to be within the lawful control of the state under the authority of which a Court sits, and that authority has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within that jurisdiction, that decision is conclusive, whether, according to the law of another country, it might seem right or wrong. *Castrique* v. *Imrie* (L. R. 4 H. L. 414), Rel. on. (*Viscount Haldane*) C. F. ADOLF OTTO INGENOHL *v.* WING ON & CO., LTD. **47 C. L. J. 263 = 30 Bom. L. R. 753 = 107 I. C. 352 = A. I. R. 1928 P.C. 83.**

———Most of the trust property situate in Pondicherry —Trust to be performed there—Decision of Pondicherry Court as to appointment of trustee of that property should not be disturbed. (*Kumaraswami Sastri and Srinivasa Aiyangar, JJ.*) CHOCKLINGAM *v.* DURAISWAMI. **51 Mad. 720 = 29 M. L. W. 250 = 108 I. C. 305 = A. I. R. 1928 Mad. 327 = 54 M. L. J. 479.**

———*Foreign judgment that an application is a step-in-aid of execution—Binds Court in British India.*

Per Schwabe, C. J. (*Wallace, J.* dissenting)--Where there has been a foreign judgment on a matter directly adjudicated upon between the same parties, under the section it is not open, whatever the High Court might have said in such cases, to an unsuccessful party to the application in the foreign Court, to contend that the law there is otherwise. (*Schwabe, C.J. and Wallace, J.*) SRINIVAS IYENGAR *v.* NARAYANARAO. **45 Mad. 1014 = 69 I. C 932 = 1922 M.W.N. 647 = 16 M. L. W. 735 = A. I. R. 1923 Mad. 72 = 43 M. L.J. 700.**

———Where the decision in a Foreign Court was obtained in a Court of Native States between the widow and the alleged son of the deceased it must be held that the widow completely represented the estate and that any decision between the parties in that suit provided there was a direct adjudication upon the point is conclusive between them and between their successors-in-title provided that the judgment is not disqualified by any of the flaws set forth in S. 13 of the Code. But where the decision in the Patiala Court was obtained by fraud the question is not *res judicata* between the parties. (*Le Rossignol and Martineau, JJ.*) GOOR BACHAN SINGH *v.* GIAN SINGH. **A. I. R. 1922 Lah. 175.**

—S. 13—When not conclusive.

———If a Court pronounces a judgment upon the title or the right to possession of land out of its jurisdiction, the Courts of the country where it is situated, are justified in refusing to be bound by it, and this even if the judgment proceeds on the *lex loci rei sitae*. (*Tekchand, J.*) AMRU *v.* BHOGWANI. **119 I. C. 482 = A.I.R. 1929 Lah. 627.**

———Foreign judgment based on a second or third review on the same grounds is opposed to natural justice and cannot be basis of suit in British Indian Court. (*Harrison and Addison, JJ.*) HARI SINGH *v.* MUHAMMAD SAID. **8 Lah. 54 = 102 I.C. 523 = A.I.R. 1927 Lah. 200.**

—S. 14—Burden of proof.

———*Foreign judgment—Suit upon considerations—Production of certified copy—Presumption of competency of foreign court regarding jurisdiction.*

It is well settled rule of international law that Courts cannot, by their judgments, bind absent foreigners who have not submitted to their jurisdiction, and can only exercise jurisdiction over persons who are within the territorial limits of their jurisdiction, and, therefore, a judgment of a foreign Court obtained against a defendant cannot be enforced in British India where the

defendant at the time of the commencement of the suit was not a subject of, nor resident in, the country in which the judgment was obtained. Therefore in a suit based on a foreign judgment, one of the questions that arises for consideration is, was the defendant at the time of the commencement of the suit in the foreign Court residing within the territorial limits of the jurisdiction of the State in which the suit was brought. But on the production of a certified copy of a foreign judgment the Court is bound to presume that the judgment was pronounced by a Court of competent jurisdiction and therefore it devolves on the defendant by his pleading and evidence to deny and disprove every fact and circumstance which negative the jurisdiction of the foreign Court. 29 Cal. 509, Rel. on. (*Iqbal Ahmad and Kendall, JJ.*) ISHRI PRASAD *v.* SRI RAM. **25 A.L.J. 887 = 105 I.C. 186 = A. I. R. 1927 All. 510.**

—S. 14—Waiver of plea of jurisdiction—What is.

———The appearance for the purpose of obtaining an adjournment or for applying to set aside an *ex parte* decree in a foreign Court amounts to a submission to the jurisdiction of the foreign Court. So also appearance merely to dispute jurisdiction amounts to submission by the party and such party cannot dispute in a British Court want of jurisdiction in that foreign Court. (1915) 2 K. B. 580, Foll. (*Kotval, A. J. C.*) MT. JANKI SETHANI *v.* SETH LAXMI NARAYAN. **22 N.L.R. 82 = 89 I.C. 129 = A.I.R. 1926 Nag. 77.**

—S. 15—Commencement of suit.

———When the plaint is returned to be presented in a Court of competent jurisdiction, the suit is to be considered as instituted on the date of such presentation, and the suit thus presented cannot be said to be in contiuation of the suit filed in a Court without jurisdiction. 15 C. L. J. 241 ; A.I.R. 1926 Cal. 355 ; and 36 Mad. 131, Rel. on. (*Patkar and Baker, JJ.*) HIRACHAND *v.* G. I. P. RY. CO. **52 Bom. 548 = 113 I.C. 511 = 30 Bom. L. R. 970 = A I. R. 1928 Bom. 421.**

—S. 15—Jurisdiction.

———*Suit filed before Subordinate Judge—Subject-matter of suit found to fall within Munsif's jurisdiction—Case returned for presentation to proper Court—Propriety—Duty to exercise concurrent jurisdiction.*

A suit for declaration of title to certain properties was filed in the Court of the Subordinate Judge. The valuation put by the plaintiff was Rs. 5,300 and the Court had jurisdiction over the suit. In the course of the suit however it was held that the value of the subject-matter of the suit was less than Rs. 5,000 and thereupon the Judge directed that the plaint be returned to the plaintiff for presentation to the Court of the Munsif, *held*, that where the subject-matter of the suit does not exceed the jurisdiction of the Munsif, the jurisdiction of the Subordinate and District Judge to hear the same was concurrent and that the Sub-Judge should consequently have disposed of the case on the merits instead of returning the plaint. 7 A. 230, Rel. on. (*Mukerji and King, JJ.*) KANHAI RAM *v.* JAI DEVI. **1930 A. L. J. 386 = 122 I. C. 187.**

—S. 15--Jurisdiction, determination of.

———Prima facie *plaint determines jurisdiction except in cases where the result ousts the jurisdiction from the very start.*

Prima facie plaintiff's claim determines jurisdiction and the jurisdiction continues whatever be the result unless a different principle comes into operation to prevent such a result as to make the proceedings from the first abortive. Where therefore the trial Court found that the amount due to the mortgagee was above its jurisdiction and it accordingly returned the plaint, *held*, the order was legal. (*Suhrawardy and Chotzner, JJ.*) SARODA SUNDARI BASU *v.* AKRAMANESSA KHATUN.

51 Cal. 737 = 78 I. C. 747 = 28 C. W. N. 710 = A. I. R. 1924 Cal. 783.

—S. 15—Trial by higher court.

———*Suit triable by Court of lower grade instituted in Court of higher grade.*

The provision of S. 15 does not warrant the inference that if a suit triable by a Court of a lower grade is instituted in a Court of a higher grade, the latter Court would have no jurisdiction to try that suit. The trial of the suit by the latter Court is merely an irregularity and the decision on the merits should not be upset on the ground of mere irregularity. 17 Cal. 155, Rel. on. (*Sundaram Chetty, J.*) SURYANARAYANA *v.* BULLAYYA. **25 M. L. W. 367 = 101 I. C. 85 = A. I. R. 1927 Mad. 568 = 52 M. L. J. 323.**

—S. 15—When not applicable.

———*Punjab Courts Act, S.* 34.

Where a Judge receives plaints for distributing to proper Courts, he is acting not in the capacity of a Court but ministerially. His discretion overrides the provisions of S. 15, C. P. Code, in so far as he can direct a suit which might be tried by a Court of lower jurisdiction to be tried by a Court of higher jurisdiction, but no such discretion is conferred on the suitor who remains bound by the provisions of the Code. (*Harrison and Dalip Singh, JJ.*) SHARAM SINGH *v.* SADHU SINGH. **110 I. C. 293 = A. I. R. 1928 Lah. 484.**

———It is imperative on the suitor under S. 15 to bring his suit in the Court of lowest grade. The word "shall" in S. 15 is not imperative on the Courts and does not deprive the higher Court of its jurisdiction to try a suit triable by a Court of less pecuniary jurisdiction. 7 All. 230 (F. B.), Ref. (*Heald and Chari, JJ.*) MAUNG SIT PAUNG *v.* MAUNG TUN.

4 Bur. L. J. 104 = 90 I. C. 728 = A. I. R. 1925 Rang. 278.

—S. 16—Change of jurisdiction after institution.

The jurisdiction of a Court consists in its power to entertain suits, and when once a suit has been properly entertained the jurisdiction is not removed unless it is specifically so done by the order of a competent authority. Once the suit has been entertained, the remaining proceedings taken therein are not taken by reason of any particular territorial jurisdiction, but in the exercise of the powers vested in the Court to try suits generally and consequently the only time at which territorial jurisdiction comes into operation is at the time of filing the suit. Once the Court has seisin of the case it has jurisdiction to try it to its conclusion unless there is any reason for holding that that jurisdiction has been removed, though the subject-matter of the suit may be transferred to another Court in the meanwhile. (*Phillips and Venkatasubba Rao, JJ.*) CHOKKALINGA PILLAI *v.* VELAYUDHA MUDALIAR.

87 I. C. 152 = A. I. R. 1925 Mad. 117 = 47 M. L. J. 448.

—S. 16—" Defendant ".

———The word " defendant " means " all the defendants" where there are more than one defendant in the suit. 13 B. L. R. 91, Foll. (*Chatterjee and Panton, JJ.*) MOHMED YASIN *v.* BIMOLA PROSAD MUKERJEE. **73 I. C. 405 = A. I. R. 1924 Cal. 443.**

—S. 16—Mesne profits, suit for.

———A suit to recover mesne profits of land situated outside British India can be instituted in British India.

Although S. 16 of the Code does not seem to be applicable to cases of land outside British India there is reason to believe that the whole of the section follows the English Law with regard to jurisdiction in case of suits in which specially the decree could be executed by the personal obedience of the defendant. (*Macleod, C. J. and Shah, J.*) MAHADEO GOVIND SUKTANKAR *v.* RAMCHANDRA GOVIND SUKTANKAR.

46 Bom. 108 = 68 I. C. 510 = 23 Bom. L. R. 903 = A. I. R. 1922 Bom. 188.

—S. 16—Moveable property.

———Ss. 16 and 17 are not confined to suits involving only immovable property but they apply equally to suits for immovable property as well as movable property, provided that the immovable property is situate wholly or in part within the local jurisdiction of the Court. 4 Bom. 482, Foll. (*Shadi Lal. C. J. and Le Rossignol, J.*) SHIV RAM *v.* PRAHLAD RAI.

27 P. L. R. 398 = 96 I. C. 691 = A. I.R. 1926 Lah. 503.

—S. 16—Partition suit—Property outside jurisdiction.

———Where in a suit for partition some of the immovable property was situated out of British India.

Held, that the Courts in British India cannot entertain a suit with respect to that property since their decree cannot be enforced there. (*Prideaux, A. J. C.*) PREMCHAND *v.* HIRALAL. **24 N. L. R. 95 = 111 I. C. 135 = A. I. R. 1928 Nag. 295.**

—S 16—Property in two places —Declaration against probate of.

———A suit for a declaration that the probate proceedings shall not affect the plaintiffs and for the administration of the estate left by the testator, is not a claim for the determination of any right to or interest in immovable property within S. 16, so that the mere fact that part of the property to be administered is situate in a particular district will not give the first Court jurisdiction. The question of jurisdiction has, therefore, to be determined by S. 20. Such a suit lies in the Court at the place where the probate is taken out. (*Martineau, J.*) SHIV RAM *v.* MT. ISHRI.

94 I. C. 1046 = A. I. R. 1926 Lah. 456.

— S. 16—Property in two provinces.

———*Probate proceedings.*

Suit for the administration of the estate of the deceased is cognizable by the Court in the jurisdiction of which a portion of the immovable property is situate and where such a suit is directed mainly against the probate proceedings taken in another province, that fact does not oust the jurisdiction of the Court which is established by reason of the relief relating to the administration of the estate including immovable property being situate in the jurisdiction of that Court. (*Shadi Lal, C. J. and Le Rossignol, J.*) SHIV RAM *v.* PRAHLAD RAI. **27 P. L. R. 398 = 96 I. C. 691 = A. I. R. 1926 Lah. 503.**

—S. 16—Property partly outside.

———*Administration suit.*

If in an administration suit it is found that some of the properties are situated outside the jurisdiction of the Courts of British India, and are in the possession of a person claiming a share in the estate, the Court has no jurisdiction to order that person to deliver possession of the property to the administrator to enable him to sell it and realize its proper price for the benefit of the estate; but the Court has jurisdiction to direct that person to account for the value of such property as a condition to his obtaining his share of the estate in the hands of the administrator. Case-law considered and discussed. (*Maung Kin and Higginbotham, JJ.*) MT. AYESHA BEE *v.* GULAM HUSEIN SULEMAN ABOO. **11 L. B. R. 188 = 66 I. C. 530 = A. I. R. 1921 L. B. 82.**

—S. 16—Suits for land.

———A suit for declaration, that a mortgage decree in respect of properties at Patna passed by the Court at Benares is inoperative against the plaintiff, is not a suit for land and S. 16 does not apply. The cause of action cannot be said to arise in Patna. (*Das and Macpherson, JJ.*) THE BENARES BANK, LTD. *v.* SURENDRA NARAIN SINGH. **75 I. C. 469 = A.I.R. 1924 Pat. 831.**

—S. 16—Suit regarding temple.

———*Decision under Madras Religious Endowment Act.*

A suit for setting aside the Board's decision under the Madras Religious Endowments Act that a temple is a public temple lies only in the Court where the temple is situate. (*Kumaraswami Sastri, J.*) VYTHILINGA *v.* SADASIVA AIYAR. **28 M. L. W. 535 = 116 I. C. 561 = A. I. R. 1928 Mad. 1272 = 55 M. L. J. 605.**

—S. 16—Suit for specific performance—Defendant and property in different places.

———A suit for a relief that the defendant should execute and register a deed of surrender of the occupancy holding, as he had promised to do, or should pay back to the plaintiffs the consideration of his promise, is triable in a Court within whose jurisdiction the defendant resides though the property is outside its jurisdiction. (*Hallifax, A.J.C.*) NARAYAN DIN *v.* MAHESH SINGH. **93 I. C. 103 = A. I. R. 1926 Nag. 313.**

—S. 16—Suit for dissolution of partnership at two places.

———Where business is carried on in two places Courts in both places can entertain a suit for dissolution of partnership. (*Devadoss and Waller, JJ.*) TIMMAPPA *v.* BALAKRISHNA MUDALIAR. **23 M.L.W. 361 = 92 I.C. 915 = A. I. R. 1926 Mad. 427 = 50 M.L.J. 298.**

—S. 16—Suit for money and declaration of charge.

———A suit for recovery of a certain amount on a promissory note and also for declaration that the decretal amount is a charge on a certain property mortgaged as collateral security for the payment of the debt secured by the promissory note falls within the purview of S. 16 (*d*). 40 Bom. 337, Foll. (*Jai Lal, J.*) JAI DEV SINGH *v.* JAI SINGH. **96 I. C. 752 = A.I.R. 1926 Lah. 660.**

—S. 16—Suit for rent.

———Suit for rent can be brought where property is situate or where tenant resides—But suit for ejectment can be brought only where property is situate. (*Mookerjee and Chotzner, JJ.*) KUNJA MOHAN CHAKRAVARTY *v.* MONINDRA CHANDRA ROY CHOWDHURY. **27 C.W.N. 542 = 77 I.C. 253 = A. I. R. 1923 Cal. 619.**

—S. 16—Suit for "determination of any other rights"—Suit to declare a will is a forgery.

———For S. 16 (*d*) to apply the suit must be expressly for the purpose indicated in it. It is not enough to say that the relief granted would indirectly affect rights in immovable property, but the suit itself must be for the purpose of determining such rights. (*Krishnan and Venkatasubba Rao, JJ.*) N. ACHAYYA *v.* N. YALLAMMA. **16 M.L.W. 785 = 72 I. C. 920 = 1922 M.W.N. 834 = A. I. R. 1923 Mad. 109 = 43 M.L.J. 615.**

———S. 17—Jurisdiction.

When once jurisdiction is vested in a Court, it will not be taken away afterwards, even if it is found that the portion of the property being situated within the

local limits of the Court which gave it jurisdiction does not belong to the plaintiff as alleged in the plaint unless the inclusion of that portion is not a *bona fide* one. The trial of an issue as to whether the portion belongs to the plaintiff as alleged as a preliminary point is quite unnecessary and is not warranted by law. Such preliminary point does not raise a question of law only and therefore O. 14, R. 2 does not apply. 12 Mad. 308; 30 All. 560, Rel. on; 9 C.L.J. 128; A.I.R. 1924 P.C. 65, Dist. (*Mohiuddin, A.J.C.*) FAIZUDDIN *v.* MIR YUSUF ALI. **26 N.L.R. 103 = 124 I. C. 703 = A.I R. 1930 Nag. 189.**

—S. 17—Mutawaliship.

———Although a mutawali of a waqf is not the owner but the manager and there is an essential difference between the position of a mutawali and that of an owner, yet where the waqf was to be administered as mutawali by the person who was the successor of the waqif, a Court having jurisdiction to try the question as to who the successor of the waqif is has also jurisdiction to decide as to the mutawaliship of the waqf property. (*Pullan, J.*) MOHAMMAD ALI KHAN *v.* NISAR ALI KHAN. **109 I. C. 835 = A. I. R. 1928 Oudh 67.**

—S. 17—Property partly outside India.

———*Jurisdiction of British Indian Court to entertain suit on mortgage of.*

The words "a suit to obtain relief respecting immovable property" are wide enough to cover suits for foreclosure, sale or redemption, but the words in S. 17 "within the jurisdiction of the different Courts" must mean within the jurisdiction of different Courts to which the Code applies, *i.e.*, Courts in British India. Where, therefore, in a mortgage suit part of the property is situated not within the jurisdiction of the Courts in British India, British Indian Courts have no jurisdiction to try the suit so far as it relates to such property. A.I.R. 1919 P. C. 150, Rel. on; A.I.R. 1924 Bom. 387, Reversed. (*Sir Lancelot Sanderson.*) NILKANTH BALWANT NATH *v.* VIDYA NARASIM BHARATHI SWAMI. **57 I.A. 194 = 34 C.W.N. 854 = A.I.R. 1930 P.C. 188 = 59 M.L.J 379.**

—S. 17—Suit for money.

———*Forum.*

Where the plaintiff, a resident of Madanapalle, talked and settled with the defendant at Madras about the commission to be paid to him as commission agent for the sale of goods which the plaintiff was to send directly to Madras or to others according as defendant would direct and the defendant was from time to time informing plaintiff of the current prices in Madras and suggesting him despatch of goods and under the arrangement the sale price was to be paid to the plaintiff at Madanapalle.

Held, that the suit for price of goods despatched lay at Madanapalle, as a part of the cause of action arose there. (*Ramesam, J.*) VENKATA REDDY *v.* NATARAJA SETTY. **19 M.L.W. 499 = 84 I.C. 691 = 34 M.L.T. 116 = 1924 M.W.N. 336 = A. I. R. 1924 Mad. 789 = 46 M.L.J. 371.**

—S. 19—"Business" meaning.

———The business intended by the section is a commercial business and not a business of State or Government. (*Coutts-Trotter, C.J. and Beasley, J.*) GOVINDARAJULU NAIDU *v.* SECRETARY OF STATE. **50 Mad. 449 = 39 M.L T. 304 = 26 M.L.W. 558 = 105 I. C. 576 = A.I.R. 1927 Mad. 689 = 53 M.L.J. 355.**

—S 19—Contract of pledge.

———*Suit upon—Cause of action—Determination of.*

S. 160 of the Contract Act does not contemplate

directions by the pawnor's assignee, but by the pawnor himself about the delivery of the property pawned. The use of the words "without demand" in that section seem to indicate that the directions referred to in it are directions given before the purpose for which the goods were pawned has been accomplished. S. 148, seems to cover the case of directions given after the purpose is accomplished. The directions must be definite and reasonable. It is not open to the pawnor to name any place he chooses for delivery of the goods pledged. The place where the cause of action arises must be determined with reference to the terms of the original contract. (*Kotval, A.J.C.*) TEKCHAND *v.* MAHADEO.
65 I. C. 65 = A.I.R. 1922 Nag. 127.

—S. 19—Option available.

———Where defendant is ordinarily resident in the Punjab but carried on business at Quetta he can be sued in Quetta though the cause of action took place in Persia. (*Viscount Haldane.*) HAVELI SHAH *v.* PAINDA KHAN. **1926 M.W.N. 592 = 96 I.C. 887 = 31 C.W.N. 174 = A.I.R. 1926 P.C. 88.**

—S. 19—" Resides ".

———The word "resides" must be taken to refer to natural persons and not to legal entities such as limited companies or Governments. (*Coutts-Trotter, C.J. and Beasley, J.*) GOVINDARAJULU NAIDU *v.* SECRETARY OF STATE. **50 Mad. 449 = 39 M.L.T. 304 = 26 M.L.W. 558 = 105 I. C. 576 = A.I.R. 1927 Mad. 689 = 53 M.L.J. 355.**

S. 20.

Accounts.
Cause of action.
Contract.
Debtor and creditor.
Decree.
Insurance.
Jurisdiction.
Leave to sue.
Negotiable Instrument.
Partnership.
Place of suit.
Residence.
Tort.

—S. 20—Accounts.

———*Principal and agent—Agency entered into outside British India—Accounts to be rendered there—Suit filed in British India—Jurisdiction.*

In a suit by plaintiff on an alleged contract of agency for collection of certain dues at a place in British India while all the parties reside and carry on business out of British India, *prima facie* the British Court has no jurisdiction and it is for the plaintiff to prove collection at the place in British India as alleged, before the Court would hold that it had jurisdiction. (*Madgavkar and Wild, JJ.*) SANKALCHAND HAKAMCHAND *v.* AMBALAL NAGINDAS.
32 Bom. L.R. 171 = 54 Bom. 192 = A.I.R. 1930 Bom. 150.

———*Suit for accounts—Cause of action—Basis.*

In a suit for accounts based upon an agency for collection of dues, it is the general contract of agency with liability to account and refund the balance which is the cause of action and not each separate payment or collection. 13 Bom. 404, Foll. *Read* v. *Brown*, 22 Q.B.D. 128; 29 Bom. 368 and 16 All. 165, Ref. (*Madgavkar and Wild, JJ.*) SANKAL CHAND HAKAMCHAND *v.* AMBALAL NAGINDAS. **32 Bom. L.R. 171 = 54 Bom. 192 = A.I.R. 1930 Bom. 150.**

———Suit for accounts of agency is cognizable by Court having jurisdiction at place where agency was or

was to be carried on. (*Jai Lal, J.*) JAGAN NATH AMAR NATH *v.* BURMA OIL CO. LTD.
11 L. L. J. 282 = 119 I. C. 481 = A. I. R. 1929 Lah. 605.

———Defendant agent of plaintiff to sell goods at *M* agreeing to make payments, be accountable and to report stock at Karachi and also agreeing to sue and be sued in Karachi Courts—Jurisdiction of Karachi Courts. Defendant was the plaintiff's agent for the sale of the plaintiffs' goods in the district of Meerut: He had to remit sale proceeds to Karachi, to render accurate and sufficient account of sales of goods every month and to submit to the plaintiff at the end of each month an accurate report of stocks of goods belonging to the plaintiff: This agreement further specifically stated, that "the agent must submit at the end of each month to the company at Karachi" a certified statement detailing the property of the company and it contained the clause that all legal proceedings are to be instituted in Karachi.

Held, that the clauses relating to payment accountability, reporting or jurisdiction in the agreements should be read together and the Court in Karachi had jurisdiction, (1898), A. C. 524; A. I. R. 1924 All. 530, Dist. (*Aston, A. J. C.*) ASIATIC PETROLEUM CO. LTD. *v.* AZEEZUDIEN & SON. **A. I. R. 1929 Sind. 227.**

———*Pakka Adatya—Place of contract and of payment not known—Jurisdiction.*

Where there is no evidence as to where the contract of pakka adatya agency was entered into and also as to where any money was expressly or impliedly payable in performance of the contract of agency and the contract was to be performed in *A* or the performance thereof was to be completed in *A*, the mere fact that goods to be sold were sent from *B* does not give *B* Court jurisdiction to try a suit for account of the agency transaction. (Case law discussed.) (*Patkar and Baker, JJ.*) NANDLAL *v.* KISANLAL. **30 Bom. L. R. 1391 = 112 I. C. 734 = A. I. R. 1928 Bom. 548.**

———*Pakka Adhatia—Accounting by—Place of.*

Pakka adhatia probably corresponding to *del credere* agent, that is to say, an agent or factor, who being entrusted with the goods of his principal to dispose of to the best advantage, is in lawful possession of them with a general power to deal with them without reference to his principal but guaranteeing the solvency of the sub-purchasers, and while entitled to charge against his principal his expenses and entitled also to an indemnity from his principal against all losses resulting from carrying out his duty, is under an obligation to pay to his principal the amount due after the accounts have been properly settled. Unless the contract clearly indicates the contrary, *pakka adhatia* becomes a factor entrusted with goods of his principal with wide powers and has no doubt under the appropriate section of the Contract Act, eventually to account to his principal but the accounting must necessarily be done at the place where all the business is transacted. 33 Bom. 167. Doubted; 54 I. C. 260. Exp.; 8 A. L. J. 1160, Foll. (*Walsh, Ag. C. J. and Neave, J.*) TIKA RAM *v.* DAULAT RAM. **46 All. 465 = 80 I. C. 661 = 22 A. L. J. 591 = 6 L. R. A. Civ. 9 = A. I. R. 1924 All. 530.**

———*By principal suit against Commission agent—Place of.*

A suit by a principal against a commission agent who has agreed to execute an order placed with him by correspondence must be instituted at the place where the commission agent carries on his business and the principal cannot sue him at the place from where he sent the order. 76 P. R. 1896; 1 Lah. 203 and A. I. R. 1924 Lah. 593, Foll. (*Harrison and Tekchand, JJ.*) BHAM-

BOO MAL *v.* RAM NARAIN. **9 Lah. 455 = 10 L.L.J. 87 = 29 P. L. R. 406 = 109 I. C. 28 = A. I. R. 1928 Lah. 297.**

———*Suit by Principal against commission agent.*

A Court, having jurisdiction at the place where, in compliance with the orders of the principal, the commission agent works, is competent to entertain a suit for balance of accounts by the agent against his principal. (*Campbell, J.*) FIRM HAZURA MAL *v.* RANG ILAHI. **92 I. C. 273 = A. I. R. 1926 Lah. 287.**

———*Suit between principal and agent—Cause of action.*

In a suit between principal and agent the cause of action arises where the contract of agency is made or where it was to be performed, and where the refusal to account takes place. A. I R. 1925 Lah. 387 and 12 Bur. L. T. 198, Foll. (*Lobo, A. J- C.*) GORDHANDAS KALIDAS *v.* DOWLATRAM KANAYALAL. **94 I. C. 287 = A. I. R. 1926 Sind 238.**

———*Accounts—Suit for by principal—Forum.*

The cause of action in a suit for accounts against an agent arises at the place where the contract of agency was made or where it was to be performed and where the refusal to account took place. The plaintiffs were grain dealers at *S.* The defendants were commission agents doing business at *K.* The plaintiffs sent goods to the defendants at *K.* They accepted the plaintiffs' drafts, paid money at their request and having sold the goods credited the amount realised to their account. Later on, the defendants at the plaintiff's request purchased goods at *K*, and sent them abroad according to the plaintiffs' directions to various constituents. The defendants purchased goods at *K.* and despatched them to *S.* and in doing so they adopted the following procedure:—They drew money from the *K.* branch of a certain Bank and handed over the Railway receipts to the Bank which transmitted them to the *S.* Branch to be handed over to the plaintiffs on payment of the price of the goods received. Sometimes the plaintiffs sent money to *K.* and drew the same by means of Hundies and *vice versa.* The defendants also used to draw hundis upon the plaintiffs. The plaintiffs instituted the suit on the following allegations :—That there were mutual dealings between the plaintiffs and the defendants and that the latter received from the plaintiffs by way of loan Rs.......out of which they paid Rs.......leaving a balance of......due to the plaintiffs. They further claimed a sum of Rs.......on account of the profits of the grain transactions.

Held, that it was a suit for an account by a principal against an agent and that the Court at *S.* had no jurisdiction to try the suit but that only the Court at *K.* had the jurisdiction. (Case Law discussed.) (*Abdul Raoof and Jai Lal, JJ.*) RAM DAS UTTAM CHAND *v.* DHANPAT DIWANCHAND. **6 Lah. 153 = 88 I. C. 950 = 7 L. L.J. 562 = 26 P. L. R. 335 = A. I. R. 1925 Lah. 387.**

———In the absence of an agreement to the contrary, or of special circumstances showing a different intention, the principal cannot, where agent carries on business elsewhere call upon him to render an account at his own place of business, on the ground that the money or goods were sent to the agent from such place. 76 P. R. 1896 Foll. (*Martineau, J.*) THE FIRM PRITHI SINGH *v.* THE FIRM HARSUKH DAS. **75 I. C 849 = A. I. R. 1924 Lah. 593.**

———Where several shops were owned by the plaintiffs and separate *Khatas* were kept in respect of them but the transactions relating to one shop were with the defendants' consent entered in the accounts of the other shops and the whole set of transactions were treated by

the defendants in a cross suit filed by them as forming one cause of action and one account. *Held* that the accounts in regard to each shop cannot properly be treated as entirely separate causes of action. (*Daniels, A. J. C.*) BANKILAL *v.* KANHAIYA LAL. **A. I. R. 1922 Oudh 124.**

—S. 20—Cause of action.

———Cause of action must be antecedent to the suit and so no cause of action can be founded on any allegations made in the proceedings. (*Graham and Mitter, JJ.*) RAMJOY MODUK *v.* DURGA CHARAN. **50 C. L. J. 328 = A. I. R. 1929 Cal. 830.**

———*Assignment of claim—Jurisdiction of Court where assignment takes place.*

A "cause of action" includes every fact necessary to be proved in order to enable the plaintiff to sustain his action and everything which if not proved gives the defendant an immediate right to judgment. An assignment of a claim whether voluntary or by virtue of adjudication of the person in whom that claim resides forms a part of the cause of action in a suit in respect of that claim and the Court within whose limits the said assignment takes place can entertain the suit. (*Rupchand Bilaram, A.J.C.*) OFFICIAL RECEIVER OF THE ESTATE OF MOHANDAS CHATANDAS *v.* NARAINDAS LATARAM. **20 S. L. R. 209 = 89 I. C. 493 = A.I.R. 1926 Sind 31.**

———*Suit for refund of over charge by foreign Railway.*

In a suit for refund of over-charge demanded from a consignee by a foreign Railway the cause of action arises in part at the place where the contract for carrying was made and so the Court at the latter place has jurisdiction to try the suit. (*Stuart, J.*) SRI NEWAS *v.* E. I. R. CO. **6 L. R. A. Civ. 395 = 88 I. C. 575 = A. I. R. 1925 All. 823.**

———Plaintiff firm residing at Gujranwala ordered goods from defendant firm residing at Calcutta. Latter firm consigned the goods to itself in Gujranwala and sent the Railway receipt to plaintiff firm per V.P.P. for the balance of the price. The plaintiff firm refused the V.P.P. but sent the balance to the defendant and asked the defendant firm to advise the railway to deliver goods. The goods were lost by the Railway. Plaintiff firm thereupon sued the defendant at Gujranwala for return of the price paid by him. *Held* the goods remained throughout under the control of the defendant and they had to be delivered at Gujranwala. The failure to deliver the goods was a part of the cause of action, and therefore the Gujranwala Court had jurisdiction to entertain the suit. (*Scott-Smith, J.*) THE FIRM JAGAN NATH DIWAN CHAND OF GUJRANWALA *v.* THE FIRM JAGAL NATH MOTI LAL OF CALCUTTA. **71 I.C. 38 = A. I. R. 1924 Lah. 349.**

———Plaintiff, a cotton merchant, residing at Khamgaon, in the Buldana District, sent some bales of cotton for sale in Bombay to defendants a firm of *adtias* or commission agents at Bombay. The accounts were to be rendered and money to be paid at Khamgaon. *Held*, that part of the cause of action accrued in the Buldana District. The term "cause of action" is not defined in the Code, but various rulings have defined it as the whole bundle of relevant facts plaintiff must allege and prove to enable him to succeed. (1 N. L. R. 4, Ref. (*Baker, J. C. and Prideaux, A. J. C.*) J. R. ADTIA FIRM, BOMBAY *v.* SUNDERLAL NARAINDAS. **78 I. C. 991 = A. I. R. 1924 Nag. 308.**

———*"Cause of action"—Meaning of, in reference to contracts of insurance.*

For the purposes of S. 20 of the Code, the words "cause of action" so far as suits on contract are concerned include the making of the contract and the performance or completion of performance of the contract and the payment of money under the contract, and in cases based on contract of insurance they do not include the loss or damage of the property insured, which is merely a cause of the cause, and is not even a proximate cause since the real cause of action is the failure to pay the money due under the contract and the primary cause of that cause is the contract itself, the destruction of the property being only a secondary cause which is purely accidental being due merely to the nature of the particular kind of contract under consideration. The meaning of the expression "cause of action" in the section in question, when applied to suits based on contract, should be ascertained by a consideration of the meaning of the expression in the past, in the course of the development of such legislation in India and the case-law thereon, and not by reference to any English decision on the construction of any English Statutes. (*Heald and Lentaigne, JJ.*) JUPITER GENERAL INSURANCE CO., LTD. *v.* ABDUL AZIZ. **1 Rang. 231 = 76 I. C. 482 = A. I. R. 1924 Rang. 2.**

———Discovery of the fraud is no part of the cause of action. The cause of action is the fraud. (*Schwabe, C. J. and Wallace, J.*) PARAMESWARA *v.* V. MAHADEVI. **1922 M. W. N. 841 = 72 I. C. 982 = A. I. R. 1923 Mad. 272.**

———*Suit by reversioner for cancellation of Will executed by widow—Situation of property will give a cause of action.*

The words "cause of action" means the whole bundle of facts which it is necessary for the plaintiff to allege and prove in order to obtain the relief he claims in the suit. Where a reversioner sues in the Godavari Court to cancel a Will by a widow in respect of properties in Godavari and Kistna, *held*, that as the plaintiff was bound in such a suit to prove that he has an interest in the properties dealt with by the Will, part of the cause of action arose in all the places where the properties are situate, and where the threat of an injury to those properties arose. The term 'cause of action' is not limited to contracts only. It applies to all suits of whatever nature. (*Krishnan and Venkatasubba Rao, JJ.*) N. ACHAYYA *v.* N. YELLAMMA. **16 M. L. W. 785 = 72 I. C. 920 = 1922 M. W. N. 834 = A. I. R. 1923 Mad. 109 = 43 M. L. J. 615.**

———*Sale of goods—Delivery to railway company is delivery to buyer—Place of delivery furnishes cause of action.*

Delivery by the seller of the goods sold to the railway company to be despatched to the buyer operates as delivery to the buyer under S. 91, Contract Act and a suit [illegible] breach of contract to deliver goods by the buyer would lie at the place where the goods were delivered to the railway company. (*Martineau, J.*) FIRM NAND LA[illegible] *v.* FIRM MIAN MUHAMMAD ALI. **67 I. C. 888 = A. I. R. 1922 Lah. 474.**

———*Suit for restitution of conjugal rights.*

A [illegible] by the husband for restitution of conjugal rights was dismissed on the ground of cruelty to the wife, [illegible] pleaded cruelty and divorce but no specific finding was given on the question of divorce. The wife, afterwards sued for a declaration that there was a divorce [illegible] in the alternative for a decree for the dissolution [illegible] marriage on the basis of the opinions expressed in the judgment of the previous suit by the husband.

Held, a [illegible] for dissolution of marriage or for declaration [illegible]o an accomplished divorce is essentially differen[illegible] to cause of action from a suit for restitution of conjugal rights. The opinions expressed in the judgment of the suit for restitution of conjugal rights as to the affirmation of cruelty or the negation of divorce cannot form a cause of action in a suit for dissolution of marriage or for declaration of dissolution. (*Wazir Hasan, A.J.C.*) MUHAMMAD HAMIDULAH KHAN *v.* MT. FAKHRIJAHAN BEGAM. **8 O. L. J. 650 = 65 I. C. 452 = A. I. R. 1922 Oudh 109.**

———*What constitutes.*

Every fact which, it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court, is plaintiff's cause of action. (*Wazir Hasan, A.J.C.*) MUHAMMAD HAMIDULLAH KHAN *v.* MT. FAKHRIJAHAN BEGAM. **8 O. L. J. 650 = 65 I. C. 452 = A. I. R. 1922 Oudh 109.**

———Plaintiff residing at *M* ordered certain goods from defendant who carried on business at *S*. Plaintiff sued defendant at *M* for damages on the allegation that the goods supplied were short in quantity and inferior in quality. Defendant objected that the cause of action having arisen at *S*, the Court at *M* had no jurisdiction to hear the suit. This objection was overruled. On revision :

Held, (1) that the cause of action arose at *S* and that, therefore, the Court at *M* had no jurisdiction to hear the suit; (2) that the High Court had jurisdiction in revision to set aside an interlocutory order, and that that jurisdiction ought to be exercised in this case. (*Abdul Raoof, J.*) HAR PARSHAD DALIP SINGH *v.* SEWA RAM JADO RAI. **(1921) 60 I. C. 481 (Lah.).**

———Cause of action includes every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. *Read* v. *Brown* (22 Q B.D. 128) and *Cooke* v. *Gill* (L. R. 8 C. P. 107), Foll. (*Oldfield and Ramesam, JJ.*) RAIPUR MANUFACTURING CO., LTD. *v.* VENKATASUBBA RAO. **14 M. L. W. 341 = 70 I. C. 284 = A. I. R. 1921 Mad. 664.**

———Lex loci—*Marriage—Validity.*

The law of the place where a marriage is contracted determines the validity of a marriage. (*Robinson, J.*) MA TWE *v.* LWE HAIN. **22 Cr. L. J. 130 = 59 I. C. 555 = 13 Bur. L. T. 105 (1921) (L.B.).**

—S. 20—Contract.

———A suit was brought in the Court at *B* for the recovery of price of tendu leaves supplied by *P* to *D* at *B*. *D* made the contract of sale at *B* but expressly agreed that *P* shall receive the price of leaves at *C*. It was contended that the only Court having jurisdiction was the Court at *C* because the suit was for the performance of that agreement whereby the price was to be paid and that part was to be performed at *C*.

Held, that Courts at both *B* and *C* could entertain the suit. A.I.R. 1925 P. C. 290, Rel. on; 31 Mad. 223 and 16 C.L.J. 279, Dist. (*Munje, A.J.C.*) MOHANLAL *v.* ABDUL RAHIM. **12 N. L. J. 177 = 121 I. C. 667 = A. I. R. 1930 Nag. 90.**

———Suit on contract can be instituted where contract is to be performed. (*Heald, Ag. C. J. and Sen. J.*) MAHOMED ESHAK BHIYAT *v.* SARI CHANDRA BOSE. **A. I. R. 1930 Rang. 216.**

———*Suit on.*

In suits on contracts the making of the contract is part of the cause of action. The Courts within whose jurisdiction the agreements in suit are accepted have jurisdiction. (*Aston, A.J.C.*) ASIATIC PETROLEUM CO., LTD. *v.* AZEEZUDDIN & SON. **A. I. R. 1929 Sind 227.**

———Plaintiff was employed by the defendant to sell his goods at *M*. The defendant was not to sell the goods in the area allotted to the plaintiff. Defendant sold goods at *M* in contravention of the terms.

Held, that *M* Court has jurisdiction to try a suit for damages. A.I.R. 1921 Mad. 664, Foll. (*Wallace and Madhavan Nair, JJ.*) ARUMUGAM PILLAI *v.* A. CHANDER BHAI ATTARWALLA.

103 I. C. 37 = A.I.R. 1927 Mad. 1150.

———Where a thing is purchased at *C* and the property passes to the vendee, but part of the purchase-money is paid at *D* to which place the article is sent, a Court at *D* has jurisdiction to try suit by vendee for return of purchase-money on the ground of breach of warranty by the vendor. (*B. B. Ghose, J.*) ADAM SAJAN & CO. *v.* ASUTOSH BANDOPADHYA.

86 I. C. 1046 = A. I. R. 1926 Cal. 100.

———Contract to supply goods—Breach—Suit for damages at place where price was payable is maintainable. (*Kotval, A.J.C.*) P. D. BOLTON *v.* HARJIVAN ULLABHJIWAN. **89 I. C. 181 = A.I.R. 1925 Nag. 408.**

———In a suit for damages on a breach of contract the cause of action consists of the making of the contract and of its breach in a place where it ought to have been performed; thus where the contract was to be completed at Karachi though made elsewhere, suit for damages can lie in Karachi. (*Kincaid, J.C. and Aston, A.J.C.*) KOOVERBHAN SUKHANAND *v.* LOUIS DREYFUS & CO. **19 S. L. R. 207 = 79 I. C. 30 = A. I. R. 1925 Sind 132.**

———The cause of action in suits arising out of a contract arises at the place where the contract was made or the place where the contract was to be performed or performance completed or at the place where in performance of the contract any money to which the suits relate was expressly or impliedly payable. (*Drake-Brockman, J.C.*) JODRAJ *v.* BYRAM. **7 N. L. J. 25 = (1924) 83 I. C. 309 (Nag.).**

———The defendants had by wire ordered the plaintiffs to send to them at Akola certain bags of grain. The price was agreed to be paid at Khurai. The plaintiffs sent the bags by train to Akola. Defendants failed to pay the money. The goods were sold at a loss for which the plaintiffs brought the suit.

Held, that the breach of contract occurred at Akola, and therefore the cause of action arose wholly at Akola and the Small Cause Court at Khurai had no jurisdiction. (*Baker, J. C.*) GANPAT LAL *v.* THE FIRM OF BILASRAI RAMJI DASS. **79 I. C. 393 = A. I. R. 1924 Nag 18.**

———*Cause of action—Suit for damages lies where breach takes place or performance is completed or money is paid.*

Contract is made at the place where an offer made by a telegram is accepted. Where an agent is instructed not to sell but to buy goods the amount payable to the agent for purchasing goods is not presumably payable at the place of residence of the principal. The amount which the principal claims from such an agent as damages for negligence in purchasing goods is also not payable at the place of the principal. Even where a breach of a contract takes place outside a certain place still if the contract is to be performed or its performance is completed within that place or money is payable in that place in performance of the contract a suit for recovery of damages for breach of that contract will be filed in a Court within the jurisdiction of which that place is situated. (*Bilaram, A.J.C.*) FIRM OF PREMJI MULJI *v.* FIRM OF TARACHAND THAWERDAS. **76 I. C. 353 = A. I. R. 1924 Sind 64.**

———Certain contracts for goods were executed at Peshawar and both the parties had their places of business there but one of them had also a branch office in Karachi. The payment for the goods was to be made in Peshawar. Property in the goods passed under the terms of the contract to the applicants as soon as they arrived in the Karachi Harbour and the responsibility for any loss or damage to the goods was entirely theirs from that moment.

Held, that the parties contemplated the performance of the contracts in Karachi, a part of the cause of action therefore arose in Karachi and therefore Karachi Court had jurisdiction to entertain a suit in respect of the contract. 1 Lah. 22, Dist. (*Kennedy, J.C. and Raymond, A.J.C.*) FIRM OF KHALSA BROTHERS *v.* HARI RAM SRI RAM & CO. **17 S. L. R. 164 = 83 I. C. 539 = A. I. R. 1924 Sind 29.**

———*Sale of goods—Suit for price.*

Ordinarily if goods are purchased, or money is borrowed, the payment for the goods or repayment of money must be presumed to have been agreed to be made at the place and the residence of the seller or the lender as the case may be. (*Banerji, J.*) BANGALI MAL *v.* GANGA RAM ASHRAFI LAL.

71 I. C. 431 = A. I. R. 1923 All. 465.

———*Place of suing—Contract by correspondence—Part of contract taking place at Y—Y Court has jurisdiction.*

Where it appeared from the correspondence that the plaintiff had informed the defendants that he had a particular item of work to be done in Bombay and asked on what terms the defendants were prepared to do that work and the defendants seemed to have expressed their willingness to do that work on the terms given in their letters with a view to the plaintiff assenting to that work being done on those terms by them,

Held, that the contract, which is a part of the cause of action, was thus formed at Yeotmal, the plaintiffs' place, and the Court at Yeotmal had jurisdiction to try the suit. (*Kotval, A. J. C.*) CHHAGANLAL *v.* ABOOBAKAR. **72 I. C. 465 = A. I. R. 1923 Nag. 167.**

———Where the contract was made in Bengal and the goods were to be sent to Bengal and the only thing done in Azamgarh was that the goods were despatched from Azamgarh, it cannot be said that the cause of action wholly or in part arose in Azamgarh. (*Ryves, J.*) PURAN CHAND *v.* JODHA RAJ RAM KUMAR.

66 I.C. 501 = A. I. R. 1922 All. 448.

———The plaintiff, resident of Sialkot, leased a house in Murree from defendants of Rawalpindi. The negotiations were carried on by correspondence and the plaintiff sued for breach of contract at Sialkot. *Held*, though the contract was completed at Rawalpindi the breach took place at Murree which therefore was the place of the cause of action. The posting of the cheque from Sialkot by the plaintiff does not effect the formation of the contract at Sialkot, nor does the leasing of Sialkot property by an agent mean that the defendants carried on business at Sialkot. The Sialkot Courts, therefore, have no jurisdiction to entertain the suit but there being no failure of justice, objection as to place of suing cannot be sustained under S. 21. (*Campbell, J.*) SOHAN SINGH *v.* G. B. RIDDICK.

65 I. C. 865 = A. I. R. 1922 Lah. 164.

———Where plaintiffs from Ludhiana asked defendants at Gonda for quotations and terms and the defendants by post-card sent their terms and asked the plaintiffs to wire if they wanted goods and the plaintiffs did so. *Held*, the post-card was only an invitation for an offer in the same way as a catalogue of goods sent out by any shop or business firm and not a proposal within the meaning of the Contract Act. The contract was completed at Gonda where the proposals were received by the wire acceptance signified and therefore the suit on the contract was cognizable not by the

Ludhiana Court but by the Gonda Court. (*Wilberforce, J.*) THE FIRM DURGA PRASHAD MUTSADDI LAL *v.* THE FIRM RULIA MAL DOOJAR MAL.
4 Lah. L. J. 176 = 65 I. C. 282 = 29 P. L. R. 1922 = A. I. R. 1922 Lah. 100.

——Where payment was according to the contract to be made in one place but was made in another owing to the plaintiff's own default, advantage cannot be taken of the fact to give him a choice of jurisdiction. (*Leslie Jones, J.*) DAMRI SHAH THAKUR RAM *v.* RULIA MAL DONGAR MAL. **17 P. L. R 1922 = 64 I. C. 387 = A. I. R. 1921 Lah. 213.**

—S. 20—Debtor and creditor.

——Ordinarily where money is borrowed, the repayment of the money must be presumed to have been agreed to be made at the place of residence of the lender. A. I. R. 1926 All. 477 and A. I. R. 1925 Lah. 555, Rel. on. (*Addison, J.*) HARDIAL HARGOPAL *v.* BATHAL DAS. **118 I. C. 898 = A. I. R. 1929 Lah. 868.**

——In the absence of a contract to the contrary the borrower ought to seek out the lender for payment. A suit to recover the money from the borrower may be brought in the place where the lender resides as it is payable at that place. A. I. R. 1923 All. 465, Foll. (*Mukerji, J.*) GOKUL DAS *v.* NATHU. **48 All. 310 = 24 A. L. J. 291 = 92 I. C. 492 = A.I.R. 1926 All. 477.**

——Where the parties have not expressly or impliedly agreed on any place of payment, the creditor is entitled to be paid at his own place. Defendant selected some articles at *A* and ordered them to be sent to *B* where he promised to purchase such of them as should be selected by his wife. The articles were accordingly sent to *B* and out of them some were selected by the defendant and the others with the price for the articles selected were sent to *A*. After this, further consignments were also sent to *B*.

Held, that there was an implied contract to pay at *A* and that the Court at *A* had jurisdiction to try a suit for the balance of the price. (*Kendall, A. J. C.*) RAJA MOHAMMAD MUMTAZ ALI KHAN *v.* LALA GANGA PERSHAD. **82 I. C. 122 = A. I. R. 1925 Oudh 209.**

—S. 20—Decree.

——*Execution—Suit for declaration as nullity—Forum.*

A decree passed by a Bombay Court was going to be executed in Amritsar by the Bombay Court. No action was taken at Amritsar though a proclamation of sale was issued.

Held, that no cause of action arose at Amritsar for a declaration that the decree was a nullity as no part of execution was taking place at Amritsar. (*Zafar Ali and Addison, JJ.*) PURSHOTTAM DAS *v.* RADHA KISHAN. **11 L. L. J. 306 = 120 I. C. 279 = A. I. R. 1929 Lah. 449.**

——Ex parte *decree obtained in one Court sent for execution to another—Suit to set aside the decree on the ground of fraud filed in the latter Court—If latter can entertain.*

Where an *ex parte* decree was obtained in a Court outside Oudh by a grave fraud by wilful misstatement and suppression of material facts in the plaint and deliberately misdescribing the persons against whom the decree was sought in order to prevent their being in a position to defend and it was attempted to be executed in a Court in Oudh,

Held, that the Court in Oudh can hear a suit to declare a decree so passed as null and void and that it should be so declared. 37 All. 189, Foll. (*Stuart, C. J. and Raza, J.*) DANAJI JAS RAJ *v.* PURAN LAL BOBIND PRASAD. **3 Luck. 142 = 106 I. C. 541 =**

4 O. W. N. 1103 = A. I. R. 1928 Oudh 88.

——*Suit to set aside a decree in executing court.*

A Court has jurisdiction to entertain a suit to set aside a decree if the decree is put into execution within the territorial limits of the jurisdiction of that Court. A. I. R. 1926 Lah. 277, Foll. (*Shadi Lal, C. J. and Broadway, J.*) SOHARMAL UTTAM CHAND *v.* JAMES FINLAY & CO. **100 I. C. 164 = A. I. R. 1927 Lah. 778.**

——Where the plaintiff in the case seeks (1) a declaration that the decree is inoperative on the ground of fraud ; and (2) an injunction for the protection of his property against attachment and sale in execution of that decree; the second prayer cannot be ignored for the purpose of determining the jurisdiction of the Court. It is, therefore, clear that part of the cause of action arises at the place where the property sought to be attached is situate, and the suit is consequently cognizable by that Court. 25 All. 48 ; 37 All. 189 ; 39 All. 607 and 5 C. W. N. 559, Foll. (*Shadi Lal, C. J. and Le Rossignol, J.*) JAWAHAR SINGH *v.* SASOON & CO. **7 Lah. 61 = 27 P. L. R. 517 = 94 I. C. 377 = A. I. R. 1926 Lah. 277.**

——*B* obtained a decree against *N* at Amritsar and *J* obtained another decree against *N* at Ferozepore. *B* applied for the execution of his decree at Amritsar and attached certain property of *N* situate at Amritsar. *J* applied for the transfer of his decree to be executed at Amritsar and after the transfer applied for rateable distribution. *B* objected to *J*'s application alleging that his decree was obtained fraudulently but his objection was disallowed. Thereupon he filed a suit for declaration that *J*'s decree was collusive and fraudulent.

Held, that the cause of action for the declaration arose at Amritsar only after *J*'s decree was transferred and hence Amritsar Court had jurisdiction to try the suit. (*Abdul Raoof, J.*) BALLA MAL *v.* JAGAN NATH. **72 I. C. 392 = A. I. R. 1924 Lah. 398.**

——If cause of action did not occur within the jurisdiction of the Court it cannot entertain a suit that a decree granted by another Court does not bind plaintiff. (*Das and Macpherson, JJ.*) THE BENARES BANK, LIMITED *v.* SURENDRA NARAIN SINGH. **75 I. C. 469 = A. I. R. 1924 Pat. 831.**

——The proper and convenient course to set aside a decree is to go to the Court that granted the decree and to get it set aside by that Court. (*Das and Macpherson, JJ.*) THE BENARES BANK, LTD. *v.* SURENDRA NARAIN SINGH. **75 I. C. 469 = A. I. R. 1924 Pat. 831.**

——Setting aside of suit for declaration that decree is void can lie in the Court to which decree is transferred for execution. (*Chatterjee and Pearson, JJ.*) THE INDIAN PROVIDENT CO., LTD. *v.* GOVINDA CHANDRA DAS. **27 C. W. N. 359 = 65 I. C. 318 = A. I. R. 1923 Cal. 425.**

——*Place of suit—Suit to set aside* ex parte *decree obtained by fraud.*

A instituted a suit in Ferozepore against *B*, a resident of Lahore. The serving officer wrongly reported to the Court that *B* was evading summons, and an *ex parte* decree was passed against him. *B* thereupon sued *A* in Lahore to set aside the decree on the ground of fraud, *held*, that the suit was maintainable inasmuch as, by the wrong report of the serving officer, part of the cause of action arose in Lahore. 37 All. 189, Foll. (*Abdul Raoof, J.*) RAM LAL ISHER DAS *v.* SALIG RAM **(1921) 59 I. C. 2 = 7 P. W. R. 1921.**

—S. 20—Insurance.

——*Suit on fire insurance—Part of cause of action arises where fire occurs.*

For a suit on a fire insurance a part of the cause of action arises where the fire occurs and under S. 20 (*c*) the suit is maintainable at that place. *Read* v. *Brown*, (1889) 22 Q. B. D. 128 and *Galliand* v. *Champian*, (1797) 7 T. R. 205, Rel. on. (*Findlay, J. C.*) BRITISH EQUITABLE ASSURANCE CO., LTD. *v.* RAJARAM. **11 N. L. J. 184 = 113 I. C. 896 = A. I. R. 1928 Nag. 305.**

—S. 20—Jurisdiction.

———Parties cannot confer jurisdiction by agreement on Court when it does not possess it. (*Aston, A. J. C.*) ASIATIC PETROLEUM CO., LTD. *v.* AZEEZUDDIN & SON. **A. I. R. 1929 Sind 227.**

———A Court, where a suit was originally rightly instituted, continues to have jurisdiction over the suit even if the place where the cause of action arises ceases to be situate within its jurisdiction. (*Ramesam and Devadoss, JJ.*) SUBRAMANIA AYYAR *v.* SWAMINATHA CHETTIAR. **28 M. L. W. 885 = 114 I. C. 545 = A. I. R. 1928 Mad. 746.**

———*Partition suit—Defendant living out of British India—Jurisdiction of British Indian Courts.*

British Indian Courts cannot pass a partition decree with regard to the moveable property with a defendant living out of British India. (*Prideaux, A.J.C.*) PREMCHAND *v.* HIRALAL. **24 N. L. R. 95 = 111 I.C. 135 = A. I. R. 1928 Nag. 295.**

———*Suit in respect of property out of British India pending in appeal—Defendant residing in British India—Suit for mesne profits.*

A British Indian Court will not adjudicate on questions relating to the title to, or the right to the possession of, immovable property out of British India. But the Code does not forbid the institution of a suit for mesne profits even if the decision in the suit involves adjudication regarding the plaintiff's title to immovable property outside British India, where the decree of the Court for mesne profits can effectively be enforced by the personal obedience of the defendant within the jurisdiction. A. I. R. 1927 Cal. 768, Foll. (*Macnair, A. J.C.*) YADAO GHIRNIKAR *v.* KRISHNAJI DORLE. **23 N. L. R. 170 = 106 I. C. 7 = 10 N. L. J. 232 = A. I. R. 1928 Nag. 56.**

———Foreigners are not excepted from jurisdiction of British Indian Courts. (*Boys and Kendall, JJ.*) V. E. SMITH *v.* INDIAN TEXTILE CO. **25 A. L J. 356 = 101 I. C. 673 = 49 All. 669 = A. I. R. 1927 All. 413.**

———*Suit against foreign subject.*

It is a fundamental principle of international jurisprudence that a sovereign of a country acting through the Courts thereof has no jurisdiction over any matters with regard to which he cannot give effective judgment or which he can render effective only by interfering with the authority of a foreign sovereign or the jurisdiction of a foreign Court. Effective judgment means a decree which the sovereign under whose authority it is delivered, has, in fact, the power to enforce against the person bound by it, and which, therefore, his Courts can, if he chooses to give them the necessary means, enforce against such person. (*Rupchand Bilaram, A. J. C.*) DOONGERSI AVCHAR *v.* HARIBHOY PRAGJI. **23 S. L. R. 46 = 101 I. C. 438 = A. I. R. 1927 Sind 160.**

———*No rule as to revision from questions of jurisdiction can be laid down.*

No hard and fast rule as to revision can be laid down in case of decisions as to jurisdiction under S. 20 and each must be decided on its own merits. Ordinarily, interference in revision is inadvisable in such cases and should only be exercised in exceptional cases to remedy an injustice. Where the defendant is by law entitled to have the case tried at Patna, it will be a grave injustice to him to insist on its trial in Jagraon in the Punjab, which will put him to a very great expense merely because the trial Court has erroneously held that the Jagraon Court has jurisdiction. (*Moti Sagar, J.*) SITA RAM RAM DHAN *v.* BANARSI DAS PURAN CHAND. **77 I. C. 764 = A. I. R. 1923 Lah. 565.**

—S. 20—Leave to sue.

———Where cause of action indubitably arising within jurisdiction—No leave is necessary. (*Percival, J. C. and Rupchand, A. J. C.*) TAHILRAM *v.* MAGHANMAL. **23 S. L. R. 365 = 117 I. C. 150 = A. I. R. 1929 Sind 170.**

———Some defendants living outside jurisdiction—Leave to sue refused—Suit cannot go on unless they acquiesced in the filing of the suit. (*Macleod, C. J. and Shah, J.*) MAHOMED BHAI HUSEINBHAI *v.* ADAMJI HALIMBHAI. **46 Bom. 229 = 64 I. C. 919 = 23 Bom. L. R. 1086 = A. I. R. 1922 Bom. 152.**

—S. 20—Negotiable instrument.

———Assignment of pronote—Recital that money should be paid where assignee resides does not entitle assignee to sue in Court where he resides. (*B. B. Ghose and Panton, JJ.*) SEW BARAN SAW *v.* RAM CHARITRA. **119 I. C. 295 = A.I.R. 1929 Cal. 306.**

———A suit based on hundi can be brought in the High Court in whose jurisdiction the hundi was endorsed and payment was made after default, because an endorsement on the hundi is a part of the cause of action. 22 Cal. 451 ; 4 Bur. L. T. 183 ; 31 M. L. J. 816; *Read* v. *Brown*, (1889) 22 Q. B. D. 128 ; and A. I. R. 1926 Sind 31, Foll. (*Aston, A. J. C.*) NARAINDAS & CO. *v.* CHANDIRAM & CO. **22 S. L. R. 305 = 107 I. C. 218 = A. I. R. 1928 Sind 86.**

———When a firm outside Madras draws *hundis* on a firm in Madras which under the contract the Madras firm has to honour and pay when presented to them in Madras, the payment cannot be considered to be made when the *hundi* is negotiated by the firm outside Madras but only when the payment is actually made by the firm in Madras on the *hundi*. Negotiation of the *hundi* is only a provisional method of realising money from persons who are willing to accept the *hundi* for a small profit and take the trouble of presenting the *hundi* to the drawee and recovering the money from him. If the *hundi* is dishonoured the endorsee will of course have recourse to the payee of the *hundi* who had endorsed it over to him ; so that the receiving of the money from an endorsee cannot be treated as payment towards the contract. The payment becomes complete only when the drawee, the Madras firm actually makes payment on the *hundi* and such payment is clearly a payment made in Madras. Where payment was to be made only on the delivery of the railway receipts and the railway receipts were to be attached to the *hundis* and presented in Madras along with the *hundis* when payments of the *hundis* were demanded from them and thus the presentation of the railway receipt in Madras was a part of the performance of the contract and was a necessary condition to be performed, before money could be demanded from the Madras firm. *Held*, that part of cause of action arose in Madras. 37 M. L. J. 712, Dist.; 30 Bom. 167, Expl. (*Krishnan and Waller, JJ.*) PONNUSWAMY AIYAR AND N. AIYAR *v.* DAMODAR HUNSRAJ. **47 Mad. 403 = 79 I. C. 800 = 19 M. L. W. 168 = 34 M. L. T. 7 = 1924 M. W. N. 178 = A. I. R. 1924 Mad. 464 = 46 M. L. J. 82.**

———Where a *hundi* drawn in Cawnpore for acceptance and payment in Calcutta is so accepted and paid

in Calcutta and the plaintiff sued to recover the sum so paid, *held*, that as the cause of action would not be complete unless he proved the fact that he had accepted the *hundi* in Calcutta on the due date, part of the cause of action arose within the Ordinary Original Jurisdiction of the High Court of Calcutta. (*Sanderson, C. J., Mookerjee and Fletcher, JJ.*) RAM CHUNDER GOURI SHANKER *v.* GANPATRAM BISWANATH.
(1921) 59 I. C. 539 = 47 Cal. 583.

—S. 20—Partnership.

———The cause of action partly arises where a partnership is entered into, and, therefore, although the partnership is not carried on in that place, a suit for dissolution of partnership can be brought there. (*Dalal, J.*) GUR DIYAL *v.* SUKHNANDAN LAL. **117 I. C. 824 = A. I. R. 1929 All. 236.**

———A suit for dissolution of partnership and rendition of account can be entertained at the place where the contract of partnership is entered into or where the business of partnership is carried on, if these two places are different. 42 P. R. 1916, Dist. (*Zafar Ali, J.*) HARIKISHAN LAL *v.* RAMJIDAS. **108 I. C. 51.**

———A man may carry on business either personally or through an agent and although the manager of a joint Hindu family is not liable to account to the sleeping partners in precisely the same way as the manager of an ordinary business, his position approximates more nearly to that of an agent than any other. He acts on behalf of the family and in its interests and each individual member of the family carries on business wherever a branch of the family firm is in active existence. He is therefore liable to be sued even in a purely personal suit at any of these places just as a partner in an ordinary partnership is liable to be sued wherever a branch of the business exists. (*Shadi Lal, C. J. and Harrison, J.*) JAMNA DAS *v.* MURLIDHAR. **67 I. C. 69 (Lah).**

———If the plaintiff and the defendant are within the jurisdiction of the Court, the plaintiff can file a suit against the defendant for dissolution of partnership, even though that partnership commenced and was carried on in foreign territory. (*Macleod, C. J. and Shah, J.*) ISMAILJI HAJI HALIMBHAI *v.* ISMAIL ABDUL KADAR. **45 Bom. 1228 = 23 Bom. L. R. 543 = 63 I. C. 959 = A. I. R. 1921 Bom. 460.**

—S. 20—Place of suit.

See also under **Accounts, Cause of Action** *infra.*

———The whole of the Punjab Province cannot be said to be a single place for the purposes of Expl. 2 and so it cannot be claimed that the Punjab Government can be sued at any place within the limits of that Province. (*Hilton, J.*) R. J. WYLLIE & CO. *v.* SECY. OF STATE. **A. I. R. 1930 Lah. 818.**

———*Prima facie* the question of jurisdiction must be decided on the averments contained in the plaint. Where the primary transaction of the sale and purchase of articles took place at one place, the liability of the purchaser for the price of the articles naturally arises out of that transaction. The cause of action, therefore, for a suit to recover the price accrues at that place, and is not extinguished by the execution of promissory notes in respect of the same debt at a subsequent date and at another place. (*Wazir Hasan, Ag. C. J. and Pullan, J.*) MANOHAR LAL *v.* MOHRE LAL. **4 Luck. 347 = 5 O. W. N. 1117 = 114 I. C. 507 = A. I. R. 1929 Oudh 91.**

———*Suit by principal charging agent with misconduct and negligence and for damages—Cause of action.*

Where the principal charges the agent with various acts of negligence and misconduct on his part in the conduct of the agency and claims damages from him as resulting from such acts of negligence and misconduct, in such a suit the cause of action arises where the agent committed the alleged acts of negligence and misconduct, A. I. R. 1924 Sind 64 and A. I. R. 1924 Sind 22, Rel. on; A. I. R. 1924 Mad. 464 and A.I. R. 1925 Sind 132, Dist.; 30 Bom. 167, Appr. (*Lobo, A. J. C.*) GOBARDHANDAS KALIDAS *v.* DOWLATRAM KENAYALAL. **94 I. C. 287 = A. I. R. 1926 Sind 238.**

———An action for the recovery of the price of goods despatched by plaintiff by railway from Delhi to the defendant at Meerut is triable at Delhi where the goods were delivered to railway, as delivery to the railway company as a carrier has the same effect as delivery to the buyer under Contract Act, S. 91. (*Shadi Lal, C. J.*) FIRM AMAR SINGH DHUNI MAL *v.* SHARAF-UD-DIN. **26 P. L. R. 498 = 89 I. C. 751 = 7 L. L. J. 395 = A. I. R. 1925 Lah. 555.**

———*Conduct alleged as cause of action determines forum.*

Where the plaint alleged that on account of defendants' dishonesty or negligent conduct and dereliction of his duty as agent, the plaintiffs had suffered a loss,

Held the cause of action accrued at the place where the conduct complained of occurred. 6 S. L. R. 181, Dist. (1912) 1 S. L. R. 93, Foll. (*Kennedy, J. C. and Raymond, A. J. C.*) FIRM OF GHANDAJI KLUBAJI *v.* FIRM OF DEVIJI LADHA. **76 I. C. 197 = A. I. R. 1924 Sind 22**

———*Cause of action, arising in part at a particular place—Court of that place can try suit.*

In a case where plaintiff sent goods from Sialkot to defendant at Calcutta to be sold there and the money realised from the sale was payable at Sialkot, and the plaintiffs sued for the money in Sialkot Court,

Held, that the Court at Sialkot has jurisdiction to try the suit, 26 P. R. 1918 Ref. to. (*Broadway and Abdul Qadir, JJ.*) LAL SINGH *v.* HAJI KADIR BAKSH. **3 L. L. J. 499 = 69 I. C. 424 = A. I. R. 1922 Lah. 36.**

———*Goods ordered by V. P. Post.*

Where *A* at Kasganj ordered goods of *B* at Delhi and the goods were sent by V. P. P. and on taking delivery, *A* found that the parcel did not contain the goods ordered, whereupon he instituted a suit at Kasganj against *B* for damages, *held*, that the contract, though entered into at Delhi, was not completed till delivery was made and the goods paid for at Kasganj, that until such delivery and payment was made the goods remained the property of *B* at Delhi and that the Kasganj Court had jurisdiction to entertain the suit. (*Ryves and Gokul Prasad JJ.*) RAM LAL *v.* BHOLA NATH. **42 All. 619 = 18 A.L.J. 749 = 59 I.C. 359 = 2 U.P.L.R. (All.) 254.**

—S. 20—Residence.

———Suit instituted in Court within whose jurisdiction defendant has permanent residence is properly instituted though he resides for business elsewhere. (*B. B. Ghose, J.*) SITANATH BHADRA *v.* JATINDRA NATH SARKAR. **57 Cal. 65 = A. I. R. 1930 Cal. 347.**

———"*Actually and voluntarily resides*" *does not refer to legal persons—*"*Business.*"

The words " actually and voluntarily resides " refer only to natural persons and not to legal entities such as limited companies and Governments and further "business" is commercial business and not the business of Government. A. I. R. 1927 Mad. 689; 14 Cal. 256; 40 Cal. 308 and 97 I. C. 246, Foll. (*Hilton, J.*) R. J. WYLLIE & CO. *v.* S[illegible] OF STATE. **A. I. R. 1930 Lah. 818.**

———Payments actu[illegible] made by debtor at place other than where credit[illegible] the [illegible]es, rebut presumption that parties when [illegible] under cl. [illegible] contract intended to make

payments where creditor resides. (*Hilton, J.*) R. J. WYLLIE & CO. *v.* SECY. OF STATE.
A. I. R. 1930 Lah. 818.

———*Life Insurances.*

Where a Life Assurance Company has agency in Madras, but the agency does nothing, but act as a post office forwarding proposals and sending money and not having any discretion in the matter either to conclude contracts or to vary them, or to enter into them, it does not carry on business in Madras. A.I.R. 1929 Mad. 146 and O. S. Appeal No. 6 of 1928, Rel. on. (*Kumaraswami Sastri, J.*) J. D. JOHN *v.* ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE CO., LTD. **29 M. L. W. 628 = 121 I. C. 155 = A. I. R. 1929 Mad. 347 = 56 M. L. J. 299.**

———*For damage done in Persia, defendant, carrying on business at Quetta though resident in Punjab can be sued at Quetta.*

Where defendant is ordinarily resident in the Punjab but carried on business at Quetta he can be sued in Quetta though the cause of action took place in Persia. (*Viscount Haldane,*) HAVELI SHAH *v.* PAINDAKHAN. **1926 M. W. N. 592 = 96 I. C. 887 = 31 C. W. N. 174 = A. I. R. 1926 P. C. 88.**

———*Loan borrowed at* B—*Creditor residing at* P—*Debtor permanently residing at* P *and temporarily at* B.

The ordinary principle of law is that the debtor shall find out his creditor and pay him. Ordinarily therefore the debtor has to pay the debt at the creditor's place of residence or place of business.

Where the creditor resided at *P* and the debtor had a permanent family house at *P*, but the loan was borrowed at *B*, where the debtor had a temporary residence,

Held, that the Court at *P* had jurisdiction to try the suit in respect of the loan: 31 Mad. 223, Not Appl. (*Phillips, J.*) SURYANARAYANA *v.* VISWANATHA.
24 M.L.W. 576 = 97 I. C. 1027 = A. I. R. 1926 Mad. 1207.

———*Loan borrowed at* S *but repayable at* H—*Defendant residing at* H—*Jurisdiction of* S *Court to try suit.*

Where the loan was borrowed at *S*, but the defendants were residents of *H* and the loan was also repayable at *H*, the Court at *S* has no jurisdiction to entertain a suit for recovery of the loan. (*Lord Blanesburgh.*) BANSILAL ABIRCHAND *v.* GHULAM.
23 M.L.W. 3 = 43 C.L.J. 1 = 24 A.L.J. 48 = 92 I.C. 760 = 27 P.L.R. 1 = 1926 M.W.N. 108 = 53 Cal. 88 = 28 Bom. L. R. 211 = 53 I.A. 58 = 30 C.W.N. 577 = A. I. R. 1925 P.C. 290 = 49 M.L.J. 806.

———*What is.*

In every case residence is a question of fact, and it must depend upon the particular circumstances. The general practice is to accept as the person's residence the place where throughout the year you would ordinarily expect him to be found. The term residence is naturally a flexible one, but in the case of traders carrying on business it is manifestly their place where they earn a living and do their daily work nor does that place cease to be their residence merely because for purposes of rest or recreation or family ties, they occasionally return to the family home where they and their families have been brought up. (*Mears and Piggott, JJ.*) MUNICIPAL BOARD, BAREILLY *v.* HAFIZ ALI BAKSHA. **22 A.L.J. 457 = 79 I.C. 567 = 5 L.R.A. Civ. 363 = A. I. R. 1924 All. 669.**

———A defendant cannot be s[illegible] to carry on business at a place where he keeps n[illegible] but has agent to canvass orders and forward [illegible] *ti Sagar, J.*)

C. P. CODE (1908), S. 21—Applicability—Execution sale.

FIRM HIRANAND *v.* FIRM GURMUKH RAI.
73 I. C. 205 = A. I. R. 1923 Lah. 427.

———*"Carrying on business" is not personally working—Firms in different places constituted differently may yet be the same legal entity.*

In the case of firms carrying on business in different parts of the country sometimes constituted of the same people, with omissions or with additions in different places, a Court should analyse the facts thoroughly in order to determine whether the firms or persons so carrying on business are really the same legal entity. A firm, without being a branch in the sense that it is subordinate to and under the control of a firm in a different town and compelled to render an account to the latter, might still be in substance the same business so as to make it carry on business in its own place, if it is transacting the business of the other firm in its own place as agent for that firm. "Carrying on business" is used in S. 20, C. P. Code as distinct from personally working; a man may carry on business in a place where he does no personal work of any kind and a firm may be carrying on business at a particular place either through an agency or through a manager or by its servant without ever having left its own town. (*Walsh and Wallach, JJ.*) KIRPA RAM SITA RAM *v.* MANGAL SEN BISHAN MAL. **19 A. L. J. 696 = 65 I. C. 93 = A. I. R. 1922 All. 367.**

———The mere fact that the ancestral home of persons, who are really residing outside the jurisdiction, was within the jurisdiction, does not give jurisdiction. (*Walsh and Wallach, JJ.*) KISHORI LAL *v.* RAM SUNDAR. **19 A.L.J. 822 = 64 I.C. 688 = A.I.R. 1921 All. 193.**

—S. 20—Tort.

———*Subsequent aggravation does not furnish fresh cause of action.*

A subsequent aggravation of the damage caused by a tort without any act or omission on the part of the defendants does not furnish a cause of action: 5 Pat. L.J. 359, Foll. (*Macpherson, J.*) B. &N. W. RY. CO. *v.* MOHAMMAD ABDUL HALIM.
11 P.L.T. 384 = 122 I.C. 153 = A.I.R. 1930 Pat. 528.

———In a suit for damages for conversion of land it is open to the plaintiffs to proceed against any one or more of the joint tort-feasors as they may elect. Therefore a suit started against one of the tort-feasors, who resides in Calcutta, can be properly maintained in Calcutta High Court: 13 B.L.R. 91, Dist. (*C. C. Ghose and Buckland, JJ.*) GOKULDAS *v.* CHAGAN LAL.
32 C.W.N. 208 = 116 I.C. 727 = A.I.R. 1928 Cal. 887.

—S. 21—*See also* **Jurisdiction.**

—S. 21—Applicability—Ex-parte decree.

———*Application to set aside.*

Held, that the principle underlying S. 21, C. P. Code, would apply to an application for setting aside an *ex-parte* decree by virtue of the provisions of S. 141, C. P. Code. (*Sulaiman, J.*) DWARKA DAS *v.* PYARE LAL. **1930 A.L.J. 997.**

—S. 21—Applicability—Execution proceedings.

———*Ramesam, J.*—It is not permissible to use S. 21 in execution proceedings.

Devadoss, J.—S. 21 cannot in terms apply to execution proceedings although the principle applies to them. (*Ramesam and Devadoss, JJ.*) SUBRAMANIA AYYAR *v.* SWAMINATHA CHETTIAR. **28 M.L.W. 885 = 114 I. C. 545 = A. I. R. 1928 Mad. 746 (759).**

—S. 21—Applicability—Execution sale.

———S. 21 does not apply to an execution sale held by a Court having no jurisdiction. (*Mookerjee and Chots-*

ner, JJ.) KUNJA MOHAN CHAKRAVARTY *v.* MONINDRA CHANDRA ROY CHOUDHURY.

27 C.W.N. 542 = 77 I.C. 253 = A.I.R. 1923 Cal. 619 (b).

———Under S. 21 of the Code, it is necessary to show not merely that the suit was decided wrongly but that its being decided wrongly was in some measure due to its having been instituted in a wrong local jurisdiction. (*Daniels, A.J.C.*) BANKE LAL *v.* KANHAIYA LAL.

A.I.R. 1922 Oudh 124.

—S. 21—Decree when reversed.

———The question of jurisdiction should be raised in the Court of first instance and it should be given effect to by the appellate Court only when prejudice is caused by the trial in the first Court. (*Krishnan and Waller, JJ.*) A. CHELMAYYA *v.* A. LAKSHMI DEVAMMA.

79 I.C. 857 = A.I.R. 1925 Mad. 171.

—S. 21—Decree, when set aside.

———All conditions under S. 21 must be fulfilled for setting aside decree. (*Cuming and B. B. Ghose, JJ.*) RADHAMATULLA MONDAL *v.* LOKEMAN DAFADAR.

96 I.C. 544.

—S. 21—Effect of decision on objection.

———Jurisdiction may be defined as the power and authority conferred on a Court to pronounce the sentence of the law or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the Court for decision, and authorised by law to be the subject of investigation or action by that Court, and in favour of or against persons who present themselves, or who are brought before the Court in some manner sanctioned by law.

Where, in a mortgage suit the defendant raised a plea that the Court had no jurisdiction, but did not bring to the notice of the Court, S. 5 of Bengal Regulation III of 1872 which also barred the jurisdiction of the Court, and the question was decided against the defendant, *held* that the Court had jurisdiction to decide whether it has jurisdiction to entertain the suit, and that its decision on the point is final and conclusive in all collateral enquiries.

Where the want of jurisdiction is not apparent on the face of the proceedings but the absence of jurisdiction depends on a fact in the knowledge of a party, then, if he does not bring that fact forward but allows the Court to proceed with the judgment he ought not to be permitted to impeach the jurisdiction in any collateral proceeding. (*Das and Adami, JJ.*) DWARKA PRASAD MARWARI *v.* JAI BARHAM. **67 I.C. 686 = A.I.R. 1922 Pat. 322.**

———Section 11 creates what may be called a statutory waiver of the objection to jurisdiction so far as it relates to the place of suing and where there was no consequent failure of justice the validity of a decree passed in such suit cannot be challenged by a separate suit: 43 Mad. 675 (F. B.), Rel. on.; A. I. R. 1925 Mad. 117, Foll. and A. I. R. 1919 P. C. 150, Expl. (*Zafar Ali and Addison, JJ.*) PURSHOTTAM DAS *v.* RADHA KISHAN.

11 L. L. J. 306 = 120 I. C. 279 = A. I. R. 1929 Lah. 449.

—S. 21—Effect on Letters Patent.

———*Letters Patent* (*Calcutta*), *Cl.* 12—*Cl.* 12 *is not controlled by S.* 21.

Although the legislature had power in 1908 to override the Letters Patent the legislature has not by introducing S. 21, C. P. Code, overridden the provisions of Cl. 12. (*Rankin, C. J. and Buckland, J.*) MANINDRA CHANDRA NANDI *v.* LALMOHAN ROY.

49 C. L. J. 212 = 56 Cal. 940 = 120 I. C. 577 = A. I. R. 1929 Cal. 358.

—S. 21—Execution of foreign Judgments.

———S. 21 cannot be construed, as either legislating for foreign tribunals or codifying any rules of international law. The section has no application to cases of foreign judgments sought, under the provisions of S. 44 to be executed in British Indian Courts. (*Srinivasa Aiyangar, J.*) KRISHNASWAMI CHETTY *v.* MADHAPPA CHETTIAR. **21 M. L. W. 330 = 86 I. C. 492 = A. I. R. 1925 Mad. 788 (b).**

—S. 21—Failure of Justice.

———*Test.*

If the first Court, even although it had no territorial jurisdiction, has tried out the case upon the merits in such a way, that all the available evidence which either party wanted to call has been called, the hearing and trial was satisfactory as a matter of procedure, and the decision appears to be right in fact, the question of the territorial jurisdiction is relegated to obscurity. (87 P. R. 1914, Foll.) Amongst other things to be taken into account in appeal in considering whether there has been a consequent failure of justice, is the conduct of one party or other during the suit itself. These matters must be considered as thoroughly as though the appeal is being heard upon the merits. (*Walsh and Ryves, JJ.*) LACHHA RAM *v.* VIRJI. **19 A. L. J. 305 = 62 I. C. 399 = A. I. R. 1921 All. 66.**

—S. 21—Jurisdiction, objection to.

———Question of jurisdiction can be raised only if prejudice is proved first. (*Foster, J.*) INDIAN GENERAL NAVIGATION & RY. CO. *v.* F. D. RAM CHATURBOY. **2 Pat. L. R. Civ. 74 = 80 I. C. 745 = A. I. R. 1924 Pat. 527.**

—S. 21—Loss of Jurisdiction pending execution.

———Section 38 does not make it optional to a Court to execute its own decree, or to transmit it to the Court which has territorial jurisdiction, if the original Court has lost jurisdiction over the subject-matter of the suit. Although the words in S. 39 are "the Court may send it for execution," in all cases the Court should send its decree to the Court which has territorial jurisdiction if between the passing of the decree and the executing of it, the jurisdiction has passed to another Court. (*Spencer and Devadoss, JJ.*) K. C. MANAVIKRAMAN *v.* N. C. ANANTHANARAYANA AYYAR.

19 M. L. W. 16 = 1924 M. W. N. 38 = 79 I. C. 806 = A. I. R. 1924 Mad. 457 = 46 M. L. J. 250.

—S. 21—No waiver when Court incompetent.

———Judgment of a Court of incompetent jurisdiction is not *res judicata.* 9 All. 191 (P. C.), Expl. (*Mukerji, J.*) PEYARE LAL *v.* BANKE LAL. **95 I. C. 406 = A. I. R. 1926 All. 650.**

—S. 21—Objection in fresh suit.

———Section 21 does not preclude the objection about jurisdiction being raised in a fresh suit. (*Fawcett, J.*) RAJARAM *v.* CENTRAL BANK OF INDIA.

28 Bom. L. R. 879 = 98 I. C. 341 = A. I. R. 1926 Bom. 481.

—S. 21—Objection when to be allowed.

———Objection to valuation of claim and jurisdiction cannot be raised for the first time in second appeal. A.I.R. 1924 Mad. 6. (F. B.), Ref. (*Anant Krishna Ayyar, J.*) PAKKARAN *v.* PATHUMMA UMMA.

A. I. R. 1930 Mad. 541.

———A suit for land part of which only was situate within the ordinary original civil jurisdiction of the High Court and the other part was situate in the mofussil was brought on the Original Side without leave being obtained as under cl. 12.

C. P. CODE, (1908), S. 21—Objection when to be allowed.

Held, that as regards all properties outside the original jurisdiction of the High Court the suit was without jurisdiction and that effect must be given as to the objection about jurisdiction though taken in the appellate Court for the first time. (*Rankin, C. J. and Buckland, J.*) MANINDRA CHANDRA NANDY *v.* LALMOHUN ROY. **49 C. L. J. 212 = 56 Cal. 940 = 120 I. C. 577 = A. I. R. 1929 Cal. 358.**

———The objection as to the place of suing cannot be allowed by an appellate Court, unless there has been a consequent failure of justice. (*Dalal, J.*) GURDIYAL *v.* SUKHNANDAN LAL. **117 I. C. 824 = A. I. R. 1929 All. 236.**

———*Objection to place of suing—When can be raised.* Under S. 21, C. P. Code, no objection as to the place of suing can be allowed by any appellate or revisional Court unless there has been a consequent failure of justice. Where after the Court decided the question of jurisdiction the party failed to adduce evidence on the merits, *held*, that the objection as to place of suing cannot be raised at a later stage. (*Addisan, J.*) HARI SINGH *v.* HARNAM SINGH. **31 P. L. R. 616.**

———Section 21 forbids any appellate or revisional Court to allow any objection as to the place of suing unless it was taken in the original Court, and even then, unless there was a consequent failure of justice. The effect of the section is that objections which the appellate or revisional Court is thereby precluded from allowing must be considered cured for all purposes unless taken before the passing of the decree in the original Court. The ordinary way of questioning any decree passed without jurisdiction is on appeal or in revision and, if this is forbidden, the Court of First Instance cannot in execution do that which the appellate or revisional Court is precluded from doing. Neither can a Court of collateral jurisdiction in a subsequent suit between the same parties question the decree: 43 Mad. 675 (F. B.), Foll. (*Dawson Miller C. J. ond Adami, J.*) DIRGOPAL RAI *v.* KESHO PRASAD. **7 Pat. 216 = 9 P. L. T. 789 = 108 I. C. 321 = A. I. R. 1928 Pat. 324.**

—S. 21—Principle—Scope.

———The principle underlying S. 21 has been applied to cases which do not strictly fall within its terms: 43 Mad. 675 (F. B.), Foll. 42 Mad. 813 (P. C.), Expl. (*Venkatasubba Rao and Madhavan Nair, JJ.*) RAJAGOPALA *v.* TIRUPATHIA PILLAI. **49 Mad. 746 = 95 I. C. 12 = A. I. R. 1926 Mad. 421 = 50 M. L. J. 161.**

—S. 21—Review when allowed.

———The failure to notice the provisions of S. 21, bears an analogy to a mistake or error apparent on the face of the record and is a ground for review: A. I. R. 1922 P. C. 112, Rel. on. (*Macnair, A. J. C.*) MUKUNDA *v.* MOTIRAM. **12 N. L. J. 13 = 25 N. L. R. 104 = 116 I. C. 645 = A. I. R. 1929 Nag. 73.**

S. 21—Waiver of objection—Effect of.

———Per *Venhatasubba Rao, J.*—The section in terms refers to the disallowing of the objection to jurisdiction by an appellate or revisional Court. But the principle is of general application, and if in appeal or revision the decree cannot be impeached it is equally reasonable that in a collateral proceeding it should not be allowed to be attacked. The principle underlying S. 21 is that the objection to territorial jurisdiction is cured not merely for the purpose of the appellate and revisional Court, but cured entirely and for all purposes. The section applies when there is want of jurisdiction not merely at the institution of the suit but at any stage during the progress of it. (*Phillips and Venkatasubba Rao, JJ.*) CHOKKALINGA PILLAY *v.* VELAYUDHA MUDALIAR. **87 I. C. 152 = A. I. R. 1925 Mad. 117 = 47 M. L. J. 448.**

—S. 21—Waiver, effect of, on execution.

———Waiver of a right to object to jurisdiction before the passing of the final decree in a mortgage suit will not imply a waiver of the right to object in execution proceedings to a sale of the property. (*Wallace and Jackson, JJ.*) SRI RAJAH SATRUCHERLA SIVAKANDA RAJU BAHADUR GARU *v.* RAJAH OF JEYPORE. **50 Mad. 882 = 38 M L. T. 351 = 25 M. L. W. 671 = 1927 M. W. N. 282 = 103 I. C. 245 = A. I. R. 1927 Mad. 627 = 52 M. L. J. 605.**

—S. 21—Waiver, what is.

———The distinction between territorial jurisdiction and that as to subject-matter is fundamental. Where the local jurisdiction of a Court was transferred to another Court by a notification but the party did not raise any objection at the time of judgment.

Held: that the objection to the want of jurisdiction must be deemed to have been waived.

Per *Wallace, J.*—Transfer of local jurisdiction automatically effects the transfer of all suits and proceedings arising originally from that local jurisdiction. S. 21 governs all cases of want of territorial jurisdiction. (*Odgers and Wallace JJ.*) RAMANI *v.* NARAYANASWAMY IYER. **87 I. C. 341 = 34 M. L, T. 275 = 20 M. L. W. 467 = A. I. R. 1924 Mad. 697 = 47 M. L. J. 192.**

—S. 21—When not applicable.

———A suit instituted in a British Indian Court against a non-resident foreigner on a cause of action which arose wholly outside British territory is not covered by S. 21: A. I R. 1919 P. C. 150 and (1918) M. W. N. 378, Foll.: 87 P. R. 1914, Rel. on. (*Harrison and Tek Chand, JJ.*) BHAMBOO MAL *v.* RAM NARAIN. **9 Lah. 455 = 29 P. L. R. 406 = 10 L. L. J. 87 = 109 I. C. 28 = A. I. R. 1928 Lah. 297.**

—S. 22—Balance of Convenience.

———Where the dealings all took place at Karachi, the persons from whom goods were bought and to whom goods were sold, by the petitioners were at Karachi, and all the accounts relating to the dealings in question were at Karachi,

Held that the balance of convenience was greatly in favour of the case being tried at Karachi though the parties lived in Delhi. (*Martineau, J.*) BANARASI DAS *v.* KISHORI LAL. **72 I. C. 592 = A. I. R. 1923 Lah. 383.**

—S. 22—Considerations for transfer.

———In applications for transfer of suits the burden lies very heavily on the defendant to show that considerations of convenience should outweigh the cardinal principles that it is the right of the plaintiff as *arbiter lites*; and one should rather look to the allegations of the plaintiff than that of the defendant in considering such an application: 41 All. 378, Doubted: A. I. R. 1924 Lah. 249, Rel. on. (*Curgenven, J.*) PRATAP SIMHA RAJA SAHIB *v.* SRINIVASAGOPALACHARIAR. **39 M. L. T. 401 = 1927 M. W. N. 607 = 106 I. C. 870 = A. I. R. 1928 Mad. 15.**

—S. 22—Convenience.

———Convenience is a valid ground of transfer. (*Chatterjee and Panton, JJ.*) MOHABAR RAHMAN *v.* ABDUR RAHIM. **48 Cal. 53 = 62 I. C. 115 = A. I. R. 1921 Cal. 210.**

—S. 22—Delay in applying.

———The language of S. 22 is mandatory and an application under the section not presented at the earliest possible opportunity must be rejected. (*Zafar Ali, J.*) PANDIT SHIV DATT *v.* PANDIT MOTIRAM.

7 L. L. J. 93 = 26 P. L. R. 465 = 88 I. C. 531 = A. I. R. 1925 Lah. 322.

—S. 22—Delay—What is not.

———Party taking transfer proceedings in trial Court and then approaching High Court is not guilty of delay. A.I.R. 1925 Lah. 322, Dist. (*Curgenven, J.*) PRATAP SIMHA RAJA SAHIB *v.* SRINIVASAGOPALACHARIAR.

39 M. L. T. 401 = 1927 M. W. N. 607 = 106 I. C. 870 = A. I. R. 1928 Mad. 15.

—S. 22—Discretion of Court.

———*Limitations*

In the matter of transfers the Legislature has left it to the unfettered discretion of the Court to determine upon the circumstances of each case whether or not the venue should be changed from the place where the plaintiff has laid it. But though there is no statutory provision governing the jurisdiction of the Court in a matter of this kind there are certain principles which are recognised by the English Courts as well as the Indian Courts. The cardinal principle, the soundness of which is beyond dispute is that the plaintiff as the *arbiter litis* has a right to choose his forum and that the Court is exceedingly reluctant to interfere with this right. The jurisdiction conferred upon the Court is of an exceptional character and should be exercised very cautiously and only when a clear cause has been shown. The mere circumstances that the defendant's convenience would be promoted by the transfer should not be regarded as an adequate ground for depriving the plaintiff of his right to file his suit in any Court allowed by law but if the defendant establishes a manifest preponderance of convenience in his favour the Court would be justified in granting his prayer. (*Shadi Lal, C.J.*) ROOPCHAND *v.* GOKUL CHAND. **73 I.C. 860 = A.I.R. 1924 Lah. 249.**

—S. 22—Nature of provisions.

———Provisions are mandatory and application should be made at or before settlement of issues. (*Broadway, J.*) BEHARI LAL KANHAYA LAL *v.* O', OFFICIAL RECEIVER, INSOLVENT ESTATES, LAHORE.

78 I. C. 608 = A. I. R. 1925 Lah. 175.

—S. 22—Notice.

———The provision as to notice laid down by the legislature in S. 22 is not merely directory, and the failure to comply with it bars an application for transfer under that section. *Simmonds* v. *Elliott*, (1917) 2 K. B. 894 and 11 P. R. 1917, Foll. (*Tek Chand, J.*) EDALJI DINSHAW & CO. *v.* DHANPAT MAL BHAGWAN DAS.

107 I. C. 593.

—S. 22—Objection to jurisdiction—Effect of.

———S. 22 does not absolutely bar an application for transfer where the defendant has objected to the jurisdiction of the Court and gone to trial on that issue alone and has finally failed, but where the application is merely an attempt to get an order from the Court which would enable the petitioner to evade the question of jurisdiction decided against him, the application will not be allowed. A. I. R. 1925 Lah. 175, Foll.; A. I. R. 1923 Lah. 288, Dist. (*Jai Lal, J.*) PAHLAD RAI *v.* SHIV RAM.

100 I. C. 67 = A. I. R. 1927 Lah. 183.

—S. 22—Order for transfer, when made.

———Ordinarily it is for the plaintiff to choose the Court in which he should institute the suit and an order for transfer should be made only if the preponderance of convenience necessitates such a course. (*Jai Lal, J.*) BURMA OIL CO. *v.* ADAMJI MAMOONJI.

27 P. L. R. 831 = 97 I. C. 390 = 8 L. L. J. 578 = A. I. R. 1927 Lah. 14.

—S. 22—Powers of High Court.

———A High Court has jurisdiction to direct a case to be tried by a Court subordinate to a High Court other than the High Court by which such direction is made. (*Wort, J.*) NAND RAM *v.* MAHADEO LAL.

110 I. C. 699 = A. I. R. 1928 Pat. 640.

—S. 22—Sufficient grounds for transfer, what are not.

———It is well settled that where the law allows a person to institute a suit in two different Courts, it is the plaintiff who is the *arbiter litis*. It is he who has the right to choose his forum and his choice will not be interfered with by Courts except where special circumstances are proved to exist: 167 P. R. 1919; 21 O. C. 217 and A. I. R. 1927 Lah. 404, Foll. Where, a suit for specific performance of a contract to sell immoveable property at *M* was filed at *M* and the defendants applied to have it transferred to *K*.

Held, that a departure from the ordinary rule would not be justified merely because the correspondence was conducted at *K*, or that some of the witnesses would come from *K*, or again that it would be much more convenient for the defendants to have the case tried at *K*. A. I. R. 1924 Lah. 304 and A. I. R. 1923 Lah. 383, Dist. (*Tek Chand, J.*) EDULJI DINSHAW *v.* DHANPAT MAL BHAGWAN DAS.

A. I. R. 1928 Lah. 183.

———*Petition by defendant for transfer of suit to his place of residence for his convenience is not acceptable.*

The principle is well established that it is the right of the plaintiff to choose the forum for his action, and that in deciding whether the plaintiff should be deprived of that right, a very strong case must be made out by the defendant, and further that in deciding whether a suit should or should not be transferred it is not merely the convenience of the defendant that has to be considered, but the plaintiff's convenience also should be borne in mind. (*Jai Lal, J.*) RUCHI RAM KHATTAR *v.* SARAT NARAIN SHAH. **106 I. C. 869 = A. I. R. 1928 Lah. 159.**

———Mere inconvenience is not sufficient ground—Whether sufficient grounds exist depends upon the facts of each case. (*Abdul Raoof, J.*) RAMJI DAS PROPRIETOR OF FIRM SEWA RAM DAYAL DAS *v.* THE FIRM BRIJI LAL JAGAN NATH OF CAWNPORE.

69 I. C. 239 = A.I.R. 1924 Lah. 304.

—S. 22—Transfer—Rights of defendants to.

———Where plaintiff has got a right to sue at more than one place and has chosen a place, defendants are, by showing a clear balance of advantage in the way of convenience and expense entitled to have the case transferred to some other court. A.I.R. 1923 Oudh 30; A.I.R. 1922 All. 65 (2) Ref. (*Neave, A.J.C.*) N. K. DATT *v.* SHEO BALAK PANDEY. **11 O. L. J. 377 = 86 I. C. 495 = A. I. R. 1924 Oudh 410.**

— S. 22—When applicable.

———It is only when a suit may be brought in the one or other of two Courts, both of which have jurisdiction, that an application may be made for transfer. Where the jurisdiction of one of the Courts is denied an application cannot lie. (*Abdul Qadir, J.*) NATIONAL ENGINEERING CO. *v.* RATTON ENGINEERING CO.

71 I. C. 268 = A. I. R. 1923 Lah. 288.

—S. 22—When not applicable.

———*Transfer to original side of a High Court from a Court subordinate to another High Court is not governed by Ss. 22, 23—High Court has inherent jurisdiction which should be sparingly used.*

Ss. 22 and 23 do not apply where transfer to the Original Side of a High Court from a Court subordinate to another High Court is desired. The High Court

has the power in exercise of its inherent jurisdiction to grant the petitioner the relief for which he asks by an order of stay but the right of a plaintiff to institute a suit in a Court in which the law permits him to sue should not be interfered with by the High Court in exercise of its extraordinary jurisdiction unless the suit is brought in bad faith for the purpose of working injustice to which the defendant would not be subjected if the suit were brought in another competent Court. The mere fact that it would be more convenient to the applicant to have the action tried elsewhere at Bombay, is no sufficient reason to force the plaintiffs summarily out of the Court in which they are entitled legally to sue and to deprive them of the substantial sum expended by them on Court-fees in a proceeding for which there is no provision in the Code of Civil Procedure and by the application of inherent powers not utilised in practice except for the purpose of preventing or remedying grave abuse. 65 Ind. Cas. 782; 20 A. L. J. 118; 44 A. 278; A. I. R. 1922 All. 65, Dist. (*Campbell, J.*) PRAGJI SOORJI AND CO. OF BOMBAY *v.* KALU MAL SHORI MAL AND CO. AMRITSAR.
69 I. C. 772 = A. I. R. 1924 Lah. 306.

—S. 23—Original Side is 'subordinate.'

———For purposes of transfer of a case, the Judge sitting on the original side of the High Court is subordinate to the High Court. A. I. R. 1922 Lah. 306, Diss. from; A. I. R. 1923 Rang. 22, Foll. (*Tek Chand, J.*) EDULJI DINSHAW *v.* DHANPAT MAL BHAGWAN DAS. **A. I. R. 1928 Lah. 183.**

———For the purposes of transfer applications of suits from the Original Side of the High Court, the Judge sitting on the Original Side is subordinate to the Appellate Side of the High Court. (*Robinson, C. J. and Duckworth, J.*) V. F. R. M. V. E. RAMANATHAN CHETTY *v.* V. E. R. M. N. R. RAMANATHAN CHETTY. **11 L. B. R. 446 = 77 I. C. 408 = 1 Bur. L. J. 194 = A.I.R. 1923 Rang. 22.**

—S. 23—Original Side—Not 'subordinate.'

———A Judge of the Original Side is not a Court subordinate to the High Court, but is a High Court itself, and so an application for the transfer of a suit pending before him will not lie before a Bench of the same High Court, 26 Cal. 133, Rel. on. (*Rankin, C.J. and C. C. Ghose, J.*) AYAT MAHOMED *v.* SHAIKH MANNU. **45 C. L. J. 71 = 100 I. C. 331 = A. I. R. 1927 Cal. 290.**

—S. 23—Powers of High Court.

———Under sub-S. (3) of S. 23, High Court has jurisdiction to order the transfer of a suit to a Court outside its appellate jurisdiction. 35 Cal. 541, Ref. (*Fawcett and Madgavkar, JJ.*) VALLABBHAI NARANJI *v.* CHHOTALAL PURUSHOTHAM DAS & CO.
51 Bom. 26 = 28 Bom. L. R. 1442 = 100 I. C. 154 = A. I. R. 1927 Bom. 79.

—S 23—Stay of Suit.

———Ex parte *decree by Calcutta Court—Execution at Surat Court—Suit for declaring the decree null and void is maintainable in Surat Court—Suit cannot be stayed under S. 151—Application ought to be made under S. 23 (3).*

A decree was obtained *ex parte* by *A* against *B* in Calcutta Court. The decree was transferred to the Court at Surat for execution; and *A* applied for the execution of decree. Thereupon *B* filed a suit in the Surat Court for a declaration that the decree was inoperative, having been obtained by fraud, and for an injunction restraining *A* from executing the decree. The Surat Court stayed the suit holding that it had jurisdiction to hear the suit, but that for the ends of justice it should be stayed under S. 151 on the application of *A*.

Held, that if *A* wanted to stay the suit in the Surat Court, he ought to have applied under S. 23 (3) for an order that the suit should be transferred to the Calcutta High Court at the earliest opportunity as required by S. 22 and that there was no substantial basis for holding under S. 151 that it was necessary for the ends of justice that proceedings in the Surat Court should be stayed; and that the stay order was without jurisdiction. A.I.R. 1924 Bom. 90, Dist. (*Fawcett and Madgavkar, JJ.*) VALLABBHAI NARANJI *v.* CHHOTALAL PURSHOTTAM DAS AND CO. **51 Bom. 26 = 28 Bom. L. R. 1442 = 100 I. C. 154 = A. I. R. 1927 Bom. 79.**

S. 23—Transfer, when unnecessary.

———Transfer is unnecessary if the suit will be more expeditiously and more economically decided in the original Court. (*Stuart, C. J. and Raza, J.*) PUNJAB NATIONAL BANK *v.* JAI RAM DAS.
4 O. W. N. 1114 = A. I. R. 1928 Oudh 89 (1).

—S. 24—' Court of Small Causes ' meaning.

———The expression "Court of Small Causes" in S. 24, sub-S. (4) includes a Court vested with the powers of a Court of Small Causes and the procedure for the trial of a suit transferred under that sub-section is governed by the provisions of the Provincial Small Cause Courts Act and no appeal lies from the decision. 38 All. 425, 39 All. 214; 40 All. 525; A. I. R. 1924 All. 761; A. I. R. 1923 Pat. 49; 38 Mad. 25; 31 Bom. 314; 27 C. L. J. 461, Foll.; 31 Cal. 1057, Diss. from. (*Mukerji and Mallik, JJ.*) BADAL CHANDRA *v.* SRIKRISHNA DEY. **49 C. L. J. 237 = 56 Cal. 588 = 120 I. C. 589 = A. I. R. 1929 Cal. 354.**

—S. 24—Effect of transfer of Small Cause suit to regular side.

———Where a suit instituted in the Court of Small Causes is subsequently transferred to the regular side, the Judge trying the suit must be deemed to have the same powers as the Small Cause Court possessed in the matter of awarding compensation under S. 35-A. (*Subhedar, A. J. C.*) MANGILAL *v.* LAXMANAPPA.
120 I. C. 412 = A. I. R. 1930 Nag. 133.

———A suit was being tried in the Court with small cause powers. Before the suit was decided, the Judge was transferred. He was succeeded in office by a Judge not invested with the powers of a Small Cause Court Judge. The suit therefore was transferred to the Court of the Additional Munsif who finally decided it. The Additional Munsif having decided the case an appeal was filed.

Held, that no appeal lies as S. 24 (4) did apply, and the Court of the Additional Munsif must be treated as a Small Cause Court, 5 All. 274, Foll.; 27 C.L. J. 461, Ref.; 31 Cal. 1057, Diss. from. (*Lindsay, J*) RAM CHARAN BANWARI LAL *v.* KISHORI LAL RAM SARUP. **50 All. 810 = 115 I. C. 127 = 26 A L. J. 772 = A. I. R. 1929 All. 50.**

———*Suit filed in Small Cause Court transferred by consent of parties to Sub-Judge's Court—Trial of the suit as ordinary money suit—Still no appeal lies from the decree.*

A suit for recovery of Rs. 870 on account of price of milk was instituted in the Court of Small Causes at Sealdah, having pecuniary jurisdiction upto Rs. 1000. A suit for rent between the parties being pending at the time in the Third Court of the Munsiff at Alipur, the District Judge of 24 Parganas, with the parties' consent transferred the suit to the Court of the Munsiff to be tried with the rent suit. The Munsiff was invested with Small Couse Court powers up to Rs. 250. He registered the suit as an ordinary money suit and tried it as such and decreed it for Rs. 432 with interest and proportionate costs.

Held, that the consent to the transfer readily given by both parties on the ground of mutual convenience as another suit between them was pending in that Court carried with it the necessary consequence which followed under the law itself, namely, S. 24, sub-S. (4) and neither party could complain that a right of appeal was taken away. Besides the provision of sub-S. (4) was more or less a statutory recognition of the general rule that the incidents of a trial are to be governed by the law as applicable to the conditions which existed at the institution of the suit, unless these incidents have been expressly varied by the legislature. 31 Cal. 1057, Diss. from ; A. I. R. 1923 Mad. 444, Rel. on. (*Case Law Discussed.*) (*Mukerji and Mallick, JJ.*) BADUL CHANDRA *v.* SRIKRISHNA DEY. **49 C. L. J. 237 = 56 Cal. 588 = 120 I. C. 589 = A.I.R. 1929 Cal. 354.**

———Where in a suit, instituted in a Small Cause Court, a question of title was raised and the suit was transferred to the original side for trial, and afterwards the issue of title was deleted but the suit was tried on the original side without any objection from the plaintiff and further the objection was not also raised in the grounds of plaintiff's appeal to the High Court, the plaintiff would not be allowed to raise it at a later stage. A.I.R. 1922 Mad. 352, Rel. on (*Odgers, J.*) VANAMAMALAI RAMANUJA JEER SWAMIGAL *v.* MA. SAMI NADAR. **119 I. C. 386 = A.I.R. 1929 Mad. 525.**

———Small Cause suit transferred to Munsif's Court—Proceedings in the latter Court are governed by Provincial Small Cause Courts Act, and no appeal lies. 39 All. 214, Rel. on. (*Sulaiman, Ag. C. J. and Weir, J.*) JAI NARAIN MISRA *v.* SARDA PRASAD. **26 A. L. J. 839 = 110 I. C. 493 = A. I. R. 1928 All. 609.**

———*Bengal, N.W.P. and Assam Civil Courts Act II of* 1896, *S.* 9.

Appeal lies from Hon. Munsiff appointed under S. 9 of Act II of 1896 to Sub-Judge, though the case may have been transferred to the Munsiff from a Court of Small Causes. (*Boys, J.*) MEGI MAL *v.* HIRALAL. **22 A.L.J. 880 = 82 I.C. 292 = 5 L.R.A. Civ. 725 = A. I. R. 1924 All. 761.**

———Transfer of Small Cause suit to Munsif's Court—Trial as ordinary suit—No appeal lies from decree. (*Coutts and Adami, JJ.*) BHAGWAN DAS *v.* KESHWAR LAL. **1 Pat. 696 = 69 I. C. 681 = 4 P. L. T. 259 = 1 Pat. L. R. 186 = A. I. R. 1923 Pat. 49.**

—S. 24—Execution—Applicability to.

———*S. 24 applies to execution proceedings—Competency does not refer to territorial or local or pecuniary competency.*

In regard to suits competency is not referred to in the section in the sense of territorial or local or pecuniary competency. There may be other kinds of incompetency so far as an executing Court is concerned. S. 24 applies to execution proceedings. 39 Mad. 485; 22 Bom. 778 and A. I. R. 1925 All. 276 (2). Foll. Contention that S. 39 gives to the Court that passed the decree a power to transfer, whereas S. 24 gives a similar power, and no higher power to a superior Court, is wrong. This construction is far-fetched and if adopted will render S. 24, so far as execution proceedings are concerned, almost useless. (*Venkatasubba Rao and Madhavan Nair, JJ.*) RAJAGOPALA *v.* TIRUPATHIA PILLAI. **49 Mad. 746 = 95 I. C. 12 = A. I. R. 1926 Mad. 421 = 50 M. L. J. 161.**

—S. 24—Execution of decree.

———S. 38 was enacted to decide the question as to

jurisdiction of a Court when a suit is transferred. If a suit instituted in Court *A* is transferred to Court *B* and Court *B* decided it, S. 38 enjoins that application for execution shall be presented to Court *B* and not to Court *A*, that is, the application is to be presented to the Court which passed the decree and not to the Court in which the suit was instituted. The section is not exhaustive and a decree can be executed by the Court to which it is transferred under S. 24. (*Walsh, Ag. C. J. and Dalal, J.*) MUHAMMAD HABIBULLAH *v.* TIKAM CHAND. **47 All. 57 = 85 I. C. 746 = 6 L. R. A. Civ. 103 = A. I. R. 1925 All. 276.**

—S. 24—Execution proceedings.

———The word " suit" in S. 24 will include execution proceedings. A particular execution application can be transferred under the section. (*Walsh, Ag. C. J. and Dalal, J.*) MUHAMMAD HABIBULLAH *v.* B. B. SETH TIKAM CHAND. **47 All. 57 = 6 L. R. A. Civ. 103 = 85 I. C. 746 = A. I. R. 1925 All. 276.**

—S. 24—Grounds for.

———Plaintiff has right to choose his forum—Applicant under S. 24 must make out strong case for transfer—Court should not interfere unless expenses and difficulties of trial are so great as to lead to injustice. (*Addison, J.*) DIWAN SINGH MAFTUN *v.* ARJAN SHAH SINGH. **A. I. R. 1930 Lah. 944.**

———It is true that the reasonable apprehension on the part of the litigant should receive consideration when a transfer is applied for but at the same time the apprehension must be such as a reasonable man might reasonably be expected to have. (*Broadway, J.*) KHWAJA AHAD SHAH *v.* MT. AYSHAN BEGUM. **77 I. C. 762 = A. I. R. 1923 Lah. 564.**

—S. 24—Good grounds—What are.

———A plaintiff has an undoubted right to bring his suit in any Court which has jurisdiction but no particular sanctity can be attached to this right. If the defendants can show a clear balance of advantage in the way of convenience and expense they are entitled to have the case transferred. 9 Cal. 980, Foll. ; 13 Bom. 178, Not Foll. (*Ashworth, J.C. and Simpson, A.J.C.*) THAKUR NARINDRA BIKRAM *v.* THAKURAIN SHEO RATAN KUAR. **9 O. L. J. 413 = 69 I. C 717 = A. I. R. 1923 Oudh 30.**

———*Transfer of suits—Convenience of parties is a good ground.*

A litigant applying for transfer must make out a strong case of the balance of convenience followed. (1919) 41 All. 381 ; Dissented. The convenience of the parties in the conduct of litigation is certainly a relevant consideration, and it is perhaps not too much to say that it is the basis of nearly all statutory jurisdiction on the Civil side. Therefore in a suit for cancellation of certain deeds of gift executed in the C. P. in a state of ill-health under undue influence, the High Court allowed a transfer on showing that all available witnesses resided in the C. P. (*Piggott and Walsh, JJ.*) INAYAT ULLAH *v.* NISAR AHMAD KHAN. **44 All. 278 = 65 I. C. 782 = 20 A. L. J. 118 = A. I. R. 1922 All. 65.**

—S. 24—Good grounds—What are not.

———The fact that a Judge has decided a point of law arising in one case is not a good ground for transferring from his Court another case in which the same point arises. (*Martineau, J.*) JAI NARAIN BABU LAL *v.* JOHRI MAL CHUNNA MAL. **78 P. L. R. 1922 = 67 I. C. 228 = A. I. R. 1921 Lah. 357 (1).**

———Expression of opinion on certain points in a previous case is not a ground for transfer. (*Zafar Ali, J.*) NARAIN DEVI *v.* SHANKAR DASS.

C. P. CODE (1908), **S. 24—Insolvency petition.**

94 I. C. 394 = A. I. R. 1926 Lah. 345.

—S. 24—Insolvency petition.

———*Provincial Insolvency Act, S.* 5 (2)—*Application to withdraw petition from Subordinate Judge and transfer to High Court is not maintainable.*

An application to withdraw an insolvency petition from the file of a Subordinate Judge and transfer it for trial and disposal to the original side of the High Court is not maintainable: 25 M.L.J. 299, Rel. on; 27 M.L.J. 645, Ref. (*Curgenven, J.*) GOKULDOSS JAMNADOSS & CO. *v.* N. M. SADASIVIER. **28 M. L. W. 369 = 114 I.C. 352 = 52 Mad. 57 = A.I.R. 1928 Mad. 1091 = 55 M. L. J. 671.**

———*Original Side of High Court has no Jurisdiction to transfer insolvency case from one Court to another.*

Original Side of the High Court is not competent to transfer insolvency proceedings from one Court to the other. The powers conferred by S. 5 of the Provincial Insolvency Act, which are made subject to the other provisions of the Act, cannot be exercised in such a way as to give the Original Side of the High Court a jurisdiction from which it is expressly excluded by the terms of the Act whether that section is read with S. 24, C.P. Code, or Cl. (11) of the Letters Patent. (*Chari, J.*) OOMER AHMED BROTHERS, *In the matter of.* **4 Rang. 554 = 100 I. C. 265 = A. I. R. 1927 Rang. 105.**

———The High Court in the exercise of its insolvency jurisdiction has no power to order a withdrawal of the proceedings in insolvency from the Court of the Subordinate Judge in the presidency to itself. [39 Bom. 604, Appr.] But in the exercise of the jurisdiction of the High Court in insolvency a Judge invested with that jurisdiction has power under S. 18 to stay any suit or other proceeding pending against the insolvent in a District Court or Subordinate Judge's Court in the Presidency which is subject to the superintendence of the High Court. A.I.R. 1922 Bom. 390, Expl. and Dist. (*Taraporewala, J.*) NAGINLAL MAGANLAL JAICHAND *In re* AND GUNVANTRI DHIRAJLAL DESAI.

49 Bom. 788 = 91 I. C. 160 = 27 Bom. L. R. 1207 = A. I. R. 1925 Bom. 543.

—S. 24—Interpretation.

———S. 24 only contemplates a transfer of suit from one competent Court to another. Where original Court finds that it has no jurisdiction to hear a suit the District Judge has no jurisdiction to transfer the suit. (*Johnstone, J.*) AMIR CHAND *v.* BUTI SHAH.

A. I. R. 1930 Lah. 195.

———The term "suit" in S. 24 includes execution proceedings, and a Court to whom execution proceedings are transferred from a Court of Small Causes is a Court of Small Causes for the purposes of such proceedings. (*Jai Lal, J.*) FIELDING *v.* JANKI DAS & SONS.

95 I. C. 243 = A. I. R. 1926 Lah. 465.

—S.24—Jurisdiction—When conferred by transfer.

———A Small Cause Court is established first and the Judge of that Court is appointed afterwards. Therefore, the Court does not cease to exist if at any time there should be no Judge to preside over it. Suits can be instituted in the Court even if there should be no Judge appointed for the time being. The suits so instituted would remain in the Court until they are withdrawn therefrom. A Small Cause Court dismissed a suit. The High Court in revision directed the Trial Court to re-entertain the suit. In the meanwhile a new officer came to be the Judge in the Trial Court and he was invested with Small Cause Court powers. But the value of the suit exceeded the limits of his pecuniary jurisdiction. The District Judge transferred the suit to another Court.

C. P. CODE (1908), **S. 24—Sufficient grounds—What are.**

Held, that the Court to which the suit was transferred had small cause jurisdiction with regard to the suit. (*Martineau and Zafar Ali, JJ.*) JOGI PERSHAD *v.* AMIR BAKSH. **26 P. L. R. 308 = 88 I. C. 139 = A. I. R. 1925 Lah. 561.**

—S. 24—No notice, effect of.

———It is always usual to issue notices to the parties informing them that a case has been transferred from one Court to another and in the absence of such a notice a party may well plead that he did not know in what Court he had to appear. (*Moti Sagar, J.*) GANGA RAM *v.* GUJAR MAL. **84 I. C. 238 = A. I. R. 1923 Lah. 444.**

—S. 24—'Proceedings', meaning.

———The word "proceeding" in S. 24 covers all proceedings contemplated at the date when the C. P. C., of 1908 was passed and not a special proceeding not then in contemplation but established by a subsequent Act, namely, the Criminal Procedure Amendment Act (Act XVIII of 1923). Hence the section cannot be invoked to allow a Court other than the Court, in the course of proceedings in which, a perjury or forgery was committed, or a Court to which appeals ordinarily lie from that Court, to entertain the question of preferring a criminal complaint under S. 476, Cr. P. Code. (*Ashworth, J.*) RAMESHAR LAL *v.* RAJDHARI LAL. **49 All. 460 = 25 A. L. J. 433 = 101 I.C. 247 = A. I. R. 1927 All. 469.**

—S. 24—Refusal of pleaders to accept brief.

———Where the Opposite Party had engaged a number of pleaders and presumably had paid them their fee or portions of it, but on the other hand the applicant did not seem to have engaged any pleader,

Held in the circumstances the ends of justice would be fully satisfied if the case was transferred to another court in the same place and it would be unjust to transfer the case to another place. (*Wazir Hasan, J.C.*) ALLAHABAD BANK LTD. *v.* THAKUR BAKSH SINGH. **11 O. L. J. 337 = 80 I. C. 826 = 27 O. C. 401 = A. I. R. 1924 Oudh 372.**

—S. 24—Remedy on refusal by District Judge

———Even though the District Judge has refused to exercise the power vested in him by law under S. 24, the High Court has jurisdiction to act under that section: 11 C. L. J. 218, Foll. Besides, the High Court has the general power of superintendence over all inferior Courts and this power is not limited by any course taken by the District Judge. (*Jwala Prasad, J.*) SHEO NANDAN LAL *v.* MANGAL CHAND.

8 P. L. T. 777 = 103 I. C. 456 = A. I. R. 1927 Pat. 383.

———The High Court in its general powers of superintendence over all inferior Courts can direct the transfer of a case where a District Judge has refused to exercise that power of transfer under S. 24. (*Suhrawardy and Cuming, JJ.*) SOROJ BASHINI DEBI *v.* GIRIJA PROSAD BHATTACHARJI. **87 I. C. 170 = A. I. R. 1926 Cal. 326.**

—S. 24—Retransfer—Powers of High Court.

———Where a case is transferred, the High Court in revision has authority to re-transfer it to the original Court without the formality of having the plaint filed in the Court to which the case is transferred as a preliminary to the application for re-transfer. (*Piggott and Walsh JJ.*) NAND RAM SAHU *v.* MT. HIRA DEI.

21 A. L' J. 86 = 73 I. C. 495 = 4 L. R. A. (Civ.) 311 = A. I. R. 1923 All. 249.

—S. 24—Sufficient grounds—What are.

———Where the Judge has already expressed his opinion, it is preferable that the case be transferred to other Court. (*Bhide, J.*) BAKHTAWAR MAL *v.* MISRI LAL. **109 I. C. 402 (Lah.).**

—S. 24—Sufficient grounds—What are not.

——The fact that a Judge has decided a point of law arising in one case is not a good ground for transferring from his Court another case involving the same point. Moreover where the application is a belated one and made by only one of the several defendants after the evidence is concluded and date for arguments is given no adequate ground for transfer can be said to be established. (*Shadi Lal, C. J.*) SUMMUN *v.* JAWAHIR SINGH. **A. I. R. 1930 Lah. 176.**

——Defendant having influence in the town is no ground. (*Shadi Lal, C. J.*) SHIBA MAL *v.* RUP NARAIN. **98 I. C. 859 = A. I. R. 1927 Lah. 80.**

——*Prejudice of Judge against party's pleader is no ground for transfer unless it is likely to affect judicial attitude of Judge towards the party or the case.*

It may possibly be that it would be incumbent on a higher Court to transfer a case from the file of a particular tribunal to another tribunal the moment it is clear that some prejudice has been created and that a fair hearing and an impartial adjudication could not reasonably be expected even though such a state of things has been brought about by the conduct of the very party applying for the transfer; but it cannot, however, be assumed that prejudice against a particular pleader is or will operate as prejudice against the party or his case. It may no doubt, and perhaps often does, and one can only do his best to form his own judgment taking that and all other circumstances into consideration. It would be a dangerous principle to establish that the moment a judge falls out with a pleader or *vice versa* the case should be transferred from that Judge to some other; but if, on the other hand, there is any reasonable ground for supposing that the prejudice against the pleader has in any manner or measure affected the judicial attitude towards the petitioner or his case, transfer would certainly be ordered. (*Srinivasa Iyengar, J.*) NARAMMA *v.* RENGAMMA. **91 I.C. 559 = A. I. R. 1926 Mad. 359.**

—S. 24.—Suits with same issues.

———Two suits raising same issues instituted in two different Courts may be ordered to be tried together. (*Greaves and Cuming, JJ.*) SOROJ BASHINI *v.* GIRIJA PROSAD. **87 I. C. 170 = A. I. R. 1926 Cal. 326.**

—S. 24— Transfer, Basis of.

——— In ordering transfer of a case the convenience of the parties is not merely a relevant but also a material consideration, and, in effect, the convenience of the parties is at the basis of all the arrangement for statutory jurisdiction on the civil side. A.I.R. 1922 All. 65, Foll. Where in a partition suit the greater part of the property is situated in *B* district.

Held, that this is a reason why it should be advantageous to both parties alike to have the suit tried in that district. The mere fact that the majority of the individual parties reside there, is not a very weighty consideration in favour of the transfer. That a party has engaged a counsel with heavy fees is a circumstance to be considered when ordering transfer of a case. (*Findlay, J.C.*) LAXMIKANT *v.* GOVINDRAO. **10 N.L.J. 67 = 101 I. C. 723 = A.I.R. 1927 Nag. 219.**

—S. 24—Transfer—Effect of, on decision.

———*Decision of the Court to which case is transferred is appealable in same manner as its other decision.*

When a question is referred to an established Court without more, it imports that the ordinary incidents of the procedure of that Court are to attach and also that any general right of appeal from its decisions likewise attaches. So, where a case is transferred to a High Court on its original side by the Governor-General in Council, under C. P. Code, S. 25, the appellate side of the High Court has jurisdiction to hear an appeal from decision on the original side. *National Telephone Co., Limited* v. *Postmaster-General*, (1913) A.C. 546 and 39 Mad. 617(P.C). Foll. (*Schwabe, C.J. and Odgers, J.*) K. APPAYYA *v.* K. KUTTAPPA. **1922 M.W. N. 830 = A. I. R. 1921 Mad. 687.**

—S. 24—Transfer, effect of, on jurisdiction.

——— Order of transfer passed under sub-Cl. 4, S. 24 cannot invest a Court not having small cause jurisdiction with one; nor could such an order enable a Judge having Small Cause jurisdiction up to a particular limit to try as a small cause suit a suit exceeding that limit. 38 Mad. 25; 38 All. 425; 39 All, 214; A. I. R. 1929 All. 50, Dist.; 32 M.L.J. 258; A. I. R. 1927 Mad. 321, Rel. on.; C.M.P. 151 of 1917, Foll.; 27 C.L.J. 461, not Foll. (*Anantakrishna Aiyar, J.*) MURUGESA MUDALIAR *v.* VENKATAKESAVALU CHETTY. **29 M.L.W. 810 = 121 I. C. 481 = A. I. R.. 1929 Mad. 513 = 56 M. L. J. 649**

—S. 24 — Transfer of case remanded by High Court.

———S. 24 empowers a District Judge to transfer an appeal remanded by High Court for disposal according to law, unless the order of the High Court shows a clear intention to the contrary. (*Piggott and Walsh, JJ.*) RAJKALI *v.* GOPI NATH NAIK. **44 All. 211 = 66 I. C. 317 = 20 A.L.J. 44 = A. I. R. 1922 All. 35.**

— S. 24—Transfer on application.

———*Piggott, J.*—Where High Court has refused to make, of its own motion, the order of transfer which the plaintiffs desired, it is no doubt still open to the Court to make the same order on the application of the plaintiffs and after notice to the opposite party. (*Piggott and Walsh, JJ.*) JANGPAL SINGH *v.* RAJA KRISHALPAL SINGH. **20 A. L. J. 97 = 70 I.C. 942 = A.I. R. 1923 All. 153.**

—S. 24—Transfer, when not possible.

———The object of S. 5 (2) is to enable the Chief Justice to prescribe generally the duties to be performed by a Judge of the City Civil Court when transferred to the Small Cause Court for any substantial period and not to enable the Chief Justice to interfere with regard to the transfer of particular cases and create a City Civil Court Judge a Small Cause Court Judge *ad hoc* with reference to an individual case. Proceedings under Ch. 7 of the Small Cause Courts Act are not suits within the meaning of Act V of 1916. Though under S. 24 of the C.P. Code, the Chief Justice has jurisdiction to transfer matters other than suits to a subordinate Court, *e.g.*, the City Civil Court, he can only transfer them to a Court which has jurisdiction to try them. The jurisdiction to try a summary application in ejectment is one exclusively vested in the Small Cause Court and the Chief Justice has no power to transfer it to the City Civil Court. (*Coutts-Trotter, C. J.*) J. MANICKA CHETTIAR *v.* KUPPUSWAMY NAICKER. **25 M. L. W. 115 = 98 I. C. 371 = 38 M.L.T. (H.C.) 35 = A. I. R. 1927 Mad. 321.**

———No court can direct any transfer from one Court to another unless both Courts are subordinate to it. Even if a High Court is of opinion that a suit, which has been duly instituted in a Court subordinate to it, should proceed in another Court beyond the territorial limits of the jurisdiction of such High Court, it is doubtful whether it is competent to direct the former Court to return the plaint for presentation to the latter. Assuming that it is so competent, the High Court should not adopt such a course save upon most exceptional grounds. 13 N. L. R. 81, Foll. (*Baker, J. C.*) TOPAN HARJI & CO. *v.* SINGHAI DALCHAND.

75 I. C. 548 = A. I. R. 1924 Nag. 152.

—S. 24—Transfer, when valid.

———A transfer cannot be made from one Court to another, unless the suit has been brought in a Court having jurisdiction; such an order if made is void. 6 Cal. 30; 9 All. 191, Ref. (*Venkatasubba Rao, J.*) SINGARA *v.* GOVINDASWAMI. **27 M.L.W. 609 = 108 I. C. 413 = A.I.R. 1928 Mad. 400 = 54 M L. J. 145.**

—S. 24—Transfer without notice to other party.

———Transfer of case at the request of one party without notice to other party is material irregularity within S. 115. 18 A. L. J. 351, Foll.; 6 All. 233, Diss.; 43 All. 564 (F.B.) Dist.; A. I. R. 1924 P.C. 198 Ref. (*Mukerji and Boys, JJ.*) DE. MELLO *v.* VICTORIA MILLS CO., LTD. **23 A. L. J. 948 = 6 L.R. A. Civ. 555 = 90 I. C. 287 = A.I.R. 1926 All. 17.**

———S. 24 of the Civil Procedure Code requires the Court to issue notice to the parties before it makes an order for transfer otherwise than of its own motion and an order of transfer made without notice to the other party can be set aside in revision and on the application of one party. (*Martineau, J.*) LABHU RAM *v.* KARTA RAM. **78 I.C. 614 = A.I.R. 1925 Lah. 189.**

—S. 24—What is not transfer under S. 24.

———A Small Cause Court finding a question of title to immoveable property raised sent the plaint to the District Judge who sent it to a Munsif for disposal. On appeal from the decision of the latter,

Held, that the District Judge must be deemed to have acted under S. 23 of the Provincial Small Cause Court Act and not under S. 24, C.P. Code. The Munsif could not therefore be deemed to have tried it as a Small Cause Court under S. 24 (4), C.P. Code and his decision was appealable. (*Scott-Smith, J.*) AMIR DIN *v.* MT. LACHIA. **64 I.C. 335 (Lah.).**

—S. 25—Effect of transfer on decision.

———*Decision of the Court to which case is transferred is appealable in same manner as its other decisions.*

When a question is referred to an established Court without more, it imports that the ordinary incidents of the procedure of that Court are to attach and also that any general right of appeal from its decisions likewise attaches. So, where a case is transferred to a High Court on its original side by the Governor-General in Council under C. P. Code, S. 25, the appellate side of the High Court has jurisdiction to hear an appeal from the decision on the original side. *National Telephone Co., Ltd.* v. *Postmaster-General*, (1913) A. C. 546 and 39 Mad. 617 (P. C.), Foll. (*Schwabe, C. J. and Odgers, J.*) KONGANDRA APPAYYA *v.* KONGANDRA KUTTAPA. **1922 M. W. N. 830 = A. I. R. 1921 Mad. 687.**

—S. 26—Date of institution.

———*Date of presentation of plaint is date of institution of suit.*

The date of the institution of a suit should be reckoned from the date of the presentation of a plaint or from the presentation of a document purporting to be a plaint notwithstanding its imperfections. 22 M. 494. foll.; 27 Bom. 330 and 32 M. 305, Ref to. (*Raymond, A.J.C.*) MITSUI BUSSAN KAISHA, LTD. *v.* FIRM OF TOTARAM BHAGWANDAS. **85 I. C. 893 = 17 S. L. R. 223 =**

A. I. R. 1921 Sind 166.

—S. 26—Proper presentation, what is not.

———Where the plaint was signed and presented by a servant of the plaintiff, while the *Vakilpatra* was also signed by the servant,

Held, the plaint was not duly presented and not duly signed as the plaintiff made no effort to prove that his servant was his recognized agent trading on his behalf while he was away from the jurisdiction. (*Macleod, C. J. and Shah, J.*) UTTARAM VITHALDAS *v.* THAKUR DAS PARSHOTAMDAS. **46 Bom. 150 = 68 I. C. 217 = 23 Bom. L. R. 911 = A. I. R. 1922 Bom. 113.**

—S. 26—Proper presentation what is.

———The presentation of a plaint after the usual Court hours at the residence of the Judge is a valid presentation and the Judge has jurisdiction to receive the plaint at his residence and after the Court hours, though he is not obliged to do so. (*Dhobley, A.J.C.*) MADHORAO *v.* MANOHAR LAL. **19 N. L. R. 23 = 65 I. C. 674 = A. I. R. 1922 Nag. 167.**

—S 26—Suit, commencement of.

———*Limitation Act, S.* 14.

Where a suit has been instituted in a Court which is found to have no jurisdiction and it is found necessary to raise a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a continuation of the first, even though the subject-matter and the parties to the suits were identical. (*Lord Salvesen.*) RAMDUTT RAMKISSEN DASS *v.* E. D. SASSOON & CO. **56 Cal. 1048 = 115 I. C. 713 = 56 I. A. 128 = 1929 A. L. J. 254 = 33 C. W. N. 485 = 29 M.L.W. 682 = 6 O.W.N. 473 = 49 C. L. J. 462 = 31 Bom. L. R. 741 = 1929 M. W. N. 546 = A. I. R. 1929 P. C. 103 = 56 M. L. J. 614 (P.C.).**

———A suit commences with the presentation of a plaint. (*Wallace, J.*) PONNUSAMI CHETTIAR *v.* KALIAPERUMAL NAICKER. **113 I. C. 550 = A. I. R. 1929 Mad. 480.**

———*Limitation Act, S.* 3.

A suit must be deemed to have been instituted on the date when the plaint was filed in court and not on the date when it was ordered to be registered. Even if there is a defect in the verification the court can allow an amendment at any stage; such amendment would not make the suit open to objection on the ground of limitation. (*Mukerji and Panton, JJ.*) MAHARAJA OF COOCH BEHAR *v.* RAJA MAHENDRA. **34 C. L. J. 465 = 66 I.C. 923 = A. I. R. 1921 Cal. 277.**

—S. 30—Summons when issued—Fine—Imposition—Conditions.

———By S. 30 the Court is authorized to issue summonses to persons only when their presence is required to give evidence, etc., and by S. 32 the Court is given power to enforce the attendance of such persons for that purpose by imposing fine. In other words fine can be imposed only on a person who is required to attend the Court in connection with a case and does not appear in obedience to the summons of the Court and not on a person who after failure to attend on the date for which he was summoned is not required to give evidence, etc., and has not been called upon to appear on a subsequent date. (*Bennet and Iqbal Ahmad, JJ.*) HIRDEY NARAIN MUKHTAR *v.* EMPEROR. **1929 A.L.J. 1216 = 1929 Cr. C. 404 = A. I. R. 1929 All. 850.**

—S. 32—Mode of imposing fine.

———Jurisdiction to impose fine vested by S. 32 can be exercised only in manner laid down by O. 16, (*Bennet and Iqbal Ahmad, JJ.*) HIRDEY NARAIN MUKHTAR *v.* EMPEROR. **1929 A. L. J. 1216 =**

1929 Cr. C. 404 = A. I. R. 1929 All. 850.

—S. 33—Decree, application by party for.

———There is no provision requiring a party or his pleader to move the Court to draw up a decree and mere omission to ask the Court to do that which it is the duty of the Court to do on its own motion cannot affect his right to appeal. 38-B. 331, Foll. Nor is there any obligation on the parties even to apply for a copy of the decree until the Court drew it up. 13 C. P. L. R. 78. Diss. (*Kinkhede, A. J. C.*) PANDU *v.* RAJESWAR. **20 N. L. R. 131 = 78 I. C. 996 = A. I. R. 1924 Nag. 271.**

—S. 33—Decree to conform to judgment.

———*C. P. Code, O. 20, R. 6.*

The decree which is drawn up by the Court must be in accordance with the judgment. (*Walsh, A. C. J. and Ryves, J.*) PANDIT BALGOBIND *v.* SHEO KUMAR. **22 A. L. J. 791 = 82 I. C. 184 = 5 L. R. A. Civ. 545 = 46 All. 864 = A. I. R. 1924 All. 818.**

—S. 34—Action to dissolve partnership.

———In an action to dissolve and wind up the affairs of a partnership, until the accounts have been taken it is impossible to say what if anything is due from any partner or co-partners; interest, therefore, should only be allowed to the plaintiffs from the date of final decree and not from the date of the plaint (*Lord Russell of Killowen.*) SULEMAN *v.* ABDUL LATIF. **1930 A. L. J. 868 = 124 I.C. 891 = 34 C. W. N. 737 = A. I. R. 1930 P. C. 185.**

—S. 34—Appeal.

———Where the lower Court has not considered the question of interest, the appellate Court may grant it. (*Broadway, A. C. J. and Bhide, J.*) KESHO RAM *v.* PIRUMAL DINA NATH. **9 L. L. J. 347 = 104 I. C. 146 = A. I. R. 1927 Lah. 679.**

—S. 34—Contract rate.

———The mere finding that the rate of interest in a mortgage bond is excessive, is not sufficient reason to refuse interest at the contract rate. (*Newbould and Buckland, JJ.*) DINESH CHANDRA SHAH *v.* SAFER ALI MANDAL. **60 I. C. 693 (Cal.).**

—S. 34—Decree for partition and accounts.

———Where the decree is not for a definite sum of money but is one for accounts and for partition it does not fall under S. 34 and sub-S. (2) does not apply. (*Marten and Fawcett, JJ.*) KESARLAL GIRDHARLAL *v.* JAGUBHAI HIRALAL. **49 Bom. 282 = 94 I. C. 686 = 27 Bom. L. R. 226 = A.I.R. 1925 Bom. 406.**

—S. 34—Discretion—Interest.

———Interest between date of suit and decree is discretionary with Court and it can grant interest at contractual rate. 8 L. L. J. 305, Ref. (*Dalip Singh and Abdul Qadir, JJ.*) MEHETAB RAI *v.* IQBAL NATH. **A. I. R. 1930 Lah. 733.**

———*Grant of interest is a matter of discretion.*

The grant of interest is a matter within the discretion of the Court. (*Tekchand and Johnstone, JJ.*) ABDUL RAHMAN *v.* GHULAM ALI. **29 P.L.R. 670 = 111 I. C. 354 = A.I.R. 1928 Lah. 954.**

———Interest between date of suit and decree is discretionary. (*Kumarasawmi Sastri and Walsh, JJ.*) NALLAPERUMAL CHETTI *v.* VALLIYAPPA CHETTI. **53 Mad. 475 = 123 I. C. 7 = 32 M. L. W. 143 = A.I.R. 1930 Mad. 721.**

———*Interest Act* (1839).

The High Courts in India having the powers both of a Court of Equity and a Court of Law, can award interest in cases which are not provided for by the Interest Act. It is impossible to say that equitable

principles should not be applied in cases of contract. A question of equity must apply to all cases. *Miller* v. *Barlow*, 3 P.C. 733, Foll. (*Phillips, J.*) NANCHAPPA KOUNDAN *v.* VETESSERI TARWAD KARNAVAN. **97 I.C. 453 = A. I. R. 1927 Mad. 47.**

———*In case of Damdupat.*

Where the rules of damdupat applies, the contractual obligation, as regards interest, comes to an end as soon as the maximum limit of interest is reached and it is not correct to say that the contractual obligation remains until a decree is passed. When that obligation has come to an end before the suit is filed, the Court has discretion to award interest from the date of suit over and above the amount of interest allowed by the rule. 37 Bom 326 (P.C.); 22 Bom. 86 and A.I.R. 1924 Nag. 348, Rel. on ; A. I. R. 1929 Nag. 117 ; A. I. R. 1922 Nag. 155 and 40 Cal. 710, Cons.; 34 Cal. 150 (P. C.), not Appl. (*Jackson, A. J. C.*) KISANRAO *v.* MANGNIRAM. **121 I. C. 45 = A. I. R. 1929 Nag. 355.**

—S. 34—Discretion—Exercise of.

———Discretion should be reasonably exercised. (*Jwala Prasad and Ross, JJ.*) MICHU MISSIR *v.* BALBHADRA PRASTI. **2 P. L. T. 147 = 62 I. C. 116 = A. I. R. 1921 Pat. 367.**

—S. 34—Future interest.

———Future interest is a matter which is within the discretion of the Trial Court and where it is not shown that the discretion has been improperly exercised, the appellate Court will not interfere. (*Harrison and Zafar Ali, JJ.*) BENARSI DAS *v.* SETH HIRA LAL. **7 L. L. J. 1 = 86 I. C. 240 = A. I. R. 1925 Lah. 308.**

———*Grant of, without prayer.*

O. 7, R. 7 lays down that it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. This of course, is subject to the limitation that this "other relief" is not inconsistent with relief claimed in the plaint. The granting of interest, not specifically asked for in a suit for money, cannot be regarded as an inconsistent relief and a Court has discretion to award interest subsequent to suit. (*Broadway and Abdul Qadir, JJ.*) RUP RAM *v.* HARPHUL. **2 Lah. 256 = 64 I. C. 896 = 107 P.L.R. 1921 = A. I. R. 1921 Lah. 125.**

—S. 34—Interest after suit.

———The award of interest after suit is in the discretion of the Court. Where throughout the dealings between the parties compound interest was charged and the total amount of such interest exceeded one-third of the amount of the claim, *held*, the Court would be justified in refusing future interest. (*Mears, C. J. and Banerjee, J.*) BHAGWAN BAKSH *v.* DAMODARJI JOSHI. **42 All. 230 = 59 I. C. 20 = 18 A. L. J. 100.**

—S. 34—Interest at contract rate.

———Interest on mortgage is payable at contract rate *pendente-lite* unless rate is excessive or transaction unfair. (*N. R. Chatterjea and Graham JJ.*) JOGENDRA NATH ROY *v.* N. MURTAZA BEGUM. **29 C.W.N. 118 = 85 I.C. 218 = A.I.R. 1925 Cal. 268.**

—S. 34—Interest in redemption suit.

A Court has discretion in the matter of allowing in a redemption suit interest from the date of suit to the date fixed for redemption even in cases where the rule of Damdupat applied at the date of suit. A.I.R. 1922 Nag. 155, Foll. (*Kinkhede, A. J. C.*) WILAYAT ALI KHAN *v.* MAROTI. **78 I. C. 632 = A. I. R. 1925 Nag. 193.**

—S. 34—Interest on damages.

———Where a party improperly delays the ascertainment of damages for a long time he should be penalized by awarding interest from date of suit. (*Marten, J.*) COORLA SPINNING AND WEAVING MILLS CO., LTD. *v.* VALLABHDAS KALLIANJI. **27 Bom. L. R. 1168 = 94 I. C. 575 = A. I. R. 1925 Bom. 547.**

———Court has discretion under S. 34 to award interest on damages from the date of the suit to the date of the decree ; but the Court should state its reasons for so decreeing interest. (*Sanderson, C. J. and Richardson, J.*) PANNALAL TAGORE MULL *v.* MUKHRAM RADHAKISSEN. **39 C L.J. 77 = 80 I. C. 87 = A. I. R. 1924 Cal. 637.**

—S. 34—Interest on mesne profits.

———Interest on mesne profits is entirely within discretion of Court and High Court will not interfere. (*Das and Ross, JJ.*) SURAJ PRASAD PANDE *v.* SOMRA MAHTO. **2 P.L.T. 648 = 68 I. C. 903 = A. I. R. 1921 Pat. 430.**

—S. 34—Interest, reasons for disallowing.

———The mere presence of sub-S. (2), S. 34 on the Statute Book does not necessarily imply an invitation to Judges, when they see reason to disallow future interest, to refrain from stating these reasons, and obviously in the normal case it is highly desirable that the Judge should give his reason for disallowing such future interest. 37 Bom. 326 (P. C.). Ref. (*Findlay, J. C.*) MD. ABDUL SATTAR *v.* MT. UMRAOBI. **106 I.C. 270 = A. I. R. 1928 Nag. 115.**

—S. 34—Interest, right to.

———Post diem *interest—No presumption in favour of or against—But creditor is entitled to damages.*

Where there is no express stipulation for the payment of interest after the due date the law raises no presumption either in favour of or against an implied intention to pay interest after the due date. The determination of the question rests entirely upon the interpretation of the instrument; the mortgagee, however, is entitled to damages on account of the failure of the debtor to pay the debt at the stipulated time. The measure of damages would *prima facie* be the same as the rate of interest stipulated for by the parties. There is no rule of law making the contract rate necessarily the measure of damages, and the Court has discretion to reduce the rate if it is found to be unusual. 17 All. 511 (P.C.) A.I.R. 1922 Lah. 254, (F.B.) Ref. (*Scott-Smith and Fforde, JJ.*) BUDHU RAM *v.* NIAMAT RAI. **4 Lah. 406 = 75 I. C. 375 = 6 Lah. L. J. 72 = A. I. R. 1923 Lah. 632.**

—S. 34—Interest, what is not excessive.

———Interest allowed at Re. 1-8 per cent. (compound) *pendente lite* as stipulated for in mortgage-deed is not excessive. (*Findlay, J. C.*) RAM GOPAL *v.* AMBA PRASAD. **113 I. C. 891 = A. I. R. 1929 Nag. 6.**

—S. 34—Interest when allowed.

———*Purchaser in auction paying off prior mortgage is entitled to interest on amount paid.*

Where a person discharges in good faith a prior mortgage in respect of the properties which he had purchased in court auction, that person is entitled to interest on the amount of the prior mortgage. The accidental circumstance, that he became the purchaser in court auction by payment of money, and as compensation therefor, he happened to be in possession, does not in any way prejudice his right as a person entitled to the rights of the prior mortgagee whom he paid up. 12 M. L. W. 101; 41 Mad. 513 and A.I.R. 1924 P.C. 36, Rel. on. (*Anantakrishna Ayyar, J.*) PICHAI KONAR *v.* NARASIMHA RAMA IYER. **31 M.L.W. 832 = A. I. R 1930 Mad. 471 =**

58 M.L.J. 343.

———Interest cannot be claimed unless written notice demanding it is given. (*Kinkhede, A.J.C.*) SARJABAI *v.* YADEOSA. **90 I. C. 58 = A. I. R. 1926 Nag. 64.**

———*Court may award interest under S.* 34 *though it has ceased or is not, due for any reason.*

The very fact that it is within the discretion of the court to award interest or not, and to fix the rate of interest makes it manifest that it is a statutory power which does not relate back to the contract nor comprise the enforcement of any part of the contract between the parties. The law recognizes that in claims for money there may be considerable delay between the institution of the suit and the realization of his money for which delay the plaintiff may not be responsible. If the money is carrying interest by contract till the date of payment then probably no interest under S. 209 (new S. 34) will be allowed but merely interest under the contract. But if the money carried no interest *ab initio* or for any reason had ceased to carry interest from and after the date of suit or some earlier date, then the Court may in a proper case apply S. 34. Where interest had ceased on account of rule of damdupat even before institution of suit,

Held, that the court had the power of applying S. 34. (*Kinkhede, A.J.C.*) MOTILAL RAMLAL *v.* RENI. **78 I. C. 711 = A. I. R. 1924 Nag. 348.**

—S. 34—Interest when disallowed.

———Where a lessee knowing that the lessor would not be able to put him in possession waits for three years and then institutes a suit for recovery of possession, he cannot justly claim an interest on the sum paid as premium by him or for the amount of rent paid at the time of the lease. (*Mukerji and Mallik, JJ.*) AHAMADAR RAHMAN *v.* JAMINIRANJAN. **57 Cal. 114 = A. I. R. 1930 Cal. 385.**

———The judgment-debtor deposited the decretal amount in the Court intending the decree-holder to receive it only on giving security pending the appeal that was preferred by him. Decree-holder did not give security and consequently was not paid the money. The amount of the decree was reduced in appeal.

Held, that the decree-holder could not claim interest on the amount since the date the deposit was made.

Held further, that the judgment-debtor could not claim interest on the surplus amount deposited by him, because it was at his instance that the decree-holder was directed to receive the money only on condition of giving security : A. I. R. 1925 Bom. 313, Dist. (*Jai Lal, J.*) SAHIB RAM *v.* GHULAM HUSSAIN. **120 I. C. 423 = A. I. R. 1929 Lah. 316.**

———The Court cannot under S. 151 award interest or damages in lieu of interest on the decretal amount where no interest has been awarded by the decree. (*Lentaigne and Carr, JJ.*) MAUNG PE *v.* MA HNIT. **3 Bur. L. J. 58 = 82 I. C. 427 = A.I.R. 1924 Rang. 275.**

———Where the rate charged and decreed was 24 per cent. interest after decree was not allowed. (*Harrison and Dalip Singh, JJ.*) BULAKI MAL *v.* B. L. PESRICHA. **109 I. C. 416 = A. I. R. 1928 Lah. 811 (1).**

———Although the award of interest pending suit is discretionary it should not ordinarily be refused in the absence of proper reasons. 23 C. W. N. 336, Foll. (*Wadegaonkar, A.J.C.*) RAMDHAN *v.* PURUSHOTTAM. **22 N.L R. 49 = 88 I. C. 699 = A. I. R. 1926 Nag. 109.**

———There is certainly no ground for granting interest where a co-sharer makes no demand for his share of the profits. (*Batten, J.C.*) MAKUNDRAM *v.* SHRI

KRISHNA. **19 N.L.R. 24 = 73 I. C. 142 = A. I. R. 1923 Nag. 197.**

———Redemption suit—Mortgagee persisting in unwarrantable claim—Interest disallowed. Decision upheld by P. C. (*Mr. Ameer Ali.*) MOHAMMAD ALI MOHAMMAD KHAN *v.* QAZI RAMZAN ALI. **23 O.C. 150 = 24 C.W.N. 977 = 14 M.L.W. 710 = 7 O.L.J. 350 = 58 I.C 891 = 69 I. C. 65 = A. I. R. 1921 P.C. 100.**

———In a suit for recovery of money representing the depreciation in the value of goods supplied, no interest can be claimed during the pendency of the suit as the amount is neither 'debt' nor sum certain within S. 1 but only unliquidated damages. (*Mukerji and Fletcher, JJ.*) CREWDSON *v.* GANESH DAS HARI BUX. **60 I.C. 288 = 32 C.L.J. 239.**

———Discretion of lower courts will not be interfered with by High Court unless exercised unreasonably, 21 O.C. 265, Ref. (*Stuart, C.J. and Misra, J.*) KIDAR NATH *v.* BHIKHAM SINGH. **92 I.C. 679 = 13 O.L.J. 338.**

—S. 34—Money meaning.

———The word "money" in the section should not be understood in the limited sense of an unascertained sum. The expression "decree for the payment of money" is very general and to give it due effect, it must be construed as including a claim to unliquidated damages. 32 C.L.J. 239, not Foll.; 32 Mad. 95 (F.B.) and (1913) M.W.N. 874, Foll. (*Spencer and Venkatasubba Rao, JJ.*) RAMALINGAM CHETTIAR *v.* GOKULDAS MADAVJI & CO. **1926 M.W.N. 691 = 97 I.C. 871 = A. I. R. 1926 Mad. 1021 = 51 M.L.J. 243.**

—S. 34—Mortgage suit.

———Question of interest is determined by O. 34 and not by S. 34. (*Lord Phillimore.*) JAGANNATH PRASAD SINGH CHOUDHURY *v.* SURAJMUL JALAL. **54 Cal. 161 = 99 I. C. 686 = 25 A.L.J. 23 = 4 O.W.N. 46 = 31 C.W.N. 390 = 38 M.L.T. (P.C.) 73 = 54 I.A. 1 = 29 Bom.L.R. 752 = 45 C.L.J. 279 = 25 M.L.W. 685 = 8 P.L.T. 173 = A. I. R. 1927 P.C. 1 = 52 M.L.J. 373.**

———S. 34 applies only to decrees for the payment of money and has no applicability to a suit brought by a mortgagee to recover the amount due to him on foot of the mortgage and a mortgage decree until it reaches the stage shown by S. 90 of the Transfer of Property Act. O. 34, R. 6, C. P. Code, cannot be said to be decree for money. (*Tekchand and Agha Haidar, JJ.*) MANGAT RAI *v.* BABU SINGH. **8 Lah. 721 = 9 L.L.J. 301 = 103 I.C. 437 = 28 P.L.R. 380 = A. I. R. 1927 Lah. 445.**

———There is a discretion vested in the Court to decide whether interest should be allowed on the redemption money from the date of the suit. Where the lower Court allowed interest after the date of the suit so as to make the total sum decreed for interest equal to the amount of the principal and then allowed further interest in case of default, on the total sum from the date fixed for payment under the decree up to actual realization at 6 per cent.

Held, that plaintiff had no particular claim on the court to award him any further amount and that the award of interest was proper. (*Macleod, C. J. and Coyajee, J.*) ACHYUT NARAYAN KHARE *v.* RAMACHANDRA KESHAV UKIDVE. **27 Bom.L.R. 492 = 87 I. C. 719 = A. I. R. 1925 Bom. 362.**

—S. 34—Non-mention in appellate decree—Effect.

———Where as regards interest on costs, the first Court in its judgment awarded to the defendants their costs with interest at the usual rate and the appellate

Court reduced the amount of costs to be paid to defendant and increased the amount due to the plaintiff, it is reasonable to suppose that the appellate Court considered it unnecessary to award interest on costs, although it did not expressly say so. Under S. 34 (2) where a decree is silent with respect to interest, the Court shall be deemed to have refused such interest. (*Spencer and Devadoss, JJ.*) SUBRAMANIAM PATTAR *v.* P.K.V. SRIDEVI. **18 M.L.W. 686 = 75 I. C. 566 = 33 M.L.T. 101 = 1923 M.W.N. 753 = A. I. R. 1924 Mad. 102 = 45 M.L.J. 687.**

—S. 34—No stipulation for interest.

———Where money is due to the plaintiff but has not been paid through proper channel, the court may allow interest by way of damages even though there is no stipulation for interest in the contract. (*B.B. Ghose and S.K. Ghose, JJ.*) KUMAR CHANDRA *v.* NARENDRA NATH. **34 C.W.N. 121 = A. I. R. 1930 Cal. 357.**

—S. 34—Rate of interest.

———Court has power to award interest at the contractual rate from date of institution to judgment, (*Fforde and Campbell, JJ.*) LAL SINGH *v.* MUHAMMAD ALI KHAN. **96 I. C. 310 (Lah.).**

———The question of the rate of interest is a matter to be decided on the facts of each case. (*Baker, J.C.*) DAULATRAM *v.* GULAB CHAND. **76 I.C. 131 = A. I. R. 1924 Nag. 346.**

———Although in the absence of evidence of custom 24 per cent., per annum is a high rate, Small Causes Court has jurisdiction to grant it. (*Rankin, J.*) RAKHAL CHANDRA CHATTERJEE *v.* ROHNI KUMAR CHATTERJEE. **37 C. L. J. 399 = 74 I.C. 601 = 27 C. W. N. 549 = A. I. R. 1923 Cal. 650.**

—S. 34—Santhal Parganas Regulations.

———The Santhal Parganas Regulation applies only to the interest to be decreed under the bond and does not limit the powers of a Court under S. 34, C. P. Code.. to award interest on the decretal amount until realization : A. I. R. 1922 Patna 450, Foll. (*Das and Foster, JJ.*) BASUDEV BHAGAT *v.* SHEIKH KADIR. **5 Pat. 433 = 1926 P. H. C. C. 282 = 96 I. C. 627 = A. I. R. 1926 Pat. 359.**

—S. 35.

Appeal.
Compensation.
Cost as damages or debts.
Costs—Meaning of.
Discretion of Court.
Interest.
Jurisdiction.
Mortgage suit.
Parties.
Reasons in writing.

—S. 35—Appeal.

———*Appeal against order for costs accepting decision on main point is not competent.*

An appellate Court cannot be asked in effect to allow the lower Court's decision on the main point of dispute in the case to stand and to say that for the purpose of costs it should be treated as a wrong decision.

A suit was stayed with liberty to file another fresh suit in another place, saddling the plaintiff with the costs of the suit incurred by the defendants. The order was founded substantially on the ground that the suit was vexatious and oppressive and an abuse of the process of the Court. The plaintiff thereupon filed a suit at the other place but appealed against as much of the former Court's order as directed him to pay costs.

Held : that having accepted the stay order and acted under it the plaintiff could not challenge the grounds on which the order was made, and since those grounds

could not be challenged question of costs which involved the consideration of these grounds could not be challenged : 42 Bom. 327 and 16 Bom. 676, Dist. (*Marten, C.J. and Blackwell, J.*) DINANATH NARPATRAI *v.* DIVANCHAND.
32 Bom. L. R. 406 =
A. I. R. 1930 Bom. 445.

———*Suit held not maintainable but another defendant substituted—Costs not awarded—Latter portion of order can be appealed against.*

The trial Court dismissed the suit with costs of defendant. The appellate Court held that the suit was not maintainable but ordered that another must be substituted in place of the existing defendant. In doing so, the lower appellate Court deprived him of his costs which had been awarded by the trial Court and did not award him any costs in the appellate Court.

Held, that although he could not contest the order in so far as another party was substituted in his place, yet, he could appeal to the high Court in so far as he was deprived of his costs in the trial Court and was not awarded his costs in the lower appellate Court. (*Mookerjee and Panton, JJ.*) AGENT, B. N. W. RAILWAY COMPANY *v.* JAGANNATH AGARWALLA.
66 I.C. 903 = 34 C.L.J. 475 = A.I.R. 1921 Cal. 156.

———*Costs—Appeal against order of costs when entertainable.*

Where a person's suit is dismissed and where without filing an appeal against its dismissal he appeals against the order awarding costs, such appeal lies only where an order as to costs involves a matter of principle or where there has been no real exercise of discretion in making the order as to costs or where the order as to costs proceeds upon a misapprehension of fact or law. (*Addison, J.*) ARYA RAM *v.* HARINDER SINGH.
114 I. C. 710 = A. I. R. 1930 Lah. 234.

———*Land Acquisition Act (I of 1894), Ss. 27 and 53—Collector's award upheld — Costs of Government refused by lower Court—S. 35—Held appeal—Lay for costs only.*

The lower Court upheld the Collector's award but refused Government costs by explaining that the exaggerated demands of landowners were due to the uncertainty of the land market due to the boom and its aftermoth. There was nothing in the case inconsistent with the special provisions of the Land Acquisition Act.

Held, that S. 35, C. P. Code., governed the case, and that the lower Court had exercised its discretion in violation of well-recognized principles of law and, therefore, an appeal lay for costs only : *Cooper* v. *Whittingham*, (1880) 15 Ch. D. 501 ; 27 Mad. 341 and 16 Bom. 676, Rel. on. *Upmann* v. *Forester*. (1883) 24 Ch. D. 231 and *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (1903) 2 K. B. 756, Ref. (*Marten, C. J., and Murphy, J.*) ASSISTANT COLLECTOR, SALSETTE *v.* DAMODARDAS TRIBHUVANDAS BHANJI.
30 Bom. L. R. 1622 = 114 I. C. 397 =
53 Bom. 178 = A. I. R. 1929 Bom. 63.

———A question of costs cannot be allowed to be litigated in second appeal, where the two Courts below have taken the same view and when no substantial point on the merits arises in the case. (*Mukerji, J.*) DAMODAR DAS *v.* MD. ISMAIL.
93 I.C. 1008 =
A. I. R. 1926 All. 419.

———After an appeal has been preferred to the High Court and an order has been made dismissing the appeal, the Court passing the decree appealed from is competent to deal with the matter of taxation of costs arising in the Court under the decree. 18 Bom. 542, Dist. (*Macleod, C. J and Coyajee, J.*) MAHADEO *v.* SECRETARY OF STATE.
28 Bom. L. R. 550 =

95 I. C. 515 = A. I. R. 1926 Bom. 367.

———Question as to costs—Second appeal lies if question of law or principle is involved or discretion is exercised arbitrarily. (*Addison, J.*) NARAIN DAS *v.* KHUSHI RAM.
100 I. C. 598 = 27 P. L. R. 391.

———Where lower Court has exercised discretion under S. 35, its order will not be disturbed in appeal. Costs to follow the event, and where the effect of order for costs is that only, no reasons to support it need be stated. (*Hallifax, A. J. C.*) SETH KISANLAL *v.* RAMCHANDRA.
95 I. C. 446 (Nag.).

———When respondents lodge a case, but do not appear at the hearing and the appeal was dismissed with costs, the costs should be paid to respondents down to the lodging of the case. (*Mr. Ameer Ali.*) GAJADHAR *v.* AMBIKA PRASAD.
6 L. R. P. C. 126 = 87 I.C. 292 =
1925 M. W. N. 532 = 22 M. L.W. 306 =
47 All. 459 = 41 C. L. J. 450 =
27 B. L. R. 853 = A. I. R. 1925 P. C. 169 =
49 M. L. J. 238 (P.C.).

———No appeal lies against an order passed by a Judge directing how costs are to be taxed. (*Macleod, C.J. and Coyajee, J.*) LAXMAN WAMAN *v.* SARASWATI GANESH.
27 Bom. L. R. 692 = 89 I. C. 211 =
A. I. R. 1925 Bom. 432.

———*Appellate Court will not interfere with discretion unless it is manifestly wrong.*

A Court has absolute discretion in the matter of costs and an appellate Court will not interfere with an exercise of discretion unless it has proceeded on a manifestly wrong ground such as the application of an erroneous principle or a misapprehension of the facts. So long as the discretion was in fact exercised, an appellate Court will not interfere simply because it would itself have exercised the discretion differently. 2 Bom. L.R. 254, Foll. (*Wazir Hasan and Simpson, A. J. Cs.*) RAM BHAROS *v.* RAMPAL SINGH.
2 O. W. N. 901 = 91 I. C. 111 =
A. I. R. 1925 Oudh 699.

———Where the grounds of appeal were loosely drafted consequent on a misunderstanding or want of understanding of the facts of the case, the Court disallowed the costs of the successful appellant and decreed the respondent's costs to be paid by appellant. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) SHEORAJ SINGH *v.* MT. PHULBASA KUER.
28 O. C. 203 =
85 I. C. 445 = A. I. R. 1925 Oudh 561.

———Where the order appealed from was held not appealable but was held as bad on merits, the appeal was dismissed without costs. (*Daniels and Boys, JJ.*) HUSAIN BHAI *v.* BELTI SHAH.
46 All. 733 = 83 I. C. 1035 =
22 A. L. J. 706 = 5 L.R.A. Civ. 482 =
A. I. R. 1924 All. 808.

———*Appellate Court will reverse order of lower Court if passed without considering all circumstances.*

It may be a sound exercise of discretion to refuse costs where the suit is based on a state of law which has been afterwards altered either by statute or by the decision of a superior tribunal ; but this is so only if the party to whom the costs are to be awarded is responsible for the litigation. Where there is an omission to consider the necessary circumstances then there cannot be a sound exercise of discretion, and the Appellate Court in that case can reverse the order as to costs (*Macleod, C.J. and Crump, J.*) KHIMCHAND NIROTTAM DAS *v.* SOBHAGCHAND BHAGI LAL.
25 Bom. L. R. 242 = 72 I. C. 324 =
47 Bom. 559 = A. I. R. 1923 Bom. 206.

———An appeal against an order for payment of costs alone will lie, subject to such restrictions in respect of the value of the subject-matter and so on, as are prescribed by the Code. The award of costs is a matter of discretion and an appellate Court will not interfere unless a matter of principle has been involved. (*Saunders, J.C.*) JALLALUDIN *v.* IBRAHIM. **63 I.C. 811= 4 U. B. R. 8=A. I. R. 1921 U. B. 20.**

—S. 35—Compensation.

———*Limitation Act, S.* 3.

Where a point as to limitation was raised for the first time in application for review, the party was allowed to raise it but was ordered to pay the costs of that application to the other party. (*Lord Phillimore.*) JIJIBHOY N. SURTY *v.* T. S. CHETTYAR.

6 Rang. 302=55 I.A. 161=5 O.W.N. 479= 109 I. C. 1=30 Bom. L. R. 842= 47 C. L. J. 510=26 A. L. J. 657= 32 C. W. N. 845=28 M. L. W. 207= A. I. R. 1928 P. C. 103=54 M. L. J. 696 (P.C.).

—S. 35—Costs as damages or debts.

———*Contract Act, Ss.* 59 *and* 60—*Costs as debt.*

Where only portion of a decree is set aside as against the defendant, and the remainder of the decree is not appealed against, then unless there is an express order by the appellate Court allowing the defendant to recover costs incurred by him in the first Court it must be held that these costs cannot be recovered, and did not constitute lawful debt within the meaning of Ss. 59 and 60, and the defendant is not entitled to appropriate any amounts paid by plaintiff towards them. (*Cuming and Cammiade, JJ.*) DWARKA NATH MANDAL *v.* SREE GOBINDA CHOUDHARI. **104 I. C. 799= A. I. R. 1927 Cal. 906.**

———*Contract Act, S.* 73—*Interest as damages.*

There is no such thing as a "Court rate" of interest. What is usually so called is merely the maximum rate which the Court may order to be paid on the costs under S. 35. A rate of 6 per cent. per annum may in some cases be the appropriate rate of interest to allow for damages. (*Hallifax, A. J. C.*) KISHANLAL *v.* BAPU. **94 I.C. 971=A.I.R. 1926 Nag. 363.**

—S. 35—Costs—Meaning of.

———*Disciplinary action not permissible.*

Per *Niamatullah, J.*—S. 35 was not intended to confer any disciplinary jurisdiction on any Court a High Court which cannot acting under that section including award costs against a legal practitioner for what amounts to misconduct or other reasonable cause justifying the existence of disciplinary jurisdiction. The right to receive and the liability to pay costs under S. 35 must be treated like any other question in the case and no Court of appeal can ever be justified in making it a matter for consideration over the heads of the parties to the cases an action which has all the attributes of a disciplinary measure to which different considerations should apply. (*Mears, C. J., Sulaiman, Boys, Banerji, Young, Sen and Niamatullah, JJ.*) SHANTHA NAND *v.* BASUDEVA NAND.

1930 A. L. J. 402=A. I. R. 1930 All. 225 (F.B.).

—S. 35—Costs—Connotation.

———*Witness resident abroad.*

A witness who resides abroad is entitled to the expenses of being brought to give evidence and also to subsistence money due during the period of detention, and the same principle applies to the case of a party where evidence is reasonably necessary and material for the purpose of his case and on his behalf: Howes *v.* Barber, (1852) 18 Q. B. 588; Potter *v.* Rankin, (1870) 5 C. P. 518; Lonergan *v.* Royal Exchange Co. (1831) 7 Bing 725 and Ansett *v.* Marshall, (1853) 22 L. J. Q. B. 118, Ref. (*Rangnekar, J.*) LANGLEY *v.* D'ARCY.

54 Bom. 62=122 I. C. 121=31 Bom. L. R. 1020= A. I. R. 1930 Bom. 24.

———*Failure to present case properly in trial Court—Costs in trial Court refused.*

Costs in the trial Court were refused to the successful appellant on the ground that it was due to his failure to present his case properly in the trial Court that judgment was given against him. (*Ramesam and Cornish, JJ.*) RAJA RAMA *v.* FAKRUDDIN SAHIB.

31 M. L. W. 65=122 I. C. 504=1930 M. W. N. 16= A. I. R. 1930 Mad. 218=58 M. L. J. 210.

———Unless there is a specific reference to any personal order for payment of costs, a decree for costs should not be interpreted to imply a personal decree for costs: 20 All. 523 (F. B.) and 40 All. 109 Ref. (*Wazir Hasan and Pullan, JJ.*) JAGAL KISHORE *v.* JAGMOHAN DASS. **7 O. W. N. 138= A. I. R. 1930 Oudh 167.**

———Diet money of plaintiffs who attended the Court but were not produced before the Court is correctly charged as cost where the number of witnesses is not excessive and where the defendant does not disclose the line of defence. But costs of document unnecessarily produced cannot be awarded. (*Bennet and Iqbal Ahmad, JJ.*) SHUJANDDIN KHAN *v.* MEHDI RAZA.

118 I. C. 230=A. I. R 1929 All. 873.

———Apart from the question of the onus of proof, it lies upon a party, whether he be plaintiff or defendant, to produce all such material documents relating to the suit as may be in his possession, even though no application has been made for their production by the other party. High Court would deprive party of costs for failure to do so, A. I. R. 1917 P. C. 6, Rel. on. (*Sen and Weir, JJ.*) MULCHAND NANDU MAL *v.* KANHAIYA LAL. **1929 A. L. J. 262=112 I. C. 791= A. I. R. 1929 All. 134.**

———Witnesses brought by a party at his expense from their place of residence and served at the place of suit-Court satisfied that expenses were reasonable—Court is entitled to include expenses in costs. (*Jailal, J.*) GANGA BISHEN *v.* MURREE BREWERY CO. OF RAWALPINDI. **10 L. L. J. 401=109 I. C. 476= A. I. R. 1928 Lah. 800.**

———Charges incurred in procuring attendance of witnesses whether summoned through Court or not, can be included. (*Jailal, J.*) GANGA BISHEN *v.* MURREE BREWERY. **10 L. L. J. 401=109 I. C. 476= A. I. R. 1928 Lah. 800.**

———Where the plaintiffs did not properly represent their case before the Courts below, but were successful in appeal.

Held, that they would not get any costs of the litigation. (*Jailal, J.*) RATI RAM *v.* TIRKHA.

104 I. C. 325=A. I. R. 1927 Lah. 723.

—S. 35—Costs—Award of.

———It is the party's business to direct the mind of the Court to the authorities which show him the right practice, and if a party has failed to do this he should not be allowed costs although case is decided in his favour. (*Coutts Trotter, C. J. and Viswanatha Sastri, J.*) UMAMAHESWARA MUDALY *v.* MUNISWAMI MUDALY.

1926 M. W. N. 465=94 I. C. 306= A. I. R. 1926 Mad. 642=50 M. L. J. 428.

———Exaggerated claim for damages justifies award of proportionate costs. (*Schwabe, C. J.*) KANDASWAMI NAIDU *v.* KANNIAH NAIDU. **1924 M. W. N. 373= 78 I. C. 573=20 M. L. W. 60= A. I. R. 1924 Mad. 692=46 M. L. J. 366.**

———The successful party is entitled to travelling expenses of the witness summoned by him as against the unsuccessful party. (*Greaves, J.*) HARA SUNDAR

C. P. CODE, (1908), S. 35—Costs—Award of.

MAJUMDAR *v.* LAHABARA SINGH. **67 I. C. 277 = A. I. R. 1923 Cal. 315.**

———*Costs against several defendants.*

If costs are awarded against a number of defendants or a number of respondents without indicating the proportion in which these costs shall be borne by the different respondents, such an order is always taken to mean that the respondents, or the defendants, as the case may be, are jointly and severally liable for the costs and the order for costs may be executed against any one of them, who will have a right of contribution against others in a case of this nature. (*Dawson Miller, C. J. and Mullick, J.*) THE MIDNAPUR ZAMINDARY CO *v.* MADAN MARWARI. **1923 P. H. C. C. 17 = 70 I. C. 782 = A. I. R. 1923 Pat. 215.**

———*Costs on Special scale should not be granted save in very exceptional cases.*

The suit does not cease to be an ordinary cause merely because witnesses are examined at inordinate length or because the true agreement between the parties has to be spelt out of a lengthy correspondence. Costs are awarded. not as a punishment to the defeated party but as a recompense to the successful party for the expenses to which he had been subjected, *i. e.* for whatever appears to the court to be the legal expenses incurred by the party in prosecuting his suit or his defence. The theory on which costs are now awarded to a plaintiff is that default of the defendant made it necessary to sue him, and to a defendant is that the plaintiff sued him without cause; costs are thus in the nature of incidental damages allowed to indemnify a party against the expenses of successfully vindicating his rights in court and consequently the party to blame pays cost to the party without fault. These principles apply, not merely in the award of costs, but also in the award of extra allowance or special costs. Courts are authorised to allow such special allowances, not to inflict a penalty on the unsuccessful party, but to indemnify the successful litigant for actual expenses necessarily or reasonably incurred in what are designated as important cases or difficult and extraordinary cases. No rigid definition of an important cause can be framed; the character of a case cannot be determined by any particular phase of it, but various factors such as the difficult and complicated nature of the questions of law and fact involved, the large amount in controversy, the length of time consumed in the trial, and like matters must be taken into account, not separately but in the aggregate. Finally, even though a case may appear important or difficult and extraordinary, the Court is not bound to award costs on the special scale. Costs on the special scale (Scale No. 3) are not awarded except in very exceptional cases. (*Mookerjee, A. C. J. and Fletcher, J.*) MANINDRA CHANDRA *v.* ASWINI KUMAR. **48 Cal. 427 = 25 C. W. N. 297 = 60 I. C. 337 = A. I. R. 1921 Cal. 185.**

—S. 35—Costs—Determination of.

———Where the appellate decree is silent as to costs the decree of the Trial Court is the guide to determine the costs. (*Rigg, J.*) DALL DWARKADAS *v.* BURMA RAILWAY CO. **10 L. B. R. 280 = 62 I. C. 299 = 13 Bur. L. T. 173.**

———*Interest on costs.*

Interest should not be allowed until the costs have actually been incurred. A judgment decreed a certain sum in favour of plaintiff with proportionate costs and future interest from the date of suit till realization at one per cent. per month. *Held* the interest was payable only on the principal sum and not on the costs. (*Chevis, J.*) UTTAM CHAND *v.* BILAMAL. **60 I. C. 345 (Lah.)**

C. P. CODE, (1908), S. 35—Discretion of Court—Appeal.

—S. 35—Costs—Expert witness.

———An expert witness who has conducted elaborate and technical experiments ought to be allowed special expert fees as part of the costs in the case. (*Twomey, C. J. and Young, J.*) RANGOON MUNICIPAL COMMITTEE *v.* BURMA RAILWAYS CO., LTD. **10 L. B. R. 203 = 59 I. C. 823 = 13 Bur. L. T. 62. and 136.**

—S. 35—costs. refusal.

———*When party trying to profit by his fraud.*

The matter of costs is always a matter of discretion for the Court, and that discretion cannot be said to have been improperly exercised in refusing costs to a party who was endeavouring to profit by his own fraud. (*Wallace, J.*) NARASIMHAM *v.* NARASINGA RAO. **123 I. C. 39 = A. I. R. 1930 Mad. 707.**

—S. 35—Discretion of Court—Appeal.

———Costs are discretionary—High Court will not interfere unless order for costs is irregular. (*Simpson, A. J. C.*) GOBIND PRASAD *v.* NARBHIR SINGH. **90 I. C. 577 = A. I. R. 1926 Oudh 35.**

———The Court which tries a suit has full power to determine by whom the costs are to be paid. Where this discretion was exercised with care, the Appellate Court ought not to interfere with such discretion. (*Walmsley and B. B. Ghose, JJ.*) RAKHAL CHANDRA MONDAL *v.* GOUR GOPAL DUTTA. **42 C. L. J. 137 = 90 I. C. 486 = A. I. R. 1925 Cal. 1085.**

———Where a redemption suit was decreed by the Trial Court and the appellate Courts but in second appeal the defendant's costs of the suit were claimed on the ground that he was not guilty of any mis-conduct.

Held that as the point had never been raised before the lower Appellate Court, he was entitled only to the costs in the trial Court. (*Ramesam, J.*) RATNAM PILLAI *v.* KAMALAMBAL AMMAL. **48 M. L. J 213 = 21 M. L. W. 252 = 86 I. C. 793 = A. I. R. 1925 Mad. 778.**

———*Presidency Small Cause Courts Act, S. 22.*

The Appeal Court, while setting aside a decree passed by the lower Court before which the question whether S. 22 of the Presidency Small Cause Courts Act applied was not relevant owing to the decision being in favour of the plaintiff, has discretion to disallow costs to the defendant in the lower Court. (*Macleod, C.J. and Shah J.*) M. R. MEHTA & CO. *v.* JOSEPH HEUREUX. **48 Bom. 531 = 26 Bom. L. R. 382 = 80 I. C. 766 = A. I. R. 1924 Bom. 422.**

———Where a reasonable discretion has been exercised by the lower Court, the High Court will be slow to interfere. (*Daniels, A.J.C.*) RAJENDRA NARAYAN *v.* GHAFOOR KHAN. **73 I.C. 307 = A. I. R. 1924 Oudh 110.**

———Discretion of Lower Court properly used—No appeal lies. (*Marten and Pratt, JJ.*) SHRIDHAR KAXMAN DHEKNE *v.* JANARDHAN BAPUJI LURAWDE. **72 I. C. 993 = A. I. R. 1923 Bom. 37.**

———*Court must make some order as to costs—Failure to do so can be corrected in appeal.*

Section 35 must be construed to impose upon the Court a duty that it shall award costs or make some direction as to costs. The failure of a Court to make any direction could no doubt be remedied by way of review but it is equally open to a party to appeal against a decree which fails to make provision for costs. The failure to make such a provision amounts to a failure to comply with the law and as such is open to correction in appeal. There is no distinction made by the law between pleas based on facts and pleas based on law so far as the apportionment of costs is concerned. (*Ashworth, J.C.*) RAM KISHAN DAS *v.* JAGANNATH PRASAD.

C. P. CODE, (1908), S. 35—Discretion of Court—Appeal.

25 O. C. 385 = 10 O. L. J. 20 = 73 I. C. 222 = A. I. R. 1923 Oudh 155.

———Where the reasons given by the Munsif for the order as to costs were good and the Subordinate Judge gave no reason whatsoever for interfering with the exercise of the discretion by the Court of first instance, High Court interfered. (*Wazir Hasan, A. J. C.*) RAGHO PERSHAD *v.* SECRETARY OF STATE. **9 O. L. J. 629 = 27 O. C. 64 = 74 I. C. 369 = A. I. R. 1923 Oudh 114.**

———Plaintiff sued defendant for settlement of accounts due by the late father of the defendant who pleaded not merely that he was not personally liable but raised every other plea that could be thought of. The Court directed that as the defendant raised all sorts of pleas which had been decided against him the defendant was personally liable for costs.

Held, the reasons given by the Lower Court for making defendant personally liable for costs are perfectly sound. The Courts have discretion to make such orders as to costs as they think fit and unless that discretion is exercised unreasonably, an Appellate Court should not interfere. (*Chevis, J.*) JHANWAR DAS *v.* BODH RAJ. **4 Lah. L.J. 210 = 60 I.C. 362 = A. I. R. 1922 Lah. 229.**

—S. 35—Discretion of Court—Facility to party.

———A Court ought to give the successful party such costs as are necessary to enable him to place his case properly before the Courts. (*Macleod, C.J., Pratt and Fawcett, JJ.*) JAGANNATH VASUDEO PANDIT, *In re.* **45 Bom. 1177 = 61 I.C. 271 = 23 Bom. L. R. 189 = A. I. R. 1921 Bom. 71.**

—S. 35—Discretion of Court—Interlocutory proceeding.

———Where in an interlocutory proceeding costs were ordered to be costs in the cause and a decree is ultimately passed in favour of one side or the other for the costs, the costs of the interlocutory proceeding must be deemed to be included in the final order where the Judge does not expressly exclude them. (*Macleod, C. J. and Shah, J.*) GIVABHAI PITAMBHERDAS *v.* TEJA SAMA. **26 Bom. L. R. 282 = 80 I.C. 263 = A. I. R. 1924 Bom. 398.**

—S. 35—Discretion of Court—Interpretation.

———Rule 1 (3) does not impose an unavoidable obligation on the Court to award costs in all cases. The word "shall," as used in the context, is merely directory and not mandatory. This rule has not the effect of divesting the Court of discretion vested in it by S. 35. (*Wazir Hasan and Simpson, A. J. Cs.*) RAM BHAROS *v.* RAMPAL SINGH. **2 O. W. N. 901 = 91 I.C. 111 = A. I. R. 1925 Oudh 699.**

—S. 35—Discretion of Court—Plea.

———*Allahabad High Court Rules, Ch. 21, R. 1.*

It is bad practice to allow an appellant who has taken no objection to an award of costs against him in the lower Court to go to the High Court and argue that point there. (*Mears, C.J. and Piggott, J.*) JAINI LAL *v.* FIRM DURGA PRASAD DAD DAYAL. **75 I.C. 527 = A. I. R. 1923 All. 334**

—S. 35—Discretion of Court—Principles.

———*Suit for libel.*

Even in a suit for damages for alleged libel making a claim for an amount much higher than that which the Court in the circumstances of the case might think fit to grant him, the costs are in the discretion of the presiding Judge. (*Tek Chand and Agha Haidar, JJ.*) DINA NATH *v.* SAYAD HABIB. **10 Lah. 816 = 117 I.C. 884 = A.I.R. 1929 Lah. 129.**

C. P. CODE, (1908), S. 35—Discretion of Court—Proportionate costs.

—S. 35.

———Where the lower appellate Court uses its discretion with regard to costs with due care though differing from the trial Court the High Court will not interfere with it unless the order is demonstrably wrong. (*Stuart, C. J. and Wazir Hasan and Pullan, JJ.*) RAGHUNANDAN *v.* MOTI RAM. **6 O. W. N. 689 = 119 I. C. 449 = A. I. R. 1929 Oudh 1929.**

———The costs incurred before the arbitrator or umpire cannot be regarded as the costs of "a proceeding in the High Court" but are costs of a tribunal unconnected with Court. Where the Court holds that there is no valid reference to arbitration, it has no jurisdiction to pass an order as to costs of the award. (*Ramesam and Jackson, JJ.*) ARUNACHALA IYAH *v.* LOUIS DREYFUS & CO. **1928 M. W. N. 228 = 27 M. L. W. 803 = 109 I. C. 175 = A. I. R. 1928 Mad. 370 = 54 M. L. J. 580.**

———Awarding greater or less costs than are normally applicable to a particular suit—Reasons should be stated. (*Findlay, J. C.*) VENKAT RAO *v.* COLLECTOR OF NAGPUR. **108 I. C. 740 = A. I. R. 1928 Nag. 171.**

———Suits based on immoral contracts—Costs should not be allowed. (*Aston, A.J.C.*) MT. MARIAM BEGUM *v.* MT. MUNGI. **113 I. C. 366 = A. I. R. 1928 Sind 173.**

———It is not proper to disallow costs to the successful party on the ground that some evidence adduced by that party is false, though if the time of the Court is wasted by false or unnecessary evidence the Court would be justified in refusing costs to the successful party. (*Devadoss, J.*) LAKSHMINARASARAJU *v.* VENKATARAJU. **100 I.C. 224 = A. I. R. 1927 Mad. 474.**

———The principle involved in awarding costs is that costs follow the event and that the successful party is entitled to get his costs unless it has been shown that there is some very good reason why he should bear his own costs. (*Macleod, C. J. and Crump, J.*) VITHAL YESHWANT *v.* SHIVAPPA MULLAPPA. **47 Bom. 637 = 25 Bom. L. R. 323 = 72 I. C. 659 = A. I. R. 1923 Bom. 265.**

———S. 35 deals with costs and vests them in the discretion of the Court, with full powers to determine by whom and to what extent such costs are to be paid. It further provides that when the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing. The Court in exercising its discretion should state the principles upon which that discretion was exercised. Such a discretion of the lower Court may be interfered with where there has been violence of any established principle, misapprehension of facts, or no real exercise of discretion. (*Walsh, J.*) HAKIM ZAHUR AHAMAD *v.* FATEH ULLAH. **64 I.C. 962 = 3 U. P. L. R. (All.) 55.**

—S. 35—Discretion of Court — Proportionate costs.

———Per *Sulaiman, Banerji* and *Sen, JJ.*—The mere fact that the plaintiff or the applicant has asked for more than he can get does not give the Court any discretion to refuse to grant even that part of the relief asked for to which he is entitled and to make his advocate to pay the costs personally. Courts exist for doing justice and not forcing any discipline against litigants. (*Mears, C.J., Sulaiman, Boys, Banerji, Young, Sen and Niamatullah, JJ.*) SHANTHA NAND *v.* BASUDEVA NAND. **1930 A. L. J. 402 = A.I.R. 1930 All. 225 (F.B.).**

———*Costs in maintenance suits.*

C. P. CODE, (1908), S. 35—Discretion of Court—Proportionate costs.

It is not possible to foretell or predict accurately the amount of maintenance that a person will be entitled to in the opinion of the Court. What the Courts therefore have to look into in such circumstances, while awarding costs, is to see whether there was any *prima facie* excessive or exaggerated claim made in the plaint. (*Anantakrishna Ayyar, J.*) (KETHIREDDI) KODANDA RAM REDDI *v.* (KETHIREDDI) CHENCHAMMA.
A. I. R. 1930 Mad. 479.

———In a case where it is extremely difficult for the plaintiff to value his claim at a particular figure, he is entitled to his full costs and not merely proportionate costs. (*Sen and Niamatullah, JJ.*) RAHIM BAKHSH *v.* BACHCHA LALL. **51 All. 509 = 1929 A.L.J. 303 = 115 I. C. 458 = A.I.R. 1929 All. 214.**

———It is very difficult to assess a claim for moral damages, and therefore it is hardly right to order proportionate costs. (*Phillips and Madhavan Nair, JJ.*) CHENNA BASAPPA *v.* SANKARA BHARATHI SWAMI GARU. **29 M. L. W. 604 = 1929 M.W.N. 341 = 119 I. C. 149 = A.I.R. 1929 Mad. 493.**

———Where a suit has been overvalued the plaintiff is only entitled to costs as taxed in a suit valued at proper valuation. (*Rupchand Bilaram, A. J. C.*) THE SECRETARY OF STATE FOR INDIA *v.* DINSHAW NAVROJI. **87 I. C. 1002 = A.I.R. 1925 Sind 275.**

—S. 35—Discretion of Court—Result.

———The ordinary rule is that costs should follow the event unless there is some ground which would be sufficient to deprive the successful party of his costs. (*Devadoss, J.*) ARUNACHALLAM CHETTIAR *v.* NAMAKKAL UNION BOARD. **27 M. L. W. 841 = 110 I. C. 5 = A. I. R 1928 Mad. 346 = 54 M. L. J. 603.**

———The ordinary rule that the costs should follow the event may be departed from in a proper case according to its circumstances. (*Macleod, C. J. and Coyajee, J.*) SASSOON *v.* ARDESHIR.
28 B.L.R. 126 = 98 I. C. 358 = A.I.R. 1926 Bom. 189.

———Ordinarily costs should be awarded to parties according to success or otherwise in litigation. (*Greaves and Chakravarti, JJ.*) NIBARAN CHANDRA ROY *v.* NABIN CHANDRA ROY. **40 C. L. J. 504 = 85 I.C. 127 = A.I.R. 1925 Cal. 297.**

———Costs generally abide the result and if the plaintiff's suit is practically decreed in full, costs should be awarded to him. (*Moti Sagar, J.*) AGHA MUHAMMAD *v.* JODH SINGH. **77 I.C. 416 = A.I.R. 1923 Lah. 513.**

———Costs generally abide the result, if no valid reason has been assigned as to why an exception should be made in a case. (*Moti Sagar, J.*) DES RAJ SAWHUNY *v.* FRAYS MOTOR WORKS. **75 I. C. 64 = A. I. R. 1923 Lah. 302.**

———Costs not following the event amounts to erroneous exercise of discretion and there is an interference on appeal. (*Walsh, J.*) HAKIM ZAHUR AHMAD *v.* FATEHULLAH. **64 I. C. 962 = 3 U. P. L. R. (A.) 55.**

———Where it was found that the suit was rendered inevitable by reason of the gross mismanagement of the trust estate by the appellant the lower Court was held to be right in directing the appellant to pay the costs of the suit. (*Das and Bucknill, JJ.*) MAHOMED WAHAB HUSSAIN *v.* SYED ABBAS HUSSAIN.
4 P. L. T. 326 = 71 I. C. 280 = A. I. R. 1923 Pat. 420

—S. 35—Improper.

———*Joinder as parties—Order regarding costs.*

Where parties are unnecessarily impleaded at the instance of the defendant the Court can direct the latter to pay the costs of the added parties. (*Ramesam, J.*)

C. P. CODE, (1908), S. 35—Parties—Appellant.

SIVARAMAKRISHNA *v.* SANKARANARAYANA.
(1930) M. W. N. 679.

—S. 35—Interest.

———*Claiming high rate of interest.*

A Court disallowing costs on the ground that the interest claimed is very high, exercises a very proper discretion. (*Daniels, A. J. C.*) FAZAL AZIM *v.* LALA GIRDHARI LAL. **9 O. L. J. 442 = 69 I. C. 657 = A. I. R. 1923 Oudh 8.**

—S. 35—Jurisdiction.

———If an objection as to jurisdiction of Court not raised in the first Court, is successfully taken in the High Court, the High Court has jurisdiction not to allow costs. (*Dalip Singh, J.*) ATTOCK OIL CO. *v.* ABDUL MAJID. **118 I. C. 533 = A. I. R. 1929 Lah. 246 (1).**

—S. 35—Mortgage suit

———*Claim for costs—Character.*

The costs in a mortgage suit are not to be treated as independent claims by the mortgagee irrespective of the rights under the mortgage; but such costs should form part of the amount decreed in the mortgage suit to be realized in accordance with the procedure laid down in the Code. It makes no difference if the order for costs was passed before the final decree was drawn up.

The costs awarded in a mortgage suit follow the character of the amount decreed in the suit and form part of the entire decretal amount to be realized from the mortgaged properties. 35 Cal. 431; 20 All. 528 (F. B.); 40 All. 109 and 30 Mad. 464, Foll. (*Suhrawardy and Graham, JJ.*) MAHARAJ BAHADUR SINGH DUGAR *v.* BASIRUDDIN AHAMAD.
41 C. L. J. 607 = 93 I. C. 364 = A. I. R. 1925 Cal. 1135.

—S. 35—Parties—Administration suit.

———The correct course in administration suits, when orders for costs are made, is to make them in such a form that the person who has not encumbered his share shall be relieved as far as possible in the matter of costs created by the fact that another co-sharer has assigned or encumbered his share. *Greedy* v. *Lavender*, (1848) 11 Beav. 417, Rel. on. (*Rankin, C. J. and B. B. Ghose, J.*) NATIONAL INSURANCE CO., LTD. *v.* NISSIM ABRAHAM GUBAY. **56 Cal. 447 = 119 I. C. 21 = A. I. R. 1929 Cal. 477.**

—S. 35—Parties—Alienees.

———*Reversioner's suit.*

In the suit, in which a reversioner plaintiff impleads various alienees as party defendants, if the judgment should go against the alienees, it is the established practice and in consonance with the reason of the thing that any costs that may be allowed to the plaintiff should be, so far as each set of defendants is concerned, proportionate to the value of the property in which such set of defendants may be interested. (*Srinivasa Ayyangar, J.*) RANGANATHA THATHACHARIAR *v.* RAJAGOPALACHARIAR. **A. I. R. 1928 Mad. 16.**

—S. 35—Parties—Appellant.

———*Principles.*

Where a lower Court decides a case relying upon cases generally regarded as authority for the proposition accepted by the Court and subsequently a different pronouncement is made which either dissents from or explains away previous rulings and the decision is reversed on the basis of that ruling the party successful in the Court below should not be saddled with costs of the appeal or revision. (*Niamatullah, J.*) JIT SINGH *v.* DAULATIA TAMTA. **A. I. R. 1930 All. 167.**

———Costs ordered to be borne by the successful appellant because his conduct in the case did not appear to have been at all creditable or straightforward. (*Phillips and Reilly, JJ.*) B. ISWARAYYA *v.* (SWARNAM) ISWARAYYA. **1929 M. W. N. 831 = 31 M. L. W. 97 = A. I. R. 1930 Mad. 154 = 58 M. L. J. 29.**

———Where a trial Court leaves the parties to bear their own costs, and one of them appealed from such order while the other does not, the appellate Court cannot make the former pay the costs of the latter in the trial Court. (*Jai Lal, J.*) FAIZ ALI *v.* MT. ASHRAF KHATUN. **30 P. L. R. 600 = 118 I. C. 464 = A. I. R. 1929 Lah. 177.**

———*Privy Council Appeal.*

Where a party obtained leave to appeal to the Privy Council, but took no steps to prosecute the appeal after the record reached there, and the appeal was thus dismissed for non-prosecution.

Held, that the respondents were entitled to the costs incurred by them in the High Court on the petition to obtain a certificate for leave to appeal. (*Macleod, C. J. and Crump, J.*) VALLABHDAS KANJI *v.* RANCHHORDAS MATHRADAS. **27 Bom. L. R. 699 = 89 I. C. 213 = A. I. R. 1925 Bom. 471.**

———When one of the plaintiffs refused to appeal and was made a respondent by the plaintiff who appealed and was mis-stated in the decree as appellant,

Held, both plaintiffs were entitled to costs of the Court of the first instance, but plaintiff-appellant alone was entitled to costs in the first appellate Court and in the High Court. (*Piggott and Walsh, JJ.*) HARDEO PRASAD *v.* DAMODAR PRASAD. **20 All. L. J. 980 = 71 I. C. 424 = 4 L. R. A. (Civ.) 53 = A. I. R. 1923 All. 119.**

———Where the Privy Council could have finally decided the suit but was not permitted by the appellant to do so who insisted on the Privy Council confining itself to the question of procedure,

Held, that though the appellant had succeeded on the question of procedure, yet the costs should be reserved and might even be awarded against him even if he ultimately succeeded. (*Lord Buckmaster.*) BHAIDAS SHIVDAS *v.* BAI GULAB. **48 I.A. 181 = 45 Bom. 718 = 23 Bom. L. R. 626 = 33 C. L. J 488 = 19 A. L. J. 409 = 25 C. W. N. 605 = 14 M. L. W. 7 = 1921 M. W. N. 408 = 60 I. C. 822 = A.I.R. 1921 P. C. 6 = 40 M. L. J. 519.**

—S. 35—Applicant.

———Revision due to carelessness of applicant—Applicant though successful should pay costs. (*Dulip Singh, J.*) LACHMAN DAS NATHOLI MAL *v.* SHAMASUDDIN. **115 I.C. 23 = A.I.R. 1930 Lah. 240.**

———*Interlocutory Application.*

When the Judge either in Chambers or on motion makes an order that the costs of application or motion shall be costs in the cause, he makes an order that those costs should be received by the party who gets the general costs of the action, and it is not open to the Judge who hears the case to interfere with that order. 25 Bom. 230, Overruled. Where in the orders in Chambers for the examination of one witness *de bene esse* and the examination of another witness on commission, it was ordered that the costs should be costs in the cause. *Held*, that the Judge who heard the case had no jurisdiction to interfere with those orders whereby those events became part of the general costs of the action to which the successful defendants were entitled, although it would have been open to the Judge to have held that the defendants by their conduct were not entitled to the whole of the costs of the action.

(*Macleod, C.J. and Coyajee, J.*) AMERICAN TRADING CO. *v.* BIRD & CO. **50 Bom. 430 = 28 Bom. L.R. 1283 = 97 I.C. 133 = A.I.R. 1926 Bom. 596.**

—S. 35—Parties—Charitable Society.

———Where a philanthropic Society unsuccessfully sought to be made a guardian of a minor's property and claim costs which cannot be regarded as expenses either as on account of necessaries or as having been incurred for the welfare of the minor or for protection of his estate the society is not entitled to the costs. (*Mukerji and Guhra, JJ.*) S. M. ASALATA ROY *v.* SOCIETY FOR P. C. I. **51 C.L.J. 272 = A.I.R. 1930 Cal. 397.**

—S. 35—Parties—Defendant.

———The plaintiff has to prove his case, and when he fails to prove it, the defendant is entitled to his costs without his being required to prove that the case is a false one; and the mere fact that the case is not entirely false is not a good ground for disallowing costs to defendant. (*Martineau, J.*) RAJADA *v.* BARU MAL. **27 P.L.R. 254 = 97 I.C. 795 = A.I.R. 1926 Lah. 464 (2).**

———When the plaintiff institutes a suit against a party who shows that he is in no way liable to be sued and the suit fails, the defendant should get his costs. (*Spencer and Ramesam, JJ.*) SECRETARY OF STATE *v.* SOMAYYA. **24 M.L.W. 378 = 97 I.C 847 = A.I.R. 1926 Mad. 1084 = 51 M.L.J. 446.**

———*Several defendants.*

Where plaintiff's suit is dismissed each defendant is entitled to costs taxed on the basis of the suit valuation and not on the basis of what each defendant's interest might be in the suit itself. (*Macleod, C. J. and Coyajee, J.*) LAXMAN WAMAN *v.* SARASWATI GANESH. **27 Bom. L.R. 692 = 89 I.C. 211 = A.I.R. 1925 Bom. 432.**

———*Defendant absent need not be exonerated—Antecedent conduct of parties should be looked into.*

There is no rule of law that because a suit or appeal is heard *ex parte*, the successful plaintiff or appellant is not entitled to costs against the absent defendant or respondent. The case would be different if the defendant would appear at the trial and state that he had no interest in the litigation, that there was no cause of action as against him, that he did not dispute the allegations of the plaintiffs in the plaint and that he should consequently be discharged. The Court while awarding costs is not confined to the consideration of the defendant's conduct in the actual litigation itself, but may also take into consideration matters which led up to and were the occasion of that litigation; in other words, to look at the antecedent conduct of the defendant which led to the apparent necessity for the plaintiff's instituting the suit. (*Mookerjee and Chotzner JJ.*) UPENDRA NARAIN ROY *v.* BISWESWAR ROY CHOWDHRY. **29 C.W.N. 297 = 86 I.C. 321 = A.I.R. 1925 Cal. 569.**

—S. 35—Parties—Estate.

———*Vague Directions.*

Where it is the fault of the testator in making the testamentary directions vague or uncertain in law or fact, that is responsible for a litigation, the costs of all parties should be awarded out of the estate. (*Rupchand Bilaram, A.J.C.*) SHAMBAI *v.* GOVARDHAN. **19 S.L.R. 220 = 78 I.C. 249 = A.I.R. 1925 Sind 195.**

—S. 35—Parties—Guardian ad litem.

———The words "by whom" in S. 35 are wide enough to include next friends and guardians of minor plaintiffs and defendants. An order as to costs can therefore be made against a guardian-*ad-litem* even if he is not a party to the suit : 8 Bom. 391, Rel. on ; 3 Mad. 263, Dist. *Morgan* v. *Morgan*, 12 T.L.R. 199 and A.I.R. 1928 Mad. 590, Ref. (*Ramesam and Jackson, JJ.*) YELLAMMA *v.* SURYANARAYANAMURTHI **1929 M.W.N. 545 = A.I.R. 1929 Mad. 782.**

—S. 35—Parties—Guardian.

———Where during the pendency of a suit the minor becomes major, but the guardian continues to represent him and the parties continue the old state of affairs the guardian is liable for costs. (*Ramesam and Jackson, JJ.*) NITTALA YELLAMMA *v.* NITTALA SURYANARAYANAMURTHY.

1929 M.W.N. 545 = A.I.R. 1929 Mad. 782.

———Under S. 35 there is no reason why a guardian *ad litem* should not be made to pay costs if he is a party to the suit. O. 32, R. 11, is a special provision whereby a guardian *ad litem* who is not on record may be ordered to pay costs and cannot be said to restrict the provisions of S. 35 so far as they relate to parties on record. (*Phillips and Devadoss, JJ.*) KRISHNAYYA *v.* RAMMAYYA. **1928 M.W.N. 318 = 110 I.C. 310 = A.I.R. 1928 Mad. 590.**

—S. 35—Parties—Husband.

———Divorce—Husband must pay wife's costs even if her defence fails. (*Walsh and Stuart, JJ.*) PARTICK NORMAN DWYER *v.* HARRIETT MARY CECILIA DWYER. **66 I. C. 494 = A. I. R. 1922 All. 243 (1).**

—S. 35—Parties—Legal Practitioner.

———(Per *Full Bench.*)—The High Court has no power to order a legal practitioner to pay personally the costs of an application or suit except in cases to which S. 35 can be made applicable. (*Mears, C. J. Sulaiman, Boys, Banerji, Young, Sen and Niamatullah, JJ.*) (MAHANT) SHANTHA NAND GIR CHELA AND MAHANT GAYANAND GIR *v.* (MAHANT) BASUDEVANAND. **1930 A. L. J. 402 = A. I. R. 1930 All. 225.**

—S. 35—Parties—Liability—Third party.

———An order for costs binds a person not party to a suit when it is directed against persons through whom he claims. (*Madhavan Nair and Cornish, JJ.*) ASURAN *v.* SUB-COLLECTOR, RAJAHMUNDRY. **1930 M. W. N. 153 = 123 I. C. 47 = A. I. R. 1930 Mad. 577 = 58 M. L. J. 318.**

—S. 35—Parties—Liquidator.

———*Winding up proceedings—Costs of.*

Costs of unsuccessful litigation incurred by a liquidator, whether in a voluntary or compulsory winding upare payable to the party entitled out of the assets of the company in priority to the costs of the liquidation. This rule applies whether the order simply directs payment of costs, or directs that the costs be paid out of the assets of the company, or that the liquidator do pay the costs, with liberty to recoup himself out of the assets. The onus is on the liquidator to show that the condition of the assests is such that immediate payment cannot be made and if he shows that other persons have a prior right to, or entitled *pari passu* with the successful litigant, no order for payment will be made without providing for the other claims. The date of the order gives no priority, but payment will not be indefinitely postponed until all claims have come in : In re *Pacific Coast Syndicate Ltd.*, (1913) 2 Ch. 26 and In re *London Metallurgical Co.*, (1895) 1 Ch. 758 Rel. on. (*Marten, C. J. and Crump, J.*) MANEKLAL *v.* SURVAPUR MILL CO. **52 Bom. 477 = 30 Bom. L.R. 549 = 110 I. C. 33 = A. I. R. 1928 Bom. 252.**

—S. 35—Parties—Misconduct.

———(Per *Sulaiman Banerji and Sen, JJ.*) No doubt S. 35 as it now stands has a wider scope and authorizes a Court in appropriate cases to make an order as to costs against a person who is strictly speaking not a party to the litigation. But the section has nothing to do with the misconduct of advocates. Cases of contempt of Courts stand on a separate footing and are not within the scope of the section, as inferior Courts have no jurisdiction to punish for contempt of Court in cases not falling within Penal Code, but under this section Court can order payment of costs by any person who is really responsible for those costs, that is, has been the cause of those costs having been incurred, whether he is a party to the suit or not and whether those costs have been directly occasioned like commission or omission. (*Mears, C. J. Sulaiman, Boys, Banerji, Young, Sen and Niamatullah, JJ.*) SHANTHANAND *v.* BASUDEVA NAND. **1930 A. L. J. 402 = A. I. R. 1930 All. 225 (F.B.).**

—S. 35—Parties—Mortgagee.

———Where the defendant mortgagee contests the suit on the ground that the transaction is a sale and not a mortgage, the ordinary rule as to the award of costs to mortgagee, will not apply. (*Shah Ag. C. J.*) SHIVBASAPA NINGAPA *v.* BALAPA BASAPA. **25 Bom. L. R. 1209 = 81 I.C. 673 = A. I. R. 1924 Bom. 172.**

—S. 35—Parties—Partition.

———The general rule is that in partition suits parties should have their own costs, except with regard to the institution fee which should be borne proportionately by all the parties. (*Macleod, C. J. and Crump, J.*) KASTURI BHAI NANIBHAI *v.* BAI MAHALAXMI. **77 I.C. 914 = A. I. R. 1923 Bom. 464.**

—S. 35—Parties—Plaintiff.

———Where in an application by plaintiff to the revenue authorities for partition of land the defendant sets up exclusive title to the land on the basis of a private partition and repeats the same in the civil Courts but fails to substantiate it, there is no reason why the plaintiff who was driven to Court by the unjustifiable action of the defendant, should not be allowed the costs of the suit. (*Tekchand, J.*) SANSARCHAND *v.* UGGARSAIN. **116 I. C. 717 = A. I. R. 1930 Lah. 229.**

———In every partition case before a suit can be instituted there must be a demand and a final refusal. Where therefore there is a demand and refusal but the defendants take no further steps to contest the plaintiff's case, the plaintiff is not entitled to costs up to passing of preliminary decree. 34 Cal. 878; 42 Cal. 451 and 12 C.L.J. 346, Rel. on. (*Adami and Kulwant Sahay, JJ.*) PROMOTHO NATH *v.* BIPIN BIHARI. **11 P. L. T. 233 = A. I. R. 1930 Pat. 336**

———Commission for taking accounts—Plaintiff succeeding is entitled to costs of commission. (*B. B. Ghose and Panton, JJ.*) MANMATHA NATH *v.* MATILAL MITRA. **33 C. W. N. 614 = A.I.R. 1929 Cal. 719.**

———Widow kept back from information of income of family and hence claiming maintenance at a rate found to be excessive—Defendant coparceners putting vexatious pleas to defeat her claim—Direction that defendant should pay plaintiffs all costs is proper. (*Wallace and Thiruvenkatachariar, JJ.*) S. SRINIVASA AYYAR *v.* LAKSHMI AMMAL. **28 M.L.W. 328 = 108 I.C. 712 = A. I. R. 1928 Mad. 216 = 54 M. L. J. 530.**

———In a suit by landlord against tenant for ejectment the sub-tenants are not necessary parties and therefore they cannot object to the delivery of possession on the ground that the decree is not binding on them. A suit by the sub-tenants claiming that the decree is not binding on them as they were not made parties to it, is wholly unjustifiable and they should therefore be saddled with the costs. (*Page J.*) RAMKISSENDAS *v.* BINJRAJ CHOUDHURY. **50 Cal. 419 = 77 I. C. 910 = A. I. R. 1923 Cal. 691.**

——— Contract of indemnity—Suit on—Plaintiff should be awarded actual costs incurred if reasonable. English case-law referred to. (*Wallis, C. J. and Seshagiri Aiyar, J.*) RANGAYYA APPA RAO *v.* SATYANARAYANA VARAPRASADA RAO. **13 M. L. W. 297 = 60 I. C. 164 = A. I. R. 1921 Mad. 544.**

—S. 35—Parties—Pre-emptor.

———Where a plaintiff comes to enforce a legal right and there has been no misconduct on his part, no omission or neglect which would induce the Court to deprive him of his costs the Court has no discretion and cannot take away his right to costs. In a pre-emption suit the mere fact that the vendee had, even before the suit not denied that the plaintiffs had a right of pre-emption would not be a good ground for depriving them of their costs. if nevertheless in order to enforce that right they were compelled to bring a suit. 27 Mad. 341, Foll. (*Leslie Jones, J.*) ABDUL RAHMAN *v.* ABDUL WAHAB. **62 I. C. 812 = A. I. R. 1921 Lah. 104.**

—S. 35—Parties—Principles of.

———*Third party proceeding—Taxation of costs—Method.*

Where defendant succeeds in third party proceedings after a decree is passed against him his costs in the suit as against the third party should be taxed as between solicitor and client and the cost of the third party proceedings should be taxed as between party and party. (*Marten J.*) WELD AND CO. SHER AHMED EKBAL AHMED. **59 I. C. 18 = 21 Bom. L. R. 808.**

—S. 35—Parties—Receiver.

———Where a mortgagee brings his suit to enforce his security, the order as to costs may be to give him liberty to add his costs to his security. But if a mortgagor or receiver chooses to dispute the validity of the mortgage, there must be an order for payment of costs against such disputing mortgagor or receiver. (*Marten, C. J. and Patkar, J.*) KESHIBAI *v.* CHUNNILAL HATHISING. **31 Bom. L. R. 1199 = 122 I. C. 857 = A. I. R. 1930 Bom. 11.**

———*Insolvency—Official Receiver.*

The Official Receiver or a trustee in bankruptcy may, like any ordinary litigant, be ordered to pay costs in any action taken or defended by him. *John Tweedle & Co. Ltd., In Re*, (1910) 2 K. B. 697; *Williams & Co., In re*, (1913) 2 K. B. 88; and 7 Bom. 484; Foll. (*Wallace and Thiruvenkatachariar, JJ.*) A. V. BALAKRISHNA MENON *v.* K. MANAKKAL UMA. **114 I. C. 825 = 55 M. L. J. 873 = 28 M. L. W. 719 = 52 Mad. 263 = A. I. R. 1929 Mad. 105.**

———A simple order for costs against the Official Receiver has the usual meaning or such an order against any litigant, and the Official Receiver is, therefore, in the first instance, personally liable for costs. The circumstance that the Official Receiver had obtained the leave of the Court would only entitle him to claim reimbursement out of the estate or from the creditors in whose interest he was acting in the litigation in which he was unsuccessful. 7 Bom. 484; 23 C. W. N. 431; *Pitts* v. *La Fontaine*, 6 A. C. 482 and *Ex parte Angerstein, in re Angerstein*, 9 Ch. A. 479, Rel. on; A. I. R. 1928 Mad. 890; Disc. & Dist. (*Wallace and Thiruvenkatachariar, JJ.*) A. V. BALAKRISHNA MENON *v.* K. MANAKKAL UMA. **114 I. C. 825 = 55 M. L. J. 873 = 28 M. L. W. 719 = 52 Mad. 263 = A. I. R. 1929 Mad. 105.**

—S. 35—Parties—Relief.

———Where no right to relief is alleged to exist against a person, he is not a proper party, and an order making him liable for costs cannot be supported. 61 I. C. 315 and A. I. R. 1928 Mad 1129, Rel. on. (*Curgenven, J.*) LAKSHUMANAYYA *v.* RAJAM AYYAR. **30 M. L. W. 949 = 58 M. L. J. 118 = A. I. R. 1930 Mad. 195.**

—S. 35—Parties—Respondent—Pro forma.

———Where persons though necessary parties in the trial Court have been added in appeal only as formal parties and no relief is asked against them it is not necessary for them to be represented and hence are not entitled to their costs in appeal. (*Phillips and Madhavan Nair, JJ.*) GANAPATHI *v.* SUBRAMANIYAM CHETTY. **52 Mad. 845 = 30 M. L. W. 254 = 57 M. L. J. 374 = 122 I. C. 167 = A. I. R. 1929 Mad. 738.**

—S. 35—Parties—Right of successful party to costs.

———The general rule is that costs shall follow the event unless there is some reason why it should not be followed. (*Mohiuddin, A. J. C.*) DHANWAPRASAD *v.* HARMOHANLAL. **122 I. C. 378.**

—S. 35—Parties successful.

———There is nothing in principle which precludes a Court from assessing costs and passing a decree for costs in favour of the successful party in a suit for accounts in the course of preliminary decree, (*Sulaiman A. C. J. and Sen. J.*) MD. ABDUL RAHIM *v.* MT. IZZATUNNISSA BAI. **121 I. C 550 = A. I. R. 1930 All. 72.**

—S. 35—Parties—Suit re. costs.

———*Failure to disclose in reply notice evidence which one was not under obligation to disclose—Suit filed—Defence found valid—Plaintiff is not entitled to proceed with suit only as to costs.*

P a receiver to an estate demanded from *D* a sum as due by *D* to the said estate. *D* replied that sum had been paid with interest and that he had got back the receipt which he had passed for the amount. *P* from time to time called upon *D* to let him know as to whom *D* had paid the amount and to produce the receipt for inspection. No reply was sent by *D*; *P* filed the present suit to enforce the demand. After the suit was filed, *D* gave inspection of the receipt. *P* informed *D* that he would not proceed with the suit except to ask for costs.

Held, that *D* was under no obligation to disclose to *P* the evidence by which he proposed to substantiate the defence which he had set out in his reply and *P's* suit was liable to be dismissed. (*Mirza, J.*) N. H. MOOS *v.* GULAMALI TYABALI. **32 Bom. L. R. 200 = A. I. R. 1930 Bom. 152.**

—S. 35—Parties—Wife.

———*Suit for judicial separation—Order for Costs.*

A suit for judicial separation was brought by the wife against her husband. The parties were members of the Jewish community and professed the Jewish religion. The wife took out summons for an order on the husband to pay to the wife a certain sum on account of and towards the costs of the suit.

Held, that neither Cl. 35, Letters Patent (Calcutta) nor the Divorce Act applied to the case, but the suit came within the ordinary original civil jurisdiction of the High Court under Cl. 12, Letters Patent, and the procedure as regards payment of costs was that laid down by C. P. Code, of which S. 35 did not give the Court power to direct the order prayed for. (*Panckridge, J.*) R. K. SAMUEL *v.* F. H. T. SAMUEL.

34 C. W. N. 319 = A. I. R. 1930 Cal. 558.

—S. 35—Parties—Witnesses.

———*Costs of witnesses summoned but not examined cannot be taxed against a party.*

Costs of such witnesses as are not examined though summoned cannot be taxed in the decree against a party. (*Wazir Hasan, C. J. and Raza, J.*) SHIVA KUMAR *v.* THAKUR PRASAD. **7 O. W. N. 815 = A. I. R. 1930 Oudh 432.**

—S. 35—Reasons in writing.

———Departure from practice of directing costs to follow event—Reasons must be in writing—Discretion exercised on judicial principles—Appellate Court should not interfere. A. I. R. 1925 Oudh 699; 40 All. 558, Foll. (*Stuart, C. J. and Wazir Hasan, J.*) BISHUN NARAIN *v.* MAZHARUL HAQ. **5 O.W. N. 35 = 107 I. C. 881 = A. I. R. 1928 Oudh 224.**

———When costs do not follow event, reasons must be given—Plaintiff who is not guilty of misconduct is not disentitled to his costs. (*Macleod, C.J. and Coyajee, J.*) RAMPRASAD SHIVLAL *v.* SHRINIVAS BALMUKUND. **90 I. C. 685 = 27 Bom. L. R. 1122 = A. I. R. 1925 Bom. 527.**

—S. 35-A—Appeal from order of costs.

———Appeal lies to District Judge from an order of Small Cause Court awarding costs. (*Mukerji, J.*) BANWARI LAL *v.* SHALIMAR PAINTS CO. LTD. **94 I. C. 790 = A. I. R. 1926 All. 554.**

—S. 35-A—Compensation when granted.

———Compensation under the section can be awarded only after objection by the opposite party. (*Le Rossignol, J.*) HIRA LAL *v.* DARBARI LAL. **94 I. C. 78 = A. I. R. 1926 Lah. 472.**

—S. 35-A—Damages, effect of.

———*Tort—Damages—Maliciously bringing a civil suit.*

Where damages are sought for the mere bringing and prosecution of a civil suit two main questions emerge. The first question is a question of the remoteness of the damage. The mere institution of the proceedings may, having regard to their character, involve damage to credit or reputation, damage to property in the sense that the defendant is put to expense, or damage to the person in the sense that he is liable to arrest. In such cases that damage is not remote but in any ordinary case the bringing of an ordinary action however maliciously and however great the want of reasonable and proper cause, will not support a subsequent action for malicious prosecution. Injury to plaintiff's business is not a ground for maintaining such a suit. The second question is as to what is meant by malice. There is some authority for the view that it is actionable for one person wilfully to injure a man in his trade if damage results to him, provided that if the real purpose is not to injure another, but to forward or defend one's own trade, then no wrong is committed and no action will lie, although damage to another ensues. In some cases malice is postulated as an element, meaning thereby that the act complained of is wilfully and knowingly done, or that it is done for the purpose of injuring another but not as connoting personal enmity or spite or some other evil motive. *Wren* v. *Weild*, (1869) 4 Q. B. 730 and *Sorrell* v. *Smith*, (1925) A. C. 700, Foll. (*Rankin, C.J. and C.C. Ghose, J.*) IMPERIAL TOBACCO CO. *v.* ALBERT BONNAN. **46 C. L. J. 455 = 106 I. C. 277 = A. I. R. 1928 Cal. 1.**

—S. 35-A—Parties—Next friend.

———What is awarded under S. 35-A is " costs " and nothing but costs, although those costs are to be awarded by way of compensation and the order to pay it is covered by S. 35 itself. An order under S. 35-A can therefore be passed against nevt friend of a minor. (*Mukerji and Bennet, JJ.*) RAJKUMAR *v.* MANGAD RAI. **A.I.R. 1930 All. 577.**

—S. 35-A—Powers of Small Cause Court.

———Small Cause Court Judge not vested with jurisdiction up to Rs. 250 cannot grant costs unless empowered by High Court. (*Mukerji, J.*) BANWARI LAL *v.* SHALIMAR PAINTS CO. **94 I. C. 790 = A. I. R. 1926 All. 554.**

—S. 35-A—Transfer of small cause suit to regular side.

———Where a suit instituted in the Court of Small Cause is subsequently transferred to the regular side, the Judge trying the suit must be deemed to have the same powers as the Small Cause Court possessed in the matter af awarding compensation under S. 35-A. (*Subhedar, A. J. C.*) MANGILAL *v.* LAXMANAPPA. **120 I. C. 412 = A. I. R. 1930 Nag. 133.**

—S. 36—Judgment on admission.

———It is not necessary to have a decree drawn up on a judgment obtained on admission under O. 12, R. 6. It is open to the plaintiff to enforce payment of the amount awarded as an order in execution proceedings by virtue of S. 36. (*Rupchand Bilaram, A. J. C.*) TAHILRAM TARACHAND *v.* VASSUMAL DEUMAL. **20 S. L. R. 216 = 92 I. C. 562 = A. I. R. 1926 Sind 119.**

—S. 36—When applicable.

———*Commissioners' fees—Amount not deposited in Court—Order directing payment is covered by S. 36 and is a decree under S. 47.*

Order directing payment of an amount to a Commissioner on his application is covered by S. 36 and is to be executed as a decree and provisions of S. 47 will apply in execution proceedings. 10 C. W. N. 234, Dist. (*Suhrawardy and Duval, JJ.*) CHANDRA KUMAR DE *v.* KUSUM KUMARI ROY. **52 Cal. 269 = 84 I. C. 724 = 40 C. L. J. 180 = A. I. R. 1925 Cal. 57.**

———An order under O. 20, R. 11 (2) can be executed as if it were a decree. (*Robinson, C. J. and Baguley, J.*) ALLAN BROS *v.* SHAIK JOOMAN SONS. **4 Bur. L. J. 32 = 85 I. C. 291 = 2 Rang. 673 = A. I. R. 1925 Rang. 189.**

———A subsequent order of the Court in regard to particular costs is capable of execution and the costs are covered by the previous decree of Court, even though those particular costs were not shown in that decree. 38 Cal. 125, Foll. (*Fawcett, J.C. and Raymond, A. J. C.*) IBRAHIM *v.* FIRM OF GULAM HUSSAN. **15 S. L. R. 11 = 62 I. C. 507 = A. I. R. 1921 Sind 13.**

—S. 37—Abolition and revival of Court.

———Even if a Court ceases to exist it can again be revived and if another Court of the same designation is established within the district with the same jurisdiction it can be said that it is the same Court. 4 C. L. J. 473, Dist. (*Mullick and Ross, JJ.*) KHODAIJATUL KOHRA *v.* HARIHAR MISSAR. **4 Pat. 688 = 7 P. L. T. 333 = 92 I. C. 900 = A. I. R. 1926 Pat. 209.**

—S. 37—' Court which passed decree ' meaning.

———Where the whole business of one Court has been transferred to another Court, the expression the 'Court by which the decree was passed ' cannot be taken to be limited to the original Court. (*Spencer and Krishnan, JJ.*) J. V. SRINIVASA RAO *v.* HANUMANTHA RAO.

**46 Mad. 1=65 I. C. 727=15 M. L. W. 458=
1922 M. W. N. 349=31 M. L. T. 79=
A. I. R. 1922 Mad. 10=42 M. L. J. 344.**

—S.37—Execution by Court after re establishment

———Where the Court which passes a decree is abolished but is subsequently re-established, it can execute the decree provided it would have jurisdiction to try the suit to which the decree relates if it were instituted at the time of the application for execution. (*Mullick and Ross, JJ.*) KHODAIJATUL KOHRA *v.* HARIHAR MISSAR. **4 Pat. 688=7 P. L. T. 333=92 I. C. 900=
A. I. R. 1926 Pat. 209.**

—S. 37—Execution of decree.

———*In general, appellate decree is the one to be executed.*

In general, the rule must be that the Appellate Court's decree, if properly drawn, is the sole decree to be executed in the case but there may be cases in which that general and ordinary rule cannot and should not be invariably enforced, and in particular circumstances it may be incumbent upon to the Courts to permit execution of the decree of the original Court. 14 M. I. A. 465, 6 Ben. L.R. 52; 13 Cal. 13; 11 All. 267, F.B.; 39 Cal. 925; 39 Bom. 175 Foll. (*Robinson, C. J. and Duckworth, J.*) S. C. DAS GUPTA *v.* THE BURMA RAILWAYS CO.
11 L. B. R. 163=A. I. R. 1921 L. B. 37.

—S. 37—Interpretation.

———The Code has not defined for the purpose of S. 144 what is the " Court of first instance " when the "Court of first instance" has lost territorial jurisdiction. In a case like this the Court must proceed upon some general principle as laid down in S. 37 (*b*) in interpreting the phrase " the Court of first instance " which would apply even to cases where the Court of first instance has been abolished and also to cases where the Court of first instance has ceased to have jurisdiction. 13 L. W. 67, Ref. (*Wallace, J.*) PANCHAPAKESA *v.* NATESA PATTAR. **1926 M. W. N. 395=
95 I. C. 587=A. I. R. 1926 Mad. 813=
51 M. L. J. 161.**

—S. 37—Loss of territorial jurisdiction after decree.

———The Court which tried the suit and passed the decree does not lose its jurisdiction to execute the decree even though it has lost territorial jurisdiction over the property. [6 Cal. 513 and 42 Mad. 821 (F. B.) Foll., 37 Mad. 462 and A. I. R. 1927 Mad. 627, Diss from] and the new Court which acquires territorial jurisdiction is not a Court competent to execute the decree. 30 Mad. 537 and 42 Mad. 461, Foll. 42 Mad. 821, Expl. (*Ramesam and Devadoss, JJ.*) SUBRAMANIA AYYAR *v.* SWAMINATHA CHETTIAR. **28 M. L W. 885=
114 I. C. 545=A. I. R. 1928 Mad. 746.**

—S. 37—Objections to transfer, decision on

———Where, in an application for transfer of a decree the judgment-debtor raises an objection as regards the executability of the decree the proper Court to decide such objection is the Court, which transfers the decree. The Court which passed a decree retains jurisdiction over all matters relating to the executability of the decree and should decide such matters before transferring the decree to the Court which has territorial jurisdiction over the property against which the decree-holder seeks to execute the decree but there the function of the Court passing the decree ceases. It has no power to attach or sell property outside its jurisdiction. 42 Mad. 821 (F. B.). A. I. R. 1929 Mad. 199, Foll. (*Raza and Pullan, JJ.*) BALKRISHNA *v.* DEBI PRASAD. **7 O. W. N. 363=
123 I. C. 881=A. I. R. 1930 Oudh. 305.**

—S. 37—Redistribution of civil work effect of.

———*Redistribution of civil work by District Judge in the District under S.* 13 (2) *of Civil Courts Act does not disturb the territorial jurisdiction of a Subordinate Judge in the District.*

Subordinate Judge has jurisdiction throughout the district. The territorial jurisdiction thus conferred upon him can only be removed by a proper order and notification by the local Government under section 13, clause (1) of the Civil Courts Act. An order of the District Judge under clause (2) of section 13 of the Act simply making arrangements for the distribution of the civil work in the district cannot at all disturb or curtail the territorial jurisdiction of the Subordinate Judge.

Where a mortgage decree was passed by a Subordinate Judge, first class, but subsequently the civil work of the area in which the mortgaged property was situated was transferred to 3rd Subordinate Judge by an order, under section 13 (2) of the Bengal, N. W. P. and Assam Civil Courts Act, of the District Judge.

Held, that the 1st Subordinate Judge did not cease to have jurisdiction to execute the decree, passed by him. (*Jwala Prasad and Adami, JJ.*) JAGANNATH PRASAD SINGH *v.* SHEONANDAN SAHAY.
**2 P. L. T. 374=62 I. C. 487=6 P. L. J. 304=
1921 P. H. C. C. 186=A. I. R. 1921 Pat. 152.**

—S. 37—Transfer of jurisdiction after preliminary decree.

———When the territorial jurisdiction of the Court which passed the decree is taken away between the date of the preliminary decree in a mortgage suit and the final decree and it passes the final decree also it has power to entertain an execution application for transmission to the Court having territorial jurisdiction but has no power to sell the property : 37 Mad. 462, Expl.; 42 Mad. 821 (F.B.). Foll.; Venkata Subba Rao, J., in A. I. R. 1926 Mad. 421, not foll. (*Wallace and Jackson, JJ.*) SRI RAJAH SATRUCHERLA SIVAKANDA RAJU BAHADUR GARU *v.* RAJAH OF JEYPORE.
**50 Mad. 882=39 M. L. T. 351=25 M. L.W. 671=
1927 M. W. N. 282=103 I. C. 245=
A. I. R. 1927 Mad. 627 (a)=52 M. L. J. 605.**

—S. 38—Application for retransfer.

———Even when a decree is transferred for execution to another Court, an application to the parent Court to re-transfer it to a third Court is one made to the proper Court so as to amount to a step-in-aid of execution ; A. I. R. 1916 P. C. 16 and 37 Mad. 231, Expl.: A. I. R. 1926 Lah. 113, Appr.; A. I. R 1922 Bom. 359, Diss. from ; A. I. R. 1926 Bom. 271, Ref. (*Ramesam and Jackson, JJ.*) MEHADUM BEG SAHIB *v.* MUHAMMAD MEERA SAHIB. **110 I.C. 829=
A. I. R. 1928 Mad. 493.**

—S. 38—Appointment of Receiver by High Court.

———The Calcutta High Court on its original side has the power to appoint a receiver by way of execution in respect of property situated outside its ordinary original jurisdiction. But it should exercise this power only on a proper case being made out that the appointment is necessary or advantageous. It cannot make an appointment on the sole ground that it is the only form of execution open to it which can be availed of to enforce its decree. 15 B. L. R. 318, Rel. on. (*Rankin, C. J. and C. C. Ghose, J.*) (RAJA) PROMOTHANATH MALIA *v.* H. V. LOW & CO. **34 C.W.N. 238=
51 C. L. J. 209=A. I. R. 1930 Cal. 502.**

—S. 38—Bonafide application.

———Application made by decree-holder merely to issue notice to the judgment-debtor to pay the decretal amount, to the Court which passed the decree is not illegal or to an improper Court, although the judgment-debtor at the time was residing outside that Court's jurisdiction. And if such application is made in good faith for the purpose of executing the decree, it will be a step in-aid within the meaning of Art. 182 (5); A.I.R. 1926 All. 95; A. I. R. 1922 Cal. 44 and 25 Cal. 594, Rel. on. (*Pratt and Otter, JJ.*) C. K. R. M. KATHIRASAN CHETTYAR *v.* MA HTA. **116 I. C. 474 = A. I. R. 1929 Rang. 95.**

—S. 38—Concurrent executions.

———There is nothing in the Code to prohibit concurrent executions It is a matter for the discretion of the Court to direct or to refuse concurrent execution. (*Rigg. J.*) S.R.M.M.C.T. CHETTY FIRM *v.* CHIMAN BUX BHON SINGHA. **63 I. C. 809 = 11 L. B. R. 15 = A. I. R. 1921 L.B. 25.**

—S. 38—Execution of transferred suit.

———*Section is not exhaustive—Particular execution application may be transferred under S. 24.*

S. 38 was enacted to decide the question as to the jurisdiction of a Court when a suit is transferred. If a suit instituted in Court *A* is transferred to Court *B* and Court *B* decided it, S. 38 enjoins that application for execution shall be presented to Court *B* and not to Court *A*, that is, the application is to be presented to the Court which passed the decree and not to the Court in which the suit was instituted. The section is not exhaustive and a decree can be executed by the Court to which it is transferred under S. 24. (*Walsh, Ag. C. J. and Dalal, J.*) MUHAMMAD HABIBULLAH *v.* B. B. SETH TIKAM CHAND. **47 All. 57 = 6 L. R. A. Civ. 103 = 85 I. C. 746 = A. I. R. 1925 All. 276.**

—S. 38—Exception to S. 39.

———Under Ss. 38 and 39 no Court can execute a decree in which the subject-matter of the suit or of the application of the suit is property entirely outside the local limits of its jurisdiction, but an exception has been recognized in cases of decrees for sale of mortgaged properties. 39 Cal. 104, Foll. (*Das and Ross, JJ.*) SHAIK ABDUL HADI *v.* MT. KABULTUNNISSA. **80 I. C. 901 = 6 Pat. L. T. 71 = A. I. R. 1925 Pat. 139.**

—S. 38—Injunction after transfer of decree.

———Where the execution proceedings have gone into the hands of the Deputy Commissioner the issue of an injunction to the Court which passed the decree originally, is obviously futile. (*Wazir Hasan, Ag. C. J. and Misra, J.*) KAMAKHYA DUTT RAM *v.* SHYAM LAL. **117 I. C. 471 = 6 O. W. N. 226 = 4 Luck. 635 = A. I. R. 1929 Oudh 235.**

—S. 38—Jurisdiction, change of after decree.

———The area in which the judgment-debtor lived, was transferred from the jurisdiction of the principal Dt. Munsif of Salem, who passed the decree sought to be executed, to that of the Dt. Munsif of Namakkal.

Held: the latter Court had jurisdiction to execute the decree: 42 Mad. 821, Foll. (*Oldfield and Venkatasubba Row, JJ.*) MUTHUKARUPPA CHETTY *v.* PAIYA KAVUNDAN. **73 I.C. 956 = 18 M. L. W. 17 = 1923 M. W. N. 406 = A. I. R. 1924 Mad. 32 = 45 M. L. J. 210.**

—S. 38—Jurisdiction, change of, during execution.

———S. 38 does not make it optional to a Court to execute its own decree, or to transmit it to the Court which has territorial jurisdiction, if the original Court has lost jurisdiction over the subject-matter of the suit. Although the words in S. 39 are "the Court may send it for execution," in all cases the Court should send its decree to the Court which has territorial jurisdiction if between the passing of the decree and the executing of it, the jurisdiction has passed to another Court. (*Spencer and Devadoss, JJ.*) MANAVIKRAMAN *v.* ANANTHANARAYANA AYYAN. **79 I. C. 806 = 19 M. L. W. 16 = 1924 M. W. N. 38 = A. I. R. 1924 Mad. 457 = 46 M. L. J. 250.**

—S. 38—Jurisdiction, effect of transfer on.

———*Transfer of darkhast—Jurisdiction of executing Court is not deprived.*

Because a decreeing Court may not be a proper Court in which a certain step-in-aid of execution may be taken it does not follow that it is therefore a Court entirely without jurisdiction in respect of the decree which it itself has made and of a darkhast which it itself has transferred wholly or in part to another Court. Ss. 38 to 43 nowhere lay down that a decreeing Court is deprived of its jurisdiction by the mere act of transfer of the darkhast: 25 Bom. 337 (P.C.); A.I.R. 1928 P.C. 162, Foll.; A.I.R. 1916 P.C. 16; A.I.R. 1922 Bom. 359 and A. I. R. 1924 Bom. 359, Expl. (*Madgavkar, J.*) FATECHAND RAMPRATAP *v.* GITMAL RUPCHAND. **31 Bom. L.R. 1105 = 53 Bom. 844 = A. I. R. 1929 Bom. 418.**

—S. 38—Jurisdiction in execution.

———In view of Ss. 38 and 150, Civil P. C., the jurisdiction to execute a decree can be exercised both by the Court which passed it, as well as by the Court to which the business of the former Court has been transferred. (*Prideaux, A. J. C.*) POKHORDAS *v.* GANPAT RAO. **107 I. C. 195.**

—S. 38—Jurisdiction when not vested in transferee Court.

———Where the application for execution has been entertained by the Court having jurisdiction to execute, any defect in mere procedure, such as omission to transmit to the Court to which the application is sent, a copy of the decree and a necessary certificate etc. under Order 21, rule 6, would not vitiate the execution proceedings or the sale held thereunder. 20 Mad. 10 App. Still where the application for execution is not at all entertained by the Court which alone had jurisdiction to entertain it, nor is it properly sent by that Court to another Court, the other Court will not derive any jurisdiction by the mere filing of the application in that Court on the refusal of the Court of first instance to entertain it. (*Jwala Prasad and Adami, JJ.*) JAGANNATH PRASAD SINGH *v.* SHEO NANDAN SAHAY. **62 I. C. 487 = 2 P. L. T. 374 = 6 P.L.J. 304 = 1921 P.H.C.C. 186 = A. I. R. 1921 Pat. 152.**

—S. 38—Sales by Receiver—Applicability of principle of S. 39.

———The rule that sales in execution of immovable property shall be carried out by Courts having territorial jurisdiction over such property has primary reference to execution which takes the form defined in S. 51 (*b*) and is *prima facie* not applicable to sales by a receiver appointed by Court, but the principle would apply to an application for the appointment of a Receiver when the main purpose of the appointment is to effect a sale in execution. (*Rankin, C. J. and C. C. Ghose, J.*) (RAJA) PROMOTHANATH MALIA *v.* H. V. LOW & CO. **34 C.W.N. 238 = 51 C.L.J. 209 = 57 Cal. 964 = A. I. R. 1930 Cal. 502.**

—S. 38—Suit to set aside execution sale.

———If can be treated as proceeding in execution. (*Kotval, A. J. C.*) BRIJ MOHAN SINGH *v.* KASTHUR CHAND. **68 I.C. 693 = A.I.R. 1922 Nag. 189.**

—S. 39—Application for transfer—Whether one for execution.

———Application for transfer of decree is not appplication for execution but step-in-aid under Limitation Act, Art. 181. (*Kanhaiya Lal and Ashworth, JJ.*) MT. SAHODRA *v.* BHAGWANDAS. **94 I.C. 482 =**

A.I.R. 1926 All. 473.

—S. 39—Death of judgment-debtor after transfer.

———*Judgment-debtor dead before full satisfaction of decree—Execution proceedings in transferee Court do not abate but are merely suspended.*

If the judgment-debtor dies before a certificate of full-satisfaction of decree is issued, the Court of transfer does not lose its jurisdiction over the execution proceedings, which do not abate by reason of such death. The proceedings in such Court are merely suspended on such death until the judgment-creditor has obtained an order from the Court which passed the decree for inserting the name of the legal representative. 30 Bom. L. R. 1373, Foll.; 50 Mad. 1, Ref. (*Barlee, J. C. and Aston, A. J. C.*) SHOWKOMAL *v.* JAHATMAL THAROOMAL. **118 I.C. 221 = A.I.R. 1930 Sind 16.**

—S. 39—Essentials of power of execution.

———Where it is necessary in execution of a decree for money to sell properties not within the local limits of the jurisdiction of the Court which passed the decree, the sale of the properties can only be effected by the Court within the local limits of which the property is situate and that the property was attached by an order of attachment before judgment, along with properties within the jurisdiction does not make any difference: nor is O. 21, R. 64 applicable: 17 Cal. 699 (F.B.), Rel. on.; 25 Cal. 179, Ref. (*B. B. Ghose and Panton, JJ.*) AMBIKA RANJAN *v.* MANIKGANJ LOAN OFFICE LTD. **33 C. W. N. 848 = 57 Cal. 67 = A. I. R. 1929 Cal. 818.**

—S. 39—Exception.

———In the case of a mortgage decree, a Court which passed it may notwithstanding the fact that the property is outside its jurisdiction, bring it to sale. (*Venkatasubba Rao and Madhavan Nair, JJ.*) RAJAGOPALA *v.* TIRUPATHIA PILLAI. **49 Mad. 746 = 95 I. C. 12 = A. I. R. 1926 Mad. 421 = 50 M. L. J. 161.**

———Under Section 39 a Court can execute a decree for sale of the mortgaged property, though it is wholly out of its jurisdiction because a mortgage decree is practically a decree of specific performance of the contract between the mortgagor and the mortgagee. (*Das and Ross, JJ.*) SHAIKH ABDUL HADI *v.* MT. KABUTTUNISSA. **80 I. C. 901 = 6 Pat. L T. 71 = A. I. R. 1925 Pat. 139.**

—S. 39—Failure of execution, certifying of.

———*Transfer for execution to another Court—Latter Court certifying failure of execution — Fresh application for execution can be entertained by the same Court.*

S. 41 requires that a Court to which a decree has been sent for execution shall certify to the Court which sent if that it is completely executed the decree or has failed to do so and is unable to do so any further. The section may also require certificates to be sent of the result of each application for execution that is made to the Executing Court, but in any case such certificates have to be sent under the executive orders of the High Court. But the sending of a certificate does not of itself put an end to the jurisdiction of the Court to execute the decree, and the sending of a certificate of the latter class cannot do so at all. 37 Mad. 231, distinguished, 20 All. 129, followed. (*Batten, J. C. and Hallifax, A.J.C.*) INDRA RAJ SINGH *v.* MURADKHAN. **68 I. C. 657 = 18 N. L. R. 178 = A. I. R. 1922 Nag. 210.**

—S. 39—Jurisdiction after order of transfer.

———An application for a certificate is a step-in-aid of execution and it is a step which is always necessary where the decree-holder desires to obtain execution against property situate outside the territorial limits of the jurisdiction of the Court which made the decree. Where the decree-holder having obtained his order for some reason or other best known to himself, either because he was not satisfied as to the existence of the property or for some other reason, never carried out the order which he had obtained and the decree was never in fact sent, the court passing the decree does not lose jurisdiction. (*Miller, C. J. and Jwala Prasad, J.*) RAMACHANDRA MARWARI *v.* KRISHNA LAL MARWARI. **65 I.C. 332 = 3 Pat. L. T. 298 = 1 Pat. 328 = A. I. R. 1922 Pat. 301.**

—S. 39—Jurisdiction of original Court after transfer.

———Even where a Court transfers a decree for payment of money, on application of the decree-holder to another Court by grant of a certificate of non-satisfaction and the property is attached by transferee Court, the former Court does not lose jurisdiction to execute the decree and is competent to proceed with the execution of the decree. But where the value of the property is greater than the amount of decree and decree-holder is likely to realize the whole amount of its sale, a further order for arrest of the judgment-debtor is not justified : A.I.R. 1923 Pat. 384; 37 Mad. 231; A.I.R 1925 Oudh 428; A.I.R. 1925 Oudh 492; A.I.R. 1925 Lah. 233; A.I.R. 1926 Lah. 113 and A.I.R. 1926 Bom. 271, Dist.; A.I.R. 1928 Nag. 29; 14 M.I.A. 529 (P.C.) and A.I.R. 1928 Mad. 493, Rel. on and A.I.R. 1916 P.C. 16, Expl and Dist. (*Jai Lal, J.*) HANUMAN BAKSH *v.* CHUNNA MAL. **121 I. C. 68 = A. I. R. 1930 Lah. 199.**

—S. 39—Limitation.

———Application under S. 39, Civil P.C., is governed by S. 3 (1), Lim. Act and Court in considering such application must go into the question of limitation. (*Madhavan Nair and Jackson, JJ.*) SUBRAMANIAN CHETTIAR *v.* RAMANADHAN CHETTIAR. **29 M. L. W. 246 = 1929 M.W.N. 36 = 116 I.C. 113 = A.I.R. 1929 Mad. 199.**

—S. 39—Objection to transfer.

———*Decree—Transfer of—Objection*—Res judicata.

Where the decree-holder applies for the transfer of a decree to another Court for execution and the judgment-debtor raises objections as regards the executability of the decree the proper Court to decide such objections is the Court to which transfers the decree and not the Court to which the decree is transferred ; because if the judgment-debtor after receiving notice to show cause why the decree should not be transferred, does not raise all his objections to execution, he will be precluded from doing so in a later execution petition on the ground of constructive *res judicata*. A.I.R. 1924 Mad. 673; A. I. R. 1926 Mad. 411; (1928) M.W.N. 152, Rel. on.; 8 Cal. 51 and A.I.R. 1921 P.C. 23, Ref.; 43 Cal. 903 and A.I.R. 1927 P.C. 73, Dist. (*Madhavan Nair and Jackson, JJ.*) SUBRAMANIAN CHETTIAR. *v.* RAMANATHAN CHETTIAR. **29 M.L.W. 246 = 1929 M. W. N. 36 = 116 I. C. 113 = A. I. R. 1929 Mad. 199.**

———Execution—Objections should be taken in the Court passing the decree and not in transferee Court for execution. (*Prideaux, A.J.C.*) RAMPRASAD *v.* HARIDAS. **97 I. C. 768 = A. I. R. 1927 Nag. 31.**

—S. 39—Retransfer, application for.

———Where a decree has been transferred for execution to another Court, an application to transfer the same decree for execution to a third Court, or to execute the decree itself, can be made to the Court passing the decree: 13 C. P. L. R. 169, Foll. (*MacNair, A.J.C.*) GOVIND *v.* LAXMAN. **10 N. L. J. 24 = A.I.R. 1927 Nag. 367**

—S. 39—Robkar—Construction of.

———In a suit decree was given on 13th June 1913. The execution proceedings began on 13th January 1925, *i.e.*, within 12 years under S. 48, C.P.Code. During these proceedings the decree-holder applied for the transfer of the execution under S. 39. The robkar in sanctioning the transfer application ran: "In my opinion the issue regarding the limitation period does not arise in such a transfer and the proceedings will be the same. The fact that this decree will have to be transmitted to the other Court is an intermediate proceeding since the property is situate outside the jurisdiction of the Court.

Held, that the transmitting Court did intend to decide that no objection as to limitation could possibly arise by reason of the transfer and, by holding that the proceedings before the transferee Court were only intermediate proceedings, it practically did intend to order execution as distinct from mere transfer. (*Dalip Singh, J.*) DEVI DAS *v.* MUHAMMAD AKBAR KHAN.

11 L. L. J. 501 = A.I.R. 1930 Lah. 118.

— S. 39—Scope of transfer.

———The Court passing a decree can send it for execution to another Court within the jurisdiction of which the judgment-debtor resides, irrespective of the mode in which the decree is sought to be executed and it would be necessary for the decree-holder to satisfy the Court that the judgment-debtor has not sufficient property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy the decree. (*B. B. Ghose and Panton, JJ.*) DWARKA NATH *v.* IMPERIAL BANK OF INDIA.

33 C.W.N. 620 = 56 Cal. 1176 = A.I.R. 1929 Cal. 529.

—S. 39—Second transfer when invalid.

———Once a decree is transferred under S. 39 the Court which passed the decree ceases to have jurisdiction till it receives a certificate under S. 41 and therefore a second transfer of the case by the Court passing the decree to a different Court for execution is without jurisdiction. A.I.R. 1925 A. 276 affirmed; A.I.R. 1923 P. 224, Dist.; 1923 P. 384, Ref. (*Dalal and Wazir Hasan, A. J. Cs.*) KUNWAR JANG BAHADUR *v.* LALU BENI MADHO.

89 I.C. 99 = 12 O.L.J. 287 = 2 O.W.N. 313 = 29 O.C. 84 = A.I.R. 1925 Oudh 428.

—S. 39—Simultaneous execution.

———In execution proceedings more than one Court can have jurisdiction at a time in regard to a darkhast whatever the case might be in regard to a suit. A decree may be executed in more than one Court simultaneously. 14 M.I.A. 529 and 8 Cal. 687, Foll. (*Madgavkar, J.*) FATECHAND RAMPRATAP *v.* JITWAL RUPCHAND. **53 Bom. 844 = 31 Bom.L.R. 1105 = A. I. R. 1929 Bom. 418.**

———There is nothing in the present Code, any more than there was in the Code of 1859 which prohibits the sending of a decree for execution to two Courts at the same time: A.I.R. 1926 P.C. 16, Expl.; 14 M.I.A. 529 (P.C.), Foll. (*Heald and Cunliffe, JJ.*) K. K. DEB *v.* N. L. CHOWDHARY. **5 Rang. 397 = 104 I.C. 133 = A.I.R. 1927 Rang. 258 (2).**

—S. 39—Order of transfer after objection—Ministerial.

———Order for transfer of decree after hearing judgment-debtor's objections, is not ministerial. (*Madhavan Nair and Jackson, JJ.*) SUBRAMANIAN CHETTIAR *v.* RAMANADHAN CHETTIAR.

29 M. L. W. 246 = 1929 M. W. N. 36 = 116 I. C. 113 = A. I. R. 1929 Mad. 199.

—S. 39—Transfer, after presenting execution application.

———*Second application to the Court to which decree has been transferred for execution is not necessary.*

O. 21, R. 6 read with S. 39, C.P. Code makes it quite clear that where there has been no application for the execution of the decree in the Court which passed the decree, the decree-holder is bound to make an application for execution in the Court to which the decree has been transferred; but there is nothing in the law which compels the decree-holder to make a second application for the execution of the decree in the Court to which the decree has been transferred if he has already made an application in the Court which passed the decree. 22 C. 921 and 16 C. 744 Ref. (*Mullick and Foster, JJ.*) K. B. DUTT *v.* TARAPRASANNA ROY CHOWDHURY.

74 I. C. 753 = 2 Pat 909 = 5 P. L. T. 11 = 1923 P. H. C. C. 230 = A. I. R. 1924 Pat. 120.

—S. 39—Transfer application, when in order.

———An application for the transfer of a decree was made, to the District Court of *A* but the judgment-debtors were resident in district *B*. The District Judge of *A* had jurisdiction over both the administrative districts *A* and *B*.

Held: The application could not be said to be not in accordance with law. (*Newbould and Suhrawardy, JJ.*) JUHARLAL SADHU KHAN *v.* CHANDRA KANTA.

A. I. R. 1928 Cal. 265.

—S. 39—Transfer *per se* is not execution.

———The sending of the decree for execution to another Court is not by itself an execution of the decree, though an application for such a transmission may amount to taking step-in-aid of such execution. (*Sulaiman and Sen, JJ.*) ATHERTON & CO. *v.* HABIB BAKSH. **115 I. C. 865 = 1929 A. L. J. 553 = A. I. R. 1929 All. 390.**

—S. 39—Transfer of award.

———A Court which has the power to execute an award under R. 34 framed under S. 43, Bombay Co-operative Credit Societies Act has the power to transfer it for execution to another Court. (*Macleod, C. J. and Shah, J.*) KRISHNAJI SHRIDHAR BARDE *v.* MAHADEO SAKHARAM PATIL. **64 I. C. 337 = 46 Bom. 128 = 23 Bom. L. R. 909 = A. I. R. 1922 Bom. 377 (2).**

—S. 39—Transfer of Small Cause decree to Munsif—Effect of.

———Small Cause decree transferred to Munsif's Court—Order in execution appealable as if the decree is passed by Munsif. (*Dalal, J.*) MT. MENDHA KUNWAR *v.* GANGA SARAN SAHU. **103 I. C. 344 = A. I. R. 1927 All. 740.**

—S. 39—Transfer to Agent's Court.

———When the decree is transmitted to the Agent's Court for execution, if nothing more is said, it is presumably intended that it should be executed against those properties over which the Agent's Court has jurisdiction. It would not be reasonable to presume that the Court which passed the decree intended the unusual course to be taken of the decree being executed against properties situated within the jurisdiction of the transmitting Court, for, as regards such properties, the natural course would be that the Court which passed the decree should execute its own decree. (*Spencer and Devadoss, JJ.*) VIKRAM DEV *v.* LAKSHMINARASIMHA GARU. **76 I. C. 269 = 18 M. L. W. 747 = A. I. R. 1924 Mad. 144.**

—S. 39—Transfer when disallowed.

———*Decree cannot be transferred in Court having no pecuniary jurisdiction over the value of the suit.*

If a Court has no pecuniary jurisdiction to entertain and try an original suit it is incompetent to execute the decree in that suit. The suit therefore cannot be transferred to it for execution under S. 39 of the C. P. Code, S. 39, Clause (2) of the new Code which modifies

C. P. CODE, (1908), S. 39—Transfer when sufficient property within Jurisdiction.

S. 223 of the old Code requires that when the Court sends a decree *suo motu* to another Subordinate Court, the latter must be a Court " of competent jurisdiction." The competence cannot be determined irrespective of its pecuniary jurisdiction. (*Jwala Prasad and Bucknill, JJ.*) AMRIT LAL *v.* MURLIDHAR. **67 I. C. 538 = 3 Pat. L. T. 422 = 1922 P. H. C. C. 229 = 1 Pat. 651 = A. I. R. 1922 Pat. 188.**

—S. 39—Transfer when sufficient property within jurisdiction.

———*Permissibility.*

The jurisdiction of a Court transferring decree for execution to another Court is not confined to cases in which there is no property within the jurisdiction of the Court which passed the decree sufficient to satisfy decree. Under cl. (d) of sub-S. (1) of S. 39 of the C.P. Code the Court can make the order of transfer if it "considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court." (*Wazir Hasan and Kendall, A. J. Cs.*) MUHAMMAD SADIQ ALI KHAN *v.* SHARF JAHAN BEGAM. **85 I. C. 411 = 28 O. C. 199 = A. I. R. 1925 Oudh 481.**

—S. 39—Transmission, a Ministerial Act.

———The order of transmission of a decree by one Court to another can be made *ex parte* as it is a Ministerial Act. A.I.R. 1927 P. C. 73, Foll. (*Rutledge, C.J. and Carr, J.*) NACHIMAI ACHI *v.* S.N. SUBRAMANIAM CHETTY. **5 Rang. 775 = 6 Bur. L. J. 225 = 106 I. C. 857 = A. I. R. 1928 Rang. 40.**

—S. 39—When inapplicable.

———Section does not apply to a decree under the Presidency Small Cause Courts Act. (*Newbould and Suhrawardy, JJ.*) JAHARLAL SADHUKHAN *v.* CHANDRA KANTA PAL. **A. I. R. 1928 Cal. 265.**

—S. 40—Jurisdiction to transferee Court.

———If a decree pending in the "transferee" Court has been completely withdrawn from that Court, the transferee Court has no further jurisdiction. A. I. R. 1926 Pat. 274 ; A.I.R. 1925 All. 179, 168 P. R. 1888; 20 All. 129 and A.I.R. 1922 Nag. 210, Ref. (*Johnstone, J.*) SALIG RAM *v.* ISHAR DAS. **A. I. R. 1930 Lah. 508.**

—S. 41—Certificate—Necessity of.

———Certification is a very important step when a decree has once been transferred to another Court, for its consequence is that the latter Court ceases to have jurisdiction to execute the decree. There must be a formal certification by the Court to which the decree has been transferred for execution, to the Court which passed the decree, and the fact of certification should not be left open to inferences to be drawn from entries in register of suit of the Court transferring the decree. (*Macleod, C. J. and Shah, J.*) SHIVLINGAPPA MALLAPPA SADALGI *v.* SHIDMALLAPPA NURANDAPPA KAPALI. **26 Bom. L. R. 345 = 80 I. C. 752 = A. I. R. 1924 Bom. 359.**

—S. 41—Certificate respecting small cause decrees.

———*Executed on original side.*

Macleod, C. J.—No particular method is prescribed for certifying the fact of execution and all that the section means is that the Court to which the decree is sent for execution should inform the Court which passed the decree what has happened in execution.

Crump, J.—When the Subordinate Judge is invested with Small Cause Court powers, and where in the exercise of the latter jurisdiction he makes a decree and the decree comes before him for execution in the exercise of his ordinary jurisdiction then, in such a case it is impossible to apply S. 41 strictly, because that section

C. P. CODE, (1908), S. 41—Jurisdiction of transferee Court.

clearly has in contemplation different Courts and not different branches of one Court presided over by the same individual. All that is necessary is that there should be sufficient compliance with the section such as an entry as to the result of the execution proceedings made in the Small Cause Suit Register. (*Macleod, C.J. and Crump, J.*) MANIRAM PEERCHAND *v.* VITHU RAMJI PATIL. **76 I. C. 549 = A. I. R. 1923 Bom. 371.**

—S. 41—Jurisdiction after certificate.

———Even after issue of certificate under S. 41, transferee Court has jurisdiction to decide objections relating to anything done in the course of its proceedings. A.I.R. 1925 All. 179. (*Gokaran Nath-Misra and Pullan, JJ.*) MT. JILAI *v.* ABDUL RAHMAN. **5 O. W. N. 1053 = 115 I. C. 444 = 4 Luck. 209 = A. I. R. 1929 Oudh 76.**

———The mere striking off of an application for execution does not terminate the jurisdiction of the Court to which the decree is sent for execution to execute the decree ; but the jurisdiction ceases as soon as the Court takes action under S. 41 and certifies to the Court which passed the decree the circumstances attending the failure on the part of the transferee Court to execute the decree. (*Das and Ross, JJ.*) MUHAMMAD IBRAHIM *v.* CHHATTOO LAL. **5 Pat. 398 = 7 P.L. T. 461 = 1926 P. H. C. 86 = 94 I. C. 36 = A. I. R. 1926 Pat. 274.**

———After issue of certificate whether rightly or wrongly, the Court to whom the decree is transferred cannot deal with execution matters. (*Dalal, J.*) SHIAM LAL *v.* KOERPAL. **22 A. L. J. 1039 = 6 L. R. A. Civ. 28 = 85 I. C. 390 = A. I. R. 1925 All. 179.**

———*Transfer for execution to another Court—Latter Court certifying failure of execution—Fresh application for execution can be entertained by the same Court.*

S. 41 requires that a Court to which a decree has been sent for execution shall certify to the Court which sent it that it has completely executed the decree or has failed to do so and is unable to do so any further. The section may also require certificates to be sent of the result of each application for execution that is made to the Executing Court, but in any case such certificates have to be sent under the executive orders of the High Court. But the sending of a certificate does not of itself put an end to the jurisdiction of the Court to execute the decree, and the sending of a certificate of the latter class cannot do so at all. 37 Mad. 231 distinguished. 20 All. 129 followed. (*Batten, J. C. and Hallifax, A. J. C.*) INDRA RAJ SINGH *v.* MURAD KHAN. **68 I. C. 657 = 18 N. L. R. 178 = A. I. R. 1922 Nag. 210.**

—S. 41—Jurisdiction of transferee Court.

———The Court to which a decree has been transferred for execution is not divested of jurisdiction until it sends the certificate under S. 41 to the Court which passed the decree, and until such certificate is sent the Court which passed the decree has no jurisdiction to entertain application to certify payment under the decree so as to save limitation. 39 Mad. 640 (C.P.C.) Foll. (*Dalal, J.*) SYED MOHAMMAD SHAKIR *v.* JUGAL KISHORE. **85 I. C. 455 = 28 O. C. 169 = A. I. R. 1925 Oudh 492.**

———The Court to which a decree is sent for execution retains its jurisdiction to execute the decree until the execution has been withdrawn from it, or until it has fully executed the decree and has certified that fact to the Court which sent the decree, or until it has failed to execute the decree and certified that fact to the Court which forwarded the decree. There should be complete failure such as would result in no benefit to the judgment-creditor for one reason or another, and not merely a partial failure. (*Macleod, C. J. and Crump, J.*) VITTU DANLAGA *v.* GANESH RAMCHANDRA. **74 I. C. 149 = 25 Bom. L. R. 453 = A. I. R. 1923 Bom. 396.**

—S. 41—Madras Civil Rule 161 (a).

———*Validity.*

R. 161 (*a*) is only a rule of detail giving further guidance to Court in the carrying out of the provisions of S. 41, C. P. Code, and the two provisions are not inconsistent with each other, nor is R. 161 (*a*) *ultra vires.* All the rules of the Rules of Practice are supplemental to the C.P. Code R. 161 (*a*) is a rule within the power of the High Court, the object being to compel decree-holders to be prompt in filing execution petitions in Courts to which the decrees are transferred : 20 All. 129 and A. I. R. 1923 Bom. 396, Dist. (*Ramesam, J.*) MIR MD. NOORULLA *v.* HASARATH KIBULAI. **98 I. C. 455 = A. I. R. 1926 Mad. 1209 = 51 M. L. J. 554.**

—S. 41—Powers of Original Court.

———The Court which makes an order transferring its decree for execution to another Court, must also have the power to bring the decree back. (*Macleod, C. J. and Coyajee, J.*) LANG *v.* JASVANTLAL. **50 Bom. 439 = 28 Bom. L. R. 381 = 94 I. C. 146 = A.I.R. 1926 Bom. 271.**

—S. 42—Applicability.

———S. 42 is not applicable to proceedings in execution of a decree of the Madras Small Cause Court transferred to a Court in mofussal ; but it only applies to execution proceedings in the Madras Small Cause Court, whether the decree sought to be executed was passed by the Madras Small Cause Court or transferred to that Court from a Court in the mofussal. (*Devadoss and Wallace, JJ.*) PONNAPPA REDDI *v.* THIRUVENGADA PILLAI & CO. **90 I. C. 509 = 22 M. L. W. 455 = 1925 M. W. N. 713 = A. I. R. 1925 Mad. 1179 (a) = 49 M. L. J. 104.**

—S 42—Application for second transfer.

Per *Shah, J*:—It is possible to read S. 42 in a comprehensive manner and to hold on the words of that section that even an application for the transfer of the decree again to another Court must be made in the first instance to the Court to which the decree has already been transferred. I should have been glad to see my way, if possible, to hold that another application for a transfer to third Court might be made to the Court which had originally passed the decree. At any rate it may be said in favour of the view that there is no express provision prohibiting such a procedure. (*Macleod, C.J. and Shah, J.*) RANGASWAMI CHETTI *v.* SHESHAPPA MANJAPPA SHIMPI. **68 I. C. 506 = 24 Bom. L. R. 798 = 47 Bom. 56 = A. I. R. 1922 Bom. 359.**

—S. 42—Execution of Small Cause Courts decrees.

———An order in execution by a Small Causes Court is final. (3 Pat. L. W. 146, and 3 L. W. 34 Ref.) When, however, the decree has been transferred to the ordinary Court to be executed as if it were a decree made by that Court, the orders, made in execution are appealable in the same way as orders made in execution of decrees passed by that Court. 31 All. 1 Foll. (*Mookerjee and Panton, JJ.*) JAMINIBALA DEBI *v.* KARALI PRASAD MUKHERJEE. **67 I. C. 6 = 34 C. L. J. 477 = A. I. R. 1921 Cal. 242.**

—S. 42—Jurisdiction after transfer.

———*Vesting of powers in Court to which case is transferred does not divest parent Court of its powers of retransferring a case—Application for second transfer in parent Court.*

The fact that in S. 42 the transferee Court is given the same powers in executing such decree as vested from the start in the Court which passed the decree, does not divest the parent Court of the jurisdiction which it alone enjoys of making an order of transfer. An application, therefore, for the issue of a certificate to a Second Court lies to the Court which passed the decree, and once a certificate is given by the transferee Court the Original Court is competent to re-transfer to the same transferee Court on proper application being made. If at the time of application the certificate of non-satisfaction had not been granted by the transferee Court the defect is cured by the certificate being received subsequently. 39 Mad. 640, Dist. A. I. R. 1922 Bom. 359, Diss. 14 M. I. A. 529, Foll. (*Shadi Lal, C. J. and Harrison, J.*) HIRA LAL *v.* SHERUMAL. **89 I. C. 958 = A. I. R. 1926 Lah. 113.**

—S. 42—Powers of executing Court.

———The executing Court would have power to determine the question under O. 21, R. 50 (2) whether a person is a partner in a firm or not : A. I. R. 1921 All. 199, Foll. (*Bhide, J.*) E. D. SASSOON & CO. LTD. *v.* SHIVJI RAM DEVI DAS. **115 I. C. 536 = A. I. R. 1929 Lah. 228.**

———*Attachment.*

When a decree is transferred to a Court other than the Court which passed the decree, for execution the Court to which it is transferred has the power of attachment under O. 21, R. 48 (1). (*Wazir Hasan and Gokaran Nath Misra, JJ.*) LAL BAHADUR *v.* BENI MADHO. **1 Luck. 46 = 6 O. W. N. 1144 = 13 O. L. J. 174 = 91 I. C. 1043 = A. I. R. 1927 Oudh 112.**

———*Court to which decree is transferred for execution is bound to stay execution when acquainted with the fact that decree is no longer in existence.*

Although the Court to which a decree is transferred for execution has no power to entertain any objection regarding the legality or propriety of the order directing execution or the right of the person shown in the order as the person entitled to execute the decree, yet it is the duty of the executing Court, on being acquainted with facts showing that the decree is no longer in existence, being superseded by another decree of the appellate Court, to refuse to allow the sale to proceed. The effect of the appellate Court's decree on appeal is to cancel the trial Court's decree, and any sale under the decree of the lower Court is null and void and must be set aside : A. I.R. 1926 P.C. 93, Rel. on. (*Rutledge, C.J and Brown, J.*) S. M. HASHIM *v.* J. A. MARLIN. **4 Rang. 562 = 100 I. C. 285 = 5 Bur. L. J. 239 = A. I. R. 1927 Rang. 104.**

———A Court to which a decree is transferred for execution cannot execute it in absence of regular application therefore under O. 21, Rr. 10 and 11. (*Kinkhede, A. J. C.*) SULTAN ALI *v.* BALAJI. **80 I.C. 59 = A. I. R. 1924 Nag. 413.**

———By S. 42 the Court to which a decree or order is transferred for execution is for the purpose of O. 21, R. 50 (2) the "Court which passed the decree," and is competent to determine the question whether a certain person is a member of a firm. 20 C. L. J. 129, Ref. (*Piggott and Walsh, JJ.*) SITAL PRASAD *v.* CLEMENTS ROBSON & CO. **61 I. C. 401 = 43 All. 394 = 19 A. L. J. 187 = A. I. R. 1921 All. 199 (2).**

—S.42—Powers of execution Court—What are not.

———*Revenue Court in execution of an ejectment decree cannot put heirs of decree-holders in possession.*

C. P. CODE, (1908), S. 42--Powers of execution Court—What are not.

Under Rule 16 of Order 21 the heirs of a deceased decree-holder may apply for execution to the Court that passed the decree, and under S.42 they can do so equally to any Court to which that decree has been transferred for execution. It would seem also that the right to apply for execution in these circumstances includes the right to carry on an execution already initiated by the deceased decree-holder. But both these things can be done only in a Civil Court. The Tahsildar as a Revenue Officer has certain powers in the execution of a decree by ejectment, but he cannot execute such a decree in favour of any one but the person named in it. When he is ordered to give possession of a holding to a certain person who is then alive, he has no more power to give possession to anybody else whom he considers to be the heir of that person, than a Mazkuri would have in the same circumstances. (*Hallifax, A. J. C.*) MT. KRISHNA BAI *v.* DEBISING. **71 I. C. 409 = A. I. R. 1923 Nag. 195.**

--S. 42—Propriety of order of execution.

———A Court executing a transfer decree cannot entertain any objection regarding the legality or propriety of the order directing execution. 7 All. 330; 21 Bom. 456, 5 Cal. 736 and 156 P. L. R. 1905. Rel, on. ; A. I. R. 1925 Pat. 807 and 1 Pat L. W. 582, Dist. (*Johnstone, J.*) PAIRA MAL *v.* MEHRCHAND.
123 I. C. 531 = A. I. R. 1930 Lah. 143.

—S. 42—Questions under S. 47—Beyond purview.

———The enactment of S. 42 is clearly intended to be of general application and to remove all questions arising out of the decree, such as those dealt with by S. 47 of the Code and the like, from the cognisance of the court which made the transfer. 43 All. 394, Foll. (*Mukerji and Daniels, JJ.*) SANWAL DAS *v.* COLLECTOR OF ETAH. **83 I. C. 848 = 46 All. 560 = 22 A. L. J. 439 = 5 L. R. A. (Civ.) 380 = A. I. R. 1924 All. 700.**

—S. 44—Discretion of Court.

———*Courts may refuse execution—Discretion to refuse is not limited to Ss. 13 and 14, C. P. Code.*

The expression " may be executed" in S. 44 gives a discretion to the Court, to which application is made for executing a decree, to refuse to execute it, though the discretion should not be capriciously exercised. That discretion is not with special reference to Ss. 13 and 14. Cases may arise where in the exercise of proper discretion, Courts of law in British India may properly refuse execution of such decrees even apart from the exceptions enumerated in S. 13. However, in practice, no case may arise where the grounds on which the Court may consider it proper to refuse execution in the exercise of its discretion, are not included in one or the other of the very general exceptions engrafted in S. 13. (*Srinivasa Aiyangar, J.*) KRISHNASWAMY CHETTY *v.* MADHAPPA CHETTIAR. **86 I. C. 492 = 21 M. L. W. 330 = A. I. R. 1925 Mad. 788 (d).**

-S. 44—Foreign judgment—Powers of executing Court.

———The provisions of S. 13 of the C. P. Code apply to decrees that are transferred to British Courts for execution under the provisions of S. 44. It is therefore open to the Court to which a decree of a foreign Court is transferred for execution to go into the question whether the decree is passed without jurisdiction 39 Mad. 24 and 40 Bom. 551, Foll. (*Suhrawardy and Cuming, JJ.*) PANCHKARI MAJUMDAR *v.* GIRIDHARIMAL MOHESRI. **89 I. C. 347 = 98 I. C. 740 = 30 C. W. N. 785 = 41 C. L. J. 508 = A. I. R. 1925 Cal. 955.**

—S. 44—Interpretation.

———The words "may be executed in British India as if they had been passed by the Courts in British India" refer only to the mode of execution. They do not mean that such decrees should for all purposes whatsoever be placed in the same position as decrees of British Indian Courts. (*Srinivasa Aiyangar, J.*) KRISHNASWAMY CHETTY *v.* MADHAPPA CHETTIAR. **86 I. C. 492 = 21 M. L. W. 330 = A. I. R. 1925 Mad. 788.**

—S. 44—Notice—Necessity.

———When foreign decrees are sought to be executed in British Indian Courts, as an invariable rule notice ought to be issued by the executing Court to the judgment-debtor, to appear and state his objections if any, and execution should be ordered, if deemed proper only thereafter. (*Srinivasa Aiyangar, J.*) KRISHNASWAMY CHETTY *v.* MADHAPPA CHETTIAR. **86 I. C. 492 = 21 M. L W. 330 = A. I. R. 1925 Mad. 788.**

—S. 44—Objection by judgment debtor.

———*Judgment-debtor can object to execution on the ground that the decree is not conclusive.*

Ss. 13 and 44 should be read together, but it ought not to be forgotten that S. 13 merely lays down a rule of *res judicata* and has nothing to do whatever, with the manner in which the rule of *res judicata* should be enforced. Further, S. 13 merely codifies the rules of international law, with regard to foreign judgments. Unless, therefore, under its provisions, a decree that is produced for execution is conclusive, as to the matter directly thereby adjudicated, it cannot and ought not to be executed. The judgment-debtor in such cases, is permitted by the very provisions of S. 13 to show how or why it is not conclusive, by showing that the case falls under one of the exceptions enumerated. (*Srinivasa Aiyangar, J.*) KRISHNASWAMY CHETTY *v.* MADHAPPA CHETTIAR. **86 I. C. 492 = 21 M. L. W. 330 = A. I. R. 1925 Mad. 788.**

—S. 44—Objection to jurisdiction.

———*Execution of foreign judgments—S. 21 does not apply.*

S. 21 cannot be construed, as either legislating for foreign tribunals or codifying any rules of international law. The section has no application to cases of foreign judgments sought, under the provisions of S. 44, C. P. Code, to be executed in British Indian Court. (*Srinivasa Aiyangar, J.*) B. N. KRISHNASWAMY CHETTY *v.* MADHAPPA CHETTIAR- **86 I. C. 492 = 21 M. L. W. 330 = A. I. R. 1925 Mad. 788.**

—S. 45—Attachment before judgment.

———An order of attachment before judgment issued. by British Indian Court against the partnership property lying in Dutch territory is indubitably inconsistent with the supremacy of the Dutch Government and the mandate issued to the British Consul therein cannot be maintained. (*Wild, J.C. and Rupchand Bilaram, A. J. C.*) NARSOMAL JIWANDAS *v.* PESUMAL. **23 S. L. R. 205 = 114 I. C. 98 = A. I. R. 1929 Sind 45.**

--S. 45—Interpretation.

———The Courts contemplated by S. 45 are Courts in the Native Indian States in alliance with the British Government. (*Wild, J. C. and Rupchand Bilaram, A. J. C.*) NARSOMAL JIWANDAS *v* PESUMAL. **23 S. L R. 205 = 114 I. C. 98 = A. I. R 1929 Sind 45.**

—S. 46- Application under section—Nature of.

———An application for an attachment under S. 46 cannot be regarded as an application for execution. (*Greaves and Cuming, JJ.*) KASIBAR DE *v.* ASWINI KUMAR PAL. **90 I. C. 527 = A.I.R. 1926 Cal. 249.**

C. P. CODE, (1908).

—S. 46—Concurrent execution—Permissibility.

———Indeed in principle there seems to be no difference between a concurrent execution after transfer in another Court and a concurrent execution in the Court in which the decree was passed. That the present Code does not view with disfavour concurrent execution is among other sections indicated by S. 46 which is new and relates to precepts. Two applications for attachment of different properties can proceed simultaneously in execution of the same decree. There is no provision of law which prevents the Court from entertaining a fresh application for the execution of the decree by attachment of money in deposit to the credit of the judgment-debtor in the same Court or in any other Court, when another execution proceeding is going on, in the same Court. (*Mullick and Kulwant Sahay, JJ.*) RAMSUMRAN PRASAD *v.* RAM BAHADUR. **71 I. C. 741 = 2 Pat. 328 = 4 P. L. T. 99 = 1923 P. H. C. C. 61 = A. I. R. 1923 Pat. 224.**

—S. 46—Powers of Court to which precept is issued.

———*Court to which a precept is issued can accept money or security.*

A Court to which a precept is issued derives its authority from that precept and has no power to do anything not authorized thereby, but it must be presumed to have inherent powers to deal with all matters that may incidentally arise in connexion with proceedings for attachment, and so a Court to which a precept is issued for attachment of property should do the same under the same circumstances. It cannot therefore be said that the Court has no jurisdiction to accept money or security. But even if the Court acts without jurisdiction, the judgment-debtor and the surety are both estopped from raising the objection, and cannot be allowed to challange the validity of an arrangement brought about by themselves. (*Zafar Ali, J.*) PURAN MAL *v.* FIRM DINA NATH. **8 L. L. J. 164 = 27 P.L.R. 757 = 94 I. C. 119 = A. I. R. 1926 Lah. 433.**

—S. 46—Precept by Parent Court.

———After the transfer of the decree for execution, the Court which passed it retains jurisdiction for certain purposes out of which S. 46 is one. The object of a precept is to enable a decree-holder to obtain an interim attachment when there is ground to apprehend that he may otherwise be deprived of the fruits of his decree and it can be issued by the parent Court even after the decree is transferred. (*Mukerji and Graham, JJ.*) J. C. GALSTAUN *v.* F. E. DINSHAW. **31 C. W. N. 653 = 102 I. C. 513 = A. I. R. 1927 Cal. 581.**

—S. 46—Precept by transferee Court.

———S. 46 enables a judgment-creditor to apply for a precept to " the Court which passed the decree, " and so a Court to which a decree is transferred for execution is not competent to issue precept. (*Rupchand Bilaram, A. J. C.*) LANGLEY BILLIMORIA & CO. *v.* LAKHMICHAND GOPALDAS. **92 I. C. 621 = A. I. R. 1926 Sind 157.**

—S. 46—Validity of precept.

———The Court to which the precept has been issued cannot vest itself with jurisdiction to question the validity of the precept. The issuing Court makes the order and the Court to which it is sent has only to carry it out. If any variation is to be made, it is the issuing Court which is competent to make it and not the Court to which it is sent. (*Mukerji and Graham, JJ.*) J. C. GALSTAUN *v.* F. E. DINSHAW. **31 C. W. N. 653 = 102 I. C. 513 = A. I. R. 1927 Cal. 581.**

C. P. CODE, (1908), S. 47—Appeal—Compromise decree.

—S. 47.

Appeal.
Applicability.
Bar of Suit.
Compromise decree.
Conditional decree.
Conversion.
Defence to a suit.
Execution sale.
Foreign decree.
Limitation.
Parties and representatives.
Powers of executing Court.
Question relating to execution.
Rateable distribution.
Restitution.
Scope of.

—S. 47—Appeal.

Amendment of Decree.
Award.
Compromise decree.
Conversion.
Extension of time.
Interlocutory Order.
Limitation.
Local Acts.
Objection to attachment.
Order.
Parties and Representatives.
Question relating to execution.
Rateable distribution.
Receiver.
Re-sale.
Sale proclamation.
Scheme.
Second Appeal.
Stay of execution.
Want of notice.

—S. 47—Appeal—Amendment of Decree.

———An executing Court has no power to amend a decree, but when it does pass an order to amend any decree its order comes within the purview of S. 47. (*Dalip Singh, J.*) MIR MAHOMED *v.* SURJAN MAL & CO. **103 I.C. 673 = A. I. R. 1927 Lah. 651.**

—S. 47—Appeal—Award

———*Execution of Order in.*

An award filed under Arbitration Act is enforceable as if it were decree and must be executed in the manner laid down by the C. P. Code. Hence S. 47, C. P. Code, is applicable for the purposes of an appeal. 40 Cal. 21 (P. C.), Expl., 40 All. 89 and 35 Bom. 196, Dist. A. I. R. 1921 Sind 132 and A. I R. 1924 Lah. 544, Rel. on. (*Bhide, J.*) E.D. SASSOON & CO., LTD. *v.* SHIVJI RAMDEVI DAS. **115 I. C. 536 = A. I. R. 1929 Lah. 228.**

———*Execution—Order in.*

For the purposes of Section 47 an award under the Arbitration Act must be considered to be a decree in a suit and the award proceedings must be deemed to be a suit for the purposes of that section. An appeal would therefore lie against an order in execution of such award although that execution was of an award and not of a decree in suit. (*Kennedy, J. C. and Madgaonkar, A. J. C.*) DONALD GRAHAM & CO. *v.* KEWALRAM. **79 I. C. 477 = 16 S. L. R. 245 = A. I. R. 1921 Sind 132.**

—S. 47—Appeal—Compromise decree.

———Parties to a suit for accounts entered into a compromise and a preliminary decree was passed as to past accounts and the petition of compromise was attached to it, but no mention whatsoever was made of one of the clauses in compromise relating to the sharing of the profits of a specified contract, as the compromise in para. 3 expressly provided that this matter would be entirely distinct and separate from the rest. When the accounts of this contract were about to be audited, the party entitled to a share in its profits insisted upon its right to be represented at the audit. The other party denied this right, whereupon the former claimed under the terms of the compromise to refer the matter to arbitration, nominated its arbitrator, called upon the other party to nominate its arbitrator and on its failure to do so made an application to the District Judge under S. 8 (2). The learned District Judge decided that a dispute had arisen and that there had been a valid submission to arbitration and directed that the parties were to nominate their arbitrators by a fixed date. In an appeal from that order,

Held, that the question before the Court was not one relating to the execution of any decree and that, therefore S. 47 had no application and no appeal was competent. (*Bradway and Abdul Qadir, JJ.*) BAKSH ILAHI *v.* ABDUL RAHMAN. **71 I. C. 817 = A. I. R. 1924 Lah. 405.**

—S. 47—Appeal—Conversion of.

———*Application into suit--Case between rival assignees of decree converted by Court into suit—Appeal lies—C. P. Code, O. 21, R. 16.*

Where two rival assignees from decree-holder applied for execution of the same decree and the question arose as to the validity of the assignments and the case was converted by Court into a suit under S. 47 (2) and decided,

Held, that the Court acted within its jurisdiction, even supposing that it acted under O. 21, R. 16, an appeal lay from the decision as from one passed in a regular suit. (*Jwala Prasad and Kulwant Sahay, JJ.*) RUN BAHADUR SINGH *v.* BAJRANGE PRASAD. **78 I. C. 495 = 3 Pat. 344 = 1924 P. H. C. C. 193 = A. I. R. 1925 Pat. 16.**

—S. 47—Appeal—Extension of time.

———*Bengal Tenancy Act.*

When a decree is drawn up directing the judgment-debtor to pay the decretal amount within a specified time, the extension of time would not be an order under S. 65 (3), Beng. Ten. Act. It is an order varying the terms of the decree which the Court has no jurisdiction to vary. Where the Court varies the terms of a decree by extending time which he has no jurisdiction to do, there is no appeal from that order but it can only be set right by an application for revision. 26 Cal. 639, Dist. (*B. B. Ghose aud Bose, JJ.*) DALILUDDI *v.* BAKSHI BEPARI. **112 I. C. 124 = A. I. R. 1929 Cal. 140.**

———An order granting or refusing an extension of time for performance in the case of a decree for specific performance is not the determination of a question under S. 47, and as such is not appealable. (*Heald and Mya Bu, JJ.*) KO BA CHIT *v.* KO THAN DAING. **5 Rang. 615 = 6 Bur. L. J. 216 = 105 I. C. 467 = A. I. R. 1927 Rang. 311.**

—S. 47—Appeal—Interlocutory Order.

———*Mortgage suit—Order reducing decretal amount.*

In the execution proceedings of a mortgage decree for sale, the Court, on an objection being raised, passed an order stating that the mortgage debt had been split up and there ought to be rateable reduction in the decretal amount,

Held, that as the objection was not disposed of conclusively and the Court had still to determine the market value of the different portions of the property and the rateable liability of each item, its order was in the nature of an interlocutory order and so did not amount

to a decree. A. I. R. 1924 All. 808 and A. I. R. 1926 All. 401, Rel. on. (*Sulaiman and King, JJ.*) MOTI CHAND *v.* MAHABIR PRASAD. **A. I. R. 1930 All. 638.**

———*Direction to Collector.*

Where the judgment-debtor does not object to the sale of certain land in execution of a decree against him but the Collector, to whom decree is sent for selling that land returns it thinking that the land in question is not saleable, but the Court decides that the land is saleable and directs the Collector by its order to sell it, the order of the Court is merely a direction to the Collector, and there being no decision between the parties to the suit on any question relating to the execution, discharge or satisfaction of the decree, the order is not appealable. (*Addison, J.*) MAIN SINGH *v.* PARAS DAS. **115 I. C. 75 = A. I. R. 1929 Lah. 391.**

———Order granting mortgagee interest on mortgage money for the time during which sale proceeds of mortgage property are lying in Court, is not appealable but is revisable. (*Heald and Otter, JJ.*) S.A.S. CHETTIAR FIRM *v.* U. MIN DIN.. **118 I. C. 416 = A.I.R. 1929 Rang. 127.**

———*Decree final or preliminary.*

An appeal need not be preferred against every order in execution proceedings. It is open to the party aggrieved to challenge by an appeal against the final order which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings. 36 Cal. 422, Foll. A person obtained a decree for realization of money by sale of certain property of judgment-debtor. He applied for execution but the Court held that the decree was preliminary and could not be executed. He then applied to have the decree made final and at the same time protested that the decree as it stood was capable of execution. The application for final decree was held as time-barred. He preferred an appeal in which he again reiterated his plea that the decree could be executed.

Held, that he could urge the plea though he did not appeal from the order of the executing Court disallowing execution. (*Shadi Lal, C. J. and Broadway, J.*) NATHU MAL *v.* MOHAN SINGH. **100 I. C. 653 = A. I. R. 1927 Lah. 232.**

———Order directing properties to be sold in a particular order is not appealable. I. L. R. 27 Mad. 259 (F.B.) Foll. 18 M. L. W. 311, Dist. (*Krishnan and Waller, JJ.*) L. RAMA NAIDU *v.* L. RAMAKRISHNA NAIDU. **78 I.C. 829 = 19 M. L. W. 235 = 33 M. L. T. 275 = 1924 M. W. N. 220 = A. I. R. 1924 Mad. 527 = 46 M. L. J. 192.**

———*Sale postponed.*

An order refusing to postpone a sale or alter the terms of the sale proclamation either by raising the upset price or by dividing the property into lots, is only an interlocutory order. (*Schwabe, C. J. and Coleridge, J.*) KAVERIBAI AMMAL *v.* B. MEHTA. **75 I. C. 901 = 18 M. L. W. 615 = 1923 M. W. N. 894 = A. I. R. 1924 Mad. 234 = 46 M. L. J. 71.**

———*Substitution of names.*

Where the order of the Court below merely directs that the defendants are liable to render accounts as the legal representatives of the deceased judgment-debtor but the amount for which they are liable has not been determined, the question which has been actually determined by the Court below is merely a question relating to the substitution of the names of the defendants in the place of the deceased, and their liability to render the accounts directed by the decree as his legal representatives. It is not a question relating to the execution, satisfaction or discharge of a decree. S. 47 therefore has no application. It is at best an interlocutory order and no appeal is maintainable but the defendants can raise the plea of their non-liability in the appeal from the final decree. (*Lindsay and Kanhaiya Lal, JJ.*) RUDRA PRASAD *v.* SARDA MAHESH.

47 All. 543 = 87 I. C. 322 = 23 A. L. J. 458 = 6 L. R. A. Civ. 359 = A. I. R. 1925 All. 588.

—S. 47—Appeal—Limitation.

———The question whether or not an execution was time-barred is a question within S. 47 arising between the parties and relating to the execution of the decree and therefore its decision is a decree as defined in S. 2. (*Dawson Miller, C.J. and Foster, J.*) S. M. LAL CHAUDHURY *v.* NARAYAN PRASAD.

2 Pat. L. R. 222 = 84 I. C. 576 = A. I. R. 1924 Pat. 683.

—S. 47—Appeal—Local Acts.

———*Bengal Tenancy Act, S.* 173.

Where the question is one which is covered by S. 47, C. P. Code, an appeal is allowable from an order passed under S. 173, Bengal Tenancy Act, though no provision for appeal is made in the Act itself. The right to appeal therefore from an order passed under S. 173, Bengal Tenancy Act, depends upon the questions raised and upon the party appealing. 19 C. 683 and 24 C. 707, Dist.; 13 C.L.J. 257, Ref. 19 C. L. J. 81, Foll. (*Suhrawardy and Duval, JJ.*) AZAM KAN *v.* UMEDALI MORAL.

85 I.C. 750 = A. I. R. 1925 Cal. 1223.

———*Deccan Agriculturists' Relief Act, S.* 22.

An order under S. 22 passed in execution of a decree falls under S. 47, C. P. Code. so that an appeal lies from such an order. (*Fawcett J. C. and Raymond, A. J. C.*) CHOITHORAM KALIANDASS *v.* LALBUX.

63 I. C. 310 = 15 S. L. R. 47 = A. I. R. 1921 Sind 29.

———*Estates Land Act, S.* 77.

A petition filed for the execution of a decree given by a revenue Court in a suit filed under S. 77 of the Estates Land Act is appealable and is also open to second appeal as in C. P. Code, S. 47. (*Sundaram Chetty, J.*) RAJA ANKINEEDU PRASAD *v.* RAVI BASAVAYYA.

100 I. C. 678 = A. I. R. 1927 Mad. 440 = 52 M. L. J. 332.

———*Oudh Rent Act.*

Where a Revenue Court executing a decree dismisses the judgment-debtor's objection in default of appearance, no appeal lies either under the Oudh Rent Act or the C. P. Code. (*Dalal, J. C. and Wazir Hasan, A.J.C.*) MOHAMMAD ZAKATULLAH *v.* MT. GULKANDI.

85 I. C. 393 = 28 O. C. 124 = A. I. R. 1925 Oudh 485.

—S. 47—Objection not raised in suit.

———An agriculturist can make a valid mortgage of his house in execution of a decree in which the house may be sold. If the agriculturist fails to raise the point in the suit itself he cannot raise it in the execution. *Contra* :*Ryves. J.* (*Walsh, Ryves and Mukerji. JJ.*) MUBARAK HUSSAN *v.* AHMAD. **84 I.C 749 = 22 A. L. J. 321 = 5 L. R. A. Civ. 201 = 46 All. 489 = A. I. R. 1924 All. 328 (F. B.)**

—S. 47—Appeal—Objection to attachment.

———Where an objection to sale had been brought under S. 60, and the sale was confirmed, the order should be implied to have the effect of determining objections of that character within the meaning of S. 47 and hence is appealable. (*Shadi Lal, C.J. and Hilton, J.*) BAHADUR ALI KHAN *v.* CO-OPERATIVE CREDIT SOCIETY. **120 I. C. 165 = A. I. R. 1929 Lah. 778.**

———Where one of the defendants to the suit objected to the attachment in execution of the decree under O. 21, R. 58,

Held, that the objector being a party to the suit, the proceedings were governed by S. 47, and an appeal lies from the decision of the executing Court. (*Addison, J.*) NABI BAKHSH. *v.* UDHO RAM. **100 I. C. 786 = 28 P. L. R. 121 = A. I. R. 1927 Lah. 895.**

———Order of dismissal of objection by judgment-debtor stating that he has no saleable interest in the property attached is appealable. 8 All. 146 (F. B.), Foll. (*Dalal, J. C. and Wazir Hasan, A.J.C.*) LACHMAN PRASAD *v.* SRIMATI MIRNALINI DEBI.

85 I. C. 997 = 28 O. C. 175 = A. I. R. 1925 Oudh 618.

———A defendant against whom a suit has been dismissed is a party to the suit, within S. 47 and therefore if an objection lodged by such a person to the attachment of certain property in execution of the decree passed in the suit is dismissed, the order dismissing the objection is open to appeal under S. 47 though the objection is wrongly described as one under O. 21, R. 58. (*Moti Sagar, J.*) MT. GAURAN *v.* CHANDU LAL.

75 I. C. 747 = A. I. R. 1924 Lah. 589.

———*By third party.*

Where after a decree had been passed in a bond suit and the assets of the deceased debtor in the hands of judgment-debtor had been attached in execution, the reversioner who had obtained a decree against the judgment-debtor brought an objection which was allowed,

Held, decree-holder's only remedy against successful reversioner who was a third party to this suit and execution proceedings was a suit for declaration and not an appeal. Section 47 did not apply. (*Banerji, J.*) BANSI DHAR *v.* LALA SHYAM LAL.

71 I. C. 1012 = A.I.R. 1923 All. 292.

———Order 21, Rule 58, applies to the objection of a judgment-debtor that the property attached in execution is *wakf* property and, therefore not liable to be attached and sold. Section 47 does not apply. No appeal lies from the order passed by the executing Court in the case. (*Coutts and Das, JJ.*) SHAIKH NAZIR HUSSAIN *v.* MAHOMAD EJAZ HUSSAIN.

67 I. C. 438 = 3 Pat. L. T. 432 = 1 Pat. 637 = A. I R. 1922 Pat. 196.

—S. 47—Appeal—Order.

———Every order passed by execution Court in the course of proceedings under S. 47 does not necessarily amount to a decree so as to be appealable. S. 47 must be read with the definition of 'decree' in S. 2. The mere determination of a question would not be sufficient but that determination must amount to the formal expression of an adjudication which so far as regards the Court expressing it conclusively determining the rights of the parties with regard to the matters in controversy. An order in execution proceedings on a mortgage decree rateably reducing decretal amount is in the nature of an interlocutory order and not a decree. (*Sulaiman and King, JJ.*) MOTICHAND *v.* MAHABIR PRASAD.

A. I. R. 1930 All. 638.

———*Order is appealable.*

A question in execution as to whether the execution can proceed or not is an order under Section 47 and is therefore appealable. (*Coutts and Ross, JJ.*) RAM BHUJHWAN PRASAD SINGH *v.* NATHO RAM.

70 I. C. 483 = 3 Pat. L. T. 146 = A. I. R. 1922 Pat. 59.

———An order allowing one of two assignees of a decree to execute the decree to the exclusion of the other is not appealable. (*Kinkhede, A. J. C.*) RADHABAI *v.* BHIMRAO. **82 I. C. 734 = 21 N. L. R. 34 = A. I. R. 1925 Nag. 186.**

———No appeal lies from an order refusing to restore an application in the Execution Department. (*Sulaiman J.*) LACHMI NARAIN *v.* MT. BRIJ RANI. **80 I.C. 39 = 5 L. R. A. Civ. 573 = A. I. R. 1924 All. 794.**

———Even if a case does not strictly fall under S. 47, the order of the Court would be appealable if it purported to act under that section. (*Spencer and Odgers, JJ.*) B. HANUMANTHA RAO *v.* A. KRISHNAMMA. **70 I. C. 329 = 32 M. L. T. 118 = A. I. R. 1924 Mad. 518.**

———Section 47 must be read with S. 2 and the effect of reading both the sections is not to make every order passed by the execution Court appealable but only such orders appealable as determine the rights of the parties to the execution with regard to all or any of the matters in controversy in suit. (*Sulaiman and Mukerji, JJ.*) MD. ZAKARIA *v.* KISHUN. **48 All. 260 = 92 I. C. 644 = A. I. R. 1928 All. 268.**

———In order to be appealable, an order under S. 47 must be of such a nature as to come within the word "decree" as defined by S. 2 (2). (*Iqbal Ahmed, J.*) ALIMUDDIN *v.* GOBIND PRASAD. **99 I. C. 208 = A. I. R. 1927 All. 208.**

———Order in proceedings under S. 47 is decree only if it determines a question which parties ask court to decide as to their rights or liabilities and not if it decides merely incidental questions of procedure. The duty of the Court to decide any of the questions that may arise does not come into existence till the parties are brought before the Court, or after having been served, they fail to appear. (*Dawson Miller, C. J. and Foster, J.*) SHIVA NARAYAN LAL CHAUDHURY *v.* NARAYAN PRASAD. **84 I. C. 576 = 2 Pat. L. R. 222 = A. I. R. 1924 Pat. 683.**

———Question if execution is time barred is under S. 47 and its decision is "decree" and is appealable. (*Dawson Miller, C J. and Foster, J.*) SHIVA NARAYAN LAL CHAUDHURY *v.* NARAYAN PRASAD. **84 I.C. 576 = 2·Pat. L.R. 222 = A. I. R. 1924 Pat. 683.**

———An order passed in execution cannot be appealable merely because it fulfils the conditions laid down in S. 47. In order to be appealable it must fall within the definition of decree in S. 2 (2). (*Sulaiman, J.*) HIRALAL *v.* TIKAM SINGH. **94 I. C. 1 = A. I. R. 1926 All. 401.**

———*Attachment—Application for.*

In an execution proceeding the property to be attached was not pointed out on behalf of the decree-holder and the execution case was consigned to records for want of prosecution. An application was made to the Court praying that the decree-holder might be given one more opportunity to have the property to be attached pointed out on the spot, but this application was rejected.

Held, that no appeal lay from this order. (*Raza, J.*) NILKANTH *v.* RANA UMA NATH BAKSH SINGH. **5 O. W. N. 529 = 110 I. C. 175 = A. I. R. 1928 Oudh 329.**

———*Appeal from order under, lies only if case comes under S.* 47.

No appeal is provided against an order under O. 21, R. 15 or R. 16. It is only when such orders determine questions arising between parties to the suit or their representatives that they become appealable as decrees passed, under S. 47, C. P. Code. (*Spencer and Odgers, JJ.*) B. HANUMANTHA RAO *v.* A. KRISHNAMMA. **70 I. C. 329 = 32 M. L. T. 118 = A. I. R. 1924 Mad. 518.**

———*Order of arrest.*

The order to have the force of a decree must not only relate to a question which falls within S. 47, but it must also determine the rights of the parties with regard to any matter in controversy between them as regards the decree. Hence an order passed under O. 21, R. 22, for arrest, not being a final order, is not a decree which can be appealed against: 14 C. L. J. 489, Foll. (*Thiruvenkatachariar, J.*) SOMU AYYAR *v.* CHELLIAH PILLAI. **30 M. L. W. 230 = 1929 M. W. N. 74 = 119 I. C. 43 = A. I. R. 1929 Mad. 718.**

———An order issuing a warrant for the arrest of a judgment-debtor in execution of a decree, falls under S. 47 and is appealable as a decree under S. 96 though not under S. 104 (1) (*h*). (*Scott-Smith, J.*) MEHR CHAND *v.* RAM LAL. **73 I. C. 766 = A. I. R. 1924 Lah. 360.**

———An appeal lies against the order of arrest where the judgment-debtor is arrested, on the ground that the arrest is invalid. (*Wallace and Jackson, JJ.*) GOVINDASWAMY ODAYAR *v.* THE UNION BANK, LTD. **84 I. C. 513 = 47 M. L. J. 678 = 1924 M. W. N, 781 = 35 M. L. T. 102 = A. I. R. 1924 Mad. 900.**

———An order committing a judgment-debtor to jail was passed without jurisdiction. But no objection was made to the committal to jail and the question of its legality was not then raised.

Held, that the order was not under S. 47 and therefore, not appealable. (*Pratt, J.*) RAMDAS *v.* KANNAMAL. **7 Rang. 110 = 117 I. C. 245 = A. I. R. 1929 Rang. 161.**

———An appeal is competent from an order that the judgment-debtor is not entitled to the benefit of O. 21 R. 40: 1 Lah. 77, Rel. on. (*Coldstream, J.*) JAIDEV, SINGH *v.* YUSAF ALI. **111 I. C. 707 = A. I. R. 1929 Lah. 141.**

———*Sale proclamation.*

If an order falls within section 47 and is finally decisive, it is a decree and is appealable. For determining whether an order falls within section 47, Subsection (1), we must see whether the order decides a question arising between the parties to the suit in which the decree was passed and relates to the execution of the decree. The test in each case would be whether there had been judicial adjudication binding on the parties in a subsequent proceedings. The determination of a question relating to an application under Order 21, Rule 66 may also be an order passed under section 47. Where objection was taken to a sale proclamation on the ground of misdescription of the boundaries, *Held* that an order passed on the objection is within section 47 and is appealable. (*Pearson and Graham, JJ.*) DEVENDRA NATH BASU *v.* KAILASH CHANDRA KALU. **80 I. C. 861 = 29 C. W. N. 556 = A. I. R. 1925 Cal. 318.**

———*Delivery of possession.*

An order passed on an application made under the provisions of R. 95, O. 21 against a judgment-debtor in favour of the auction-purchaser, who was also a decree-holder, is not an order under S. 47 of the Code and is not appealable: 31 All. 82 (F. B.), 1 P. L. J. 232 (F. B.), A. I. R. 1924 Bom. 429 (F. B.); A. I. R. 1926 Cal. 798 (F.B.), 7 Mad. 255, Cons. (*Stuart, C.J., Wazir Hasan and Gokar Nath Misra, JJ.*) GANGA

C. P. CODE, (1908), S. 47—Appeal—Order.

BAX SINGH *v.* RAJENDRA BAHADUR SINGH.
3 Luck. 182 = 5 O. W. N. 108 = 110 I. C. 83 = A. I. R. 1928 Oudh 199.

———Order rejecting an application under O. 21, R. 95, for delivery of possession, is appealable under S. 47. No suit lies from an order passed under that rule. (*Odgers, J.*) D. B. PACHAIAPPA CHETTI *v.* C. VENKATACHARIAR. **90 I. C. 952 = 51 M. L. J. 106 = 1926 M. W. N. 599 = 1925 M. W. N. 577 = A. I. R. 1925 Mad. 1198.**

———An order for removal of obstruction-passed against the judgment-debtor on an application under O. 21, R. 97, is appealable. (*Spencer and Ramesam, JJ.*) SIVANANJIAH *v.* SITHAY GOUNDAR.
70 I. C. 367 = 41 M. L. J. 490 = 14 M. L. W. 449 = 1921 M. W. N. 510 = A. I. R. 1921 Mad. 627.

———When the decree-holder is the auction purchaser and is resisted by the judgment-debtor an order made under rule 98 is appealable as a decree. (*Mullick and Ross, JJ.*) ASKARAN BAID *v.* RAGHUNATH PRASAD.
88 I. C. 104 = 4 Pat. 726 = 6 P. L. T. 351 = 1925 P. H. C. C. 212 = A. I. R. 1925 Pat. 478.

———An appeal does not lie against an order under O. 21, R. 99 passed on an application under O. 21, R. 97 by the decree-holder auction-purchaser for removing resistance to possession. (Case law referred.) (*Johnstone, J.*) PUNJAB NATIONAL BANK, LTD., DELHI *v.* BIRI MAL. **120 I. C. 593 = A.I.R. 1930 Lah. 363.**

———An appeal lies where an application under O. 21, R. 100 was fought out between persons who were parties to the suit or the representatives of the parties to the suit. 42 Bom. 10, Diss.; 43 Mad. 69 and 39 M. L. J. 603, Foll. (*Sadasiva Ayyar and Coutts Trotter, JJ.*) RUKMANI AMMAL *v.* NARASIMHA IYER.
14 M.L.W. 85 = 63 I.C. 730 = 1921 M.W.N. 487 = A.I.R. 1921 Mad. 612 = 41 M.L.J. 54.

———Orders of removal of obstruction are appealable, if passed under O. 21, R. 98, against the judgment-debtor or an obstructor at his instigation. But the later description does not necessarily apply to a person who merely relies on a title derived from the debtor. Such a person will, if his good faith is established, be maintained in possession under R. 99, unless the transfer to him was *pendente lite*. Further R. 103 does not exclude an appeal, if one is authorised by S. 47. (*Oldfield and Ramesam, JJ.*) MEYAPPA CHETTY *v.* MEYAPPA SERVAI. **1921 M.W.N. 698 = 66 I.C. 722 = A.I.R. 1921 Mad. 559.**

———*Order dismissing application in the nature of one for review.*

Certain decree-holder made an application to the execution Court for setting aside an order dismissing a previous application for execution without stating under what provisions of the law such application was being made. The execution Court dismissed the application holding the same to be an "informal" application. The decree-holder appealed under S. 47, C. P. Code.

Held, that the order appealed against was not an appealable order and hence no appeal could lie. (*Tek-Chand, J.*) LAHORE ELECTRIC SUPPLY CO., LTD., LAHORE *v.* JAGAT RAM. **115 I.C. 862 = A.I.R. 1928 Lah. 811 (2).**

———*Order refusing execution.*

An order of the executing Court refusing to allow the decree-holder to execute the decree against an alleged legal representative or universal donee of the deceased judgment-debtor is of the nature of the decree and is appealable and precludes a separate suit challenging the validity of the order under the express provision of S. 47. (*Raza and Pullan, JJ.*) ABID HUSSAIN *v.* RAM NIDU. **7 O.W.N. 523 = A.I.R. 1930 Oudh 268.**

C. P. CODE, (1908), S. 47—Appeal—Question relating to execution.

—S. 47—Appeal—Parties and Representatives.

———An appeal lies against an order determining whether a party applying for execution is or is not the representative of the decree-holder. 25 Mad. 545, Foll. (*Jackson, J.*) KRISHNAN CHETTY *v.* AVUDAYAMMAL. **98 I.C. 783 = 24 M.L.W. 600.**

———An order passed in execution proceedings that a person is a legal representative is within the jurisdiction of the execution Court and if not appealed against, bars a subsequent suit challenging that order: 2 Cal. 131 (P.C.), Rel. on. (*Phillips, J.*) MUSTHABU *v.* NANI. **92 I.C. 377 = A.I.R. 1926 Mad. 536.**

———Where the Court in execution adjudicates on the question of the right of the applicant to be brought on records as the legal representatives of the deceased judgment-debtor the decision is a decree and a second appeal lies. (*Mukerji and Daniels, JJ.*) KHEM SINGH *v.* RAGHUBIR SINGH. **47 All. 365 = 86 I.C. 1048 = A.I.R. 1925 All. 578.**

———Sub S. (3) of S. 47 of the present Code in express terms includes a question arising between the parties as to whether any person is or is not representative of a party, and in view of S. 2 of the Code the determination of such a question as between the decree-holder or a person claiming to represent the decree-holder and the judgment-debtor amounts to a decree and is appealable as such. 36 All. 423, Ref. to. 20 All. 539, overruled. (*Daniels, J.*) PEARE LAL *v.* JHABBA LAL. **82 I.C. 604 = 5 L.R.A.Civ. 668 = A.I.R. 1925 All. 66.**

———*Third party entrusted with property.*

During the continuance of an attachment in execution, a suit was filed by a person, who had been a defendant in the suit but who had been exempted by the decree, for a declaration that the property did not belong to the judgment-debtor and during this suit the property was entrusted to a third person. On the suit being decreed by the Trial Court, that person sold the property and distributed the proceeds as directed by the decree. The decree was reversed in appeal. Then the person who had been entrusted with the property in question was ordered by the Court executing the decree under which the property was originally attached, to refund the proceeds.

Held, that inasmuch as he was not a party to the execution proceedings no appeal lay from the order,

Held, further that even assuming the person to have been a receiver under O. 40, against whom an order was passed under O. 40, R. 4, no second appeal lay. (*Sulaiman and Mukerji, JJ.*) JWALA PRASAD *v.* SHEIKH CHUTTAN. **6 L.R.A.Civ. 36 = 85 I.C. 161 = A.I.R. 1925 All. 328.**

—S. 47—Appeal—Question relating to execution.

———Where the appellant is a party to the decree under execution and matter relates to the execution, discharge or satisfaction of the decree, the case is one under S. 47 and an appeal is competent. (*Wallace and Madhavan Nair, JJ.*) DAKSHINAMURTHY PILLAI *v.* VEDAMURTHY MUDALIAR. **103 I.C. 311 = A.I.R. 1927 Mad. 842 = 53 M.L.J. 440.**

———*Application for withdrawal of mortgage-money.*

A sub-mortgagee obtained an order for sale of the half share of the mortgagee rights. Prior to this, the mortgagor's representative brought a suit for redemption impleading only the original mortgagee and deposited the amount in Court. The sub-mortgagee applied

C. P. CODE, (1908), S. 47—Appeal—Question relating to execution.

for the substitution of his name as defendant and for withdrawing half the amount due to him. The Sub-Judge allowed the application holding that the sub-mortgagee was entitled to receive the money under S. 134, T. P. Act. On an appeal against this order,

Held, that the application by the sub-mortgagee to the execution Court, praying for withdrawal of money deposited by the mortgagor in the redemption suit against the mortgagee, could be treated as an application for execution of his original decree and that the order passed thereon was appealable. (*Nanavutty and Misra, JJ.*) HASAN BIBI *v.* CHITTO.

113 I.C. 733 = A.I.R. 1929 Oudh 309.

———*Payment by instalments.*

Order passed by the Court, on application made under the provisions of O. 20, R. 11 (2) directing that the decretal amount should be paid by instalments, is appealable being one under S. 47. A. I. R. 1926 Rang. 192, Rel on. (*Brown, J.*) U SHWE YONE *v.* MA YHAL MA. **119 I C. 751 = A.I.R. 1929 Rang. 191.**

———*Executability of decree.*

Order of a Judge on original side refusing to decide on the question of executability of decree on the ground that the questions raised were questions which ought to be decided by the executing Court and not the transmitting Court is appealable. (*Rutledge, C. J. and Carr, J.*) NACHIMAI ACHI *v.* S. N. SUBRAMANIAN CHETTY. **5 Rang. 775 = 6 Bur. L.J. 225 = 106 I.C. 857 = A.I.R. 1928 Rang. 40.**

———*Sale set aside.*

Where the executing Court passed an order in spite of the fact that the sale had been confirmed, setting aside the confirmation of the sale on the ground that the balance of the auction-money had not been paid within 15 days and remitted to the tribunal constituted under the Sikh Gurdwaras Act, an issue as to whether the property under attachment belonged to the Gurdwara,

Held, that no appeal lay as it could not be a matter arising under S. 47. (*Addison, J.*) RADH KISHAN *v.* HARI SINGH. **100 I.C. 800 = A.I.R. 1927 Lah. 337.**

———*Costs on security.*

An order under S. 47, that the costs paid into Court should not be paid out to the successful party without his furnishing security is not appealable: 41 Cal. 160; A.I.R. 1921 Bom. 208; 25 C.W.N. 555; A.I.R. 1924 All. 808 and 34 All. 530, Rel. on. (*Heald and Mya Bu, JJ.*) R. JAGANNATH PADAYACHI *v.* R.M. K.M.S. CHINNA CHETTIAR. **5 Rang. 534 = 5 Rang. 641 = 6 Bur. L.J. 155 = 104 I.C. 324 = A.I.R. 1927 Rang. 317.**

———*Property not saleable.*

Where the first appellate Court, disagreeing with the executing Court decided that a part of the property ordered to be sold in the decree not being saleable, the whole sale must be set aside,

Held, that this decision under S. 47, C. P. Code, has the force of a decree as it finally decides a question of right between the parties to the suit and a second appeal lies. (*Mullick and Ross, JJ.*) AMRIT LAL SEAL *v.* JAGAT CHANDRA. **4 Pat. 696 = 7 P.L.T. 468 = 93 I.C. 935 = A.I.R. 1926 Pat. 202.**

———*Sale in a particular order.*

A question between the purchaser who has been subrogated to the rights of the prior mortgagee and the mortgagor relating to the sale of their respective properties is a question which relates to the execution of the decree and would come under S. 47 and would be appealable.

C. P. CODE, (1908), S. 47—Appeal—Rateable distribution.

Quære—Whether 27 Mad. 259 (F.B.) is still good law under C. P. Code of 1908. (*Phillips and Madhavan Nair, JJ.*) NARSIMHA RAO *v.* SUBBARAYUDU. **23 M. L. W. 765 = 1926 M. W. N. 566 = 96 I. C. 492 = A. I. R. 1926 Mad. 834 = 51 M. L. J. 135.**

———Where a mortgage decree was passed against certain properties and Court ordered that at first all except a certain item should be put up for sale and if such sale failed to fetch a sufficient sum, then the other item should be sold,

Held, that the order was a final order between the parties in a matter relating to the execution, satisfaction and discharge of the decree and was appealable. (*Mullick and Ross, JJ.*) KHIRODHAR SINGH *v.* GAJADHAR LAL. **91 I. C. 221 = 6 P. L. T. 393 = 1925 P. H. C. C. 164 = A. I. R. 1925 Pat. 484.**

———An order directing that properties proceeded against in execution are to be sold in a particular order is not appealable as it is an administrative and not a judicial order. I. L. R. 27 Mad. 259 (F. B.), Foll. 18 M. L. W. 311, Dist. (*Krishnan and Waller, JJ.*) RAMA NAIDU *v.* RAMAKRISHNA NAIDU. **78 I. C. 829 = 19 M.L.W. 235 = 33 M. L. T. 275 = 1924 M. W. N. 220 = A. I. R. 1924 Mad. 527 = 46 M. L. J. 192.**

———*Dispute regarding sale.*

If the parties disputing the sale are parties to the suit, they approach the Court under S. 47 which decides the forum. The Court then proceeds according to its statutory powers. It may exercise inherent jurisdiction under S. 151, or it may exercise its power under O. 21, R. 90. There is no second appeal when a Court approached under S. 47 acts under O. 21, R. 90. But when it is so approached and exercises its inherent power under S. 151, there is a second appeal. (*Jackson, J.*) AKSHIA PILLAI *v.* GOVINDARAJULU CHETTI. **84 I. C. 975 = 1924 M. W. N. 842 = A. I. R. 1924 Mad. 778 = 47 M. L. J. 549.**

———*Assignment of decree.*

An assignee of a decree, pleaded fraud in order to avoid his liability for the payment of the money under the assignment. The decree-holder who applied for execution therefore stated that his application for execution might be dismissed if the Court held the deed of assignment to be a valid transaction. The executing Court without expressing any opinion on the question of the validity or invalidity of the transaction, dismissed the application, *Held*, that the order is one under S. 47 and is appealable. (*Shadi Lal, C. J.*) HARDITTA *v.* NIGHAHIA MAL. **79 I.C. 546 = 4 L. L. J. 259 = A. I. R. 1922 Lah. 396.**

— S. 47—Appeal—Rateable distribution.

———Where the matter before the Court is one under S. 73 and the Court proceeds to decide the question under that section though finally the order passed is not such as is contemplated by S. 73, the order is not appealable. (*Jai Lal, J.*) BILAS MAL-DAMODAR DAS *v.* HARI DAS. **118 I. C. 908 = A. I. R. 1929 Lah. 645.**

———No appeal lies against an order passed wholly and simply under S. 73 of the Code. But an order which does, as a fact, decide a matter covered by S. 47 (1), even although it be passed ostensibly under S. 73, can be the subject of appeal. 39 Mad. 570 & 31 M. L. J. 820. Rel. on. Thus where an order forbidding amendment, not only denies the right to rateable distribution but also dismisses the application for execution, such an order is appealable. (*Coldstream, J.*) SHIB DAS *v.* BULOKIMAL & SONS. **98 I. C. 884 = A.I. R. 1927 Lah. 100.**

———Per *M. N. Mukherji, J.*—An order under S. 73 is not appealable unless it also comes under S. 47 and satisfies all the requirements thereof. In order to be appealable the order must therefore decide a question arising between the decree-holder on the one hand and the judgment-debtors on the other. In cases where as between the parties to the suit a question relating to the execution, satisfaction or discharge of the decree passed therein has been decided by the order for rateable distribution it has always been held that an appeal lies. 42 Cal. 1; 36 Bom. 156; 36 Mad. 570, Foll. and 14 All. 210, Dist. (*Walmsley and M. N. Mukherjee, JJ.*) DWARKA DAS MARWARI *v.* JADAB CHANDRA GANGULI.
78 I. C. 731 = 51 Cal. 761 = 39 C. L. J. 439 = 28 C. W. N. 704 = A. I. R. 1924 Cal. 801.

———An order under S. 73 is not an order under S. 47 inasmuch as the question which arises is not one between the parties to the suit and the order rejecting the application under S. 73 does not otherwise come within the definition of decree in S. 2, because it does not conclusively determine the rights of the parties. It would also be unduly extending the meaning of the word "suit" in that section, make it include an application under S. 73. 42 Cal. 1, Foll. (*Coutts and Adami, JJ.*) HARMOOZI BEGAM *v.* MT. AYASHA.
1921 P. H. C. C. 204 = A. I. R. 1921 Pat. 401.

—S. 47—Appeal—Receiver.

———An order directing a party to pay receiver's remuneration not being decree, is not appealable. (*Johnstone, J.*) GHAFUR ALI *v.* MT. KAMAN.
A. I. R. 1930 Lah. 352.

———*Surety for.*

An order against a receiver to pay up moneys can be executed against the surety and the order directing execution against such surety is appealable under S. 47. (*Twomey, C. J., and Robinson, J.*) MAUNG PO THEIN *v.* MA WAING. **13 Bur. L. T. 91 = 59 I. C. 844 = 10 L. B. R. 236.**

—S. 47—Appeal—Re-sale.

——— An order passed under R. 71 of O. 21 is a decree, and also an order passed under S. 47, that an appeal against it does lie. 7 N. L. R. 134, Overruled ; 25 Cal. 99 ; 18 Mad. 439 ; A. I. R. 1922 All. 200 (F. B.), and 36 Bom. 329, Foll. (*Hallifax and Prideaux, A. J. Cs.*) NAGAPPA *v.* BALKISHANDAS. **100 I. C. 691 (2) = 23 N. L. R. 14 = A. I. R. 1927 Nag. 112.**

———An order under O. 21, R. 71 is a decree within the meaning of S. 47. 2 O. W. N. 141, Foll. (*Daniels, J. C.*) ANGNU *v.* NAWAB MIRZASAJJAD MOHAMMED ALI KHAN. **88 I. C. 131 = 12 O. L. J. 261 = 2 O. W. N. 212 = 28 O. C. 327 = A. I. R. 1925 Oudh 397.**

———Certain property which was put up for sale in an execution sale was knocked down by the sale officer to the appellant, the highest bidder. On his failure to make the necessary deposit of 25 per cent. of the purchase-money, as it had become too late in the day, the sale officer put up the property for re-sale the next morning, and the sale fetched much less price. The judgment-debtor applied under O. 21, R. 71 to make the first purchaser liable for the difference,

Held, there had been a sale forthwith within the meaning of O. 21, R. 84, and the defaulting purchaser was liable. Orders passed by trial Courts between the decree-holders or judgment-debtors and defaulting purchasers are appealable. (*Piggott, Walsh and Lindsay, JJ.*) SITA RAM *v.* JANKI RAM.
65 I. C. 813 = 20 A. L. J. 105 = 44 All. 266 = A.I.R. 1922 All. 200 (F.B.).

—S. 47—Appeal—Sale Proclamation.

———An application for setting aside an auction sale on the ground that the judgment-debtor had no notice of the settling of the proclamation under O. 21, R. 66, falls under S. 47 of the Code and second appeal is open to the parties. 11 M.L.W. 59 and A. I. R. 1925 Mad. 1142, Foll. (*Venkatasubba Rao and Madhavan Nair, JJ.*) MEYYAPPAN SERVAI *v.* SELLAPPA CHETTIAR.
A. I. R. 1930 Mad. 489.

———An order refusing to postpone a sale or alter the terms of the sale proclamation either by raising the upset price, or by dividing the property into lots, is only an interlocutory order and so not appealable. (*Schwabe, C. J. and Coleridge, J.*) KAVERIBAI AMMAL *v.* B. MEHTA. **75 I. C. 901 = 18 M. L. W. 615 = 1923 M. W. N. 894 = A. I. R. 1924 Mad. 234 = 46 M. L. J. 71.**

———*Valuation of property.*

If an objection is raised by the judgment-debtor to the valuation of property contained in proclamation of sale by public auction under O. 21, R. 66, and is rejected, there is no appeal against the order rejecting the objection. For if the undervaluation results in substantial injury to the appellant he can have it set aside under O. 21, R. 90. Unless such contingency happens, the rules of procedure do not entitle the judgment-debtor to question the propriety of the statement as to the value of the property which the Court has directed to be made in the proclamation of sale. Case-law discussed. (*Wazir Hasan and Srivastava, JJ.*) MT. INDRANI *v.* BIMLA PRASAD.
6 O. W. N. 1085 = A. I. R. 1930 Oudh 81.

———*Valuation of property.*

An order of a Court refusing to alter the valuation of the property to be sold that was entered in a proclamation of sale, or to adjourn the sale in order to have a further enquiry as to its value, is merely an administrative order and not judicial, and it does not fall under S. 47. 27 Mad. 259 (F. B.) ; 16 C. W. N. 124 ; 39 All. 415 ; 2 P. L. J. 13 ; 5 P. L. J. 270 ; A. I. R. 1923 Mad. 619 and A.I.R. 1924 Mad. 527, Foll. ; A. I. R. 1924 Mad. 234, Dist. (*Fawcett and Mirza, JJ.*) KRISHNARAO AMBADAS *v.* KRISHNARAO RAGHUNATH. **111 I. C. 892 = 52 Bom. 444 = 30 Bom. L. R. 679 = A. I. R. 1928 Bom. 245.**

———All orders under R. 66 are not appealable. Only such orders as would come under S. 47 are appealable. (*Phillips and Madhavan Nair, JJ.*) NARASIMHA RAO *v.* SUBBARAYUDU. **23 M. L. W. 765 = 1926 M. W. N. 566 = 96 I. C. 492 = A. I. R. 1926 Mad. 834 = 51 M. L. J. 135.**

——— —*Misdescription of property.*

Where objection was taken to a sale proclamation on the ground of misdescription of the boundaries, *held* that an order passed on the objection is within section 47 and is appealable. The determination of a question relating to an application under O. 21, R. 66 may also be an order passed under S. 47. (*Pearson and Graham, JJ.*) DEVENDRA NATH BASU *v.* KAILASH CHANDRA KALU. **80 I.C. 861 = 29 C. W. N. 556 = A. I. R. 1925 Cal. 318.**

———Though petition by judgment-debtor is filed as one under O. 21, R. 90, where the objections are that the petitioner had no notice of the proclamation of sale and that there is an under-valuation of the property, they fall under O. 21, R. 66 and a second appeal is competent. 11 M.L.W. 59, Foll. (*Madhavan Nair, J.*) KAMANA VENKATASWAMI *v.* GODAVARTI NAGAYYA.
87 I. C. 413 = 1925 M. W. N. 701 = A. I. R. 1925 Mad. 1142.

———Where in spite of the opposition of the judgment-debtor, sale proclamation is ordered to be issued, but the Judge says that he will in the meanwhile hear and decide upon judgment-debtor's objection to sale, the order passed does not decide any of the rights of the parties in relation to all or any of the matters in controversy between the parties and hence the order is not appealable. (*Sanderson, C.J. and Chotzner, J.*) JOGESH CHANDRA *v.* HEMENDRA KUMAR ROY.

35 C.L.J. 170 = 64 I.C. 547 = A.I.R. 1921 Cal. 629.

—S. 47—Appeal—Scheme.

———Orders passed relating to a scheme formed and sanctioned by the Court in a scheme suit, are not orders in execution of a decree and are not therefore appealable. (*Sir John Edge.*) BHOGILAL *v.* TEMPLE COMMITTEE. **87 I. C. 313 = 6 L. R. P. C. 117 = 41 C. L. J. 628 = 1925 M. W. N. 474 = 22 M. L. W. 246 = 30 C. W. N. 459 = 23 A. L. J. 555 = 27 Bom. L. R 872 = 2 O. W. N. 535 = A. I. R. 1925 P. C. 155 = 49 M. L. J. 25.**

———Orders passed by Court in relation to a scheme sanctioned in a scheme suit are not orders in execution and no appeal lies. A. I. R. 1925 P. C. 155 and A.I.R. 1926 Mad. 130 and 559, Foll. (*Ramesam and Madhavan Nair, JJ.*) VENUGOPAL REDDY *v.* MUTHUSWAMI KAVUNDAN. **102 I. C. 633 = A. I. R. 1927 Mad. 1110.**

———*Collector acting under.*

Where a scheme of management of a religious institution impliedly provided that the District Judge was also to exercise control generally in regard to any question of management that might properly be brought before him and the District Judge on application divided the offerings to the deity in a certain proportion among the claimants,

Held, that the District Judge was the final authority in the matter and no appeal would lie to the High Court from his decision. A. I. R. 1924 Mad. 369, Approved. (*Fawcett and Patkar, JJ.*) SHRIDHAR ANANT *v.* GANU RAGHO. **29 Bom. L. R. 891 = 102 I. C. 659 = A. I. R. 1927 Bom. 422.**

———*Court acting under.*

An appeal will not lie against an order made by a Court exercising a power given to it by a provision in the scheme of management of a trust; such an order is not an order made in execution. (*Spencer and Madhavan Nair, JJ.*) SIVAN PILLAI *v.* VENKATESWARA AYYAR. **22 M. L. W. 796 = 92 I. C. 556 = A. I. R. 1926 Mad. 130.**

———When the relief asked for and granted was the scheme alone, there is no reason for holding that the further remedy provided in the scheme need or can be asked for execution of the decree or that the order granting or refusing it is appealable as one passed under S. 47.

When a suit is instituted in the words of S. 92, C. P. Code, to obtain a decree settling a scheme, the relief must, so far as the suit is concerned, be regarded to have been finally given and there remains nothing to obtain by way of execution. (1923) M. W. N. 133 and (1923) M. W. N. 78, Foll ; 24 B. 45, Diss. (*Oldfield and Venkatasubba Rao, JJ.*) M. RANGANATHA THATHACHARIAR *v.* KRISHNASWAMI THATHACHARIAR. **75 I. C. 189 = 47 Mad. 139 = 18 M. L. W. 237 = 1923 M. W. N. 664 = A. I. R. 1924 Mad. 369.**

—S. 47—Appeal—Second appeal.

———*Order under O. 21, R. 90.*

A second appeal against an order passed under O. 21, R. 90, is competent where the decree-holder himself is the purchaser as the case under such circumstances falls under S. 47. A. I. R. 1926 Cal. 798 (F. B.), Rel. on. (*Subhedar, A. J. C.*) MADANLAL *v.* RIPUSUDAN PRASAD. **A. I. R. 1930 Nag. 191.**

———*Auction purchaser—Appeal to lower appellate Court under S. 47—Auction purchaser applying in revision—No second appeal lies and so revision is not barred.*

Where the appeal to the lower Court was under S. 47, C. P. Code, and where the auction purchaser and not the decree-holder or judgment-debtor petitions the High Court for revision his petition is not barred, because a second appeal by him does not lie. (*Ramesam, J.*) KRISHNA AIYAR *v.* MUTHUSWAMI THEVAR. **117 I. C. 789 = A. I. R. 1929 Mad. 84.**

———*Sale.*

No second appeal lies against an order setting aside or refusing to set aside a sale, although the matter is one between the decree-holder auction purchaser and judgment-debtor. A.I.R. 1926 C. 798 (F.B.), Expl. (*Mukerji and Roy, JJ.*) SATYENDRA NATH CHOUDHARY *v.* CHARU CHANDRA MAJUMDAR. **104 I. C. 188 = 45 C. L. J. 557 = A. I. R. 1927 Cal. 657.**

———*Order under O. 21, R. 90.*

All orders between decree-holder and judgment-debtor under S. 47 are not decrees and appealable as such. An order under O. 21, R. 92 being appealable under O. 43 R. 1 (*j*), a second appeal does not lie. (*Suhrawardy and Duval, JJ.*) BANSHIBADAN *v.* CHHAUNAT BIBI. **42 C.L.J. 176 = 90 I. C. 228 = A. I. R. 1926 Cal. 400.**

———*Small cause execution.*

No second appeal lies in a matter of execution in a suit which is of a Small Cause nature. 12 Mad. 116 ; 30 Mad. 212 ; 42 All. 200 ; 43 All. 403, Ref. to. (*Wallace and Madhavan Nair, JJ.*) P. K. VEERARAYAN *v.* AYYAKUTTI. **90 I. C. 794 = A. I. R. 1925 Mad. 742 = 48 M. L. J. 499.**

———*Valuation.*

In determining whether a second appeal lies against an order passed in execution proceedings, the amount of the subject-matter of the suit and not the amount sought to be recovered in execution must be taken into consideration. 29 P. R. 1902 and 30 Mad. 212, Followed. (*Broadway and Martineau, JJ.*) MOHAN MAL *v.* TULSI RAM. **67 I. C. 718 = 3 Lah. 141 = 28 P. W. R. 1922 = A. I. R. 1922 Lah. 290.**

———*Execution proceedings.*

A second appeal will not lie in an execution matter if a second appeal would not have laid in the suit itself. (*Piggott and Walsh, JJ.*) SANT PRASAD *v.* BHAWANI PRASAD. **60 I. C. 831 = 43 All. 403 = 19 A. L. J. 72 = A. I. R. 1921 All. 55.**

—S. 47—Appeal—Stay of execution.

———The order for staying execution of a decree till the decision of the appeal clearly falls under S. 2 (2) read with S. 47 and is appealable as a decree. The order finally and conclusively determines the question concerning the very important right of the decree-holder to reap forthwith the fruits of the decree and arising between parties to the suit and relating to the execution of the decree. 7 All. 73; 7 Cal. 733; 8 Cal. 477; 12 Cal. 624; 13 Cal. 111; 12 Bom. 30; 39 Mad. 541 and 14 C. L. J. 489; Ref. A. I. R. 1922 Lah. 480; A. I. R 1923 Lah. 514; A. I. R. 1924 Lah. 631; A. I R. 1925 Lah. 69; A. I. R. 1924 Lah. 602 and A. I. R. 1927 Lah. 915, Rel. on. A. I. R. 1921 Bom. 203, Diss. from.; A. I. R. 1924 All. 808; 41 Cal. 160; 55 I. C. 228; A. I. R. 1922 Lah. 400 and A. I. R. 1927 Lah. 852, Expl. (*Tek Chand and Johnstone, JJ.*) DURGA DEVI *v.* HANSRAJ **124 I. C. 349 = A. I. R 1930 Lah. 187.**

C. P. CODE, (1908), S. 47—Appeal—Stay of execution.

———No appeal lies against an order rejecting an application for stay of sale as the order does not involve any question relating to the execution of the decree which would amount to an adjudication conclusively determining the rights between the parties with regard to any of the matters in controversy. A. I. R. 1924 All. 808; A. I. R. 1926 All. 268. Rel. on.; 14 A. L. J. 363, Dist. (*Sulaiman, Ag. C. J. and Banerji, J.*) MANGAT RAI *v.* BABU RAM. **112 I. C. 620 = 26 A. L. J. 1325 = A. I. R. 1929 All. 85 (1).**

———*Execution transferred to Collector—Application to wrong court.*

The Execution of a decree was transferred to the Collector and the sale of immovable property was fixed on 28th March 1925. On that day, the judgment-debtor deposited a part of the decretal amount in the Court which passed the decree and applied for stay and obtained it. But before this order of stay could be transmitted to the Mamlatdar in the same town, who was holding the sale, the property was sold. On 6th April 1925, the appellant applied to set aside the sale on the ground that, having obtained the stay, before the sale actually took place, the sale was void. The auction-purchaser was not made a party to this application.

Held, that the execution and sale having been transferred to the Collector under S. 68. such application to adjourn the sale lay to the Collector rather than to the decreeing Court. If so, the original application would not fall under S. 47 and no second appeal lies. (*Madgavkar and Patkar, JJ.*) RUDRAPPA *v* BASHETTAPPA. **52 Bom. 290 = 30 Bom. L. R. 465 = 110 I. C. 710 = A. I. R 1928 Bom. 189.**

———No appeal lies from an order staying execution of a decree. (*Cuming and B. B. Ghose, JJ.*) KHETRA MOHAN *v.* SARATCHANDRA. **94 I. C. 352 = A. I. R. 1926 Cal. 830.**

———An order granting stay is not appealable because it does not determine the rights and liabilities of the parties with reference to the relief granted by the decree but merely the incidental question whether execution should proceed at once or after an interval of two months. (*Daniels and Boys, JJ.*) HUSAIN BHAI *v.* BELTI SHAH. **83 I. C. 1035 = 46 All. 733 = 22 A. L. J. 706 = 5 L. R. A. Civ. 482 = A. I. R. 1924 All. 808.**

———The expression "an order relating to execution of a decree" under S. 47 is comprehensive enough to include an order relating to the stay of execution thereof. (*Scott-Smith, J.*) FIRM PHALLU MAL-HIRA LAL *v.* BANARSI DAS. **75 I. C. 615 = A. I. R. 1924 Lah. 631.**

———An order refusing to stay a sale of immoveable property in execution of a decree during the pendency of an appeal in the High Court under Order 41, Rule 6 (2) of the Civil Procedure Code is appealable as a decree under Section 47. Civil Appeal No. 687 of 1922. Foll.; 15 C. W. N. 432, Dist. (*Moti Sagar, J.*) THE FIRM PHAGGU MAL MATA DIN *v.* BENARSI DAS. **75 I. C. 1001 = A. I. R. 1924 Lah. 671.**

———A decision that execution shall not take place does determine a right for the time being and may have far-reaching results. An appeal lies from the order staying execution, (Case-Law discussed). (*Martineau, J.*) FIRM GOBIND RAM RAM CHANDER *v.* FIRM RULIA RAM NAULTA RAM. **76 I. C. 174 = A. I. R. 1924 Lah. 602.**

———All orders staying execution of decrees are questions arising between the parties to the suit in which the decree was passed, and relating to the execution thereof and, as such, appealable. (*Scott-Smith, J.*)

C. P. CODE, (1908), S. 47—Applicability.

P. W. FITZHOLMES *v.* WARYAM SINGH. **75 I. C. 419 = A. I. R. 1923 Lah. 514.**

———No appeal lies from an order for stay of execution of a decree. (*Macleod, C. J. and Fawcett, J.*) JANARDAN TRIMBUK *v.* MARTON TRIMBUK. **45 Bom. 241 = 59 I. C. 523 = A. I. R. 1921 Bom. 208.**

———All orders staying or refusing to stay execution of decrees are orders determining questions relating to execution and thus appealable. (*Maung Kin, J.*) KYANKSEMA *v.* APARNA CHARAN. **62 I. C. 342 = 10 L. B. R. 326.**

—S. 47—A peal—Want of Notice.

———In considering whether an appeal from an order under S. 47 should be allowed merely on the ground of want of notice in the execution petition, the Court must consider whether that want of notice has in any way prejudiced the appellant. (*Wallace and Madhavan Nair, JJ.*) VEERA RAGHAVA RAO *v.* GURUNATH RAO. **91 I.C. 414 = A. I. R. 1926 Mad. 355.**

—S. 47—Applicability.

———A question betweeen the auction-purchaser and the judgment-debtor with reference to the possession of property sold under the decree is not covered by S. 47. (1908) 31 All. 82 (F.B.) Foll. 1924 Bom. 429 (F.B.), Ref. (*Ryves and Daniels, JJ.*) IMTIAZ UN-NISSA *v.* CHUTTAN LAL. **47 All. 304 = 22 A. L. J. 1119 = 6 L.R.A.Civ. 153 = 84 I.C 746 = A.I.R. 1925 All. 236.**

———S. 47 of the C. P. Code has no application to disputes between rival decree-holders. (*Harrison, J.*) NUR HUSAIN SHAH *v.* ABDUL QADIR. **113 I.C. 776.**

———*Decree-holder auction-purchaser.*

A dispute between an auction-purchaser and the judgment-debtor, even if the former be the decree-holder who has purchased the property with the permission of the Court, is not a dispute between the judgment-debtor and the decree-holder relating to satisfaction, discharge etc., of the decree and therefore S. 47, Civil Procedure Code, has no application to such a case. (*Jai Lal, J.*) MULK RAJ *v.* MT. KISSI. **119 I. C. 226.**

———A dispute between judgment-debtor and the auction-purchaser even if the latter is regarded as the representative of the former does not fall within the purview of S. 47. A.I.R. 1927 Rang, 45, Dist. (*Maung Ba and Baguley, JJ.*) MA HLA MAY *v.* NYAUNGLEBIN URBAN CO-OPERATIVE BANK, LTD. **A. I. R. 1930 Rang. 281.**

———*Validity of decree.*

S. 47 is limited to cases where the satisfaction of the decree as distinguished from the validity of the decree itself is in question. The test is whether the relief claimed aims at something which refers to discharge or satisfaction of the decree, assuming it is a good decree or whether the relief claimed is one which, if granted will nullify the decree altogether. Where the question between the parties does not relate "to execution, discharge or satisfaction of the decree" but is one which if decided in favour of the appellant would strike at the very root of the decree which the respondent is seeking to execute, S. 47 can have no application. The fact that the suit was instituted after executiou proceedings had been taken to a certain stage will not make S. 47 applicable if it was not so applicable before. (*Sen and Niamatullah, JJ.*) RAM CHARAN SAHU *v.* SALIK RAM SAHU. **121 I. C. 702 = A. I. R. 1930 All. 628.**

———*Bengal Tenancy Act, S.* 174.

An order under S. 174, Ben. Ten. Act does not fall within S. 47, C.P. Code. 3 C.W.N. 344, Foll.; 11 C.L.J. 202, Dist. (*B. B. Ghose and S. K. Ghose, JJ.*) ABDUL GAFUR MULLA *v.* KALIDHAN MONDAL. **124 I.C. 481 = 50 C.L.J. 532 = 34 C. W. N. 250 = A. I. R. 1930 Cal. 302.**

———*Procedure and jurisdiction.*

The question as to the legality of the execution Court's procedure or as to its jurisdictional power to order a sale is a question falling under S. 47. 6 O L.J. 640, Foll. (*Zafar Ali and Addison, JJ.*) PURSHOTTAM DAS *v.* RADA KISHAN. **120 I.C. 279 = 11 L. L. J. 306 = A.I.R. 1929 Lah. 449.**

———*Third party also interested.*

If there is a question relating to the execution, discharge or satisfaction of a decree arising between the decree-holder and the judgment-debtor, the mere fact that the auction-purchaser is also interested does not make S. 47 the less applicable. 19 Cal. 683 (P.C.) and 43 Mad. 107 (F.B.), Foll; 43 Mad. 696, Expl.; A. I. R. 1921 Mad-420, Dist. (*Ramesam, J.*) PERIYAYA AMBALAM *v.* ARULAPPAN. **111 I. C. 551 = A.I.R.1928 Mad. 806.**

———*Orissa Tenancy Act [B. and O. Act II of* 1913, *S.* 227 (3).]

An application under S. 227 (3) of the Orissa Tenancy Act for setting aside a sale on the ground that the holding was purchased by the judgment-debtor himself through another person is not an application under S. 47 of the Code. (*Kulwant Sahay and Macpherson, JJ.*) ANANTA CHARAN *v.* NIMAI BAHUBALENDRA. **101 I. C. 564 = 6 Pat. 366 = 8 P. L. T. 186 = A.I.R. 1927 Pat. 177.**

———*Money deeree executed as a rent decree.*

Certain co-sharer landlord brought a suit against a tenant for arrears of rent and obtained a decree. The decree was executed as rent decree under Bengal Tenancy Act. The holding was sold and purchased by a third party. The co-sharers did not object to the proceedings in execution and allowed the holding to be sold. Subsequently on partition the holding was allotted to co-sharers and they sued to recover possession of the property alleging that the purchase by the third party was benami for the co-sharers landlord and that the decree obtained was a money decree and did not operate to convey the holding to the third party but only operated to convey the right, title and interest of judgment-debtors in property. It was also contended that the case fell under S. 47 barring the suit.

Held, that the suit was not barred by S. 47 as the execution that has already taken place was not disturbed and that the co-sharer was not estopped from contending that the previous decree was only a money decree and could not be executed as rent decree under Bengal Tenancy Act. (*Das and Fazl Ali, JJ.*) BHAGWAN DUTT SINGH *v.* LACHMI NARAYAN SINGH. **119 I.C. 882 = A. I. R. 1930 Pat. 150.**

———*Parties on same side.*

S. 47 applies not only to the disputes between parties who are opposed to each other in the main suit as plaintiffs or defendants, but also applies to disputes between parties on the same side as co-plaintiffs or co-defendants. 7 All., 681, Diss. from ; A. I. R. 1924 Mad. 365, Foll. (*Rutledge, C. J. and Carr, J.*) ABDUL SATTAR *v.* CHI DOE RHI. **4 Rang. 418 = 99 I.C. 418 = A. I, R. 1927 Rang. 45.**

———*Judgment-debtor and Decree-holder.*

The position of a judgment-debtor who brings a suit contesting an execution sale to the decree-holder differs as regards the applicability of S. 47, from the position of a decree-holder who sues for the possession of the property he has purchased in execution. 8 P. R. 1918 and 31 All. 82 (F. B.). Dist. (*Martineau and Jai Lal, JJ.*) NAND KISHORE *v.* SULTAN SINGH. **7 Lah. 1 = 27 P. L. R. 258 = 93 I. C. 1007 = A. I. R. 1926 Lah. 165.**

———Collector executing a decree transferred to him is not a Court and therefore cannot entertain an application under S. 47. (*Mukherji and Dalal, JJ.*) BHAGWAN DAS *v.* SURAJ PRASAD. **47 All. 217 = 22 A.L.J. 1060 = 6 L.R.A. Civ. 89 = 84 I.C. 1031 = A.I.R. 1925 All. 146.**

———*Jurisdiction.*

Where the Court declines to entertain application for execution at all on the ground that it has no jurisdiction, the order does neither come under S. 47 nor under the general definition of "decree." (*Chatterjea and Chotzner, JJ.*) ASIRUDDIN MONDAL *v.* RAM SHAKHI DEBYA. **86 I.C. 775 = 41 C.L.J. 166 = A.I.R. 1925 Cal. 679.**

———*Commission—Order directing payment of.*

In a partition suit, the appellant was appointed commissioner to effect a partition. After the appellant had done most of the work neither party appeared before the Court and the suit was dismissed for default of both the parties. On the next day the appellant applied to the Court for obtaining his remuneration and an order was passed upon it in his favour. He applied for execution of this order :

Held, that under S. 36 C. P. Code, an order directing the payment of an amount is to be executed in the same way as a decree and consequently the provisions of S. 47 will apply to execution of an order under that section. 10 C.W.N. 234, Dist. (*Suhrawardy and Duval, JJ.*) CHANDRA KUMAR DE *v.* KUSUM KUMARI ROY. **84 I. C. 724 = 40 C. L. J. 180 = 52 Cal. 269 = A. I. R. 1925 Cal. 57**

———*Mortgage suits.*

A suit on a mortgage remains pending till the final decree. Questions arising in proceedings for making preliminary mortgage decree final are not covered by S. 47. That section applies only to questions regarding the satisfaction of the decree. (*Baker, J.C.*) LACHIRAM *v.* BHOLU. **82 I.C. 452 = 22 N.L.R. 110 = A.I.R. 1925 Nag. 132.**

———*Sale.*

When the execution itself is attacked at the outset and a sale takes place afterwards, the judgment-debtor has the right to challenge the sale under S. 47. (*Mullick and Foster, JJ.*) KISHUN NARAYANA MAHTA *v.* RAMREJHAN SINGH. **83 I.C. 747 = 1923 P.H.C.C. 298 = 5 P.L.T. 61 = A.I.R. 1924 Pat. 67.**

———*Fraud.*

The plaintiff sold 14 1/2 bighas out of the 16 bighas owned by him, to the defendant, the latter agreeing to satisfy two decrees outstanding against the former. The defendant satisfied one of these decrees, in which he himself was the sole decree-holder but did not pay off other decree-holders, holding the other decree along with him. The defendant however got mutation effected on only 4 bighas out of the 14 1/2 bighas sold to him. The decree-holders other than the defendant put the remaining 11 bighas, standing in name of the plaintiff to sale and the same was purchased by the son of the defendant. The plaintiff thereupon sued to recover 1 1/2 bigha, the difference between the 14 1/2 bighas originally sold by him and the 16 bighas owned by him. The defendant contended that the proceedings were barred under Section 47, C. P. Code.

Held, that plaintiff was justified in filing a suit to recover his property and that this was fraud neither in publishing nor conducting the sale, and that an application like the present suit could not have been made under Section 47. (19 Cal. 683, P. C. Diss.) (*Gokul Prasad, J.*) NARAIN SINGH *v.* ZALIM SINGH. **74 .C. 351 = A.I.R. 1923 All. 573**

C. P. CODE, (1908), S. 47—Applicability.

———Per *Shah, J*:—It is not necessary to put a strict construction upon the terms of S. 47, so as to exclude the consideration of a question which is closely connected with the subject matter of the decree. (*Macleod, C.J. and Shah, J.*) MOTILAL HIRALAL *v.* BAI MANI. **87 I. C. 269 = 46 Bom. 529 = 23 Bom. L.R. 1279 = A. I. R. 1922 Bom. 370.**

—S. 47—Bar of suit.

———In India no separate suit can be brought on the basis of an executable judgment. The judgment-creditor is left to his remedy by execution. But where a new obligation is created by a judgment without provision for execution a suit can be brought on the basis of the judgment. (6 B.H.C.R. 231 and 9 C.W.N. 952, Foll ; 27 Mad. 243 ; 8 Bom 1 ; 20 C. W. N. 58 and 43 All. 170, Dist) (*Ramesam and Jackson, JJ.*) RAMASWAMI NATHEN *v.* MUTHIAH CHETTY. **85 I.C 991 = 48 Mad. 482 = 21 M.L.W. 75 = A.I.R. 1925 Mad. 279 = 47 M.L.J. 829.**

—S. 47—Bar of suit—Adjustment.

———Per *Kemp, A.J.C.*—If the suit does not relate to the execution of the decree but to the transaction of adjustment a separate suit will lie. Any cause of action from the transaction whether amounting to a contract or not will furnish material for a separate suit and such suit is not barred by Section 47, C. P. Code. (F. B.). (*Fawcett, J.C., Crump and Kemp, A. J. Cs.*) BANUMAL *v.* NEWANDMAL. **83 I. C. 360 = 16 S.L.R. 207 = A.I.R. 1921 Sind 159 (F.B.).**

—S. 47—Bar of suit—Binding debt.

———*Decree against Hindu father — Execution against sons as Legal Representatives—Question of executability of decree on ground of immorality of debts is one within S. 47.*

A separate suit for the determination of the liability of the sons for the debt covered by the decree passed against their father would be barred by S. 47. The only remedy of the decree-holder is to apply for execution of the decree against the son of the deceased judgment-debtor as his legal representative. The question as to whether the decree is capable of execution inasmuch as the debt covered by it was tainted with immorality, is one relating to the execution of the decree and the plea with respect to that must be taken and determined in the execution proceedings. (*Jwala Prasad and Adami, JJ.*) SHEIKH KAROO *v.* RAMESHWAR SAO. **62 I. C. 905 = 3 P L T. 43 = 6 P.L.J. 451 = A.I.R. 1923 Pat. 143.**

—S. 47—Bar of suit—Damages for non-certification.

———Any Court other than the Court executing the decree can recognise the payment, provided, in doing so, the Court does not disobey the provisions of S. 47. And recognition of such a payment by the Court other than the Court executing the decree must necessarily be in a suit, (1) where the judgment-debtor sued for the money he has paid out of Court on the ground of failure of consideration, (2) where the judgment-debtor sues for damages for a breach of an express or implied promise of the decree-holder to certify the payment. (*Moung Kin, J.*) MOUNG MYO *v.* MOUNG KHA. **70 I.C. 115 = 11 L.B.R. 429 = 1 Bur. L.J. 207 = A. I. R. 1923 Rang. 88.**

—S. 47—Bar of suit—Declaratory decree.

———In a suit by widow of the mortgagor in respect of the mortgage, a decree was passed in favour of the plaintiff, declaring the right to redeem and the right to recover possession on payment of a certain amount and further declaring devolution of the right on the death of the plaintiff, but no period for the payment of the mortgage money was fixed.

C. P. CODE, (1908), S. 47—Bar of Suit—Executable decree.

Held, that the decree was to be interpreted as purely declaratory in the nature of the plaintiff's right to redeem the mortgaged property leaving it open to the plaintiff to claim actual possession whenever she found it convenient to do so on payment of the mortgage money.

Held, further, that a subsequent suit for redemption was neither barred by the rule of *res judicata* nor by the provisions of S. 47, C. P. Code. (*Wazir Hasan and Gokaran Nath Misra, JJ.*) SURAJ BAKHSH v. GANGA BAKSH. **105 I. C. 93 = 4 O.W.N. 882 = A.I.R. 1927 Oudh 457.**

—S. 47—R. 63 and 58—Bar of suit—Different cause of action.

———Plaintiff sued for possession of a house. Defendant claimed adverse possession. The former owner, under whom defendant claimed admitted plaintiff's claim in 1908. Defendant however raised a question of adverse title in 1913, when he objected to the attachment and sale of the property in execution of the decree ot the creditor against plaintiff : *Held* (1) adverse possession began not in 1908 when the defendant, claimed to be in possession with the permission of the former owner but since 1913 when he objected to the attachment and sale. The suit therefore was well within time. (2) The original owner of the house admitted plaintiff's claim in 1908. This suit being based on the allegation that the defendant denied plaintiff's title and set up a title in himself S. 47 did not apply. (3) There being no record of the objection made by the defendant in the execution proceedings of 1913, the suit was not barred by R. 63, O. 21. (*Gokul Prasad and Stuart, JJ.*) JETHO MISIR *v.* GODAWARI DUTT. **77 I.C. 107 = 20 A.L.J. 619 = A.I.R. 1922 All. 411.**

———Certain land was sold in execution of a decree. The auction-purchaser subsequently surrendered the land to the decree-holder, who, on the basis of such surrender, brought a suit against the judgment-debtor to recover possession. *Held*, the suit was not brought by the plaintiff in his capacity as decree-holder, but by virtue of the surrender, and his position was that of a stranger, S. 47, C. P. Code was no bar to the suit. (*N. R. Chatterjee and Panton, JJ.*) DURGAPADA DALAL *v.* MANINDRA NATH UKIL. **63 I.C. 762 (Cal.).**

—S. 47—Bar of Suit—Dispossession.

———Plaintiff obtained a decree for possession of his share in certain property but did not execute it. In execution of another decree, he obtained symbolical possession of the property which continued undisturbed for some time. Plaintiff then applied for mutation of names in his favour but his application was refused by the Revenue Court. He then brought another suit for possession.

Held: that the refusal of the revenue authorities amounted to dispossession and furnished him with a fresh cause of action and therefore his suit for possession was not barred under S. 47. (*Dalal, J. C.*) MT. SAIRA BIBI *v.* KAZIM HUSAIN. **91 I. C. 19 = A. I. R. 1926 Oudh 263.**

—S. 47.—Bar of Suit—Executable decree.

———Where the terms of the decree were as follows :—"It is ordered that this suit be decreed in the terms of the award annexed herewith" and where the terms of the award were :—"the parties will collect rents and other profits and each of the two parties will deliver respectively to each other all the zamindari papers which they may have in their possession,"

Held that it was an executable decree and precluded a fresh suit for the possession of the properties concerned

by one of the parties. (*Lord Dunedin.*) SASI SEKHARESHWAR *v.* LALIT MOHAN.
86 I. C. 245 = 23 A. L. J. 717 = 48 M. L. J. 20 = 6 L. R. P. C. 23 = 27 Bom L. R. 166 = 21 M. L. W. 286 = 52 I. A. 79 = 52 Cal. 314 = 29 C. W. N. 633 = A. I. R. 1925 P. C. 34.

———Whether a subsequent suit is barred by reason of C. P. Code, S. 47 depends upon the existence of a decree which is executable for the purpose of the reliefs sought to be enforced in the subsequent suit. (*Spencer, O.C.J. and Srinivasa Aiyangar, J.*) ARUNACHALLAM CHETTI *v.* SETHUPATHI. **91 I. C. 338 = 22 M. L. W. 195 = A. I. R. 1925 Mad. 1260.**

———A suit is not maintainable on a prior decree, if the relief claimed in the suit has already been granted by the decree and could have been obtained by enforcement thereof in execution proceedings. A decree which merely declares the rights of parties and does not direct any act to be done, is incapable of execution. In such an event a separate suit will lie to enforce the rights declared by the decree. *Dobee* v. *Fowkee*, 3 Agra H. C. R. 381 and 4 Mad. 219 (*Mookerjee and Chotzner, JJ.*) SYAMA CHARAN DAS *v.* SATYA PRASAD CHAUDHURI. **70 I. C. 427 = 36 C. L. J. 101 = A. I. R. 1923 Cal. 252.**

—S. 47—Bar of Suit—Execution barred.

———Where in a pre-emption suit according to a compromise decree, plaintiff is to obtain possession of property if he pays a certain amount within a particular time but in case of default the suit is to stand dismissed the plaintiff pays the required amount within the specified time but does not obtain possession either through Court or privately, and after the lapse of the period of limitation for the execution of the decree files a fresh suit for the possession of the property, such suit should be held to be barred under the provisions of Section 47 of the C.P. Code. Case-law discussed. 14 A. L. J. 102 Diss. from. (*Sulaiman and Gokul Prasad, JJ.*) RAMANAND *v.* JAIRAM. **59 I. C. 632 = 43 All. 170 = A. I. R. 1921 All. 369.**

—S. 47—Bar of Suit—Joint possession.

———A suit lies for restoration to joint possession which is disturbed though it was granted by a decree. (*Kotval, A. J. C.*) JUGAN *v.* AMAN SINGH MANSUKH SINGH. **78 I. C. 390 = A. I. R. 1924 Nag. 345.**

—S. 47—Bar of suit—Mesne rofits.

———Where in a former suit between the same parties specific performance of a contract of sale and recovery of possession of property was solicited but where there was no specific prayer for the awarding of future mesne profits, a subsequent suit for the recovery of mesne profits can be maintained. S. 47 is clearly no bar to such a suit. (*Sundaram Chettiar, J.*) R. SOBHANADRI *v.* S. RAMIREDDI. **30 M. L W. 738 = A. I. R. 1929 Mad. 785 = 57 M. L. J. 515 (2).**

—S. 47—Bar of suit—Objection to attachment.

———Where an objection by the judgment-debtor that his land could not be attached and sold in execution of decree, he being an agriculturist is dismissed, a separate suit by him for declaration that he is an agriculturist does not lie by reason of S. 47. It is a direct attempt to set aside a decision of the executing Court between the parties to the suit in matter relating to the execution or satisfaction of the decree. (*Addison, J.*) GHERUMAL *v.* UDA. **31 P. L. R. 191 = A. I. R. 1930 Lah. 628.**

———Some of the representatives of the judgment-debtor objected to the sale of a house in execution of a decree but the objections were dismissed for default. The decree was fully satisfied later on and the file was consigned to the record-room. Subsequently all the representatives of the judgment-debtor brought a suit for a declaration that the house belonged to them and was not liable to sale in execution of the decree. *Held*, that S. 47, C. P. Code, did not bar the suit; the decree having been fully satisfied the execution Court had become *functus officio.* (*Martineau, J.*) NIZAM DIN *v.* BHAGAT RAM. **60 I. C. 516 (Lah.).**

—S. 47—Bar of suit—Obstruction to possession.

———The proper remedy of a decree-holder auction-purchaser who is resisted in trying to get possession of the property purchased, by the judgment-debtor as well as a third person claiming to have an interest in the property, is to bring a separate suit for possession both against the judgment-debtor and the stranger. S. 47 of the Code is no bar to such a suit. (*Macleod, C. J. and Heaton, J.*) GOBA NATH BAROLA *v.* SAKHARAM TEJU PATIL. **44 Bom. 977 = 59 I. C. 366 = 22 Bom. L. R. 1101.**

—S. 47—Bar of suit—Partition.

———Where a decree for partition did not include a house that had been mortgaged to a third person but only recorded the agreement of the parties to divide that house half and half as and when it should fall into possession, it is open to the parties either to effect the partition by mutual agreement or enforce their rights by a separate suit and such a suit is not barred by S. 47, C.P. Code. (*Patkar and Baker, JJ.*) GOVINDDAS RAJARAMDAS *v.* GANPATDAS NAROTTAMDAS. **113 I.C. 173 = 30 Bom.L.R. 912 = A.I.R. 1928 Bom. 365.**

———Where a partition decree simply declared that the property be divided subject to the payment of a certain amount paid towards the discharge of a prior mortgage on the property and that possession should not be given until that amount is paid : *Held* the partition decree did not entitle the parties to work out their mortgage rights in execution of the partition decree and a separate suit for possession was not barred under S. 47. (*Kumaraswami Sastri aud Devadoss, JJ.*) SUPPAYAN PILLAI *v.* LAKHMANA PATTAR. **106 I. C. 507 = A. I. R. 1928 Mad. 474.**

—S. 47—Bar of suit—Pro forma defendants.

———A suit by a person who was a party to objection proceedings under O. 21, R. 58, though as a *pro forma* defendant is barred by S. 47. (*Ashworth, A. J. C.*) SANTU CHAMAR *v.* ARJUN MISRA. **88 I. C. 542 = A. I. R. 1926 Oudh 64.**

—S. 47—Bar of suit—Redemption.

———Where a final decree for sale is passed in a suit on a mortgage, but is not executed for more than 3 years, S. 47 does not prevent the mortgagor from suing for redemption of the mortgage. 39 Mad. 896 and 25 Mad. 300, Dist. (*Devadoss, J.*) N. NAGASAMI AIYAR *v.* T. ELLARAGAN. **86 I. C. 527 = A. I R. 1925 Mad. 1191.**

—S. 47—Bar of suit—Relief against parties.

———The plaintiff was the brother of one who had obtained a decree in Suit No. 34 of 1905 against the first defendant. In execution of that decree the suit house was sold and purchased by *D*, but no possession was obtained. Consequently after *D's* death the plaintiff filed a suit for possession against defendant in the first suit and his sons.

Held, that although the plaintiff's brother by becoming the auction-purchaser in execution of his decree would not thereby cease to be a party to the suit, defendant Nos. 2 and 3, sons of the original defendant, were not representatives of the first defendant in that suit. That the plaintiff in order to get possession of the property, which the brother purchased at the auction-sale could not take out execution proceedings making defendants Nos. 2 and 3, parties to those proceedings, as they were not parties to the suit. Therefore a suit was necessary if the plaintiff wished to recover the property from the defendants Nos. 2 and 3. (*Macleod, C.J. and Crump. J.*) DADA JINAPPA *v.* YESU. **73 I.C. 402= 25 Bom. L. R. 494=A. I. R. 1923 Bom. 450.**

—S. 47—Bar of suit—Relief not available before.

———*G* who was one sixth co-sharer brought a suit to recover his share of revenue from *R* who was the Managing Jaghirdar of the shrakati inam village. It was decreed that *G* should receive one-sixth share out of the vasuli rakam every year and that *R* should pay it to *G* every year in the month of May. It was further directed that on *R* failing to pay the same, *G* should recover the amount through Court. Some time before 1900, Government suspended the revenue of the village and so *R* declined to pay *G* his share. Whereupon *G* applied to execute the decree and obtained his share. In the year 1918-19 Government suspended the revenue and *G* again applied to execute the decree which was granted and amount recovered. During the pendency of the application the Government entirely remitted the land revenue of the village for that year. *R*, therefore, brought a suit for declaration that *G* had no right to recover the one-sixth share of the revenue in the year in which the Collector had suspended or remitted the revenue and claimed recovery of amount remitted in 1918-19. *G* objected to the suit as being barred under S. 47 and claim being *res judicata* and set up the decree and order in execution applications.

Held, that the suit was not barred under S. 47 or under S. 11 as neither the declaration nor refund could be claimed under previous decree. (*Madgaonkar, J.*) RAGHO RAVJI *v.* GOPAL JANARDHEN. **31 Bom. L. R. 1415=54 Bom. 162= A. I. R. 1930 Bom. 132.**

—S. 47—Bar of suit—Re-sale.

———An order under O. 21, R. 71 comes within the provisions of S. 47. A separate suit cannot be brought to set aside such an order. 14 All. 201; 19 All. 22; Dissented from. 1922 All. 200; 23 O. C. 140; 23 O. C. 342; 18 Mad. 439 ; 20 Cal. 599 ; 36 Bom. 329 and 45 Bom. 223; Foll. (*Daniels, J.C. and Dalal, A.J.C.*) MATHURA PRASAD *v.* KUNWAR BAHADUR SINGH. **87 I. C. 284=12 O. L. J. 80=2 O. W. N 141= 29 O. C. 18=A. I. R. 1925 Oudh 360.**

—S. 47—Bar of suit—Satisfaction of decree.

———Although O. 21, R. 2 of the C. P. Code specifically enacts that an uncertified adjustment cannot be recognised as an adjustment of the decree by any Court executing the decree it is implied that it may be recognised as such by Court trying the matter as a regular suit, and that a suit for a declaration that the decree had been satisfied is maintainable notwithstanding that its object is to restrain the decree-holder from executing the decree. A suit for a declaration that a decree had been satisfied and should not consequently be satisfied against the judgment-debtor is competent, and S. 47 of the Code of Civil Procedure does not operate as a bar to such a suit. (*Moti Sagar, J.*) BISHEN SINGH *v.* MAHINDAR SINGH. **79 I. C. 125=A. I. R. 1925 Lah. 54.**

———A suit for a declaration that a decree has been fully satisfied and is incapable of execution is barred under Section 47, C. P. Code. (*Chevis, Abdul Raoof and Abdul Qadir, JJ.*) RAM LABHAYA *v.* FIRM MUKUNDA, MULKAPUR. **67 I. C. 593= 3 Lah. 319=A. I. R. 1922 Lah. 428 (F.B.).**

—S. 47—Bar of suit—Setting aside sale.

———Where application to set aside sale is made under O. 21, R. 90 and is dismissed, no suit for cancellation of the sale can lie on an allegation of fraud and irregularity in the publication or conduct of auction sale. A. I. R. 1921 Mad. 121; A. I. R. 1923 Lah. 592, Rel. on; A. I. R. 1925 P. C. 146; A. I. R. 1924 Mad. 431; 1 N. L. J. 184 ; 19 Cal. 683 ; 33 Bom. 698 ; 26 All. 101 and 28 All. 681, Dist. (*Staples, A. J. C.*) TUKARAM *v.* SAKHARAMSA. **25 N. L. R. 58=118 I. C. 49= A. I. R. 1929 Nag. 130.**

—S. 47—Bar of suit—Suit directed by Court.

———A suit filed by decree-holder in pursuance of an order passed under O. 21, R. 58 directing him to file a separate suit to establish his title cannot be dismissed on the ground that the remedy lay under S. 47. (*Daniels and Neave, JJ.*) MATHURA DAS *v.* RAMRAJ SINGH. **5 L. R. A. Civ. 755=86 I. C. 323= A.I.R. 1925 All. 240.**

—S. 47—Bar of suit—Validity of decree.

———Section 47 cannot bar a suit which raises questions which do not merely relate to the execution, discharge and satisfaction of the decree, but go behind the decree and are such as the execution Court could not have decided. (*Banerji and King, JJ.*) KALLOO *v.* NIADAR SINGH. **115 I. C. 462=1929 A.L. J. 425= A. I. R. 1929 All. 252.**

S. 47—Compromise decree.

———In a simple money-suit a compromise decree was passed. The parties agreed that in case of default the amount would be recovered by sale of the house specified in the decree and other property belonging to the judgment-debtor. Even though the house and the other property were not the subject of the suit, the decree did create a charge on the house.

Held, that the decree was capable of execution and that it was not necessary to bring a separate suit to enforce it. A.I.R. 1925 Mad. 1101, Rel. on; 35 Cal. 837 and A.I.R. 1919 P.C. 79, Dist. (*Staples, A.J.C.*) BAPUJI *v.* TANSU. **120 I. C. 218=A.I.R. 1930 Nag. 17.**

———*Alternative modes of execution.*

A compromise decree in a suit for breach of a contract to supply ore exclusively to the plaintiffs provided "that in the event of the defendants failing to deliver the full quantity of 4,000 tons of ore of the stipulated grade in any particular year or violating any of the conditions of this compromise, the defendants shall pay to plaintiffs damages at the rate of Re. 1 (rupee one) per ton on the whole of the quantity which may then have remained undelivered out of the total quantity of 31, 234 tons and the same shall be recovered by execution of this decree." A breach occurred and the defendants presented an application for leave to deposit Rs. 28,649-2-9 to be paid over to the decree-holders, and for an order declaring the decree to have been thus fully satisfied. The decree-holders applied for execution of their decree by seizure and delivery to them of certain manganese ore, alleged to be lying at several mines and railway sidings, and by the appointment of a receiver and other relief. The trial court granted application of defendants and held that the decree-holders were not entitled to the relief prayed but must take in satisfaction the amount deposited by the judgment-debtors. This decision was affirmed in appeal. On appeal to Privy Council.

Held: that this clause did not enable the judgment-debtors to render nugatory all their obligations under the prior part of the contract, whenever it suited their pockets to do so. It provided that they shall pay at the specified rate, if they fail to perform the contract in any respect, but it did not say that such payment was to be a full and exclusive satisfaction of all obligations under the contract. The paymenti nto court did not make the decree a satisfied decree. It provided a mode of enforcing such payment but it did not say that the other terms would not be enforced by execution of the decree, namely, by applying to the court to enforce the injunction. (*Viscount Sumner.*) SIR BISSESSAR DASS DAGA *v.* EMMANUEL VAS.

55 Cal. 238 = 107 I. C. 25 = 55 I.A. 58 = 47 C.L.J. 162 = 30 Bom. L.R. 243 = 32 C. W. N. 509 = 27 M.L.W. 655 = 26 A.L.J. 667 = 24 N.L.R. 17 = 1928 M.W.N. 951 = A. I. R. 1928 P.C. 27 = 54 M.L J. 122.

——*Mortgage suit.*

A compromise decree in a suit on a usufructuary mortgage provided that the mortgagor should pay the amount within a certain time and in case he paid it later, recover possession by taking out execution. The mortgagor paid it after the time fixed and applied in execution for possession. It was dismissed as barred by limitation. He then brought a suit to redeem the properties.

Held, that there was nothing in the compromise decree which put an end to the relationship of mortgagor and mortgagee and that the provision to take possession by execution in the compromise decree necessarily reduced the period of sixty years allowed by law for redemption to a period of three years and hence was invalid being a clog on the equity of redemption, and that the rajinama decree did not render the present suit *res judicata* and that C. P. Code S. 47. was no bar to the suit. 19 Mad. 249 and A.I.R. 1925 P.C. 63, Rel. on; 16 Bom. 659 (F.B.) and A.I.R. 1921 Bom. 224, Ref.; 10 Bom. 461, Dist. (*Kumaraswamy Sastri and Walsh, JJ.*) K. AMBU NAIR *v.* E. C. KELU NAIR.

123 I. C. 584 31 M.L.W. 44 = A.I.R. 1930 Mad. 305.

——*Matters extraneous to suit.*

Court's power to pass a consent decree is limited to matters covered by the suit. But if the agreement refers to matters outside the suit forming consideration for the compromise or settlement of the matter compromised in the suit such terms should also be mentioned in the decree. But it does not follow that such terms can be enforced in the execution of that decree. They can be enforced only by a separate suit. Where a decree includes matters covered by the suit and also matters outside it the decree can be executed only to the extent of the matters included in the suit and not in respect of the matters outside it. (*Suhrawardy, J.*) ARJUN KAPALI *v.* ASVINI KUMAR KAPALI.

78 I. C. 317 = A. I. R. 1925 Cal. 286.

—S. 47—Conditional Decree.

——Where a decree ordered payment by the appellants of a sum of money into court by a certain date upon which the respondents were directed to reconvey the land to them and where the appellants failed to pay the money within time and did not obtain extension of time.

Held: that though the appellants subsequently paid the money they were debarred from executing the decree. (*Young and Baguley, JJ.*) MA PU MAI *v.* KO SIT TIN. **85 I. C. 352 = 3 Bur. L.J. 163 = A. I. R. 1924 Rang. 375.**

—S.47—Conversion.

——It would seem that it was mainly to avoid a claim being defeated on mere technical pleas that S. 47 (2) of the C.P. Code was enacted. (*Hallifax, A.J.C.*) LAXMAN *v.* BISHRAM. **71 I.C. 42 = A.I.R. 1923 Nag. 94.**

——It is open to an appellate court to treat the proceedings arising out of an application under S. 47 as proceedings in a suit and grant the necessary relief. (*Sulaiman and Mukerji, JJ.*) DAULAT SINGH *v.* RAJA RAMJI. **48 All. 362 = 24 A.L.J. 379 = 93 I. C. 376 = A.I.R. 1926 All. 387.**

——Where a suit was asked, in appeal, to be treated as an application under C.P. Code, S. 47.

Held: that as the plaint had not been presented to the executing court, the request should not be granted. (*Martineau and Jai Lal, JJ.*) NAND KISHORE *v.* SUBHAN SINGH. **7 Lah. 1 = 27 P.L.R. 258 = 93 I.C. 1007 = A.I.R. 1926 Lah. 165.**

——The circumstance that a plaint is filed after paying a higher amount of court-fee cannot according to the present Code be a ground for not treating the proceeding as an application under S. 47. (*Anantakrishna Ayyar, J.*) CHENGALRAYA *v.* KOLLAPURI.

1929 M.W.N. 811 = 123 I.C. 24 = A.I.R. 1930 Mad. 12.

——*Mesne profits.*

Where through an error in the decree an application for an enquiry into mesne profits is made by an execution petition, and no further point is involved such as limitation, it is clearly open to the court to allow a mistake of this kind to be repaired and treat the petition as an application in the suit. A.I.R. 1924 Mad. 473, Ref. (*Venkatasubba Rao and Madhavan Nair, JJ.*) KEMGAM *v.* VADDADI SUBBAMMA.

30 M.L.W. 810 = A. I. R. 1930 Mad. 30 = 57 M.L.J. 728.

——*Objection to execution.*

Plaintiffs in the present suit were some of the defendants in a previous suit. That suit was decreed against the other defendants but dismissed as against the present plaintiffs. The decree-holder in that suit started execution proceedings and the present plaintiffs objected as regards execution in respect of their plots but their objections were disallowed as premature. They sued for declaration and also prayed for possession of the same plots in the event it were found they were not in possession. The Courts below dismissed the suit on the ground that it was barred by the provisions of S. 47, C. P. Code. In the lower appellate Court, the plaintiffs asked that the plaint in the present suit might be treated as proceedings under S. 47. The Court below refused the prayer on the ground that proceedings under S. 47 were barred by the rule of *res judicata* arising out of the previous order in execution.

Held, that the suit was not barred by the rule of *res judicata* and it should be treated as proceedings under S. 47. (*Wazir Hasan and Raza, JJ.*) TALUKDAR KHAN *v.* KHAIRUNNISSA.

4 O.W.N. 1045 = 106 I. C. 133 = A. I. R. 1928 Oudh 38.

——*Rival decree holders.*

Where two rival assignees from decree-holders apply for execution of same decree and the question arose as to the validity of the assignments and the case was converted by Court into a suit under S. 47 (2) and decided,

Held, the court acted within its jurisdiction and that an appeal lay from the decision as from one passed in a regular suit. (*Jwala Prasad and Kulwant Sahay, JJ.*) RAM BAHADUR SINGH *v.* BAJRANGI PRASAD.

3 Pat. 344 = 78 I. C. 495 = 1924 P.H.C. C. 193 = A.I.R. 1925 Pat. 16.

——*Plaint misconceived.*

Where the Court while rejecting decree-holder's application under O. 21, R. 95 directed him to a suit which was filed and the party subsequently discovering after 12 years that a suit was not competent as an appeal lay from that order under S. 47, requested the Court to change the suit into a proceeding and it was found that the plaint was misconceived.

Held : that the conversion of suit into proceedings should not be allowed. (*Odgers, J.*) PACHAIAPPA CHETTY *v.* VENKATACHARIAR.

90 I. C. 952 = 1926 M. W. N. 599 = 1925 M.W. N. 577 = A. I. R. 1925 Mad. 1198 = 51 M.L.J. 106.

———*Application for attachment.*

A decree-holder who applies for attachment of alleged assets of a deceased zamindar cannot ask for converting the application into a suit since he must obtain a declaration that these alleged assets are liable for his decree-debt. (*Krishnan and Waller, JJ.*) BOMMAYYA NAICKEN *v.* SUBRAMANIA IYER.

83 I. C. 165 = 1924 M.W.N. 342 = 34 M.L.T. 290 = A. I. R. 1924 Mad. 707 = 46 M.L.J. 374.

———*Executing Court.*

Under S. 38, a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution and where the Trial Court is not the Court to which the decree is sent for execution, this section prevents it from proceeding with the suit as a matter in execution. (*Kotval, A. J. C.*) BRIJMOHAN SINGH *v.* KASTURCHAND.

68 I. C. 693 = A. I. R. 1922 Nag. 189.

———*Revision.*

Where a suit is instituted in respect of a matter which can be agitated only in execution in the same Court, the suit should not be dismissed but the plaint should be treated as an application for execution. Failure to do so can be rectified in revision. (*Mitra, O.J.C.*) SITARAM *v.* DONGAR SINGH.

59 I.C. 477 = A. I. R. 1921 Nag. 130.

—S. 47—Defence to a suit.

———Where a person has successfully opposed an application under S. 47, C. P. Code, on the ground that that section did not apply, he cannot subsequently raise a plea in a suit brought by the applicant that the suit was barred by S. 47. (*Kinkhede, A.J.C.*) UTTAMCHAND *v.* SALIGRAM. **117 I.C. 285 = A. I. R. 1929 Nag. 79.**

———It is not open to an assignee who was not a party to the suit or to the original proceedings in connection with the attachment to say that the suit was barred by S. 47. 28 All. 262, Dist. A.I.R. 1923 Mad. 562 and A. I, R. 1926 Mad. 1011, Expl. (*Ananthakrishna Ayyar, J.*) RAMA IYER *v.* ANDIAPPA PILLAI

1929 M.W. N. 718 = 120 I.C. 565 = A. I. R. 1929 Mad. 850.

———An objection, which could not have been raised by plaintiff in a suit by him under S. 47, C.P. Code, can be made the ground of defence in a suit by another. 26 Cal. 946, Foll. (*Walmsley and Suhrawardy, JJ.*) SURADHANI DUTTA *v.* SITTOO SHEIK.

71 I.C. 378 = 38 C.L.J. 17 = 27 C.W.N. 280 = A.I.R. 1922 Cal. 311.

———The effect of S. 47 is to debar the plaintiff from bringing a suit for the determination of a question relating to the execution, discharge or satisfaction of a decree which had arisen between himself and the defendant as parties to the suit, in which the decree was obtained, but not to debar the defendant from setting up by way of defence a matter which related to the execution, discharge or satisfaction of a decree obtained in a suit to which he and the plaintiff were parties, unless the defendant was estopped or otherwise barred by any rule of law from putting forward his claim. 19 M.L.J. 1 Foll. (*Ayling and Spencer, JJ.*) CHINA DANDSI *v.* PEDDA TATIAH. **70 I.C. 303 = 14 M.L.W. 424 = 1921 M. W. N. 536 = A.I.R. 1921 Mad. 279 = 41 M.L.J. 261.**

—S. 47—Execution Sale.

———Where sale was duly confirmed by order of the court and became absolute under Order 21, Rule 92, *held*, the only remedy was by suit, and an application under section 47 was incompetent. (*Ayling, Offg. C. J. and Odgers, J.*) RAMASWAMI KONAN *v.* KULANDAIVELU PILLAI. **70 I. C. 569 = 1922 M. W.N. 121 = 15 M. L. W. 272 = A. I. R. 1922 Mad. 63.**

———Where the decree itself is not impeached a separate suit will not lie to set aside a sale even on the ground of fraud and even where the auction-purchaser who was not a party to the suit in which the decree was obtained is impleaded as a defendant together with the decree-holder in the subsequent suit, the matter being one for an application to the executing court under S. 47 of the C. P. Code, 19 Cal. 683 and 26 Cal. 324. Foll. (*Dawson Miller, C.J. and Ross, J.*) PAHLAD SINGH *v.* SAJIWAN RAI. **61 I. C. 126 = 6 P. L. J. 16 = 2 P. L. T. 66 = A. I. R. 1921 Pat. 54.**

—S. 47—Foreign decree—Objection to execution.

———The judgment-debtor under foreign decree sought to be executed in a British Indian Court can raise objections to the decree. (*Srinivasa Ayyangar, J.*) KRISHNASWAMY CHETTY *v.* MADHAPPA CHETTIAR.

86 I. C. 492 = 21 M. L. W. 330 = A. I. R. 1925 Mad. 788.

—S. 47—Limitation.

———Article 165, Limitation Act, does not govern the cases of those applications which are filed by the parties to the suit as objections to the execution proceedings under S. 47, C. P. Code. The only article applicable in those cases is Art. 181. 38 All. 339 ; 42 Mad. 753 (F. B.); A.I.R. 1922 Bom. 271 and 1 L. L. J. 230, Foll.; 17 O.C. 94 ; 6 O.C. 44 ; 21 Mad. 494 ; and 25 All. 343 ; Diss. from. (*Gokaran Nath Misra and Pullan, JJ.*) MT. JILAI *v.* ABDUL RAHMAN. **5 O. W. N. 1053 = 115 I.C. 444 = 4 Luck. 209 = A.I.R. 1929 Oudh 76.**

———An application under S. 47 falls within Art. 181, Limitation Act and not under Art. 166 of the Act, although in the result the applicant has asked for setting aside the sale. (*B. B. Ghose and N. K. Bose, JJ.*) HAFEZ UZIR ALI *v.* NASIMANNESSA BIBI.

116 I. C 634 = A. I. R. 1928 Cal. 865.

———The article applicable for applications under S. 47 of the Code is Art. 181 which gives three years from the date when the right to apply accrues. (*Duval and Mitter, JJ.*) UMAPATI MUKERJEE *v.* SHEIKH SOLEMAN. **54 Cal. 419 = 103 I. C. 233 = A. I. R. 1927 Cal. 614.**

———Application under S. 47 must be governed by the residuary article. (*Greaves and Mukerji, JJ.*) ABDUL KADER *v.* AMBICA CHARAN BHIMYA.

97 I. C. 697 = A. I. R. 1927 Cal. 57.

———*Decree-holder—Auction-purchaser.*

An order on an application under O. 21, R. 95, by an auction-purchaser who is also decree-holder, is an order under S. 47, C. P. Code. The application is governed by the limitation laid down in Art. 182 and not by Art. 180. (*Findlay, J. C.*) BALAJI KASHINATH *v.* R. B. ANANDRAO. **103 I. C. 335 = A. I. R. 1927 Nag. 294.**

———Where an execution sale is void as against a party and he applies for relief under S. 47, C. P. Code or otherwise, the article applicable is Art. 181 and not Art. 166. (*Schwabe, C. J. Ramesam and Waller, JJ.*) RAJAGOPALA AIYAR *v.* RAMANUJACHARIAR.

80 I.C. 92 = 47 Mad. 288 = 19 M. L. W. 179 = 34 M. L. T. 37 = 1924 M. W. N. 182 = A. I. R. 1924 Mad. 431 = 46 M. L. J. 104.(F. B.).

———Art. 166 is applicable to petitions under S. 47. (*Oldfield and Venkatasubba Rao, JJ.*) C. GANAPATHI MUDALIAR *v.* N. KRISHNAMACHARI.

43 M. L. J. 184 = 16 M. L. W. 178 =

C. P. CODE, (1908), S. 47—Parties and Representatives.

1922 M. W. N. 514 = 31 M. L. T. 135 = 70 I. C. 743 = A. I. R. 1922 Mad. 417.

S. 47—Parties and Representatives.

Auction-purchaser.
Benamidar.
Claim Petition.
Commissioner.
Court of Wards.
Custodian of Property.
Decree-holder.
Different capacities of Judgment-debtor.
Executor.
Exonerated Defendant.
Ex parte Order.
Hindu Widow.
Judgment-debtor.
Legal Representatives.
Lessee.
Meaning of.
Minor.
Mortgagee.
Mortgage suit.
Mutwalli.
Occupancy Right.
Parties unnecessarily impleaded.
Partnership.
Person acquiring title before attachment.
Personal Property.
Pre-emption.
Prior mortgagee.
Purchaser.
Receiver.
Scope of.
Subsequent mortgage.
Surety.
Transferee *pendente lite.*
Transferee prior to decree.
Unrepresented Party.
Waqf.

—S. 47—Parties and Representatives—Auction-purchaser—Appeal.

———Adjudication between auction-purchaser and judgment-debtor comes under S. 47 and is appealable. (*Kinkhede, A. J. C.*) SUNDERABAI *v.* SHRIKISAN RAMDHAN. **79 I. C. 636 = 20 N. L. R. 170 = A. I. R. 1924 Nag. 328.**

—S. 47—Parties and Representatives—Auction-purchaser—Mortgage decree.

———Auction-purchaser in execution of a decree on a mortgage represents rights of mortgagor and mortgagee as they stand on the date of the mortgage free from any subsequent equities. (*Mears, C. J. and Bannerji, J.*) KARAMAT ALI *v.* GORAKHPUR BANK, LTD. **67 I. C. 29 = 44 All. 488 = 20 A. L. J. 337 = A. I. R. 1922 All. 495.**

———The condition in S. 47, C.P. Code, that the question should be one " arising between the parties " is satisfied by the question being one of a nature in which the parties to the suit are adversely interested, though the person actually raising it in any particular case against one party may not be the representative of the other party. A judgment-debtor who alleges that some properties were delivered wrongly to the stranger auction purchaser under a mortgage decree should proceed under S. 47, C. P. Code, and not by separate suit. 43 Mad. 107 (F. B.), Expl. (*Ayling and Krishnan, JJ.*) JAINULABIDDIN SAHIB *v.* KRISHNA CHETTIAR. **63 I. C. 200 = 14 M. L. W. 92 = 1921 M.W.N. 491 = A. I. R. 1921 Mad. 420 = 41 M. L. J. 120.**

—S. 47—Parties and Representatives—Auction-purchaser—No party.

C. P. CODE, (1908), S. 47—Parties and Representatives — Auction-purchaser — Representative Character of.

———A question arising on an application under R. 97 by an auction-purchaser other than the decree-holder, is not a question between the parties to the suit and so the question cannot be determined under S. 47. 31 All. 82 and 19 C. W, N. 835, Rel. on. (*Macpherson and Fazl Ali, JJ.*) RAM KUMAR *v.* RAMCHARAN. **11 P. L. T. 331 = A. I. R. 1930 Pat. 311.**

———When the Court, by its order of sale, directs certain property to be sold under the description given by the decree-holder, it must be taken that the Court accepts that description as correct. If no objection is taken to the description by the judgment-debtor and the property is sold under that description, it is not open to the judgment-debtor who had had an opportunity to appear before the court and contest the description, to come in, after the sale, either by way of an application under S. 47 of the Code or by a suit, to contest the description. (*Mukerji and Bennet, JJ.*) KISHEN LAL *v.* PEARE LAL. **125 I. C. 765.**

———In an application by decree-holder to set aside the sale, the fact that the auction-purchaser who is not party to the suit, is interested in the result, is no bar to the application of S. 47. A. I. R. 1917 P. C. 121 and 19 Cal. 683 (P. C.), Rel. on. (*B. B. Ghose and N. K. Bose, JJ.*) UZIR ALI *v.* NASIMANNESSA BIBI. **116 I. C. 634 = A. I. R. 1928 Cal. 865.**

———S. 47 is no bar to a suit instituted against an auction-purchaser, who was not a decree-holder, by one of the judgment-debtors for the recovery of the property not liable to be sold in execution of the decree. A. I. R. 1925 All. 236 ; 31 All. 82 (F. B.) and A. I. R. 1923 All. 470, Rel. on. (*Banerji, J.*) PIAREY LAL *v.* RAMCHANDRA. **96 I. C. 771 = A. I. R. 1926 All. 730.**

——— A question between the judgment-debtor and the auction-purchaser, who is not the decree-holder but a stranger, does not come within S. 47. (*Sulaiman, J.*) BASAWAN *v.* ANPURNA. **95 I. C. 46 = A. I. R. 1926 All. 509.**

———If a wrong decree is passed by the Court and the sale takes place in execution of it and a third party purchases the property that sale cannot be set aside merely on the ground that that decree is subsequently amended. A stranger having purchased the property, it is no longer a matter relating to execution of a decree exclusively between the original parties to the suit. 10 All. 166 (P. C.) Rel. on. (*Lindsay and Sulaiman, JJ.*) AGHA HUSAIN *v.* QASIM ALI. **48 All. 94 = 23 A. L. J. 946 = 6 L. R. A. Civ. 580 = 89 I. C. 1018 = A. I. R. 1926 All. 35.**

———A *bona fide* auction-purchaser for value is not a party to the suit within the meaning of S. 2 or S. 47 of the Civil Procedure Code and an order refusing restitution against him is not a decree and therefore not appealable. (*Moti Sagar, J.*) MT. ASGHARI BEGUM *v.* IRSHAD-UD-DIN. **79 I. C. 57 = A. I. R. 1925 Lah. 176.**

—S. 47—Parties and Representatives—Auction-purchaser—Representative character of.

———The auction-purchaser is not the judgment-debtor's representative and cannot move under S. 47. 34 M. 417 ; 42 B. 411 Rel. on. (*Prideaux, A. J. C.*) BALWANT *v.* RATANLAL. **68 I. C. 429 = A. I. R. 1923 Nag. 161.**

———An auction-purchaser might be treated as a representative in one sense of the decree-holder and in another sense of the judgment-debtor ; a question as to dispute about the identity of the property sold between a person who has acquired the rights of the judgment debtors and the judgment-debtors cannot be entertained

C. P. CODE, (1908), S. 47—Parties and Representatives — Auction-purchaser - Representative Character of.

under S. 47. 31 All. 82, Ref. It is open to the judgment-debtors to obtain any relief to which they might be entitled by way of regular suit. (*Stuart and Kanhaiya Lal, JJ.*) MUNNA LAL *v.* COLLECTOR OF SHAJAHANPUR. **74 I. C. 995=45 All. 96= A. I. R. 1923 All. 470.**

———An auction-purchaser is a stranger to the proceedings, and is not a representative of any of the parties to the suit, so that any questions which might arise between him and the parties to the suit or their representatives must be determined by a separate suit. But if the question raised by the judgment-debtor as to the legality of the Court-sale is virtually one between the parties to the suit, *i.e.*, between the decree-holder and the judgment-debtor, and if in the decision and result of that question the auction-purchaser was interested, the judgment-debtor ought not to be allowed to attack the sale in a suit. 34 B. 546, Ref. (*Macleod, C. J. and Crump, J.*) BAI (MANI) *v.* RANCHODLAL AMRITLAL. **72 I. C. 256=25 Bom. L. R. 147= A. I. R. 1923 Bom. 214.**

———For the purpose of an adjudication between an auction-purchaser and a judgment-debtor the auction-purchaser should be regarded as a representative of the decree-holder. (*Kinkhede, A. J. C.*) SUNDERABAI *v.* SHRIKISAN RAMDHAN. **20 N. L. R. 170= 79 I. C. 636=A.I.R. 1924 Nag. 328.**

———The term "representative" when taken with reference to the judgment-debtor does not mean only his legal representative, but it means his representative-in-interest and includes a purchaser of his interest who, so far as such interest is concerned, is bound by the decree.

Such a purchaser, whether he has purchased the judgment-debtor's interest at a private sale or at execution sale, can be made a party to the execution proceedings and he can have an opportunity to raise objections against the execution proceedings, if any. The real test to be applied in determining the question whether the auction-purchaser is to be regarded as the representative of the judgment-debtor or the decree-holder depends upon the nature of the question raised and who the contesting party is. If the question is between the judgment-debtor and the auction-purchaser and the interests of the two are conflicting, the auction-purchaser can in no sense be considered to be a representative of the judgment-debtor. 19 Cal. 683 (P. C.) Foll. ; 24 Cal. 62 (F. B.) ; 26 All. 447 ; and 43 Mad. 107 (F.B.); Cons. and Rel. on. ; 42 Bom. 411 ; 44 Bom. 352 ; A.I. R. 1921 Bom. 45 ; 31 Mad. 177 ; 34 Mad. 417 ; 41 Mad. 467 ; 8 O. C. 370 ; and 2 O. L. J. 57, Dist. (*Gokar Nath Misra and Srivastava, JJ.*) NAROTAM DAS *v.* SUKHRAJ SINGH. **5 O. W. N. 791= 10 L. R. A. Rev. 85=3 Luck. 719= 116 I. C. 49=A. I. R. 1928 Oudh 442.**

———A purchaser in execution of a decree by an inferior Court can bring to the notice of the superior Court the fact of his purchase as a representative of the judgment-debtor for stopping the sale in execution of a decree of a superior Court but he cannot object under O. 21, R. 58. 15 C. W. N. 542, Diss. (*Krishnan and Odgers, JJ.*) SRINIVASACHARIAR *v.* APPAVOO REDDY. **84 I. C. 265=20 M. L. W. 864= 1924 M. W. N. 551=A. I. R. 1924 Mad. 889= 47 M. L. J. 720.**

———The auction-purchasers are the representatives of judgment-debtor for the purposes of S. 47 of the C. P. Code. (*Kotval, A. J. C.*) BRIJMOHANSINGH *v.* KASTURCHAND. **68 I. C. 693= A. I. R. 1922 Nag. 189.**

C. P. CODE, (1908), S. 47—Parties and Representatives—Benamidar.

———*Question between judgment-debtor and auction-purchaser—S. 47 does not apply.*

Where the question for decision is one between auction-purchaser and the judgment debtor, S. 47 does not apply, the auction-purchaser being the representative of the judgment-debtor. The questions which are meant to be covered by the section are those which arise between persons opposed in interest in the suit and not between a party to the suit and his own representative. 25 Bom. 631, Ref. (*Abdur Rahim and Odgers, JJ.*) YAGNASAMI AYYAR *v.* CHIDAMBARANATHA MUDALIAR. **61 I. C. 961=13 M. L. W. 15= A. I. R. 1921 Mad. 81.**

———Pending a suit on a mortgage the mortgaged properties were brought to sale in execution of a money decree against the mortgagor and were purchased by the fourth respondent. The petitioner purchased the property in execution of the mortgage decree and applied for possession but was resisted by the fourth respondent.

Held, that the fourth respondent was a person claiming under the mortgagor judgment-debtor and against whom proceedings can be taken under S. 146 of the C.P. Code and that the respondent was liable to be removed from possession under O. 21, R. 98 of the C. P. Code. 43 Mad. 107, Ref. (*Abdur Rahim and Napier, JJ.*) MANICKA GRAMANI *v.* PARASURAMA MUDALI. **1920 M. W. N. 787=59 I. C. 894=12 L. W. 350.**

—S. 47—Parties and Representatives—Auction-purchaser—Suit against.

———Whereof two judgment-debtors one only was proceeded against in execution proceedings as being the sole owner of the property sold in auction, a suit by the other judgment-debtor after the auction sale for recovery of the property from the auction-purchaser is maintainable. S. 47 is not strictly applicable in such a case. (*Findlay, O. J. C.*) KANHAIRAM *v.* KALICHARAN. **91 I. C. 218=8 N. L. J. 184= A. I. R. 1926 Nag. 68.**

———Where the representatives of the judgment-debtors sued the auction-purchasers on the ground that owing to mistake in sale certificate, land in excess of that decree had passed to the auction-purchasers.

Held, that the latter's plea that the plaintiff's remedy was by application under S. 47, C. P. Code and not by suit was untenable. 31 All. 82 and 1923 All. 470, Foll. (*Daniels, J.*) MUKHTAR AHMAD *v.* KABIR AHMAD. **78 I. C. 666=A. I. R. 1924 All. 856.**

———Proceedings based upon a complaint by the judgment-debtors that the auction-purchaser had taken possession of certain property not covered by the sale are not proceedings in execution within S. 47, inasmuch as auction-purchaser is not a representative of the decree-holder. Such question can be tried only by a suit. 25 Bom. 631, Rel. on. (*Batten and Kotval, A. J. Cs.*) PANDURANG *v.* GOPIKISAN. **64 I. C. 860=A. I. R. 1921 Nag. 59.**

—S. 47—Parties and Representatives—Auction-purchaser—Suit by.

———An auction purchaser, who has paid the full price can bring a suit to recover that money on being dispossessed of the property by a successful claimant, who had lodged an unsuccessful objection under O. 21, R. 58 and subsequently brought a suit and established his right to the property. 36 C. L. J. 205, Foll. (*Harrison and Zafar Ali, JJ.*) ASAD ULLAH KHAN *v.* KARAM CHAND. **76 I. C. 605=4 Lah. 354= 6 L. L. J. 67=A. I. R. 1924 Lah. 115.**

—S.47—Parties and Representatives—Benamidar.

———Where a judgment-debtor raises the question that the person who seeks to execute the decree obtained by his benamidar alleging to be the true owner is not the true owner, the question should be decided under S. 47. (*B. B. Ghose and Bose, JJ.*) NIL KANTA GHOSAL *v.* RAMCHAND ROY. **114 I. C. 495 = A. I. R. 1928 Cal. 835.**

———A benamidar is neither a party nor the representative of a party under S. 47. (*Odgers, J.*) VENKAMMA *v.* P. PARTHASARTHI & BROS. **24 M. L. W. 634 = 98 I. C. 14 = A. I. R. 1926 Mad. 1081 = 51 M. L. J. 391.**

—S. 47—Parties and Representatives—Claim Petition.

———The combined effect of S. 47 and O. 21, R. 58 is that when an objection to attachment is made by a party to the suit or his representative, the objection should be treated as one falling under S. 47, whereas if the objection to attachment is made by a third party, his objection will be governed by the provisions of O. 21, R. 58. (*Fazl Ali, J.*) MADHO BIBI *v.* HAZARI MAL. **10 P. L. T. 95 = 115 I. C. 695 = 8 Pat. 717 = A. I. R. 1929 Pat. 141.**

———Objections to attachment raised by a party to the suit in which the decree under execution was passed or by his representative fall within the scope of S. 47. One who has purchased the judgment-debtor's interest in his putni tenure prior to the decree for rent obtained by the landlord is bound by that decree and as such is representative of the judgment-debtor within the meaning of S. 47, C. P. Code. 32 Cal. 1031, Rel. (*Panton and Mitter, JJ.*) KRISHNA CHANDRA *v.* DINA NATH. **54 Cal. 1064 = 107 I. C. 357 = A. I. R. 1928 Cal. 94.**

———Plaintiff sued *P* on certain pro-note joining *H* as party. The suit against *H* was dismissed on the ground of misjoinder. In execution of his decree, the plaintiff attached certain properties ; *H* and her husband applied for removal of attachment claiming the properties as their own. The application was heard and allowed under O. 21, Rr. 58 and 61 without objection by plaintiff. Instead of filing a suit under R. 65 plaintiff appealed to the High Court against the order.

Held, that as the proceedings were all under O. 21, Rr. 58 to 62 and the order on the joint application of *H* and her husband who was not a party to the suit was not and could not have been made in the execution proceedings, the plaintiff, decree-holder, who had acquiesced in the adoption of the procedure under O. 21, could not contend that R. 63 did not apply, but his case came within Expl. to S. 47. (*Heald and Cunliffe, JJ.*) U KALA *v.* MA HNIN U. **101 I. C. 794 = 5 Rang. 110 = A. I. R. 1927 Rang. 137.**

———Proceedings between the opposite party and the judgment-creditor as to whether the attachment is valid are proceedings under S. 47 and not under O. 21. S. 47 would be very much narrowed if it were laid down that people claiming under a purely colourable and fraudulent document are not to have their claim set aside or ignored when proceedings are taken in execution. (*Rankin, J.*) KARALI PRASAD MUKHERJI *v.* JAMINI BALA DEVI. **76 I. C. 316 = A. I. R. 1923 Cal. 344.**

—S. 47—Parties and Representatives—Commissioner.

———An order passed by the Court in favour of a Commissioner for the payment of costs connected with the execution of a commission which were recoverable from the parties to the suit may be enforced by the Court under the inherent powers conferred upon it by S. 151 of the Code of Civil Procedure in such manner as may be thought proper. Any proceedings taken in

enforcement of such an order is not a proceeding between the parties to a suit for the execution of a decree, within the meaning of S. 47. (*Kanhaiya Lal, J.*) GOPAL DAS *v.* GAURI SHANKER. **74 I. C. 186 = A. I. R. 1924 All. 122.**

—S. 47—Parties and Representatives—Court of Wards—Manager of.

———Where under S. 6 (*c*) of the Court of Wards Act a proprietor is declared to be disqualified and the Court of Wards is in possession of his properties then under S. 47 of C. P. Code any objection taken by the manager of the Court of Wards in execution proceedings against the properties of the proprietor is an objection taken by the judgment-debtor through the general manager of the Court of Wards. (*Ross and Sen, JJ.*) LACHMI NARAIN *v* MD. ABRAHIM HUSSAIN. **84 I. C. 620 = 4 Pat. 172 = 6 P. L. T. 400 = 1924 P.H.C.C. 310 = A. I. R. 1925 Pat. 179.**

—S. 47—Parties and Representatives—Custodian of property.

———A suit by a decree-holder against a supratdar on the ground that the plaintiff had suffered loss by the supratdar misappropriating the property is barred by Ss. 145 and 47. (*Dalal, J.*) PEAREY LAL *v.* SITA RAM. **113 I. C. 751 = 1929 A. L. J. 80 = A. I. R. 1929 All. 266.**

———A sapurdar being a person to whom goods attached in execution of a decree are entrusted is a surety and his liability can be enforced in execution proceedings in virtue of S. 145 read with S. 47, C. P. Code. (*Harrison and Tekchand, JJ.*) DODA SHAH *v.* BISHEN DAS. **111 I. C. 592 = A. I. R. 1928 Lah. 181.**

———The security given by a depository or custodian for the safe custody of the property entrusted to him by the orders of Court in execution can be realized by issue of a summary process in execution against him by the executing Court whether the supratdar is or is not a party to the execution proceeding. (*Prideaux and Kinkhede, A.J.Cs.*) RAMJI *v.* ZIBLAJI. **80 I. C. 49 = 20 N.L.R. 93 = 7 N.L.J. 130 = A.I.R. 1924 Nag. 258.**

———*Decree-holder as.*

Where movable property is attached before judgment and placed in the custody of the plaintiff sapurdar and a decree is passed in his favour but the property is released from attachment by Court's order but is not returned by the decree-holder, the judgment-debtor is entitled to sue the decree-holder for compensation for wrongful detention of his property provided the sapurdar is sought to be held liable as depository and not as decree-holder or as only party to the suit ; such a claim is outside the scope of S. 47, 13 C. P. L. R. 104 and 16 N. L. R. 178, Ref. (*Mitra, O. J. C.*) SITARAM *v.* DONGAR SINGH. **59 I. C. 477 = A. I. R. 1921 Nag. 130.**

—S. 47—Parties and Representatives—Decree-holder.

———Disputes between rival decree-holders are excluded from the operation of S. 47. 7 All. 681, Foll. (*Harrison, J.*) NUR HUSAIN SHAH *v.* ABDUL QADIR. **113 I. C. 776.**

———*Rival decree-holders.*

Where, of two joint decree-holders, one purchases the property in execution sale but the sale is set aside on judgment-debtor depositing the decretal amount and 5 per cent. as compensation the question whether the purchasing decree-holder alone is entitled to the 5 per cent. is not one between the parties to the suit, but it is a question between two decree-holders and hence the decision thereon is not appealable. (*Das and Adami, JJ.*) MUNSHI RAI *v.* RUP NARAIN. **6 Pat. 386 = 103 I. C. 724 = A.I.R. 1927 Pat. 288.**

———*Rival decree-holders—Dispute between assignee of decree-holder and one holding charge on decree—Order relating to, is not appealable.*

A dispute between an assignee from decree-holder and a person having a charge over the decree is one between persons who occupy substantially the position of decree-holders and the order passed relating to such dispute is not appealable under S. 47, Civil P. Code. (*Waller and Madhavan Nair, JJ.*) RAMAN CHETTIAR *v.* CHOKALINGA CHETTIAR. **24 M. L. W. 70=93 I. C. 649= A. I. R. 1926 Mad. 691.**

———*Auction-purchaser.*

A dispute between auction-purchaser and the judgment-debtor, even if the former be the decree-holder who has purchased property with the permission of the Court, is not a dispute between the judgment-debtor and decree-holder relating to satisfaction, discharge, etc., of the decree and therefore S. 47 has no application to such a dispute. Hence the order of the executing Court deciding such a dispute is not appealable. 8 P.R. 1918 and 1 Lah. 134, Foll. (*Jai Lal, J.*) MULK RAJ *v.* KISSI. **119 I.C. 226 (Lah.).**

———*Auction-purchaser.*

K executed a mortgage in favour of the defendants who later brought a suit on the basis of their mortgage, and brought some property to sale. A share was included in the sale which was not included in the mortgage or in the decree. The decree holder himself purchased and obtained possession. A suit was brought by the judgment-debtor to recover excess share sold.

Held, that there was no adequate reason for treating the auction-purchaser as a representative of the decree-holder in the present proceeding and, therefore, S. 47 did not constitute a bar to the suit. (*Boys and Iqbal Ahmad, JJ.*) BULAKI DAS *v.* KESRI. **50 All. 686= 26 A.L.J. 716=113 I. C. 725=A.I.R. 1928 All. 363.**

———*Auction-purchaser.*

A decree-holder who purchases, under the sale held in execution of his decree, property of the judgment-debtor is still, in subsequent proceedings between him and the judgment-debtor, a party to the suit in which the decree was passed. (*Stuart, C. J., Wazir Hasan and Gokar Nath Misra, JJ.*) GAYA BAKHSH SINGH *v.* RAJENDRA BAHADUR SINGH. **3 Luck. 182=5 O. W. N. 108= 110 I. C. 83=A. I. R. 1928 Oudh 199.**

———Execution proceedings in which a decree-holder seeks to recover the costs to which he is entitled under the decree from the property of such of the judgment-debtors also who are not liable to pay those costs under the terms of the decree, must be treated to be proceedings under S. 47. (*Hasan, J.*) MUNIR AHMAD *v.* ABDUL WAHAB. **109 I. C. 203=5 O. W N. 242.**

———*Third assignee—Person attaching decree.*

Quaere—Whether an order on a question arising between an assignee from a decree-holder and a person attaching the decree prior to assignment is appealable. 25 Mad. 383, Doubted; A.I.R. 1921 Mad. 81; 31 M.L.J. 44; A.I.R. 1924 Mad. 518; A.I.R. 1926 Mad. 691, Appr.; 20 C.W.N. 679, Ref. (*Odgers and Curgenven, JJ.*) RAMAKRISHNA AIYAR *v.* MARI GOUNDAN. **1927 M. W. N. 680=105 I. C. 606= A.I.R. 1927 Mad. 1025.**

———*Purchaser of property.*

A dispute as to the right to execute a decree between an assignee-decree-holder and a purchaser of property included in the decree cannot be properly decided in execution proceedings but a separate suit must be brought to declare the title and in such a case the assignee decree-holder is entitled to execute the decree. (*Krishnan, J.*) PERUMAL NAIDU *v.* MARUKRITHAMMAL. **98 I.C. 856=A. I. R. 1927 Mad. 240.**

———*Auction-purchaser— Decree-holder auction-purchaser is a party to the suit.*

Per *Curiam.*—A decree-holder is a party to the suit and does not cease to be so after the auction sale. (*Cuming, J., contra.*) (*Chatterjea, Ag. C.J. and Walmsley, Cuming, Page and Chakravarti, JJ.*) KAILASH CHANDRA *v.* GOPAL CHANDRA. **53 Cal. 781= 43 C. L. J. 345=30 C. W. N. 649=95 I. C. 494= A. I. R. 1926 Cal. 798 (F.B.).**

———*Auction-purchaser.*

When a question which arises is really a question between the judgment-debtor and the decree-holder, and relates to execution of the decree, the mere fact that the decree-holder has become the auction-purchaser does not take the matter out of the purview of S. 47. 31 All. 82 and A.I.R. 1926 Cal. 714 (F.B.), Dist. (*Greaves and Mukerji, JJ.*) ABDUL KADER *v.* AMBIKACHARAN. **97 I. C. 697=A. I. R. 1927 Cal. 57.**

———*Assignee not on record.*

Where a decree-holder has, during the pendency of the suit in which he subsequently obtains a decree, assigned his rights to a third party who is not brought on the record, the assignee has no right to execute the decree that is subsequently passed. But the decree vests in the assignee in equity. Case-law referred. (*Lobo, A. J. C.*) LALCHAND KHUSALDAS *v.* HUSSAINIO MAMO. **97 I. C. 257=A. I. R. 1927 Sind 78.**

———*Auction-purchaser—Representative of.*

The proceedings between a decree-holder who has purchased at Court auction and the judgment-debtor are proceedings relating to the execution, discharge and satisfaction of the decree; and no distinction can be drawn in principle between such a case and one where the proceedings are between a party who derives title from a decree-holder who has purchased at Court auction and a judgment-debtor. 28 Mad. 87 held not overruled by 43 Mad. 107 and Foll. (*Phillips and Madhavan Nair, JJ.*) SORNAM *v.* THIRUVAZHI PERUMAL PILLAI. **23 M. L. W. 744=96 I. C. 657= 1926 M. W. N. 563=A. I. R. 1926 Mad. 857= 51 M. L. J. 126.**

———Where money is deposited in Court by the judgment-debtor to satisfy the decree of *A* and *B*, another decree-holder of the same judgment-debtor applies to the Court to satisfy his decree out of the deposit and the Court orders, as between *A* and *B* alone, that the money should be paid to *B*, the order is not one under S. 47, 9 L. W. 32; Dist.; A. I. R. 1922 Mad. 99, Rel. on. (*Wallace, J.*) RAMANATHA *v.* KARUPPAYYA. **1926 M. W. N. 683=97 I. C. 1020= A. I. R. 1926 Mad. 1104=51 M. L. J. 436.**

———*Co-decree-holders are not 'parties' within the meaning of S. 47.*

The expression "parties" in S. 47 refers to parties ranged on opposite sides and not as co-decree-holders on one side only, (*Kinkhede, A. J. C.*) RADHABAI *v.* BHIMRAO. **82 I. C. 734=21 N. L. R. 34= A. I. R. 1925 Nag. 186.**

———*Execution by assignee—Objection as to assignee's title can be raised.*

When a decree is sought to be executed by the assignee thereof, it is competent to the Court to entertain, at the instance of the judgment-debtors and the original decree-holder, objections to the execution of the decree on the ground that the title to the decree has not passed to the assignee. (*Ross and Kulwant Sahay, JJ.*) SHO PRASAD *v* P. E. LALL. **86 I. C. 564= 4 Pat. 120=A. I. R. 1925 Pat. 449.**

———*Decree-holder purchasing property at auction-sale* *cannot sue separately for possession.*

S. 47 bars a separate suit for the possession of property purchased by a decree-holder at a Court-sale. For a decree-holder by purchasing property at Court-sale does not cease to be a party to the suit within the meaning of S. 47 and proceedings for the delivery of possession of property purchased by him are proceedings in execution and fall within the scope of S. 47. (*Raymond and Kennedy, A. J. C.*) PIRI MAL *v.* MT. SANGHAR. **78 I. C. 930 = 18 S. L. R. 34 = A. I. R. 1925 Sind 171.**

———*Decree-holder purchasing property at Court sale can sue for possession.*

An auction-purchaser who is himself a decree-holder can sue to recover possession of the property purchased by him at the Court sale. 26 B. L. R. 601, Foll. (*Shah, Ag. C. J. and Fawcett, J.*) LUXMAN SADASHEO *v.* GOVIND GANESH. **26 Bom. L. R. 843 = 86 I. C. 503 = A. I. R. 1924 Bom. 527.**

———*Questions between decree-holders* inter se *do not fall under S. 47.*

Disputes between co-decree-holders as to the right of one to execute a joint decree to the exclusion of the other are not questions arising between the parties to a suit. (*Spencer and Odgers, JJ.*) HANUMANTHA ROW *v.* A. KRISHNAMMA. **70 I. C. 329 = 32 M. L. T. 118 = A. I. R. 1924 Mad. 518.**

———The holder of a decree sought to be executed by attachment of another decree is in law the representative of the holder of the attached decree. (*Mookerjee and Panton, JJ.*) MADHAN MOHAN *v.* BISHNUPADA DEY. **35 C. L. J. 109 = 64 I. C. 780 = A. I. R. 1921 Cal. 580.**

———Where the decree-holder auction purchaser in execution of a decree is obstructed in obtaining possession and the Court refuses to remove the obstruction, *held*, that the order is one under S. 47 of the Code. (*Oldfield and Seshagiri Aiyar, JJ.*) MEYAPPA CHETTY *v.* CHIDAMBARAM CHETTY.

12 L. W. 273 = 61 I. C. 349 = 1920 M. W. N. 562 = 39 M. L. J. 603.

—S. 47—Parties and Representatives—Different capacities of—Judgment-debtor.

———Decree against judgment-debtor in his individual capacity—Attachment of property in his possession—Judgment-debtor objecting on the ground that the property is an endowed one and he is in possession as manager—Objection lies under S. 47, not under O. 21, R. 58.—No distinction should be made between the judgment-debtor in his personal capacity and the judgment-debtor in his representative capacity. 39 Cal. 298 (F. B.), Diss. from; 19 Cal. 683, Expl. and Foll. (*Stuart, C. J. and Raza, J.*) SHAH NAIM ATA *v.* GIRDHARILAL. **2 Luck. 145 = 4 O.W.N. 102 = 100 I. C. 464 = A. I. R. 1927 Oudh 120.**

—S. 47—Parties and Representatives—Executor.

———*Legatee's property attached in execution of personal decree against executor—S. 47 applies.*

Legatee, in possession of property attached in execution of a personal decree against executors—Legatee not a party to the suit as such—Legatee's title should be decided in execution—Separate suit is not necessary. 23 Mad, 361, Rel. on. (*Rutledge, C.J. and Brown, J.*) CHETTIAR FIRM OF S.R.M.M.R.M. *v.* TEO EE SAN.

5 Rang. 393 = 6 Bur. L. J. 107 = 104 I. C. 121 = A. I. R. 1927 Rang. 273.

—S. 47—Parties and Representatives—Exonerated defendants.

———Persons party to suit, but no decree against them—Their rights infringed in execution proceedings—

Even such persons must apply under S. 47. (*Anantakrishna Ayyar, J.*) CHENGALRAYA *v.* KOLLAPURI. **123 I. C. 24 = A. I. R. 1930 Mad. 12 = 1929 M. W. N. 811.**

———Defendant discharged not because he was an unnecessary party—He continues party to suit. 15 N. L. R. 146; 40 Mad. 964; A. I. R. 1925 Nag. 118, Dist. (*Kotval, A. J. C.*) GAYARAMSAO *v.* BALKISHAN. **A. I. R. 1929 Nag. 179.**

———Defendant against whom suit dismissed objecting to attachment under O. 21, R. 58—Objection application is one under S. 47 and regular suit is barred—C. P. Code, O. 21, R. 58. (*Das and Wort, JJ.*) HAZARI LAL *v.* RAMJIVAN RAMCHANDRA. **10 P. L. T. 563 = 115 I. C. 691 = A. I. R. 1929 Pat. 472.**

———Defendant as against whom suit was dismissed wrongly bringing objection under O. 21, R. 58, in execution of decree passed in that suit—Objection recorded under R. 58 and after inquiries rejected—Objection being by party to suit must be treated as under S. 47 and as such is not revisable—In revision High Court should not vacate that order and direct objector to apply afresh under S. 47—C. P. Code, O. 21, R. 58—Civil P. C., S. 115—The nature of the claim preferred will be determined by the character of the claimant and not by the label used by the party. The jurisdiction to try the claim cannot also be affected by a mere misdescription of the character of the claim. A. I. R. 1921 Cal. 242; A. I. R. 1925 Pat. 482, Foll.; A. I. R. 1927 Pat. 404 and 1 Pat. L. T. 645, Dist. (*Fazl Ali, J.*) MADHO BIBI *v.* HAZARI MAL. **10 P. L. T. 95 = 115 I. C. 695 = 8 Pat. 717 = A. I. R. 1929 Pat. 141.**

———*Person not sought to be bound by adjudication—S. 47 does not apply.*

Where the name of a person originally joined as a party is subsequently struck off at some stage of the suit and for some reason he is to be regarded as a person whom the Court did not regard or wish to regard as a person sought to be bound by the adjudication in the action and by the decree eventually passed in the suit and thus he being a person who is not bound by the adjudication, not having been party to the proceeding at the time of the adjudication and, therefore, was not a party to the decree then, it cannot be said that any matter arising thereafter could be regarded as relating to the execution of the decree so far as he is concerned. A. I. R. 1923 All. 115 and A.I.R. 1926 Lah. 165, Dist. (*Srinivasa Aiyangar and Anantakrishna Aiyar, JJ.*) NALLAPERUMAL PILLAI *v.* SAKUL HAMED MARACAYAR. **1927 M. W. N. 905 = 108 I. C. 406 = 28 M. L. W. 146 = A.I.R. 1928 Mad. 276 = 54 M.L.J. 721.**

———Exonerated defendants are parties within S. 47. 23 Mad. 361 (F.B.); A. I. R. 1926 Mad. 484; 23 M. L. T. 206, Foll. (*Wallace, J.*) LAKSHMANA DOLA BEHARA *v.* JUJISTI PANDA. **1928 M. W. N. 601 = 113 I. C. 547.**

———A suit was brought against *A* and *B*. *A's* name was struck off by consent and plaintiff was asked to pay his half costs but his name was retained in the cause title in the decree finally drawn up.

Held, in spite of *A's* name being struck off he was a a party within S. 47. Striking is the proper procedure to be employed in the case of misjoinder. In any other case the proper procedure is dismissal. (*Odgers and Viswanatha Sastri J.*) LINGA AIYAR *v.* LAKSHMANAN CHETTIAR. **23 M. L. W. 533 = 1926 M.W.N. 409 = 94 I. C. 123 = A. I. R. 1926 Mad. 687 = 50 M. L. J. 387.**

——The mere exoneration of a party does not have the result of making him cease to be a party. It may mean only that the plaintiff does not want a decree against him. The ground upon which a party is exonerated can never determine whether he continues to be a party to the suit or ceases to be a party, but it will depend entirely upon whether his name has been struck off from or retained on the record. 40 Mad. 964 and 17 M. L. J. 416, Disappr.; 23 Mad. 361 (F.B.), Foll. (*Spencer and Madhavan Nair, JJ.*) SETHU KONAR *v.* RAMASWAMI KONAR. **49 Mad. 494 = 1926 M. W. N. 251 = 94 I. C. 526 = A. I. R. 1926 Mad. 484 = 50 M. L. J. 205.**

——Party exonerated in course of suit—Party fraudulently deprived of property in execution proceedings—Remedy is in execution—Though a person who was once a party might be exonerated in the course of the suit and though no decree is passed against him and no relief is given against him, yet if any question by virtue of the execution of that decree between the parties arises such a question must be determined according to the provisions of S. 47, that is to say, in execution no separate suit will lie for the purpose of agitating any question which arises by reason of the execution of the decree provided the party which raises the question was a party to the suit in which the decree was passed. 15 Mad. 226, Diss.; 23 Mad. 361 (F.B.) Foll. (*Devadoss, J.*) VALLABHA VALIA RAJA *v.* V. M. KOVILAKATH VEDATURATH. **86 I. C. 947 = A. I. R. 1925 Mad. 1133.**

——*No adjudication against defendant—Section does not apply.*

Defendant's name struck out at plaintiff's instance but claim not dismissed against him—Defendant is not a party under the section as there is no formal conclusive adjudication against him. (*Kinkhede, A. J. C.*) KANHAIYALAL KALAR *v.* LACHHI. **80 I. C. 470 = A. I. R. 1925 Nag. 118.**

——Objection to attachment by a party against whom suit was dismissed—Objection is one under S. 47 and not under O. 21, R. 58. (*Mullick and Ross, JJ.*) SHAIK KALOO *v.* BHOLANATH. **87 I. C. 743 = 3 Pat. L. R. (Civ.) 90 = 6 P. L. T. 725 = A. I. R. 1925 Pat. 482.**

——*Exoneration in appeal—Section still applies.*

A suit against several defendants having been dismissed, the plaintiff preferred an appeal against some of the defendants alone and succeeded in getting a decree. In execution, some of the other defendants who had not been impleaded in the appeal objected. *Held* they must still be deemed parties to the suit within the meaning of S. 47 and objections should be disposed of in execution proceedings. (*Shadi Lal, C. J. and Le Rossignol, J.*) AKHTYAR *v.* AKBAR. **91 I. C. 181 (1) = 1 L. C. 1.**

——Where mortgage decree against two persons is set aside against one in appeal, objection by successful defendant that judgment-debtor had no interest in property sought to be sold must be tried in execution proceedings as the successful defendant is a party. (*Stuart and Mukerji, JJ.*) MT. MAHADEI *v.* JAGAN NATH DAS. **78 I.C. 225 = 5 L.R.A. (Civ.) 91 = A. I. R. 1924 All. 313.**

——Quia timet *application—Premature.*

The plaintiff filed a suit against two defendants who were father and son. The suit was dismissed against the first defendant, and decreed against the second defendant. The plaintiff applied to the Court to attach the property of the son. The first defendant then applied to the Court that the Court should not execute the decree against properties which he alleged belonged

to him, but if the Court had granted execution and attached his properties the attachment should be raised.

Held, that the application of defendant No. 1 was in effect a *quia timet* application to prevent that happening which he was afraid would happen if the Court after making an order for attachment of his property actually distrained his property. The application was premature and ought not to have been entertained by the Court. Even when the application is made after attachment is effected, it being one between *parties* must be decided on evidence as a suit under S. 47 and not summarily under O. 21, R. 58. (*Macleod, C. J. and Crump, J.*) CHUNILAL ASHARAM *v.* KASHIBHAI NATHABHAI. **73 I. C. 419 = 25 Bom. L. R. 440 = A. I. R. 1923 Bom. 381.**

——Suit by creditors of deceased—Widow expressed to be not proper party as she was not an heir—But she being alleged to have deceased's property and treated as proper party—She succeeding on merits and suit being dismissed against her—She is party within S. 47. (*Mookerji and Panton, JJ.*) JAMINIBALA DEBI *v.* KARALI PRASAD. **34 C. L. J. 477 = 67 I. C. 6 = A. I. R. 1921 Cal. 242.**

—S. 47—Parties and Representatives—Ex parte Order.

——An *ex parte* order granting leave to apply for execution is not a decree nor has it the force of a decree because sub-cl. (3) indicates that only such order, granting leave as is passed after dispute and after the question has been tried and determined as if it were an issue in a suit is to have the force of a decree. (*Sulaiman and Sen, JJ.*) ATHERTON & CO. *v.* HABIB BAKSH. **115 I.C. 865 = 1929 A. L. J. 553 = A.I.R 1929 All. 390.**

—S. 47—Parties and Representatives—Hindu widow.

——*Execution of money decree against widow—Widow's alienee must be proved to be her legal representative.*

Where a decree is not a decree for sale of property but is only a money decree it is perfectly open to the transferee of the land from a widow to object that the decree against the widow cannot be executed against the transferee unless it is shown that the transferee is widow's legal representative either by being in possession of the property, which was the widow's property, or, at least, by being in possession of property over which the widow had created an encumbrance which continued to be binding on the property after her death. 32 Mad. 429, Ref. (*Reilly and Cornish, JJ.*) C. MEENAMBAL AMMAL *v.* ABURUBAMMAL. **1930 M. W. N. 337 = A. I. R. 1930 Mad. 688.**

—S. 47—Parties and Representatives—Judgment-debtors.

——(*Sen, J.*)—*Conflict between judgment debtors inter se—S. 47 does not apply.* (*Niamatullah, J. dissenting.*)

Where the conflict of interest in the execution department is between two sets of judgment-debtors and there is no question between the decree-holder on the one side and one or other of the judgment-debtors on the other side relating to the execution, discharge or satisfaction of the decree. S. 47 does not apply. 7 All. 681; 30 All., 379; 31 All. 82 (F.B.), Foll.; A. I. R. 1924 Mad. 365 Diss.

Niamatullah, J.—The view that S. 47 can, under no circumstances apply to an order passed by a Court executing the decree as between two judgment-debtors *inter se* cannot be accepted. (*Sen and Niamatullah, JJ.*) ABDUL AZIZ *v.* SHAH ABDUL RAHIM. **119 I. C. 440 = 51 All. 752 = 1929 A. L. J. 757 =**

A.I.R. 1929 All. 291.

—S. 47—Parties and Representatives — Legal representatives.

———*Deceased party can continue his execution application.*

Decree-holder dying while decree in actual execution—His sons need not freshly apply for execution but can continue after substitution of their names. A. I. R. 1928 All. 299, Ref. A. I. R. 1927 All. 165 (F. B.) Expl. (*Mukerji and Bennet, JJ.*) NIADER *v.* KHAZAN. **A. I. R. 1930 All. 604.**

———If in an execution proceeding a person is sought to be impleaded as the legal representative of the deceased judgment-debtor, but if the person denies his character as a legal representative, the question whether or not he is a legal representative must be decided by the executing Court and not in a separate suit. (*Kumaraswami Sastriar, J.*) ABRUPAMMAL *v.* THAYAMMAL. **117 I. C. 122.**

———*Objections by representatives should be under S.* 47.

After a preliminary mortgage decree was passed the judgment-debtor died. His legal representative who was brought on record objected that the property was subject to a charge in his favour. The objection was disallowed. During proceedings for sale under final decree the legal representative did not object that the property could not be sold free from his charge but brought a suit for declaration of his lien on property.

Held: that the suit was barred under S. 47: A. I. R. 1921 Lah. 173, Foll. 14 I. C. 7, not. Foll. (*Jai Lal, J.*) MT. AISHA *v.* JOWAHIR MAL. **A. I. R. 1929 Lah. 762.**

———*Objections by legal representatives should be under S. 47—Decree against husband—Wife impleaded as representative on his death—Property in her hands attached—Objection by her that the property did not form assets of her husband is one covered by S. 47 and not by O. 21, R. 58—Summary rejection is illegal—C. P. Code, O. 21, R. 58.*

A decree was passed against a judgment-debtor, on whose death, the wife was impleaded as his legal representative. On certain property being attached, the wife filed an objection to the effect that the property in question did not form part of the assets of the deceased judgment-debtor, and hence it was not liable to attachment. The lower Court rejected the objection summarily.

Held: that the objection was one covered by S. 47, and not by O. 21, R. 58, as the objector was a party to the execution proceedings as the legal representative of the deceased judgment-debtor. The lower Court was wrong in throwing out the objection without considering it on merits. (*Shrivastava, J.*) MT. MUSHRAFI BEGAM *v.* MD. MUSTAJABULLAH KHAN. **5 O. W. N. 990= 111 I. C. 837=A. I. R. 1929 Oudh 21.**

———Heirs of mortgagor J. D. cannot challenge right of mortgagor to mortgage in execution proceedings. (*Dawson Miller, C. J. on difference between Das and Foster, JJ.*) HITENDRA SINGH *v.* RAMESWAR SINGH. **88 I. C. 141=87 I. C. 849=4 Pat. 510= 6 P. L. T. 634=A. I. R. 1925 Pat. 625.**

———Decree-holder dying and his legal representatives applying for execution—Judgment-debtor objecting that there are other representatives of decree holder who have not applied—Execution Court must investigate the matter. A. I. R. 1925 Pat. 501, Dist. (*Das and Fazl Ali, JJ.*) KAILASH KINKAR *v.* DASRATH SINGH. **119 I. C. 883=A. I. R. 1929 Pat. 232.**

———Defendant *S* dying before decree—His legal representative *P* brought on record—Decree passed against property of *S*—*P* dying before execution—*P's* legal representatives objecting to execution—They are legal representatives of parties to suit and their objection being under S. 47, order passed by Court on it would be appealable. 23 Bom. 237; 26 Mad. 501: 28 All. 51; 27 Cal. 34; 11 Beng. L. R. 149 (P. C.); 34 Bom. 546; A. I. R. 1923 Bom. 38 and A. I. R. 1927 Bom. 53, Rel. on. (*Patkar and Baker, JJ.*) MARIA URSULA *v.* DARA NAVALAJI & CO. **30 Bom. L. R. 1447= 114 I. C. 861=53 Bom. 46= A. I. R. 1928 Bom. 534.**

———A decree was obtained against the father of the plaintiff. It was executed against the plaintiff as the legal representative, and in execution the defendants obtained possession of certain property. The plaintiff brought a suit for a declaration of his title to the property as heir to some other person.

Held; that the suit was barred under S. 47, as the section is applicable when the judgment-debtor or the representative impleaded in the execution proceedings claims a right in the property on his own behalf though under a different right: 17 Cal. 711 (F. B.), Foll.; 39 Cal. 298, Rel. on. (*B. B. Ghose and Bose, JJ.*) NAIDA BASHI MAJHI *v.* RAJENDRA CHANDRA MALA. **115 I. C. 353=48 C. L. J. 551.**

———Questions arising in an enquiry under S. 52 (2) are questions arising between parties to suit relating to execution and must be decided by executing Court and no separate suit lies—C. P. Code, S. 52 (2). (*Heald and Cunliffe, JJ.*) DAW TOKE *v.* MAUNG BA HAN. **5 Rang. 44=101 I. C. 431= A. I. R. 1927 Rang. 127.**

———Alleged representative does or does not occupy that capacity is to be decided by executing Court. 21 All. 277; 5 A. L. J. 550 and 31 All. 45, Expl. as being under old Code. (*Walsh and Dalal, JJ.*) BABU LAL *v.* JANAK DULARI. **48 All. 429=24 A. L. J. 462= 94 I. C. 454=A. I. R. 1926 All. 681.**

———*Executing Court must decide question of legal representative and cannot refer party to separate proceedings—Execution—Practice.*

If the claimant who claims to be the legal representative, produces a probate or a letter of administration or any such general conclusive proof of his status, then the Court certainly need not go further and should accept that as conclusive. But if there is no such evidence then it is not for the Court to refer to the applicant to separate proceedings, but it must itself make up its mind after such inquiry as may be possible. (*Kennedy, J.C. and Tyabji, A. J. C.*) PARUMAL THAWERDAS *v.* MT. MHAKAN. **21 S. L. R. 20=92 I. C. 575= A. I. R. 1926 Sind 113.**

———Legal representative cannot prefer claim in individual capacity under S. 47 but must bring separate suit, as he is a third party in his individual capacity. (*Raymond and Madgavkar, A. J. Cs.*) MURAD *v.* DAYARAM. **78 I. C. 49=A.I.R. 1925 Sind 156.**

———In execution proceedings and more particularly in proceedings which involve the determination of the rights of parties as they arise in proceedings where the legal representative of the deceased judgment-debtor has been brought in, greater care, attention and time should be devoted to them. 12 All. 313, Foll. (*Lentaigne and Carr, JJ.*) V. T. ARUNACHELLAM CHETTY *v.* MAUNG SAN NGWE. **83 I. C. 550=2 Rang. 168= A. I. R. 1924 Rang. 323.**

———Objection to liability of legal representative must be decided under S. 47. Order of substitution of legal representative making him liable to satisfy the decree as legal representative, but without deciding his objections is improper. (*Jwala Prasad, Ag. C. J. and Ross, J.*). PATIAT DINANATH SAHI *v.* PATIAT MALHIJI BAID. **82 I. C. 803 = 3 P. L T. 106 = 1921 P. H. C. C. 293 = A. I. R. 1923 Pat. 149.**

———An objection taken by a person who has become the representative of the judgment-debtor in the course of the execution of a decree to the effect that the property attached in satisfaction thereof is his own property and not held by him as such representative is a matter cognizable only under S. 47, C.P. Code and not the proper subject-matter of a separate suit by a party against whom an adverse order may have been passed. Where *qua* the execution proceedings a person happens to be the representative of the judgment-debtor any question raised by him can only be decided under S. 47. But objections to attachment raised by a third party come under O. 21, R. 58. 17 Cal. 711 ; 19 C.W.N. 517, Foll. (*Coutts and Das, JJ.*) NAURATAN LAL *v.* MRS. MARGARET ANNE STEPHEN. **68 I. C. 369 = 3 Pat. L. T. 613 = A. I. R. 1922 Pat. 572.**

—S. 47—Parties and Representatives—Lessee.

———Lessees of a mortgagor impleaded as defendants in mortgage suit—Claim by them under O. 21, R. 100—Enquiry should be made into the question of title. 41 Mad. 418 and 40 Mad. 964, Dist. (*Ramesam and Jackson, JJ.*) GOVINDRAJULU NAIDU *v.* C. PADAYACHI. **111 I.C. 147 = A.I.R. 1928 Mad. 1270.**

———*Lessee* pendente lite *cannot be made party in execution.*

During the pendency of a suit to recover possession of certain property by the plaintiff (applicant) defendant granted a lease to the non-applicant (lessee). The suit was decreed in favour of plaintiff and plaintiff applied to have non-applicant lessee added as parties in order to ascertain the mesne profits though the mesne profits had been already ascertained by an Amin.

Held, the liability, if any, of the lessee to pay damages for removal of the mica in the leased property is not a liability which has devolved to him from the defendant. They were both liable, if liable at all, as trespassers, and a case, if any, against the non-applicant lessee must rest upon his action and the direct relation established thereby between him and the plaintiff. O. 22, R. 10, does not apply. There has been no assignment, creation or devolution of any interest within the meaning of that Rule. (*Lord Phillimore.*) MANINDRA CHANDRA NANDI *v.* RAM KUMAR LAL BHAGAT. **68 I. C. 973 = 31 Mad. L. T. 131 = 49 I. A. 220 = 1 Pat. 581 = 24 Bom. L. R. 1251 = 27 C. W. N. 29 = 36 C.L.J. 542 = 20 A.L. J. 988 = 16 M.L.W. 905 = 4 P.L.T. 1 = 4 L. R. P. C. 1 = A. I. R. 1922 P.C. 304 = 43 M.L.J. 589.**

—S. 47—Parties and Representatives—Meaning of.

———Where a Malabar tarwad is sued by making the karnavan a party or all the members of the tarwad parties, the tavazhis of which the tarwad is composed need not necessarily be considered to be parties to the suit. Where a person is an actual party to the suit, his rights in any other capacity must be deemed to be rights of a party to the suit and he must consequently come under S. 47. But when he is not an actual party, but is merely a constructive party represented by another, he can only be deemed to be a party or representative of a party in the capacity in respect of which he was so represented. In any other capacity, more especially when such capacity is adverse to the person who represented him, he can in no sense be deemed to be a party to a decree or representative of a party ; 23 Mad. 195 (F. B.), Foll.; 24 Mad. 658 and 30 Mad. 215, Overruled. (*Phillips, Offg. C. J. and Beasley and Anantakrishna Ayyar, JJ.*) NARAYANAN *v.* THEVA AMMA. **51 Mad. 46 = 26 M. L. W. 775 = 106 I. C. 230 = A. I. R. 1927 Mad. 1043 = 53 M.L.J. 824.**

———" Representatives " include assignees or successors to the interest of a party to the decree (Per *Page, J.*) (*Chatterjea, A. C. J. and Walmsley, Cuming, Page and Chakravarti, JJ.*) KAILASH CHANDRA *v.* GOPAL CHANDRA. **53 Cal. 781 = 43 C. L. J. 345 = 30 C. W. N. 649 = 95 I. C. 494 = A. I. R. 1926 Cal. 798.**

———The expression 'between the parties in the suit,' in S. 47 of the C. P. Code, must not be limited to the parties arrayed against each other as plaintiff and defendant but it also applies to parties on the same side who are arrayed against each other. Therefore a question pertaining to the execution of a decree and decided in a dispute between the defendants themselves cannot be re-opened in a separate suit, 24 M.L.J. 477 ; 1924 Mad. 366, Foll. 31 M. L. J. 44, Dist. (*Madhavan Nair, J.*) S. VENKATA SASTRI *v.* Y. VENKATA GOPALUDU. **85 I. C. 209 = 20 M.L.W. 742 = A. I. R. 1925 Mad. 353.**

—S. 47—Parties and Representatives—Minor.

———Where there is no fraud in the appointment of the guardian *ad litem* for the minor, he is validly appointed by the Court and the minor is duly represented in in the suit. The minor is, therefore, a party to the decree rightly passed and any action that he takes to set aside that decree or to invalidate the proceedings taken in execution of it must be taken under S. 47. (*Phillips and Madhavan Nair, JJ.*) K. ANANTHACHARIAR *v.* RANGACHARIAR AND OTHERS. **98 I. C. 463 = A. I. R. 1927 Mad. 209.**

—S. 47—Parties and Representatives—Mortgagee.

———Mortgagee of patni interest is representative of judgment-debtor patnidar. 24 Cal. 62 and 11 C.W.N. 312 Foll. (*Greaves and Mukherji, JJ.*) HARI MOHAN DALAL *v.* PRURENDRA NATH NAG. **90 I. C. 955 = A.I.R. 1926 Cal. 356.**

———*Right to share in surplus sale proceeds.*

Where a decree for rent was obtained after the relationship of landlord and tenant between the parties had ceased and the question was raised whether the prior mortgagee of the tenure was entitled to share in the surplus sale proceeds, *held*, that the mortgagee was not a representative of the judgment-debtor within the meaning of S. 47. (*Suhrawardy and Costello, JJ.*) OFFICIAL TRUSTEE OF BENGAL *v.* PURNA CHANDRA ROY. **34 C. W. N. 702.**

—S. 47—Parties and Representatives—Mortgage Suit.

——— Suit on mortgage—Party claiming adverse title exempted—Suit by such party for the declaration of title and alternatively for possession is not barred. 16 A.L.J. 752, Dist. (*Mukerji and Ashworth, JJ.*) MT. SHIBBI *v.* HARDHIAN SINGH. **49 All. 379 = 25 A.L.J. 258 = 100 I.C. 495 = A. I. R. 1927 All 378.**

—S. 47—Parties and Representatives—Mutwalli.

———Objection by legal representative that she holds property as Mutwalli and not as the legal representative of her deceased husband is to be tried under R. 58 and not under S. 47. (*Kanhaiya Lal, J.*) BHAGWANDAS *v.* MT. MAHMUD BANO. **75 I. C. 1058 = 4 L. R. A. Civ. 447 = A. I. R. 1924 All. 188.**

—S. 47—Parties and Representatives—Occupancy Right.

———Sale to tenant of proprietary right set aside and possession given to landlord in execution—Suit thereafter by tenant for occupancy rights is not barred either under S. 47 or S. 11, because of the difference in titles. (*Chevis and Abdul Qadir, JJ.*) RANI SURAJ KAUR *v.* NAGINA SINGH. **67 I.C. 485 = 4 L. L. J. 400 = A. I. R. 1922 Lah. 44.**

—S. 47—Parties and Representatives—Parties unnecessarily impleaded.

———Person against whom suit is dismissed as having no real concern with the suit is not a party. 40 Mad. 964 and 41 Mad. 418 (F. B.), Foll. (*Heald and Cunliffe, JJ.*) U. KALA *v.* MA HNIN U. **5 Rang. 110 = 101 I.C. 794 = A. I. R. 1927 Rang. 137.**

———Where a suit is dismissed against a person on the ground that he was improperly impleaded as party having no concern with the suit, such a person does not remain a party to the suit for the purposes of S. 47, notwithstanding whether his name has or has not been removed from Record. In such cases it is the duty of the Court to strike out the name of the party improperly impleaded; it is quite wrong procedure to dismiss the suit as against him. It is quite otherwise in the case where the plaintiff abandons his claim against the defendant and the suit is dismissed as against him. In the latter case the defendant is not a person to whom O. 1, R. 10 (2) applies; 40 Mad. 964, Appr.; A. I. R. 1926 Mad. 484; 23 Mad. 361 (F.B.) and 52 I. C. 671, Diss. from; A.I.R. 1927 Rang. 137 and 41 Mad. 418, Ref. to, 37 I.C. 673, Doubted and Dist.; A.I.R. 1926 Mad. 687, Dist. (*Beasley, C.J. Anantakrishna Ayyar and Curgenven, JJ.*) ABDUL SAC *v.* SUNDARA MUDALIYAR. **A. I. R. 1930 Mad. 817 (F.B.).**

———To determine whether particular defendant against whom suit has been dismissed is or is not party to suit within operation of S. 47 Court should always look into decree, judgment and pleadings as question does not entirely depend upon whether name has been struck off or retained on record. (*Beasley, C. J., Anantakrishna Aiyar and Curgenven, JJ.*) ABDUL SAC *v.* SUNDARA MUDALIAR. **A. I. R. 1930 Mad. 817 (F. B.).**

———Where no relief was claimed against defendant and they were also not proper parties to the suit and where the Court discharged them but did not strike out their names from the record,

Held, that the order amounted to striking out the defendants from the record. 41 Mad. 418; 40 Mad. 964, Expl. 20 C. W. N. 1279, Ref. The mere fact that the name of the exonerated party is not formally removed from the record pursuant to the order exonerating him would not affect the question as to whether he remains a party. 17 M.L.J. 416, Foll. (*Addison, J.*) BAIJNATH *v.* UGGAR SAIN. **27 P. L. R. 194 = 93 I. C. 921 = A. I. R. 1926 Lah. 202.**

———Person impleaded without notice—Name removed without his participating in proceedings—Person is not "party." (*Oldfield and Ramesam, JJ.*) MEYAPPA CHETTY *v.* MEYAPPAN SERVAI. **66 I. C. 722 = 1921 M. W. N. 698 = A. I. R. 1921 Mad. 559.**

—S. 47—Parties and Representatives—Partnership.

———Decree in name of joint family partnership firm of father and son—Son neither appearing, nor admitting partnership nor served individually—No order under R. 50 (2)—Decree cannot therefore be executed against property in hands of son, and if in executing against property in hands of father, son's interest is impaired, son can agitate the question by fresh suit. (*Das and James, JJ.*) SATCHIDANAND *v.* PRAYAG SAH-SAHEB RAM. **A. I. R. 1930 Pat. 205.**

—S. 47—Parties and Representatives – Person acquiring title before attachment.

———Person getting title to property before attachment whether can be joined as party. (*Devadass, J.*) VENKATAPPAYYA *v.* VENKATACHALAPATHI RAO. **99 I. C. 989 = A. I. R. 1927 Mad. 450.**

—S. 47—Parties and Representatives—Personal property.

———Legal representative of deceased judgment-debtor asserting that certain property is his own and not part of assets of deceased in his hands—His objection is one under S. 47 and so it cannot be raised by regular suit. 12 All. 313 (F. B.), Expl. and Foll. 39 All. 47; 31 All. 82 (F. B.); 26 All. 447 (F. B.); A. I. R. 1928 All. 363, Ref. (*Sulaiman and Banerji, JJ.*) MT. IMTIAZ BIBI *v.* MT. KABIA BIBI. **118 I. C. 164 = 1929 A. L. J. 805 = 51 All. 878 = A. I. R. 1929 All. 602.**

———Objection by person who became representative of judgment-debtor during execution, that property attached is his property is congnizable only under S. 47 and no separate suit lies. 39 All. 47 and 12 All. 313, Foll; and 19 Cal. 683 (P. C.), Ref. (*Dalal, J.*) PIARE LAL *v.* KISHAN LAL. **110 I. C. 876 = A. I. R. 1928 All. 704.**

———Legal representative against whom decree passed as such objecting to attachment, claiming the property in his own rights by virtue of a gift prior to suit by the deceased in his favour—Matter falls under S. 47. 17 Cal. 711 (F. B.), Rel. on. (*Maung Ba, J.*) MA SHWE MRA PRU *v.* MAUNG BA ON. **5 Rang. 659 = 107 I.C. 856 = A. I. R. 1928 Rang. 29.**

———Objection by judgment-debtor's representative under O. 21, R. 58—Case falls under S. 47, and decision thereon is a decree. O. 9, R. 13 would in terms be applicable to an *ex parte* decision passed on the objections. 39 All. 47, Foll. 41 Cal. 1, Dist. (*Walsh and Sulaiman, JJ.*) JHUNNI *v.* NATHA. **87 I.C. 287 = 6 L. R. A. Civ. 278 = A.I.R. 1925 All. 594.**

———Question by representative, that property does not belong to J. D. but to him, is within the section. 11 B. L. R. 149, Dist. 12 All. 313; 17 Cal. 711; 5 Mad. 391; 7 Mad. 255; 9 Bom. 458; 16 Cal. 1; 28 All. 51; 34 Bom. 546; 19 C. W. N. 517; 39 All. 47, Foll. (*Lentaigne and Carr, JJ.*) V. T. ARUNACHELLAM CHETTY *v.* MAUNG SAN NGWE. **83 I. C. 550 = 2 Rang. 168 = A. I. R. 1924 Rang. 323.**

—S. 47—Parties and Representatives—Pre-emption.

———Absolute occupancy land mortgaged to *M* and a portion of that land previously mortgaged to *S*—In execution of decree obtained by *S* on his mortgage, portion sold and its possession obtained by landlord under S. 6, C. P. Tenancy Act—In execution proceedings of decree obtained by *M*, landlord's application to have that portion he got possession of in execution of the decree of *S* excluded, was allowed, and remainder of land ordered to be sold—Appeal against such order does not lie as application cannot be considered to be one under S. 47 but must be deemed to be disposed of under inherent power of Court—C. P. Code, S. 151. 26 All. 447, Dist. (*Jackson, A. J. C.*) MAHADEO *v.* ZINGRU. **A. I. R. 1930 Nag. 199.**

—S. 47—Parties and Representatives—Prior mortgagee.

———One *P* mortgaged twice to *K* his property and subsequently mortgaged the same to *G* and afterwards again to *K*. On his two earlier mortgages *K* sued *P* and

G and obtained a final decree. During the pendency of *K*'s suit, *G* sued on his mortgage *P* and *K* and obtained an *ex parte* final decree. On *G*'s application for execution of his decree, *K* objected on the ground of being owner on a title prior in time to *G*'s mortgage, *held* that *K*'s objection was not covered by section 47 as he was not a party to the decree and that it was covered by O. 21, R. 58 as that was a direct attack on *G*'s decree for the sale of the property. (*Hallifax, A. J. C.*) GANGARAM *v.* KANHAILAL. **80 I. C. 626 = A. I. R. 1925 Nag. 185.**

———A prior simple mortgagee in possession by purchase of equity of redemption, though dispossessed by subsequent simple mortgagee under an auction purchase under his mortgage decree, cannot sue for possession; his suit for possession is barred by S. 47. (*Daniels and Boys, JJ.*) LALA DWARKA DASS *v.* SHAH DURGA PRASAD. **82 I. C. 80 = 22 A. L. J. 683 = 6 L. R. A. Civ. 15 = A. I. R. 1924 All. 752.**

—S 47—Parties and Representatives—Purchaser.

———Purchaser from decree-holder-auction-purchaser who had not obtained possession cannot bring separate suit for possession as the purchaser is a representative of the decree-holder—If however possession of judgment-debtor is as licensee from decree-holder, suit is governed by Limitation Act, Art. 142, and is competent. 31 All. 82 (F.B.), Dist.; 28 Mad. 87, Rel. on. and A.I.R. 1926 Cal. 798 (F.B.), Ref. (*S. K. Ghose, J.*) JADAV CHANDRA KARMARKAR *v.* AKRUR CHANDRA KARMARKAR. **A. I. R. 1930 Cal. 586.**

———Where the sale is effected by the judgment-debtor before the attachment is actually made, the vendee does not become the representative of the judgment-debtor and is not bound by any proceedings against the judgment-debtor subsequent to the date of sale. (*Devadoss, J.*) VENKATAPPAYYA *v.* VENKATACHALAPATHI RAO. **99 I. C. 989 = A. I. R. 1927 Mad. 450.**

———Purchaser of judgment-debtor's attached property is representative within S. 47—Order disallowing his claim is appealable and regular suit is unnecessary. 16 All. 286 and 64 P.R. 1912, Dist. 21 All. 20 : 28 Cal. 492; 20 Mad. 378 and 34 Mad. 450, Foll. (*Shadi Lal, C.J. and Le Rossignol, J.*) ISHAR DAS *v.* PARMA NAND. **6 Lah. 544 = 93 I.C. 30 = A. I. R. 1926 Lah. 134.**

———Where before determining what item fell to the share of the decree-holder, particular items of property in the possession of a vendee from judgment-debtor were delivered to decree-holder,

Held, that such a contention could have been put forward by the judgment-debtor and it is difficult to see why the transferee from the judgment-debtor pending execution could not put forward the same contention. An objection of such a nature is not one under O. 21, R. 99 or R. 101, but one under S. 47, and his objection would prevail in spite of a notice served upon him that certain items are to be delivered to decree-holder. A.I.R. 1925 Mad. 1133 and 14 M.L.W. 92, Rel. on. (*Devadoss, J.*) RAJARATNAM *v.* SHEIK HASSAN BI. **24 M.L.W. 254 = 97 I. C. 1031 = A. I. R. 1926 Mad. 968 = 51 M.L.J. 255.**

———When a question arises between auction purchaser, decree-holder and judgment-debtor as to what was the property that was sold, the matter is one to be investigated by a separate suit and not by an application to the execution Court. A. I. R. 1923 All. 470, Foll. *Mukerji, J.*) JAI SINGH *v.* CHIRANJI LAL. **87 I. C. 641 = 6 L.R.A. Civ. 282 = A. I. R. 1925 All. 703.**

———After a decree for possession had been passed the decree holder sold his interest in some of the properties of which possession was directed to be given to him. He then applied for execution of his decree. His purchasers were not parties to that application. An order was made in execution under Order 21, rule 35 (1) but the Subordinate Judge held that action ought to have been taken under Order 21, rule 36, which he directed should be done, and that the possession given under Order 21, rule 35 (1) should be set aside. The purchasers sought to appeal from that order.

Held, that as they were not parties to a proceeding in the lower Ccurt they cannot appeal from the decree or order passed, when there had been no assignment in their favour and the procedure under O. 21, R. 16 was not followed.

Per *Shah, J.*—The mere fact that on the decree-holder's application the possession was in fact ordered to be given to the purchasers is not sufficient to make them parties to the proceedings or to constitute them representatives of the decree-holder within the meaning of S. 47 of the Code. (1907) A.W.N. 280, Foll. (*Macleod, C.J. and Shah, J.*) VITHAL LAXMAN NAIK *v.* MAHADEO RAGHUNATH. **26 Bom. L.R. 333 = 80 I. C. 249 = A. I. R. 1924 Bom. 426**

———Purchasers of one of several mortgaged properties are representatives of judgment-debtor mortgagor and are proper parties in execution of mortgage decree against the particular property though they were not parties to the mortgage suit. (*Das and Adami, JJ.*) DHAROHAR SINGH *v.* RAM PRASAD NARAYAN SAHI. **72 I. C. 862 = 1 Pat. L.R. 139 = A. I. R. 1924 Pat. 367.**

———Purchaser from the decree-holder auction-purchaser is not a representative of the decree-holder.—If he sues for possession, the suit can never be in respect of the execution, discharge and satisfaction of the decree—So S. 47, C.P. Code would not bar such a suit. A purchaser from a decree-holder auction-purchaser no doubt acquires the interest and the rights of the auction-purchaser, but there is no justification for holding that he is, therefore, to be deprived of the rights of an ordinary auction-purchaser to bring a suit at any time within twelve years to recover possession. (*Robinson, C.J. and Heald, J.*) MI AH KOOK *v.* MI HLA MO WAY. **64 I.C. 68 = 11 L.B.R. 17 = A. I. R. 1922 L. B. 18.**

———If an outsider buys a property from a person who, as far as he can judge, is the ostensible owner and can give him a good title to the property, the mere fact that the ostensible owner is a judgment-debtor cannot possibly make the purchaser his representative within the meaning of S. 47. (*Macleod, C. J. and Shah, J.*) BALWANT DASS *v.* UMABAI SHANKAR RAO. **45 Bom. 812 = 23 Bom. L.R. 254 = 61 I. C. 287 = A. I. R. 1921 Bom. 45.**

———Where the landlord has accepted rent for a long period from the purchaser of a non-transferable occupancy holding as marfatdar, he has a *locus standi*, under S. 47, C. P. Code to object to execution proceedings against the original tenant in respect of his holding. The use of the word marfat, in a rent-receipt is not sufficient to resist the claim of the purchaser to take objection under S. 47, C. P. Code. (*Newbould and Cuming, JJ.*) GAGAN CHANDRA MANNA *v.* NAFAR CHANDRA GHOSE. **64 I. C. 124 (Cal.).**

—S. 47—Parties and Representatives—Receiver.

———Receiver for execution of decree— Execution application by him dismissed—Appeal lies as he is representative of both parties. (*Pathar and Murphy,* *JJ.*) NADIRSHAW JAMSHED *v.* PURSHOTTAMDAS GANPATDAS. **118 I.C. 694 = 31 Bom. L.R. 320 = A.I.R. 1929 Bom. 279.**

—S. 47—Parties and Representatives—Scope of.

———The execution court cannot go behind the decreee and allow the judgment-debtor to put up a paramount title in the execution department. Where pending a mortgage suit by the puisne mortgagee the prior mortgagee who was a party filed another suit on his mortgage and the property was sold in the execution of the decree of the later mortgage, the purchaser under the prior mortgage claimed priority, *held*, that the issue as to priority not having adjudicated upon, the purchaser could not raise the plea in execution but should file a separate suit for that purpose. (*Sulaiman and Kendall, JJ.*) SRIMATI *v.* SAHU NAND KISHORE. **1930 A.L.J. 1135.**

———The words "all questions arising between the parties to the suit" in S. 47 do not mean all questions which were actually raised in the execution proceedings. The words mean that the questions must be such as would relate to or affect the rights of parties to the suit. The intention underlying S. 47 and O. 21 is that all questions arising between the parties to the suit or their representatives in interest relating to the execution, discharge or satisfaction of the decree should be determined in the proceedings in which the decree was passed. If a party to the suit or his representatives desire to raise an issue which falls within S. 47, such as whether the sale ought to be set aside on the ground of irregularity or fraud as provided in O. 21. R. 90, or whether the property sold was liable to attachment in execution of the decree, they must do so in the course of the execution proceedings as provided in the Code and not otherwise. A stranger auction-purchaser after the sale has become absolute and a sale certificate has been granted, ought not to be left in doubt as to whether the parties or their representatives intend in the future to attack the sale in further or other proceedings. In like manner the parties or their representatives are also precluded from raising such issues, as ought to have been raised in the execution proceedings, by way of defence in any proceedings other than those for which provision is made in the Code. (*Case Law referred to.*) (*Suhrawardi and Page, JJ.*) MOHAN SINGH *v.* PANCHANAN SADHUR KHAN. **53 Cal. 837 = 99 I.C. 180 = A.I.R. 1927 Cal. 106.**

———*B* obtained a decree which he transferred to *K*. *K* was brought on the record as transferee decree-holder. *K* died and two rival execution petitions were filed, one by the heir of *K*, alleged benamidar, and the other by the son of the alleged real transferee. It was urged that no question of benami arising in execution can be gone into.

Held, that after the original parties, *i.e.*, the original transferor and the original alleged benami transferee and the original alleged real transferee are all dead, the question of benami shrinks to very unimportant proportions, the question being who is the real owner of the decree which is, so to speak, floating about and without any person authorized to execute it. Order 21, R. 16 is not exhaustive of every case which might come under its provisions. By the death of the original parties the whole matter is set at large and it is the duty of the Court under S. 47 to decide on the merits which of the contestants is in fact entitled to execute this decree. A. I. R. 1925 Mad. 701, Expl. 4 C. W. N. 785; 31 Mad. 534 and A. I. R. 1921 Mad. 599 (F. B.), Rel. on. Case-law discussed (*Odgers and Curgenven, JJ.*) RADA KRISTAM NAIDU *v.* DURVADA PATRUDU. **26 M. L. W. 308 = 39 M. L. T 176 = 1927 M.W.N. 639 = 105 I. C. 405 = A. I. R. 1927 Mad. 903 = 53 M. L. J. 568.**

———Parties need not be ranged on opposite sides—Questions between defendants *inter se* are covered by the section. 7 All. 681, 13 M.L.W. 15, 31 All. 82 (F.B.) Dist.; 19 Cal. 683 (P.C.), Foll. (*Oldfield and Devadoss, JJ.*) VEDAVIASA AIYAR *v.* MADURA HINDU LABHA NIDHI CO., LTD. **77 I. C. 148 = 18 M. L. W. 311 = 1923 M. W. N. 662 = A. I. R. 1924 Mad. 365 = 45 M. L. J. 478.**

———A question arising between the same parties but not in their capacity as decree-holder and judgment-debtor but in their capacity as landlord and tenant is not covered by S. 47 and a separate suit is necessary. (*Batten, J. C.*) RAMASA *v.* GAMBHIRCHANDRA. **69 I. C. 500 = 6 N. L. J. 25 = A. I. R. 1923 Nag. 149.**

———*Semble*:—A person who is a representative of the judgment-debtor within the meaning of S. 47 of the C. P. Code might maintain an application under O. 21, R. 100 of the C.P. Code, 3 Pat. L.J. 579 Doubted. (*Suhrawardy and Cuming, JJ.*) GIRIBALA DASI *v.* PRIANATH PAL. **65 I. C. 476 (Cal.)**

—S. 47—Parties and Representatives—Subsequent mortgagee.

———Suit by prior mortgagee—Subsequent mortgagee impleaded but subsequently exempted—Latter can challenge the validity of the decree in a separate suit. (*Kanhaiyalal and Ashworth, JJ.*) RAJARAM *v.* CHHADAMMI LAL. **48 All. 574 = 95 I. C. 147 = A. I. R. 1926 All. 475.**

—S. 47—Parties and Representatives—Surety.

———Person giving security for payment of decretal amount by judgment-debtor can contest his liability as between himself and decree-holder under S. 47 only and separate suit by him does not lie. 43 Mad. 325, Expl. (*Jai Lal, J.*) BIR SINGH *v.* LABHU RAM. **123 I. C. 126 = A. I. R. 1930 Lah. 399.**

———When any person has become liable as surety for the fulfilment of any condition imposed on him, such person is for the purposes of appeal a party within the meaning of S. 47 and therefore an order discharging him from the suretyship is a decree and is appealable. (*Sulaiman and Mukerji, JJ.*) RATNI BAI *v.* GHASI RAM. **86 I. C. 105 = 23 A. L. J. 59 = 6 L. R. A. Civ. 171 = A. I. R. 1925 All. 344.**

———A surety by virtue of S. 145 is a party within the meaning of S. 47 and a plea of fraud can be raised before the execution Court by him. (*Zafar Ali, J.*) KANSHI RAM *v.* FIRM PRABH DIAL ARJAN DASS & CO. **92 I. C. 259 = 7 L. L. J. 457 = 26 P. L. R. 561 = A. I. R 1925 Lah. 618.**

—S. 47—Parties and Representatives—Transferee pendente lite.

———Transferees *pendente lite* cannot be representatives of the transferor within the meaning of S. 47, C. P. Code, for the purpose of attacking the decree-holder's right to sue. 16 All. 286 and 22 All. 243, Expl. (*Fawcett and Mirza, JJ.*) BASAPPA *v.* BHIMAN GOWDA. **52 Bom. 208 = 30 Bom. L. R. 102 = 108 I. C. 17 = A. I. R. 1928 Bom. 65.**

———Per *Oldfield, J.*—A transferee *pendente lite* from a defendant whose transfer proves to be inoperative against the decree-holder and persons claiming under him is not a representative of the judgment-debtor so as to be entitled to appeal under S. 47 against an order for the removal of obstruction to delivery of possession passed against him.

Per *Ramesam, J.*—Such a transferee is entitled to appeal under S. 47. (*Oldfield and Ramesam, JJ.*)

C. P. CODE (1908), S. 47—Parties and Representatives—Transferee prior to decree.

MEYAPPA CHETTY *v.* MEYAPPAN SERVAI.
66 I.C. 722 = 1921 M. W. N. 698 = A. I. R 1921 Mad. 559.

—S. 47—Parties and Representatives—Transferee prior to decree.

———Money decree against tenant for rent—Transferee of the holding prior to the decree is not representative of the tenant. A transferee of the interest of a tenant against whom rent decree has been passed, in order that he may be clothed with the legal character of his representative, must be bound by the decree. 9 C. W. N. 134 and 32 Cal. 1031, Dist. (*Das, J.*) RAMDEHAL SINGH *v.* JOGINDRA PRASAD SINGH.
1921 P. H. C. C. 154 = A. I. R. 1921 Pat 189.

—S. 47—Parties and Representatives—Un-represented Party.

———If a lunatic is not properly represented in a suit, the effect is that he is no party to the suit and has no *locus standi* to object to the execution of the decree under S. 47. 44 Cal. 627, Cons. and Expl. (*Kulwant Sahay and Macpherson, JJ.*) TIKA RAM *v.* TULA RAM. **11 P. L. T. 185 = A. I. R. 1930 Pat. 480.**

—S. 47, O. 34, R. 5—Parties and Representatives—Wakf.

———Final decree for sale on foot of mortgage obtained.—Then mortgagor made wakf of mortgaged property directed to be sold—It is not necessary that beneficiaries under wakf should be made parties to application for execution as the wakf cannot affect the rights of the decree-holder's right of sale. (*Niamatullah and Kisch, JJ.*) ZAHURUL HASAN *v.* BADRI NARAIN.
A. I. R. 1930 All. 597.

—S. 47—Power of executing Court.

———If a decree is the instrument which created the charge, though no doubt the charge can be enforced in execution, yet an executing Court, though it cannot question the validity of a decree, is bound to construe the decree, if necessary. 30 Mad. 26 ; 32 Mad. 429 and 19 All. 480, Dist. (*Reilly and Cornish, JJ.*) C. MEENAMBAL AMMAL *v.* ABURUBAMMAL
1930 M. W. N. 337 = A. I. R. 1930 Mad. 688.

———Per *Kulwant Sahay, J.*—It is open to the Court executing the decree to refuse to execute it, if it finds that the decree was a nullity. But it is important to bear in mind the distinction between a decree which is void or is a nullity and a decree which is merely voidable. A decree can be said to be void where there is a total want of jurisdiction in the Court to pass it. If the Court had no jurisdiction to entertain the suit, it cannot possibly have jurisdiction to pass a decree in the suit. If, however, the Court had jurisdiction to entertain the suit but acted irregularly or illegally in the exercise of its jurisdiction, the decree passed by it may be erroneous or illegal but cannot be said to be without jurisdiction. If a minor or a lunatic is properly described in the plaint and if a guardian is nominated for him, the Court has jurisdiction to entertain the suit. If the minor or lunatic was effectively represented in the suit, the lack of a formal order appointing a guardian would only amount to an irregularity of procedure which would not be fatal to the suit. The decree rendered in such suit is not a nullity. Hence the Court executing the decree could not go behind the decree and examine the validity thereof. 50 I.C. 529 (F.B.) and A.I.R. 1925 Cal. 907 (F. B.), Rel on; 30 Cal. 1021, (P. C.), Expl. and Rel. on; A. I. R. 1923 Pat. 242, Appr. and 32 Cal. 296, Dist (*Kulwant Sahay and Macpherson, JJ.*) TIKA RAM *v.* TULA RAM. **11 P. L. T. 185 = A. I. R. 1930 Pat. 480.**

———*Questioning validity of decree—Limits.*

C. P. CODE (1908), S. 47—Power of Executing Court.

The authority of the executing Court to question the validity of the decree will depend on the facts and circumstances of the particular case under consideration and no hard and fast rule can be laid down in this matter. The executing Court can within certain limits question the validity of a decree where the question of jurisdiction is involved. Dispute regarding money owed by *K* to a bank was referred to the Registrar of Co-operative Societies and he gave an award. It was ordered in the award that in case the full sum due by *K* to the Bank was not collected, *K* should execute a mortgage over his immovable property. It was objected in execution of award that such direction in the award was outside the power of the Registrar.

Held, that the execution Court should consider the objection : A.I.R. 1924 Lah. 448 ; A.I.R., 1926 Pat. 202 and A.I.R. 1927 Nag. 216, Dist.; A.I.R. 1925 Cal. 907 (F. B.), Rel. on. (*Mohiuddin and Staples, A.J.C.*) KASHINATH *v.* HARDA CENTRAL BANK.
26 N. L. R. 60 = 120 I. C. 732 = A. I. R. 1929 Nag. 357.

———*Agreements prior to decree cannot be gone into.*

An objection based on an agreement prior to the passing of the decree is not maintainable in the Court executing the decree. If parties wish to enter into such arrangements, the only proper course is to have the terms embodied in a decree passed by consent : A. I. R. 1926 Rang. 140, Rel. on. (*Carr, J.*) MAUNG BA *v.* DAW THIT. **98 I. C. 1056 = 5 Bur. L. J. 142 = A. I. R. 1927 Rang. 48.**

———*Objection that decree is nullity—Objection proceedings can be treated as suit.*

Where a decree is passed against a minor without appointing a guardian *ad litem* on the footing that he was a major and the minor objects to the execution of the decree against him, the decree being a nullity, the execution Court can treat the objection proceedings as proceedings in a suit and grant a declaration that the decree was a nullity. (*Sulaiman and Mukerji, JJ.*) DAULAT SINGH *v.* RAJA RAMJI. **48 All. 362 = 24 A. L. J. 379 = 93 I. C. 376 = A.I.R. 1926 All. 387.**

———*Null decree need not be executed.*

A minor against whom a decree is passed but who was not represented in the suit, can object to the execution of the decree, and the executing Court can entertain such objection. (*Madhavan Nair, J.*) ARUNCHALAM CHETTY *v.* ABDUL SUBAN.
23 M.L.W. 311 = 1926 M.W.N. 129 = 93 I. C. 356 = A. I. R. 1926 Mad. 429 = 50 M. L. J. 232.

———*Legal representatives and limitation—Court passing decree must determine.*

The questions as to who are the legal representatives and whether the decree was barred by limitation or not, must be determined by the Court which passed the decree before it transfers the decree for execution to another Court : 28 Mad. 466 (F. B.) and A. I. R. 1924 Mad. 673, Rel. on. (*Venkatasubba Rao and Madhavan Nair, JJ.*) MUTHUVEERASAWMI NAYUDU *v.* ANNAMALAI CHETTIAR. **23 M. L. W. 92 = 1926 M. W. N. 120 = 91 I. C 1056 = A. I. R. 1926 Mad. 411.**

———*Partition—Not on execution petition.*

Court cannot grant partition merely on execution petition by auction purchaser. (*Phillips, J.*) MUTHU PILLAI *v.* ALAGIRISAMI PILLAI. **22 M. L. W. 663 = 1926 M. W. N. 165 = 91 I. C. 961 = A. I. R. 1926 Mad. 232.**

———*Saleability decided in suit—Executing Court cannot reopen the question—S. 60 does not apply to* *mortgaged property.*

The question whether a certain pension is of such a character as not to be liable to be sold is a mixed question of law and fact. If the point was expressly raised by the defendant concerned in the suit itself and decided against him and a decree under O. 34, R. 4 was passed for the sale of that pension, it no longer remains open to the judgment-debtor to say that the pension was of such a character as not to be saleable at all. It would not be proper for the execution Court to reopen the question which has already been decided in the original suit. In cases where no attachment is necessary and the sale takes place in pursuance of a mortgage decree directing a sale of the mortgaged property, S. 60 will not be applicable to decide the saleability of the property so as to prevent the Court from selling the property. A.I.R. 1924 All. 328, Rel. on. (*Sulaiman and Daniels, JJ.*) MAHOMED MAZHAR ALI *v.* MT. BIJJA BEGAM. **89 I. C. 364 = 23 A. L. J. 841 = 6 L. R. A. (Civ.) 448 = 47 All. 900 = A. I. R. 1925 All. 652.**

——*Decree made without jurisdiction need not be executed.*

Execution of decree—Court trying suit without jurisdiction—Executing Court can refuse to execute decree passed in the suit. (*Walmsley, C C. Ghose, Suhrawardy, B. B. Ghose and Duval. JJ.*) GORA CHAND HALDAR *v.* PRAFULLA KUMAR ROY. **89 I. C. 685 = 53 Cal. 166 = 42 C. L. J. 1 = 29 C. W. N. 948 = A. I. R. 1925 Cal. 907 (F.B.).**

——*Validity of decree cannot be questioned.*

It is not competent to an executing Court to investigate the validity of a decree provided that a valid decree capable of being executed is in existence. (*Pearson and Graham, JJ.*) SHRINATH CHATTERJEE *v.* KEDAR NATH RAI. **82 I. C. 255 = A. I. R. 1925 Cal. 276.**

——*No sale in declaratory decree.*

The Court executing the decree cannot go beyond the terms of the decree and order sale of partnership property and distribution of sale proceeds where the decree merely declared partners' interest. A sale in lieu of partition is ordered only when the property is incapable of division by metes and bounds and when the equities of the case require it. (*Kennedy, J. C. and De Souza, A.J.C.*) LILARAM KHANCHAND *v.* NIHALCHAND KAKOOMAL. **93 I. C. 825 = A. I. R. 1925 Sind 318.**

——*Validity of decree cannot be questioned.*

The Court executing the decree must take the decree as it stands and has no power to go behind the decree or entertain an objection to the legality or correctness of the decree. (*Baker, J. C. and Prideaux, A.J.C.*) GANGAPATRAO *v.* MT. TULSABAI. **78 I. C. 853 = A. I. R. 1924 Nag. 419.**

——*Cannot question validity of decree.*

An executing Court cannot go beyond the decree for enquiring whether the Court that passed the decree was entitled to do so in view of what was actually alleged by the plaintiff. It can interpret a decree but cannot say that it should not have been passed by the Court. (*Das and Ross, JJ.*) HAKIM MOHAMMAD IDRIS *v.* LACHMAN DAS. **78 I. C. 303 = 5 P. L. T. 368 = 1924 P. H. C. C. 25 = A. I.R. 1924 Pat. 504.**

——*No inherent power to question validity of decree.*

S. 151 of the C. P. Code does not empower the executing Court to refuse execution on such ground. 22 Bom. L.R. 1409, Foll. (*Macleod, C.J. and Fawcett, J.*) RAMANATH MULCHAND *v.* GAJANAN PANDURANG. **23 Bom. L. R. 306 = 62 I. C. 96 = A. I. R. 1921 Bom. 301 (2) at 302.**

——*Cannot entertain objections against decree.*

The Court executing the decree cannot deal with the question whether the decree should stand or whether it should be set aside on any of the grounds on which a decree can be set aside. 22 Bom. 475, Foll. (*Macleod, C. J. and Fawcett, J.*) RAMCHANDRA GOVIND *v.* JAYANTA. **45 Bom. 503 = 59 I. C. 715 = A. I. R. 1921 Bom. 228.**

——The executing Court's only duty is to execute the decree according to its terms, and it is not for that Court to say that the decree is not binding on the property in the absence of certain parties. 43 Mad. 675 (F.B.), Ref. (*Abdur Rahim and Sadasiva Aiyar, JJ.*) NARASA REDDI *v.* KONDAPPA NAIDU. **61 I. C. 759 = 13 M. L. W. 143 = A. I. R. 1921 Mad. 85.**

——*Cannot pass orders expecting reversal in appeal.*

It is not open to an appellate Court on an appeal from an order in execution, preferred by the plaintiff, to pass orders contemplating the entire setting aside of the decree in plaintiff's favour against which no appeal had been filed. (*Kennedy, J.C. and Madgaonkar, A. J. C.*) SANGATMAL LILARAM *v.* JAN MAHMED GULAM KHAN. **79 I. C. 553 = 16 S. L. R. 260 = A I.R. 1921 Sind 102.**

—S. 47—Question Relating to Execution.

Adjustment.
Agreement.
Application.
Attachment of property.
Certificate of payment.
Claim.
Decree.
Decree-holder purchaser.
Delivery of possession.
Discharge.
Dispossession.
Excess property.
Execution sale.
Injunction.
Instalment decree.
Jurisdiction.
Legal representative.
Mesne profits.
Mistake.
Mortgage.
Notice.
Oudh Laws Act.
Partition.
Partition during suit.
Power of executing Court.
Priority.
Sale proclamation.
Satisfaction of decree.
Scheme.
Stay of execution.

—S. 47—Question relating to execution—Adjustment.

——Set-off not claimed in the suit cannot be claimed in the execution proceedings. (*Kendall, A. J. C.*) NATIONAL BANK OF UPPER INDIA, LTD., LUCKNOW *v.* GOPAL DAS. **81 I. C. 651 = 11 O. L. J. 517 = 27 O. C. 248 = A. I. R. 1924 Oudh 434.**

——*Fraud as to adjustment falls under S 47.*

Per *Fawcett, J. C.*—A separate suit based on fraud will not lie simply because it does not relate to the execution of the decree but to the transaction of adjustment. S. 47, C. P Code, includes not only questions relating to the 'execution' of a decree but also its 'discharge or satisfaction'; and alleged fraud in execution proceeding comes under that section. (*Fawcett, J. C., Crump and*

C. P. CODE (1908), S. 47—Question Relating to Execution—Agreement.

Kemp, A.J.Cs.) BANUMAL *v.* NEWANDMAL.
83 I. C. 360 = 16 S. L. R. 207 = A. I. R. 1921 Sind 159 (i) (F.B.).

—S. 47—Question relating to execution—Agreement.

———*Ante-decree agreement not to execute.*

An application to record an alleged agreement not to execute the decree, entered into prior to the passing of the decree, cannot be entertained under O. 21, R. 2, nor can be dealt with by the executing Court under S. 47. A.I.R. 1926 Rang. 140, Foll. (*Rutledge, C.J. and Carr, J.*) M. E. MOOLLA *v.* CHARTERED BANK OF INDIA **5 Rang. 685 = 107 I. C. 860 = A.I.R. 1928 Rang. 36.**

———*Agreement to execute for lesser amount does not fall under S 47 or O. 21, R. 2.*

A decree which on the face of it is enforcible to the fullest extent cannot in execution proceedings be challenged as being inexecutable wholly or in part on account of an agreement between the parties entered into prior to the decree. Where a judgment-debtor sets up an agreement that prior to the decree there was an arrangement between the parties that though the decree is to be passed for a larger sum it should only be executed to the extent of a lesser sum specified in the arrangement and not for the whole, he is not seeking the aid of the Court to determine any question relating to the execution of the decree within S. 47 or O. 21, R. 2, but is asking the Court to embark on an enquiry whether the decree to be executed is the decree as passed by the Court or as agreed upon by the party. 29 Cal. 810 ; 31 Cal. 179, Appr. ; 22 Bom. 463 ; 43 Mad. 725, Disapproved. (*Chari, J.*) MULLA RAMZAN *v.* MG. PO KYAING. **4 Rang. 118 = 5 Bur. L. J. 41 = 96 I. C. 773 = A. I. R. 1926 Rang. 140.**

———*Ante-decree agreement relates to execution.*

An agreement made before the passing of the decree by which the decree was not to be executed against one of the judgment-debtors should be enquired into and decided on the merits by the executing Court. (*Madhavan Nair and Jackson, JJ.*) VELU THEVAN *v.* KRISHNASWAMI REDDI. **87 I. C. 297 = 21 M L. W. 725 = A. I. R. 1925 Mad. 591 = 48 M. L. J. 277.**

———*Ante-decree agreement—Plea of, in bar of execution.*

An agreement made prior to the decree as to the manner in which the decree should be executed after it was passed could be pleaded as a bar to the enforcement of the decree as it stood. (*Spencer and Devadoss, JJ.*) ARUNACHALA GOUNDAN *v.* SWAMINATHAIYER. **77 I. C. 547 = 19 M. L. W. 27 = 1924 M. W. N. 144 = A. I. R. 1924 Mad. 611 = 46 M. L. J. 240.**

—S. 47—Question relating to execution—Application.

———*Ex-parte* decree—Decree amount deposited and decree sought to be set aside—Decree-holder's application for payment, is not one in execution. A.I.R. 1927 Mad. 377, (F.B.) not Appl. (*Devadoss, J.*) IBRAHIM SAHIB *v.* ACHI THAYARAMMAL. **1927 M. W. N. 885 = 27 M. L. W. 661 = A. I. R. 1928 Mad. 296 = 54 M. L. J. 452.**

—S. 47—Question relating to execution—Attachment of property.

———Objection as to the defect or absence of necessary attachment of the property sold in execution comes within the provisions of S. 47. A.I.R. 1924 Rang. 124, Rel. on. (*Pandalai, J.*) (BADAM) SESHAYYA *v.* (GRANDHI) SATTIRAJU. **120 I. C. 863 = A. I. R. 1930 Mad. 414.**

———*Absence of attachment falls under S. 47.*

C. P. CODE (1908), S. 47—Question Relating to Execution—Claim.

Where the petition filed by the judgment-debtor to set a sale aside contained an allegation that there were material irregularities in the publishing and conducting the sale, the application must be treated as being in part an application under O. 21, R. 90. But where such irregularities were not specified and the real ground of attack was based on the absence of any attachment of the greater portion of the area. *Held*, that the absence of an attachment may be a material irregularity in the publishing of the sale. A defective notice specifying the wrong property or wrong portion of a property may be so misleading as to amount to an absence of notice and therefore the objection as to the defect or absence of the necessary attachment involves a substantial question as to the absence of proper notice to the judgment-debtor as to the property attached and it does not come within O. 21, R. 90, but does come within S. 47. 40 Cal. 45, Appl. (*Lentaigne, J.*) MA PWA *v.* MD. TAMBI. **77 I. C. 368 = 1 Rang. 533 = A. I. R. 1924 Rang. 124.**

—S. 47—Question relating to execution—Certificate of payment.

———Judgment-debtor paying certain amount towards satisfaction of decree—Decree-holder not certifying payment and executing whole amount due under decree—Judgment-debtor bringing suit to recover amount paid—Such suit is maintainable—S. 47 does not bar such suit as it is based on an alleged failure of the decree-holder to carry out his promise of crediting the amount to his decree which though bearing on question as to satisfaction of decree is not directly a question relating to such satisfaction. A. I. R. 1923 Rang. 88, Rel. on. (*Brown, J.*) A. K. R. M. M. C. T. CHETTY FIRM *v.* MAUNG THA DIN. **7 Rang. 310 = 119 I. C. 742 = A. I. R. 1929 Rang. 269.**

———Where an application for certifying a payment out of the Court was made, under O. 21, R. 2, cl. (2) within the period prescribed for making such an application to the Court which was executing the decree and where an inquiry was therefore invited by the judgment-debtor as to the payment alleged to have been made by him to the decree-holder during the pendency of the execution proceedings, his application could not be thrown out upon the ground that it was not certified under cl. (3) of that rule. The application was made for the purpose of having the payment certified and until that question was decided the stage of cl. (3) did not arise. The application of the judgment-debtor for certifying payments by him to the decree-holder out of Court is an application in course of the execution of the decree obtained by the decree-holder. The application is therefore one under S. 47, Civil Procedure Code, for it raised the question as to the execution and satisfaction of the decree sought to be executed. The dismissal of that application certainly gives rise to a right of appeal to the judgment-debtor. (*Jwala Prasad and Bucknill, JJ.*) JADANANDAN SINGH *v.* SHEONANDAN PRASAD SINGH. **68 I. C. 645 = 1 Pat. 644 = 3 Pat. L. T. 487 = 1922 P. H. C. C. 200 = A. I. R. 1922 Pat. 276.**

———*Bar of Limitation.*

Right to have payment recorded, time barred—Judgment-debtor cannot agitate under S. 47, afterwards. (*Jwala Prasad and Adami, JJ.*) RADHA KANT LAL *v.* PARBATI KUER. **63 I. C. 535 = 6 P. L. J. 337 = 2 P. L. T. 765 = A. I. R. 1921 Pat. 135.**

S. 47—Question relating to execution—Claim.

———*Execution of mortgage decree—Prior mortgagee's claim does not fall under S. 47.*

Prior mortgagee holding a decree on his mortgage impleaded in puisne mortgagee's suit—His rights under his decree not put in issue—Prior mortgagee purchasing himself in execution of his decree and objecting to sale of these properties in execution of puisne mortgagee's decree—Claim is not barred by *res judicata*—Claim does not fall under S. 47. 47 Cal. 662 (P.C.), Rel. on. (*Wallace and Madhavan Nair, JJ.*) THAREEKUTTI HAJI *v.* M. ISANAU. **99 I. C. 658 = A. I. R. 1927 Mad. 431.**

—S. 47—Question relating to execution—Decree.

———*Charge decree—Non-party cannot resist execution—His remedy is by separate suit—C. P. Code, O. 34, R. 1.*

The charge-decree-holder is entitled to the benefits of his charge decree in execution of the decree and any other person who refuses to be bound by the decree on whatsoever ground it may be has got to file a regular suit for the proper relief. 14 Cal. 631 and 19 All. 480, Ref. (*Ramesam and Cornish, JJ.*) ISMAIL HASSAN *v.* HAJI MOOSA & CO. **123 I. C. 194 = 1930 M. W. N. 160 = A. I. R. 1930 Mad. 538 = 58 M. L. J. 355.**

———*Specific Relief Act, S. 42—Assignment of decree—Judgment-debtor can get it declared invalid.*

A judgment-debtor can maintain a suit for declaration that the assignment of the decree against him by the decree-holder is invalid as being fraudulent. 26 Mad. 264, Rel. on. (*Shadi Lal, C. J. and Agha Haidar, J.*) ISHAR DAS GORAKH RAM *v.* SALIQ RAM. **117 I.C. 893 = A.I.R. 1929 Lah. 51.**

———A judgment-debtor cannot raise an objection that he has no saleable interest in the property ordered to be sold in execution of a mortgage-decree. The proper time to raise such objection is at the hearing of the suit and before the decree ordering the sale is passed. A. I. R. 1926 Pat. 202; 34 All. 25, Rel. on. (*Maung Ba and Brown, JJ.*) U. LU GALE *v.* M. MAHOMED HABI. **A. I. R. 1929 Rang. 275.**

———*Execution—Decree null and void—Objection that decree against dead person is nullity can be taken in execution.*

A decree passed against a dead man is a nullity and it is not essential for a separate suit to be brought to challenge the fact. 26 Bom. 317, 40 All. 423 and A. I. R. 1925 Bom. 290, Considered. (*Martin, C. J. and Percival, J.*) SHIVAJI SAYAJI *v.* VITHAL NARAYAN. **28 Bom. L. R. 1367 = 98 I. C. 927 = A. I. R. 1927 Bom. 53.**

———*Property comprised in the decree—Executing Court must determine.*

Question whether certain land is included in a decree is one under S. 47. A.I.R. 1922 P.C. 252, Foll. (*Duval and Mitter, JJ.*) UMAPATI MUKERJEE *v.* SHEIKH SALEMAN. **54 Cal. 419 = 103 I. C. 233 = A. I. R. 1927 Cal. 614.**

———*Validity of decree challenged—Separate suit only will lie.*

Any question relating to the execution, satisfaction or discharge of the decree arising between persons, who are parties to the suit, whether exempted or otherwise, must be decided in the execution proceeding arising out of the decree passed in the suit, to which he was such a party. The question must, however, relate to the execution of that decree and must not seek to challenge its validity; for no Court executing a decree can go behind it; and if a person seeks to challenge the validity of a decree, the only remedy open to him is, if the matter has not already been finally determined in a previous suit, to get it adjudicated by a separate suit, or in such other manner as may be open to him according to law. 16 A. L. J. 752, Dist. (*Kanhaiya Lal and Ashworth, JJ.*) RAJARAM *v.* CHHADAMMI LAL. **48 All. 574 = 95 I. C. 147 = A. I R. 1926 All. 475.**

———*Quantum of property comprised in the decree.*

The main object underlying the section is to prevent multiplicity of suits and to secure that all matters, which can be decided in the suit, shall be so decided. Where the decree was for land in excess of that which formed the subject of the suit, and where it included land which ought not to have been included,

Held, that such matters are for determination by the Court executing the decree, and that looked at from that point of view a subsequent suit is bad. (*Pearson and Graham, JJ.*) KAYEM BISWAS *v.* BAHADUR KHAN. **89 I. C. 744 = 42 C. L. J. 22 = 30 C. W. N. 41 = A. I. R. 1925 Cal. 1258.**

———Objection that decree is a nullity can be taken in. (*Scott-Smith and Fforde, JJ.*) ANWAR-UL-HAQ *v.* NAZAR ABBAS. **88 I. C. 865 = 6 Lah. 313 = 26 P. L. R. 474 = A. I. R. 1925 Lah. 494.**

———*Order declaring decree executable against property only of judgment-debtor is a decree.*

Order declaring that a decree-holder can proceed against the property but not against the person of the judgment-debtor is a decree as it conclusively determines the right of the parties with regard to one of the matters for determination under S. 47, that is to say, the personal liability of the judgment-debtors to satisfy that decree. (*Campbell, J.*) FIRM MUL CHAND HUT CHAND *v.* FIRM GANDA MAL RALLIA RAM. **75 I. C. 1039 = A. I. R. 1924 Lah. 604.**

———*Reversioner questioning validity—Section does not apply.*

A reversioner as the legal representative of a widow who was the judgment-debtor cannot raise objections challenging the very foundations of the decree even though the widow admitted the claim without contest. An objection that the decree was collusive or in respect of a non-existent debt is not one relating to the execution, discharge or satisfaction of the decree. That question can be only tried in a regular suit. Entertaining such an objection is exercising jurisdiction where there is none and is consequently revisable. (*Kinkhede, A.J.C.*) BIHARI SINGH *v.* NEWAL SINGH. **78 I. C. 136 = 20 N. L. R. 24 = A. I. R. 1924 Nag. 81.**

———*Order under O. 20, R. 14—Whether payment made in time or not falls under S. 47.*

The question whether a payment under a pre-emption decree was made or not within the time allowed is a question affecting the satisfaction or discharge of the decree and falls within the purview of S. 47. A decree for pre-emption is complete in itself and in case of a non-fulfilment of the condition laid down by that decree, no final decree is necessary. It may combine a preliminary direction with the effect it would finally have, if that direction was not complied with. The question whether in a particular case that direction has been complied with or not is a question which arises independently of that decree and can only be determined under S. 47. Such a determination involves an adjudication of the question whether the decree has been satisfied or discharged and is open to an appeal by force of S. 2, which treats such orders as decrees from which an appeal is maintainable. (*Kanhaiya Lal, J. C.*) NILKANTH *v.* MAHABIR SINGH. **26 O. C. 345 = 74 I.C. 558 = A. I. R. 1924 Oudh 104.**

———Execution of mortgage decree—Question whether some properties mortgaged did not belong to mortgagor

is one within the section. (*Stuart, J.*) PANDIT SADANAND PANDEY *v.* SHEIKH TUFAIL AHMAD.
79 I. C. 486 = A. I. R. 1923 All. 115.

———Pre-emption decree—Question of title to standing crops is not one under S. 47 when decree does not touch it. (*Kotwal, A. J. C.*) BABU *v.* VITTOBA.
76 I. C. 193 = A. I. R. 1923 Nag. 327.

———Decree may be shown to be in favour of person dead at its date, though no objection was taken at the time. (*Piggott and Walsh, JJ.*) BHAIYA BINDHA CHAL *v.* NAWAL RAJ KUARI. **64 I. C. 927 = 19 A. L. J. 95 = 43 All. 328 = A. I. R. 1921 All. 404.**

———Per *Coutts-Trotter, J.*—In an application under O 21, R. 100 by a person who is a party to the decree all that the Court is entitled to do is to construe the decree before it. (*Sadasiva Aiyar and Coutts-Trotter, JJ.*) (APPLA) RUKMANI AMMAL *v.* KUTTUVAVA NARASIMMA IYER. **63 I. C. 730 = 14 M. L. W. 85 = 1921 M. W. N. 487 = A. I. R. 1921 Mad. 612 = 41 M. L. J. 54.**

—S. 47—Question relating to execution—Decree-holder Purchaser.

———*Decree-holder auction-purchaser seeking possession—Proceedings are not under S. 47—C. P. Code, O. 21, R. 97.*

Where a decree-holder who has purchased the property at a Court sale seeks to get possession he does not do so in execution of his decree but by virtue of the title acquired as purchaser and his claim based on such title does not come under S. 47. 31 All. 82; A. I. R. 1924 Bom. 429 (F. B.), Foll. 43 Mad 696 and A. I. R. 1925 Pat. 478, not Foll. (*Mirza and Broomfield, JJ.*) HIRALAL MOHANLAL MUTNA *v.* RAMCHANDRA KUNDANMAL MARWADI. **32 Bom. L. R. 619 = A. I. R. 1930 Bom. 375.**

———Application for possession of property purchased by decree-holder auction-purchaser is not application in execution, discharge or satisfaction of decree so as to bar subsequent suit for possession. 1 Pat. L. J. 232 (F. B.); 4 Pat. L. J. 716; 31 All. 82 (F. B.); A. I. R. 1924 Bom. 429, Foll. A. I. R. 1926 Cal. 798, Dist. (*Wort and James, JJ.*) JADAB CHANDRA *v.* RAMESHWAR. **9 Pat. 332 = 11 P. L. T. 315 = A. I. R. 1930 Pat. 308.**

———If the decree-holder happens to be the auction purchaser, the property purchased by him cannot be regarded by him as the proceeds of the sale or the fruits of the decree. The proceeds of the sale consist of the purchase money for which the property was sold, and it is the amount of this purchase money which the decree-holder obtains as the fruit of his decree. If he purchases the property he does not get it as an equivalent of the amount of his decree but he has to pay the purchase money and he may do so either in cash or by setting it off against the amount of his decree. The purchase of the property can therefore in no sense be regarded as acquisition of the fruits of the decree and failure to obtain possession of the property cannot affect the decree itself. Thus the question of the decree-holder purchaser's right to possession as against the judgment-debtor is not a question relating to the execution, discharge or satisfaction of the decree. It is not therefore a question within the scope of S. 47 and the order relating to such question is not appealable. 31 All. 82; 1 Pat. L. J. 232 and A. I. R. 1924 Bom. 429 (F. B.), Rel. on; 25 Mad. 529, not Foll. (*Brown and Maung Ba, JJ.*) J. A. MARTIN *v.* S. M. HASHIM.
8 Rang. 162 = A. I. R. 1930 Rang. 61.

———*Claim for possession by decree-holder auction-purchaser is not within S. 47.*

Per *Macleod, C. J.*—Neither in the Code of Civil Procedure nor in the Indian Limitation Act is there any distinction drawn between a decree-holder auction purchaser and a stranger auction purchaser. The decree-holder purchaser does not seek to get possession in execution of his decree but by virtue of his being declared the purchaser at the auction sale. 35 B. 452 overruled.

Per *Shah, J.*—Claim made by the auction-purchaser, for possession based on the title acquired as auction-purchaser even though he may be the decree-holder does not relate to the execution, discharge or satisfaction of the decree. That question, generally speaking, is outside the scope of S. 47 of the Code. Though it is between the same parties it cannot be said to relate to the "execution, discharge or satisfaction of the decree." Where the validity of the sale is questioned. it may be said that the questions arising in the suit may relate to the execution, discharge or satisfaction of the decree, in execution whereof the sale is held. (1892) L. R. 19 I. A. 166, (1917) L. R. 45 I.A. 54 (60), Dist. (*Macleod, C. J., Shah and Crump, JJ.*) HARGOVIND FULCHAND *v.* BHUDAR RAOJI. **26 Bom. L. R. 601 = 48 Bom. 550 = 83 I. C. 932 = A. I. R. 1924 Bom. 429 (F. B.)**

—S. 47—Question relating to execution—Delivery of possession.

———So far as the Patna High Court is concerned the view has prevailed that an application under O. 21, R. 95 or 97 will not be a proceeding relating to the execution, discharge or satisfaction of the decree. 31 All. 82; 1 P. L. J. 232; A. I. R. 1930 Pat. 308; A. I. R. 1923 Pat. 22, Rel. on; A. I. R. 1925 Pat. 478, not Foll. and A. I. R. 1926 Cal. 798, Ref. (*Macpherson and Fazl Ali, JJ.*) RAMKUMAR *v.* RAMCHARAN.
11 P. L. T. 331 = A. I. R. 1930 Pat. 311.

———*Prima facie* the legislature intended that proceedings under O. 21, Rr. 97 or 100 should be regarded as included under the word "execution." Proceedings under Rr. 97 and 100 follow as sequel on the execution of the decree (using the word "execution" in its stricter sense) and on the Court sale, and the legislature has enacted that such proceedings shall be regarded in law as part of the execution proceedings. It is obvious that S. 141 does not apply to such proceedings under O. 21 as are not also proceedings under S. 47. Therefore O. 9 does not apply to such proceedings under R. 97 or R. 100 as do not also fall within S. 47. A. I. R. 1926 Cal. 798, 4 P. L. J. 135, Rel. on; 17 All. 106 (P.C.), Dist. (*Wallace, Beasley and Madhavan Nair, JJ.*) ALAGASUNDARAM PILLAI *v.* PICHUVIER.
120 I. C. 567 = 30 M. L. W. 424 = 52 Mad. 899 = A. I. R. 1929 Mad. 757 = 57 M. L. J. 381 (F. B.).

———*Wrong property delivered—Mistake rectified under inherent powers of court.*

In the execution of a decree on two mortgages the decree-holder purchased the property mortgaged. The writ of delivery of possession was obtained. The bailiff executing the writ delivered possession of the property not covered by the writ of delivery along with that covered by it. Consequently mortgagor filed an objection by an application purporting to be under S. 47 and O. 21, R. 100.

Held, that the application was not provided for in any of the rules relating to the delivery of possession in execution of a decree or after an execution sale. The question of this nature was not a question relating to the execution, discharge or satisfaction of the decree and that it does not arise between the judgment-debtor and the decree-holder as such and did not fall within the scope of S. 47. Although it purported to be under S. 47 and O. 21, R. 100 it was in effect an application under S. 151 to prevent the abuse of the process of the Court and its inherent powers. (*Ross and Chatterji, JJ.*) (MALIK) ABDUL MOKIT *v.* (MALIK) ABDUL RASHID, **A. I. R. 1929 Pat. 391.**

———Money decree—Auction-purchaser, different from decree-holder, applying for delivery—No question of validity of sale—S. 47 does not apply—Decree-holder auction-purchaser is on a different footing from a purchaser who is not decree-holder. A.I.R. 1921 Mad. 420, Dist. (*Ramesam, J.*) PERIYAYA AMBALAM *v.* ARULAPPAN. **111 I. C. 551 = A. I. R. 1928 Mad. 806.**

———Proceedings as to the delivery of possession may not affect the decree, nor impeach the sale, but when the question arises as to the kind of possession to be delivered it is a question relating to the execution of the decree. (*Chatterji, Ag. C. J. and Walmsley, Cuming, Page and Chakravarti, JJ.*) KAILASH CHANDRA *v.* GOPAL CHANDRA. **53 Cal. 781 = 43 C. L. J. 345 = 30 C. W. N. 649 = 95 I. C. 494 = A. I. R. 1926 Cal. 798 (F. B.).**

———After a property is sold in execution, the Court occupying the position of the vendor has to deliver possession of the property sold by it to the purchaser. This duty Court undertakes in order to complete the sale by which the money due to the decree-holder has been realized. These proceedings may not be strictly a part of the execution before realization of the money due under the decree, but they certainly arise out of the execution of the decree and are therefore related to it. (*Chatterji, Ag. C. J. and Walmsley, Cuming, Page and Chakravarti, JJ.*) KAILASH CHANDRA *v.* GOPAL CHANDRA. **53 Cal. 781 = 43 C. L. J. 345 = 30 C. W. N. 649 = 95 I. C. 494 = A. I. R. 1926 Cal. 798 (F.B.).**

———The proceeding relating to delivery of possession after confirmation of Court sale, to the auction-purchaser, whether he be a stranger or the decree-holder, is not a proceeding in execution of a decree and any question arising in such a proceeding is not a question relating to execution, satisfaction or discharge of the decree within the meaning of S. 47, C. P. Code 20 C. L. J. 433, Rel. on. (*Suhrawardy and Duval, JJ.*) SHYAMBALLAV SAHA *v.* BROJENDRA LAL PODDAR. **89 I. C. 196 = A. I. R. 1925 Cal. 1250.**

———It may be disputed whether an order for delivery of possession to purchaser is an order relating to the execution, discharge or satisfaction of a decree. For, so far as the decree-holder is concerned, his decree is satisfied and whether the auction-purchaser gets the property or not is a matter with which he is not concerned. But assuming this, the point remains whether the question which arises in an application for delivery of possession does so arise between the parties to the suit or their representatives. In the case of *Sashi Bhusan Mukherjee* v. *Ratha Nath Bose* (20 C.L.J. 433) it was held that the capacities of the decree-holder auction purchaser, are radically distinct. Section 244 does not apply to bar the suit even where the purchaser happens to be also the decree-holder. There is no distinction in principle between one case and the other.

Per *Cuming, J.*:—Delivery of possession is not a part of the satisfaction of the decree. So far as the decree holder is concerned the decree is satisfied when the property is sold and the money paid to the decree-holder. Obviously he is not concerned with the property being delivered to the purchaser. The question of the delivery of possession to the auction-purchaser is not one relating to the execution of the decree or between the parties to the suit or their representatives. (20 C.L.J. 433). It is immaterial that the auction-purchaser is also the decree-holder. As an auction-purchaser he is in an entirely different capacity. (*Woodroffe and Cuming, JJ.*) LAKHI PRIA GULA *v.* NANDA KUMAR BASU. **84 I. C. 525 = A. I. R. 1923 Cal. 345.**

———*Possession got privately from judgment-debtor is valid and lawful possession.*

The judgment-debtor stated to the baliff that he had no objection whatever and that he had given up the land, which was lying vacant. Thereupon the plaintiffs took possession and remained in possession for many years.

Held, it cannot be said that that possession was taken in "in execution" in the sense that an official of the Court actually placed the decree-holders upon the land, but it was taken in the course of execution proceedings and as a result of the decree which the plaintiffs had obtained. The plaintiffs were in lawful possession and when dispossessed were entitled to maintain a suit for possession. (*Chevis and Harrison, JJ.*) RUPCHAND *v.* ALLAH JAWAYA. **68 I. C. 744 = A. I. R. 1922 Lah. 459.**

———After a decree for possession in a suit against defendant No. 1 the plaintiff instituted another suit for a declaration of his title to the land. Plaintiff alleged that after he had obtained possession of the land in execution of his final decree he had been dispossessed by the defendants. The lower courts found that he had not obtained actual possession under the first decree.

Held : The Second suit was barred under section 47. (*Das and Adami, JJ.*) SOVANI JENA *v.* BHIMA RAY. **87 I.C. 251 = 1 Pat. 157 = A. I. R. 1922 Pat. 407.**

—S. 47—Question relating to execution — Discharge.

———*Matters subsequent to the decree alone might be raised.*

Questions relating to the execution of a decree and arising between parties to a suit in which the decree was passed or their representatives must be such as have reference to matters arising subsequent to the passing of the decree and not antecedent to it. A claim that the debt on which the decree sought to be executed was obtained had been discharged before suit is not within S. 47, C.P. Code. (*Broadway, J.*) RAM DAS *v.* S. P. NETTO. **64 P.L.R. 1922 = 67 I. C. 753 = 4 U.P.L.R. (Lah.) 93.**

—S. 47—Question relating to execution—Dispossession.

———An application by the judgment-debtor under S. 47 against unlawful dispossession is maintainable even though it is filed after the execution application is struck off as fully satisfied. 10 C. 538 ; 5 Ind. Dec. (N. C.) 360; 13 C.P.L R. 177, Dist. (*Kotval, A.J.C.*) KRISHNAJI KUNBI *v.* VINAYAK KUNBI. **76 I. C. 224 = A. I. R. 1924 Nag. 122.**

—S. 47—Question relating to execution—Excess property.

———*Fresh suit does not lie.*

Questions relating to excess execution, if raised by a person who was a party to the suit should not be raised by a fresh suit but should be decided in execution proceedings only. 5 M.H.C. 185 and 6 M.H.C. 293, Rel. on. (*Anantakrishna Ayyar, J.*) CHENGALRAYA *v.* KOLLAPURI. **123 I. C. 24 = A. I. R. 1930 Mad. 12 = 1929 M.W.N. 811.**

———*No application for restitution lies after decree is satisfied.*

When a particular decree is consigned to record-room after it is fully satisfied, an application by a judgment-debtor for correction of description of property sold in execution of the decree and restitution of property from auction-purchaser sold in excess is not maintainable as the executing court is *functus officio*. The application is not one relating to execution, discharge or satisfaction of the decree. 8 P.R. 1918 and 121 P.R. 1919, Rel. on. (*Addison, J.*) KARTAR SINGH *v.* JORAWAR SINGH. **113 I. C. 778 = 10 L. L.J. 474 = A. I. R. 1929 Lah. 121.**

———Excess of decree paid to decree-holder under fraud and cheating—Application under S. 47 is the proper remedy and no separate suit lies. S. 47 cannot be evaded merely by interlarding the application with epithets, such as fraud, cheating, etc. 44 Bom. 97 and 38 All. 339, Foll. (*Rankin, C. J. and Mukerji, J.*) RADHA CHARAN *v.* KAILASH CHANDRA. **115 I. C. 581 = A. I. R. 1928 Cal. 776.**

———Property not covered by decree given in possession to decree-holder in execution of his decree—Separate suit for recovery of such property is barred—Remedy is to make application under S. 47. 1 Lah. L.J. 230, Foll. (*Jai Lal, J.*) AMIRUDIN *v.* MT. KHAIRI. **110 I.C. 859 = A. I. R. 1928 Lah. 936.**

———An application by the judgment-debtor to set aside an execution sale on the ground that the sale had taken place in contravention of the decree and the property sold was in excess of that ordered to be sold is one under S.47 and an appeal lies from the order on the application. (*Sulaiman and Daniels, JJ.*) GANGA DEVI *v.* RAM PRASAD. **88 I. C. 393 = 23 A.L.J. 558 = 6 L. R. A. Civ. 464 = A. I. R. 1925 All 551.**

———*Not taken in execution—Section does not apply.*

If the property was in fact attached and sold then the judgment-debtor's only remedy as a party to the suit would be under S. 47 of the C.P. Code, and not by a separate suit. But if the property was not included either in the sale proclamation or in the sale certificate and was not in fact purchased at the auction-sale, but was wrongly taken possession of by the auction-purchaser under colour of a title which he did not possess no question arises within S. 47 of the Code and the period for recovering possession of property taken under such circumstances will be 12 years from the date of dispossession. (*Dawson Miller, C.J. and Foster, J.*) LACHMI NARAIN *v.* REBTI DEBYA. **86 I. C. 648 = 6 P.L.T. 473 = 1925 P.H.C.C. 37 = A. I. R. 1925 Pat. 376.**

—S. 47—Question relating to execution—Execution sale.

———Mortgage decree—Purchaser of part made defendant—He applying that his portion be sold last—Court granting application but imposing certain conditions—Order is not one relating to execution, etc. as his purchase was prior to suit and he was a party to the suit. (*Sen and Niamatullah, JJ.*) ABDUL AZIZ *v.* SHAH ABDUL RAHIM. **119 I. C. 440 = 51 All. 752 = 1929 A.L.J. 757 = A. I. R. 1929 All. 291.**

———Limitation Act, Art. 181—Petition for review of order confirming auction-sale is application under S. 47 and governed by Art. 181. A. I. R. 1928 Cal. 60, Rel. on. (*Kinkhede, A.J.C.*) SUNDARABAI *v.* BAPUNA. **116 I. C. 65 = A.I. R. 1929 Nag. 305.**

———Events subsequent to sale in execution do not form part of execution and remedy for such is by separate suit. (*Das and James, JJ.*) DUKHU MANDAL *v.* GOPINATH. **119 I. C. 881 = A. I. R. 1929 Pat. 559.**

———Where a suit was filed by a judgment-debtor for a declaration that the auction-sale was null and void, inasmuch as the auction-purchaser, the liquidator of the decree-holder bank was not competent to bid for and purchase any property as liquidator under the company law even with the permission of the executing Court.

Held that the suit was barred under S. 47. (*Harrison and Zafar Ali, JJ.*) BANK OF UPPER INDIA, LTD. *v.* FITZHOLMES, HOMSTEAD, SIMLA. **108 I. C. 606 = A.I.R. 1928 Lah. 666.**

———Where a sale takes place contrary to the directions in the decree that it should take place in a certain order, the application to set aside the sale on that ground is one under S. 47, C.P. Code, and is governed by Art. 166. View of Oldfield. J., in 27 M.L.J. 605, Foll.; A.I.R. 1924 Mad. 431, Cons. (*Waller and Madhavan Nair, JJ.*) AMAKUTTI ACHI *v.* DORAISWAMI AIYAR. **106 I.C. 242 = A.I.R. 1928 Mad. 140.**

———Application to set aside the sale, on the ground that a decree-hoider in executing his decree induced the court to sell more property than allowed under judgment, comes within the scope of S. 47. 19 Cal. 683 (P.C.); 35 Bom. 452; 43 Mad. 107 (F.B.); 30 Cal. 142; 26 Cal. 727 ; 8 All. 146 (F.B.); 16 Mad. 447; 27 Cal. 810 and A.I.R. 1923 All. 470, Rel. on. (*Carr, J.*) MG SAI *v.* C.A.M.K. FIRM. **114 I.C. 679 = A.I.R. 1928 Rang. 215.**

———*Question relating to legality of sale is one in execution.*

A question arising out of an execution proceeding relating to the legality of the sale between the judgment-debtor on the one hand, and the decree-holder or the auction-purchaser on the other, is a question relating to execution, satisfaction, or discharge of a decree, and a judgment-debtor is entitled to have any question, relating to the execution, discharge, or satisfaction of a decree under execution, decided under S. 47 as much against the decree-holder as against an auction-purchaser of the property who is regarded as a representative of the decree-holder for the purpose of enquiring into that question. A.I.R. 1922 All. 200 (F.B.); A.I.R. 1923 All. 394 (F.B.) and 43 Mad. 107, Ref. (*Kanhaiyalal and Boys, JJ.*) NAND KISHORE *v.* SHODI RAM. **24 A.L.J. 519 = 96 I.C. 137 = A.I.R. 1926 All. 457.**

———*Suppression of sale processes.*

The question whether there was suppression of sale processes can only be raised under S. 47, and therefore a second appeal lies. (*Suhrawardy and Page, JJ.*) RAMPADA NAG MADAK *v.* KANAI RAI. **44 C.L.J. 167 = 98 I.C. 206 = A.I.R. 1926 Cal. 1219.**

———In an application under O. 21, R. 89 to set aside an execution sale, an objection by the decree-holder that interest was not mentioned in the application for execution by mistake and that therefore, besides the principal amount, interest also should be ordered to be deposited, comes within S. 47 of the C. P. Code. (*Walmsley and B. B. Ghose, JJ.*) JADAB KRISHNA KUNDU *v.* APSARDDIN SARDAR. **41 C.L.J. 391 = A.I.R. 1925 Cal. 948.**

———Permission to bid granted to decree-holder—Permission modified in his absence—Sale can be set aside in appeal--Question comes under S. 47. 32 M. 752; 30 A. 379 and 43 M. 107, Foll. (*Daniels, A.J.C.*) ALI ABBAS *v.* NARAIN DAS. **87 I.C. 997 = 12 O.L.J. 321 = 2 O.W.N. 297 = A.I.R.' 1925 Oudh 381.**

———If the sale is to be set aside on the ground that it was absolutely illegal and not merely irregular the case would not come within the four corners of Order 21, Rule 90 which refers to 'material irregularity or fraud in publishing or conducting it.' When the auction-purchaser is the decree-holder himself and when an application is made to have the sale set aside on a ground other than that covered by Order 21, Rule 90 and there is not an application under Order 21 Rule 89, then it raises a question within the meaning of the expression " execution, discharge or satisfaction of a decree " as mentioned in Section 47, C. P. Code. (*Sulaiman and Mukerji, JJ.*) SUPERIOR BANK, LTD., MUZAFFAR NAGAR *v.* BUDH SINGH. **83 I.C. 1028 = 22 A.L.J. 413 = 5 L.R. A. Civ. 769 = A.I.R. 1924 All. 698.**

———Question as to order in which properties are to be sold is one of substantive right, and is covered by the section. (24 Cal. 729 Foll.) (*Oldfield and Devadoss, JJ.*) VEDAVIASA AIYAR *v.* MADURA HINDU LABHA NIDHI CO. LTD. **77 I. C. 148 = 18 M. L. W. 311 = 1923 M. W. N 662 = A. I. R. 1924 Mad. 365 = 45 M. L. J. 478.**

———Where a mortgage decree is attached by a person holding a decree for costs against the mortgage-decree-holder and the mortgage decree is executed only for realising the costs due to the attaching decree-holder and a portion of the property is sold and the decree for costs is satisfied with the sale proceeds, the execution sale is not absolutely void but irregular and the judgment-debtors can waive the irregularity. (*Chatterji and Panton, JJ.*) KAMINI KUMAR *v.* PROTAP CHANDRA. **25 C.W.N. 400 = 66 I.C. 608 = A.I.R. 1921 Cal. 382.**

———*Application under O. 21, R. 90—Compromise therein is compromise in suit.*

The term " suit " has not been used in the Procedure Code in its narrow sense as being terminated by the decree made by the first Court, but in a broad sense as including not only the stages of a suit to its termination by the decree of the first Court but as including its appellate stage and proceedings in execution of the decree made in the suit, and so an application for setting aside a sale under O. 21, R. 90, is a suit or a proceeding in the suit within the meaning of O. 23, R. 3, and not a proceeding in execution. Therefore a compromise in a proceeding under O. 21, R. 90 cannot be recorded under O. 21, R. 2, read with S. 47 of the Code. That being so, it can be recorded under O. 23, R. 3. (*Das and Ross, JJ.*) CHOUDHURY JAGDISH MISSIR *v.* CHOUDHURY SURESHWAR MISSIR. **62 I.C. 608 = 2 P.L.T. 273 = 6 P. L. J. 253 = A. I. R. 1921 Pat. 107.**

—S. 47—Question relation to execution—Injunction.

———Remedy against fraudulent decree lies by way of injunction to restrain party from executing decree. (*Kinkhede, A. J. C.*) SULTANALI *v.* BALAJI. **80 I. C. 59 = A. I. R. 1924 Nag. 413.**

—S. 47—Question relating to execution—Instalment decree.

———Decision whether a decree-holder is entitled to enforce the default clause of an instalment decree, inasmuch as he has accepted part payments after there were defaults in the payment of the instalments on due dates, adjudicates a question relating to the rights of the parties to the execution of the decree and falls under S. 47. (*Bhide, J.*) GOPAL DAS *v.* KANSHI RAM. **113 I. C. 541 = A. I. R. 1929 Lah. 390.**

—S 47—Question relating to execution—Jurisdiction.

———Question whether decree is nullity for want of jurisdiction falls under S. 47. A. I. R. 1925 Cal. 907; A. I. R 1928 Lah. 829 and A. I. R. 1927 Lah. 651, Foll. (*Zafar Ali and Addison, JJ.*) PARSHOTTAM DAS *v.* RADHA KISHAN. **120 I. C. 279 = 11 L. L. J. 306 = A. I. R. 1929 Lah. 449.**

———Decree *prima facie* being legal—No objection

regarding jurisdiction of Court passing it can be raised before executing Court. (*Devadoss, J.*) KUPPUSWAMI AYYAR *v.* SECRETARY OF STATE. **119 I. C. 33 = A. I. R. 1929 Mad. 383.**

———Objection as to jurisdiction to try suit cannot be raised in execution. 43 Mad. 675 (F.B.), Ref. (*Spencer, J.*) RADHAKRISHNA AIYAR *v.* VINAYAKASWAMIAR. **22 M. L. W. 567 = 91 I. C. 98 = A. I. R. 1926 Mad. 128 = 49 M. L. J. 664.**

—S. 47—Question relating to execution—Legal representative.

———Decree against deceased debtor's estate—Decree sought to be executed against person holding deceased's property—Executing Court can decide whether property in question is assets of the deceased—Separate suit does not lie ; such a question has to be decided under S. 47 by the Court executing the decree and not by a separate suit. (*Kinkhede, A. J. C.*) JANIABAI *v.* RANGNATH. **9 N. L. J. 183 = 96 I. C. 963 = A. I. R. 1926 Nag. 476.**

———Whether a decree passed against a judgment-debtor who was dead at the time binds his legal representatives who were not impleaded in his stead, is a question within S. 47. (*Broadway and Wilberforce, JJ.*) BURKAT RAI *v.* MT. GHULAM FATIMA. **70 I. C. 929 = 5 L. L. J. 1 = A. I. R. 1921 Lah. 219.**

———Judgment-debtor dying after decree—Execution against legal representatives—Question as to whether certain properties belong to assets of deceased—S. 47 applies. 12 All. 313 (F. B.); 39 All. 47; 47 P. R. 1887; 87 P. R. 1887 Foll. (*Abdul Raoof and Harrison, JJ.*) BHAGAT RAM *v.* NIZAM DIN. **63 I. C. 853 = 3 L. L. J. 406 = A. I. R. 1921 Lah. 173.**

—S. 47—Question relating to execution—Mesne profits.

———Application under O. 20, R. 12 (3) for enquiry into mesne profits is not application under S. 47. (*Sundaram Chettiar, J.*) RALLABANDI SOBHANADRI *v.* S. RAMIREDDI. **30 M. L. W. 738 = A. I. R. 1929 Mad. 785 = 57 M. L. J. 515.**

———Price of trees cut by judgment-debtor as well as rents collected by him after date of decree in a suit for possession can be recovered in execution. (*Dawson Miller, C. J. and Jwala Prasad, J.*) MAHADEO PRASAD SAHU *v.* GAJADHAR PRASAD SAHU. **73 I. C. 359 = 1 Pat. L. R. 145 = A. I. R. 1924 Pat. 362.**

—S. 47—Question relating to execution—Mistake.

———Where an order of dismissal of execution case is made on account of mutual mistake, the order by consent may be re-opened. There is no authority that any order or proceeding can be reopened on the ground of mistake of fact of one of the parties to it. An execution case was dismissed on the application of the decree-holder stating that the decree had been satisfied in full. Subsequently the decree-holder applied to have the execution proceedings re-opened on the ground that the decree-holder made a mistake in calculating the amount due to him under the decree as a result of which the decree-holder got much less than what he was entitled to.

Held, that the execution proceedings could not be opened. It would be against all fundamental rules of relief on the ground of mistake to say that the mistake due to the negligence of one of the parties is sufficient to relieve him of his own agreement. (*B. B. Ghose and Panton, JJ.*) DWIJENDRA KRISHNA *v.* KEDAR NATH. **33 C. W. N. 739 = A. I. R. 1929 Cal. 670.**

———Some property of decree-holder sold through mistake instead of judgment-debtor's property—Remedy

C. P. CODE, (1908), S. 47—Question relating to execution—Mortgage.

is under S. 47 and not by a separate suit. 41 Cal. 590 (P. C.), Rel. on ; A. I. R. 1922 P. C. 252, Ref. (*B. B. Ghose and N. K. Bose, JJ.*) UZIR ALI *v.* NASIMANNESSA BIBI. **116 I. C. 634 = A. I. R. 1928 Cal. 865.**

—S. 47—Question relating to execution—Mortgage.

———Where a money decree imposing a liability on the defendant to pay a sum of money to the plaintiffs declares that the plaintiffs have a first charge and a lien on certain immovable property of the defendant and the plaintiff applies in execution proceedings for sale of the property charged, the plaintiff has a right to bring the property charged to sale in execution proceedings, and it is not necessary to bring a separate suit for the sale of the property. A. I. R. 1925 Mad. 1101 and 43 Bom. 631, Foll. In such a case it is not necessary that a final decree should be passed for O. 34, R. 5 does not apply to an award decree or to a compromise decree if it is clear from the decree that the sale was ordered and it was in itself a final decree. A. I. R. 1924 Pat. 263 ; A. I. R. 1923 Cal. 626 and A. I. R. 1922 All. 383, Foll. (*Patkar and Murphy, JJ.*) SHANKAR KONDAPPA *v.* GANPAT SHANKARSHET. **119 I. C. 186 = 31 Bom. L. R. 439 = A. I. R. 1929 Bom. 227.**

———Where certain shares in a Company were pledged and during that period of pledge, the company issued fresh shares, payable out of the dividends of the old ones, and a suit by pledgor to redeem the old shares was decreed and the pledgor in execution applied for return of the new shares also.

Held, that the question whether the new shares were accretions to the old ones was a question within S. 47. (*Mr. Ameer Ali.*) MOTI LAL *v.* BAI MANI. **86 I. C. 368 = 30 C. W. N. 5 = 52 I. A. 137 = 27 Bom. L. R. 455 = 49 Bom. 233 = A. I. R. 1925 P. C. 86 = 48 M. L. J. 648 (P. C.).**

———When a person wants to have the benefit of the discharge of a prior encumbrance he can only bring a suit on the prior encumbrance ; he cannot claim to be substituted for the plaintiff in the mortgage decree obtained by the prior encumbrancer and execute the decree. Where a prior mortgagee had obtained a mortgage decree and the plaintiff advanced money to the mortgagor to pay off the decree amount, for the purpose of getting a mortgage from him.

Held, that the plaintiff's right of priority could be enforced only by suit and not by execution. (*Devadoss, J.*) AVUDAI AMMAL *v.* CHINNA RAMASAMI NAICK. **82 I. C. 846 = 20 M. L. W. 651 = 35 M. L. T. 112 = A. I. R. 1925 Mad. 129.**

———In a suit for sale upon a mortgage a puisne mortgagee was impleaded as a defendant. He consented to a decree for sale free of his mortgage on condition that the balance be paid to him after discharge of the prior mortgage.

Held, the decree for the sale in which the puisne mortgagee's right was not reserved was binding on him and if duly executed, would extinguish his mortgage. (*Oldfield and Ramesan, JJ.*) S. N. RAGUNATHASAMI AYYANGAR *v.* S. GOPANJ RAO. **68 I. C. 667 = 15 M. L. W. 123 = 1921 M. W. N. 732 = A. I. R. 1922 Mad. 307 = 41 M.L.J. 547.**

—S. 47—Question relating to execution—Notice.

———An objection under O. 21, R. 22 comes within S. 47 and therefore an order on such objection is open to second appeal. (*Cuming and Chakravarti, JJ.*) SARADA PRASAD ROY *v.* KRISHNA DOME. **91 I. C. 711 = A. I. R. 1926 Cal. 539.**

———Order on question of notice under O. 21, R. 22 is one in execution, and second appeal lies. (*Das and*

C. P. CODE, (1908), S. 47—Question relating to execution—Partition during suit.

Adami, JJ.) BIHARI LAL MITTER *v.* TANUK LAL MANDER. **8 P. L. T. 28 = 97 I. C. 798 = A. I. R. 1926 Pat. 397.**

—S. 47—Question relating to execution—Oudh Laws Act.

———C. P. Code, S. 47—Objection to sale of ancestral land attached in execution on ground of want of sanction as required under S. 20, Oudh Laws Act—Objection must be raised in execution proceedings for separate suit is barred by S. 47. 22 All. 108, Ref. ; 21 Cal. 496 (P. C.), Expl. (*Stuart, C. J. and Srivastava, J.*) KASHIF HUSAIN *v.* B. SASHADHAR SINGH. **7 O. W. N. 140 = A. I. R. 1930 Oudh 256.**

—S. 47—Question relating to execution—Partition.

———*Final decree for partition—Dispute regarding adjustment falls under S. 47.*

Where the Commissioner went to deliver possession of certain properties in terms of the final decree for partition, and objection was put forth by one of the parties that there was an adjustment of the decree in contravention of the final decree.

Held, that a dispute with regard to adjustment of the decree with regard to possession is a dispute under S. 47 and it must be decided by the executing Court whether there was such an adjustment or not. (*B. B. Ghose and Basu, JJ.*) SABERJAN BIBI *v.* KANTARI BIBI. **116 I. C. 373 = A. I. R. 1928 Cal. 753.**

———Partition— Decree directing payment by one sharer to others as compensation for excess portion—Payment must be enforced by execution and not by a separate suit. (*Neave, A. J. C.*) CHOB SINGH *v.* A. J. WILLIAMS. **91 I. C. 1009 = A. I. R. 1926 Oudh 230.**

———If a decree is passed in a partition suit, the parties thereto whether arrayed as defendants or as plaintiffs, are in the position of plaintiffs, and in regard to properties that may be allotted they are exactly in the position of decree-holders. In such a case the decree can be executed by any party and a separate suit for possession is barred by S. 47. But if the partition decree merely directed the separation of the shares of the plaintiffs in the partition suit and left the shares of the defendants joint amongst themselves, the defendants cannot execute that decree and there is nothing to prevent defendants from bringing a fresh suit for partition of the lands jointly allotted to them. (*Mullick, Ag., C.J. and Kulwant Sahay, J.*) HEMCHANDRA MAHTO *v.* PREM MAHTO. **7 P. L. T. 295 = 1925 P. H. C. C 330 = 90 I. C. 739 = A. I. R. 1926 Pat. 154.**

———If the plaint properties or any of them have been sold so that the partition proceedings can no longer go on, then the Court in charge of execution proceedings will have to decide what is proper course to follow, whether to direct that the parties entitled to partition should get the sale proceeds brought into Court and divide them which would of course be the simplest way of settling the matter or to relegate the parties to separate suits. If the plaintiff alleges that some property has been fraudulently sold by other sharers, the question cannot be dealt with in execution proceedings but in a separate suit. (*Macleod, C. J. and Shah, J.*) ELLIS ENAS PAVLOO GHARRY *v.* KITTER PHILIP GOWRYA. **64 I. C. 490 = 46 Bom. 226 = 23 Bom. L. R. 981 = A. I. R. 1922 Bom. 380.**

—S. 47—Question relating to execution—Partition during suit.

———In execution the decree-holder can be put in possession of the specific lands substituted for his share on partition. A. I. R. 1922 P. C. 54, Appl. (*Raza and*

Misra, JJ.) GANGA BAKSH SINGH *v.* SHEO BAKSH SINGH. **117 I. C. 764 = A. I. R. 1929 Oudh 263.**

———The plaintiff's share was sold by the Collector for arrears of revenue and the plaintiff sued for setting aside the sale and for recovery of possession but before the decree was passed partition had been effected by the Collector in ignorance of which the decree was made. The plaintiff thereupon applied in execution for possession of the share got under the partition. *Held* : the questions as to what were such substituted shares were questions which arose within the meaning of S. 47 of the Code of Civil Procedure, 1908, between the parties and related to the execution and satisfaction of the decree and that no separate suit was necessary. (*Sir John Edge.*) RAI BAIJNATH GOENKA *v.* RAVANESHWAR PRASAD SINGH. **69 I. C. 180 = 1922 M. W. N. 415 = 20 A. L. J. 650 = 31 M. L. T. 43 = 36 C. L. J. 1 = 26 C. W. N. 906 = 16 M. L. W. 128 = 1 Pat. 378 = 3 Pat. L. T. 547 = 24 Bom. L. R. 974 = 49 I. A. 139 = A. I. R. 1922 P. C. 54 = 43 M. L. J. 124 (P. C.).**

—S. 47—Question relating to execution—Power of executing court.

———Judgment-debtor mortgaging property as security under O. 41, R. 6 (3) (*c*)—Bond can be enforced in execution proceedings—No attachment or suit is necessary for realizing properties—Application to enforce security must be made to Court passing decree appealed from. 30 Cal. 1060 ; A. I. R. 1919 P. C. 55 and 41 Mad. 327, Ref. (*Das and Wort, JJ.*) TATA IRON AND STEEL CO., LTD. *v.* CHARLES JOSEPH SMITH. **8 Pat. 801 = A. I. R. 1930 Pat. 108.**

———Consent decree on condition that if defendant deposited certain amount within certain time suit shall stand dismissed or else it shall stand decreed—Defendant depositing amount but after period fixed—Court declaring deposit to have retrospective effect, dismissed suit—Court's order not being in discharge or satisfaction of decree was not appealable.

Held: further, that the Court had no power to extend the period of time fixed for making the deposit because, although, where in the progress of the suit something has to be done, Court granting time can extend it under S. 148, still where the decree finally settles the rights of the parties, the Court cannot extend time so as to interfere with the rights of the parties. 40 All. 579 and 42 All. 639, Appr. (*Mukerji and Niamatullah, JJ.*) SHIAM LAL *v.* MOTI RAM. **118 I. C. 591 = 1929 A. L. J. 968 = A. I. R. 1929 All. 666.**

———Person other than judgment-debtor in possession of property sold in execution—Executing Court cannot decide upon his title—The only remedy of the purchaser is a regular suit. (*Suhrawardy and Cammiade, JJ.*) NARAYAN BERA *v.* JHARU MANDAL. **115 I. C. 36 = A. I. R. 1928 Cal. 792**

———By an auction sale in execution of a decree the purchaser got proprietary right in the whole of the village excluding occupancy rights in the *sir* land, and he was put in possession of the proprietary rights in the village including the *sir* land. Later on, the purchaser dispossessed the owners of their occupancy holding of the said *sir* land, upon which the owner applied to the Court which had executed the decree to restore them to possession of their holding.

Held : that the Court could not grant the application for possession as the decree had been completely executed, as the possession of the owners as tenants was not disturbed till the auction-purchaser actually went on the land and began to cultivate it or prevented them from doing so.

Held : further, that the application cannot be treated as a plaint under S. 47 (2), C. P. Code. (*Hallifax and Kotval, A.J.Cs.*) LAKSHMI NARAYAN *v.* SHRIDHAR. **105 I. C. 420 = A. I. R. 1928 Nag. 100.**

———The Court transmitting a decree is not the Court to decide objections on the part of the judgment-debtor that the decree is incapable of execution or that execution is barred by limitation. Such objections should be taken before and heard and determined by the Court to which the decree is transmitted as the Court of execution. A. I. R. 1925 Cal. 213, Ref. (*Rutledge, C. J. and Carr, J.*) NACHIMAI ACHI *v.* S. N. SUBRAMANIAN CHETTY. **5 Rang. 775 = 6 Bur. L. J. 225 = 106 I. C. 857 = A. I. R. 1928 Rang. 40.**

———Executing Court can decide if decree is a nullity—Such decision is within S. 47. (*Obiter*) A. I. R. 1925 Cal. 907 (F. B.), Appr. (*Dalip Singh, J.*) MIR MAHOMED *v.* SURJAN MAL & CO. **103 I. C. 673 = A. I. R. 1927 Lah. 651.**

———Schedule—Notifications in Burma—Order for payment by instalments can be passed in execution—The question whether such order can be so passed comes under S. 47. 7 L. B. R. 71, Dist. (*Carr, J.*) SAYA HATTIE *v.* MA PWA SA. **97 I. C. 1037 = 4 Rang. 247 = 5 Bur. L. J. 143 = A. I. R. 1926 Rang. 192.**

———Decree for specific performance of contract for sale—Question of judgment-debtor damaging property after decree can be gone into by executing Court. The question with regard to waste committed by a judgment-debtor after the date of the decree is a question arising between the parties relating to the execution discharge or satisfaction of the decree, and must be determined by the Court executing the decree and not by a separate suit. 1923 Bom. 391, Foll. (*Macleod, C. J. and Coyajee, J.*) BAI LALBU *v.* MOHANLAL GOKALDAS JAVERI. **89 I. C. 205 = 27 Bom. 687 = A. I. R. 1925 Bom 385.**

———The decree-holder took possession of a house under his decree ; the house contained certain moveables of which a list was prepared. The judgment-debtor complained that some more property was there in the house and therefore requested the executing Court to hold an enquiry into the matter. The executing Court directed him to a separate suit.

Held: that the Court ought to have held an enquiry into the matter itself. 19 Cal. 683 ; 1 P. L. J. 558 ; 38 All. 339 ; 22 Cal. 483, Foll. (*Kinkhede, A. J. C.*) KESHORI SINGH *v.* UMRAO SINGH. **83 I. C. 1031 = 20 N. L. R. 90 = 7 N. L. J. 151 = A. I. R. 1924 Nag. 246.**

———Decree for possession—Waste by judgment-debtor after decree—Question is one under S. 47. If the property has depreciated in value or been damaged since the decree, owing to the wilful action of the defendants, it is a question in execution whether defendants are liable to make good the loss. (*Macleod, C. J. and Crump, J.*) HARI SHRIDHAR *v.* SAKHARAM PADMANNA. **73 I. C. 443 = 25 Bom. L. R. 449 = A. I. R. 1923 Bom. 391.**

———Decree satisfied by one judgment-debtor and certified—Payment over again by another, under mistake—Executing Court has power to refund it—C. P. Code, S. 47—Execution. (*Dawson Miller, C. J. and Jwala Prasad, J.*) GOPAL RAI *v.* RAMBHANJAN RAI. **65 I.C. 307 = 1 Pat. 336 = 1922 P. H C.C. 53 = 3 P. L. T. 754 = A. I. R. 1922 Pat. 166.**

—S. 47—Question relating to execution—Priority.

———Though the sale to the defendant in execution of his money-decree was earlier, the later sale to the plaintiff in execution of his mortgage-decree, the mortgage-decree being in existence at the time of the defendant's purchase, is to prevail. (*Dawson Miller, C.J. and Adami, J.*) CHAMAN LAL *v.* KAMARUDDIN MIAN. **67 I. C. 262 = 3 Pat. L. T. 757 = A. I. R. 1922 Pat. 655.**

—S. 47—Question relating to execution—Sale proclamation.

———Petition that properties should not be sold subject to incumbrances as notified in sale proclamation is one under S. 47. An order thereon is appealable as a decree. (*Das and Adami, JJ.*) WILLIAM MALING GRANT *v.* SURAJMAL MARWARI. **72 I. C. 860 = 1923 P. H. C. C 76 = 1 Pat. L. R. 53 = A. I. R. 1923 Pat. 134.**

—S. 47—Question relating to execution—Satisfaction of decree.

———Attachment before judgment of money in fixed deposit with a bank to the credit of *F* and *M* or either of them—In truth money belonged to *M* only—*M* procuring *N* to execute a security bond by which *N* agreed that in the event of a decree against *F* and *M* or either of them, he would deposit in Court, a sum equal to that attached—Security bond reciting that the amount attached belonged only to *M*—Attachment raised in consequence of the security bond—Decree passed against *F* alone—Decree-holder receiving the money—*M* filing a suit for rectification of the security on the ground of mistake and the repayment of the money received and in the alternative for damages against the decree-holder.

Held: that the bond expressed quite accurately the intention of the parties. It proved simply that the money provided by *N* was to be in truth in place and in stead of the money that had been attached and it in no way gave greater rights to *S* than he would have possessed in respect of the money which was attached. There had been no mistake and the foundation of the suit failed.

Held, further, that the order of the payment out was in satisfaction of the decree and that in itself precluded any cause of action by *M*. (*Lord Atkin.*) JULIEN MARRET *v.* MAHOMED KHALEEL SHIRAZI & SONS. **122 I.C. 11 = 34 C.W.N. 425 = 51 C.L.J. 253 = A. I. R. 1930 P.C. 86 = 58 M.L.J. 275 (P.C.).**

———Decree adjusted—Adjustment not recorded—Sale in execution of decree—Judgment-debtor cannot plead adjustment even by way of defence in suit for possession by decree-holder purchaser. 24 Cal. 355; 27 Cal. 946; 7 C.W.N. 607; 4 I.C. 168 = 9 C.L.J. 464 and 71 I.C. 378 = A. I. R. 1922 Cal. 311 = 27 C. W. N. 280, Overruled; 16 C. W. N. 805 and 25 Bom. 337 (P.C.), Appr.; 19 M.L.J. 1; 32 Mad. 242 and A. I. R. 1921 Mad. 279, Doubted and not Followed. (*Rankin, C.J., C. C. Ghose, B. B. Ghose, Panton and Mukerji, JJ.*) LAKSHAN CHANDRA *v.* RAMDAS MANDAL. **33 C.W.N. 795 = 49 C.L.J. 441 = 118 I.C. 857 = A.I.R. 1929 Cal. 374 (F.B.).**

———If one decree is sold in execution of another decree it is open to the judgment-debtor, when the purchaser of such decree seeks to execute that decree against him, to plead that the decree had been satisfied by him prior to its sale although the satisfaction was not certified according to the provisions of O. 21, R. 2. R. 2 (3) does not bar the plea and the Court must enquire into under S. 47. (*Wazir Hasan, A.J.C.*) SURJI NARAIN MISRA *v.* ULAUD SINGH. **78 I.C. 776 = 27 O.C. 277 = A.I.R. 1925 Oudh 225.**

———*Separate suit lies if double payment is received by decree-holder.*

If the creditor by taking out a Darkhast recovered the decretal amount over again, the judgment-debtor can by suit recover the amount which he had paid to his creditor without its being certified. The fact that in the execution proceedings judgment-debtor failed to get credit for the amount does not bar the suit. (*Macleod, C. J. and Crump, J.*) GANESH MAHADEV SAHASRABUDHE *v.* YESHWANT MAHADEV PHADKE. **95 I.C. 410 = 25 Bom. L. R. 247 = A. I. R. 1923 Bom. 253.**

—S. 47—Question relating to execution—Scheme.

———Applications in execution of a scheme of management of trust do not come under S. 47. A. I. R. 1925 P.C. 155, Foll. (*Phillips and Madhavan Nair, JJ.*) ANKAYYA *v.* VENKATARAMAYYA. **1926 M.W.N. 283 = 95 I.C. 5 = A. I. R. 1926 Mad. 655.**

—S. 47—Question relating to execution—Stay of execution.

———Matters relating to stay of execution fall within S. 47. 33 I.C. 66; 39 M. 541, Foll. (*Martineau, J.*) SHANKAR DAS *v.* KASTURI LAL. **75 I. C. 789 = A. I. R. 1925 Lah. 69.**

———An order relating to the sufficiency of the security tendered as a condition of the stay of execution which has been granted, is not one which comes within the purview of S. 47. 41 Cal. 160, Foll. (*Heald and Chari, JJ.*) MOOLJEE DHARSEE & CO. *v.* MOOLLA. **88 I.C. 740 = 4 Bur. L. J. 61 = 3 Rang. 255 = A. I. R. 1925 Rang. 225.**

———Under S. 2 read with S. 47 an order passed by the execution Court is a decree only when it determines a question relating to the execution, discharge or satisfaction of the decree; stay of proceedings is not a decree. (*Sulaiman, J.*) LACHMI NARAIN *v.* BRIJ RAM. **80 I.C. 39 = 5 L.R.A. Civ. 573 = A. I. R. 1924 All. 794.**

———An order of the Trial Court directing stay of execution is one relating to execution and is appealable since all questions that determine the rights and liabilities of the parties in the matter of the execution of a decree are appealable. (*Le Rossignol, J.*) SARDAR KHAN *v.* FATEH DIN. **68 I.C. 751 = A. I. R. 1922 Lah. 480.**

———Limitation Act, S. 15 (1)—Execution may be stayed by injunction in proceedings other than execution proceedings or by order of executing Court. Where a decree is stayed by injunction as to part of the properties and by order of the executing Court itself as to the rest, the decree-holder is entitled to deduct the time during which the injunction and the order continued, the date on which the injunction was issued and the order was made, and the date on which the injunction and the order ceased to be operative. (*Mookerjee and Panton, JJ.*) GOVINDA NATH CHAUDHURI *v.* BASIRUDDIN MANDAL. **64 I.C. 594 = 34 C.L.J. 163 = A. I. R. 1921 Cal. 606.**

—S. 47—Rateable distribution.

———Plaintiff and one defendant got decrees for money against the same defendant in a partition suit; plaintiff got his decree transferred to another Court and realised a certain amount in execution. Defendant applied for rateable distribution without transfer of his decree. Order on the defendant's application is covered by S. 47. (*Madhavan Nair, J.*) AYISA BIVI AMMAL *v.* JOKARA BIBI. **90 I.C. 869 = 22 M. L. W. 740 = A. I. R. 1925 Mad. 1265 = 49 M. L. J. 375.**

—S. 47—Restitution.

———Application for restitution on setting aside of sale is not matter within S. 47. **2 P. L. J. 361, Ref.**

C. P. CODE, (1908), S. 47—Restitution.

(*Fazl Ali and Dhavle, JJ.*) RAM RATAN PRASAD *v.* BANARSI LAL. **122 I.C. 589 = 11 P. L. T. 156 = A. I. R. 1930 Pat. 280.**

———Applications under Ss. 47 and 144 are classed together when referred to in S. 2 of the Code and are obviously kindred and similar applications though there is a real distinction that when a decree has been actually executed and the property has passed, the application is of the nature of an application to recover possession. It is in consequence of the decree passed by the appellate Court that the application is made under S. 144 and it is in a sense a mere accident that because the decree has been fully executed, the petitioner is prevented from coming to the Court under S. 47 and is compelled to take action under S. 144, C. P. Code. It would be most inequitable that he should be penalised by being forced to stamp his application *ad valorem.* 40 Mad. 780 and 41 Bom. 625, Ref.; A.I.R. 1921 Bom. 67, Foll.; A.I.R. 1922 All. 223, Ref.; A I. R. 1925 All. 137 and A. I. R. 1925 Pat. 1, Ref. (*Harrison, J.*) RAHMAT ALI SHAH *v.* RIKHI KESH. **107 I. C. 491 = A.I.R. 1928 Lah. 143.**

———Only the Court which executes the decree has jurisdiction to restore the property to the judgment-debtor—C.P. Code, S. 144. 16 Mad. 287 and 22 All. 108, Rel. on. (*Jwala Prasad, J.*) RAGHUNANDAN PRASAD *v.* GHANAND SINGH. **113 I. C. 217 = A.I.R. 1928 Pat. 502.**

———A defendant in a suit who had been exempted from the decree, filed a suit for a declaration that certain property which had been attached in execution of the decree in the other suit, did not belong to the judgment-debtor. At the instance of the plaintiff, a receiver was appointed by the Court. The suit was decreed and under the decree, the Receiver disposed of the property. The decree was reversed in appeal.

Held, that the appointment of the Receiver must be deemed to have been only in the execution department and that in order to compel him to refund the value of the property no separate suit was necessary but that the executing Court itself had jurisdiction. (*Sulaiman and Mukerji, JJ.*) JWALA PRASAD *v.* SHEIKH CHUTTAN. **85 I.C. 161 = 6 L. R. A. Civ. 36 = A.I.R. 1925 All. 328.**

———Determination of a question arising under S. 144 will naturally relate to the execution, discharge or satisfaction of the decree either of the First Court or of the Appellate Court. If the First Court's decree has been discharged by the Appellate Court, the question arising under S. 144 will naturally be a question as to the discharge of the decree coming under S. 47 of the C. P. Code. In an appeal under S. 47 of the C. P. Code "A" was declared (reversing the lower Court's order) entitled to a certain share in the sale proceeds realised by the decree-holder which were lying in Court. Subsequently the lower Court allowed also the claim of "A" for interest and damages from the date on which the decree-holder removed from the Court, the entire sale proceeds realised by him.

Held, that the order came under S. 47, that therefore the B. and O. Government Notification No. 2576 L.A.-25 of 1921 directing under S. 35 of the Court Fees Act that the fee chargeable on appeals from orders under C. P. Code, S. 47, shall be limited to the amounts chargeable under Sch. 2, Art. 11 of the Court Fees Act applied and therefore that an appeal from the Court's order in the present instance need not be stamped *ad valorem* but that a stamp of Rs. 4 was enough. (*Jwala Prasad, J.*) SITAL PRASAD SINGH *v.* JAGDEO SINGH. **92 I. C. 474 = 4 Pat. 294 = 7 P. L. T. 415 = A. I. R. 1925 Pat. 577.**

C. P. CODE, (1908), S. 47—Scope of.

——— Recovery of land in excess of share under partition decree—Final decree can be amended, and excess land restored without separate suit, under Ss. 47 and 151. (*Raymond and Madgavkar, A. J. Cs.*) DANDUMAL *v.* DWARKAMAL. **78 I. C. 1039 = 19 S. L. R. 302 = A.I.R. 1925 Sind 126.**

———An auction-purchaser under a decree which has been, after confirmation of the sale, set aside as the result of a separate suit, can recover his purchase-money from the decree-holder and his remedy is by application under S. 47. 40 Mad. 299, 43 Mad. 107, 19 Cal. 683 (P. C.) Foll.; 42 Bom. 411, not Foll.; 44 All. 266, Cons., 43 All; 60, Dist. (*Lindsay, Ryves and Daniels, JJ.*) BINDESHARI PERSHAD TEWARI *v.* BADAL SINGH. **74 I. C. 873 = 21 A. L. J. 228 = 45 All. 369 = 4 L. R. A. Civ. 161 = A. I. R. 1923 All. 394 (F. B.).**

———An order restoring possession to the judgment-debtor on the ground that the possession was given to the decree-holder under a misapprehension that the decree-holder had satisfied the condition of the decree, is an order within S. 47 and is appealable as a decree. (*Daniels, J. C.*) DORI LAL *v.* MT. JAMAGA. **72 I. C. 879 = A. I. R. 1923 Oudh 16.**

———Though applications for restitution may have to be brought under S. 144 yet they are in substance execution proceedings and as such cognizable by the executing Court. They also come under S. 47, C. P. Code, and under that section suits can be treated as execution proceedings and proceedings as a suit. (*Prideaux, A. J. C.*) JAMANLAL *v.* RAGBA. **67 I. C. 319 = A. I. R. 1922 Nag. 198.**

———After the decree-holder had obtained the possession under the final decree for foreclosure it was set aside in appeal. The application of the judgment-debtor for compensation under S. 144, C. P. Code, was dismissed and he appealed against the order paying 8 annas Court-fee in the memorandum of appeal.

Held, that the question of compensation related to execution, discharge or satisfaction of the decree in appeal and being thus an order coming within S. 47 of the Code, the Court-fee of 8 annas paid on the memorandum of appeal to the District Judge was sufficient. (*Drake-Brockman, J. C.*) GABBA *v.* KANCHHEDILAL. **67 I.C. 225 = 18 N. L. R. 15. A. I. R. 1922 Nag. 62.**

—S. 47—Scope of.

———Where there is an appeal as from an order under S. 2, C. P. Code, it would be difficult to bring that matter under S. 47 so as to allow of a second appeal. (*B. B. Ghose and Bose, JJ.*) RANJINI SUNDARI *v.* HIRALAL BISWAS. **33 C. W. N. 1170 = A. I. R. 1930 Cal. 249.**

———Adverse possession—Decree for possession—Possession acquired without Court's intervention is still to be ascribed to decree. Decree is effective *qua* that part of land over which possession has been proved. A.I.R. 1921 Bom. 470, Rel. on. (*Shadi Lal, C. J. and Abdul Qadir, J.*) MT. INDAR DEVI *v.* KIRPA RAM. **31 P. L. R. 578 = A. I. R. 1930 Lah. 803.**

———Questions relating to execution, discharge or satisfaction of decrees—Parties or representatives not only cannot raise such questions by separate suit but not even in separate suit except by way of defence when judgment-debtor was kept out of knowledge of execution proceedings, until after suit was brought, by fraud of decree-holder or the judgment-creditor. 34 Bom. 546; 19 Cal. 683; 12 Mad. 19 (F.B.); 8 All. 146; 28 All. 273; 34 Cal. 199; A.I.R. 1927 Cal. 106, Expl. (*Page and Mallik, JJ.*) BENI MADHAB *v.* RAICHARAN.

33 C. W. N. 165=56 Cal. 467=117 I. C. 558= A. I. R. 1929 Cal. 247.

———Under S. 47 there is no distinction between a money decree and a decree under O. 34. (*Jai Lal, J.*) MT. AISHA *v.* JOWAHIR MAL. **A. I. R. 1929 Lah. 762.**

———*Surety.*

A surety in case of arrest before judgment can apply for discharge under O. 38, R. 3, but a surety for due performance of a decree cannot be discharged. 43 Mad. 325, Foll.; 41 Bom. 402, Ref. (*Dalip Singh, J.*) ARURA *v.* MAVELI RAM. **119 I. C. 419= 30 P. L. R. 130=11 L. L. J. 141= A. I. R. 1929 Lah 435.**

———Execution proceedings—Orders are deemed to have been passed in the presence of parties—Objection to irregularity of such proceedings can only be taken either before the executing Court itself or by way of appeal from the order of the Court. 5 Cal. 584, Rel. on and 2 L.L.J. 563, Ref. (*Jai Lal, J.*) PIARA RAM *v.* SOHAWA. **109 I. C. 561= A. I. R. 1928 Lah. 910.**

———*Adami, J.*—A prayer under S. 47 can be joined with a prayer under O. 21, R. 90 in one application. It is only reasonable that the executing Court should deal with every objection which the judgment-debtor puts forward in one and the same proceeding.

Macpherson, J.—If it is necessary for the objectors to make an election in the first Court, that Court ought to put them to their election and not itself to choose at a late stage which of the two objections it should consider and which it should not consider. (*Adami and Macpherson, JJ.*) JAMILA KHATOON *v.* DAYANAND THAKUR. **7 Pat. 331=107 I. C. 848= A. I. R. 1928 Pat. 272.**

———O. 21, R. 52 does not override S. 47. A decree-holder obtained a decree against four judgment-debtors who were jointly and severally liable for a portion of the decree, while one of them was responsible for the balance in his individual capacity. Certain property was attached which the decree-holder alleged belonged to the judgment-debtor who was individually liable, while the other judgment-debtors alleged that it belonged to them, and was liable only for that portion of the decree for which they were jointly and severally liable. The decree-holder applied for the attachment of the sale proceeds of the property, and the three judgment-debtors who were jointly and severally liable filed an objection. A suit was pending between the judgment-debtors as to the ownership of the property, and the executing Court held that it had no jurisdiction to decide the question inasmuch as a suit was pending and the question of title would be decided in that suit.

Held, that the matter fell under S. 47 and the executing Court must decide it. (*Walsh and Banerji, JJ.*) AJODHIA PRASAD RAM LAL *v.* MAHADEO PRASAD. **102 I. C. 179=A. I. R. 1927 All. 574.**

———Every payment on account of a debt is perfectly lawful payment irrespective of its effect upon the other creditors. 26 Mad. 792, Foll. (*Jackson, J.*) V. CHINNAMALU *v.* C. K. MENON. **100 I. C. 24= A. I. R. 1927 Mad. 625.**

———Art. 138 of Limitation Act cannot override the provisions of S. 47 of C.P. Code. (*Chatterjea, Ag. C.J., Walmsley, Cuming, Page and Chakravarti, JJ.*) KAILASH CHANDRA TARAFDAR *v.* GOPAL CHANDRA PODDAR. **53 Cal. 781=43 C. L. J. 345= 30 C. W. N. 649=95 I. C. 494= A. I. R. 1926 Cal. 798. (F.B.).**

———The procedure under S. 47 and under R. 103 are not cumulative and the aggrieved party cannot at his option proceed by way of suit or appeal. (*Odgers, J.*) PACHIAPPA CHETTY *v.* VENKATACHARIAR. **90 I. C. 952=1926 M.W. N. 599= 1925 M.W.N. 577= A.I.R. 1925 Mad. 1198=51 M.L.J. 106.**

———An order passed under S. 47 should conclusively and finally determine the rights of the parties and should not be contingent upon future events alternative in their nature. (*Godfrey, J.*) N.K.R.R.M. CHETTY FIRM *v.* SUBRAYA MUDALIAR. **89 I.C. 300= 3 Rang. 132=A. I. R. 1925 Rang. 271.**

———Order in proceedings under S. 47 is decree only if it determines a question which parties ask court to decide as to their rights or liabilities and not if it decides merely incidental questions of procedure. The duty of the Court to decide any of the questions that may arise does not come into existence till the parties are brought before the Court or after having been served they fail to appear. (*Dawson Miller, C.J. and Foster, J.*) S.N. LAL CHAUDHURY *v.* NARAYAN PRASAD. **84 I. C. 576=2 Pat. L R. 222= A. I. R. 1924 Pat. 683.**

———A wide construction should be put upon the provisions of the Act with regard to introducing parties by devolution and of the desirability of ascertaining all possible points in execution proceedings without a fresh suit. But that which should in reality form the basis of an independent suit against a separate party for some act done by himself cannot be introduced as a question to be tried in execution proceedings in another suit. (*Lord Phillimore.*) MANINDRA CHANDRA NANDI *v.* RAMKUMAR LAL. **68 I. C. 973= 31 M. L. T. 131=49 I.A. 220=1 Pat. 581= 24 Bom. L.R. 1251=27 C.W.N. 29=36 C.L.J. 542= 20 A.L.J. 988=16 M L.W. 905=4 Pat. L. T. 1= 4 L.R. C. P. 1=A. I. R. 1922 P. C. 304= 42 M L.J. 589 (P.C.).**

———O. 21, R. 2 does not in any way limit or affect the operation of S. 47 and does not prevent the Court from deciding any question out of the execution of the decree. 7 L.B.R. 367, Foll. (*Rutledge, J.*) P.R.P.L. CHETTY FIRM *v.* G. LOU POW. **70 I. C. 859= A. I. R. 1922 L.B. 31=1 Bur. L. J. 43.**

———Applications for the execution of a decree are proceedings in the suit itself. 26 Bom. 109 and 22 I.A. 44, Foll. (*Kincaid, J.C. and Kemp, A.J.C.* JUMNOMAL *v.* GURDINOMAL. **83 I. C. 913= 17 S. L R. 211=A. I. R. 1921 Sind 61.**

—S. 48.

Bar of limitation.
Fraud.
Interpretation of.
Scope.
Starting point.
Miscellaneous.

—S. 48—Bar of limitation.

———*Execution application—Continuation of a prior application—Test.*

D was the zamindar and *C* was patnidar of a certain lot. In 1893 *D* sold the zemindari to *B*. *D* then obtained a decree in 1896 against *C* for rent up to date of sale. *B* also sued *C* for subsequent arrears of rent. *F*, a darpatnidar paid *C*'s due and obtained possession. In May 1908, *D* applied for execution against the patnidar and got it attached and sold. The sale was ultimately set aside in February 1911. In January 1915, *D* again applied for execution requesting to convert rent decree into money decree. Execution was alleged to be barred by limitation. On 19th March 1917, the decree-holders on the footing of the decree being merely a money-decree applied for attachment of other properties belonging to *C*. On 23rd November 1918, the decree-holders again on the footing of the decree being a money decree applied for and obtained an order that certain personal properties of another purchaser of the patni might be attached and sold and from such sale proceeds their claim be satisfied. The last application to attach patni was on 2nd December 1922.

Held, that the applications of 22nd January 1915, 19th March 1917 and 23rd November 1918 were essentially different in character from the application of 9th May 1908. D had abandoned the application of 9th May 1908 which proceeded on the footing that his decree created a charge on the tenure. The combined effect of these previous applications marked such substantial departures from the orlginal application of 9th May 1908 as to make it impossible to hold that the application of 2nd December 1922 was a continuation of the application of 9th May 1908. 1926 Pat. 748, affirmed. (*Sir Binad Mitter.*) MAHARAJ BAHADUR SINGH *v.* A.H. FORBES. **116 I.C. 268 = 33 C. W. N. 977 = 30 M.L.W.407 = 31 Bom. L. R. 1383 = 50 C. L. J. 345 = 10 P.L. T. 807 = A. I. R. 1929 P.C. 209 = 57 M.L. J. 184.**

———Execution applications by decree-holder subsequent to appointment of receiver for execution of the decree are valid for purposes of saving limitation. (*Patkar and Murphy. JJ.*) NADIRSHAW JAMSHEDJI *v.* PURSHOTTAMDAS GANPATDAS. **118 I. C. 694 = 31 Bom. L. R. 320 = A. I. R. 1929 Bom. 279**

———Compromise entered into during execution proceedings by which part of claim was given up and part agreed to be paid in instalment—If default in payment on specified date decree-holder entitled to execute for whole—Application for execution made on default — Application filed for execution of substituted decree held not barred under S. 48. (*B. B. Ghose and S. K. Ghose, JJ.*) HRIDOY MOHAN *v.* KHAGENDRA NATH. **34 C. W. N.213 = A. I. R. 1929 Cal. 687.**

———*Application for attachment allowed to be decided* ex parte *even after notice—Plea of twelve years' bar in appeal.*

Where even after the notice of a petition filed by the judgment-creditor for the attachment of properties is duly served, the judgment-debtor allows the petition to be heard and order made *ex parte*, he cannot ask for a review of the order, neither can he, in appeal, for the first time raise the plea that the application for execution, being after the expiration of twelve years from the date of decree sought to be executed cannot be entertained in accordance with S. 48 (1). A.I.R. 1921 P.C. 23; A.I.R 1924 Mad. 1 (F.B.) ; A. I. R. 1924 Mad. 673, Rel. on. (*Waller and Cornish, JJ.*) VENKATALINGAMA *v.* DHANARAJ GIRJI.

A. I. R. 1929 Mad. 826.

———Where a decree was passed on 25th April 1911 and the decree-holder having applied for its transmission without prayer for execution. to another Munsiff's Court on 19th April 1923 again applied on 20th April 1923 for its execution to that another Court on 20th April 1923 and had his application dismissed being then imcompetent as the transmission orders had not been received, applied for its restoration on 30th July 1923.

Held, that the application of 30th July 1923 cannot be regarded as a continuation of the application of 19th April 1923 which was in time, as the latter was not strictly an execution application and hence was time barred. 16 Cal. 744 ; 22 Cal. 921 ; 35 Bom. 103 ; 34 All. 396 and A.I.R. 1926 All. 93, Rel. on ; A.I.R. 1924 Pat. 120, Dist. (*Venkatasubba Rao, J.*) ANKINEDU PRASAD *v.* M. JAGAYYA. **1929. M W. N. 633 = 120 I. C. 369 = AI.R. 1929 Mad. 745.**

———Solenama instalment decree passed in a mortgage suit in 1909 authorising decree-holder to realize whole amount in case of default—Final decree was passed in 1911—Personal decree passed under O. 34, R. 6 in 1920—Execution application in 1925 — Application was held to be time barred and personal decree not necessary, 1917 P.C. 85, Rel. on. (*B. B. Ghose and Garlick, JJ.*) HARIPADU DUTTA *v.* SASHI BHUSAN. **48 C. L. J. 102 = 114 I. C. 792 = A.I. R. 1928 Cal. 668.**

———*Petition beyond* 12 *years of decree praying to continue an execution case filed* 3 *years before and for other new reliefs—New reliefs constitute a fresh petition and are barred.*

Where an application for execution was made within three years of the previous execution proceedings for rateable distribution but after 12 years from the decree, wherein the decree-holder asked that the heir of the judgment-debtor should be brought on the record and that notice should go to him under the provisions of O. 21, R. 22, and further asked that the amount due should be realized by the attachment and sale of the judgment-debtor's moveables and that the petition should be put up with the records of the previous execution cases and that execution proceedings might be carried on in continuation thereof.

Held, that the proceedings should be treated as an application in continuation of the previous execution cases aud prayer to bring the heir on the record and issuing notice to him would not make it a new application, but the application, in so far as it sought to attach the moveables, was a new application for execution within the provisions of S.48 and was clearly barred by time. (*Graves and Graham, JJ.*) SULTAN HASAN MIRZA *v.* SRIMATI NANKI BIBI.

A.I. R. 1928 Cal. 241.

———Execution application pending for a long time due to no fault of decree-holder—Another application filed to supplement list of properties to be attached 12 years after date of decree—Second application is in substance a fresh execution application and is barred by time. A. I. R. 1924 Cal. 131, Rel. on; 27 C. L. J. 398; A. I. R. 1923 Pat. 224; A. I. R. 1924 Pat. 20; and A. I. R. 1925 Mad. 781, Dist. (*Tekchand and Bhide, JJ.*) RAM RATAN *v.* DATAR KAUR. **120 I. C. 622 = A. I. R. 1928 Lah. 808.**

———Where all that is implicitly decided is that a previous execution petition was not barred by the 12 years rule, that decision cannot for ever remove the operation of S. 48 out of the way of all future execution petitions. (*Wallace and Madhavan Nair, JJ.*) DAKSHINAMURTHY PILLAI *v.* VEDAMURTHY MUDALIAR. **103 I. C. 311 = A. I. R. 1927 Mad. 842 = 53 M. L. J. 440.**

———Execution application filed within limitation but arrested without fault of decree-holder—Application to continue the execution made beyond limitation—Latter application is merely ancillary to first and is not barred. 18 All. 482 (F. B.); 33 All. 517 (F. B.), Expl. (*Kanhaiyalal and Boys, JJ.*) GIRIDHARILAL *v.* RAM CHARAN LAL. **24 A. L. J. 437 = 94 I. C. 613 = A. I. R. 1926 All. 331.**

———*Decree passed under old C. P. Code* (1882)—*Execution sought after* 1908—*Bar of* 12 *years in S.* 48 *applies.*

Where a decree was passed at a time when the old C. P. Code of 1882 was in force but the application for execution of it is made at a time when the new Code of 1908 is in force, the law of procedure and limitation applicable to an application for execution would be the law actually in force at the time when the application is made, and such application is governed by the bar of 12 years contained in S. 48. C. P. Code. 32 All. 499, Expl. and Dist. (*Lindsay and Sulaiman, JJ.*) MT. BEGAM SULTAN *v.* SARVI BEGAM. **90 I. C. 274 = 48 All. 121 = 23 A. L. J. 977 = 6 L. R. A. Civ. 582 = A. I. R. 1926 All. 93.**

———*Defendant not party to appeal—Decree against him cannot be executed beyond 12 years of trial Court decree.*

A decree of the trial Court does not merge in the decree of the appellate Court where the particular defendant against whom decree is sought to be executed was not a party to the appeal and as such no order could have been made as against him by the appellate Court by its decree. Therefore, under the provisions of S. 48 an application for execution made more than 12 years after the decree of the trial Court is barred against the said defendant. 20 C. W. N. 178, Dist. (*Newbould and B. B. Ghose, JJ.*) AMIR ALI *v.* HARISH CHANDRA. **95 I. C. 257 = 30 C. W. N. 306 = A. I. R. 1926 Cal. 664.**

———Decree directing recovery of money from *A* on failure to recover from *B*—Execution against *A* is barred after 12 years from date of decree. (Phillips and Devadoss, JJ.; Wallace, J, *contra*)—40 Mad. 989 (F.B.), considered as overruled in 22 C. W. N. 145 (P. C.)

Wallace, J.—In a case like this the decree-holder's remedy against the former party accrues not on the date of the decree but on the date of the failure of the other party to satisfy the decree, which date must be fixed by an order of Court, and limitation begins to run in respect of that remedy from the date of that order. Such order would have the effect of a fresh decree directing the payment of money by the second party to be made from the date of its order, and S. 48 would apply to it as such; that is, 12 years' limitation for the relief against the second party will run from the date of such an order. (*Phillips J, on difference between Devadoss and Wallace, JJ.*) SHUJA ULMULK BAHADUR *v.* UMIR-UL-UMIRA BAHADUR. **48 Mad. 846 = 1926 M. W. N. 213 = 91 I. C. 597 = A. I. R. 1926 Mad. 20 = 49 M.L.J. 498.**

———The parties to an execution agreed that the decretal amount should be paid by instalments, and the Court accepted the compromise and consequently passed an order striking off the execution proceedings.

Held, that the Court, when accepting the request of the parties, intended that the decretal amount should be payable by instalments, that S. 48 (*b*) of the new Code applied and the order which it passed was in essence and substance one made under S. 210 of the Civil Procedure Code (1882) which extended the period of limitation, (*Shadi Lal, C. J. and Fforde, J.*) BANARSI DAS *v.* RAMZAN. **73 I. C. 671 = A. I. R. 1923 Lah. 381.**

———Property attached in execution of decrees of two Courts higher and lower—Proceedings in lower Courts stopped—Application thereafter to Higher Court for rateable distribution is a continuation of the lower Court proceeding and is not barred by S. 48. 21 I. C. 923, Ref. to. (*Odgers, J.*) VENTALA VERRARAZU *v.* KURUVELLA SUBBARAYADU. **64 I. C. 493 = 15 M. W. N. 245 = 1921 M.W.N. 507 = A. I. R. 1922 Mad. 3 = 41 M. L. J. 378.**

—S. 48—Fraud.

———Fraud or force by one of several judgment-debtors in preventing execution—Extension can be granted only as against him. 38 Mad. 419, Foll. (*Percival, J. C. and Wild, A. J. C.*) JHAMANDAS NEBHOMAL *v.* DHARAMDAS. **A. I. R. 1930 Sind. 218.**

———Per *Ashworth, J.*—Fraud as used in S. 48 includes not merely deceit but also, except with reference to contract, includes circumvention. A. I. R. 1922 All. 145, Foll. (*Mukerji and Ashworth, JJ.*) AMBIKA NATH *v.* RAM RAJ TEWARI. **25 A. L. J. 842 = 103 I. C. 277 = A. I. R. 1927 All. 668.**

———The term fraud is used in wider sense than in English law—Locking house, evading arrest or payment or fictitious transfer is fraud. So also is a fictitious transfer of property to defeat or delay execution of a decree that may be passed against the judgment debtor. Ordinarily two things are essential for execution of a decree for money. Either the property of the judgment-debtor must be available or the person of the judgment-debtor must be available for arrest. Conduct is the best proof of intention. (*Kinkhede, A. J. C.*) KHARRULLA *v.* SETH DHANRUPMAL. **80 I. C. 905 = 22 N. L. R. 67 = A. I. R. 1925 Nag. 82.**

———Evasion by judgment-debtor of arrest when able to pay is fraud and extends limitation. (*Phillips and Odgers, JJ.*) RAMANATHAN CHETTIAR *v.* MOHIDEEN SAHIB. **80 I.C. 731 = 20 M. L. W. 475 = 1924 M. W. N. 745 = A. I. R. 1924 Mad. 836 = 47 M. L. J. 428.**

———An intentional avoiding by the judgment-debtor of arrest under a warrant by the decree-holder to avoid payment of decretal amount amounts to fraud and gives a fresh start to the period of limitation. (*Abdur Rahim and Odgers, JJ.*) AYYAVU *v.* SOMASUNDARAM CHETTIAR. **12 L. W. 710 = 60 I.C. 630 = 1920 M. W. N. 788.**

—S. 48—Interpretation of.

———Application for execution by decree-holder in 1920—Objection raised by judgment-debtor—Attachment ordered to continue but sale stayed until disposal of appeal by judgment-debtor—Appeal disposed of in 1928—In March 1928 order passed that no application being made by decree-holder, that record be consigned to record room but attachment was to continue—Order held not to have dismissed application for execution but merely to have postponed execution—S. 48 held not applicable—Later application by decree-holder held to be made to continue pending proceedings. 3 M. L. W. 601; A. I. R. 1922 All. 62; A. I. R. 1926 All. 734 and 107 I. C. 574, Rev. 38 Cal. 482.; 41 All. 157; A. I. R. 1922 Lah. 108 and A. I. R. 1924 Lah. 645, Dist. (*Jai Lal, J.*) DHANPAT RAI *v.* ALLIANCE BANK OF SIMLA, LTD. **123 I. C. 113 = 31 P. L. R. 321 = A. I. R. 1930 Lah. 647.**

———S. 48 cannot override S. 7, Lim. Act, and does not, therefore, imply that running of time will not be suspended against minor—Limitation Act, S.7. (*Wallace and Madhavan Nair, JJ.*) MANNARSWAMI AYYAR *v.* RAMASWAMI NAYAKAN. **1929 M. W. N. 158 = 30 M. L. W. 361 = 119 I. C. 39 = A. I. R. 1929 Mad. 394.**

———To the decision of a question under S. 48. the fact of minority is wholly irrelevant. (*Wallace and Madhavan Nair, JJ.*) MANNARSWAMI AYYAR *v.* RAMASWAMI NAYAKAN. **1929 M. W. N. 158 = 30 M. L. W. 361 = 119 I. C. 39 = A. I. R. 1929 Mad. 394.**

———*Limitation Act, S.* 15 (*obiter*).

Section 48, C. P. Code, is not controlled by S. 15, Lim. Act, and the only exception to sub-S. (1) is that contained in sub-S. (2) (*obiter*). (*Kulwant Sahay and Macpherson, JJ.*) KIRTYANAND *v.* PIRTHICHAND. **120 I. C. 315 = A. I. R. 1929 Pat. 597.**

———Section 15, Lim. Act applies only to the periods prescribed in the Schedule to that Act and does not apply to the period of limitation prescribed by S 48, C. P. Code. 45 Mad. 785, Foll. (*Wallace and*

Tiruvenkata Chariar, JJ.) TANDAVAMURTI *v.* DURGAMBA. **113 I. C. 260 = A.I.R. 1928 Mad. 1154.**

———An order for mesne profits is not an order for the payment of money on a certain date within the meaning of O. 48 (1) (*b*): A. I. R. 1926 Mad. 954 and A. I. R. 1926 Mad. 20; Diss. from: 40 Mad. 989 (F.B.), Foll. (*Wallace and Madhavan Nair, JJ.*) DAKSHINAMURTHY PILLAI *v.* VEDAMURTHY MUDALIAR.

103 I. C. 311 = A. I. R. 1927 Mad. 842 = 53 M. L. J. 440.

———*Limitation Act, Arts.* 181, 182—*Date of decree means the date when the decree becomes executable.*

A compromise decree provided that the money should be payable without interest within six months and that if no such payment was made, the decree-holder should be entitled to recover his money with interest at Re. 1 per mensem from the date of decree. *Held*, that the decree did not become capable of execution till a default had been made by the judgment-debtor to pay the decretal money within the period allowed and whether Art. 181 or 182 (7) was applied, the time would not commence to run till after the expiry of that period. (19 A. L. J. 26 (P. C.) and 40 Mad. 989, Foll.) (*Kanhaiya Lal, J.*) SURAJMAN CHAUBE *v.* ANJORE SHUKAL.

79 I. C. 605 = 46 All. 73 = 21 A. L. J. 861 = 4 L. R. A. civ. 591 = A. I. R. 1924 All. 263 (b).

———The prohibition against the execution of decrees more than 12 years old contained in S. 48, C. P. Code. (1908) is not controlled by S. 15, Limitation Act (1908). (*Spencer and Ramesam, JJ.*) SUBBARAYAN *v.* NATARAJAN. **16 M. L W. 68 = 1922 Mad. W. N. 424 = 31 M. L. T. 140 = 70 I. C. 396 = 45 Mad. 785 = A. I. R. 1922 Mad. 268 = 43 M. L. J. 168.**

———"*Period of Limitation*"—*Meaning of.*

The phrase "period of limitations" can be used in two senses (1) a strict and (2) a loose sense. In the strict sense it means such a period that a proceeding to which it is sought to be applied will be in time, if filed within the period, and beyond time, if filed after it. Ss. 3, 5 and 7 to 25 of the Limitation Act, 1908, apply only to "periods of limitation" in the strict sense such as those prescribed by the schedules to that Act and not to periods of limitation in the loose sense such as that prescribed by S. 48 of the C. P. Code. In the loose sense it means a secondary period which applies as a further check to an application or suit which is found not wanting when the primary or strict period of limitation is applied. S. 48, C.P. Code of 1908, for example prescribes a period of limitation in the loose sense. (*Spencer and Ramesam, JJ.*) SUBBARAYAN *v.* NATARAJAN.

16 M. L. W. 68 = 1922 M. W. N. 424 = 31 M. L. T. 140 = 70 I. C 396 = 45 M. 785 = A. I. R. 1922 Mad. 268 = 43 M. L. J. 168.

———*Retrospective effect.*

S. 48 as retrospective effect in regard to decree passed prior to the coming into force of the new Code. 32 All. 499 not Foll. 40 Cal. 704 Foll. (Case Law discussed.) (*Macleod, C. J. and Fawcett, J.*) GOPALDAS GANPATDAS *v.* TRIBHOWAN. **45 Bom. 365 = 59 I. C. 790 = A. I. R. 1921 Bom. 40.**

———Subsequent order directing payment in S. 48, Cl. (*b*), means a subsequent order made by the Court, which made the decree acting as that Court and not an order of a Court executing a decree. (*Coutts and Adami, JJ.*) GOBARDHAN PRASAD *v.* BISHUNATH PRASAD. **2 P. L. T. 80 = A. I. R. 1921 Pat. 340.**

—S. 48—Scope.

———*When S.* 48 (2) *is available.*

In order to succeed under S. 48 (2) the decree-holder must prove that he was prevented from executing the decree by reason of fraud or force on the part of the judgment-debtor, but where the Court merely refuses to give permission to proceed against the properties of the judgment debtor in the hands of a Receiver, and it is open to the decree-holder to proceed either against the person or other properties of the judgment-debtor or surety and he does not execute the decree against either of them within 12 years, S. 48 (2) is of no help and sub-S. 1 has its operation. (*Kulwant Sahay and Macpherson, JJ.*) KIRTYANAND *v.* PIRTHICHAND.

120 I. C. 315 = A. I. R. 1929 Pat. 597.

———*Applies only to Fresh Petitions.*

S. 48, C. P. Code, applies to a fresh application for execution of the decree which is put in after the expiration of 12 years from the date of the decree. The section does not apply if the previous application for execution should be treated as rightly amended while it was pending though the amendment was ordered after the expiry of the 12 years. The application for amendment though made after 12 years from the date of the decree is not as such *ultra vires*. But if the amendment cannot be allowed and the application for amendment was in substance a fresh application for the execution of the decree then it will be clearly barred under S. 48. Whether the amendment can or cannot be allowed depends upon the circumstances of each case and is discretionary with the Court. While exercising this discretion the Court should not allow the statutory provisions of S. 48 to be evaded. 27 M. L. J. 25 and A. I. R. 1927 Mad. 327, not Appr. (*Wallace and Thiruvenkata Chariar, JJ.*) TANDAVAMURTY *v.* DURGAMBA.

113 I. C. 260 = A.I.R. 1928 Mad. 1154.

———*Retrospective effect.*

S. 48 of the C. P. Code, has retrospective effect, and governs an applicaton for the execution of a mortgage decree passed before the new Code came into force. 22 Bom. L. R. 1420, Rel. on. (*Macleod, C. J. and Crump, J.*) GULABRAO YESHWANT HARPHALE *v.* MAGAN GHELABHAI GUJARATHI. **87 I. C. 769 = 27 Bom. L. R. 461 = A. I. R. 1925 Bom. 326.**

———*Does not bar proof in insolvency.*

S. 48 deals only with execution and lays down that no order for execution of the decree shall be made upon an application presented after the expiration of 12 years from certain dates, but it does not mean that a decree more than 12 years old is not proveable in insolvency proceedings. (*Oldfield and Venkatasubba Rao, JJ.*) SIVASUBRAMANIA PILLAI *v.* THEETHIPPA PILLAI.

75 I. C. 572 = 18 M. L. W. 636 = 1923 M.W.N. 895 = 47 M. 120 = A. I. R. 1924 Mad. 163 = 45 M. L. J. 166.

———*Fraud—Frivolous and futile objections.*

Where the execution of decree has been obstructed by frivolous objections on the part of the judgment debtors, the decree-holders are entitled to the advantage of S. 48, C. P. Code. (*Piggot and Walsh, JJ.*) LALTA PRASAD *v.* SURAJ KUMAR.

65 I. C. 877 = 44 All. 319 = 20 A. L. J. 185 = A. I. R. 1922 All. 145.

—S. 48—Starting point.

———Decree-holder in partition suit directed to make certain payments as condition precedent to his getting possession of certain properties—He should have made application to deposit money within three years of decree. (*Murphy and Broomfield, JJ.*) MANA MANSARAM SHET *v.* SHRIDHAR KESHAV NAIK.

A. I. R. 1930 Bom. 503.

———*Date of decree.*

S. 48 means that no execution petition can be put in after 12 years of the date of the decree, the date being the date prescribed under R. 7, O. 20. Where, therefore, the decree directs that mesne profits should be ascertained in execution, limitation runs from the date of decree and not from the date when mesne profits are ascertained. A. I. R. 1921 P. C. 31 (P. C.) and 22 C. W. N. 145, Foll. (*Wallace and Madhavan Nair, JJ.*) DAKSHINAMURTHY PILLAI *v.* VEDAMURTHY MUDALIAR. **103 I. C. 311= A. I. R. 1927 Mad. 842=53 M. L. J. 440.**

———*Petition to transfer different from one to execute.*

An application for execution is of an entirely different nature from the application for the transfer of the decree to another Court and therefore the former can in no sense be treated as one in continuation of the latter application. 34 All. 396, Rel. on : 26 All. 361 and 4 A.L.J. 405. Dist. (*Sulaiman, J.*) SUKLA CHOUDHARI *v.* HARBANSDEO. **95 I. C. 26= A. I. R. 1926 All. 660.**

———*Non-appealable decree—Date of decree is the starting point.*

Where an appellate decree either affirms, modifies or reverses the decree of the trial Court, the period of limitation will begin from the date of the decree of the appellate Court ; but where an appeal does not lie, *e. g.*, from a decree passed from an award, but an appeal is preferred and dismissed as no appeal lay, the order of dismissal is not a decree affirming the decree of the trial Court and therefore time runs from the date of trial Court's decree. 32 All. 136 and 43 All. 405, Dist.; 36 All. 350 (P. C.) and A. I. R. 1922 P. C. 187, Foll. (*Dalal and Boys, JJ.*) SAHU NANDLAL *v.* SAHU DHARAM KIRTI. **48 All. 377=24 A. L. J. 465= 94 I. C. 961=A. I. R. 1926 All. 440.**

———Subsequent order may be by transferee Court A. I. R. 1925 Bom. 503, Foll. (*Jailal, J.*) FIELDING *v.* JANKIDAS & SONS. **95 I.C. 243= A.I.R. 1926 Lah. 465.**

———Combined order for relief against property and person passed—Time runs from the date of decree in absence of fresh order in execution, for execution against the person. If an order is passed after the property had been sold that, for the balance other properties of the mortgagors should be proceeded against, an application filed within 12 years of that order would be in time. 22 C. W. N. 145 (P. C.), Rel. on. (*Devadoss, and Waller, JJ.*) SWAMINATHA *v* THIAGARAJASWAMI. **50 M. 5=23 M. L. W. 26=1926 M. W. N. 140= 92 I. C. 846=A. I. R. 1926 Mad. 954= 52 M. L. J. 256.**

———The question whether an application for execution of a decree is a new application or a revival or continuation of an old one is a question of substance and not of form. The words " subsequent order " in sub-S. 1 (*b*) refer to the particular order permitted to be passed for instalment under O. 20, R. 11 (2) within six months of the passing of the decree under Art. 175 of the Limitation Act. 40 A. 198, 48 M. 846, Foll. The word " fraud " in sub-S. 2 (*a*) should not be interpreted in a narrow sense. Any action of the judgment-debtor which puts off the decree-holder from executing his decree at once should be taken as fraud if the result thereof is to bar the execution of the decree under the twelve years' rule. 44 A. 319, Foll. (*Dalal, J.*) GOBARDHAN DAS *v.* DAU DAYAL. **124 I. C. 43.**

———*Time allowed for payment of balance is a new starting point.*

The words " any subsequent order " must not be limited as if the words " by the Court which passed the decree " were there, but mean any order made by a competent Court, and an order made by a Court executing a decree allowing a judgment-debtor time to pay up the balance of the decretal money by instalments is a subsequent order within the meaning of S. 48, and gives a fresh period to the decree-holder to execute his decree. 40 All. 198, Diss. from. (*Macleod, C. J. and Coyajee, J.*) D. S. APTE *v.* TIRMAL HANMANT SAVNUR. **88 I. C. 949=27 Bom. L. R. 961=49 Bom. 695= A. I. R. 1925 Bom. 503.**

———Mortgage decree for sale of properties and for recovery of balance from mortgagor's person—Limitation for execution of latter part of decree runs from date of decree. (*Odgers, J.*) SAMINATHA ODAYAR *v.* THIAGARAJASWAMI ODYAR. **82 I. C. 827= A. I. R. 1925 Mad. 331.**

———*Step-in-aid starts new point.*

An application to summon the *Patwari* to take evidence for rectification of the area of property to be sold was held to be a step-in-aid as without such an application the Court would not have summoned the *Patwari* and there would have been no means to rectify the area of the property to be sold as required by the Collector. A. I. R. 1922 A. 432, Foll. It is not the application for execution alone which saves limitation. Any other application which may be taken to be a step-in-aid of execution will also start a fresh period of limitation so long as the execution is not barred under S. 48. (*Dalal, A. J. C.*) MATHURA SINGH *v.* KANDHAI PATHAK. **74 I. C. 816=A. I. R. 1924 Oudh 177.**

———Appeal against some defendants—Limitation for execution against others will run only from date of original decree. (*Macleod, C. J. and Crump, J.*) KALYANCHAND LALACHAND *v.* BHOGILAL JAYACHAND. **73 I. .C 310=25 Bom. L. R. 371= A. I. R. 1923 Bom. 400.**

———*Arrangement to pay in instalments gives no fresh starting point.*

An order under this section must be made by the Court which made that decree and acting as the Court (40 All. 198, Foll.). An arrangement entered into to pay a decree by instalments and sanctioned by the Court executing the decree does not alter the original decree nor does it give a fresh starting point for limitation. (*Broadway, J.*) H. JIWAN BAKSH *v.* MUBINUL HAQ. **73 I. C. 794=A. I. R. 1923 Lah. 678.**

———*Date of decree of executable decree is the starting point.*

When a decree *nisi* is passed under the provisions of the Dekkhan Agriculturists' Relief Act, there is no necessity to apply to the Court to have the decree made absolute. The decree-holder should apply for execution at once, and the application to have the decree made absolute would at the best be considered as a step-in-aid of execution, so that the order of the Court cannot be treated as a decree which would form a first starting point for the period of twelve years allowed by S. 48 of the C. P. Code. (*Macleod C.J. and Shah, J.*) HIRACHAND KHEMCHAND GUJAR *v.* ABA LALA PATIL. **67 I. C. 153=24 Bom. L. R. 269= 46 Bom. 761=A. I. R. 1922 Bom. 95.**

———*Appeal—Date of appellate decree is the starting point.*

Where though the plaintiff's claim was decreed in full, the plaintiff appealed by reason of certain remarks in the judgment but the appeal was dismissed as not competent. *Held*, the 12 years period of limitation must be calculated from the dismissal of the appeal. (*Piggott and Walsh, JJ.*) RUPNARAIN *v.* SHEO PRAKASH. **61 I. C. 129=43 All. 405= 19 A. L. J. 159=A. I. R. 1921 All. 134.**

———*Mortgage decree.*

Where a decree in a mortgage suit directed that the available proceeds of the sale to be held thereunder be paid in satisfaction of the decretal debt, but that if the amount due to the plaintiff was not satisfied by the sale of the mortgaged properties, the balance be realised from the other property and person of the defendant.

Held, that the period of limitation applicable runs not from the date of the sale of the mortgaged property but from the date of the decree as fixed by Order 20, Rule 6. Consequently the term of 12 years under S. 48, C. P. Code, must be taken to run from the date of the decree. (*Mookerjee and Panton, JJ.*) BARANASHI KOER *v.* BHABADEB CHATTERJEE **34 C. L. J. 167 = 66 I. C. 758 = A.I.R. 1921 Cal. 456.**

———*Amendment of decree.*

Where a decree is amended, the date of the amendment is the date of the decree within the meaning of S. 48, C. P. C. (*Das, J.*) BALDEO SHUKUL *v.* SYED YUSUF. **60 I. C. 318 (Pat).**

—S. 48—Miscellaneous.

———*Complete execution application filed within 12 years.*

Application for execution against other properties beyond 12 years cannot be allowed as one for amendment of the first. 27 M. L. J. 25, Rel. on. A decree-holder does not obtain a decree wihch but for the merely technical and possibly unjust provision of limitation, he would be at liberty to execute at any time he pleased. There lies no peculiar equity in overriding limitation. He obtains a decree which he must execute before the expiration of 12 years, and the law which limits the period is neither more nor less just than the law which authorizes the decree. (*Jackson, J.*) ALAPATI SYAMALADOSS *v.* DORADLA SUBBAYYA. **38 M. L. T. 42 = 100 I. C. 20 = A. I. R. 1927 Mad. 347 = 52 M. L. J. 137.**

———*Instalment decree ceasing to be so on default—Court cannot restore decree to original status.*

Court cannot order at the instance of the judgment-creditor that a decree which has ceased to be an instalment decree should be restored to its previous status so as to prevent time from running against him. 1922 Bom. 170, Dist. (*Macleod, C. J. and Crump, J.*) GULABRAO YESHWANT HARPHALE *v* MAGAN GHELABHAI GUJARATHI. **87 I. C. 769 = 27 Bom. L. R. 461 = A.I.R. 1925 Bom. 326.**

—S. 49—Assignor—Cross decree against.

———One *R*, obtained a decree against *G* on 9-2-1922 and the same day assigned it to one *C*. On 13 6-22 *G* filed a regular suit against the assignor and obtained a decree on 30-8-22. He deposited the decretal amount of Rs. 148-10-0 due under the decree which was assigned to *C* and then got it attached in execution of his own decree. The applicant *C* applied to have the attachment raised.

Held, that the case was governed by S. 49 and the attachment was right. (*Baker, Offg. J. C.*) CHUNNI LAL *v.* GULZARI LAL. **75 I. C. 752 = 19 N. L. R. 164 = A. I. R. 1924 Nag. 46.**

—S. 49—Benami purchase.

———The right of the assignee of a decree to execute the decree cannot be made conditional upon equities which the mortgagor judgment-debtors may have against the mortgagee judgment-debtors for whom he is said to be the benamidar. (*Ross and Kulwant Sahay, JJ.*) SHEO PRASAD *v.* P. E. LALL. **86 I. C. 564 = 4 Pat 120 = A. I. R. 1925 Pat. 449.**

—S. 49—Consideration for assignment.

———Consideration for assignment partly unpaid—Assignee's right to execute parties' intention. (*Ross and Kulwant Sahay, JJ.*) SHEO PRASAD SINGH *v.* P. E. LALL. **86 I. C. 564 = 4 Pat. 120 = A. I.R. 1925 Pat. 449.**

—S. 49—Execution of decree.

———It is the decree-holder on record who is entitled to execute the decree. The transferee of a decree will be entitled to execute the same only when he has been brought on the record and the transferee will be entitled to the benefits arising from the execution only when he takes out execution of the decree: 18 Cal. 639; 10 C.L. J. 396; 29 M. L. J. 693 and 43 Mad. 424, Rel. on: 33 Mad. 62, Dist. (*Mya Bu, J.*) CO-OPERATIVE TOWN BANK OF PADIGON *v.* S.V.K.V. RAMAN CHETTYAR. **99 I. C. 309 = 4 Rang. 426 = 5 Bur. L. J. 181 = A.I.R. 1927 Rang. 55.**

—S. 50—Ancestral property.

———Legal representative of a Hindu liable to the extent of property of the deceased in his hands not duly disposed of—Order excepting ancestral property is wrong. (*Shadi Lal, C. J. and Skemp, J.*) RAM DAS *v.* SUNDAR SINGH. **118 I. C. 396 = 30 P. L. R. 593 = A. I. R. 1929 Lah. 424.**

—S. 50—Assets, receipt and extent of.

———To make legal representative of administrator liable decree-holder must prove both amount of assets and receipt of assets.

Quaere.—Whether the proposition that if it were shown that a deceased person left a certain amount of assets and that the legal representative had received some portion of those assets it would be for him to explain why he did not receive the whole of the assets and if he says that he did not so receive them, it would be for him to establish what proportion of the assets proved to have been left by the deceased really got into his hands, is not too wide. (*Krishnan and Odgers, JJ.*) ANGAVALATHAMAL *v.* JANAKI AMMAL. **79 I. C. 894 = 19 M. L. W. 119 = 1924 M. W. N. 207 = A. I. R. 1924 Mad. 466.**

—S. 50—Assets, what are.

———Balance of the sale proceeds of occupancy fields sold after father's death in execution of the mortgage decree against him are not assets of the father's estate in the hands of the son. To hold that succession to such an untransferable right of occupancy creates a personal liability to pay the debts of a deceased judgment-debtor, would be opposed to principle and could scarcely have been intended by the legislature. (9 N. L. R. 137 and 84 P. W. R. 1916, Rel. on.) To fasten liability on the heir-at-law or legal representative, the right which has devolved must be property which can be disposed of for the purpose of satisfying the debt due by the deceased. (*Wadegaonkar, A.J.C.*) BONDRU *v.* MISRIYA. **89 I. C. 477 = A. I. R. 1925 Nag. 449.**

———Property received by the legal representative from the hands of the rightful successors to the estate of the deceased before they could enter into possession of the assets of the deceased in recognition of his antecedent rights in the estate of the deceased does not make it the property of the deceased. One test to determine whether the property held by the legal representative is the property of the deceased is to see if that property could be claimed as the property of the deceased by those in whom the inheritance vested in respect of that property after the death of the propositus.

Obiter.—Property converted into one form different from the form which the estate of the deceased originally represented could not be called as "the property of the deceased." The converted property may not be the property of the deceased yet it may be liable for the satisfaction of his debts under some other principle of law than the principle enunciated in sub-Section (2) of S. 50 of the Code of Civil Procedure. (*Syed Wazir Hasan, J.C.*) SHAMSHER BAHADUR SINGH *v.* KAILAS BIBI. **27 O. C. 262 = 11 O. L. J. 441 =**

81 I. C. 464 = A. I. R. 1924 Oudh 364.

—S. 50—Decree for Maintenance.

———Where upon a true construction of the decree for maintenance no charge was created on the estate but only a personal decree was passed against the judgment-debtor.

Held, that after the death of the judgment-debtor the decree-holder would not be entitled to any maintenance by execution of the decree against the holders of property after the judgment-debtor. (*B. B. Ghose and Panton, JJ.*) RADHA BALLAB DAS *v.* KRISHNA PRIYASHI DASYA. **120 I. C. 705 = 49 C. L. J. 267 = A. I. R. 1929 Cal. 423.**

—S. 50—Dekkan Agricultuirsts' Relief Act—No bar.

———Dekkan Agriculturists' Relief Act, Ss. 22 and 74—Collector can be appointed to manage the property of the judgment-debtor in the hands of his legal representatives after his death. (*Fawcett, J. C. and Raymond, A. J. C.*) CHOITHARAM KALIANDAS *v.* LALBUX. **63 I. C. 310 = 15 S. L. R. 47 = A. I. R. 1921 Sind 29.**

—S. 50—Effect of non-substitution of Legal Representative.

———Execution sale held after judgment-debtor's death—Legal representative not brought on record—Sale is a nullity—42 Cal. 72 (P.C.), Foll. 1922 Mad. 307, Appr. 1924 Mad. 130, Diss. (*Phillips, J.*) KARIPINENI RAJAYYA *v.* KALAPATPU ANNAPURNAMMA. **22 M. L. W. 828 = 92 I. C. 308 = A. I. R. 1926 Mad. 138 = 50 M. L. J. 662.**

—S. 50—Ex-parte order.

———The order permitting execution against the legal representatives can be made ex-parte. A.I.R. 1927 P.C. 73, Foll. (*Rutledge, C.J. and Carr, J.*) NACHI MAI ACHI *v.* S. N. SUBRAMANIAM CHETTY. **5 Rang. 775 = 6 Bur. L.J. 225 = 106 I. C. 857 = A. I. R. 1928 Rang. 40.**

—S. 50—Gratuity to heir.

———Gratuity given to heir of an employee for services is not assets of the employee in the hands of the heir (*Wazir Hasan, A.J.C.*) LACHMI NARAYAN *v.* UMAID RAI. **69 I. C. 893 = 9 O. L. J. 401 = 26 O. C. 53 = A. I. R. 1923 Oudh. 21.**

—S. 50—Legal representative—Substitution of.

———The decree-holder entitled to apply for the execution of his decree is bound to implead a representative of a deceased judgment-debtor, for the purpose of such application, only when a default under the decree occurs and execution becomes necessary. Merely because execution has been unnecessary for 20 years, decree-holder cannot be held to be debarred from it. (*Oldfield and Ramesam, JJ*) ANDAL AMMAL *v.* VIJIA NAIDU. **14 M. L. W. 632 = A. I. R. 1921 Mad. 693 (1).**

—S. 50—Legal representative, transfer by.

———A decree passed against a judgment-debtor can on his death be enforced not only against his legal representatives (26 Bom. 140, not Foll. 26 Bom. 283, Foll.) but also against the transferee from those representatives who take under an alienation pending the execution proceedings. (*Shah and Fawcett, JJ.*) KRISHNA BAI PANDURANG *v.* SAVLARAM GANGARAM' **51 Bom. 37 = 29 Bom. L. R. 60 = 100 I. C. 582 = A. I. R. 1927 Bom. 93.**

—S. 50—Limitation,

———*To bring Judgment-debtor's Legal Representative on record.*

Where a judgment-debtor dies, the decree-holder should get at least six months within which to make an application to bring his legal representative on the record on the analogy of Article 177 of the Limitation Act

(*Bucknill, J.*) RAMESHWAR SINGH *v.* MATHU MISSER. **62 I. C. 52. (Pat.)**

—S. 50—Minor sons and widow.

———Judgement-debtor dying leaving minor sons and widow—Procedure to be adopted shown—C. P. Code - O. 32, R. 3. When a judgment-debtor dies leaving minor sons and a widow, what is required under Order 32 and Order 21 in regard to each minor is : (1) Service of notice on the minor asking him to show cause against the appointment of his mother as his guardian. (2) Service of notice on the mother asking her to show cause against her own appointment. (3) The passing of an order appointing her guardian after she has expressed her willingnes and the Court has found her fit. (4) The granting of an opportunity to the mother as guardian to show cause why the decree should not be executed against the minors. (*Halifax, A.J.C.*) ADKIA *v.* Shankar RAO **59 I. C. 757 = A. I. R. 1921 Nag. 126.**

—S. 50.—Non-substitution, effect of.

———Where in execution of a decree, in which the puisne mortgagee consented for sale free of his mortgagee on the condition that the balance be paid to him after the discharge of the prior mortgage, subsequent to the order for sale but prior to the sale itself such puisne mortgagee died and his legal representative was not brought on the record and the sale was held and confirmed.

Held, as the procedure laid down by. S. 50, C.P. Code had not been followed the sale was a nullity and did not require to be set aside under Art. 166 of the Limitation Act, 1908. (*Oldfield and Ramesam, JJ.*) S. N. RAGHUNATHASAMI AYYANGAR *v.* S. GOPAUJ RAO. **68 I. C. 667 = 15 M. L. W. 123 = 1921 M.W.N. 732 = A. I. R. 1922 Mad. 307 = 41 M. L. J 547.**

—S. 50.—Personal liability.

———*Amendment of Decree.*

Decree cannot be passed against legal representative personally—Application to amend decree at a late stage is entertainable in case of such a decree. (*Macleod, C. J. and Crump, J.*) JAYAWANT RAO NARAYAN *v.* NARSING SAKHARAM. **80 I. C. 180 = A. I. R. 1923 Bom. 414.**

—S. 50 —Possession of assets.

———*Determination of, must be in execution.*

A suit against the legal representative of a deceased debtor should not be dismissed on the mere ground that he is not in possession of any portion of the estate left by the deceased. That is a matter to be determined in execution proceedings, A. I. R. 1926 Nag. 170, Foll. (*Subhedar, A.J.C.*) RAJARAM *v.* NATHU. **120 I. C. 333.**

—S. 50—Substitution, application for.

———C. P. Code., Ss. 50 and 99—Application for substituting legal representative's name can be made to the Court passing the decree—If it is not made to that Court, it is mere irregularity which is cured by S. 99. 22 Cal. 558; 35 Cal. 1047. Foll.; 17 All. 431; 19 All. 337 and 28 Mad. 466, Not Foll. (*Abdul Raoof and Fforde, JJ.*) MT. BEGAUM BIBI *v.* BULAQI SHAH. **90 I.C. 1050 = 26 P.L.R. 740 = A. I. R. 1926 Lah. 34.**

—S. 50—Substitution, by transferee Court.

———Decree transferred—Execution commenced—J. D's death—Court of transfer bringing legal representative on record—Acquiescence by legal representative—Irregularity is curable—C. P. C., S. 99. 28 Mad. 466, Dist. ; 55 I.C. 812, Foll. ; 22 Cal. 558, Ref. to. (*Dalal, J. C. and Wazir Hasan, A.J.C.*) KUER JANG BAHADUR *v.* BANK OF UPPER INDIA, LUCKNOW. **87 I. C. 21 = 12 O. L. J. 146 = 2 O. W. N. 73. 28 O. C. 330 = A. I. R. 1925 Oudh 448.**

—S. 50—Substitution of legal representative.

———Judgment-debtor dying before full satisfaction of decree—Application for substitution of legal representative made to transferee Court—Legal representative objecting to the procedure only at the last stage—He cannot be allowed to challenge legality of proceedings. 22 Cal. 558 ; 27 Cal. 488 and 28 Mad. 466, Expl ; A. I. R. 1925 Oudh. 448, Affirmed. (*Sir Lancelot Sanderson.*) JANG BAHADUR *v.* BANK OF UPPER INDIA LTD., LUCKNOW. **3 Luck. 314= 55 I. A. 227=5 O. W. N. 502=26 A. L. J. 681= 48 C. L. J. 23=32 C. W. N. 790=109 I. C. 417= 28 M. L. W. 25=30 Bom. L. R. 1373= 1928 M. W. N. 863=A. I. R. 1928 P.C. 162= 55 M. L. J. 545 (P.C.).**

—S. 51—Appointment of Receiver.

———Judgment-creditor's position is not improved by appointment of receiver in execution instead of attachment and sale. A. I. R. 1921 Mad. 218 (F. B.) and A. I. R. 1923 Mad. 505 (F. B.), Rel. on. (*Anantakrishna Ayyar, J.*) NATESA *v.* GOVINDASAMY. **A. I. R. 1930 Mad. 4.**

———Receiver appointed in execution proceedings—Other decree-holders need not apply for appointment of receiver of same property. (*Anantakrishna Ayyar, J.*) NATESA *v.* GOVINDASAMY. **A. I. R. 1930 Mad. 4.**

———Receiver cannot be appointed in respect of agricultural land of judgment-debtor in Santhal Pargannas by way of equitable execution. Bengal Regulation (III of 1872), S. 27. (*Das, James and Rowland, JJ.*) SURENDRA PROSAD *v.* TEKAIT SINGH. **118 I. C. 721= 10 P. L. T. 846=A. I. R. 1929 Pat. 700 (F.B.).**

———Civil P. C., O. 40, R. 1, is a general provision relating to appointment of Receivers and even if an order appointing a Receiver is made in execution proceedings, it may fall within the purview of O. 40, R. 1, so as to be appealable under O. 43, R. 1 (*s*) : 3 P. L. J. 573 and A.I.R. 1924 Nag. 165, Rel. on. (*Zafar Ali, J.*) ATTA ULLAH *v.* BALA MAL. **100 I. C. 298= A. I. R. 1927 Lah. 190.**

———It would be stretching too far the discretion of the Court under O. XL, R. 1 in the matter of the appointment of receiver if the decree-holder is deprived of his right to sell the mortgaged property under the decree. S. 51 of the Code does not give any right to the judgment-debtor to apply for the appointment of a receiver but prescribes the mode in which the decree-holder may seek an execution of his decree, one of the modes being by the appointment of a receiver. (*Jwala Prasad and Bucknill, JJ.*) MALIK MOKHTAR AHMED *v.* MT. BIBI RAHIMUNNISSA BEGUM. **4 P. L. T. 58=67 I.C. 606=1922 P.H.C.C. 66= A. I. R. 1922 Pat. 369.**

———Receiver can be appointed to realise property outside jurisdiction. (*Wallis, C. J. and Krishnan, J.*) ALAGAPPA CHETTY *v.* KRISHNASWAMI IYER. **61 I C. 753=13 M. L. W. 150=1921 M. W. N. 106= A.I.R. 1921 Mad. 119.**

———The High Court has jurisdiction to appoint a receiver of immoveable property situated outside its ordinary original jurisdiction, because the appointment of a receiver is not execution but a substitute for execution. The appointment of a receiver has no doubt been described in English law as one by way of 'equitable execution' but it is really not execution but it is equitable relief which the Court gives because execution cannot be had at law. (*Rankin, C. J. and C. C. Ghose, J.*) PRAMATHANATH MALIA *v.* H. V. LOW & CO, **57 Cal. 964=34 C.W.N. 238=51 C.L.J. 209= A.I.R. 1930 Cal. 502.**

—S. 51—Appointment of Receiver when made.

———Before an appointment of a Receiver by way of execution can be obtained a case should be made out that ordinary execution cannot be effected with advantage in the case. Even when such a case is made and the sole purpose of the appointment is to have immoveable property realized by sale, application by such appointment should *prima facie* be made as an application-in-execution to the Court within whose territorial jurisdiction the property is situate. (*Rankin, C.J. and C. C. Ghose, J.*) (RAJA) PROMOTHANATH MALIA *v.* H. V. LOW & CO. **57 C. 964=34 C.W.N. 238= 51 C. L. J. 209=A. I. R. 1930 Cal. 502.**

—S. 51—Compromise decree in Mortgage suit.

———Decree not providing for attachment—No attachment is necessary. (*Das and Adami, JJ.*) MT. ARUNBATI KUMARI *v.* RAMNIRANJAN MARWARI. **60 I.C. 652=2 P.L.T. 38=A.I.R. 1921 Pat. 320.**

—S. 51—Execution by arrest.

———Decree-holder asking for arrest of judgment-debtor in execution of decree cannot be compelled to accept payment in instalments. (*Johnstone, J.*) BHAGWAN SINGH *v.* GIRDHARI LAL. **30 P. L. R. 736= A. I. R. 1930 Lah. 220.**

—S. 51—Execution by Collector.

———Where the executing Court filed the execution proceedings on the ground that the decree-holder was not prepared to take the land on lease.

Held, that the procedure was wrong and that the proceedings could only be filed if all lawful means for satisfying the decree had been tried and found to be impracticable. (*Jai Lal, J.*) MT. BHAGWANTI *v.* BACHAN SINGH. **112 I. C. 790= A. I. R. 1929 Lah. 195.**

—S. 51—Execution of mortgage decree.

———Mortgage-decree directing sale of property—No attachment is necessary. (*Harrison and Tekchand, JJ.*) JAGE RAM *v.* RICHHPAL. **113 I. C. 907= 10 L. L. J. 491=30 P. L. R. 6=10 Lah. 543= A. I. R. 1929 Lah. 90.**

—S. 51—Mode of Execution.

———The Court has jurisdiction to mortgage land but ordinarily such a course should not be adopted. Where judgment-debtor is in possession of moveable property sufficient to satisfy a decree but has successfully resisted the execution for about 10 years, and where the executing Court mortgages the land of the judgment-debtor for the decretal amount, the case is an exceptional one and the Court exercises its discretion properly : 1 Lah. 192 ; A. I. R. 1929 Lah. 660 and 92 I. C. 949, Rel. on. 2 Lah. 78 Ref. (*Addison, J.*) NASAR DIN *v.* BUTA MAL. **119 I. C. 231=A. I. R. 1930 Lah. 77.**

—S. 51—Money in hands of Receiver.

———It cannot be said that a receiver is the agent of a judgment-creditor in execution of whose decree he is appointed nor can it be said that the moneys realized by the receiver become *ipso facto* moneys belonging to the judgment-creditor, and, as moneys paid to the credit of the judgment-creditor's suit the moment the receiver comes into possession of the same, 17 Mad. 501 and 20 Mad. 224 (F.B.), Rel. on. (*Anantakrishna Iyyar, J.*) NATESA *v.* GOVINDASWAMI. **A. I. R. 1930 Mad. 4.**

———A receiver appointed by the Court is appointed on behalf and for the benefit of all persons interested, as parties to the suit or proceeding. Moneys in the hands of the receiver belong to the Court which appointed him and are *in custodia legis*, and he cannot spend them except under the orders of the Court: *In re* Dickinson

Ex parte Charrington & Co. 22 Q.B.D. 187 and *In re* Potts *Ex parte* Taylor,(1893) 1 Q.B. 648, Ref. (*Anantakrishna Ayyar, J.*) NATESA *v.* GOVINDASAMY.
A. I. R. 1930 Mad. 4.

—S. 51—Order without jurisdiction.

———Order of committal to jail passed without jurisdiction—Objection to its legality not taken—No appeal lies. (*Prat, J.*) RAMDAS *v.* KANNAMAL.
117 I. C. 245 = 7 Rang. 110 = A.I.R. 1929 Rang. 161.

—S. 51—Sale without attachment.

———The failure to attach the property before sale does not render the sale null and void. It may amount to material irregularity but is not sufficient unless substantial injury is causd thereby, to vitiate the sale. A Court has jurisdiction to sell without attachment under S. 51 of the C. P. Code. (*Dawson Miller, C. J. and Mullick, J.*) RAJA WAZIR NARAIN SINGH *v.* BHIKARI RAM. **68 I. C. 363 = 3 P. L. T. 765 = 2 Pat. 207 = 1922 P. H. C. C. 321 = A. I. R. 1923 Pat. 45.**

—S. 52—Assets, what are.

———Rents and profits are legal incidents of immovable property and must bear the same character as the property itself *i.e.*, rents and profits accruing from immovable property of the deceased debtor are his assets: 1 I.A. 268 and A.I.R. 1924 Mad. 530, Foll. (*Stuart, C.J. and Wazir Hasan, J.*) NAWAB SHARAF JAHAN BEGAM *v.* MD. SADIR ALI KHAN. **2 Luck. 408 = 4 O.W. N. 98 = 99 I. C. 897 = A. I. R. 1928 Oudh 40.**

—S. 52—Heirs not made parties.

———Heirs of recorded tenant are not affected by sale in execution of a rent decree unless they were parties to the decree. (*Greaves and Panton, JJ.*) M. ABDUL AZIZ *v.* AMIR ALI. **67 I.C. 149 = A.I.R. 1923 Cal. 166.**

—S. 52—Karnavan.

———Decree obtained against karnavan—No executor appointed by will—Decree is valid against estate. If a decree obtained against the karnavan and no executor is appointed by will the decree is valid against estate. (*Srinivasa Aiyangar, J.*) KOLAREMATHU AMMA *v.* MADHAVI AMMA. **1927 M.W.N. 894 = 108 I.C. 409 = A.I.R. 1928 Mad. 243.**

—S. 52—Legal Representative, debt due to.

———*Suit against legal representatives in possession of assets—Representatives may show preference in payment of debt due to himself.*

Mukerji, J.—When an application for attachment is made, it is open to the legal representative to prove either that the property sought to be attached is not the property of the deceased or that he has sufficiently accounted for such property of the deceased as came into his possession. But in any case till a decree has been obtained by the creditor, he has no remedy: 8 Bom. 309 and 13 Bom. 653, Foll. It is neither lawful nor expedient to throw out the suit against the legal representative altogether simply because one of the legal representatives alleges and seeks to prove that no assets are available.

Ashworth, J.—Legal representatives in the possession of assets (not being executors or administrators appointed by or subject to an administration order of a Court) may show preference in the payment of debts and may retain a debt due to themselves: 337 P.R. 1895; 30 Bom. 270 and 26 Mad. 792, Rel. on. (*Mukerji and Ashworth, JJ.*) TAMIZ BANO *v.* NAND KISHORE.
49 All. 645 = 25 A.L.J. 359 = 101 I. C. 507 = A.I.R. 1927 All. 459.

—S. 52—Legal Representative, suit against.

———A suit against the legal representatives of a deceased debtor should not be dismissed on the mere ground that the defendants are not in possession of any portion of the estate left by the deceased: 2 N.W.P.H.C. R. 449 and 13 Bom. 653, Foll. (*Wadegaonkar, A.J.C.*) SHANKARLAL *v.* GANESH SINGH. **89 I. C. 236 = A.I.R. 1926 Nag. 170.**

—S. 52—Legal Representative, when bound by decree against wrong person.

———If the plaintiff without any fraud or collusion, sues a person who would be the ordinary legal representative, under the law, of the deceased person, in ignorance of other facts or circumstances by reason whereof some other person turns out to be the real or actual legal representative, then such a decree is binding in the same manner and to the same extent on the real heir and legal representative. A.I.R. 1926 Mad. 487 and 29 M. L.J. 698, Foll. (*Srinivasa Aiyangar, J.*) KOLAREMATHU AMMA *v.* MADAVI AMMA.
1927 M.W.N. 894 = 108 I. C. 409 = A.I.R. 1928 Mad. 243.

—S. 52—Legal representative when not liable.

———A decree obtained against the estate of a deceased person by joining only some of the legal representatives only cannot be executed against such representatives who were not joined in the suit. 33 Mad. 75 and 32 Cal. 226 (P.C.), Rel. on; A.I.R. 1924 Mad. 130, Dist. (*Curgenven, J.*) GANGARAJU *v.* PENDYALA SOMANNA. **98 I.C. 613 = A.I.R. 1927 Mad. 197.**

———*Right of creditor to follow assets in hands of legatee—Regular suit as the appropriate procedure.*

The right of a creditor to follow the assets of the deceased in the hands of a legatee is a right which has to be exercised by a suit. It cannot possibly be exercised merely by levying execution against the assets in the hands of the legatee under a judgment against the legal representative. (*Rankin, C. J. and C. C. Ghose, J.*) JAYACHANDRA ROY *v.* SATISCHANDRA ROY.
34 C.W.N. 761 = 52 C.L.J. 16.

—S. 52—Nature of enquiry.

———Questions arising is an enquiry under S. 52 (2) are questions arising between parties to suit relating to execution and must be decided by executing Court. (*Heald and Cunliffe, JJ.*) DAW TOKE *v.* MAUNG BA HAN. **101 I. C. 431 = 5 Rang. 44 = A.I.R. 1927 Rang. 127.**

—S. 52—One heir in possession.

———Property held by one heir as legal representative —Creditor can proceed against whole property and need not wait for partition among heirs—Purchaser in execution is not responsible for neglect on the part of heir in possession, in allowing a larger portion to be sold than necessary unless any fraud or collusion is alleged. 8 O. L.J. 191 and 1925 Oudh 330, Dist. (*Dalal, J. C. and Wazir Hasan, A.J.C.*) HAJI AHMAD *v.* MT. HAFIZ-UN-NISA. **89 I. C. 534 = 2 O.W.N. 407 = 12 O.L.J. 512 = A.I.R. 1925 Oudh 515.**

—S. 52—Personal liability.

———Assets of deceased in hands of legal representative—Legal representative failing to account for them—Decree can be executed personally against him—Lapse of time in bringing him on record does not absolve him of his liability though it may affect the quantum of proof that is required from him as to their proper disposition. (*Jai Lal, J.*) JADHU SINGH *v.* NIZAM DIN.
A.I.R. 1930 Lah. 332.

———Where heirs do not show that income of property is applied to payment of debts of deceased they are personally liable. A.I.R. 1924 Mad. 530, Rel. on. (*Tekchand, J.*) KISHANCHAND *v.* MAUJ DIN.
A.I.R. 1930 Lah. 204.

———Where the defendant along with another person took possession of the assets of the deceased and disposed of a portion thereof without any right and where the property disposed of was sufficient to have discharged the debts, a personal decree can be passed against the defendant. 20 Mad. 446, Foll. (*Kanhaiya Lal, J.C.*) MIHI LAL *v.* BAPU LAL. **77 I.C. 306 = A.I.R. 1922 Oudh 200.**

—S. 52—Plene administravi.

———The fact, that the plea of "plene administravi" can be taken in execution proceedings when events justifying such a plea may have occurred subsequent to the decree, is no reason why it cannot be taken in the suit as a reason for no decree being passed. (*Mukerji and Ashworth, JJ.*) TAMIZ BANO *v.* NAND KISHORE. **49 All. 645 = 25 A.L.J. 359 = 101 I. C. 507 = A.I.R. 1927 All. 459.**

—S. 52—Property includes income.

———Under S. 52 the income of landed property, which has passed from one Zamindar to the next, the property being an impartible Raj is liable to execution for the debts of the deceased Zamindar. Income accrued since the late Zamindar's death which has come into the hands of the new Zamindar can be attached. It is unnecessary to sell it if it is actual money. The Code has made ample provision for execution upon the money belonging to a deceased person in the hands of another. (*Schwabe, C. J. Coutts-Trotter and Ramesam, JJ.*) KADIRVELUSAMI *v.* EASTERN DEVELOPMENT LTD. **80 I.C. 163 = 47 Mad. 411 = 34 M.L.T. 17 = 1924 M.W.N. 346 = A.I.R. 1924 Mad. 530 = 46 M.L.J. 261 (F.B.).**

—S. 52—Son as representative.

———Where a sale by a Hindu was set aside as being without family necessity and the vendee being deprived of possession sued to recover the purchase money from the vendor and where his son had been brought on the record as the legal representative of his father who died during the pendency of the suit,

Held, that the proper decree to pass would be a decree against the son as the legal representative of his father and capable of execution against him so far as he held property which was liable to attachment under the Hindu Law for his father's debts. (*Ashworth and Neave, A.J.Cs.*) KALLU MAL *v.* PARTAP SINGH. **92 I.C. 787 = A.I.R. 1926 Oudh 301.**

———Where the executant of a hundi, the father of a Mitakshara family, is dead and his son is sued on the hundi, he is sued in the representative capacity. He is liable only to the extent of the assets of the coparcenary property held by him. Although the decree is a personal decree against him, yet the decree must be construed in the light of S. 52 of the C. P. C. 25 C.W.N. 54 Note and 2 P. L. J. 212, Foll. (*Jwala Prasad and Ross, JJ.*) RAM BUJHAWAN PRASAD SINGH *v.* RAM NARAYAN. **65 I.C. 224 = 2 P.L.T. 396.**

—S. 52—When applicable.

———Sub-section (2) applies only when no property of deceased is in possession of judgment-debtor and he fails to satisfy that he had duly applied property inherited. The contention that the words "such property" at the beginning of the sub-section mean 'property of which attachment is sought' is not compatible with the wording of the section. When there is a good deal of property left by a deceased person, there seems to be no good reason why the legal representatives should keep the whole of it intact on the off chance of some person getting a decree and executing it against the estate of the deceased. So long as there is sufficient property from which such a decree could be satisfied, the decree-holder cannot have any grievance in the matter. 14 W. R. 362, Rel. on. (*Bhide, J.*) MT. BHAGWATI *v.* MADAN

MOHAN. **121 I. C. 289 = 31 P. L. R. 29 = A. I. R. 1930 Lah. 354.**

———A plaintiff brought a suit on a pro-note against the father and sons of the deceased debtor who formed a joint Hindu family. The debt was not tainted with immorality.

Held, that a decree might be passed under the provisions of S. 52 and it would be for the execution department to decide whether the joint family property was liable. (*Dalal, J.*) KRISHNA RAM *v.* BACHCHOO LAL. **116 I. C. 86 = 26 A. L. J. 799.**

—S. 53—Compensation for forest dues.

———Where a decree is passed simply against the son but is really against the assets of the father deceased, the compensation in respect of forest dues from Government becoming due after the death of the father and received by the son is liable to attachment in execution of the decree. 6 Mad. 1 (P.C.). Rel. on. (*Jackson, A. J. C.*) NATHMAL *v.* CHAINSINGH. **121 I. C. 664 = A. I. R. 1930 Nag. 134.**

—S. 53—Legal representative, determination of.

———In order to see whether a certain person is the legal representative of the deceased with regard to the property sought to be attached, the crucial date is the date of the death of the deceased and not the date of the attachment of that property. It is not with respect to every property that a Hindu son can be said to be the legal representative of his deceased joint father. A Hindu son may be a legal representative with respect to a certain property and he may not be a legal representative with respect to another property. (*Sulaiman and Mukerji, JJ.*) BINDA PRASAD *v.* RAJ BALLABH. **48 All. 245 = 24 A. L. J. 273 = 91 I. C. 785 = A. I. R. 1926 All. 220.**

—S. 53—Liability of brother.

———Where after mortgage decree had been passed on a mortgage by two members of a Hindu joint family one of the mortgagors died without issue and in the proceedings for final decree one of his brothers was made party,

Held, he could resist this as it is only in case of son or other descendant that a person taking property by survivorship can be joined as legal representative under S. 53. (45 All. 455, Foll.) (*Daniels, J.*) BALAKRAM LAL *v.* MALIK NAMDAR. **78 I. C. 637 = 5 L. R. A. Civ. 279 = A. I. R. 1924 All. 873.**

—S. 53—Money decree against Hindu father.

———Money decree obtained against father and properties attached—In execution whole of interest may be proceeded against irrespective of ambiguity in description—Son is bound by such execution unless he shows that debt was immoral. There may be some special circumstances in some cases to show that the execution proceedings were limited to a particular share of interest. Where no such limitation expressly appears, all that the sons can claim is to show that the debt was illegal or immoral or that the debt never existed, and the moment they fail to prove any of the specific circumstances, their claim must fail. 13 Cal. 21 (P. C.); 12 Mad. 142 (P. C.); 17 Cal. 584 (P. C.); 14 Cal. 572 (P. C.) and A. I. R. 1927 Mad. 311, Foll. (*Ramesam and Jackson, JJ.*) SUBRAMANIA PILLAI *v.* VENKATARAMA REDDI. **120 I. C. 375 = 1929 M. W. N. 776 = A. I. R. 1930 Mad. 257.**

—S. 53—Nephew not a descendant.

———"Descendants" do not include a nephew. (*Walsh and Ryves, JJ.*) JAGANNATH SINGH *v.* MOTI LAL. **73 I. C. 958 = 21 A. L. J. 353 = 45 All. 455 = 4 L. R. A. Civ. 220 = A. I. R. 1923 All. 539.**

———Although lands inherited by agriculturist son

—S. 53—Rent of land.

could not be attached, under the Deccan Agriculturists Relief Act the rents thereof are liable to attachment for satisfaction of the decree to extent of property inherited. 8 Bom. 220 ; 9 B H. C. R. 116 and 2 W. R. 296, Rel. on. (*Patkar and Murphy, JJ.*) ANANT GOVIND JOG *v.* TUKARAM KUSHABA SHINDE. **119 I. C. 179= 53 Bom. 463=31 Bom. L. R. 442= A. I. R. 1929 Bom. 233.**

—S. 53—Scope.

———*Decree against Hindu father—Execution against assets in hands of his sons.*

If a creditor obtains a decree against a Hindu father and the father dies before the decree is executed, the decree can be executed under S. 53 by attachment and sale of the entire joint property in the hands of his sons and the ancestral property in the hands of the sons is to be deemed to be the property of the deceased which had come to the hands of the sons as the legal representatives of the father. (*Shingne, J.*) SHANKAR *v.* PREMCHAND. **32 Bom. L. R. 919.**

———The whole of the ancestral property and not merely father's share can be sold under a decree passed in terms of S. 53 of the Code of Civil Procedure. 43 Bom. 612 ; 3 P. L. J. 533 ; 48 Cal. 341 ; 46 Mad. 64 ; 44 All. 649, Ref.; 16 C.L.J. 85, Foll. (*Daniels, J.C. and Wazir Hasan, A. J. C.*) BHAGWATI SAHAI *v.* MAHARAJ PRAGDIN. **81 I. C. 15=11 O. L. J. 202= 27 O. C. 111=A. I. R. 1924 Oudh 393.**

———S. 53 is not confined to money decrees and a decree passed in respect of joint family properties can be executed against the sons after the father's death. (*Spencer and Devadoss, JJ.*) MEYAPPAN SERVAI *v.* MEYYAPPAN AMBALAM. **83 I. C. 985= 19 M. L. W. 484=34 M. L. T. 209= A. I. R. 1924 Mad. 571=46 M. L. J. 471.**

—S. 53—Son as Representative.

———A decree-holder who has a decree against a Hindu father can proceed in execution after his death against the joint ancestral property in the hands of the son and can treat the son as the legal representative of his judgment-debtor provided the property is liable under the Hindu Law for the debt. (*Sulaiman and Boys, JJ.*) RUDRA PRATAP *v.* SHARDA MAHESH. **88 I. C. 200=23 A. L. J. 467=6 L. R. A. Civ. 321= A. I. R. 1925 All. 471.**

———Where after a decree on a debt due by a Hindu father the latter died, *held* that the decree can be executed against the ancestral property in the hands of the son. The ancestral property in the hands of the son is liable under Hindu Law for the payment of this debt unless and until the son could prove that there was in fact no debt at all or that the debt was tainted with immorality (*Piggott and Walsh, JJ.*) RAMANAND SHUKUL *v.* CHHOTEYLAL. **71 I. C. 417= 20 A. L. J. 969=4 L. R. A. Civ. 31= A. I. R. 1923 All. 124.**

———Under the present law there is no necessity of any order for attachment of the property in execution of a mortgage decree. Consequently after father's death, the proceedings in execution may be continued against the sons. (*Jwala Prasad and Adami, JJ.*) SHEIKH KAROO *v.* RAMESHWAR SAO. **62 I. C. 905= 3 P. L. T. 43=6 P. L. J. 451= A. I. R. 1923 Pat. 143.**

—S. 53—Standing crops.

———*Collector can deliver standing crops.*

The Collector has power to deliver possession of the standing crops. The Collector when partitioning the estate in accordance with S. 53, C. P. Code, has power to give the shares to the respective allottees and

he can also place them in possession of the crops attached to the land. (*Macnair, A.J.C.*) MD. ABDUL RAHIM *v.* PARASHRAM. **103 I.C. 231=A. I. R. 1927 Nag. 300.**

—S. 53—When not applicable.

———Where the plaintiff, in a suit against the son of a deceased Hindu on a pro-note executed by the deceased, joined as a defendant a separated brother of the deceased praying for a decree also against him on the ground that he had sold certain crops sown by the deceased :

Held, that a decree against the separated brother cannot be passed in that suit. (*Boys, J.*) LACHMI CHAND *v.* SURJA.**103 I.C. 338=A.I.R. 1927 All. 683.**

—S. 54—Applicability.

———*Partition of particular* mouza *in undivided estate—Plaintiff if need ask for division of Government revenue.*

S. 54, C. P. Code deals with a case where there is a decree for partition of an undivided estate or for the separate possession of the share in such an estate. Where a tenure holder asks for a partition of only a particular *mouza* the case does not fall under the section.

Quaere, Whether under S. 54 it is necessary that the plaintiff should ask for a division of the Government revenue in order that the case may come within the section. (*Rankin, C. J. and C. C. Ghose, J.*) RAI KIRAN CHANDRA ROY *v.* RAMA NATH DUTTA. **34 C.W.N. 895.**

———Section 54 is meant to be applied only in the case of estates assessed to revenue in one lump sum for the whole estate and not to estates like the ordinary paddy holdings in Burma which are assessed at acre rates. 8 L.B.R. 338. approved. (*Heald and Chari, JJ.*) MG. PO NYUN *v.* MG. SAN TIN. **5 Rang. 206=4 Bur. L.J. 260=95 I.C. 39= A.I.R. 1926 Rang. 80.**

— S. 54—Scope.

———*Meaning of words " for the separate possession of a share of such an estate"—Putnidar whether can claim division of revenue.*

If a decree is for the partition of an undivided estate assessed to the payment of revenue to Government then the partition is to be carried out by the Collector under S. 54. It cannot be said that it is open to plaintiff to insist that it is carried out by a Commissioner under the civil Court merely because he has not asked for partition of the revenue. The words "for the separate possession of a share of such an estate" contemplate the case of a man whose right is to the possession of an aliquot portion or share of the whole undivided estate considered as one. 16 Cal. 203 and 24 Cal. 725, approved. *Per Obiter*. A Putnidar cannot as such ask for a separate division of the revenue. (*Rankin, C.J. and C. C. Ghose, J.*) MOULVI ABDUL RAZAK *v.* SREENATH GHOSE. **34 C.W.N. 892.**

—S. 55—Adjudication by insolvency Court.

———*Effect of.*

Proceeding commenced before adjudication order is not inoperative and must be carried to the end except in so far as it may involve an application for a remedy against the property of the insolvent. On production of order of adjudication, security to appear should be taken. The object of this requirement is to compel the insolvent when he has obtained an adjudicating order to be also reasonably diligent in proceeding with his insolvency in a *bona fide* manner. (*Lentaigne, J.*) M. V. A. L. VISWANATHAN CHETTIYAR *v.* ABDUL MAJID. **89 I. C. 381=3 Rang. 187=A.I.R. 1925 Rang. 305.**

—S. 55—Arrest by touch.

———*Arrest—Arrest is effected by touch.*

In making an arrest the person authorized to make it shall actually touch the body of the person to be arrested, unless there be a submission to the custody by word or action. 6 W.R. 690, Rel. on. (*Heald and Maung Ba, JJ.*) U. THWE *v.* A. KIM FEE.
123 I.C. 127 = 7 Rang. 598 = A.I.R. 1930 Rang. 131.

—Ss. 55—Discretion of Court.

———If the security has been realised under an order of the Court under section 55 (4) or in the first instance consists of a cash deposit, the judgment-creditor may ask the Court to execute the decree under section 145 against the money lying in Court. But the Court may, in exercise of its discretion, refuse to make an order in favour of the judgment-creditor. (*Macleod, C. J.*) ABDUL HUSSEIN ESSUFALLI *v.* D. J. MISTRI & CO.
64 I. C. 648 = 46 Bom. 702 = 23 Bom. L. R. 1263 = A. I. R. 1922 Bom. 340.

—S. 55—Effect of bar of arrest.

———Bar of arrest under C. P. Code, S. 55 (4) does not suspend complete execution and it is open to them to execute their decree in any other way *e. g.* by attachment and sale of any moveable or immoveable property of the judgment-debtor. (*Daniels, J.*) RAM BHAROSAY *v.* SOHAN LAL. **82 I. C. 1 = 5 L. R. A. Civ. 408 = A. I. R. 1924 All. 707.**

—S. 55—Extension of time.

———Court cannot extend period of one month prescribed by S. 55 (4), even under S. 148. (1916) M. W. N. 179, Foll. and 10 Cal. 55 (P.C.), Dist. (*Phillips, J.*) NARASIMHA *v.* RANGACHARI.
1926 M.W.N. 390 = 95 I. C. 444 = A. I. R. 1926 Mad. 689 = 50 M.L.J. 477.

———The Court has no power to extend the period for the judgment-debtor's filing a petition to be declared an insolvent, beyond the prescribed month. (*Jackson, J.*) VENKOBANNA *v.* MYACHAND VENICHAND.
86 I.C. 304 = A. I. R. 1926 Mad. 286.

—S. 55—Failure to apply in insolvency.

———On Judgment-debtor's failing to apply within one month option as to whether security should be realized or judgment-debtor committed to prison lies not with decree-holder but executing Court. A.I.R. 1926 Mad. 286 and A. I. R. 1924 Bom. 428, Ref. (*Dalal, J.*) MAKHAN LAL *v.* NARAIN DAS.
119 I.C. 500 = A.I.R. 1929 All. 377.

—S. 55—Non-production owing to illness.

———The illness of a judgment-debtor rendering his attendance physically impossible without risk to health or life is a valid excuse for the sureties for his non-production, if they were otherwise liable so to do, so as to absolve them from liability under the bond. (*Jai Lal J.*) SARDAR SINGH *v.* IMPERIAL BANK.
117 I.C. 910 = A.I.R. 1929 Lah. 479.

—S. 55—No record of reasons.

———Absence of note in record that provisions of S. 55 (3) have been complied with does not necessarily indicate that they have not been complied with—Failure to comply with provisions does not invalidate arrest. (*Tapp, J.*) HAQ DAD KHAN *v.* MUL RAJ.
31 P.L.R. 188 = A.I.R. 1930 Lah. 736.

—S. 55—Provisions mandatory.

———Provisions of S. 55 are mandatory. (*Panton and Mitter, JJ.*) DHARANI MOHAN *v.* KSHITIPATI RAY. **54 Cal. 782 = 106 I.C. 66 = A.I.R. 1928 Cal. 62.**

—S. 55—Security bond.

———Security bond given under S. 55 must be interpreted and enforced according to conditions expressly mentioned in the bond. (*Jai Lal, J.*) SHAW WALLACE & CO. *v.* SUNDAR SINGH.

A.I.R. 1930 Lah. 575.

———The condition was that if the judgment-debtor failed to apply in the Insolvency Court for his discharge, the surety would render himself liable for a certain sum.

Held, that no question, whether the surety has failed to produce the judgment-debtor, being called upon to do so, would arise. The surety's liability did not terminate on the striking off or dismissal of the execution case in which the bond was given. 22 C.W.N. 919, Foll. ; 14 Cal. 757, Dist. (*Mullick and Jwala Prasad, JJ.*) DEDHRAJ *v.* MAHABIR PRASAD.
1921 P.H.C.C. 19 = A.I.R. 1921 Pat. 72.

———*Obiter* under the present Code the surety's bond would be enforceable even after the dismissal of the execution case, in which it was given. (*Mullick and Jwala Prasad, JJ.*) DEDHRAJ *v.* MAHABIR PRASAD.
1921 P.H.C.C. 19 = A.I.R. 1921 Pat. 72.

—S. 55—Security when non-acceptable.

———A Court is fully justified in refusing to accept the security of a person over whose property or person it has no jurisdiction. (*Jai Lal, J.*) ABDUL RAHIM *v.* RAGHUBIR CHAND. **112 I. C. 689 = A. I. R. 1929 Lah. 161.**

—S. 55—Surety's discharge.

———*Proper form and formalities and prescribed time are necessary essentials.*

Any and every petition which is presented by a judgment-debtor in Court though it is not in the prescribed form or accompanied by necessary deposit or otherwise proper and is not represented after due compliance has not the effect of discharging the surety from his liability under the bond. The section should be interpreted as meaning 'applying in the proper form and after due complying with the formalities prescribed by law or the rules framed thereunder within the prescribed period or within such extension thereof as may have been granted by the Court'. (*Rupchand Bilaram, A. J. C.*) EBRAHIM MAHOMED *v.* PIR MAHOMED. **111 I. C. 258 = A. I. R. 1928 Sind 192.**

———When the Court acts under S. 55 (4) of the C. P. Code, the surety bond is in favour of the Court though the ultimate beneficiary may be the decree-holder, and where the decree-holder grants time to the judgment-debtor a surety under S. 55 (4) is not discharged under Contract Act, S. 135. (*Dalip Singh, J.*) DHARI MAL *v.* KANSHI RAM. **100 I. C. 762 = A. I. R. 1927 Lah. 336.**

—S. 55—Surety's liability.

———Under S. 55 (4) it is not open to the Court to proceed both against the judgment-debtor and the surety ; it could proceed only against one or the other : A. I. R. 1924 Bom. 428, Foll. (*Jai Lal, J.*) SARDAR SINGH *v.* IMPERIAL BANK. **117 I. C. 910 = A. I. R. 1929 Lah. 479.**

———Surety producing judgment-debtor and requesting to cancel security bond given by him— Court should not refuse to absolve him from further liability. A. I. R. 1925 All. 344, Dist. (*Bhide, J.*) MT. AISHAN BI *v.* MAHABIR PARSHAD. **118 I. C. 438 = 30 P. L. R. 595 = A. I. R. 1929 Lah. 262.**

———Surety under-taking to produce judgment-debtor on date fixed must produce even though decree-holder remains absent. (*Jai Lal, J.*) BIR SINGH *v.* MOHINDAR SINGH. **116 I. C. 554 = A. I. R. 1928 Lah. 974.**

———Surety becomes liable where judgment-debtor fails to apply for insolvency within time fixed. (*Jai Lal, J.*) BIR SINGH *v.* MOHINDAR SINGH.
116 I. C. 554 = A. I. R. 1928 Lah. 974.

———Liability of surety arises when he fails either to produce the judgment-debtor or when the latter fails to apply for adjudication. A. I. R. 1924 Bom. 428,; A. I. R. 1925 Lah. 170 and A. I R. 1926 Mad. 286, Foll. (*Spencer and Ramesam, JJ.*) WORIUR COMMERCIAL BANK LTD. *v.* KAJA MAROOP SAHIB. **26 M. L. W. 49=101 I. C. 525= A. I. R. 1927 Mad. 1081=52 M. L. J. 523.**

———Under S. 55 (4) surety does not merely undertake that the judgment-debtor will appear when called upon to do so, but also that the judgment-debtor will apply to be declared an insolvent within the prescribed period. If the judgment-debtor does not apply to be declared an insolvent within the prescribed one month, the surety can be proceeded against. *Obiter.* The surety is liable even after the dismissal of the execution proceedings against the judgment-debtor. (*Jackson, J.*) VENKOBANNA *v.* MYACHAND VENICHAND. **86 I. C. 304= A. I. R. 1926 Mad. 286.**

———Failure of judgment-debtor to apply within time makes surety liable though judgment-debtor may die after the time allowed. S. 55, cl. 4 does not mean that the Court may proceed both against the surety as well as the debtor. (*Macleod, C. J. and Shah, J.*) MAKANJI MAVJI *v.* BHUKHANDAS NAGARDAS. **48 Bom. 500= 26 Bom. L. R. 415=86 I. C. 257= A. I. R. 1924 Bom. 428.**

———Court as well as decree-holder can enforce security bond even in execution although original execution application is dismissed. (*Jwala Prasad and Kulwant Sahay, JJ.*) SHYAM PROSONO KATRAJ *v.* KESHAB CHANDRA RANA. **81 I. C. 702=5 P. L. T. 336= 1924 P. H. C. C. 63=A. I. R. 1924 Pat. 487.**

———Surety for judgment-debtor incurring penalty under his bond—Amount paid by surety should be credited towards decree amount and not given to decree-holder in addition to decretal amount. 15 Cal. 171, Ref. (*Teunon and Newbould, JJ.*) SURENDRA NATH GHOSE *v.* KESHAB LAL. **25 C. W. N. 36= 59 I. C. 778=A. I. R. 1921 Cal. 559.**

———Surety bringing judgment-debtor in Court during stay which was ordered in his favour is not absolved from his liability. (*Sulaiman and Mukerji, JJ.*) RATNI BAI *v.* GHASI RAM. **86 I. C. 105=23 A. L. J. 59= 6 L. R. A. Civ. 171=A. I. R. 1925 All. 344**

—S. 55—Warrant how executed.

———Bailiff is not bound to show warrant in first instance—Penal Code, S. 225-B. It is sufficient that he should apprise the person to be arrested of the contents of the warrant and show it if desired. 5 C. W. N. 843, Foll. (*Teunon and Ghose, JJ.*) SUPT. & REMEMBRANCER OF LEGAL AFFAIRS *v.* BARADAKANTA. **25 C. W. N. 815=66 I. C. 1003= A. I. R. 1921 Cal. 79.**

—S. 58—Release before committal.

———A Judgment-debtor was released while being taken to civil prison—He cannot be held constructively to be detained in prison and is thus liable to be rearrested. The words "civil prison" in the present Code do not mean any more than the words "civil jail" in the old Code; where the judgment-debtor was not released from detention in civil prison, S. 58 had no application and the judgment-debtor is liable to be re-arrested. (*Dalip Singh, J.*) KANSHI RAM *v.* KANSHI RAM. **118 I. C. 531=A. I. R. 1929 Lah. 361.**

—S. 60.

Agriculture.
Applicability.
Contingent or possible right.
Effect of attachment.
Estoppel.
Gratuity.
House of agriculturist.

Implements of husbandry.
Jagir.
Maintenance.
Military pay.
Occupation.
Occupied by.
Pension.
Personal Service.
Power to dispose.
Proof.
Property attachable.
Provident fund.
Right to attach.
Salary.
Tool of Artizan.
Wrongful attachment.
Miscellaneous.

—S. 60—Agriculture.

———Where a person has tilled his land for years, his temporary letting out of the land does not destroy his status as an agriculturist. 47 P. R. 1897, Ref. (*Johnstone, J.*) KALUMAL *v.* LAMBU. **119 I. C. 225= 30 P. L. R. 649=A. I. R. 1930 Lah. 191.**

———Objection that house being occupied by agriculturist as agriculturist can be entertained though it is not raised at earlier stage of execution proceedings. The proviso to S. 60 (1) is mandatory and the Courts have no jurisdiction to attach and sell any of the properties specified therein. A. I. R. 1925 Nag. 320, Dist. (*Subhedar, A. J. C.*) GANPAT *v.* RAMCHANDRA. **119 I. C. 677=A. I. R. 1930 Nag. 11.**

———If the objector has properties more than sufficient for his agricultural requirements he cannot claim exemption in respect of all. 47 P. R. 1897, Rel. on. (*Bhide, J*) RAGHBIR SINGH *v.* PAT RAM GANGA RAM. **115 I. C. 478=30 P. L. R. 29=10 L. L. J. 543= A. I. R. 1929 Lah. 181.**

———House to be attached was occupied by sons of deceased debtor as agriculturists. They need not prove that it was so occupied by their deceased father. 7 Bom. 530, Foll. (*Ashworth, J.*) GIRWAR DAYAL *v.* NARAIN SINGH. **9 L. R. A. Rev. 130=116 I. C. 20= A. I. R. 1928 All. 211.**

———It is doubtful whether a person who is both a cultivator of land and a zemindar can only be called an agriculturist if his main source of income is derived from agriculture. 35 All. 307, Dist. and Doubted. (*Ashworth, J.*) GIRWAR DAYAL *v.* NARAIN SINGH. **9 L. R. A. Rev. 130=116 I. C. 20= A. I. R. 1928 All. 211.**

———One who earns his livelihood wholly or principally by agriculture or who ordinarily engages personally in agricultural labour is an agriculturist. A.I.R. 1923 Bom. 12, Foll. The judgment-debtor did not cultivate any land himself being physically unfit to do so, and owned some land which was let out to tenants on the batai system; he did not own any cattle; the house intended to be attached was used for stabling his mare and storage of fodder for the mare.

Held, that he was not an agriculturist. (*Jai Lal, J.*) ABDULLAH *v.* ANJUMAN DEHI. **106 I. C. 45= A. I. R. 1928 Lah. 132.**

———Whether agriculture must be main means of subsistence is doubtful—One of the judgment-debtors being wholly dependent on agriculture, the house belonging to all is protected. *Remarks of Devadoss, J.* in A. I. R 1926 Mad. 350, Doubted. (*Findlay, J.C.*) ANAND RAO *v.* PANDURANG. **105 I. C. 129= A. I. R. 1928 Nag. 23.**

———*A female occupancy tenant not cultivating field herself can be agriculturist.*

Where a widow inherited from her husband an occupancy field of 3·50 acres, a house said to be worth Rs. 500 and a kotha worth about Rs. 50, all in the same village, and the widow never cultivated the holding herself, but sub-let it every year since her husband's death, she having no bullocks for purposes of cultivation.

Held: that the house and kotha must be regarded as occupied by the widow as an agriculturist and thus exempt from attachment: 16 N. L. R. 89, Foll. (*Hallifax, A. J. C.*) ATMA RAM *v.* MT. RADHABAI. **10 N. L. J. 159 = 102 I. C. 712 = A. I. R. 1927 Nag. 374.**

———A person who has no other source of livelihood than agriculture is an agriculturist and houses in his occupation are exempt from attachment.

Per Daniels, J.—The burden of proving that the case falls under S. 60 C. P. Code lies on the person objecting to the attachment. 41 Bom. 475, Foll. (*Mukerji and Daniels, JJ.*) MT. BHUTA *v.* BISHESHAR SINGH. **87 I. C. 564 = 6 L. R. A Civ. 217 = A. I. R. 1925 All. 432.**

———Becoming Akali is not ceasing to be agriculturist. (*Abdul Raoof, J.*) SURAIN SINGH *v.* MULA SINGH. **7 L. L. J. 95 = 26 P. L. R. 463 = 88 I. C. 543 = A. I. R. 1925 Lah. 331.**

———An agriculturist is not a person who obtains his livelihood otherwise than by cultivating himself or through his servants, even, if he may have some sort of interest in a field or two. (*Ashworth, A. J. C.*) LACHHMAN DASS *v.* MT. PARTAPI. **85 I. C. 700 = A. I. R. 1925 Oudh 365.**

———An agriculturist can make a valid mortgage of his house in execution of a decree in which the house may be sold. If the agriculturist fails to raise the point in the suit itself, he cannot raise it in the execution. (*Contra Ryves, J.*)

Per Walsh, J.—The word 'such' in the proviso of S. 60 removes the distinction which the word 'or' would otherwise have in the expression 'attachment or sale' which must therefore mean attachment or sale in execution of decree. S. 60 does not apply to a sale under a mortgage decree.

Per Ryves, J.—S. 60 applies to all decrees. Therefore it forbids the sale of a mortgaged house of an agriculturist. (*Walsh, Ryves and Mukerji, JJ.*) MUBARAK HUSSAIN *v.* AHMAD. **84 I. C. 749 = 22 A. L. J. 321 = 5 L. R. A. Civ. 201 = 46 All. 489 = A. I. R. 1924 All. 328 (F.B.).**

—S. 60—Agriculturist.

———*Who is—Exemption from attachment.*

Where a judgment debtor's only source of living is not by cultivation of land, he is not an agriculturist. (*N. R Chatterjee and Newbould, JJ.*) SURANGINI DEBY *v.* KEDARNATH CHANDRA. **63 I. C. 681 (Cal.).**

———*Cattle of agriculturist.*

Where an agriculturist claims exemption for his cattle from attachment in execution of a decree, the Court ought to go into the question whether the cattle are necessary to enable him to earn his livelihood as an agriculturist. The fact that the cattle have been pledged as security for a debt will not prevent the operation of S. 60 (*b*). (*Tudball, J.*) GHUREY *v.* SANWALIA. **61 I. C. 777 (All.).**

—S. 60—Applicability.

———Judgment-debtor has no right after sale to claim exemption under S. 60. 34 Cal. 199; 7 All. 641; 40 All. 680 and 28 Bom. 125, Rel. on. (*Tekchand, J.*) JITA SINGH *v.* GANPAT RAI. **121 I. C. 303 = A.I.R. 1930 Lah. 106.**

———S. 60 does not apply to executions under a mortgage decree. (*Maung Ba and Brown, JJ.*) U. LU GALE *v.* M. MAHOMED HOBI. **A. I. R. 1929 Rang. 275.**

———The income of the *Panchotra* is not covered by S. 60, C. P. Code nor by S. 70 of Act XVII of 1887. (*Broadway, J.*) NAND SINGH *v.* S. LACHHMI NARAIN SINGH. **73 I. C. 928 = A. I. R. 1924 Lah. 226.**

—S. 60—Contingent or possible right.

———Rent in respect of a period still in existence is not a debt at all as the obligation is not complete, and hence such rent is not susceptible of attachment. 30 All. 246 and *Webb* v. *Stenton*: (1883) 11 Q. B. D. 518, Rel. on. (*Mukerji and Ashworth, JJ.*) LACHMAN *v.* JARBANDHAN **50 All. 507 = 108 I. C. 229 = 9 L. R. A. Rev. 47 = 26 A. L. J. 253 = A. I. R. 1928 All. 193.**

———Uncertain future on fluctuating profits cannot be attached. 30 All. 246 and 7 W. R. 266, Rel. on. (*B. B. Ghose and Bose, JJ.*) HABIBULLA *v.* JOGENDRA NATH. **33 C. W. N. 282 = A. I. R. 1929 Cal. 352.**

———If a gift and direction as to payment are distinct the direction as to the time of payment does not postpone the vesting. If there is a present gift with a postponed payment, a vested interest is created. A stipulation that interest shall be given in the meantime shows that a present gift was intended. (*Venkatasubba Rao and Reilly, JJ.*) ALAGIRISAMI PILLAI *v.* LAKSHMANAN CHETTY. **92 I. C. 1021 = A. I. R. 1926 Mad. 371 = 50 M. L. J. 79.**

———*Prospective rent cannot be attached.*

An existing debt can be attached, but there is no provision of the Court under which a debt that has not yet fallen due can be attached. An attachment of rents which are only prospective is merely an attachment of a debt that has not accrued due. (*Carr and Brown, JJ.*) MAUNG THEIN *v.* S. A.S. FIRM. **89 I. C. 794 = 3 Rang. 235 = A. I. R. 1925 Rang. 318.**

—S. 60—Effect of attachment.

———Attachment creates no charge on property nor title in creditor but merely prevents a private alienation of the property. Property attached may deteriorate in value or become entirely worthless before the date of the sale and it cannot possibly be said that what is sold is the property in the condition in which it was at the time of the attachment. (*Martineau and Harrison, JJ.*) RAM BHAJ *v.* RAM DAS. **69 I. C. 720 = 3 Lah. 414 = A. I. R. 1923 Lah. 261.**

—S. 60—Estoppel.

———Judgment-debtor has no right after sale to claim exemption under S. 60. 34 Cal. 199; 7, All. 641; 40 All. 680 and 28 Bom. 125, Rel. on. (*Tekchand, J.*) JITA SINGH *v.* GANPAT RAI. **121 I. C. 303 = A. I. R. 1930 Lah. 106.**

———*Agriculturist judgment-debtor may waive his right and agree to sell his house.*

The house of an agriculturist is not absolutely unsaleable. The judgment-debtor can waive the privilege under S. 60, cl. (*c*) and sell the house of his own free will; consequently where the judgment-debtor has entered into an agreement to give the house in security for the amount of the decree he is estopped from pleading that the house is not saleable. 4 Bom. 25; 34 All. 25 (F.B.) and 24 C. W. N. 575, Foll. (*Ross and Kulwant Sahay, JJ.*) GANGA BISHUN RAM GAJADHAR RAM *v.* JAGMOHAN RAM. **6 Pat. 254 = 102 I.C. 616 = 8 P. L. T. 563 = A.I.R. 1927 Pat. 233.**

———*Saleability decided upon by the trial Court—Executing Court cannot question.*

The question whether a certain pension is of such a character as not to be liable to be sold is a mixed question of law and fact. If the point was expressly raised by the defendant concerned in the suit itself and decided against him and a decree under O. 34, R. 4, was passed for the sale of that pension, it no longer remains open to the judgment-debtor to say that the pension was of such a character as not to be saleable at all. It would not be proper for the execution Court to reopen the question which has already been decided in the original suit. In cases where no attachment is necessary and the sale takes place in pursuance of a mortgage decree directing a sale of the mortgaged property S. 60 will not be applicable to decide the saleability of the property so as to prevent the Court from selling the property. A.I.R. 1924 All. 328, Rel on. (*Sulaiman and Daniels, JJ.*) MAHOMED MAZHAR *v.* MT. BIJJA BEGAM. **89 I. C. 364 = 47 All. 900 = 23 A. L. J. 841 = 6 L. R. A. Civ. 448 = A. I. R. 1925 All. 652.**

———An agriculturist can make a valid mortgage of his house in execution of a decree in which the house may be sold. If the agriculturist fails to raise the point in the suit itself he cannot raise it in the execution. Contra Ryves, J. (*Walsh, Ryves and Mukerji, JJ.*) MUBARAK HUSSAIN *v.* AHMAD. **84 I. C. 749 = 22 A.L. J. 321 = 5 L.R.A. Civ. 201 = 46 All. 489 = A.I.R. 1924 All. 328 (F.B.).**

—S. 60—Gratuity.

———Gratuity payable by a University to its servants is not in the nature of a goverment pension and consequently not exempt from attachment under S. 60 (*g*). 6 All. 634, Dist. (*Moti Sagar, J.*) MUHAMMAD ABDULLA *v.* JIWAN MAL. **75 I. C. 945 = A. I. R. 1924 Lah. 688.**

—S. 60—House of Agriculturist.

———An agriculturist's house occupied by him is exempt from attachment; and this would apply both to his house in the village and also to his hut in the field if he had one. 12 Bom. 363, Dist. (*Baguley, J.*) MA E SE *v.* MA BOK SON. **121 I. C. 777 = 7 Rang. 766 = A. I. R. 1930 Rang. 129.**

———Even if an objection is not taken in the execution department if the Court otherwise becomes cognizant of the fact that the property attached was the house of an agriculturist it would be its duty to withdraw the attachment. (*Mukerji and Boys, JJ.*) AIDAL SINGH *v.* KHAZAN SINGH. **A. I. R. 1930 All. 727.**

———*House dilapidated—Decree-holder cannot ask for sale of site unless the owner is proved to have no intention to rebuild.*

Merely because the house requires re-construction or re-building and short period of a year or so has elapsed since the old house disappeared or became dilapidated, the decree-holder is not entitled to come in and attach the site with the dilapidated house standing thereon in absence of clear proof that the owner has no intention of re-building and continuing to make use of the site for the same purpose as before. (*Findlay, J.C.*) ANAND RAO *v.* PANDURANG. **105 I. C. 129 = A. I. R. 1928 Nag. 23.**

———House occupied by agriculturist as such only is exempted. In other words, the house must be used by the judgment-debtor for purposes which are necessary for the cultivation of his land. (*Jailal, J.*) RALLIA RAM *v.* MT. HAYOB BIBI. **98 I. C. 857 = A. I. R. 1927 Lah. 66.**

———*Zamindars are not necessarily agriculturists.*

An agriculturist whose house is protected from attachment and sale by S. 60 (*c*) of the C. P. Code must be an agriculturist belonging to the class of persons who are ordinarily designated as agriculturists, that is, whose principal source of livelihood is by cultivation. Cultivation to a certain extent is carried on by most, if not all of the zamindars in U. P., but their houses cannot be designated as agriculturists' houses. A. I. R, 1925 Oudh. 365 and 20 C.W.N. 874, Rel. on. A. I. R. 1923 Bom. 12, Ref. A zamindar must be taken to be a zamindar unless his main source of income is proved to be from cultivation. (*Iqbal Ahmad, J.*) BACHAN SINGH *v.* BHIKA SINGH. **106 I. C. 49 = 8 L. R. A. Rev. 229 = A. I. R. 1927 All. 601.**

———Where a house of an agriculturist is in ruins and there are no doors in it and there is no roof, it is not exempt from attachment. (*Iqbal Ahmed, J.*) BALUDIN *v.* LAKAN SINGH. **99 I.C. 376 = A. I. R. 1927 All. 214.**

———Even though an agriculturist has two other houses on his land expressly meant to be used for agricultural purposes, his house, in a city where he spends his nights and where he brings his cattle every night from his agricultural lands is exempt from attachment under S. 60. (*Campbell, J.*) NOOR DIN *v.* SULAKHANMAL. **92 I. C. 759 = A. I. R. 1926 Lah. 230.**

———*Large landed proprietor is not agriculturist and his house is not exempt from attachment under S.* 60 (*c*).

The term 'agriculturist' is not used in cl. (*c*) in its etymological sense, but it is used to denote a person making his living by tilling the soil. It means and includes a small holder of land who tills the soil and cultivates it; but a large landed proprietor, *e.g.*, one owning 300 acres of land, even though his sole income is from land, is not an agriculturist within the meaning of cl. (*c*). The word 'agriculturist' in the clause must be interpreted in a strict sense. 12 Bom. 363, Appl. The expression "and occupied by him" gives the clue to the meaning of cl. (*c*), *i.e.*, that the houses for which exemption is claimed are occupied by the agriculturists as such. A mansion in a large village in which the owner lives, even though he has no other source of income except that from land, is not such a house as is contemplated by cl. (*c*); nor is the house of an ordinary agriculturist situated at a considerable distance from the land which he cultivates and which is not necessary for effective or convenient cultivation of the land 7 Bom. 530, Rel. on. (*Devadoss and Waller, JJ.*) MUTHU VENKATA RAMA REDDIAR *v.* OFFICIAL RECEIVER, SOUTH ARCOT. **49 Mad. 227 = 92 I. C. 398 = A.I.R. 1926 Mad. 350 = 50 M. L. J. 90.**

—S. 60—Implements of Husbandry.

———The press and karah which are used for making *gur* from sugarcane grown in the field are implements of husbandry and as such are not liable to attachment and sale. A. I. R. 1924 Bom. 294, Foll. (*Bhide, J.*) GAJAR SINGH *v.* BABU RAM. **111 I. C. 56 = A.I.R. 1928 Lah. 943.**

———*Charak is an implement of husbandry.*

Articles which are described as Charak, an iron pot used for the purpose of manufacturing *gul* from the sugarcane juice, and wooden planks required for the purpose, are implements of husbandry within the meaning of S. 60, cl. (*b*). (*Shah, C. J. and Crump, J.*) LAXMAN MHASU *v.* MARHARI DADASA. **25 Bom. L.R. 1211 = 81 I. C. 679 = A. I. R. 1924 Bom. 294.**

—S. 60—Jagir.

———There is no initial presumption that a jagir is a political pension and it is for a judgment-debtor to bring his case within S. 60 (*g*); 86 P. R. 1914 and 47 P. R. 1893, Foll. (*Bhide, J.*) BALDEV SINGH *v.* JAGANNATH. **111 I. C. 838.**

—S. 60—Maintenance.

———***Right of maintenance though not attachable, receiver can be appointed.***

C. P. CODE, (1908), S. 60—Maintenance.

Although the right of maintenance is in point of law not attachable and not saleable under S. 60, the proper remedy lies, in a fitting case, in the appointment of a receiver for realising the rents and profits of the property paying out of the same a sufficient and adequate sum for the maintenance of the judgment-debtor, and his family, and applying the balance, if any, to the liquidation of the judgment-creditor's debt. (*Lord Shaw.*) RAJENDRA NARAIN *v.* MT. SUNDAR BIBI. **87 I. C. 295 = 3 Pat. L. R. 142 = 47 All. 385 = 52 I. A. 262 = 1925 M. W. N. 630 = 22 M. L. W. 284 = 6 L. R. P. C. 138 = 30 C. W. N. 818 = 41 C. L. J. 383 = 23 A. L. J. 634 = 27 Bom. L. R. 849 = A. I. R. 1925 P. C. 176 = 49 M. L. J. 244.**

——" A right to maintenance " contemplates a bare right of maintenance and nothing more, a right enforceable by law and payable in the future. Appropriate remedy in difficult cases discussed. (*Walsh, J.*) SUNDAR BIBI *v.* RAJENDER NARAIN SINGH. **63 I. C. 181 = 43 All. 617 = 19 A. L. J. 648 = A. I. R. 1921 All. 120.**

——A heritable annuity conferred by a will stands on an entirely different footing from the right of maintenance contemplated by S. 60 (*n*) and is liable to attachment. 10 C. W. N. 1102, and 30 Mad. 279, Ref.; 27 Cal. 38, Diss. Other cases referred to. (*Daniels, J.*) MADAN LAL *v.* L. AMBIKA BAKHSH. **63 I. C. 851 = 24 O. C. 250 = A. I. R. 1921 Oudh. 164.**

—S. 60—Military pay.

——An Army Assistant Surgeon is included under S. 2, Army Act, as Warrant Officer, and his pay is not attachable even if he is recruited in India. (*Mears, C. J. and Mukerji, J.*) A. L. BROWNE *v.* H. A. PEARCE. **48 All. 73 = 23 A. L. J. 929 = 6 L. R. A. Civ. 578 = 89 I. C. 882 = A. I. R. 1926 All. 122.**

——The reference in S. 60 (*j*), C. P. Code, to the Indian Articles of War must now be regarded as referring to Army Act (VIII of 1911). (*Mears, C. J. and Mukerji, J.*) A. L. BROWNE *v.* H. A. PEARCE. **48 All. 73 = 23 A. L. J. 929 = 6 L. R. A. Civ. 578 = 89 I. C. 882 = A. I. R. 1926 All. 122.**

—S. 60—Occupation.

——The word "occupation" in cl. (*c*) does not necessarily mean "residence" only. (*Iqbal Ahmad, J.*) BALADIN *v.* LAKHAN SINGH. **99 I. C. 376 = A. I. R. 1927 All. 214.**

—S. 60—Occupied by.

——The words " occupied by " mean " lived in by " or " used for agricultural purposes by". (*Campbell, J.*) NOOR DIN *v.* SULANHAN MAL. **92 I. C. 759 = A. I. R. 1926 Lah. 230.**

—S. 60—Pension.

——A sum payable by the Government as compensation for forest dues in respect of Jagir land taken over by the Government for forest purposes is not a pension but a grant of money or land revenue and is not exempted from attachment. (*Jackson, A. J. C.*) NATHMAL MARWARI *v.* CHAINSINGH. **121 I. C. 664 = A. I. R. 1930 Nag. 134 (1).**

——A pension is not ordinarily attachable for sale. The burden of proof that a particular pension is attachable lies on the decree-holder. (*Mears, C. J. and Ryves, J.*) MAZHAR ALI KHAN *v.* MAHFUZ HASAN. **68 I. C. 854 = 44 All. 697 = 20 A. L. J. 679 = A. I. R. 1922 All. 429.**

——Provident Funds Act (1897), Rule 10—Money payable to retired employee is attachable. (*Richardson and Ghose, JJ.*) RAJ KUMAR MUKHARJEE *v.* W. G. GODFREY. **A. I. R. 1922 Cal. 196.**

—S. 60—Personal Service.

C. P. CODE, (1908), S. 60—Power to dispose.

——Villages or lands given as jagirs for services cannot be attached and sold in execution of a decree as the sale of such property is opposed to the nature of the interest affected and is also contrary to public policy. A. I. R. 1922 Mad. 197, Foll. (*Jackson and Mohiuddin, A. J. Cs.*) THAKURDAS *v.* DHANRAO. **116 I. C. 661 = A. I. R. 1929 Nag. 232.**

——Right of Gangaputra to receive offerings is right of personal service and cannot be attached—But right of occupation of particular spot on bank together with physical articles is liable to attachment. (Case-law considered). (*Wazir Hasan and Shrivastava, JJ.*) GANPAT PRASAD *v.* KASHMIRI BANK. **6 O. W. N. 780 = 120 I. C. 822 = A. I. R. 1929 Oudh 444.**

——The interest of an utpat or priest's share in the net balance of the offerings to the deity can be attached and sold in execution of a decree 23 Bom. 131; 23 Cal. 645 and 43 Cal. 28, Dist. (*Marten, C. J. and Patkar, J.*) DIGAMBAR TATYA *v.* HARI DAMODAR. **29 Bom. L. R. 102 = 100 I. C. 1008 = A. I. R. 1927 Bom. 143.**

——*Saleable property is attachable—Personal inam for public service—Not saleable as opposed to public policy.*

It is clear law that the Court can only sell in execution property which the judgment-debtor can lawfully alienate. S. 60 of the C. P. Code forbids the attachment of a right of personal service. If what is sought to be attached is the land and not the right of personal service, that section has no application. Sec. 6 (*h*) of the Transfer of Property Act clearly prohibits transfer of property when it is opposed to public policy. Where land is personal inam for doing public service, it cannot be sold by the inamdar; neither would the purchaser get any title, since at any moment the inam could be resumed by the Zamindar or Government where the inamdar ceases to render services. So, in such a case, the inam lands being property not saleable, could not be sold in execution of any decree against the inamdar. (*Schwabe, C. J., Coutts Trotter and Kumaraswami Sastri, JJ.*) NETI ANJANEYALU *v.* SRI VENUGOPAL RICE MILLS, LIMITED. **70 I. C. 466 = 45 Mad. 620 = 1922 M. W. N. 307 = 15 M. L. W. 513 = 30 M. L. T. 255 = A. I. R. 1922 Mad. 197 = 42 M. L. J. 477 (F.B.)**

——Jatri bahi *of Gayawal.*

Jatri bahi of a Gayawal judgment-debtor containing merely entries as to the names and addresses of the pilgrims utilizing the services of the judgment-debtor while visiting Gaya on religious pilgrimage come well within cl. (*f*) of S. 60 as property not capable of attachment or sale in execution of a decree, 2 P. L. J. 705. (*Jwala Prasad and Bucknill, JJ.*) LACHMAN LAL PATHAK *v.* BALDEO LAL THATHWARI. **68 I. C. 944 = 1 Pat. 619 = 3 Pat. L. T. 603 = 1922 P. H. C. C. 228 = A. I. R. 1922 Pat. 556.**

—S. 60—Power to dispose.

——Partner's interest in partnership may be attached and sold. 13 Mad. 447; 20 Cal. 693, Foll.; 3 Cal. 198 (P. C.), Rel. on. (*Kumaraswami Sastri, Ramesam, and Reilly, JJ.*) DHANARAJU *v.* MOTILAL DAGA. **52 Mad. 563 = 29 M. L. W. 823 = 116 I. C. 343 = A. I. R. 1929 Mad. 641 = 57 M. L. J. 264 (F.B.).**

——*Crops grown by heir after tenant's death.*

Crops grown on a tenancy by the heir of a deceased tenant after his death, are not the crops of the deceased tenant and cannot as such be liable to attachment and sale in the hands of the heir under S. 60. 84 P.W.R. 1916, Foll. (*Scott-Smith, J.*) ABDUL AZIZ *v.* SARB-

DAYAL. **69 I. C. 520 = A.I.R. 1924 Lah. 335.**

———Where Hindu widow is restricted by deed of compromise from having any disposing power the property so got cannot be attached. (*Marten and Fawcett, JJ.*) BASANGOWDA *v.* IRGOWADADI.

73 I. C. 196 = 25 Bom. L. R. 293 =
47 Bom. 597 = A. I. R. 1923 Bom. 276.

—S. 60—Proof.

———Where a person is both an agriculturist and a zamindar, the burden of proving that the house in dispute is strictly of the nature contemplated by S. 60 (*c*) is on him. 35 All. 307, Ref. (*Iqbal Ahmad, J.*) BACHAN SINGH *v.* BHIKA SINGH.

8 L. R. A. Rev. 229 = 106 I. C. 49 =
A. I. R. 1927 All. 601.

———Judgment-debtor must prove that he is agriculturist in fact for claiming exemption. 35 All. 307; 65 P. R. 1909 and 28 Bom. 125, Foll. (*Addison, J.*) BUTESHAH *v.* GURAN DITTA.

100 I. C. 104 = A. I. R. 1927 Lah. 810.

—S. 60—-Property attachable.

———*Proprietary interest of surety is not extinguished—It merely becomes the first charge on the property—Liability of property discussed—Such interest is not exempt under Transfer of Property Act, S. 6 or S. 60.*

Per *Sulaiman, Banerji and Sen, JJ.*—When either immoveable or moveable property is offered as security the proprietary interest of the surety is not automatically extinguished and merely a first charge is created on the security which will have to be available in the first instance for the purpose for which it has been offered. Although the depositor cannot defeat that purpose his power of disposal of his security subject to that charge will subsist, and his interest in the surplus which may remain over is both transferable and attachable. Such an interest does not come within any of the exceptions enumerated in S. 6, T. P. Act, nor is such security exempted from attachment under S. 60, C. P. Code. If the decree-holder desires to be cautious there is nothing in law to prevent him from applying to the Court for attaching the security so as to prevent the judgment-debtor from dealing with it personally any further. It is not only permissible to a decree-holder to attach the security but he has a right to do so subject always of course to the first charge created and the Court has no discretion to refuse his prayer. The only condition which the Court issuing an order for attachment must impose is that the previous charge created in the property is in no way to be affected. O. 21, R. 52 is specially applicable to attachment of property in the custody of any Court of public officer. A. I. R. 1929 Pat. 97; 8 Pat. 478, Ref. (*Mears, C. J., Sulaiman, Boys, Banerji, Young, Sen and Niamatullah, JJ.*) MAHANT SHANTHA NAND *v.* BASUDEVANAND

1930 A. L. J. 402 = A. I. R. 1930 All. 225 (F.B.).

———Non-transferable occupancy is exempt from sale and does not vest in Official Receiver. 39 All. 120 and 13 N. L. R. 215, Ref. (*Aston, A. J. C.*) DHARAMDAS THAWARDAS *v.* SORABJI. **121 I. C. 876 =**
A. I. R. 1930 Sind 75.

———*Interest of an heir in hands of administrator holding as trustee is liable to attachment.*

Where an administrator has paid all expenses and debts and has cleared the estate, he is in the same position with regard to the next-of-kin as an executor, who has cleared the estate, is with regard to residuary legatee and he therefore ceases to be administrator and becomes trustee and the interest of one of the heirs in the hands of such administrator is liable to attachment in satisfaction of the debt due to the creditors of the heir although his share is not yet determined and allowed to him. 23 Mad. 216, Ref. *Ponder* v. *Ponder*, (1921) 2 Ch. 59; 32 Cal. 198 (P. C.), Rel. on. (*Shadi Lal, C. J. and Broadway, J.*) AMBA PARSHAD *v.* JAMES SKINNER.

117 I. C. 76 = A. I. R. 1929 Lah. 600.

———Insolvent's money deposited by him in the Court as security for the costs of an appeal to His Majesty in Council, can be attached, but the order of attachment must be made subject to the result of the appeal. 9 Mad. 203, Rel. on. (*Doss and Ross, JJ.*) JAGDISH NARAIN SINGH *v.* RAMSAKAL KUER.

9 P. L. T. 969 = 8 Pat. 478 = 114 I. C. 465 =
A.I.R. 1929 Pat. 97.

———There is nothing in S. 60, C. P. Code, preventing the creditors of the sons of the deceased assured from attaching money payable under it. (*Rankin, C. J. and C. C. Ghose, J.*) KRISHNALAL *v.* PROMILA BALA DASI. **114 I. C. 658 = 55 Cal. 1315 =**
47 C. L. J. 587 = 32 C. W. N. 634 =
A. I. R. 1928 Cal. 518.

———Groves situate on ex-proprietary holding partake of the nature of the holding on which they stand, and as such cannot be attached and sold in execution of a decree. 9 All. 88 (F. B.), Foll. (*Iqbal Ahmad, J.*) MT. HAFIZAN *v.* CHHAKKO LAL.

101 I. C. 526 = 8 L. R. A. Rev. 132 =
A. I. R. 1927 All. 779.

———*Interest of a Buddhist couple in marriage property is indeterminate and variable according to contingencies—It is not saleable property within S.* 60.

The interests of the parties to the marriage in the property of the marriage are not only impartible, but are also indeterminate. They can be determined only on divorce or on the death of one party. The shares taken by the parties on divorce vary according to the nature of the divorce. The interest of either party, whether at death or divorce, is not in any particular item of property, but is an interest in the estate as a whole, including liabilities as well as assets so that if the liabilities equal or exceed the assets, the interest may be nil or even a minus quantity. Such an impartible and indeterminate interest, depending on and varying according to certain contingencies, is not saleable property within the meaning of S. 60, C. P. Code. (*Heald and Chari, JJ.*) MA PAING *v.* MAUNG SHWE HPAN. **104 I. C. 516 = 5 Rang. 478 =**
A. I. R. 1927 Rang. 274.

———*Occupancy holding is liable to attachment and sale in execution.*

The transfer for value of the whole or part of an occupancy holding, apart from custom or local usage in operative as against the raiyat whether it is voluntary or involuntary. The principle is a general one which applies to the case of creditors other than landlords also. A. I. R. 1924 Cal. 52 and 48 Cal. 184 (F.B.), Appl. (*Suhrawardy and Duval, JJ.*) NABINCHANDRA BISWAS *v.* ABDUL AZIZ. **90 I.C. 998 =**
A. I. R. 1926 Cal. 337.

———The estate in the hands of the mother of a deceased proprietor who derives her title by virtue of her marriage in the family is liable to attachment for payment of debts incurred by a previous male holder of the estate. (*Jailal, J.*) DHANPAT *v.* GOPAL KAUR. **26 P. L. R. 735 = 90 I.C. 1052 =**
A. I. R. 1926 Lah. 7.

———*Accrued debt is attachable.*

There is a distinction between the case where there is an existing debt, payment whereof is deferred, and the case where both the debt and its payment rest in the future. In the former case there is an attachable debt, in the latter case there is not. A debt, in order to be attachable, need not be ascertained but must be accruing or have accrued, *a debitum in prasenti solvendum in futuro.* (*Suhrawardy and Chotzner, JJ.*) BAHADURMULL RAMPURIA *v.* TRICUMDAS CALLIANJI. **78 I.C. 881 = A. I. R. 1925 Cal. 561.**

———*Hereditary but non-transferable lease.*

A heritable but non-transferable lease granted by a Settlement Court in Oudh is not liable to sale in execution of money decree, but nevertheless it is not a succession of life estates and each hereditary owner fully represents the estate. The lessee himself can raise the objection as to non-transferability against the holder of a money decree. Case-law fully discussed. (*Simpson, A.J.C.*) MT. MOHAN DEI *v.* BAL MAKUND RASTOGI. **90 I. C. 256 = 12 O. L. J. 543 = 2 O. W. N. 737 = A. I. R. 1925 Oudh 702.**

———The right to hold the property as a security for the dower debt and to continue in possession thereof until the dower debt is satisfied is property and is both heritable and transferable. (*Coutts and Das, JJ.*) MT. BIBI MAKBULUNNISSA MT. BIBI UMTUNNISSA. **70 I. C. 312 = 1922 P. H. C. C. 348 = 2 Pat. 84 = 4 P. L. T. 272 = A. I. R. 1923 Pat. 33 (b).**

———*Equity of redemption.*

The equity of redemption is a substantial right capable of attachment and sale. On attachment and the sale of the judgment-debtor's share in the equity of redemption, the auction-purchaser would acquire the right, title and interest of the judgment-debtor and nothing more. If the judgment-debtor was one of the three mortgagors, the auction-purchaser would step into his shoes, and have all the rights as one of the three mortgagors. (*Brown, A.J.C.*) MAUNG SO *v.* DEVIGYON. **70 I. C. 530 = 4 U. B. R. 132 = A. I. R. 1923 Rang. 119.**

———*Execution could be only against saleable property —Personal Inam for public service—Not saleable as opposed to public policy.*

It is clear law that the Court can only sell in execution, property which the judgment-debtor can lawfully alienate. S. 60 of the C. P. Code forbids the attachment of a right of personal service. If what is sought to be attached is the land and not the right of personal service, that section has no application. S. 6 (*h*) of the Transfer of Property Act clearly prohibits transfer of property when it is opposed to public policy. Where land is personal inam for doing public service, it cannot be sold by the inamdar; neither would the purchaser get any title, since at any moment the inam could be resumed by the zamindar or Government where the inamdar ceases to render services. So, in such a case, the inam lands being property not saleable, could not be sold in execution of any decree against the inamdar. (*Schwabe, C. J., Coutts Trotter and Kumarasawami Sastri, JJ.*) NETI ANJANEYALU *v.* SRI VENUGOPAL RICE MILL. **70 I. C. 466 = 45 Mad. 620 = 15 M. L. W. 513 = 1922 M. W. N. 307 = 30 M. L. T. 255 = A. I. R. 1922 Mad. 197 = 42 M. L. J. 477.**

———*Occupancy holding.*

The transfer of the whole or a part of an interest in non-transferable occupancy holding is operative against the tenant, whether it is made voluntarily or involuntarily, *e.g.*, in execution of a money-decree obtained against him, either by the landlord or by a stranger. 43 Cal. 148, Foll.; 1 P. L. J. 257 and 2 P. L. J. 530, Overruled. (*Dawson Miller, C. J.*) JUGESHWAR MISRA *v.* NATH KOERI. **65 I. C. 335 = 1922 P. H. C. C. 49 = A. I. R. 1922 Pat. 19.**

———*Right to get reconveyance.*

A right to get a reconveyance of and possession of property worth fifteen lakhs for payment of six lakhs is property of a very valuable kind which is attachable and saleable under the provisions of the C. P. Code notwithstanding the amendment of the Transfer of Property Act. (*Wallis, C. J. and Oldfield, J.*) NARASINGERAI GYANAGERJI *v.* PARTHASARADHI RAYANIM GARU. **1921 M. W. N. 519 = A. I. R. 1921 Mad. 498.**

—S. 60—Provident Fund.

———*Compulsory deposit made in General Provident Fund is not attachable even after contributor's retirement.*

Compulsory deposit made in the General Provident Fund is not liable to attachment even after the retirement of the contributor from service. R. 10, General Provident Fund Rules, is merely a rule of procedure directing the Accounts Officer how to proceed on receipt of a notice of attachment. It does not legalize a notice of attachment and consequently does not have the intention of making the deposit attachable after retirement. A. I. R. 1924 Pat. 524; A. I. R. 1924 All. 68, Foll.; 29 Bom. 259; 46 Cal. 962 and A. I. R. 1923 Cal. 585, Rel. on. (*Kendall, J.*) SECRETARY OF STATE *v.* HAR CHARAN DAS. **117 I.C. 622 = 1929 A. L. J. 670 = 51 All. 845 = A. I. R. 1929 All. 417 (a).**

———*Provident Funds Act* (*IX of* 1897), *S.* 2 (4)—*Compulsory deposit is deposit until payment.*

The words "repayable on demand" in sub-S. (4) clearly show that a compulsory deposit is only a deposit so long as it remains in the fund, and not after it has been paid over to the person to whose credit it had hitherto stood. So it is not exempt from attachment after it has been paid over to the person entitled: 44 Bom. 673, Diss. (*Wazir Hasan and Ashworth, JJ.*) GAURI SHANKAR *v.* R. J. DECRUZE. **92 I.C. 673 = 29 O. C. 278 = 3 O.W.N. 378 = 13 O. L. J. 425 = 1 Luck. 313 = A. I. R. 1927 Oudh 22.**

———Provident Funds Act (IX of 1897)—The fund does not become attachable till paid. (*Daniels, J.*) DEVI PRASAD *v.* SECRETARY OF STATE FOR INDIA. **74 I.C. 746 = 45 All. 554 = 21 A. L. J. 454 = 4 L. R. A. Civ. 256 = A. I. R. 1924 All. 68.**

———*Provident Funds Act* (*IX of* 1897), *S.* 4, *sub-S.* (1)—"*Compulsory deposits*" *in Railway Provident Funds are not attachable.*

The Rules regulating the General Provident Fund do not apply to the State Railway Provident Institution, which is governed by the Rules contained in the State Railway Open Line Code, Vol. II, App. 1. The amount at the credit of the officer, who has left the service, which consists entirely of deposits which when they were made were "compulsory deposits" within the meaning of R. 30 of the latter Rules and of the Provident Funds Act, is exempted from liability to attachment under the said R. 30 read with Sec. 60 (1) (*k*) of the C. P. Code and Sec. 4, sub-S. (1) of the Provident Funds Act. (*Richardson and B. B. Ghose, JJ.*) THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v* RAJ KUMAR MUKERJEE. **82 I.C. 69 = 77 I. C. 1025 = 27 C. W. N. 472 = 50 Cal. 347 = A.I.R. 1923 Cal. 585.**

— S. 60 —Right to attach.

———A right to apply for attachment is a processual right and a privilege whose exercise depends entirely on the discretion of the Court. (*Walsh, J.*) MUTHUKRISHNA PILLAI *v.* AYYASAMI AYYAR. **28 M.L.W. 344 = 113 I. C. 416 = A. I. R. 1928 Mad. 1173 = 55 M. L. J. 382.**

—S. 60—Salary of insolvent.

———*Salary of insolvent—Only half vests in the Receiver.*

C. P. CODE, (1908), S. 60—Salary of insolvent.

The combined operation of S. 28 (5) of the Provincial Insolvency Act and S. 60 (1) (III) is to make only half his salary divisible amongst the creditors. (*Walsh and Ryves, JJ.*) RADHA *v.* M.C. WHITE.
73 I.C. 413 = 45 All 364 = 21 A. L. J. 216 = 4 L. R. A. Civ. 149 = A. I. R. 1923 All. 466.

———Insolvency Court can order reasonable allowance to insolvent from out of his half salary vesting in Receiver. (*Walsh and Ryves, JJ.*) RADHA *v.* M. C. WHITE. **73 I.C. 413 = 45 All. 364 = 21 A. L. J. 216 = 4 L. R. A. Civ. 149 = A. I. R. 1923 All. 466.**

———A moiety of the insolvent's pay can be ordered to be given to the Receiver for benefit of creditors. (*Oldfield and Venkatasubba Rao, JJ.*) C. L. NARASIMHAN *v.* N. HANUMANTHARAO NAIDU.
70 I. C. 572 = 1922 M. W. N. 717 = A. I. R. 1922 Mad. 439.

—S. 60—Tool of Artizan.

———A sewing machine is a tool. There is no reason why a tool should be confined to primitive implements. (*Macnair, A.J.C.*) VITHOPA *v.* BAPULAL.
65 I. C. 416 = 19 N. L. R. 22 = A. I. R. 1923 Nag. 289.

—S. 60—Wrongful attachment.

———The attaching creditor is liable in damages to the person whose property was wrongfully attached even if he has acted honestly. 33 All. 306; A. I. R. 1926 All. 177 and A. I. R. 1925 Nag. 390, Foll. (*Johnstone, J.*) MUNSHI RAM *v.* LACHHI RAM. **112 I. C. 848 = A. I. R. 1929 Lah. 200.**

———*Damages recoverable though Defendant acts in good faith.*

Generally speaking, it is not incumbent on the plaintiff to allege and prove that the person at whose instance a wrong attachment has been made acted thereanent maliciously or without probable cause. Proof of malice is not necessary when the property of a stranger, not a party to the suit, is taken in execution. The decree-holder may have acted in perfectly good faith and innocently, but is nevertheless liable if damages have been caused by his mistake. (*Findlay, Offg. J.C.*) DR. N. LOBO *v.* BABULAL. **94 I. C. 573 = 8 N. L. J. 170 = A. I. R. 1925 Nag. 390.**

———Money deposited under decree to the credit of decree-holder, who has already assigned his interest in the decree, cannot be attached by his creditors unless the transfer is proved to be not *bona fide*. 1912 M. W. N. 176, Diss. (*Das and Adami, JJ.*) RAGHUNANDAN PRASAD *v.* BHAGWAT SAHAY. **86 I. C. 626 = 6 P. L. T. 504 = 3 Pat. L. R. 18 = 1925 P. H. C. C. 43 = A. I. R. 1925 Pat. 372.**

S. 60—Miscellaneous.

———*Procedure not followed—Sale is not a nullity.*

(*Obiter*).—Sale of property liable to attachment and sale under S. 60 is not a nullity simply because the procedure provided for the execution of a particular kind of property in the first Schedule is not followed. Omission to follow the correct procedure under the appropriate order and rule is merely an irregularity. (*Boys and Kendall, JJ.*) SHIAM LAL *v.* GIRRAJ KISHORE. **49 All. 292 = 25 A. L. J. 173 = 99 I. C. 443 = A. I. R. 1927 All. 76.**

———*Chief means of livelihood determines the profession.*

Chief means and not simply one means determines the profession. (*Devadoss and Wallace, JJ.*) GOPALAM GARU *v.* GOPALAKRISHNAYYA GARU. **92 I. C. 416 = A. I. R. 1927 Mad. 342.**

—S. 62—Residing, 'meaning of.'

———*Actual residence at date of plaint is not necessary.*

The word, residing, for the purposes of jurisdiction

does not necessarily mean keeping within the jurisdiction. If a person has a residence within the jurisdiction it is sufficient residence although he may not be staying there at the exact time when the proceedings were initiated against him. (*Walsh, A. C. J. and Ryves, J.*) TAWASSUL HUSAIN *v.* WAJID ALI.
5 L. R. A. Civ. 695 = 87 I.C. 795 = A. I. R. 1925 All. 140.

—S. 63—Attachment by Civil and Revenue Courts.

———*Same property attached by Civil and Revenue Courts but was sold by Revenue Court—It cannot be sold afterwards by Civil Court.*

The omission of the word "Civil" which was before "Court" in the definition of "decree" in the old C. P. Code, has not altered the law in this respect from what it was at the time when. 22 All. 182, was decided. (*Tudball and Sulaiman, JJ.*) ROSHAN LAL *v.* MASHKUR ALIKHAN. **63 I. C. 909 = 43 All. 612 = 19 A. L. J. 643 = A. I. R. 1921 All. 142 (2).**

—S. 63—Attachments by Court.

———Property being attached in prior decree of a different Court cannot be sold by a Court executing a subsequent decree. Sub-S. (2) protects such sale when it has taken place in ignorance of prior rights. (*Das and Adami, JJ.*) RAMDHARI LAL *v.* NATHU RAM.
62 I.C. 33 = 2 P. L. T. 719 = 6 P. L. J. 332 = A. I. R. 1921 Pat. 140.

—S. 63—Effect of stay.

———The holders of the decrees of inferior Courts, whose execution had been stopped by the superior Court under S. 63, are entitled to rateable distribution under that section read with S. 73 without any further applications. 21 Cal. 200, Foll. (Case law discussed). (*Greaves and Chakravarti, JJ.*) GIRINDRA NATH RAY *v.* KEDAR NATH BIDYANTA. **87 I. C. 783 = 29 C. W. N. 575 = A. I. R. 1925 Cal. 966.**

—S. 63—Object of section.

———S. 63 sets at rest conflict of views prior to 1908 and validates proceedings even by inferior Courts during attachment by the superior Court. It enjoins that the superior Court should realise the property in cases where the inferior Court had notice of execution by superior Court. (*Krishnan and Odgers, JJ.*) SRINIVASACHARIAR *v.* APPAVOO REDDY.
84 I. C. 265 = 47 M. L. J. 720 = 20 M. L. W. 864 = 1924 M. W. N. 551 = A.I. R. 1924 Mad. 889.

———Object of section is to prevent confusion in execution of decrees. (*Das and Adami, JJ.*) RAMDHARI LAL *v.* NATHU RAM. **62 I. C. 33 = 2 P. L. T. 719 = 6 P. L. J. 332 = A. I. R. 1921 Pat. 140.**

—S. 63—Prior attachment by inferior Court.

———Where an attachment by an inferior Court is prior to that of a superior Court, no application is necessary to the latter to entitle the decree-holder, attaching earlier, to rateable distribution, but if the decree-holder attaching through an inferior Court does so after an attachment has been effected by the superior Court, he cannot claim rateable distribution without an application to the superior Court. 21 Cal. 200, Not Foll. 14 C. W. N. 396, Foll. (*Chatterjea and Newbould, JJ.*) KRISHNA KUMAR GHOSH *v.* PASUPATI BANERJEE. **63 I. C. 11 = 25 C. W. N. 740 = A. I. R. 1921 Cal. 87.**

—S. 63—Sale by inferior Court.

———*Superior Court should call for the sale-proceeds to its Court.*

Where the property of the same judgment-debtor is attached by the Subordinate Judge as well as by the

District Munsif, and the latter, in ignorance of the attachment by Subordinate Judge, sells the property, the proper way is that the Subordinate Judge should call for the proceeds of the sale from the District Munsif's Court in order that they might be distributed in the Subordinate Judge's Court in accordance with the principle of S. 63: 46 Cal. 64, Diss. from; A. I. R. 1925 Bom. 420, Foll. (*Reilly, J.*) PERIYA KARUPAN CHETTI *v.* SOMASUNDARAM CHETTI.
98 I. C. 628 = A.I.R. 1927 Mad 67 = 51 M. L. J. 661.

——After attachment of property by First Class Subordinate Judge there was subsequent attachment and sale by Second Class Subordinate Judge First Class Subordinate Judge is entitled to call for sale proceeds to his Court for rateable distribution. 46 Cal. 64, Foll. 18 Bom. 458, expl. (*Macleod, C.J. and Coyajee, J.*) DEEKAPPA MALAPPA HUBLI *v.* CHANBASAPPA RACHAPPA NEELI. **89 I. C. 980 = 49 Bom. 655 = 27 Bom. L. R. 917 = A. I. R. 1925 Bom. 420.**

—S. 63—Sale in contravention.

——Where the property is sold by a Court which did not attach the property in the first place, then the Court (which first attached the property) instead of holding a second sale should rather accept the sale held by the first Court and require the transfer of the proceeds realised by the sale held by the Court which ought not to have sold, the property to the Court, which should have sold the property. 12 Cal. 333 and 18 Bom. 458, Foll. (*Das and Adami, JJ.*) RAMDHARI LAL *v.* NATHU RAM. **62 I. C. 33 = 6 P. L. J. 332 = 2 P. L. T. 719 = A. I. R. 1921 Pat. 140.**

—S. 63—Stay of Execution after attachment.

——Property was attached in execution of decrees of two Courts higher and lower—Proceedings in lower Courts were stopped—Application thereafter to Higher Court for rateable distribution is a continuation of the lower Court proceeding and is not barred by S. 48. 21 I.C. 923, Ref. (*Odgers, J.*) VENTALA VEERARAZU *v.* KURUVELLA SUBBARAYADU. **64 I. C. 493 = 15 Mad. L. W 245 = 1921 M. W. N. 507 = A. I. R. 1922 Mad. 3 = 41 M. L. J. 378.**

—S. 63—Subsequent attachment by High Court.

——S. 73 must be read with S. 63 A sum was attached in execution of two small cause decrees—There was subsequent attachment in execution of High Court decree on original side where the money was paid—Decree-holders in Small Cause Court need not apply for execution to High Court again. 21 Cal. 200, Rel on; 5 Bom. 198, Dist. (*Rutledge, C. J. and Brown, J.*) KWAI TONG KEE *v.* LIM CHAUNG GHEE.
110 I. C. 744 = 6 Rang. 131 = A. I. R. 1928 Rang. 157.

S. 64.

Applicability.
Effect of attachment.
Interpretation.
Money decree.
Private transfer.
Rateable distribution.
Scope.
Validity.
Miscellaneous.

—S. 64—Applicability.

——*Sale must follow attachment.*

An attachment referred to in S. 64 is the attachment under which the execution sale is held and not an attachment of a creditor who is paid off: 41 Mad. 265 (F.B.); and A. I. R. 1916 P.C. 238, Foll. (*Patkar and Baker, JJ.*) CHINDA *v.* CHHAGANLAL.
30 Bom. L. R. 1488 = 115 I. C. 414 = A. I. R. 1928 Bom. 545.

——*Decree satisfied—Section does not apply.*

Where a case does not fall strictly within S. 64 the principle of S. 64 cannot be applied in considering that case. The moment attachment comes to an end by reason of satisfaction of the decree, all claims under the attachment cease to be enforceable: 37 Bom. 138; A.I.R. 1916 P. C. 238, and 35 Bom. 516, Foll. (*Patkar and Baker, JJ.*) CHINDA *v.* CHHAGANLAL.
30 Bom. L. R. 1488 = 115 I. C. 414 = A. I. R. 1928 Bom. 545.

——*Mortgage pending attachment is void.*

Attachment before judgment—Suit decreed—Mortgage of property to third person—Property sold in execution of decree and purchased by decree-holder—Mention of mortgage in execution application does not prevent decree-holder from challenging the mortgage, nor does it prevent the provisions of S. 64 from applying, so as to make the mortgage void. A. I. R. 1922 All. 443, Foll. (*Fawcett, Ag. C. J. and Mirza, J.*) SHIVLAL *v.* TANIRAM. **30 Bom. L. R. 1136 = 113 I. C. 353 = A. I. R. 1928 Bom. 444.**

——*Attachment before judgment—Section applies.*

Attachment before judgment is not a process in execution of a decree, for at the time of the attachment there is no decree and therefore there can be no process that could be issued in execution of the same. An attachment before judgment, made while the estate is still under the Collector's control, is therefore not void under paragraph 11. The object of the provision in the latter part of paragraph 11 (1) is to protect the debtor as far as possible from the risk of losing his property wholly or for all time and mere attachment before judgment does not defeat that object. Attachment in S. 64 covers attachment before judgment. (*Kotval, A. J. C.*) BANSI LAL *v.* SITARAM. **68 I. C. 188 = A. I. R. 1922 Nag. 238.**

——*Section not applicable to claims under decree.*

Section 64 refers only to claims enforceable under the attachment effected prior to the alienation and not to claims enforceable under the decree in execution of which the attachment was made. (*Daniels, J. C. and Dalal, A.J.C.*) MD. MUZUFAR ALI *v.* S. BHAGWATI PRASAD.
66 I. C. 642 = 8 O. L. J. 358 = A. I. R. 1921 Oudh 176.

—S. 64—Effect of attachment.

——*Companies Act, S. 229—Attaching creditor is not secured creditor—Attachment creates no charge in favour of attaching creditor—No charge.*

It merely prevents and avoids alienation, and confers no right on the attaching creditor; 26 Mad. 673; 25 Cal. 179 (P. C.) and 29 Cal. 428 (F. B.), Rel. on; *In re*, Printing and Numerical Registering Co. (1878) 8 Ch. D. 535, Dist. (*Marten, C.J. and Murphy, J.*) GOVERDHANDAS VALLABHDAS *v.* OFFICIAL LIQUIDATOR, ELECTRC-METAL REFINING CO., LTD.
122 I. C. 836 = 31 Bom. L. R. 1209 = A. I. R. 1930 Bom. 16.

——*No Security.*

Attachment does not create any title in favour of the attaching-creditor. It merely prevents private alienations. The position of the attaching creditor does not confer any title upon him in the property in question and he is only entitled to be classed with other creditors all of whom are entitled to rateable distribution of the assets in the hands of the receiver. Such creditor has no higher right than that of any other unsecured creditor and he is not entitled to have his decree satisfied in full out of the sale proceeds of the property attached by him. (*B. B. Ghose and Panton, JJ.*) HARAN CHANDRA *v.* JOYCHAND. **A. I. R. 1929 Cal. 524.**

——*No title or charge.*

Attachment in itself gives no cause of action for a suit by reversioners for a declaration regarding a decree based on a mortgage passed against their predecessor-in-title, inasmuch as no title passes in virtue of the attachment, nor is any charge created upon the property: A. I. R. 1924 Lah. 52, Foll.; 32 P. R. 1904, not Foll. *Harrison and Tek Chand, JJ.*) JAGEY RAM *v.* RICHHPAL. **113 I. C. 907=10 L. L. J. 491=30 P. L. R. 6=10 Lah. 543=A. I. R. 1929 Lah. 90.**

———*Cannot be made retrospective*

If attachment is validly withdrawn though under misapprehension subsequent attachment does not relate back to date of 1st attachment and cannot have such effect against person taking transfer during interval. 23 Cal. 829; A. I. R. 1924 Cal. 744, 34 All. 490, Dist. 42 All. 39, Dist. and Disc. (*Ormestone, J.*) L. W. NASSE *In the matter of.* **7 Rang. 201=118 I. C. 615=A. I. R. 1929 Rang. 229.**

—S. 64—Interpretation.

———*Injunction—Section does not apply.*

Section 64 relates to private alienation of property after it has been attached by order of a Court and does not apply when no order of attachment is passed but only an *ad interim* injunction is issued restraining the alienation of a house. S. 64 has no application to a case in which the alienation has been made after the issue of such an injunction. (*Tek Chand, J.*) DARBARI RAM *v.* GHULAM FAZL KARIM. **A. I. R. 1930 Lah. 858.**

———It cannot be held that an assignment of a debt or fund, equitable or legal, does not involve a transfer of an interest in that debt or fund; Rodick *v.* Gandell 42 Ch. 749, Rel. on. (*Ormestone J.*) L. W. NASSE *In the matter of.* **7 Rang. 201=118 I. C. 615=A. I. R. 1929 Rang. 229.**

———*Vesting order not analogous to attachment.*

Per *Ramesam and Madhavan Nair, JJ.*—There is no analogy between a vesting order by which the rights of insolvent are vested in the Official Assignee and an attachment of property by Court. (*Phillips, Offg. C. J., Ramesam and Madhavan Nair, JJ.*) OFFICIAL ASSIGNEE, MADRAS *v.* RAMCHANDRA AIYAR. **112 I.C. 541=51 Mad. 417=1928 M. W. N. 294=28 M. L. W. 109=A. I. R. 1928 Mad. 735=55 M. L. J. 175 (F. B.).**

———*Conditional order of attachment before judgment—Purchaser is entitled to oppose the order being made absolute.*

It is usual for a plaintiff to file an application along with the plaint for the attachment of the property of the defendants and if there are minors in the suit to propose some person as their guardian. If afterwards the guardian is found unwilling to act, the Court appoints a proper guardian. But the conditional attachment made in the hope that the proposed guardian would act cannot be said to be invalid by reason of the proposed guardian being unwilling to act. The Court should see before making the conditional order absolute that a guardian is appointed to properly represent the minors, as the guardian might represent to the Court that the plaintiff has not made out a good case for attachment before judgment or that he is willing to give security for any decree that may be passed in the suit, and therefore the attachment before judgment is not necessary. Therefore an order absolute for attachment before judgment could not be made in the absence of a proper guardian. But a conditional order that simply prevents the property from alienation by the defendants pending the disposal of the application cannot be said to be invalid merely because the guardian proposed comes and

says he is unwilling to act. If the order is made absolute, then the property would be subject to the attachment order so made. A purchaser of such property during the subsistence of the conditional order is entitled to intervene in the proceedings to show that the conditional order for attachment should not be made absolute. (*Devadoss and Jackson, JJ.*) BATCHU PERRAJU *v.* BATCHU VENKATARATNAM. **106 I. C. 142=A. I. R. 1928 Mad. 1.**

———Enforceable does not necessarily mean in process of enforcement. 33 C. L. J. 7, Diss; A. I. R. 1922 Bom. 241, Foll. (*Phillips and Odgers, JJ.*) SIVA PROTAPA *v.* A. E. L. MISSION. **49 Mad. 38=97 I. C. 496=A. I. R. 1926 Mad. 307.**

———*Explanation to S. 64.*

Subsequent claims for rateable distribution must be considered as claims enforceable under the original attachment under the explanations to S. 64. When an attachment has been levied on property in execution of a decree then any attempt by the judgment-debtor to deal thereafter with the property, must be considered as contrary to the attachment and the transferee or mortgagee must be considered as taking the transfer or mortgage subject to all claims which would be made against the property attached which by the law are not confined to claims of creditors attaching before the transfer but will also include the claims of any other execution creditors who may apply for execution before the assets are realised. (*Macleod, C. J. and Coyajee, J.*) CHUNILAL DEVAJI *v.* KARAMCHAND SHRICHAND. **69 I.C. 161=24 Bom. L. R. 364=46 Bom. 895=A. I. R. 1922 Bom. 241.**

———*Abandonment of attachment.*

Execution—Attachment—Abandonment of—Attachment struck off—No steps taken except keeping alive decree for statutory period when execution and attachment were again applied for—Attachment may be presumed to be abandoned. 12 B.L.R. 411 (P. C.), Ref.

Per *Seshagiri Aiyar, J.* Contra—The practice in the Madras Presidency has been to regard the orders "striking off" as one made for statistical purposes; such orders do not ordinarily put an end to the attachmant. They are never seriously considered as having the effect of dismissing an application properly made. 1914 M.W.N. 796, Ref. The mere fact that there is a new prayer for attachment is not a ground for holding that the applicant intended to give up his rights under the original attachment. 13 M.L.J. 221, Ref.; 12 B. L. R. 411 (P.C.), Dist. (*Wallis, C. J. and Seshagiri Aiyar, J.*) CHAMIYAPPA THARAGAN *v.* RAMA IYER. **62 I.C. 121=44 Mad. 232=1921 M. W. N. 53=A. I. R. 1921 Mad. 30=40 M. L. J. 65.**

———*Sale determines rights under attachment.*

The effect of an attachment is to prevent alienation and not to confer title by way of charge or otherwise on the attaching decree-holder. 37 Mad. 418, Dissented from. Further it is only aimed at private alienations. A Court sale of attached property altogether releases it from attachment. If the judgment-debtor re-acquires the attached property from the auction-purchaser or his assignees, he acquires a fresh interest which may be made the subject of a fresh attachment, but is not affected by the earlier attachment. The attaching creditor's right to redeem any mortgage there may be on the attached property comes to an end together with the attachment itself on the sale to the auction-purchaser in execution of the decree in a suit on the mortgage, although the attaching creditor was not a party to the mortgage suit. Even if there is no such decree, the attachment and the attaching decree-holder's right of redemption will come to an end when he brings the judgment-debtor's interest to sale and it is acquired by the auction-purchaser.

Per *Seshagiri Aiyar, J.*—An auction-purchaser takes ordinarily on the rights of the judgment-debtor and he cannot claim to stand in the shoes of the judgment creditor for purposes of enforcing the right of redemption under S. 91, cl. (*f*) of the Transfer of Property Act. 39 All .536, Dissented from. (*Wallis, C.J. and Seshagiri Aiyar, J.*) CHAMIYAPPA THARAGAN *v.* RAMA IYER. **62 I.C. 121 = 44 Mad 232 = 1921 M. W. N. 53 = A. I. R. 1921 Mad. 30 = 40 M. L. J. 65.**

—S. 64—Money decree.

———*Attachment does not invalidate transfer.*

There is no provision in sub-R. (1) or (2) or (6) of R. 53, which prohibits the holder of a decree for payment of money from transferring the decree attached, and the transfer is in no way affected on account of the attachment of the decree, but is a valid transfer giving the transferees a good title and entitling them to have their names substituted in place of the assignors and to apply for execution under O. 21, R. 16. (*Kulwant Sahay and Macpherson, JJ.*) HAZARIRAM *v.* KENDAR NATH MARWARI. **113 I. C. 673 = 7 Pat. 726 = 9 P. L. T. 822 = A. I. R. 1929 Pat. 1.**

———Attachment of money decree is governed by O. 21, R. 53 and not by S. 64. (*Kulwant Sahay and Macpherson, JJ.*) HAZARIRAM *v.* KEDAR NATH MARWARI. **7 Pat. 726 = 9 P. L. T. 822 = 113 I. C. 673 = A. I. R. 1929 Pat. 1.**

—S. 64—Private transfer.

———As the agreement to sell entered into before attachment does not create any interest or charge on the property, it cannot prevail against attachment. 23 C. L. J. 115, not Applied. (*Cuming and Pearson, JJ.*) TARAK NATH MUKHERJEE *v.* SANAT KUMAR MUKHERJEE. **33 C. W. N. 805 = A. I. R. 1929 Cal. 494.**

———*Prior transfer is not affected by attachment.*

According to O. 38, R. 10, attachment before judgment does not affect the rights existing prior to the attachment of persons not parties to the suit. Therefore property transferred to stranger few days before the actual attachment before judgment in a suit, would not be affected by the attachment. Such a transfer cannot be said to be contrary to such attachment. (*Patkar and Baker, JJ.*) CHINDHA RUPLA PATIL *v.* CHHAGANLAL SHIVLAL SHETH. **115 I. C. 414 = 30 Bom. L. R. 1488 = A. I. R. 1928 Bom. 545.**

———*Creditor satisfied—Transfer not void.*

Where a property under attachment before judgment is privately transferred for consideration for satisfying the claims of the attaching creditors and their claims are actually satisfied and their suits are dismissed, the transfer is not contrary to attachment which may be said to be technically subsisting on the date of the sale-deed. (*Patkar and Baker, JJ.*) CHINDA *v.* CHHAGANLAL. **30 Bom. L. R 1488 = 115 I. C. 414 = A. I. R. 1928 Bom. 545.**

———*Prior agreement to sell perfected by sale—Prevails over attachment.*

An agreement to purchase an immovable property creates an interest in the same sufficient for putting in a claim to raise an attachment thereon. The title of such a vendee when he perfects his title to the land by obtaining a decree for specific performance and getting a transfer of the property to himself under the decree prevails against that of the attaching decree-holder. 8 L. W. 582 ; 14 L. W. 524, Foll. (*Spencer, Offg. C. J.*) SITAYA *v.* MUDARGADDI SANYASI. **80 I. C. 388 = 19 M. L. W. 455 = 34 M. L. T. 110 =**

1924 M. W. N. 329 = A. I. R. 1924 Mad. 610 = 46 M. L. J. 361.

———*Agreement to sell prior to attachment is valid.*

Where after a judgment-debtor enters into an agreement for sale of property, notice of a previous application for execution of the decree by attachment and sale of the property reaches the judgment-debtor and the property is subsequently attached and sold in execution of the decree, the promisee under the contract for sale is not precluded by the execution proceedings, on ground of *res judicata* from asserting his rights against the auction-purchaser. (*Wallis, C. J. and Seshagiri Aiyar, J.*) CHAMIYAPPA THARAGAN *v.* M. S. RAMA IYER. **62 I. C. 121 = 44 Mad. 232 = 1921 M. W. N. 53 = A. I. R. 1921 Mad. 30 = 40 M. L. J. 65.**

———*Mortgage during attachment is not binding on auction-purchaser.*

A transfer during the pendency of the attachment would be void as against all claims enforceable under the attachment. It cannot be disputed that it is open to the attaching decree-holder to ignore the subsequent mortgage and to proceed to sell the whole property and not only the equity of redemption, and that if he did so, the auction-purchaser would get the whole property free from the incumbrance, the mortgage not creating any lien on the property sold. 29 Cal. 154 and 20 All. 421, Foll.

The fact that the mortgage deed in dispute was executed in order to pay off the money due to another attaching creditor will not help the mortgagee as against the auction-purchaser. (*Stuart and Sulaiman, JJ.*) ROSHAN LAL *v.* LALLU. **68 I. C. 790 = 44 All. 714 = 20 A. L. J. 722 = A. I. R. 1922 All. 443.**

———Bona fide *award is not private transfer.*

Attachment of judgment-debtor's property—*Bona fide* arbitration award and decree thereon transferring property to third person—Award is not a private transfer under S. 64. (*Oldfield and Ramesam, JJ.*) P. S. NARAYANA AYYAR *v.* BIJARI BIVI. **68 I. C. 673 = 45 Mad. 103 = 14 M. L. W. 524 = 1921 M. W. N. 808 = A. I. R. 1922 Mad. 221 = 41 M. L. J. 557.**

———*Attachment—Private transfer is voidable.*

A private transfer of property under attachment is not absolutely void but is void only as against claims enforceable under attachment. (*Leslie Jones and Wilberforce, JJ.*) NATHU MAL *v.* GANGA RAM. **63 I. C. 108 (Lah.).**

—S. 64—Rateable distribution.

———*Assets not held by Court.*

Where no assets are held by the Court the claim is not one falling under S. 73, it cannot therefore be a claim enforceable under attachment within the meaning of S. 64. (*Patkar and Baker, JJ.*) CHINDA *v.* CHHAGAN LAL. **30 Bom. L. R. 1488 = 115 I. C. 414 = A. I. R. 1928 Bom. 545.**

———*Mere attachment before judgment without decree—S. 73 does not apply.*

A person who has merely obtained an attachment before judgment cannot put up a claim for rateable distribution unless he has obtained a decree and made an application for execution. 34 Mad. 25 ; 12 Bom. 409 ; and 33 Cal. 639, Foll. (*Patkar and Baker, JJ.*) CHINDHA RUPLA PATIL *v.* CHHAGANLAL SHIVLAL SHETH. **115 I. C. 414 = 30 Bom. L. R. 1488 = A. I. R. 1928 Bom. 545.**

———The explanation to S. 64 is to be considered with regard to the state of the law at the time when it was enacted, and cannot be held to control the clear provisions of R. '89. (*Devadoss and Waller, JJ.*) PANDIRI VIRANNA *v.* G. SATTIRAJU. **100 I. C. 82= A. I. R. 1927 Mad. 445=52 M. L. J. 157.**

———*Transfer subsequent to attachment—Second attachment and sale thereon subsequent to transfer—Transfer not void.*

It is only when the property is sold in execution of the decree of a creditor who had attached it prior to the transfer that the transfer would be void not only against the claim of the attaching creditor, but against all claims of creditors who had applied to the Court for attachment or for rateable distribution before sale. 44 Cal. 662 (P. C.) and 41 Mad. 265 (F. B.), Ref.

The underlying object of the explanation to S. 64 is to secure to the prior attaching creditor full payment of his decretal debt before the private transferee could claim any interest in the attached property or its sale proceeds. Where the alienee fails to discharge the claim of the prior attaching creditor and permits him to proceed to the sale of such property, he must necessarily be postponed till the claims of all the creditors who are by virtue of S. 73 entitled to share rateably with the prior attaching creditor are satisfied. Similar equities do not, however, arise where not only the prior attaching creditor has failed to get his decree transferred to the Court having the custody of the attached property, but cannot even claim to share rateably with the subsequent execution creditor. (*Rupchand Bilaram, A. J. C.*) RAMPARTAB PANALAL *v.* NEWANDRAM TOLARAM. **20 S.L.R. 111=93 I.C. 366= A.I.R. 1926 Sind 177.**

———*Sale under attachment set aside—Subsequent mortgage—Attachment and petition under S. 73 subsequently—Mortgage is valid against second attachment.*

Two persons *A* and *B* had each a decree against the same judgment-debtor. *A* attached certain property and *B* applied for rateable distribution. The property was sold in execution under *A*'s decree but the sale was set aside. Then the judgment-debtor mortgaged the property. Subsequently the property was attached and sold in execution of *B*'s decree.

Held, that the decree-holder *B* who had applied for rateable distribution was not entitled to attack the mortgage and that as the auction purchaser's rights could not be referred to the prior attachment but only to the later one which was subsequent to the mortgage, the mortgage was binding on him. 44 Cal. 662 (P. C.) and 41 Mad. 265 (F.B.), Foll. (*Tudball and Rafiq, JJ.*) BHUPAL *v.* KUNDAN LAL. **60 I. C. 846= 43 All. 399=19 A. L. J. 221=A. I. R. 1921 All. 45.**

———*Prior alienation not affected.*

Claim for rateable distribution arising subsequent to private alienation of the property is not binding on alienee. (*Mukerjee, A. C. J. and Fletcher, J.*) BARENDRA NATH *v.* MARTIN & CO. **33 C. L. J. 7= 62 I.C. 167=A. I. R. 1921 Cal. 801.**

———The explanation to S. 64 gives no priority to claims under S. 73 apart from the attachment in connection with which they were made, and under which they are enforceable. 44 Cal. 662 (P. C.) and 41 Mad. 265 (F. B.) Foll. (*Daniels and Dalal, A.J.Cs.*) MD MUZAFAR ALI *v.* S. BHAGWATI PRASAD. **66 I. C. 642=8 O. L. J. 358= A. I. R. 1921 Oudh 176.**

—S. 64—Scope.

———*Sale by judgment-debtor after order of attachment but before completion under O. 21, R. 54 is not within S. 64.*

Attachment is not complete until prohibition and proclamation under O. 21, R. 54 is effected. It can hardly be said that immovable property is attached on the

mere order of attachment until that order is followed up in the manner laid down in O. 21, R. 54. Mere information by attaching creditor to a purchaser from judgment debtor by letter before the date of the sale and after order of attachment was passed but before the actual prohibition and proclamation does not suffice to complete and convert the order for attachment into a legal attachment. In the absence of a legal attachment S. 64 has no application. 42 Mad. 844 (F.B.). A. I. R. 1928 P. C. 139; A. I. R. 1923 Lah. 423, Rel. on. (*Madgavkar, J.*) GALAB BHAI LALLUBHAI *v.* KIKA JIVAN. **53 Bom. 851=31 Bom. L. R. 1111= A. I. R. 1929 Bom. 395.**

———S. 64 makes no distinction between attachment before or after judgment. 23 C. L. J. 115, Discussed. (*Cuming and Pearson, JJ.*) TARAK NATH MUKHERJEE *v.* SANAT KUMAR MUKHERJEE. **33 C. W. N. 805= A. I. R. 1929 Cal. 494.**

———*Transfer—Who can object.*

Under the provisions of S. 64 it is only the persons who have claims enforceable under the attachment, who can take objection that the transfer was void. (*Kulwant Sahay and Macpherson, JJ.*) HAZARIRAM *v.* KEDAR NATH MARWARI. **7 Pat. 726= 9 P. L. T. 822=113 I. C. 673= A. I. R. 1929 Pat. 1.**

———*Prohibition is absolute.*

A sale by consent or with the connivance of the decree-holder is not exempt from the operation of S. 64. (*Odgers, J.*) (PULIPATY) SUBBAYYA *v.* KANDI SUBBA REDDI. **38 M.L.T. 310= 101 I. C. 591=A. I. R. 1927 Mad. 648.**

———*Benefit might be waived.*

Decree-holder can agree to forego benefit of section—Transferee of decree with knowledge of such agreement is also bound by it. (*Krishnan and Venkatasubba Rao, JJ.*) GANGAYYA *v.* VENKATARAMAYYA. **72 I.C. 839=16 M. L. W. 988= 1923 M. W. N. 51=31 M. L. T. 423= A. I. R. 1923 Mad. 230=44 M. L. J. 80.**

———*Prohibition is co extensive with attachment.*

It cannot be urged that decree-holder's first attachment enures beyond the dismissal of his first application for execution. If the transfer is, therefore, not made during the continuance of the attachment under which decree-holder's claim was enforced by the sale, S. 64 has no application to the case. A. I. R. 1921 Nag. 57, Referred to. (*Hallifax, A. J. C.*) AMOLAK SAO *v.* MAHIPATRAO. **66 I.C. 850= A. I. R. 1922 Nag. 81.**

———*Prior transfer not affected.*

Person already holding mortgage is not bound by attachment or subsequent encumbrance created *pendente lite*—T. P. Act, S. 52—Mortgage. 29 All. 339 (P. C.) and 15 C. L. J. 391, Foll. (*Mookerjee, A. C. J. and Fletcher, J.*) BARENDRA NATH *v.* MARTIN & CO. **33 C. L. J. 7=62 I. C. 167= A. I. R. 1921 Cal. 801.**

—S. 64—Validity.

———*Prohibition—If affects* bona fide *transferees.*

Temporary injunction restraining alienation of property pending decision of suit does not render sale void against *bona fide* purchaser. A firm brought a suit for recovery of money against another firm, *K F*, through *K* and his son *F* and an *ad interim* injunction was issued against the defendants but the order was served on *K* alone restraining them from transferring the property pending decision of the suit. The suit was settled by compromise. But in the meantime *F* had transferred the property by mortgage with possession to *D*. The decree-holder proceeded to attach the house. The lower Court dismissed objections by *D*, holding the mortgage to be void under S. 64.

Held, that the order was erroneous both as a statement of fact and law. The injunction had been served on *K* and not on *F* who actually effected the mortgage which being in favour of *bona fide* mortgagee for consideration, was not void. A. I. R. 1925 Lah. 644, Foll. (*Tekchand, J.*) Darbari Ram *v.* Ghulam Farid Fazal Karim. **A. I. R. 1930 Lah. 858.**

———*Transfer to pay prior mortgage is valid.*

Mortgage, during attachment, to pay prior mortgage is binding on purchaser. (*Wallace and Srinivasa Ayyangar, JJ.*) Andi Thevan *v.* Nagayasami.
28 M. L. W. 213 = 111 I. C. 266 = A. I. R. 1928 Mad. 703 = 55 M. L. J. 369.

———*Release of attachment between execution and registration does not invalidate sale.*

A sale-deed of certain immovable property worth more than Rs. 100 was executed on the 4th of December 1912. The property was then under attachment. It was released from that attachment on the 10th of December. The sale-deed was registered on the 13th of February 1913.

Held, that the transfer was made on the date of registration because if the deed had not been registered there would have been no transfer at all. That for certain purposes, or even for all purposes, it took effect as from the date of execution has nothing to do with the date on which it was made. (*Hallifax, A. J. C.*) Sadhasheo Rao *v.* Manboth
103 I. C. 65 = A. I. R. 1927 Nag. 289.

———*Attachment subsequent to alienation.*

Alienation of property during attachment—Attachment ceasing under O. 21, R. 57—Property sold under second attachment—Alienation is not void as against purchaser under second attachment. 6 All. 33, Foll. (*King, J.*) Nageswar Tewari *v.* Rup Narain Shukul. **97 I. C. 547.**

———*Discharge of—Prior encumbrance does not validate sale.*

Where the plaintiff took a sale of the suit property after it had been attached by the defendant and then discharged the encumbrance on the property which was subsequently sold and purchased by the defendant.

Held, that inasmuch as the plaintiff's sale was after the attachment it is void as against the defendant's interests under S. 64, C.P. Code, but that the plaintiff was entitled to have a charge upon the property for the amount of incumbrance discharged by him. 29 Cal. 154, Appr. (*Phillips and Odgers, JJ.*) A. Prakasa Rao *v.* Yelamarti Ramanna. **24 M.L.W. 444 = 1926 M.W.N. 737 = 97 I. C. 932 = A.I.R. 1926 Mad. 1082 = 51 M.L.J. 358.**

———*Alienations are void and not voidable.*

S. 64, C. P. Code, says in effect that private alienation of property after attachment shall be void as against all claims enforceable under the attachment. Such alienations therefore are not voidable merely. (*Madhavan Nair, J.*) Srinivasa Aiyangar *v.* V. Ambalam. **85 I. C. 349 = A. I. R. 1925 Mad. 338 = 47 M.L.J. 913.**

———*Section refers to beneficial interests.*

What is aimed at in S. 64 is the transfer of a beneficial interest, delivery of property or any payment.

Where the purchaser of a property had paid the purchase money and taken delivery of possession before attachment issued against vendor, but the formal sale deed was executed and registered during attachment.

Held, that the attachment did not effect purchaser's right. (*Rutledge and Heald, JJ.*) Maung Pan Pwe *v.* Hamadanee. **92 I C. 777 = 4 Bur.L. J. 166 = A. I. R. 1925 Rang. 382.**

———*Valid termination of attachment—Subsequent transfer is not affected by a later attachment.*

If an attachment comes to an end validly, then upon a second attachment no Court can refuse to recognise an interest validly created in the meanwhile, but if an attachment is wrongly released and the right to attach is established subsequently according to law either by appeal or otherwise, the attachment will relate back to the time when it was made. (*Rankin and Page, JJ.*) Najimunnessa Bibi *v.* Nacharaddin Sardar.
83 I. C. 233 = 51 Cal. 548 = 39 C. L. J. 418 = A. I. R. 1924 Cal. 744.

———*Attachment released and property attached afresh.*

The words 'All claims enforceable under the attachment' in S. 64 do not mean 'All claims of the attaching creditor enforceable under that or any subsequent attachment under the same decree.' (*Dawson Miller, C.J. and Foster, J.*) Bhagwan Lal *v.* Rajendra Prasad. **77 I.C. 1 = 4 P. L. T. 409 = A. I. R. 1923 Pat. 564.**

———*Claim allowed—Attaching creditor's suit thereon—Suit decreed—Attachment revives.*

The release from attachment on the claim to the attached property being allowed is only provisional in character and is subject to the result of the suit which is allowed to be brought by the Code to contest the order allowing the claim and if the suit succeeds the attachment is revived from the beginning. Any payment made by a debtor of the debt attached under that order of release becomes void against the attaching decree-holder 23 Cal. 829, Followed. (*Krishnan and Odgers, JJ.*) Anthiya Hegade *v.* Manjaiva Shetty.
69 I.C. 642 = 45 Mad. 84 = 14 M.L.W. 371 = 1921 M.W.N. 642 = A.I.R. 1922 Mad. 176 = 41 M. L. J. 393.

———Ultra vires *attachment does not affect transfer.*

Where, before the mortgage of the plaintiff, the property was attached before judgment by defendant but the procedure laid down by R. 5 was not followed.

Held, the attachment order was *ultra vires* and the plaintiff was bound to succeed on his mortgage. (*Kotwal, A.J.C.*) Bansi Lal *v.* Sitaram.
68 I.C. 188 = A.I.R. 1922 Nag. 238.

———*Reviver of attachment—Interim transfer affected.*

Claim suit decreed and attachment raised—Decree reversed in appeal—Attachment is revived and renders transfer during interval invalid—T. P. Act, S. 52. (*Drake Brockman, J.C.*) Mt. Bhuria *v.* Bali Ram.
65 I.C. 220 = 4 N.L.J. 213 = A. I. R. 1922 Nag. 138.

—S. 64—Miscellaneous.

———Judgment-creditor has no charge on mortgage amount by reason of his attachment—More than one creditor attaching same mortgage amount—Court cannot give to one of them charge at expense of other creditors. 25 Cal. 179; A. I. R. 1914 P. C. 129 and A.I.R. 1923 Mad. 505, Rel. on. (*Anantakrishna Ayyar, J.*) Natesa *v.* Govindaswami Phathan.
A. I. R. 1930 Mad. 4.

———Debtor's property attached by one creditor—Another creditor cannot do an act so as to put debtor's property beyond the reach of attaching creditor. (*Kumaraswami Sastri and Madhavan Nair, JJ.*) Bazar Bank *v.* Union Bank. **39 M.L.T. 196 = 26 M.L.W. 209 = 105 I. C. 246 = A. I. R. 1927 Mad. 1147.**

———The assignee of a decree already subject of attachment has only a permissive right to execute the decree. 7 M.L.T. 83; 11 M.L.T. 144, and 13 M.L.T.

227; Ref.

And the assignment though valid as between the parties to it is subject to the right of creditors who may have already attached the decree. The intervention of the insolvency of assignor after assignment makes no difference. The Official Receiver will of course be at liberty to take any steps with regard to the vesting of or distribution of the proceeds of the decree if and when realized. (*Odgers and Curgenven, JJ.*) RAMAKRISHNA AIYAR *v.* MARI GOUNDAN. **105 I.C. 606= 1927 M.W.N. 680=A. I. R. 1927 Mad. 1025.**

———Where property is usufructuarily mortgaged during pendency of an attachment and it is subsequently sold, the purchaser must sue for possession within 12 years from the date when he took symbolical possession. Nor could he ever sue for redemption. (*Devadoss and Waller, JJ.*) SRINIVASA AIYANGAR *v.* VELLAYAN. **24 M.L.W. 263=97 I. C. 718= A. I. R. 1926 Mad. 966=51 M.L.J. 143.**

—S. 65—Agreement to convey property.

———Property vests in buyer from time the property is sold—Suit based on agreement to convey property to another after such vesting does not come under S. 66 (*Patkar and Wild, JJ.*) RAMACHANDRA ANANT *v.* LAKSHMAN SAMBHARAO. **31 Bom. L.R. 1271= A. I. R. 1930 Bom. 81.**

—S. 65—Breach of warranty.

———*Sale in execution—Court is not responsible for breach of warranty.*

All that passes at the Court auction is the right, title and interest of the judgment-debtor, *i.e.*, the purchaser is placed exactly into the shoes of the judgment-debtor as regards the land sold, and he has no remedy against the Court for breach of warranty. (*Baguley, J.*) MA HAWA BI *v.* SEIN KO. **5 Rang. 803= 109 I. C. 151=A.I.R. 1928 Rang. 67.**

—S. 65—Crops go with land.

———The sale of a tenure would apparently pass all that was growing upon the land unless the growing crops were excepted by the notification of sale or else a custom was proved that the outgoing *ryot* should have the crops subject to a payment for use and occupation of the land while they remained on the land. 4 Cal. 814, Foll. (*Ross, J.*) DHOBI ROY *v.* MAHADEO SINGH, **73 I. C. 451=4 P.L.T. 318=1 Pat. L. R. 269= A. I. R. 1923 Pat. 355.**

—S. 65—Effect.

———After sale judgment-debtor has no interest in property. (*Jwala Prasad and Adami, JJ.*) HARNANDAN MARWARI *v.* PRAN NATH ROY. **61 I.C. 922=2 P.L.T. 240=1921 P.H.C.C. 205= A.I.R. 1921 Pat. 409.**

—S. 65—Gift before confirmation.

———A gift by auction-purchaser made before the confirmation of sale is operative to pass-title, to donee if the donor, who has undisputed title in the property though it is not actually in his possession, authorizes the donee to take possession: 15 Cal. 684, (P.C.), Foll. (*Stuart, C. J. and Raza, J.*) ABID HUSSAIN *v.* MT. MUNNO BIBI. **2 Luck. 496=1 L.C. 50= 102 I.C. 72=A.I.R. 1927 Oudh 261.**

—S. 65—Liability of purchasing decree-holder.

———*Sale conveys good title in equity from the date of sale.*

Plaintiff mortgagee purchasing mortgaged property—Revenue paid by him—Subsequent setting aside of the sale—Property again put for sale and purchased by a third party—Plaintiff suing mortgagor under S. 69, Contract Act, for recovery of money paid by him—Plaintiff cannot recover the money as defendant was not bound by law to pay after the purchase of the property by the plaintiff as title in equity passes to the

purchaser and the judgment debtor has a bare right to have the sale set aside till confirmed. (*Das and Fazl Ali, JJ.*) HABIBUL RAHMAN *v.* SHEONANDAN SINGH. **9 P.L.T. 795=111 I. C. 243=A.I R. 1928 Pat. 552.**

—S. 65—Permission to bid to decree-holder.

———*Sale to highest bidder not affected.*

Decree-holder allowed to bid but on conditions—His failure to fulfil the conditions does not affect the sale in favour of highest bidder, (*Adami, J.*) JHALDHARI SINGH *v.* PERSHAD BHARTI. **1926 P.H C.C. 138=95 I. C. 441= A. I. R. 1926 Pat. 335.**

—S. 65—Property held by widow.

———Property held by Hindu widow, sold in execution of simple money-decree against her—Auction-purchaser obtains only widow's interest. (*Sulaiman and Boys, JJ.*) MOTI SHAH *v.* CHANDHRAP SINGH. **48 All. 637=24 A. L. J. 873=96 I. C. 595= A. I. R. 1926 All. 715.**

—S. 65—Property with charge for maintenance.

———Plaintiff obtaining a decree for maintenance with a charge made on certain properties in a suit *in forma pauperis*—Government selling properties for costs—Sale is of equity of redemption subject to plaintiff's charge. (*Cuming and B. B. Ghose, JJ.*) GADADHAR MANDAL *v.* MANAK DASSI. **94 I. C. 391=A. I. R. 1926 Cal. 859.**

—S. 65—Purchase of property already leased.

———Purchase of land at an auction-sale—Land already leased at the time of sale—Purchaser is entitled to rent due from the lessee. (*Baguley, J.*) MA HAWA BI *v.* SEIN KHO. **5 Rang. 803=109 I.C. 151=A. I. R. 1928 Rang. 67.**

—S. 65—Purchaser's rights against invalid mortgage.

———The auction-purchaser in a Court-sale of the judgment-debtor's land possessed by a mortgagee under an invalid mortgage obtains good title to it and the mortgagee can get equitable relief only by way of repayment of his amount borrowed by the judgment-debtor. A.I.R. 1925 Rang. 291 (F.B.), Foll. (*Maung Ba, J.*) U PO HLA *v.* U PO THA. **6 Bur. L.J. 230= 106 I. C. 861=A. I. R. 1927 Rang. 332.**

—S. 65—Revenue sale.

———Rights of purchaser at revenue and voluntary sale are different. (*Walmsley and M.N. Mukerji, JJ.*) JATENDRANATH ROY CHOUDHRY *v.* NARAYAN DAS KHETRY. **52 Cal. 862=90 I. C. 901=A.I.R. 1926 Cal. 97.**

—S. 65—Rights and liabilities, commencement of.

———Property sold vests in the purchaser from the date of sale—Auction purchaser is entitled to profits and responsible for loss from the date of the sale to him. Under the old Code the position was precisely the reverse. A. I. R. 1923 Mad. 635, Foll. 40 Cal. 89, Foll. (*Findlay, O.J.C.*) NIZAMUDDIN *v.* JUMMA. **88 I. C. 693=A.I.R. 1926 Nag. 17.**

—S. 65.—Rights of purchasing decree-holder.

———*Purchase between the preliminary and final mortgage decree.*

In a case of a sale of some of the mortgaged properties by a third person in execution of his money-decree against a mortgagor, between the passing of the decree *nisi* and absolute in a mortgage suit it is not a question of absolute right but rather a question of justice or injustice to be determined in view of the fact that on the one hand the mortgagee is entitled to have his due satisfied out of the mortgaged properties and on the other that the purchaser may have bought without notice of the mortgage and paid not merely for the equity of redemption but for an absolute interest in the property.

C. P. CODE (1908), S. 65—Rights of purchasing decree-holder.

The mortgagee is not the master of the situation. On the other hand it cannot be said that the Court has got an absolute discretion in the matter. What has got to be considered is the question as to the respective equities which arise in favour of the parties. So far as the mortgagee is concerned, his rights extend only to the realisation of his dues, and if he can satisfy the Court that by the sale of the properties in the order which the Court proposes to lay down for the sale he would be prejudiced in the enforcement of his rights, the Court will have to accede to the request which the mortgagee will make. On the other hand, if the Court finds that the purchase by the stranger was made *bona fide* and although at a Court sale but without notice of the mortgagee and on payment not merely of the value of the equity of redemption but the value of the absolute interest in properties then the Court will have to make such provisions as regards the order of sale as would work no injustice to the purchaser. If the purchase by the stranger was a collusive one or if he paid only for the equity of redemption, no such equity will arise in his favour. (Case-law considered.) (*Mukerji and Graham, JJ.*) NOBIN CHANDRA *v.* DEBENDRA SEN.

45 C.L.J. 255 = 31 C. W. N. 521 = 101 I.C. 124 = A. I. R. 1927 Cal. 522.

—S. 65—Sale certificate.

———Under S. 65 on confirmation of the sale the property vests in the auction-purchaser from date of the sale. Issue of sale certificate is not necessary for title to vest. 19 All. 188, Foll. (*Sulaiman, J.*) BAIJ NATH *v.* BANWARI LAL. **95 I. C. 965**

—S. 65—Sale of covenant for title.

———*Whether implied covenant for title passes at a Court sale.*

Jackson, J.—Supposing the right and interest of judgment-debtor, which is sold by auction of the Court should happen to include an interest which the transfer was capable of passing, then that interest could be purchased at the Court sale along with the property to which it was attached, and if such interest were a covenant running with the land, as for instance, the covenant for title provided in S. 55 (2), that interest could be transferred at a Court sale.

Reilly, J.—(*Quære*) Whether in India the benefit of an implied covenant for title arising only out of the provisions of S. 55 (2), T. P. Act, could pass by sale. (*Jackson and Reilly, JJ.*) NATESA VANNIYAN *v.* GOPALASWAMI MUDALIAR. **110 I.C. 830 = 51 Mad. 688 = 1928 M. W. N. 419 = 28 M. L. W. 346 = A.I.R. 1928 Mad. 894 = 55 M. L. J. 151.**

—S. 65— Sale, passes only rights of judgment-debtor.

———Mortgagor having only charge on property mortgaged, mortgaging as owner—Purchaser in execution of mortgage-decree against him was disallowed to recover possession—Purchaser can claim a right to the charge in favour of the mortgagor, because that was all the right, title and interest of the judgment-debtor. (*B. B. Ghose and Panton, JJ.*) RAJAH JANKINATH ROY *v.* KHWAJA HABIBULLA. **100 I. C. 413 = 45 C. L. J. 151 = A.I.R. 1927 Cal. 359.**

—S. 65—Sale subject to mortgage.

———Where a person purchases certain property in execution of a money-decree expressly subject to a mortgage on it and admits the existence of the mortgage it is not subsequently open to him to challenge the mortgage in a suit, on the mortgage, by the mortgagee ; A. I. R. 1923 Nag. 282 and 47 Cal. 446, Rel. on. (*Findlay, O. J.C.*) GOVINDRAO *v.* HIRCHAND.

C. P. CODE (1908), S. 65—Two sales of property.

95 I. C. 563 = A. I. R. 1926 Nag. 446.

—S. 65—Sale under old law.

———An auction sale, at which a benamidar purchased for the plaintiff, took place on 8th August, 1908 when the Code of 1882 was in force. Under S. 316 of that Code the property purchased in execution of the decree vested in the purchaser on the confirmation of the sale; but the sale was not confirmed until 6th January, 1909 when the Code of 1882 had ceased to operate and had been superseded by the Code of 1908. In a subsequent suit against transferees from the benamidar it was argued that, under S. 65 of the new Code, on the confirmation of the sale the title to the property is to vest back with retrospective effect from the date of the sale and by the confirmation of the sale under S. 65 of the new Code the plaintiff's title to the property accrued on 8th August, 1908 and, therefore, S. 66 of the Code had no application but S. 317 of the old Code would apply.

Held, that as on 1st January this sale had not become absolute, the plaintff's right had not accrued and as the plaintiff's right did not accrue on 1st January he was clearly bound by S. 66 of the new Code and if he was bound by S. 66 the plaintiff cannot maintain the suit : 47 Cal. 1108 and A. I. R. 1923 Cal. 85, Dist. (*Duval and Mallik, JJ.*) FAZLUR RAHMAN *v.* SARDAR ALI. **32 C. W. N. 112 = 107 I. C. 67 = A. I. R. 1928 Cal. 338.**

—S. 65—Sale when void.

———Court has no jurisdiction to sell property of person against whom decree is not made—Sale, if takes place, is *ultra vires*. (*Anantakrishna Ayyar, J.*) CHENGALRAYA *v.* KOLLAPURI. **123 I. C. 24 = 1929 M. W. N. 811 = A. I. R. 1930 Mad. 12.**

———*For appropriate reliefs S. 47 applies in void sales.*

Where notice required by O. 21, R. 22 is not given but the sale or excess sale,takes place such a sale is void. Being void the sale need not be set aside and as such sale need not be set aside the period of limitation (comparatively shorter) prescribed by Art. 166 would not apply, so that in cases where sales are held to be void, appropriate relief could be obtained by parties to the suit by proceedings under S. 47, the period of limitation being not the period prescribed for the setting aside of sales but general period of three years prescribed by Art. 181 : A. I. R. 1924 Mad. 431 (F. B.) ; Foll. A. I. R. 1924 Mad. 859, Expl. and Dist. : A. I. R. 1926 Pat. 397, Expl. ; 43 Mad. 313, Ref. (*Anantakrishna Ayyar, J.*) CHENGALRAYA *v.* KOLLAPURI. **123 I. C. 24 = 1929 M. W. N. 811 = A. I. R. 1930 Mad. 12.**

—S. 65—Structures on land.

———Structures erected by defaulting proprietor do not pass to purchaser. *Prima facie* and in the absence of anything else, it is the land or the share in the land which passes at the sale and not the structures or buildings on the land. (*Walmsley and M. N. Mukerji, JJ.*) JATINDRANATH ROY CHOUDHURY *v.* NARAYAN DAS KHETRY. **52 Cal. 862 = 90 I. C. 901 = A. I. R. 1926 Cal. 97.**

—S. 65—Two sales of property.

———*Property sold in execution of two decrees—Purchaser at the unconfirmed sale gets no title to property.*

Certain property was attached in execution of a decree and was sold on 28th February, 1917. The same property was attached and sold by another Court in execution of another decree on 3rd March 1917 and was purchased by the plaintiff. The first sale was never confirmed. The judgment-debtor applied to set it aside under O. 21, R. 89, and ultimately it was decided by compromise that if the judgment-debtor deposited a certain amount by a certain time the sale should be set aside. The deposit was accordingly made by the judgment-debtor on 11th September 1920, and the sale was set aside and the proceedings in the first executing Court thus terminated. The sale of the second Court was duly confirmed. The judgment-debtor had obtained from defendants the necessary money to set aside the sale by the first Court. In consideration thereof he sold the property to them on 21st September, 1920 with certain other properties, and put the purchaser in possession thereof. The plaintiff then brought a suit to recover possession.

Held, that when the first executing Court sold the property the purchaser merely obtained a right to get the sale confirmed, and it would not be until he obtained the sale certificate, that the vesting of the property would date back to the date of the sale. When the second executing Court sold the same property, the purchaser also obtained an inchoate right which would fail to materialize if the previous sale was confirmed. When the previous sale was set aside then the right of the purchaser from the second executing Court which had been in the meanwhile in suspense, revived, and if the sale was confirmed, then his title would date back to the date of the sale. There was nothing to prevent the judgment-debtor objecting to the second sale before the certificate was issued. Therefore the plaintiff was entitled to succeed. (*Macleod, C. J. and Coyajee, J.*) VISHNU SHANKAR *v.* YUSUFF NURMAHAMAD.

88 I. C. 962 = 27 Bom. L. R. 963 = A. I. R. 1925 Bom. 483.

—S. 65—What passes.

———What passes to a purchaser at Court sale is the right, title and interest of the judgment-debtor, whatever that interest may be, and he buys the property with all risks and defects in the judgment-debtor's title, except where it is proved that the judgment-debtor had no saleable interest at all : 3 Cal. 806 (P. C.) ; 23 All. 355 ; 17 Mad. 228 and 6 Bom. 193, Foll. ; A. I. R. 1922 Lah. 277 ; 29 Bom. 435 ; 10 All. 166 and A. I.R. 1922 Lah. 299, Dist. (*Hilton, J.*) SHADI RAM *v.* AMIN CHAND. **A. I. R. 1930 Lah. 937 (e).**

—S. 66—Agreement to convey.

———Agreement to convey property made after property is purchased—S. 66 does not debar suit for specific performance upon such agreement. The suit in such a case is not brought "on the ground that the purchase was made on behalf of the plaintiff" within the above-mentioned sub-section : 47 I. A. 108 and 42 Mad. 15 (F.B.) Rel. on. (*Patkar and Wild, JJ.*) RAMCHANDRA ANANT *v.* LAXAMAN SAMBHARAO.

31 Bom. L. R. 1271 = A. I. R. 1930 Bom. 81 (b).

—S. 66—Applicability.

———S. 66 only applies to a person who attempts to enforce his secret title as against a sale certificate holder. (*Walmsley and Suhrawardy, JJ.*) SARADINU CHAKRAVARTHI *v.* GOSTA BEHARI PRAMANIK.

75 I. C. 196 = 27 C. W. N. 208 = 37 C. L. J. 403 = A. I. R. 1923 Cal. 302.

—S. 66—Auction-purchaser—Necessary party.

———Application to set aside sale—Auction-purchaser is a necessary party—Benami character of sale is no excuse. (*Madgavkar and Patkar, JJ.*) RUDRAPPA *v.* BASHETTAPPA. **52 Bom. 290 = 30 Bom. L. R. 465 = 110 I. C. 710 = A. I. R. 1928 Bom. 189.**

—S. 66—Benami purchase.

———A suit based on dispossession after an adverse possession of 12 years is clearly not a suit "on the ground that the purchase was made on behalf of

the plaintiff or on behalf of some one through whom the plaintiff claims" within the meaning of S. 66 and does not become so merely because the plaintiff as part of an alternative cause of action sets up and proves that the purchases were, in fact, benami : 14. M. I. A. 496 (P. C.) and 2 I. A. 154 (P. C.), Rel. on ; 43 All. 416 = A. I. R. 1921 All. 165 = 62 I. C. 725, Reversed. (*Sir John Wallis.*) ABDUL JALIL KHAN *v.* OBAID ULLAH KHAN. **120 I. C. 651 = 33 C. W. N. 1061 = 6 O. W. N. 637 = 30 M. L. W. 395 = 1929 A. L. J. 930 = 1929 M. W. N. 734 = 56 I. A. 330 = 31 Bom. L. R. 1393 = 50 C. L. J. 357 = 51 All. 675 = A. I. R. 1929 P. C. 228 = 57 M. L. J. 177.**

———A suit which the plaintiff alleges that he and the defendant were divided among themselves and also from their father for a long term of years, that property was purchased in court-auction in the name of the defendant who was his brother by their father and that therefore the plaintiff is entitled to one half of the properties falls within the purview of S. 66 of C. P. Code. (*Dalal, J.*) PARMESHRI DAS *v.* RAM SAHAI. **118 I. C. 713 (1).**

———*Cannot plead his own fraud in defence.*

Defendant sold part of her husband's estate, purchased a house in plaintiff's name out of the proceeds and successfully deluded the reversioner into believing that the proceeds had been devoted to the payment of debts binding on the estate. Defendant was in possession of the house. In a suit by plaintiff for possession,

Held, that it was not open to defendant to show that it was she that provided the funds for the purchase, by means of a fraud on the reversioner, to which she and plaintiff were parties on the principle that that party fails who *first* has to allege the fraud in which he participated. 32 M. L. J. 484 and 31 Bom. 405, Foll. 1923 Cal. 90, Not Foll. (*Waller, J.*) PACHYAMMAL *v.* DEVANIAMMAL. **91 I. C. 776 = 22 M. L. W. 313 = A. I. R. 1925 Mad. 1016.**

———*Section applies to suits between the* benami *and the beneficial owners.*

There is nothing to prevent a member of a joint family from recovering the property which has been bought out of the joint family money in the name of some person *benami* at a Court auction by the managing member of the family, he himself being the decree-holder. Under the new section the penal provision is confined to purchase on behalf of a plaintiff or persons through whom he claims whereas before, it was wide enough to cover purchases on behalf of any other person. A managing member buying property using family funds for that purpose cannot be properly said, within the meaning of that section, to buy on behalf of other members of the family ; he is doing some thing wholly wrong. There is no distinction between the case of a co-parcener and the case of a partner. Where partnership money is used for a *benami* transaction of that kind it would follow, if the interpretation suggested above is right, that the innocent partner would lose his property; that is not the meaning of the section. The proposition that the property is held on behalf of the whole family by the *benamidar* where the property stood in the name of a member of the family is equally applicable when the nominee is a stranger, provided that members of the family are merely seeking to enforce their claim to what they allege to be the undivided family property. (*Schwabe, C. J. and Coutts Trotter, J.*) A. NATARAJA MUDALIAR *v.* D. P. RAMASWAMI MUDALIAR.

73 I. C. 478 = 45 Mad. 856 = 16 M. L. W. 358 = 1922 M. W. N. 584 =

A. I. R. 1922 Mad. 481 = 43 M. L. J. 363.

———*Benami—Certified purchaser—Possession with real purchase.*

S. 66 of the C. P. Code should not be restricted to benami purchases made by or on behalf of judgment-debtors. 12 Bom. L. R. 317 ; 22 C. L. J. 408 Ref. The failure of the alleged benamidar of the certified purchaser to assert his rights against the real purchaser during the latter's possession after the auction-purchase cannot be regarded as a waiver or transfer of the right. 11 Mad. 234 Not Foll. 23 All. 175, Foll. (*Teunon and Newbould, JJ.*) HARISH CHANDRA GUHA *v.* NRIPENDRA KUMAR CHUCKRAVARTI. **59 I. C. 719 = 24 C. W. N. 1024.**

—S. 66— Benami purchase—What is.

———Where property is purchased by a joint Hindu family in the name of a female member thereof who has right to maintenance out of joint family property, she cannot be said to have such an interest in the purchase as would take her case out of S. 66. 12 Bom. L.R. 317 and 29 All. 557, Foll. (*Tudball and Sulaiman, JJ.*) BAIJNATH DAS *v.* BISHEN DEVI. **63 I. C. 676 = 43 All. 711 = 19 A.L.J. 787 = A.I.R. 1921 All. 185.**

—S. 66—Benami title.

———*Section discourages benami sales but does not render them illegal.*

S. 66 must be construed very strictly and not extended beyond its express terms. S. 66 prohibits suits against a certified purchaser to assert a benami title against him but does not make benami purchases illegal. The object of the stringent provisions of the section is to discourage benami sales but not to render such purchases illegal. 14 M.I.A. 496 ; 2 I. A. 154; and A. I. R. 1915 P.C. 81, Rel. on. 11 Mad. 213, Dist. (*Patkar and Wild, JJ.*) RAMCHANDRA ANANT *v.* LAXAMAN SAMBHARAO. **31 Bom. L. R. 1271 = A. I. R. 1930 Bom. 81.**

—S. 66—Certified purchaser.

———Where the defendant's name is entered as a certified purchaser, the plaintiff cannot sue on the ground that the defendant was a benamidar. (*Dalal, J.*) PARMESHRI DAS *v.* RAM SAHAI. **118 I. C. 713.**

—S. 66—Effect on title.

———The provisions of the section were designed to create some check on the practice of making what are called benami purchases at execution sales for the benefit of judgment-debtors and in no way affects the title of persons otherwise beneficially interested in the purchases. L.R. 42 I.A. 177 Foll. (*Wazir Hasan and Neave, A. J. Cs.*) JAI INDAR BAHADUR SINGH *v.* SHEO INDAR BAHADUR SINGH. **10 O. L. J. 481 = 78 I. C. 393 = A. I. R. 1924 Oudh 218.**

—S. 66—Joint purchasers.

———*Is not benami.*

A and *B* jointly purchasing property at auction-sale with joint fund—Sale certificate issued in the name of *A*—*B* can sue claiming to be owner of half the property, as such a purchase is not benami. (*Macleod, C. J. and Coyajee, J.*) VISHVANATH *v.* PANDHARINATH. **50 Bom. 600 = 28 Bom. L. R. 997 = 97 I. C. 688 = A. I. R. 1926 Bom. 525.**

—S. 66—No contest by purchaser.

———*Section does not apply.*

The section is not a bar when the certified purchaser does not contest plaintiff's claim. (*Neave, J.*) JAMBU DAS *v.* JAI PRAKASH. **5 L. R. A. Civ. 671 = 82 I. C. 344 = A. I. R. 1925 All. 47.**

—S. 66—No retrospective effect.

———The stringent rule in favour of the certified purchaser enunciated in the Code of 1908 has no retrospective operation and cannot be utilised by an execution purchaser whose title was perfected when S. 317 of the Code of 1882 was in force. (1920) 47 Cal. 1108, Foll. (*Mookerjee and Chotzner, JJ.*) PROMODE KUMAR ROY *v.* MADAN MOHAN SAHA. **70 I. C. 555 = 36 C. L. J. 396 = 27 C. W. N. 305 = A. I. R. 1923 Cal. 228.**

—S. 66—Object of section.

———*Does not preclude evidence of* benami.

S. 66 of the C. P. Code, makes a suit founded on the ground mentioned therein not maintainable. It does not go further : it has not the effect of excluding evidence as to the auction-purchaser being a *benami* for another wherever such evidence is relevant. Where the suit is founded on title by prescription, in determining that title, the fact of the purchaser being *benami* for another may be taken into consideration. (*Wazir Hasan, J. C. and Neave, A.J.C.*) MT. MAHMUDUNNISSA *v.* SYED ZAHID RAZA. **84 I. C. 98 = 11 O. L. J. 466 = A. I. R. 1925 Oudh 20.**

—S. 66—Omissions in proclamation.

———*Of revenue assessed is fatal.*

Under S. 66 it is plain that the proclamation should contain the statement as to the revenue assessed upon the estate, that it is a material matter and that its omission is the omission of a matter which would enable the judgment-debtor to base an application for setting aside the sale if he could comply with the other conditions that the Code provides. (*Lord Buckmaster.*) BALIRAM *v.* NARSINGDAS. **75 I. C. 546 = 18 M. L. W. 137 = 28 C. W.N. 593 = 33 M. L. T. 275 = 1923 M. W. N. 714 = 4 L.R. P.C. 197 = A. I. R. 1923 P.C. 93 = 45 M. L. J. 403.**

—S. 66—Sale by receiver.

———A sale by a Receiver is not a sale by the Court but a sale under the Court and in such cases the Court does not grant a sale certificate nor does it confirm the sale. S. 66, C. P. Code, does not apply to such sales. 16 C.W.N. 394, Foll. (*Kanhaiyalal and Lindsay, JJ.*) NARAINDAS *v.* RAMCHANDER. **48 All. 209 = 24 A. L. J. 26 = 6 L. R. A. Civ 610 = 90 I. C. 116 = A. I. R. 1926 All. 124.**

—S. 66—Suit for confirmation of possession.

———S. 66 applies equally to a suit for confirmation of possession as well as to a suit to recover possession from the benamidar. 23 Cal. 699, Diss. (*Cuming and Chakravarti, JJ.*) UMASASI DEBI *v.* AKRUR CHANDRA. **53 Cal. 297 = 30 C. W. N. 160 = 92 I.C. 984 = A.I.R. 1926 Cal. 542.**

—S. 66—Suit on contract to sell.

———An agreement to sell to plaintiff certain properties which were to be purchased by the defendant in a certain Court-auction, is a valid and enforceable agreement, whether the agreement was before or after the auction-sale. 43 Mad. 643 and 42 Mad. 515 Ref. to. (*Batten, J.C.*) ABDULLA KHAN *v.* JALAM SINGH. **68 I.C. 559 = A. I. R. 1923 Nag. 11.**

—S. 66—Suit on prior contract.

———*Suit on a prior contract to convey property to plaintiff is not barred.*

S. 66 bars an enquiry on the question whether the certified purchaser is a real or a nominal purchaser, and provides that the certified purchaser shall be conclusively deemed to be the real purchaser and shall not be ousted on the ground that his purchase was really made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims. But inasmuch as the provisions of that section bar the equitable jurisdiction of the Court, the section must be strictly construed and not extended beyond its express terms, 24 C. W. N. 51

C. P. CODE, (1908), S. 66—Suit when barred.

Foll. That section does not bar a suit by a plaintiff against a defendant, not on the ground that the purchase was made on behalf of the plaintiff but on the ground that there was a prior contract by virtue of which the defendant is bound to convey the property to the plaintiff. (*Das, J.*) BIKRAM AHIR *v.* RAJ PATI LAL.

62 I. C. 720 = 1921 P. H. C. C. 21 = A. I. R. 1921 Pat. 39 (2).

—S. 66—Suit when barred.

———*Real owner's suit against the benamidar is barred.*

Head of the family making purchase on its behalf but allowing a third person to be entered in the sale-certificate—Plaintiff a member of the family suing to recover possession of property — Plaintiff's suit is barred. A.I.R. 1921 All. 185, Foll.; 12 Beng. L. R. 317; 35 All. 138; A. I. R. 1922 Mad. 481: and A. I. R. 1915 P.C. 81, Dist. (*Mukerji and Ashworth, JJ.*) RAM RUP TELI *v.* KHADERU TELI. **50 All. 512 = 26 A. L. J. 245 = 108 I. C. 130 = A. I. R. 1928 All. 619.**

———S. 66 of the C.P. Code will stand in the way of a decree-holder suing for possession of property from a person who purchases the property in his own name disregarding the instructions of the decree-holder to bid at the sale for him after obtaining the Court's permission, because the purchase in such case will be *benami* for the decree-holder. Case-law discussed. (*Baker, J. C.*) MAHARAJ BAHADUR *v.* NAWAB KISHORE. **82 I.C. 541 = A. I. R. 1925 Nag. 41.**

———*Co-mortgagees—Purchase by one of them in his own name.*

Where out of two joint mortgagees, one alone sued, making the other *pro forma* defendant, and obtained a decree in execution of which he purchased the property in his own name and the question arose whether the other joint mortgagee can claim a share of the property purchased.

Held, that the suit was not maintainable. 29 All. 557 and 37 All. 545 (P.C.), Dist. (*Gokul Prasad, J.*) MAKHAN LAL *v.* BADRI PRASAD.

A. I. R. 1923 All. 405.

———S. 317 (1882)—Auction-purchaser transferring to another in 1900—Suit to question auction sale as benami filed in 1916—Suit is barred by S. 66 of the Code of 1908 even against transferees from certified purchaser—S. 317 of Code of 1882 does not apply. The essential difference in the drafting of S. 66 shows that the Legislature did not approve of the narrow construction of S. 317 given to it by decisions of which (21 All. 196) is an example. The section is intended to make it clear that the legislature, disapproving of benami transactions, meant to prevent actions against certified purchasers and their transferees. (*Mears, C.J. and Knox, J.*) ABDUL JALILKHAN *v.* OBEDULLAH KHAN. **62 I. C. 725 = 43 All. 416 = 19 A.L.J. 227 = A. I. R. 1921 All. 165.**

—S. 66—Suit when maintainable.

———A real owner can seek for a declaration of his real title against one who does not claim under a certificated purchaser. (*Cuming and Mukerji, JJ.*) ABINASH CHANDRA *v.* PRATUL CHANDRA.

55 Cal. 1070 = 32 C.W.N. 759 = 108 I.C. 585 = A.I.R. 1928 Cal. 448.

—S. 67—(As amended by Act I of 1914)—Commissioner's sanction.

———Where the Local Government had not issued any notification in accordance with S. 3 of Act I of 1914, that the special rules as to sale of agricultural land framed under S. 327 of the Code of 1882 was in force,

C. P. CODE, (1908), S. 66—Suit against sale by Collector.

Held, that the sanction of the Commissioner was not necessary as a condition precedent to the sale of agricultural land. 4 P.R. 1913 (F.B.), Dist. 89 P.R. 1913, Rel. on. (*Scott Smith, J.*) FAKIR MAHOMED *v.* AMIR CHAND. **66 I.C. 893 = 3 L.L.J. 5 = A. I. R. 1921 Lah. 223 (2).**

—S. 67—Publication of sale.

———Publication of sale at the Collector's Office is requisite under O. 21, R. 67 read with R. 54 (2) not only in the case of ryotwari land but also in the case of enfranchised shrotriem village. (*Oldfield and Devadoss, JJ.*) P. GNANAMMA *v.* K. KRISHNA REDDI.

75 I.C. 369 = 46 Mad. 736 = 1923 M.W.N. 463 = A. I. R. 1924 Mad. 217 = 45 M. L. J. 263.

—S. 68—Agricultural land.

———Agricultural land cannot be attached and decree cannot be transferred to Collector for realizing decretal amount even otherwise than by sale. 42 All. 142 Ref. (*Kanhaiya Lal and Boys, JJ.*) JANGI LAL *v.* MATABADAL SINGH. **48 All. 392 = 24 A.L.J. 397 = 93 I.C. 1020 = A. I. R. 1926 All. 339.**

—Ss. 68 to 71—Applicability.

———Sections 68 to 71, C. P. Code, have no application in the Punjab as no notification by the Local Government has been issued as is contemplated under S. 68. (*Jai Lal, J.*) CHANAN RAM *v.* DEVI DAYAL.

110 I. C. 173 = A.I.R. 1928 Lah. 475.

—S. 68—Interference with orders of Collector.

———Once the execution of the decree has been transferred to a revenue court, the civil court cannot interfere with the orders passed by the Collector or rectify mistakes committed by him. A.I.R. 1924 All. 704, Foll.; A.I.R. 1927 All. 203, Rel. on, (*Sulaiman, Ag. C.J. and Kendall, J.*) KRISHNA DAS *v.* RAM GOPAL SINGH. **50 All. 827 = 26 A.L.J. 769 = 115 I.C. 125 = A.I.R. 1928 All. 558.**

—S. 68—Powers of Civil Court after transfer.

———Where once the case has been transferred to the Collector, the civil court has no power to pass any order in that case. In spite of the sale having taken place, it is for the Collector to decide whether he would re-sell the property or not in order to realise the balance of the purchase money. Under rules framed by Local Government (Rule No. 26), it is entirely in the discretion of the Collector to decide whether he would or would not realise the balance of the purchase money by re-sale. (*Mukerji and Daniels, JJ.*) B. SHAHZAD SINGH *v.* B. HANUMAN RAI. **83 I.C. 766 = 46 All. 562 = 22 A.L.J. 452 = 5 L.R.A. Civ. 350 = A.I.R. 1924 All. 704.**

—S. 68—Powers of Collector.

———A Collector, executing a decree under S. 9, C.P. Tenancy Act, and S. 68, C.P. Code, is a judge of a civil court to which the decree has been transferred for execution, but his powers are limited to those which the court from which the decree was transferred to him could exercise in the execution of the decree only. He has no power to enquire into objections to attachment or applications for rateable distribution or matters of that kind. (*Halifax, A.J.C.*) NANHELAL *v.* JAMNADAS.

109 I. C. 381 = A I.R. 1928 Nag. 297 (2).

—S. 68—Suit against sale by Collector.

———*Rules made by Local Government, U.P. Rules 30, 31, 32 (3)—Suit to set aside sale confirmed by Collector does not lie.*

At an auction-sale, *B.* and *T.* bid for the property, *T.* asserting himself, to be a co-sharer capped each bid as it was made with a bid of a correspondingly equal sum intending to exercise the preferential right which is accorded to a co-sharer by C.P. Code, O. 21, R. 88. In due course the matter came before the Collector for the confirmation of sale. Notices were served on both *B.* and *T.*, but *T*, remained absent and did not substantiate his allegation about co-sharership. The sale was therefore confirmed in favour of *B. T.*, thereafter sued *B.* for a declaration that by virtue of right of pre-emption *T.* was the owner of shares and also, that the sale certificate in favour of *B.* was ineffectual against *T.* and for possession.

Held, that, as *T.* was the person against whom the order of confirmation of sale was made, rule 32, clause 3, operates as a bar to the suit. (*Mears, C.J., Banerji and Rafique, JJ.*) BADRI SINGH *v.* TULSI RAM. **79 I.C. 82 = 21 A.L.J. 53 = 45 All. 203 = 4 L.R.A. Civ. 43 = A.I.R. 1923 All. 186 (F.B.).**

—S. 68—Transfer when not possible.

———Simple money decree—No immovable property ordered to be sold in execution—Decree cannot be transferred to Collector. (*Hasan and Raza, JJ.*) JANG BAHADUR *v.* JAGAT NARAIN. **92 I. C. 906 = A. I. R. 1926 Oudh 318.**

—S. 69—Injunction after transfer.

———Where the execution proceedings have gone into the hands of the Deputy Commissioner the issue of an injunction to the Court which passed the decree originally, is obviously futile. (*Wazir Hasan, Ag. C.J. and Misra, J.*) KAMAKHYA DUTT RAM *v.* SHYAM LAL. **6 O. W. N. 226 = 117 I. C. 471 = 4 Luck. 635 = A. I. R. 1929 Oudh 235.**

—S. 70— Jurisdiction after notification of transfer.

The jurisdiction of the Civil Courts in the matter of the execution of decrees in cases in which any interest in land used for agricultural purposes or held on a tenure which is recognized at the time of the settlement of such land, or of houses or of other immovable property connected with such land or interest, and used for agricultural purposes is to be sold, is ousted by notification which transfers it to the Collector with effect from 1st April 1927. (*Kinkhede, A. J. C.*) MAHOMED HATAM *v.* RAMDUTT KISAN DAYAL. **103 I. C. 884 = A. I. R. 1927 Nag. 324.**

—S. 70—Orders of Collector—Remedies against.

———According to rules framed under S. 70 (2), Chief Court has neither appellate nor revisional powers over orders passed by Collector. (*Hasan and Raza, JJ.*) BASANT RAI BHANDARI *v.* SALIK RAM. **92 I. C. 549 = A I. R. 1926 Oudh 288.**

—S. 70—Order setting aside sale after confirmation.

———The Collector has no jurisdiction to set aside the sale after he had confirmed it and retransmitted the decree to the Civil Court and the validity of that order so far as it affects the title vested in the auction-purchaser, can be legitimately questioned by the party concerned in a civil Court. (*Kanhaiya Lal and Ashworth, JJ.*) NAND KISHORE *v.* BADAN SINGH. **95 I. C. 578 = 48 All. 568 = 24 A. L. J. 687 = A.I. R. 1926 All. 575.**

———The Collector has no power left to interfere with the sale or to set it aside after it has been confirmed and the decree re-transmitted to the civil Court, though he can make any correction in the sale certificate to make it conform with the proclamation of sale, if he is approached for the purpose. as a consequential or incidental exercise of the authority vested in him to grant a certificate of sale after the sale is confirmed. 34 All. 223 (P. C.); 17 Cal. 699 (F. B.), Ref.; and the fact that such order, passed without jurisdiction, was upheld by the Board of Revenue in appeal, would make no difference. (*Kanhaiya Lal and Ashworth, JJ.*) NAND KISHORE *v.* BADAN SINGH. **48 All. 568 = 95 I. C. 578 = 24 A. L. J. 687 = A. I. R. 1926 All. 575.**

—S. 70—Suit against sale by Collector.

———Decree transferred to Collector—Civil Court has no authority in the matter—Suit for declaring sale by Collector null and void is not maintainable. (*Stuart, C. J. and Raza, J.*) CHANDRA KRISHNA *v.* MANNI LALL. **1 Luck. 558 = 13 O. L. J. 807 = 3 O. W. N. 739 = 97 I. C. 1036 = A. I. R. 1926 Oudh 612.**

—S. 72—Collector's inability to act.

———Decree sent for execution to Collector—Collector reporting his inability to act—Executing Court should not file execution application but should proceed with the execution. (*Jai Lal, J.*) BHOWANI MAL *v.* ALLAH WASAYA. **96 I. C. 199 = A. I. R. 1926 Lah. 682.**

—S. 72—Presumption.

———*Collector acts judicially.*

Paragraph 74 of the Punjab High Court, Vol. 1 of the Rules and Orders, applies to cases which are governed by S. 72, C. P. Code. Under sub-S. (2), S. 72, read with S. 71, C.P. Code, the Collector is to be deemed to be acting judicially, and all objections relating to the proceedings before him must be disposed of by him. (*Jai Lal, J.*) CHANAN RAM *v.* DEVI DAYAL. **110 I. C. 173 = A. I. R. 1928 Lah. 475.**

S. 73.

Applicability.
Assets.
Procedure.
Rateable Distribution.
Right of incumbrancer.
Scope.

—S. 73—Applicability.

———*Judgment-debtor is to be the same.*

The undoubted requirement of S. 73, a requirement which must be satisfied before a person is entitled to a rateable distribution, is that the two decrees must have been passed against the same judgment-debtor. *A* obtained a money-decree against *N* in respect of money which he had lent to *N's* husband in his life-time. *N* having died *L* was substituted as her legal representative. *R* got a rent-decree against *L* in respect of certain lands and *R*'s decree was enforced first by sale. Thereupon *A* applied for rateable distribution.

Held, *A*'s application for rateable distribution could not be granted as the requirement of S. 73 was that the two decrees must have been passed against the same Judgment-debtor. 25 Bom. 494; 33 Mad. 465; 42 Cal. 1, Rel. on : 11 Cal. 718, Dist.

Quaere : Whether decree passed against the same person in different capacities one personally and the other as legal representative are decrees passed against the same judgment-debtor. (*Rankin, C. J.*) JAHAR LAL SAHA *v.* LALITA SUNDARI DASI. **34 C. W. N. 294 = A. I. R. 1930 Cal. 454.**

———Where the decree-holder and the mortgagee happen to be the same person and, the decree debt and the mortgage-debt are not two distinct and different debts, S. 73, Provisos (a) and (b) are not applicable. (*Venkatasubba Rao and Madhavan Nair, JJ.*) GOURIAMBAL *v.* RAMANATHAN. **31 M. L. W. 38 = 1929 M. W. N. 917 = 122 I. C. 366 = A. I. R. 1930 Mad. 138.**

———*Attorney's lien.*

S. 73 does not apply to an attorney's lien. (English and Indian Case law considered). (*Marten, C. J. and Blackwell, J.*) TYABJI DAYABHAI & CO.

v. JETHA DEVJI & CO. **51 Bom. 855 = 29 Bom. L. R. 1196 = 105 I. C. 383 = A. I. R. 1927 Bom. 542.**

——C. P. Code, S. 73 applies to a case where money is realised in execution by process of the Court and not when the judgment-debtor deposits in Court for payment to a particular decree-holder. (*Kinkhede, A. J. C.*) UMAR SHARIF *v.* RODBA. **81 I. C. 7 = A. I. R. 1925 Nag. 157.**

——*Section is imperative—Necessary inquiry must be made by the Court.*

The addition of the word 'passed' in S. 73 has not in the least altered the sense thereof in the old Code, but has on the other hand, made it clearer than what it was under the old Code. There is no authority for the proposition that no rateable distribution can be allowed of the assets realised from the judgment-debtors common in all the decrees concerned on the ground that in some of the decrees there are judgment-debtors other than the common judgment-debtors. 42 C. 1; 24 I. C. 476, Dist.

There is no room for any contention that section 73 is not applicable where six of the judgment-debtors are common in all the decrees. 27 C. L. J. 100 Foll. The section is imperative. It does not need any application by the parties for rateable distribution. Only an application for execution of the decree is necessary in order to obtain the benefit of it, and once an application has been made for execution the Court is bound to distribute the assets rateably among the several decree-holders. The provision in S. 73 intends to give a substantial relief to holders of decree passed against the same judgment-debtor inasmuch as it enables all of them to get the fruit of their decrees when money is realised in the execution of one of the decrees. Therefore even if the procedure is summary, the consequences thereof are very material to the decree-holders and any enquiry that may be needed in order to give relief to the decree-holders should not be grudged by any Court. (*Jwala Prasad and Ross, JJ.*) MT. INDERBASI KUER *v.* SATNARAIN SINGH. **74 I. C. 626 = 4 P. L. T. 373 = 1923 P.H.C.C. 216 = A. I. R. 1923 Pat. 521.**

—S. 73—Assets.

——*Garnishee Proceedings.*

Once money is paid to the Sheriff in garnishee proceedings it becomes money paid into Court and forms "assets in the hands of the Court" within the meaning of S. 73. It is not any the less so because due to subsequent proceedings the Sheriff is debarred from paying the amount in the Accountant-General's account with the bank. (*Rankin, C. J. and C. C. Ghose, J.*) MURLIDAS *v.* BAIJNATH. **57 Cal. 736 = A. I. R. 1930 Cal. 623.**

——*Held by the court—Stop order.*

Certain moneys of the judgment-debtors were paid into court in pursuance of an order of court in garnishee proceedings taken by a creditor. The judgment-debtors obtained an order stopping the execution proceedings for two months. During the currency of this order, another creditor got an order for attachment before judgment of the same moneys. In a contest between the two creditors, the court expressed its *opinion*, that the date when the moneys were paid into court was the date of the receipt of assets by the court and this was not varied by the stop order prohibiting the judgment-creditor from drawing it out; so no attachment obtained after that date could take away from the execution-creditor the rights he had under S. 73 or otherwise. (*Rankin, C. J. and C. C. Ghose, J.*) MOHANT MURLIDAS *v.* BAIJNATH DAS.

A. I. R. 1930 Cal. 623 = 57 Cal. 736.

——"*Assets realised*" *meaning of—Attachment of deposit in court is not.*

In absence of any order by the Court for transfer of money realized by the sale of judgment-debtor's property attached before judgment in another civil suit to the account of the judgment-creditor or for its payment to him, the amount in custody of the Court cannot be treated as assets realized in execution of the decree within the meaning of S. 51 (1); 46 Mad. 506 (F. B.) and 44 Mad. 100 (F. B.) Rel. on. (*Rupchand Bilaram, A. J. C.*) BALCHAND DEVMAL LILA RAM LAKHIMALENI *In re.* **113 I.C. 319 = 22 S. L. R. 345 = A. I. R. 1928 Sind 165.**

——"*Realised*" *meaning of—Actual receipt necessary.*

Where in pursuance of an order passed by a superior Court assets realized in execution of a decree of a Subordinate Court are transferred to the superior Court, the assets are deemed to be received within S. 73 by the transferee Court when they are actually received by that Court: 22 Bom. L. R. 1001, Dist. (*Shah and Fawcett, JJ.*) GODAVARIBAI GOVIND RAO *v.* DEEKAPPA MALLAPPA. **29 Bom. L.R. 319 = 101 I. C. 411 = A. I. R. 1927 Bom. 247.**

——*No attachment—Section does not apply.*

Where none of the conditions necessary to constitute an attachment under O. 38, R. 5, had been complied with, *i.e.*, no order to furnish security was made, nor monies were held by the defendant at the disposal of the Court.

Held, that there was no attachment and the money paid by the defendant into Court must be considered as a deposit in satisfaction of the plaintiff's claim under O. 24, R. 1, and plaintiff was entitled to have it paid out to him in satisfaction of his claim on application without taking out execution of his decree: 36 Bom. 156 and 41 Mad. 1053, Foll. (*Pratt, J.*) MAGANLAL PARBHURAM *v.* AZIZ HAJEE KARIM. **106 I. C. 77 = 5 Rang. 753 = A. I. R. 1927 Rang. 278.**

——*Money paid under O. 21, R. 43.*

Money paid by a judgment-debtor under a warrant of attachment of his moveable property under O. 21, R. 43, are assets held by the Court, and are liable to be rateably distributed among all persons who have applied to the Court for execution before the receipt of such assets: 36 Bom. 156, Diss. (*Mirza, J.*) INDAJI *v.* COOVERJI. **28 Bom. L. R. 237 = 93 I. C. 852 = A. I. R. 1926 Bom. 242.**

——Where the auction-purchaser makes default in the payment of full amount of the sale, the 25 per cent deposit which is deposited in Court becomes 'assets' within S. 73 and are liable to rateable distribution. (*Devadoss and Waller, JJ.*) SREE MAHANT *v.* RAJA OF KALAHASTI. **49 Mad. 570 = 97 I. C. 86 = A. I. R. 1926 Mad. 872.**

——*Compensation under Land Acquisition Act.*

Compensation money awarded under Land Acquisition Act comes within the meaning of 'assets held by the Court' either from the date of receipt or at least from the date of the final award: 41 Mad. 616 and A. I. R. 1922 Cal. 19, Appr.; 36 Bom. 156, Expl. (*Phillips and Odgers, JJ.*) SIVAPRATAPA BHATTADU *v.* A. E. L. MISSION. **49 Mad. 38 = 97 I. C. 496 = A. I. R. 1926 Mad. 307.**

——*Set-off—When assets can be said to be "received."*

Where decree is transferred for execution, and money is realized by the transferee Court, the parent Court is deemed to have "received" the money on the date the transferee Court's officer conducting the sale receives the same: 44 Cal. 789, Ref. An application for a set-off is equivalent to a payment by a cheque on the Court which is subsequently found to be in order and honoured, and, therefore, when the decree-holder applies for set-off of his claim against the decretal amount, the money is "received" on the date such application is made. If the application is, however, made, not to the transferee Court, but to the parent Court through the transferee Court, or if made to the transferee Court and simply transferred by it to the parent Court for acceptance the date of receipt is the date on which the application reaches the parent Court. (*Hallifax, A. J. C.*) Haji Wali Muhammed Ayub *v.* Sayid Abdul Hamid Shah. **95 I. C. 205 = A. I. R. 1926 Nag. 380.**

———*Receipt must be of the whole assets.*

The receipt of the assets of which S. 73 speaks must be the receipt of the whole of the assets realized by one order for sale: 18 Cal. 242 and 26 Mad. 179, Ref. This proposition holds good for property sold in two lots as moveable and immoveable just as much as for two lots of moveable or two lots of immoveable property. (*Hallifax, A. J. C.*) Haji Wali Muhammad Ayub *v.* Sayid Abdul Hamid Shah.

95 I. C. 205 = A. I. R. 1926 Nag. 380.

———*Sale in lots—Realisation in lots.*

Where the properties were sold separate and their sale proceeds were realised separately,

Held, that the sale of each lot was at any rate completed when the whole of the balance of the purchase-money for that lot was deposited in Court, and that a person who had applied for rateable distribution after the properties began to be sold was not entitled to rateable distribution of the sale proceeds of the whole of the properties but only of the sale proceeds of the properties that were sold subsequent to his application. (*Greaves and Chakravarti, JJ.*) Girindra Nath Ray *v.* Kedar Nath Bidyanta. **87 I.C. 783 = 29 C. W. N. 575 = A. I. R. 1925 Cal. 966.**

———*Earnest money are not "assets".*

The mere deposit of the earnest money cannot be said to be the assets realised by the sale of any property until the balance of the purchase money is deposited and the sale becomes a concluded transaction. 14 C. W. N. 396 and 15 C. W. N. 872, Foll. (*Greaves and Chakravarti, JJ.*) Girindra Nath Ray *v.* Kedar Nath Bidyanta. **87 I. C. 783 = 29 C. W. N. 575 = A. I. R. 1925 Cal. 966.**

———*Mean only assets levied in execution.*

Assets held by a Court do not include all money lying in Court to the credit of the judgment-debtor but only the assets levied in execution or paid into Court in satisfaction of the decree under execution, and there is no receipt of assets within Section 73 until the Court holding the money comes to the conclusion that no objection exists and orders the money to be transferred to the credit of the first attaching creditor's suit, the decree in which it is engaged in executing. 44 M. 100 (F. B.), Foll. Therefore where one creditor has filed a suit and attached before judgment some money belonging to the judgment-debtor, all creditors who apply for execution before the attaching creditor has obtained a decree, and applied for execution, are entitled to rateable distribution. None of them can get preference over the other. (*Schwabe, C. J., Krishnan and Wallace, JJ.*) Nachiappa Chettiar *v.* Subbier. **32 M. L. T. 198 = 72 I. C. 820 = 46 Mad. 506 = 17 M. L. W. 390 = A. I. R. 1923 Mad. 505 = 44 M. L. J. 413 (F. B.).**

———*Payment by sureties are "assets."*

Attachment before judgment raised on security being furnished. Sureties depositing money after decree and on execution being taken out—Money so deposited is "assets" held by Court—C. P. Code, S. 115—Order rejecting application under S. 73 is revisable. 41 Mad. 616, Appr.; 36 Bom. 156, Diss. from. (*Richardson, J.*) Ghisulal Agarwalla *v.* Todurmall Agarwalla. **70 I. C. 539 = 26 C. W. N. 169 = A. I. R. 1922 Cal. 19.**

———*Sale in parcels—Entire purchase-money to be paid.*

To entitle a creditor to rateable distribution, he must make an application to the Court, which holds the assets, before the receipt of such assets, for the execution of an unsatisfied decree for the payment of money passed against the same judgment-debtor. Where property is sold in execution of a decree in separate parcels, the sale proceeds are not deemed to be realised until the entire amount of purchase-money in respect of all the parcels is paid into Court. 26 Mad. 179, Foll. (*Mukerjee, A. C. J. and Fletcher, J.*) Barendra Nath *v.* Martin & Co. **33 C. L. J. 7 = 62 I. C. 167 = A. I. R. 1921 Cal. 801.**

———*Voluntary payment by judgment-debtor.*

The term "assets" includes any assets held by the Court irrespective of the manner in which they came into possession of the Court. Money brought voluntarily into Court by the judgment-debtor is also "assets." 36 Bom. 156, Diss. from; 40 Cal. 619, Dist.; 41 Mad. 616, Foll. (*Cuming, J.*) Haricharan Roy *v.* Birendra Nath. **33 C. L. J. 186 = 70 I. C. 541 = A. I. R. 1921 Cal. 749.**

———*Application must be made before assets are received—Else section does not apply.*

On 22-11-1920, the court of the Subordinate Judge sold a property of the judgment-debtor. The property was purchased by the decree-holder, opposite party, who thereupon applied that the purchase-money and the amount due under the decree might be set off against one another under O. 21, R. 72, C. P. Code. The Court posted the case for the 9th December. On the 30th November the petitioner (another decree-holder) informed the Subordinate Judge that he had applied for execution of his decree against the judgment-debtor before the District Judge and had also prayed for rateable distribution and asked the Court not to grant the opposite party's prayer for a set-off. A notice was then served on the opposite party to show cause why he should not deposit the money in cash. On the 18th December the Subordinate Judge considered the question of set-off and was of opinion that it was not necessary for the opposite party to deposit the money in cash and adjourned the case till the 8th of January 1921 for confirmation of the sale. Meanwhile the execution case pending before the District Judge was transferred, upon the application of the petitioner, to the Subordinate Judge, and on the 4th of January the petitioner made an application before the Subordinate Judge for rateable distribution:

Held, that the assets must be taken to have been realised by the Subordinate Judge before the 4th of January, when for the first time the petitioner made his application to that Court for rateable distribution. Consequently S. 73 of the C. P. Code did not apply and the petitioner was not entitled to rateable distribution. (*N. R. Chatterjee and Panton, JJ.*) Surendra Mohan Sinha *v.* Kartick Chandra Sen. **62 I. C. 857 (Cal.).**

———*Realisation must be in execution proceedings for the section to apply.*

Money deposited in Court to the credit of a judgment-debtor before any decree-holder applies in execution to have it paid towards the satisfaction of his decree should not be dealt with on a system of priority when several decree holders afterwards come in and apply to the same Court to have it attached but it should be rateably distributed among them. The fact that money was lying in Court to the credit of the judgment debtor in a suit other than in which the attachments were made does not make it assets " held by a Court" within the meaning of S. 73 which clearly refers to assets levied in execution or paid into Court in satisfaction of the decree under execution and not to assets lying in the same Court to the credit of the judgment-debtor in another suit. When the attaching Court and the custody Court are the same an order should be made by the Court as attaching Court for transferring the money from the suit in which it came into Court to the suit in which the attachment took place. It is only when this is done that the Court as attaching Court can properly be said to have received the assets and to hold it within the meaning of S. 73; and decree-holders who have attached prior to that are entitled to rateable distribution. 38 Mad. 221, Overruled ; 44 Cal. 1072, Diss. from. (*Wallis, C. J., Ayling, Sadasiva Iyer, Napier and Krishnan, JJ.*) VISVANADHAN CHETTY *v.* ARUNACHALAM CHETTY. **60 I. C. 302 = 44 Mad. 100 = 1921 M. W. N. 14 = A. I. R. 1921 Mad. 218 (F. B.).**

———*Moneys paid to avoid arrest are not assets.*

Money paid into Court by a defendant under S. 73 and O. 38, C. P. Code, to avoid his arrest in a suit, is money paid for specific purpose and as it is intended to satisfy the plaintiff who has been instrumental in compelling the deposit he acquires a lien over it and consequently other judgment-creditors of the defendant cannot attach such money. (*Raymond, A. J. C.*) MAHBUBBUX *v.* BUKSH ELAHI. **61 I. C. 424 = 14 S. L. R. 164.**

———*Moneys paid to avoid arrest.*

Payment into Court by a judgment-debtor to avoid arrest is payment for a specific purpose, *viz.*, the satisfaction of the plaintiff's decree and is therefore not attachable by other judgment-creditors. (*Raymond, A. J. C.*) MAHBUBBUX *v.* BUKSH ELAHI. **61 I. C. 424 = 14 S. L. R. 164.**

—S. 73—Procedure—Appeal.

———Where the matter before the Court is one under S. 73 and the Court proceeds to decide the question under that section though finally the order passed is not such as is contemplated by S. 73 the order is not appealable. (*Jailal, J.*) BELASMAL DAMODAR DAS *v.* HARIDAS. **118 I. C. 908 = A. I. R. 1929 Lah. 645.**

———*Order under S. 73 is not a decree.*

An order under S. 73 is an order in execution proceedings but it is not a decree unless all the conditions enumerated in S. 47 are present, and a question arising between rival decree-holders which does not affect or interest the judgment-debtor is not a question which arises between the parties to the suit in which the decree under execution was passed and so the decision of such question is not appealable. 42 Cal. 1, Rel. on. (*Heald, J.*) M. T. T. K. M. M. N. CHETTYAR FIRM *v.* K. P. A. N. M. FIRM. **120 I. C. 693 = A. I. R. 1929 Rang. 198.**

———No appeal lies against an order passed wholly and simply under S. 73 of the Code. But an order which does, as a fact, decide a matter covered by S. 47 (1) may, although it be passed ostensibly under S. 73, be the subject of appeal. 39 Mad. 570 and 31 M. L. J. 820, Rel. on. Therefore, where an order forbidding amendment does not merely decide that a decree-holder is not entitled to share rateably with other decree-holders in the assets after attachment, but it dismisses the application for execution *in toto*, such an order is appealable under S. 47 (1). (*Coldstream, J.*) SHIB DAS *v.* BULAKI MAL AND SONS. **98 I. C. 884 = A. I. R. 1927 Lah. 100.**

———*Order under S. 73 is not a decree.*

An order under S. 73 is not an order under S. 47 inasmuch as the question which arises is not one between the parties to the suit and the order rejecting the application under S. 73 does not otherwise come within the definition of decree in S. 2, because it does not conclusively determine the rights of the parties. It would also be unduly extending the meaning of the word " suit" in that section, to make it include an application under S. 73; 42 Cal. 1, Foll. (*Coutts and Adami, JJ.*) MT. HURMOOZI BEGUM *v.* MT. AYASHA. **1921 P. H. C. C. 204 = A. I. R. 1921 Pat. 401.**

—S. 73—Procedure—Condition necessary.

———There is no express provision of law that there should be an actual transfer of the decree to the Court granting rateable distribution. When an application for rateable distribution is supplemented with the transfer certificate subsequently received, all the requirements of law are duly complied with. 21 Cal. 200; 2 C. W. N. 126 ; 26 M. L. J. 406 and 35 Mad. 588, Foll. (*Findlay, J. C.*) R. S. KHOLKUTE *v.* TUKARAM KUNBI. **110 I. C. 524 = A. I. R. 1928 Nag. 332.**

———The requirements of S. 73 have not been complied with if the decree is not transferred to the Court which holds the assets and no application for execution has been made to that Court, but only the records of cases of decree-holder of another Court are forwarded to the former Court. 29 Bom. 528 ; 30 Cal. 583; 5 Bom. 198 ; 26 Mad. 179 and 1 L. B. R. 121, Ref. (*Maung Ba, J.*) C. R. M. A. CHETTIYAR FIRM *v.* K. R. V. S. CHETTIYAR FIRM. **5 Rang. 757 = 107 I. C. 169 = A. I. R. 1928 Rang. 96.**

———Attachment of property after judgment is not sufficient to share in the rateable distribution, but a formal application is necessary before the assets come into Court's possession. (*Greaves and Cuming, JJ.*) KASIWAR DE *v.* ASWINI KUMAR PAL. **90 I. C. 527 = A. I. R. 1926 Cal. 249.**

———The only two conditions laid down in S. 73 and which the decree-holder must comply with are that he must have a money decree against the same person and that he must have applied for execution of that decree before the assets were realised. If these two conditions are fulfilled, he is entitled to join in the rateable distribution. There is no condition that the execution application put in by the party should be such as would have ended in his successfully obtaining satisfaction of his decree, *e.g.*, even an application for the arrest of a person who could not have been arrested, is sufficient. (*Krishnan, J.*) SUBRAMANIAN CHETTY *v.* RAMASWAMI CHETTY. **22 M. L. W. 744 = 1926 M. W. N. 27 = 91 I. C. 11 = A. I. R. 1926 Mad. 179 = 49 M. L. J. 753.**

———The only persons entitled to a rateable distribution under S. 73, are persons who have not only obtained orders of attachment from another Court but who have got their decrees transferred to the Court having the custody of the attached property and have actually applied for execution of their decrees in the form prescribed under O. 22, R. 11, before the assets are realized out of such attached property in execution of a decree of that Court. 5 Bom. 198 and 18 Bom. 456 Rel. on. (*Rupchand Bilaram, A.J.C.*) RAMPARTAB PANALAL *v.* NEWANDRAM TULARAM.

C. P. CODE, (1908), S. 73—Procedure—Condition necessary.

20 S.L.R. 111 = 93 I.C. 366 = A. I.R. 1926 Sind 177.

———Before a person is entitled to rateable distribution under S. 73 an application for execution must be made. Where no regular applications for execution have been made and the prayer is only for rateable distribution of the assets, no rateable distribution can be ordered. 1924 Nag. 39, Ref. ; 17 N.L.R. 143, Foll. (*Baker, J. C.*) ALI MAHAMMAD *v.* MAHAMMAD NOOR.

87 I. C. 1025 = A. I. R. 1925 Nag. 382.

———In a case where an application for set-off is made and there are no obstacles to the granting of it, that is to say, no application exists under S. 73 for rateable distribution at the time of making the application for set-off, the Court will ordinarily be bound to grant the set-off, and if that is done there can be no receipt of assets by the Court within S. 73. An order allowing a set-off under O. 21, R. 72 is not equivalent to receipt of the assets. It is a disposal of the purchase-money over which the Court re-acquired dominion on the date of the sale. (*Wazir Hasan, J. C.*) MOHAN LAL *v.* AMAR NATH. **80 I. C. 40 = A. I. R. 1925 Oudh 287.**

———Rateable distribution — Conditions necessary—Decree-holder must apply in form prescribed in O. 21, R. 11 (2) to Court holding assets, before they are received. 27 All. 132, Ref. (*Kotval, A.J.C.*) DWARKADAS *v.* GHASIRAM. **17 N.L.R. 143 = 64 I. C. 53 = A. I. R. 1921 Nag. 5.**

—S. 73.—Procedure—Decree.

———*Court should not go into* bona fides *of the decree.*

Where the Court is concerned with distributing assets under S. 73 it has no power to go behind the decrees which are presented by the various decree-holders asking for rateable distribution and to look into their *bona fides*. 40 M. 841 and 46 B. 635, Foll.; 11 C. 42, Diss. (*Kotval, A.J.C.*) MAGANMAL *v.* RAGHUNATH RAO. **75 I. C. 749 = 19 N. L. R. 172 = A. I. R. 1924 Nag. 39.**

—S. 73—Procedure—Enquiry.

———S. 73 does not provide for an enquiry being made by the Court when passing an order for a rateable distribution and the Judge is not bound to make any enquiry as to whom the property belongs before making the rateable distribution. (*Das and Doyle, JJ.*) S. A. S. CHETTYAR FIRM *v.* S. A. R. A. FIRM.

113 I.C. 815 = 6 Rang. 582 = A.I.R. 1928 Rang. 163.

—S. 73—Procedure—Execution.

———*Petition wanting in particulars may be enough under S.* 73.

The purpose of S. 73 is that there sbould be an equitable distribution of assets between those creditors who have been diligent enough to obtain decrees and put in execution applications before the time such assets have been received. Court should rather look to the substance than to the form of the application in order to administer the equity which the law provides. An application for an order of attachment of a particular fund obtained out of a sale under an attachment in another suit was filed but there were certain defects in the application. Certain particulars which were required under O. 21, R. 11, for a formal application under that rule were wanting. The executing Court issued attachment order upon the petition.

Held: that the application was sufficient for the purpose of rateable distribution : A.I.R. 1928 Mad. 129 (2), Reversed. (*Coutts-Trotter, C. J., Wallace and Ananthakrishna Aiyar, JJ.*) ABDUL SALAM SAHEB *v.* VIRABHADRA RAJU. **52 Mad. 760 = 30 M.L.W. 110 = ~~1929~~ M.W.N. 611 = 118 I.C. 72 = A. I. R 1929 Mad. 703 = 57 M. L J. 97 (F.B.).**

———*Application must state the mode of execution.*

C. P. CODE, (1908), S. 73—Procedure—Remedy.

An application which does not specify the way in which the assistance of the Court sought for executing the decree according to O. 21, R. 11 is not an application for execution according to law, even though it may be application, which can be considered as a step-in-aid of execution so as to save limitation. A creditor, claiming rateable distribution on the strength of a money decree, must himself ask for attachment and sale of the property or for execution of his decree by one of the modes specified in O. 21, R. 11: A.I.R. 1921 Nag. 5; 34 Mad. 25 Appr. ; 11 C. P. L. R. 157, Ref. (*Mohiuddin and Staples, A.J.Cs.*) BALAJI *v.* GOPAL.

25 N.L.R. 94 = 116 I.C. 655 = 12 N. L. J. 64 = A. I. R. 1929 Nag. 148.

———Application for execution to transferee Court after order of transfer but before actual receipt of decree is not one to proper Court. (*Jackson, J.*) NANJUNDA CHETTIAR *v.* NALLAKARUPPAN CHETTIAR.

27 M.L.W. 423 = 109 I. C. 404 = A.I.R. 1928 Mad. 496 = 55 M. L. J. 120.

———S. 73 must be read with S. 63 — Attachment of sum in execution of two small cause decrees—Subsequent attachment in execution of High Court decree on original side where the money was paid—Decree-holders in Small Cause Court need not apply for execution to High Court again. 21 Cal. 200, Rel. on 5 Bom. 198, Dist. (*Rutledge, C.J. and Brown, J.*) KWAI TONG KEE *v.* LIM CHAUNG GHEE. **6 Rang. 131 = 110 I.C. 744 = A. I. R. 1928 Rang. 157.**

———Subordinate Judge holding assets—Decree-holder applying for execution to Munsiff—Subordinate Judge calling for execution records on application — There is no transfer of execution case. (*Scroope, J.*) FIRM LAKHIRAM BALDEO DAS *v.* MAHABIR BHAGAT.

101 I.C. 908 = A. I. R. 1927 Pat. 252.

———Application for execution must be made to Court holding assets. (*Jai Lal, J.*) FIRM NANAKCHANP *v.* FIRM GUJAR MAL, **95 I. C. 151 = A. I. R. 1926 Lah. 538**

—S. 73—Procedure—Maintenance of application for.

———*Rateable distribution is a ministerial act.*

The act of distribution under S. 73 is a ministerial act and therefore where the first decree-holder objects to rateable distribution on the ground that second decree-holder's decree was collusive and urges for judicial decision on the point,

Held: that his prayer should be disallowed: 23 All. 313 (P.C.,) Foll. (*Das and Foster, JJ.*) BIBI UMA HUBIBA *v.* MT. RASOOLAN. **5 Pat. 445 = 98 I. C. 759 = A.I.R. 1926 Pat. 497**

—S. 73—Procedure—Principle.

———Principle is " first come first served." (*Devadas and Jackson, JJ.*) ABDUL SALAM SAHIB *v.* VEERABHADRARAJU. **107 I.C. 298 = A.I.R. 1928 Mad. 129.**

—S. 73—Procedure—Remedy.

———*Claim to surplus is only in a separate suit.*

In a case where there was a contest as to the disposal of the surplus, a contest which had not been determined in the suit or in the execution proceedings, the Court should refer the claimant to a civil suit. (*Boys and Kendall, JJ.*) LACHMI NARAIN *v.* MITTHU BHAGAT. **49 All. 636 = 25 A. L. J. 390 = 101 I. C. 505 = A.I.R. 1227 All. 467.**

———*Aggrieved, decree-holder—Remedy is by suit.*

Even though the person aggrieved is the decree-holder, the remedy is by way of suit and not one under S. 47, C.P. Code or by revision. (*Oldfield and Venkatasubba Rao, JJ.*) SOMASUNDARAM CHETTIAR *v.* SUNDARESA RAO. **32 M. L. T. 155 = A. I. R. 1924 Mad. 97.**

—S. 73—Procedure—Restitution.

———An order for rateable distribution in a contest between rival decree-holders is not an order under S. 47 and is not a decree within the provisions of S. 144. Powers under S. 151, C. P. Code should be exercised when necessary for the ends of justice, *i. e.*, when this is the only legal method by which dues will be obtained. (*Ayling and Venkatasubba Rao, JJ.*) VARADA RAMASWAMI *v.* VUMMA VENKATARATNAM. **67 I. C. 546 = 1922 M. W. N. 184 = 15 M. L. W. 421 = 30 M. L. T. (H. C.) 178 = A. I. R. 1922 Mad. 99 = 42 M. L. J. 473.**

—S. 73—Procedure—Revision.

———In proper cases the High Court not only may, but should interfere by way of revision even though the parties might have under the law a right of finally adjusting their difference in a regular suit under S. 73. (*Srinivasa Iyengar, J.*) SUBRAMANIAN *v.* SIVASWAMI CHETTY. **27 M. L. W. 804 = 109 I. C. 557 = A.I. R. 1928 Mad. 362 = 54 M. L. J. 278.**

———*Order under is not merely ministerial order and is revisable.*

An order under S. 73 is not a ministerial and non-judicial act of a Judge which could not be interfered with by the High Court in revision: 23 All. 313 (P.C.). Expl.; A. I. R. 1926 Pat. 497 and 40 Mad. 841, Diss. from. (*Das and Doyle, JJ.*) S. A. S. CHETTYAR FIRM *v.* S. A. R. A. FIRM. **6 Rang. 582 = 113 I. C. 815 = A. I. R. 1928 Rang. 163.**

———If the order of the Court is obviously wrong, the High Court may interfere in revision: 32 Mad. 334, Ref. But where the matter is not obvious, *e. g.*, where the question turns on the meaning of the words "receipt of assets" in a case where the decree-holder has been allowed to bid and set off, revision should not be allowed. (*Ramesam and Odgers, JJ.*) ALAGANAN CHETTIAR *v.* RAMANATHAN CHETTIAR. **1927 M. W. N. 795 = 106 I. C. 208 = A. I. R. 1927 Mad. 1030.**

———Courts will be very slow to interfere in revision against orders under S. 73, and they will only interfere if there is any obvious mistake and the result of the regular suit is certain. 32 Mad. 334; A. I. R. 1926 Mad. 179 and A.I.R. 1925 Mad. 587, Ref. (*Ramesam, J.*) SALAI MD. HAJI IBRAHIM & CO. *v.* AYYA NADAR. **39 M. L. T. 609 = 104 I. C. 735 = A. I. R. 1927 Mad. 944.**

———The special remedy by way of suit under S. 73 does not prevent a Court from interfering under S. 115 where there is a manifest error in the order under S. 73, and putting setting that error aright as otherwise the parties will be driven to unnecessary litigation. (*Krishnan, J.*) SUBRAMANIA CHETTY *v.* RAMASWAMI CHETTY. **22 M. L. W. 744 = 1926 M. W. N. 27 = 91 I. C. 11 = A. I. R. 1926 Mad. 179 = 49 M. L. J. 753.**

———Revision lies against an order rejecting an application for rateable distribution, though a remedy by suit is open to the applicant under the provisions of S. 73 itself. (*Hallifax, A. J. C.*) HAJI WALI MUHAMMAD AYUB *v.* SAYID ABDUL HAMID SHAH. **95 I. C. 205 = A. I. R. 1926 Nag. 380.**

—S. 73—Rateable distribution.

———*Attachment by one decree-holder enough.*

In a case where out of many decree holders, each competent to execute his decree by attachment and sale of a particular property, one has attached it, it is not necessary that the other decree-holders should again attach the same property; and in such a case all the decree-holders are entitled to claim rateable distribution. 23 All. 106, Foll. (*Anantakrishna Ayyar, J.*) NATESA *v.* GOVINDASAMI. **A. I. R. 1930 Mad. 4.**

———*Application before appropriating moneys towards decree is proper.*

Where it is admitted that the third judgment-creditor applied for execution before any order was passed transferring or appropriating the fund or any portion thereof to the decree obtained by the first judgment-creditor, the third judgment-creditor is entitled to rateable distribution along with the other two. (*Anantakrishna Ayyar, J.*) NATESA *v.* GOVINDASAMI. **A. I. R. 1930 Mad. 4.**

———*Is not a form of execution.*

An application, praying only for rateable distribution is not a valid application for execution. C. P. Code does not recognize an application for rateable distribution as such. A decree-holder, to obtain rateable distribution under S. 73, must make an application for execution praying for execution of his decree in one of the ways mentioned in O. 21, R. 11, before the receipt of assets by the Court. A. I. R. 1921 Nag. 5, Appr. (*Mohiuddin and Staples, A. J. Cs.*) BALAJI *v.* GOPAL. **25 N. L. R. 94 = 116 I. C. 655 = 12 N. L. J. 64 = A. I. R. 1929 Nag. 148.**

———*Mere attachment before judgment without decree—Section does not apply.*

A person who has merely obtained an attachment before judgment cannot put up a claim for rateable distribution unless he has obtained a decree and made an application for execution. 34 Mad. 25; 12 Bom. 409; and 33 Cal. 639; Foll. (*Patkar and Baker, JJ.*) CHINDA *v.* CHHAGANLAL. **30 Bom. L. R. 1488 = 115 I. C 414 = A. I. R. 1928 Bom. 545.**

———*Two brothers of joint Hindu family—Decrees against both jointly and against one personally—Mode of distributing indicated.*

The decree-holders against one of the brothers forming a Hindu joint family alone are entitled to rateable distribution only in respect of his share in the property that was sold. In such a case the principle that should be followed by the Court is to take the sale proceeds and dividing it into two halves, distribute one half belonging to one of the brothers having no personal decrees against him amongst all the decree-holders who have obtained decrees against both the brothers and the sale proceeds representing the other's share amongst all the decree-holders who have obtained decree not only against both the brothers but also against the latter alone proportionately; in other words the decree-holders who have obtained decrees against both the brothers will get proportionately not only in the half share of the former, but also once over again in the share of the latter's sale proceeds according to the total amount made up of the decrees obtained against him whether singly or jointly with his brother. (*Srinivasa Iyengar, J.*) SUBRAMANIAN *v.* SIVASWAMI CHETTI. **27 M. L. W. 804 = 109 I. C. 557 = A. I. R. 1928 Mad. 362 = 54 M. L. J. 278.**

———Partnership assets held by Receiver in partnership action—Creditors can take out notice under C P. Code, O. 21, R. 52, without waiting for accounts being taken. (*Mirza, J.*) NESUKHGAVI *v.* RAJABALLY MULLA ABDUL KADAR. **29 Bom. L.R. 689 = 106 I. C. 184 = A. I. R. 1927 Bom. 405.**

———The moneys in the hands of the custody Court are not moneys which are realised within the meaning of S. 73 and therefore no *pro rata* distribution of such moneys can take place among the attaching creditors at that stage. (*Mirza, J.*) NESUKHGAVRI *v.* RAJABALLY MULLA ABDUL KADAR. **29 Bom. L.R. 689 =**

——*Money in hands of Custody Court attached by different creditors—Decrees should be satisfied in order of time and not* pro rata.

Where notices under O. 21, R. 52 are served on the Receiver and in pursuance of a garnishee or other order of the Court he pays in the amount in respect of any such notice into the Sheriff's office, all execution creditors whose attachments are registered in the Negative Book of the Prothonotary before the realization of the assets by the Sheriff would be entitled to *pro rata* distribution. In case the property in the custody Court has been attached at the instance of different Courts, the custody Court should seek to satisfy such attachments not *pro rata*, but in order of time, sending the moneys to the first attaching Court first, the balance to the second and so on. There is no warrant in the C.P. Code for granting of charging orders to creditor against the Receiver holding partnership assets. Such charging orders do not amount to attachment proceedings. (*Mirza, J.*) NESUKHGAVRI *v.* RAJABALLY MULLA ABDUL KADAR. **29 Bom. L. R. 689 = 106 I. C. 184 = A. I. R. 1927 Bom. 405.**

——*Creditor of one of joint debtors can claim with creditors of both.*

Where *A* obtained a decree against *B* and *C*, and in execution attached the property of both, and, *D* who held a decree against *C* alone, applied for rateable distribution of the assets,

Held, that *D* was entitled to claim rateable distribution in such of the assets held by the Court as could be found to belong to the share of *C*. (*Macleod, C. J. and Coyajee, J.*) HUSSAIN SAHEB *v.* BABOJI DHOND DEV. **28 Bom. L. R. 78 = 93 I. C. 222 = A. I. R. 1926 Bom. 150.**

——*Stay of execution—No further application necessary.*

Execution of decree of inferior Court stopped by superior Court—Decree-holder is entitled to rateable distribution without further application under S. 73. 21 Cal. 200, Foll. Case-law discussed. (*Greaves and Chakravarthi, JJ.*) GIRINDRA NATH RAY *v.* KEDAR NATH BIDYANTA. **87 I. C. 783 = 29 C. W. N. 575 = A. I. R. 1925 Cal. 966.**

——*Execution applied for before realisation is enough.*

Presentation after realisation of assets is no ground for refusing an application for reteable distribution, provided that execution of decree has been applied for, before realisation of assets. (*Srinivasa Aiyangar, J.*) KARPAGA NIDHI, LTD. *v.* VANIA VILASA NIDHI, LTD. **87 I. C. 390 = 21 M. L. W. 518 = 1925 M.W. N. 173 = A. I. R. 1925 Mad. 587 = 48 M. L. J. 459.**

——*Appeal—When lies.*

Per *Walmsley, J.*—Though there is a question between D. H. and J. D. relating to the discharge of decree still if third persons have to be brought into the proceedings, the question is not covered by S. 47, C. P. Code.

Per *M. N. Mukerji, J.*—An order under S. 73 is not appealable unless it also comes under S. 47 and satisfies all the requirements thereof. In order to be appealable the order must therefore decide a question arising between the decree-holder on the one hand and the judgment-debtors on the other. In cases where as between the parties to the suit a question relating to the execution satisfaction or discharge of the decree passed therein has been decided by the order for reteable distribution it has always been held that an appeal lies. 42 Cal. 1; 36 Bom. 156 and 36 Mad. 570, Foll.; 14 All. 210. Dist. (*Walmsley and M. N. Mukerji, JJ.*) DWARKADAS *v.* JADAB CHANDRA. **78 I. C. 731 = 51 Cal. 761 = 39 C. L. J. 439 = 28 C. W. N. 704 = A. I. R. 1924 Cal. 801.**

——*Attachment before judgment—Decree must be passed before realisation.*

Although the respondents had actually had the money attached before judgment, this fact would not, entitle them to an order for the rateable distribution when they had not obtained their decree before the money was realised. 21 C. L. J. 614, Ref.

Where money was wrongly paid over to the petitioners,

Held, even if the petitioners had not been entitled to receive the money the respondents could not compel them to refund it without bringing a suit in accordance with the provisions of S. 73. (*Martineau, J.*) THE FIRM KHANA MAL BENARSI DAS *v.* THE FIRM KHANA MAL NATHU MAL. **69 I. C. 718 = 40 P. L. R. 1922 = A. I. R. 1924 Lah. 70.**

——*Fraud—Remedy is under S.* 73 (2).

The Court distributing assets under S. 73, cannot have greater power to go behind the decree, and should not deal with the question whether the decree is fraudulent. The remedy of the opponent raising the plea of fraud lies under S. 73 (2). (*Macleod, C. J., Shah and Fawcett, JJ.*) DATTATRAYA GOVIND SETH SUBRI *v.* PURSHOTTAM NARAYAN SETH DALI. **65 I. C. 600 = 46 Bom. 635 = 24 Bom. L. R. 1 = A. I. R. 1922 Bom. 31 (F. B.).**

——*Attachments before judgments—Distribution.*

Moneys attached before judgment by a number of creditors, and realised before any of them obtained decrees, should be held to the credit of all the suits and distributed between all the attaching creditors who subsequently obtained decrees if they have obtained decrees before any of the others apply for payment. Priority of attachment by itself confers no prior right. (*Kumaraswami Sastri, J.*) SUBRAMANIAM CHETTY *v.* SANKER IYER. **68 I. C. 714 = 15 M. L. W. 531 = 1922 M.W.N. 262 = 31 M.L.T. (H. C.) 70 = A.I.R. 1922 Mad. 236.**

——*Order for rateable distribution made—Subsequent insolvency does not vest moneys in the Official Receiver.*

The exception to S. 51 (1) applies not only to the amount credited in favour of the attaching decree-holder but also to amounts rateably distributed to the other decree-holders, under S. 73. From the time of the order of rateable distribution, the money must be treated as belonging not to the judgment-debtor but to the decree-holders in whose favour the order was passed. The Official Receiver therefore could no more recover the money from the Court which passed the order than from the decree-holder, nor can he claim the money for the benefit of the general body of creditors. (*Ayling, O. C. J. and Odgers, J.*) OFFICIAL RECEIVER OF TANJORE *v.* M. R. VENKATARAMA IYER. **68 I. C. 512 = 15 M. L. W. 37 = 1922 M. W. N. 51 = 30 M. L. T. (H. C.) 67 = A. I. R. 1922 Mad. 31 = 42 M. L. J. 361.**

——*Priority of attachment does not create right to preferential treatment.*

Where a fund in Court has been attached by several creditors of the judgment-debtor, none of the attaching creditors is entitled to preferential treatment by reason of the priority of his attachment. (*Mookerjee, A. C. J. and Fletcher, J.*) BARENDRA NATH *v.* MARTIN & CO. **33 C. L. J. 7 = 62 I. C. 167 = A.I.R. 1921 Cal. 801.**

——*Interference in revision.*

C. P. CODE, (1908), S. 73—Rateable distribution

The High Court will not interfere in revision with orders disallowing or allowing claim for rateable distribution except in very exceptional circumstances. (*Chevis, J.*) Bhagat Ram Kalyan Das *v.* Mangat Ram Shibbu Ram. **60 I. C. 371 (Lah.).**

———*Rival claimants.*

A instituted a suit and obtained attachment before judgment of the debtor's properties. The properties were sold and money was deposited in Court. While *A*'s suit was pending, *B* filed a suit against the same debtor. He attached before judgment, the money deposited in Court. *B* obtained a decree and applied in *A*'s suit for the payment of his decretal amount from the money in deposit. *A* then obtained a decree and applied for the payment of the money.

Held per *Sadasiva Aiyar, J.*—Till *A* applied for execution of his decree, the money in deposit was not assets realised in execution of decree. When *B* applied for execution, no order was passed transferring the deposit from *A*'s credit to *B*'s credit. Therefore *A* and *B* were both entitled to rateable distribution. A. I. R. 1921 Mad. 218 (F. B.), Foll.; 42 Mad. 692, held overruled by 60 I. C. 302 = A.I.R. 1921 Mad. 218 = 44 Mad. 100 (F. B.).

Per *Coutts-Trotter, J.*—When *B* applied for execution and payment from the deposit, he impliedly prayed for a transfer of the deposit to his credit and therefore he was entitled to be paid in full. 42 Mad. 692, Foll. and held not overruled by 60 I. C. 302 = A. I. R. 1921 Mad. 218 = 44 Mad. 100 (F. B.). (*Sadasiva Aiyar and Coutts-Trotter, JJ.*) N. A. K. Subbiar *v.* Nachiappa Chettiar. **70 I. C. 20 = 14 M. L. W. 582 = 1921 M. W. N. 817 = A. I. R. 1921 Mad. 481.**

———*Rival decree-holders.*

One of two decree-holders against a common judgment-debtor got permission to bid at the auction sale and to set off his claim against the purchase-money, and purchased one item of the property but did not deposit the purchase-money. Another item was sold to a stranger who deposited the purchase-money whereupon the other decree-holder applied for rateable distribution. *Held*, that he was entitled to rateable distribution in respect of both the purchases as the permission to set off granted to the other decree-holder did not affect the right to such distribution. (*Seshagiri Aiyar, J.*) Arunachalam Chetty *v.* Somasundaram Chetty. **59 I. C. 86 = 12 L. W. 328.**

———*No priority apart from attachment.*

The explanation to S. 64 gives no priority to claims under S. 73 apart from the attachment in connection with which they were made, and under which they are enforceable. 44 Cal. 662 (P. C.) and 41 Mad. 265 (F. B.), Foll. (*Daniels J. C. and Dalal, A. J. C.*) S. Muhammad Muzafar Ali *v.* Sir Maharaja Bhagwati Prasad Singh. **66 I. C. 642 = 8 O. L. J. 358 = A. I. R. 1921 Oudh 176.**

———*Application can be made during sale.*

An application for rateable distribution made when the sale is going on is made before the receipt of assets within S. 73 and hence such application is maintainable. (*Coutts and Adami, JJ.*) Hurmoozi Begum *v.* Mt. Ayasha. **1921 P. H. C. C. 204 = 57 I. C 421 = A. I. R. 1921 Pat. 401.**

—S. 73—Right of incumbrancer.

———Surplus assets after auction-sale—Subsequent incumbrancer is not entitled to them without mortgagor's consent either under S. 73 or under O. 34, R. 13. (*Boys and Kendall, JJ.*) Lachmi Narain *v.* Mitthu Bhagat. **49 All. 636 = 25 A. L. J. 390 = 101 I. C. 505 = A. I. R. 1927 All. 467.**

C. P. CODE, (1908), S. 73—Scope.

———Under S. 73 where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold. But not so in the case of a private alienation where there is absolutely no necessity to refer to the prior incumbrancer. (*Martineau and Moti Sagar, JJ.*) Benarsi Das *v.* Gopi Chand. **76 I. C. 529 = 5 Lah. L. J. 279 = A. I. R. 1924 Lah. 132.**

———*Mortgagee having money decree can get relief under the section.*

Proviso (*b*) to clause (1), S. 73 applies to a mortgagee whose charge is valid against the executing decree-holder and such mortgagee can apply for rateable distribution in the proceeds of a sale held in execution of a decree in favour of the executing decree-holder where the mortgagee holds a money decree against the judgment-debtor apart from the mortgage. (*Mullick and Bucknill, JJ.*) Bishun Mohan Sahay *v.* Narayan Prasad Asthana. **74 I. C. 140 = A. I. R. 1924 Pat. 434.**

———The third category in cl. (*c*) refers only to encumbrancers entitled to precedence over money decree-holders mentioned in fourth category. (*Mookerjee, A. C. J. and Fletcher, J.*) Barendra Nath *v.* Martin & Co. **33 C. L. J. 7 = 62 I. C. 167 = A. I. R. 1921 Cal. 801.**

———*Sale free of encumbrance—Interest attaches to sale proceeds—Such interest is to be enforced by suit.*

Where property liable to be sold in execution of a decree is sold free from mortgage under S. 73 (1) of the Code of Civil Procedure the mortgagee has that same interest in the proceeds of the sale as he had in the property sold. But to enforce his interest he must proceed by way of suit, and he cannot obtain an order for payment of the amount alleged to be due on the mortgage until he had obtained a decree. (*Robinson, O. C. J.*) V. P. T. Reddyar *v.* V. R. M. Arunachalam Chetty. **13 Bur. L. T. 210 = 64 I. C. 417 = 10 L. B. R. 398.**

—S. 73—Scope.

———*Rateable distribution ordered—No restitution.*

Once inferior Court orders satisfaction or pays out amount in ignorance of decree of superior Court against same judgment-debtor, superior Court cannot order restitution or rectify error and make assets available for rateable distribution among decree-holders of superior Court. A.I.R. 1927 Mad. 67 and 11 Mad. 356, Ref. (*Jackson, J.*) Dandayutha Pani Devasthanam *v.* Muthayanswami Chetty. **123 I. C. 193 = A. I. R. 1930 Mad. 699.**

———Application for execution of a decree made after the receipt of assets into the Court does not entitle the decree-holder to a rateable share under S. 73. (*Jailal, J.*) Bilasmal Damodar Das *v.* Hari Das. **118 I. C. 908 = A. I. R. 1929 Lah. 645.**

———*Execution in different courts—Section applies.*

Where each of the 3 decree-holders of the same judgment-debtor took out execution of their decrees in the execution cases of the Sub-Divisional Court, and also in execution cases of the Township Court and where one of them in execution case of the Sub-Divisional Court attached and brought to sale certain properties belonging to the common judgment-debtor and where the other decree-holders claimed rateable distribution in the Sub-Divisional Court the decree-holders are entitled to rateable distribution in respect of the decrees for which they had taken out execution in the Township Court as well as those for which they had taken out execution in the

Sub-Divisional Court : A. I. R. 1928 Rang. 157, Rel. on. (*Heald*, *J.*) M. T. T. K. M. M. N. CHETTYAR FIRM *v.* K. P. A. N. M. FIRM. **120 I. C. 693 = A. I. R. 1929 Rang. 198.**

———In the case of proceedings under S. 295 (S. 73 of the Code of 1908) a Court cannot enquire into the validity of the decrees sought to be executed. (*Ramesam*, *J.*) SALAI MD. HAJI IBRAHIM & CO. *v.* AYYA NADAR. **39 M. L. T. 609 = 104 I. C. 735 = A. I. R. 1927 Mad. 944.**

———Rateable distribution can be asked for in execution of money decree only. (*Stuart*, *C. J. and Wazir Hasan*, *J.*) GOHARDHAN DASS *v.* JANG BAHADUR. **1 Luck. 569 = 3 O. W. N. 749 = 98 I. C. 33 = A. I. R. 1926 Oudh 616.**

———Order for rateable distribution of assets cannot be made in anticipation of assets being realised. (*Chatterjee and Panton*, *JJ.*) ADWAITA CHANDRA SAHA *v.* THE CHITTAGONG CO., LTD. **84 I. C. 747 = 28 C. W. N. 988 = A. I. R. 1925 Cal. 102.**

———Hypothecation of moveables without possession is included in the provisos to the section. (*Mukerji*, *J.*) JATINDRA CHANDRA CHOWDHURY *v.* THE RANGPUR TOBACCO CO., LTD. **80 I. C. 20 = A. I. R. 1924 Cal. 990.**

———If attachment by inferior Court is prior to that by superior Court ; application for rateable distribution to latter Court is not necessary by decree-holder attaching earlier. But if the decree-holder attaching through an inferior Court does so after an attachment has been effected by the superior Court, he cannot claim rateable distribution without an application to the superior Court. 21 Cal. 200, Not Foll., 14 C.W.N. 396, Foll. (*Chatterjea and Newbould*, *JJ.*) KRISHNA KUMAR GHOSH *v.* PASUPATI BANERJEE. **25 C. W. N. 740 = 63 I. C. 11 = A. I. R. 1921 Cal. 87.**

———An application to the superior Court to transfer an execution case to itself from an inferior Court is not an application for execution to the superior Court within S. 73. (*Chatterjea and Newbould*, *JJ.*) KRISHNA KUMAR *v.* PASUPATI BANERJEE. **25 C. W. N. 740 = 63 I. C. 11 = A. I. R. 1921 Cal. 87.**

—S. 75—Commissioner and arbitrator—Distinction.

———*Rights of parties.*

The essential difference between a Commissioner appointed to effect a partition and an arbitrator is that the former is an officer selected and appointed by the Court in whose selection the parties have not as of right, any choice, whereas the latter is a person selected by the parties in whose selection the Court has no choice. In the former case the parties express no consent to be bound by the decision of the Commissioner who is appointed by the Court under the provision of S. 75 and O. 26, R. 13 of the C. P. Code, and whose decision the parties may challenge before the Court passing a final decree. In the latter case they express such consent and cannot challenge the arbitrator's decision on questions of fact or law except on the limited grounds contained in the 2nd Sch. of the Code. (*Dawson Miller*, *C. J. and Mullick*, *J.*) BHOLA NATH ROY *v.* BATA KRISHNA ROY. **95 I. C. 321 = 7 P. L. T. 739 = 1926 P. H. C. C. 161 = A. I. R. 1927 Pat. 135.**

—S. 75—Commission to two persons.

———*Legality of.*

The issue of a commission to render proper account of improvements to two persons, is irregular and of doubtful legality. (*Odgers and Wallace*, *JJ.*) AMBI *v.* KUNHI KAVAMMA. **118 I.C. 296 = A.I.R. 1929 Mad. 661.**

—S. 75—Powers to issue.

———S. 75 does not give the Court power to issue a commission to examine anybody anywhere and before any private person whether or not any suit has been instituted. For instance, this section would not give the Court power where there was no pending suit to direct a private citizen to appear, before, say a Punchayet of some particular caste to give evidence on some caste dispute. Nor could the Court require a private citizen in a similar case to appear before the Club Committee or any other private domestic tribunal ; nor for the matter of that before, say a Government departmental commission. This section must be qualified by the rules in the First Schedule, subject of course to such further rules as may be found in the High Court Rules. (*Marten*, *J.*) JAMES MACKINTOSH & CO. *v.* SEINDIA STEAM NAVIGATION CO., LTD. **75 I. C. 221 = 24 Bom. L. R. 853 = 47 Bom. 250 = A. I. R. 1922 Bom. 444.**

—S. 75—Scope of commission.

———S. 75 defines clearly the circumstances under which a commission may be issued and it does not authorise a Court to delegate to the Commissioner the trial of any material issue which it is bound to try. (*Abdul Raoof and Harrison*, *JJ.*) SAWAN MAL *v.* RAUNAQ MAL. **68 I. C. 802 = 3 Lah. 209 = A. I. R 1922 Lah. 47.**

—S. 75—Successive commissions.

———*Legality of.*

C. P. Code does not contemplate the issue of a succession of commissions to value improvements all covering the same ground, the filing of a succession of reports all being treated alike as evidence, and the final sitting of them and selection by the Court of so much from this mass of matter as it thinks fit to adopt : A. I. R. 1922 Mad. 219, Dist. (*Odgers and Wallace*, *JJ.*) AMBI *v.* KUNHI KAVAMMA. **118 I. C. 296 = A. I. R. 1929 Mad. 661.**

—S. 75—What is not referrable.

———The question whether one of the parties is personally engaged in agricultural labour cannot be referred to the Commissioner. (*Madgavkar*, *J.*) ALIMOHOMED *v.* SHAMSUDDIN. **30 Bom. L. R. 131 = 109 I. C. 133 = A. I. R. 1928 Bom. 145.**

———*Whole case.*

Judge has no power to make over the whole case to the commissioners and to delegate his functions in the matter of taking evidence and determining issues to them : A. I. R. 1922 Lah. 47, Ref. (*Abdul Raoof and Martineau*, *JJ.*) TULSI RAM *v.* DINANATH. **89 I. C. 333 = A. I. R. 1926 Lah. 145.**

—S. 75—What is referrable.

———Where the Court, upon the materials on the record was unable to come to any decision and it ordered a party to submit certain papers before a Commissioner and directed the Commissioner to state in his report whether what had been submitted was adequate and also whether the party should not be ordered to pay money compensation for what had not been supplied,

Held, that, as after the Commissioner had submitted his report the matter would necessarily be considered by the Court there was no objection to the Commissioner having been asked to decide the above-mentioned points. (*Greaves and Mukerji*, *JJ.*) MANDALAL ROY CHOUDHURY *v.* MUKUNDALAL DE. **89 I. C. 24 = A. I. R. 1926 Cal 57.**

—S. 79—Appeals.

———*Competency.*

Where the Government acquired a plot of land for the District Board and the District Board appealed against the decision allowing compensation to the owners of the plot,

Held, that the appeals were filed by a person not competent to appeal. (*Zafar Ali and Jailal, JJ.*) COLLECTOR AND CHAIRMAN, DIST. BOARD, GUJARANWALA *v.* HIRA NAND. **111 I.C. 477 = 9 Lah. 667 = 10 L. L. J. 330 = 29 P. L. R. 268 = A. I. R. 1929 Lah. 10.**

———*Applicability to.*

S. 79 applies to appeal also. (*Zafar Ali and Jailal, JJ.*) COLLECTOR AND CHAIRMAN, DIST. BOARD, GUJRANWALA *v.* HIRA NAND. **111 I. C. 477 = 9 Lah. 667 = 10 L. L. J. 330 = 29 P. L. R. 268 = A. I. R. 1929 Lah. 10.**

—S. 79—Sheriff—Liability for acts of subordinates.

———The head of a Government department is not liable for wrongful acts of officials in the department, unless it can be shown that the act complained of, was substantially the act of the head of the Department himself. *Raleigh* v. *Goschen* (1898) 1 Ch. 73, Rel. on.

Where the acts done by the bailiff were not substantially the acts of the Sheriff himself, the Sheriff could not be sued in his official capacity for such acts. (*Marten, C. J. and Blackwell, J*) SHERIFF OF BOMBAY *v.* HAKMAJI MOTAJI & CO. **51 Bom. 479 = 29 Bom. L. R. 1071 = 104 I. C. 685 = A. I. R. 1927 Bom. 521.**

—S. 79—Suit against public servant.

———*Personal liability.*

Because one can bring a suit against a public officer in respect of acts done by him in his official capacity, it does not follow that one can sue tnat officer by his official name, just as if he was a "corporation sole." The Sheriff of Bombay is personally liable for the actions and defaults of his bailiffs and servants, and anybody complaining of his default should sue him personally and not by the name of his office : (English case-law referred to). (*Marten, C. J. and Blackwell, J.*) SHERIFF OF BOMBAY *v.* HAKAMJI MOTAJI & CO. **51 Bom. 749 = 29 Bom. L. R. 1071 = 104 I. C. 685 = A. I. R. 1927 Bom. 521.**

—S 79—Suit against State Railway.

———Railways Act of 1890 contains no clear indication that a suit against State Railway can be brought against the Manager, on the contrary the definition of Railway Administration, in the case of a Railway administered by the Government, as including the Government, suggests that a suit like this should be brought against the Government. (1901) Ind. Rly. Cas. 2nd Edn. Foll. (*Fawcett, J.*) SUKHANAND SHAMLAL *v.* OUDH & R. RLY. **48 Bom. 297 = 26 Bom. L. R. 71 = 80 I. C. 531 = A. I. R. 1924 Bom. 306.**

—S. 79—Suit on contract against Government.

———*Liability.*

When a statute lays down certain mandatory provisions in regard to the framing of contracts between the Secretary of State and a private individual, it is no answer to say that because the provisions were ignored on particular occasions and payments were made on contracts which were not in conformity with the statute, that that should be taken as a precedent which will be binding upon the Secretary of State in every case. Contracts to be binding upon the Secretary of State, must be made in strict conformity with the provisions laid down in the statute. If they are not so made, they are not valid as against him. (*Chotzner, J*) KESSORAM PODDAR & CO. *v.* SECRETARY OF STATE. **107 I. C. 360 = 54 Cal. 969 = A. I. R. 1928 Cal. 74.**

—S. 79—Wrongful acts of subordinate.

———*Liability of head of department.*

Obiter : The head of a Government department is not liable for wrongful acts of officials in the Department, unless it can be shown that the act complained of, was substantially the act of the head of the Department himself : *Roper* v. *Public Works Commissioners*, (1915) K. B. 45, Rel. on. (*Marten, C. J. and Blackwell, J.*) THE SHERIFF OF BOMBAY *v.* HAKMAJI MOTAJI & CO. **104 I. C. 685 = 29 Bom. L. R. 1071 = 51 Bom. 749 = A. I R. 1927 Bom. 521.**

—S. 80—Act purporting to be done in official capacity.

———*Meaning of.*

If the act was one such as is ordinarily done by the officer in the course of his official duties, and he considered himself to be acting as a public officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity within the ordinary meaning of the term "purport." The motives with which the act was done do not enter into the question at all : A. I. R. 1924 All. 851, Foll.; 7 A. L. J. 301 and 26 All. 220, Dist. (*King and Bennet, JJ.*) DR. BISHAMBHAR SAHI GUPTA *v.* BABU SHAMBHU DAYAL. **1930 A. L. J. 1080 = 124 I. C. 705 = A. I. R. 1930 All. 704.**

—S. 80—Applicability.

———*Injunction.*

The Bombay view that in suits to restrain by injunction the commission of some official act prejudicial to the plaintiff, if the immediate result of the act would be to inflict irremediable harm, S. 80 does not compel the plaintiff to wait for two months before bringing his suit is overruled by the Privy Council and the section is applicable to all forms of action and to all kinds of relief without exception : A. I. R. 1927 P. C. 176, Foll. (*Marten, C. J. and Crump, J.*) MARIYAM HAKIM *v.* SECRETARY OF STATE. **29 Bom. L. R. 1427 = 105 I. C. 756 = A. I. R. 1927 Bom. 649.**

—S. 80—' Cause of action.'

———*Meaning of.*

Although the cause of action in S. 80 should not be taken in a narrow sense, the object of the section being merely to inform the defendant substantially of the ground for complaint, yet the section requires the cause of action to be stated with some precision : 24 Mad. 279 Rel. on. (*Chotzner, J.*) KESSORAM PODDAR & CO. *v.* SECRETARY OF STATE. **54 Cal 969 = 107 I. C. 360 = A. I. R. 1928 Cal. 74.**

———*Notice.*

Where the cause of action has not, arisen at the time of the notice, the notice is invalid. (*Chotzner, J.*) KESSORAM PODDAR & CO. *v.* SECRETARY OF STATE. **54 Cal. 969 = 107 I. C. 360 = A. I. R. 1928 Cal. 74.**

—S. 80—Declaratory suits.

———S. 80 applies even to a suit which is brought for a mere declaratory decree : A. I. R. 1927 P. C. 176 (P. C.), Foll. (*Shadi Lal, C. J. and Abdulqadir, J.*) RURA *v.* OFFICIAL RECIVER AMRITSAR. **125 I. C. 625 = A. I. R. 1930 Lah. 708.**

—S. 80—Emergent cases.

———*Injunction against threatened act—Notice.*

Per *Kemp, J.*:—No suit may be instituted against the Secretary of State until the expiration of the two months notice required by the section. The terms of the section are imperative and make no exception in the case of suits for an injunction and a Court of law is not entitled to graft on to the plain wording of the section a qualifying clause excepting suits for an injunction, a kind of relief which must have been in the contemplation of the framers of the Code when the section was

drafted and re-drafted. Nor does it make any difference that the injury apprehended is immediate or irreparable. A suit in respect of something which a public officer is going to do not in respect of something he has done, but in respect of the further acts threatened, lies without notice. No notice is necessary in a suit for injunction to prevent a threatened act against the public officer. *See* however A. I. R. 1927 Bom. 649. (*Shah, Ag. C. J. and Kemp, J.*) BHAJCHAND DAGADUSHA *v.* SECRETARY OF STATE FOR INDIA.
26 Bom. L. R. 1 = 48 Bom. 87 = 90 I. C. 13 = A. I. R. 1924 Bom. 1.

S. 80—Government school master.

——*Services lent—Notice.*

A schoolmaster who was originally in Government service, but whose services are only lent to the municipality and part of whose allowance is payable by Government and who has a lien on the Government post he held, must be deemed to be a public officer and as such entitled to a notice of suit under the section. (*Kinkhede, A. J. C.*) WAMAN *v.* MITRA N. M.
104 I. C. 762 = A. I. R. 1928 Nag. 33.

—S. 80—Limitation.

——*Period of notice—Deduction of.*

In the case of a suit alleged to be barred under a special law of limitation, the party is not entitled to deduct the period of two months for service of notice under S. 80 of the C.P. Code. (*Woodroffe and Cuming, JJ.*) SECRETARY OF STATE FOR INDIA *v.* ANANDA MOHAN ROY. **66 I. C. 287 = 34 C. L. J. 205 = A. I. R. 1921 Cal. 661.**

—S. 80—Malafides.

——*Necessity for notice.*

In a suit for damages for wrongful arrest against a public officer, he is entitled to notice of suit under S. 80 even if in the discharge of his duty he has acted *mala fide.* 24 Cal. 584 and 41 Mad. 792 (F. B.), Foll. 16 C. W. N. 145 Diss. But no notice is necessary for the recovery of money extorted from the plaintiff by the officer as a consideration for his release. (*Sanderson, C. J. and Richardson, J.*) DAKSHINA RANJAN GHOSE *v.* OMAR CHAND OSWAL. **75 I. C. 173 = 50 Cal. 992 = 38 C. L. J. 104 = 28 C. W. N. 10 = A. I. R. 1924 Cal. 145.**

——*S. 80—Municipal Council—Suit against—Two months' notice if necessary.*

A Municipal Council is not an office of the Government within the meaning of S. 80 and that the suit instituted against the Municipality was not bad for want of two months' notice. (*Madhavan Nair, J.*) VASUDEVA RAO *v.* MUNICIPAL COUNCIL, ANANTAPUR. **(1930) M. W. N. 821.**

—S. 80—Notice by plaintiff.

——The notice of suit required by S. 80 must be given by the person who actually becomes the plaintiff and by no other. Notice by plaintiff's father in respect of the same cause of action is not therefore sufficient : 25 All. 187, Rel. on. (*Marten, C. J. and Patkar, J.*) MAHADEV DATTATRAYA RAJARSHI *v.* SECRETARY OF STATE. **124 I. C. 814 = 32 Bom. L. R. 604 = A. I. R. 1930 Bom. 367.**

—S 80—Notice by pleader.

——Notice by a pleader on behalf of his client under S. 80, C. P. Code, is not a mere private letter, as it is one which S. 80 requires in the case of an intended suit against a public officer in respect of any act purporting to be done by that public officer in his official capacity. (*Fawcett and Mirza, JJ.*) GOVT. PLEADER *v.* L. B. BHOPATKAR. **30 Bom. L. R. 934 = 113 I. C. 519 = A. I. R. 1928 Bom. 338.**

—S. 80—Notice under Railway Act -State Railway.

——*Sufficiency.*

"S. 80 is express, explicit and mandatory, and it admits of no implications or exceptions." It is not abrogated by S. 77 of the Railways Act, where the Secretary of State represents a State-owned railway. 51 B. 725 (P. C.), Rel. on, 52 B. 548, Foll. (*Findlay, J. C.*) SHAIKH HUSSAIN *v.* G.I.P. RAILWAY. **123 I. C. 902.**

——*Sufficiency.*

A notice under S. 77 would not dispense with the necessity of a notice under S. 80, C. P. Code : A. I. R. 1928 Bom. 421, Foll. (*Banerji and Young, JJ.*) ALI ASMAT *v.* G. I. P. RAILWAY. **124 I. C. 711 = 1930 A. L. J. 1125 = A. I. R. 1930 All. 476.**

——*Sufficiency*—Vice versa.

Notice served under S. 80, C. P. Code, on the Collector within six months, may be considered to be a good notice under S. 77 to the railway administration by virtue of the extended definition of railway administration including the Government under S. 3, Cl. (6). The notice, however, to be served under S. 140, Railways Act, on the manager of a railway administered by the Government is a notice required or authorized by the Railways Act to be served on a railway administration and would not be a substitute for a notice necessary to be given before institution of a suit against the Secretary of State under S. 80, C. P. Code, (Case-law discussed).

Obiter —It is a matter for the legislature to consider whether, in the case of a suit against a railway belonging to the State, it is necessary to give notice under S. 80 C. P. Code, when notice of claim is given under Ss. 77 and 140, Railways Act. (*Patkar and Baker, JJ.*) MIRACHAND *v.* G. I. P. RY. CO. **52 Bom. 548 = 113 I. C. 511 = 30 Bom. L. R. 970 = A. I. R. 1928 Bom. 421.**

——*Sufficiency.*

The plaintiff, who consigned at Bombay some goods, brought a suit against the G. I. P. Ry. Co., and the Secretary of State for loss of goods in transit. He gave a notice, as required under S. 77, Railways Act, within six months of the loss, that is, on 20th February, 1925. The railway Administration was taken over by the Secretary of State for India on 1st July, 1925, and the suit was filed on 18th August, 1925. It was contended that the suit was bad by reason of the want of notice under S. 80, C. P. Code.

Held : that the contention could not be upheld as the Secretary of State having taken over the administration of the railway Company stood in the shoes of the Railway Administration which he took over and, therefore, the suit which was good against the Railway Administration was also good against him : A. I. R. 1927 P. C. 176 (P. C.), Dist.; 44 Cal. 16, Ref. (*Devadoss, J.*) G. I. P. RY. CO. *v.* MAJETI SREERAMULU. **109 I. C. 406 = 1928 M. W. N. 218 = A. I. R. 1928 Mad. 599.**

—S. 80—Object of section.

——The object of S. 80 is merely to inform the defendant substantially of the ground of complaint and it must not be strictly or too narrowly construed and must not be construed as if it is pleading. It need not set out all the details and facts of the case which the plaintiff intends to prove and the notice must be considered sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed. *Jones* v. *Bird*, 24 R.R. 579 ; 24 Mad. 279 and 27 Bom. 189, Foll. (*Ramesam, J.*) VENKATAKRINIAR *v.* SECRETARY OF STATE. **23 M. L.W. 464 = 91 I. C. 368 = A. I. R. 1926 Mad. 408.**

—S. 80—Official Assignee.

———*Notice of suit against.*

An Official Assignee purporting to act legally in taking possession of certain goods believing them to be the insolvent's property which ultimately turns out not to be his property does not act strictly legally, all the same he is acting as an Official Assignee and in a suit against him for damages notice under S. 80 is necessary. A.I. R. 1924 All. 851 : A. I. R. 1924 Cal. 145; 26 Bom. 809. Foll, (English cases considered.) (*Ramesam and Cornish, JJ.*) F.H. WILSON *v.* NATHMULL.
124 I.C. 144 = 31 M.L.W. 339 = A.I.R. 1930 Mad. 458.

———*Notice of suit against,*

Where the plaintiff sues the Official Assignee for declaration and possession of insolvent's land, he can do so without having to give notice under section 80, the suit not being based on tort. (*Macleod, C.J. and Crump, J.*) DAMODAR JAGJIWAN *v.* GOVINDJI JIWABHAI.
73 I. C. 240 = 25 Bom. L. R. 378 = A. I. R. 1923 Bom. 392.

—S. 80—Officer Receiver.

———*Notice of suit against.*

A suit against a Receiver appointed by Court cannot be sustained without the requisite notice under S. 80, C. P, Code. There is no distinction between cases where the Receiver is already discharged and cases where the order of discharge has not been made. (*Rankin, C. J. and C. C. Ghose, J.*) RADHARANI DASSYA *v.* PURNA CHANDRA SARKAR, **34 C. W. N. 671.**

———*Notice of suit against.*

The Official Receiver, being a public officer, has to be served with a notice under S, 80. (*Shadi Lal, C.J, and Abdul Qadir, J.*) RURA *v.* OFFICIAL RECEIVER AMRITSAR. **125 I. C. 625 = A. I. R. 1930 Lah. 708.**

———*Notice of suit against.*

As soon as a receiver is appointed under the Provincial Insolvency Act, he becomes a public officer within the meaning of S, 2, sub-S, 17 and he is protected by S, 80. An Official Receiver stands on a higher footing than a receiver appointed in a particular case and therefore no suit is maintainable against him without the requisite notice, A sanction granted by Insolvency Court *ex parte* cannot be taken as an adequate compliance with the requirements of S, 80 of the Code of Civil Procedure. (*Lindsay and Kanhaiya Lal, JJ.*) MURARI LAL *v,* E. V DAVID. **47 All. 291 = 22 A.L.J. 1116 = 6 L.R.A. (Civ.) 106 = 84 I. C. 739 = A.I.R. 1925 All. 241.**

———*Notice of suit against.*

The utmost that can be said is that an Official Receiver is a public officer within S. 2, sub-clause 17 (*d*), C. P. Code, and notice under S, 80 is necessary before filing a suit against him. (*Lindsay and Sulaiman, JJ.*) MT. MAHTANA KUNWAR *v.* E. V. DAVID.
77 I. C. 57 = 21 A.L.J. 737 = 4 L.R.A. (Civ.) 483 = 46 All. 16 = A. I. R. 1924 All 40.

—S. 80—Plea of want of notice.

———A plea as to want of notice under S, 80 is not barred even though it is raised for the first time at the date of final hearing, (*Lindsay and Kanhaiya Lal, JJ.*) MURARI LAL *v,* E. V. DAVID, **47 All. 291 = 22 A L.J. 1116 = 6 L.R.A. Civ. 106 = 84 I. C. 739 = A.I. R. 1925 All. 241.**

—S. 80—Police Inspector.

———*Notice of suit against.*

Police Inspector proceeded to the scene of offence on receipt of the report forwarded to him by the head muharrir, His subsequent report complaining of assault and obstruction by the plaintiff and his party was made by him in his capacity as police-officer. One of the offences with which the plaintiff was charged was that under S. 332, I. P. Code, Plaintiff was acquitted and suit was filed by him for damages for malicious prosecution.

Held, that the Police Inspector was acting in his official capacity and that it was imperative on the plaintiff to give notice to him of the suit for malicious prosecution. A.I.R. 1924 All. 851, Foll. ; 5 I.C. 467, Dist. (*Sen and Naimatullah, JJ.*) MD. SHARIF *v.* NASIR ALI.
A.I.R. 1930 All. 742.

—S. 80—Receiver in insolvency proceedings.

———*Mortgage suit against—Notice.*

Though a receiver appointed under Provincial Insolvency Act (1920) may be a public officer within the meaning of S.80, C. P. Code yet a suit to recover a mortgage property, being not a suit in respect of any act done by the receiver as such, is maintainable without notice under S. 80. 44 Bom. 895 : A. I. R. 1925 All. 241 ; 13 Bom, 343 and A.I.R. 1927 All, 132, Rel. on, ; A. I. R. 1923 Bom. 302 ; and A.I.R. 1927 P.C. 108, Ref. (*Marten, C.J. and Patkar, J.*) KASI BAI *v.* CHUNNILAL HATHISING. **31 Bom. L. R. 1199 = 122 I. C. 857 = A.I. B. 1930 Bom, 11.**

—S. 80—Sanitation Panchayat.

———*Applicability to.*

Village Sanitation Panchayat is not a Public Officer within the meaning of S. 80 and hence in the absence of notice, a suit is not untenable, 34 Bom, 583, Diss. (*Macnair, A.J.C.*) VILLAGE SANITATION PANCHAYAT COMMITTEE *v.* S, R. DESHMUKH.
114 I.C. 288 = A.I.R. 1929 Nag. 70.

—S. 80—State Railway, combined notice to.

———In the case of a State Railway it is open to a party to give a combined notice which would satisfy all the requirements of S. 77, Railways Act, and S.80, C.P. Code. But if a party dees not do that he must give a notice under S. 77 within six months in order to enable him to claim compensation for loss of goods and he must also give a notice under S. 80, C. P. Code, in order to enable him to file a suit against the Secretary of State, (*Devadoss, J.*) G.I.P. RY. CO. *v.* MAJETI SREERAMULU. **109 I.C 406 = 1928 M. W. N. 218 = A. I. R. 1928 Mad. 599.**

—S. 80—Substantial compliance.

———*Sufficiency.*

A substantial compliance with the provisions of S. 80 is sufficient. A.I.R. 1928 Cal. 74, Appl (*Milne, A. J. C.*) THAWERDAS SIRUMAL *v.* SECRETARY OF STATE. **A.I.R. 1929 Sind 61.**

—S. 80—Suit against future act.

———Per *Ramesam, J.*—In respect of acts of public servants done in their official capacity the section applies only in the case of past acts completed or begun but incomplete and not to threatened acts.

Per *Reilly, J.*—The words "in respect of any act purporting to be done" cover only a past act and do not include a future act, (*Ramesam and Reilly, JJ.*) K. R. MUTHU, A. R, ARUNACHALAM CHETTY *v.* DAVID ESQ., THE OFFICIAL RECEIVER, RAMNAD DIST.
50 Mad. 239 = 24 M.L.W. 730 = 99 I. C. 284 = A. I. R. 1927 Mad, 166 = 51 M.L.J, 671.

—S. 80—Suit against police-officer.

———In the case of a suit for damages for assault and battery by police officer while investigating cognizable offence the Police-officer is not entitled to notice either under S, 80 (4) or C.P, Code, S. 80 (*Fawcett, Madgavkar and Mirza, JJ.*) NARAYAN HARI *v.* YESHWANT RAOJI. **114 I. C. 246 = 30 Bom.L.R. 1018 = 52 Bom. 832 = 30 Cr.L.J. 278 = 12 A.I.Cr. R. 154 = A. I. R. 1928 Bom. 352 (F.B.).**

—S. 80—Suit against receiver.

———*Enforcement of charge—Notice.*

When the Official Receiver is sued for establishing and realizing a charge over moveable and immoveable property of a debtor and when plaintiff does not allege any act or omission on the part of the Receiver, no notice under S. 80 is necessary. (*Kanhaiyalal and Ashworth, JJ.*) SKIPPERS & CO. *v.* DAVID.

48 All. 821 = 24 A.L.J. 1067 = 99 I. C. 138 = A.I.R. 1927 All. 132.

—S. 80—Suit for declaration and injunction.

———*Notice.*

A suit for a declaration that the suit properties belonged to the plaintiff, and Defendants Nos. 3 and 4 and for a perpetual injunction restraining the Official Receiver from selling them as the properties of the 2nd defendant is really to restrain the intended sale by the Official Receiver and it is not unsustainable for want of notice under S. 80. Case-law considered. (*Ramesam and Reilly, JJ.*) K. R. MUTHU, A.R. ARUNACHALAM CHETTY *v.* THE OFFICIAL RECEIVER, RAMNAD DIST.

50 Mad. 239 = 24 M.L.W. 730 = 99 I.C. 284 = A.I. R. 1927 Mad. 166 = 51 M. L. J. 671.

—S. 80—Suit for injunction.

———*Notice.*

A suit in which *inter alia* an injunction is prayed is still "a suit" within the words of the section which imposes a statutory and unqualified obligation in respect of the notice contemplated under the section, and the section applies to a suit for injunction even where the delay of two months contemplated by the section is likely to result in immediate injury to the plaintiff. A. I. R. 1927 P. C. 176, Foll. (*Rupchand Bilaram, A. J. C.*) VISHNOMAL *v.* COURT OF WARDS, SIND.

22 S.L.R. 63 = 105 I. C. 729 = A. I. R. 1928 Sind 76.

—S. 80—Two months' time.

———*Expiry of—Injunction.*

The view that plaintiff can bring his suit before the two months' time prescribed has expired in the case of suits against officials for acts purporting to be done in discharge of their duties, when part or the whole of the relief claimed is an injunction, is not correct; 25 Cal. 239; A. I. R. 1924 Cal. 145; 37 Mad. 113; 41 Mad. 792 and A. I. R. 1924 All. 851, Appr. 35 Bom. 362; 10 I.C. 639; 37 Bom. 243; 17 I. C. 876 and 40 Bom. 392; 34 I. C. 535, Overruled. Section 80 is to be strictly complied with and is applicable to all forms of action and all kinds of relief. (*Viscount Sumner.*) BHAGCHAND *v.* SECRETARY OF STATE.

51 Bom. 725 = 54 I. A. 338 = 25 A. L. J. 641 = 29 Bom. L. R. 1227 = 46 C. L. J. 76 = 1927 M. W. N. 561 = 1 L. C. 291 = 104 I. C. 257 = 32 C. W. N. 61 = 26 M. L. W. 809 = A. I. R. 1927 P. C. 176 = 53 M. L. J. 81.

—S. 80—Village Headman.

———*Applicability to.*

A Village Headman is a public officer within the meaning of S. 2 and no action for damages can lie against him for an act done in his official capacity unless the requirements of S. 80 are fulfilled. A report to the S. D. O. or D. C. is not notice. (*Heald, J.*) MAUNG SANYA *v.* MAUNG NGWE HLA.

79 I. C. 818 = 2 Bur. L. J. 29 = A. I. R. 1923 Rang. 250.

—S. 80—Want of good faith.

———*Necessity for notice.*

Notice should be given if act was done in official capacity whether or not in good faith. (13 A. L. J. 788 Foll.) (*Daniels and Neave, JJ.*) ABDUL RAHIM *v.* ABDUL RAHIM.

80 I. C. 72 = 22 A. L. J. 812 = 5 L. R. A. Civ. 599 = 46 All. 884 = A. I. R. 1924 All. 851.

—S. 80—When notice not necessary.

———Where defendant's interests devolve upon Government during suit, no notice as prescribed by S. 80 need be given. The matter is governed by O. 22, R. 10. 25 All. 187, Dist. (*Daniels, J.*) G. I. P RY. *v.* MAHADEO.

24 A. L. J. 726 = 96 I. C. 351 = A. I. R. 1926 All. 585.

—S. 86—Contracts on behalf of foreign state.

———*Liability of state—Permission to sue.*

An agent of a foreign State is personally liable for contracts entered into on behalf of his principal where the contracts are such as do not come under S. 86, C. P. Code, and permission to sue need not be applied for and even if granted no suit will lie against the foreign State. 29 All. 379, Foll. (*Rupchand Bilaram, A. J. C.*) RAMCHAND GOPALDAS *v.* ISMAIL KHAN.

113 I. C. 345 = A. I. R. 1928 Sind 189.

—S. 86—Co-sharer.

———*Ruling chief—Property in British India—Applicability.*

Under cl. 26 of the instrument of transfer conferring the dignity of a ruling chief and the Maharajah of Benares there was the declaration that "within the other estates now in the possession of His Highness" which are outside the State of Benares, he shall continue to have the status and responsibilities of a land-holder under the ordinary law and within the pergannah of Kaswar Rajah he shall assume that status and those responsibilities." By cl. 26 the British Government reserved the right to itself to withdraw from the Maharajah any special privileges which he had enjoyed in a certain pergannah Kaswar Raja estate. *Held*, that cl. 26 did not indicate that His Highness intended to waive his right to plead his status as a ruling chief in the case of suits in respect of properties held by him in British India. S. 86 therefore could be invoked in his aid. (*Lindsay and Ryves, JJ.*) KANHAYA LAL *v.* PRABHU NARAIN.

78 I. C. 559 = 46 All. 355 = 22 A. L. J. 317 = 5 L. R. A. Rev. 129 = A. I. R. 1924 All. 422.

———*Applicability.*

The section does not apply to a defence put forth as set off. Such a defence can be put forward in answer to a claim by a Ruling Chief without the consent of the Governor General. (*Abdul Raoof and Martineau, JJ.*) SUKHDEV SINGH *v.* HAZURA MAL GOBIND RAO.

62 I. C. 778 (Lah.).

—S. 86—Status as prince subsequent to suit.

———*Jurisdiction of Court.*

Though the defendant becomes a Ruling Prince, after the institution of suit the provisions of S. 86 will apply to the further prosecution of the suit, but there is no inherent want of jurisdiction in the Court to try the subject-matter of the suit against him. So if the party suing ignores the bar and persists in the suit, and the party sued acquiesces in the procedure and proceeds to judgment, the judgment cannot afterwards be questioned on the ground that the bar was not removed before the suit was proceeded with. Where with full knowledge of the facts that entitled him to make an application under S. 86 of the Code, a Ruling Prince made application for adjournment to enable him to file his written statement,

Held, that applications for adjournment are applications in the suit, and there was accordingly an appearance by the defendant in the suit and submission to the jurisdiction of the Court, which disentitled him from objecting to the jurisdiction of the Court. (*Das and Ross, JJ.*) MAHARAJ BAHADUR OF REWA *v.* SIVA SARAN LAL.

61 I. C. 989 = 6 P. L. J. 185 = 2 P. L. T. 180 = 1921 P. H. C. C. 136 = A. I. R. 1921 Pat. 23.

———*Omission to plead*—Res judicata.

C. P. CODE (1908).

—S. 88—Inter-pleader suit, what is.

An inter-pleader suit from its very nature, as described in S. 88, C. P. Code, is a suit in which several claimants are to be deemed to be claiming adversely to each other. Consequently, though a widow who adopts a son and another person who is adopted by a co-widow are arrayed in that suit on the same side as defendants, yet they must be deemed to be claiming adversely to each other. If in such a suit the latter puts forward his adoption by the widow under the powers conferred upon her under the will of her late husband it is the duty of the co-widow to contest the said adoption, both in respect of the factum as well as its validity, by filing a written statement to that effect. If she does not do so in spite of the fact that she is represented by a pleader on the date when the issue relating to the adoption was framed on the pleadings of other defendants, she must be deemed to have raised the point, and, if the Court decided it adversely, the matter must be deemed, under Expl. 4 to S. 11, C. P. Code, to be a matter directly and substantially in issue in that suit and it is no more open to her to contest the factum and the validity of the adoption in a subsequent suit, the decision in the previous suit operating as *res judicata* against her. (*Gokaran Nath Misra, J.*) ABDUL HALIM KHAN *v.* RAJA SADAT ALI KHAN. **108 I. C. 817=1 L. C. 733= A. I. R. 1928 Oudh 155.**

———Where the defendants did not claim adversely to one another the property in suit *from the plaintiff* and the plaintiff was not also ready to pay or deliver the property to one of them,

Held, in the circumstances of the case that the suit was not an inter-pleader suit. 2 C. W. N. 61; 15 C. L. J. 653; 20 C. L. J. 148, Dist. (*Chatterji and Pearson, JJ.*) ASAN ALI *v.* SARADA CHARAN KASTAGIR. **A. I. R. 1922 Cal. 138.**

———S. 88—Inter-pleader suit, when allowed.

———The plaintiff in order to be entitled to bring an inter-pleader suit must satisfy the Court that he has no claim or no interest in the subject-matter in dispute, and that he does not collude with any of the claimants. If he has in some way identified himself with one of the parties in the sense that it makes a difference to him which party succeeds he will be debarred from bringing such a suit, although he will not be refused relief merely because he has a natural affinity for one side rather than the other. Where the plaintiff has taken an indemnity from one of the claimants, or where he has entered into an agreement with one of them, the effect of which is that he will have to pay over less if that party succeeds, he by his interested conduct, precludes himself from obtaining relief by way of inter-pleader. *Murietta* v. *South American Co. Ltd.*, (1893) 62 L. J. Q. B. 396, Ref. (*Rutledge, C. J. and Carr, J.*) G. HARI KARMARKAR *v.* J. A. ROBIN. **4 Rang. 465= 99 I. C. 985=A. I. R. 1927 Rang. 91.**

—S. 88—Positions of parties.

———*Limitation.*

In an inter-pleader suit in which each of the contesting defendants attacks the title of the other, each is virtually in the position of a plaintiff. Where an adoption was set up by one party as having taken place in 1863 and the others pleaded that the former, not having sued within 12 years to establish the adoption, its right was barred as per the Limitation Act of 1871, Art. 129 and where the others also had not sued within the period prescribed by that Act, to set aside the adoption,

Held, if the supporters of the adoption are debarred from supporting it, the others will be equally debarred from getting a declaration that the adoption is invalid.

C. P. CODE (1908), S. 89—Effect of section.

(*Spencer, Offg. C. J. and Kumaraswami Sastri, J.*) MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I. C. 705=48 Mad. 1=A. I. R. 1925 Mad. 497.**

—S. 89—' Any other law" meaning.

———*Meaning of.*

The words " any other law" in S. 89 are very general and there is no reason for interpreting them as excluding the law laid down in other parts of the C. P. Code. (*Phillips, Ramesam and Madhavan Nair, JJ.*) SUBBARAJU *v.* VENKATARAMARAJU. **51 Mad. 800=28 M. L. W. 321=113 I. C. 632= A. I. R. 1928 Mad. 1025=55 M. L. J. 429 (F.B.).**

———Per *Kanhaiya Lal, J.*—The words ' any other law' in S. 89 do not exclude O. 23, R. 3 or any other portion of the Code of Civil Procedure, applicable to such a proceeding. The object of S. 89 clearly is to give effect to the provisions of Sch. 2 as if they had been enacted in the body of the Code, and it cannot be said that any material change of procedure, differing from what was in force prior to the enactment of the present Code of Civil Procedure, 1908, was really intended.

Per *Mukerji, J.* (*contra*).—Whatever meaning may be given to the words 'any other law for the time being in force' those words were never meant to apply to the schedule to be appended to the main Code of Civil Procedure, 1908 was really intended. (*Walsh, Kanhaiya Lal and Mukerji, JJ.*) GAJENDRA SING *v.* DURGA KUMARI. **88 I. C. 768=47 All. 637= 23 A.L.J. 561=A. I. R. 1925 All. 503 (F.B.).**

———Per *Madgavkar and Aston, A.J.Cs.*—"Any other law" in S. 89 does not include Order 23, Rule 3. (*Kennedy, J.C., Madgavkar and Aston, A.J.Cs.*) HAJI UMAR *v.* SHILVALDAS. **81 I. C. 653=16 S.L.R. 174= A. I. R. 1921 Sind 65 (F.B.).**

—S. 89—Appeal from award.

———*Award modified by compromise—Maintainability.*

A Court is competent on an application under Para. 20, Sch. II to pass a decree on an award as modified by a lawful compromise filed by the parties and from a decree so passed, no appeal lies except in so far as the decree is in excess of or not in accordance with the award so modified. (*Kanhaiya Lal, J. C. and Daniels, A.J.C.*) HAKIM FAZAL AHMAD *v.* ENAYAT AHMAD. **68 I. C. 209=9 O. L. J. 219=25 O. C. 213= A. I. R. 1922 Oudh 189.**

—S. 89—Applicability of O. 23, R. 3.

———*Reference to arbitration—Power to compromise.*

S. 89 does not preclude the application of O. 23, R. 3 to cases in which there has been a reference to arbitration. The power given by S. 20 of Schedule II to any person interested to apply to a court is not to be understood as overriding the general power given to parties under O. 23, R. 3 to adjust their disputes by a lawful compromise at any time after the institution of a suit. 45 Bom. 245, Foll. which overrules 40 Bom. 386. (*Spencer and Devadoss, JJ.*) C. C. DORAYYA *v.* C. VENKANNA. **76 I. C. 502=A. I. R. 1925 Mad. 50.**

—S. 89—Effect of section.

———S. 89 makes it obligatory that all references to arbitration whether by an order in suit or otherwise and all proceedings thereunder are governed by the provisions contained in Sch. 2 except where the Arbitration Act or any other law of arbitration applies, and that notwithstanding the use of the word "may" in Sch. 2. After all, parties are not bound to go to arbitration. But if they want to do so and to that extent seek a decision of a private tribunal then they must proceed in the manner indicated in S. 89. If they do not, the arbi-

tration is bad. (*Rangnekar, J.*) DINKARRAI LAXMIPRASAD *v.* YESHWANTRAI HARIPRASAD.
124 I. C. 119 = 31 Bom. L. R. 1403 = A. I. R. 1930 Bom. 98.

—S. 89—Effect on O. 23, R. 3.

———S. 89 does not affect the operation of O. 23, R. 3 at all and parties to a suit can resort to it if they have in fact adjusted the suit by an award. (*Marten, C.J., Crump and Blackwell, JJ.*) CHANBASAPPA GURUSHANTAPPA *v.* BASULINGAYYA GOKURNAYA.
51 Bom. 908 = 29 Bom. L. R. 1254 = 105 I. C. 516 = A. I. R. 1927 Bom. 565 (F. B.).

—S. 89—Object of section.

———S. 89, like S. 69, is intended to confer jurisdiction to link up the schedule and the body of the Code. Any change in the law is not intended unless it is so stated in express terms or unless it followed by necessary implication. The intention presumably is to provide for the exercise of jurisdiction in the case of those references to arbitration which fall within Sch. 2. (*Marten, C.J., Crump and Blackwell, JJ.*) CHANBASAPPA GURUSHANTAPPA *v.* BASLINGAYYA GOKURNAYA.
51 Bom. 908 = 29 Bom. L. R. 1254 = 105 I. C. 516 = A. I. R. 1927 Bom. 565 (F. B.).

—S. 89—Private reference during suit.

———*Enforceability of award.*

Once a suit has been instituted, all proceedings in arbitration are subject to the control of the Court. It is not permissible to the parties to deprive the Court of its jurisdiction by private reference to arbitration, and no award made on such reference, unless consented to by both parties, can be enforced in the suit, either by treating it as an adjustment of the matters in dispute under R. 3, O. 23, or under the general law of contract. 29 Cal. 167 (P.C.) ; A.I.R. 1921 Cal. 238 ; A.I.R. 1922 Cal. 404 and 40 Bom. 386, Foll. ; A.I.R. 1921 Bom. 310, Diss. from. Case-law discussed. (*Cuming and Cammiade, JJ.*) GUIMONIDASI *v.* TARINI CHARAN POREL. **104 I. C. 360 = 47 C.L.J. 59 = 33 C.W.N. 390 = A. I. R. 1927 Cal. 887.**

———*Validity of award.*

An award passed in a pending suit without the intervention of the Court may be regarded as an adjustment under O. 23, R. 3. A.I.R. 1921 Bom. 310 ; 24 Mad. 326 ; 42 Mad. 625 ; A.I.R. 1923 Mad. 576 and A.I.R. 1926 Mad. 1211, Foll.; A.I.R. 1922 Cal. 404; A.I.R. 1921 Cal. 238 and A.I.R. 1924 Cal. 567, not Foll. (*Waller and Madhavan Nair, JJ.*) NUNE AYYANNAMMA *v.* V. RAMASWAMI.
39 M.L.T. 593 = 26 M.L.W. 231 = 104 I. C. 674 = A. I. R. 1927 Mad. 1126 = 53 M.L.J. 444.

———If in a pending suit the parties go to a private arbitration without the consent of the Court the award cannot be enforced either under O. 23, R. 3, C. P. Code or under the provisions of the Indian Arbitration Act. If C.P. Code is looked into as a scheme for dealing with arbitrations in the course of litigation, it intends those to be under the strict conditions and stipulations of the second schedule and under the supervision of the Court. The Indian Arbitration Act does not apply to arbitrations in the course of litigation. (*Rankin, J.*) AMAR CHAND CHAMARIA *v.* BANWARI LAL RAKSHIT. **69 I. C. 808 = 49 Cal. 608 = A. I. R. 1922 Cal. 404.**

———The words "any other law for the time being in force" refer to amendments of, or substitutions for, the Arbitrations Act or other piece of legislation on that subject-matter. They do not include O. 23, R. 3. 40 Bom. 386 Foll. Reference to arbitration in a pending suit without intervention of Court cannot be recognised. (*Rankin, J.*) DEKARI TEA CO. LTD., *v.* INDIA GENERAL STEAM NAVIGATION CO., LTD.
25 C.W.N. 127 = 61 I. C. 919 = A.I.R. 1921 Cal. 238.

———*Record of award as adjustment.*

The words "by any other law for the time being in force" contained in S. 89 refer to some law extraneous to the Code of Civil Procedure and cannot be legitimately held to cover O. 23, R. 3. Any award made during the pendency of a suit and without the intervention of the Court, if it is not consented to, cannot be recorded as an adjustment and any attempt to enforce it by one of the parties is precluded by reason of S. 89. 40 Bom. 386, Rel. on. (*Shadi Lal, C.J. and Leslie Jones, JJ.*) HARI PARSHAD *v.* MT. SEOGNI DEVI.
67 I. C. 123 = 3 Lah. L. J. 162 = A. I. R. 1921 Lah. 232.

—S. 89—Scope.

———*Blackwell, J.*—The provision in S. 89 that "all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in Sch. 2" can only apply to cases in which persons choose to avail themselves of the machinery provided by Sch. 2, and not to cases in which they adopt other methods of submitting their differences to arbitration. (*Marten, C.J., Crump and Blackwell, JJ.*) CHANBASAPPA GURUSHANTAPPA *v.* BASLINGAYYA GOKURNAYA.
51 Bom. 908 = 29 Bom. L. R. 1254 = 105 I. C. 516 = A. I. R. 1927 Bom. 565 (F.B.).

—S. 90—Interference by Court.

———*Court should not interfere when legislature has provided special tribunal—Special tribunal for trial of disputes.*

Where the legislature has constituted a special tribunal with special and effective powers for determining a dispute, Civil Court ought not to interfere by giving some partial decision which it cannot make effective, and which accordingly will not necessarily end the dispute. (*Marten, C. J. and Blackwell, J.*) TRUSTEES OF THE PORT OF BOMBAY *v.* MUNICIPAL CORPORATION OF BOMBAY.
32 Bom. L. R. 416 = A. I. R. 1930 Bom. 232.

—S. 90—When not applicable.

———Where a Court can give merely a declaration without any substantial relief and such substantial relief was reserved to entirely different tribunals under the statute, thereby barring a fresh suit founded on the declaration, the case cannot be one "fit to be decided" within the meaning of O. 36, R. (5) (2) (*c*). (*Marten, C. J. and Blackwell, J.*) TRUSTEES OF THE PORT OF BOMBAY *v.* MUNICIPAL CORPORATION OF BOMBAY.
32 Bom. L. R. 416 = A. I. R. 1930 Bom. 232.

—S. 91—Conditions for suit by one member.

———*Plea of special damage—Proof of.*

If the plaintiff relies on special damage in a suit to establish a public right, he must allege special damage in the plaint giving particulars and details of special damage which has accrued to him. The mere general allegation is not sufficient. (*Greaves and Cuming, JJ.*) RAJCHANDRA *v.* MAHIN CHANDRA.
91 I. C. 728 = A. I. R. 1926 Cal. 549.

—S. 91—Effect of section on O. 1, R. 8.

———S. 91 does not control or restrict the provisions of O. 1, R. 8, and therefore it does not take away the right of the plaintiffs to sue which may exist independently of its provisions. (*Suhrawardy and Duval, JJ.*) PEARY LAL MULLIK *v.* SURENDRA NATH. **88 I. C. 505 = A. I. R. 1925 Cal. 1233**

—S. 91—Plea of want of sanction.

———*Maintainability in appeal for first time.*

Where the contention that the suit is not maintainable for want of sanction of the Advocate-General under S. 91, C. P. Code, was not made the subject of any pleading in the trial Court, but was raised for the first time in the lower appellate Court and that Court refused to entertain it,

Held, that it was perfectly within its rights in doing so, as it raised questions of fact, and, as, on principle, a defeated litigant should not be allowed to take the successful party by surprise and expose him to the brunt of a new attack at the stage of appeal. 33 Bom. 35, Ref. (*Kinkhede, A. J. C.*) SHRIDHAR *v.* RAJABHAN. **105 I.C. 113 = A.I.R. 1928 Nag. 39 (2).**

—S. 91—Right of easement—Suit for.

———*No relief for nuisance—Maintainability.*

No relief was sought in respect of the public nuisance though the plaintiff's witnesses described the place by such expression as Shah-i-am and where a relief in respect of a right of easement was claimed, *Held*, there can be no declaration that the place in suit is a public thoroughfare and has been obstructed as such. (*Abdul Raoof and Campbell, JJ.*) TIRUTH RAM *v.* MUHAMMAD ABDUL. **73 I. C. 616 = A. I. R. 1923 Lah. 546.**

—S. 91—Section merely procedural.

———S. 91 is a provision for procedure. It does not purport to create a right which did not exist before nor does it purport to deprive anybody of a right derived from the general law of the land. It is not a prohibitive section which prevent a person from asserting a right except in a particular way. (*Walsh, Ag. C. J. and Ryves, J.*) MD. RAZA KHAN *v.* MD. ASKARI KHAN. **85 I. C. 304 = 46 All. 470 = 22 A. L. J. 729 = 6 L. R. A. Civ. 67 = A. I. R. 1924 All. 599.**

—S. 91—Special damages.

———*Public nuisance—Consent of Advocate-General.*

Where an obstruction to a public road causes a particular inconvenience of a substantial kind to the plaintiff, he can bring a suit to remove it without the consent of the Advocate-General. 3 Cal. 20 (F.B.). Foll. (*Martin, C. J. and Murphy, J.*) ARDESHIR JIVANJI *v.* AIMAI KAVARJI. **117 I. C. 513 = 53 Bom. 187 = 31 Bom. L. R. 97 = A. I. R. 1929 Bom. 94.**

———*What constitutes.*

Where the plaintiff would, every day and every hour of the day when he desired to leave his house by the entrance on a particular side be compelled to go the other way and travel at least 3 or 4 times as far and 3 or 4 times as fast if he were pressed for time,

Held, that that would amount to special damage or a more particular form of nuisance suffered by him than by the general public. The Court ought to consider, even although a particular form of nuisance is not capable of being translated into rupees and annas, whether it is a substantial grievance which constitutes a wrong peculiar to the plaintiff which in the ordinary way Court of Justice would remove by granting an injunction. (*Walsh, Ag. C. J. and Ryves, J.*) MD. RAZA KHAN *v.* MD. ASKARI KHAN. **85 I. C. 304 = 46 All. 470 = 22 A. L. J. 729 = 6 L. R. A. Civ. 67 = A. I. R. 1924 All. 599.**

—S. 91—Suit for Removal of encroachment.

———*Public street—Proof of special damage.*

Plaintiff filed a suit to have declaration that the land described in the plaint was street land and to obtain a mandatory order directing defendant to remove an *otla* made by him on the land.

Held, that such a suit at the instance of a private person is not maintainable unless he is able to show that he is unable to use the road, nor can he seek the assistance

of the Court to get the *otla* removed, merely because he wants to walk over that portion of the street occupied by the *otla*, unless he proves special damage. (*Macleod, C. J. and Crump, J.*) MANILAL JIBHAI *v.* ISHVARBHAI SAMALBHAI. **87 I. C. 934 = 27 Bom. L. R. 421 = A. I. R. 1925 Bom. 367.**

—S. 91—When inapplicable.

———*Encroachment on village road.*

An encroachment on a village road raises questions of the right of easement of the residents and proprietary right of the zamindars and S. 91 would not be applicable to issues which arise on encroachments being made on a road of this nature. A suit, therefore, lies without the permission of the Advocate-General. (*Dalal, J.*) SAHDEO SINGH *v.* RAM NAWAL SINGH. **A. I. R. 1929 All. 790.**

S. 92.

Abatement of suit.
Accounts.
Addition of Parties.
Alienation of Trust Property.
Charitable Trust.
Compromise of Suit.
Co-Trustees.
De-facto Trustee. *See* EXPRESS TRUSTEE.
Express Trustee.
Forum.
Object of.
Parties.
Private Trust.
Public Trust.
Relief.
Religious Trust.
Removal of Trustee.
Right to sue.
Sanction.
Scheme.
Scope of.
Trespasser.
Trustee de son tort.
Miscellaneous.

—S. 92—Abatement of suit.

———*Suit for removal of trustee and framing scheme—Death of trustee pending suit—Effect of.*

In a suit under S. 92, C. P. Code, for removal of the defendant-Pandara Sannadhi and framing a scheme, the death of the defendant pending the suit does not cause the whole suit to abate. In order to justify a suit for a scheme under S. 92, it is necessary for the plaintiffs to allege a breach of trust and a prayer for a scheme is therefore not ancillary to a prayer for the removal of the trustee and the cause of action survives against the representative of the deceased. (*Phillips and Krishnan, JJ.*) ARUMUGA THAMBIRAN *v.* NAMASIVAYA PANDARA SANNADHI. **48 Mad. 688 = 22 M. L. W. 130 = 1925 M. W. N. 569 = 91 I. C. 109 = A. I. R. 1926 Mad. 162 = 49 M. L. J. 324.**

———*Death of one of the plaintiffs—Effect of.*

Although one of the plaintiffs obtaining the sanction for instituting the suit dies, a suit under S. 92 or an appeal therefrom does not abate. (*Spencer, Offg. C. J. and Srinivasa Aiyangar, J.*) H. K. SAYYAD GULAM GHOUSE *v.* DOST MOHAMMAD KHAN SAHIB. **85 I. C. 666 = 20 M. L. W. 882 = A. I. R. 1925 Mad. 244 = 47 M. L. J. 745.**

—S. 92—Accounts.

———*Suit for, with directions as to funds—Applicability.*

Where the plaint asked that accounts should be taken with reference to trust property received by some of the defendants and further in effect it also asked for directions as to what should be done with trust funds where the prayer of the plaintiffs was that the funds should go to the plaintiffs and some other defendants, and it was further prayed that if the funds could not be allowed to go to them at least a direction might be given that they should be allowed to retain the funds for the benefit of the temple,

Held. that the case was within S. 92. (*Shah, Ag. C. J. and Fawcett, J.*) NARAYAN BHIKERJI *v.* VASUDEV VINAYAK. **26 Bom. L. R. 950 = 86 I. C. 490 = A. I. R. 1924 Bom. 518.**

———*Suit by trustee against co-trustee—Applicability.*

A suit by trustees against a co-trustee for directing the defendant to submit his accounts and to pay up whatever may be found as the balance in his hands on the scrutiny of the accounts falls under cl. (1) and cannot be instituted except in conformity with cl. (1). 21 Mad. 406, Dist. (*Sadasiva Aiyar and Coutts-Trotter, JJ.*) GOVINDASAMI KADAVARAN *v.* KALIAPERUMAL. **66 I. C. 837 = 16 M. L. W. 155 = 1922 M. W. N. 83 = A. I. R. 1921 Mad. 696.**

———*Suit by general trustee against Kattalaidar—Sanction if necessary.*

A suit was brought by the general trustee of a temple against a subordinate trustee or Kattalaidar for the recovery of the balance of the amount due by defendant under the terms of his trust and not paid by him to the temple.

Held, that the amount not being an ascertained one and having to be determined by enquiry in the suit, the case was within the mischief of S. 92 (*d*), C. P. Code, and the suit was bad for want of the sanction required by that section. If it be sought to recover it by way of damages, then the suit falls under S. 14 of the Religious Endowments Act, and is bad for want of the sanction required by S. 18 of the same (*Ayling, Coutts-Trotter and Kumaraswami Sastri, JJ.*) SWAMINATHA PILLAI *v.* SUNDARESA PILLAI. **62 I. C. 911 = 14 M. L. W. 238 = A. I. R. 1921 Mad 479 (F.B.).**

———*Suit by trustee against dismissed servant—Applicability.*

A suit by a trustee against a person whom he alleges to have lawfully dismissed is none the less outside the scope of S. 92 because it asks for an account of the trust money received and payment of the amount due. (*Napier and Odgers, JJ.*) VENKU CHETTIAR *v.* DORAISWAMI CHETTIYAR. **62 I. C. 761 = 14 M. L. W. 38 = 1921 M. W. N. 439 = A.I.R. 1921 Mad. 403.**

—S. 92—Addition of Parties.

———*New reliefs added—Change in representative nature of suit—Applicability of C. P. Code, Sec.* 11, *Expl.* 6.

A suit in respect of trust property was instituted by seven persons with the sanction of Advocate General. It was subsequently amended without his sanction by adding strangers to the trust as defendants and by adding prayers for relief not covered by S. 92. The suit was later on compromised by six out of the seven plaintiffs.

Held, that the nature of the suit was changed, that it ceased to be one of representative character and the decree based on the compromise, however binding as against the consenting parties, cannot bind the rest of the public. S. 11, Expl. 6 has no application to such a case. (*Lord Sinha.*) ABDUR RAHIM *v.* SYED ABU MAHOMED BARKAT ALI SHAHA. **55 Cal. 519 = 55 I. A. 96 = 9 P. L. T. 65 = 32 C. W. N. 482 = 27 M. L. W. 339 = 26 A. L. J. 464 = 108 I. C. 361 = 30 Bom. L. R. 774 = 48 C. L. J. 55 =**

1928 M. W. N. 926 = = A. I. R. 1928 P. C. 16 = 54 M. L. J. 609.

———*New defendant—Sanction.*

While plaintiffs in order to be parties to a suit under S. 92 require the permission of the Government Advocate, defendants do not require any such permission. (*Rutledge, C.J. and Brown, J.*) C. E. DOOPLY *v.* M.E. MOOLA. **5 Rang. 263 = 103 I. C. 261 = A. I. R. 1927 Rang. 180.**

———*New defendant added—Sanction, if necessary.*

The test as to whether a new sanction is necessary when a new defendant is added, depends on whether the scope of the suit has been really enlarged or altered by the addition of the new party. 1920 M. W. N. 478, Foll. (*Krishnan and Venkatasubba Rao, JJ.*) VARA PRASAD RAO *v.* GOPALACHARLU. **24 M. L. W. 419 = 97 I. C. 462 = 1926 M.W. N. 626 = A. I. R. 1926 Mad. 970.**

———*New defendant—Validity of suit—Sanction of Advocate-General obtained—A stranger may be joined as defendant.*

If a suit is brought under the sanction of the Advocate-General the addition of a stranger as defendant does not render the suit bad. (*Newbould and Ghose, JJ.*) SYED ABU MAHOMED BARAKAT ALI *v.* ABDUR RAHIM. **80 I. C. 44 = A. I. R. 1925 Cal. 187.**

———*Suit filed with sanction—New defendants—Fresh sanction, if necessary.*

Where a suit is filed with sanction, its subsequen- amendment by adding parties without fresh sanction, does not invalidate it. (*Raymond, A. J. C.*) SYED BACHAL SHAH *v.* JUMA SHAH. **79 I. C. 539 = 16 S. L. R. 221 = A. I. R. 1923 Sind 35.**

—S. 92—Alienation of Trust Property.

———*Declaration of invalidity.*

A relief which prays for a declaration that the alienations made by the trustee, whose removal is prayed for in the suit may be declared void comes under S. 92. (*Sulaiman and Boys, JJ.*) RAMRUP GOSHAIN *v.* RAMDHARI BHAGAT. **89 I. C. 40 = 47 All. 770 = 23 A. L. J. 601 = 6 L. R. A. Civ. 352 = A. I. R. 1925 All. 683.**

———*Suit for recovery—Applicability.*

Where the trustee of charitable endowment transfers the trust property, plaintiffs cannot recover the property before first having the trustee formally removed by the Court for which purpose a suit under C P. Code, S. 92, is necessary. (*Krishnan, J.*) MUTHUSWAMI NAIDU *v.* RAYALU NAIDU. **88 I. C. 375 = 21 M. L. W. 525 = A. I. R. 1925 Mad. 689.**

—S. 92—Charitable Trust.

———*Order of Court to file accounts—Breach of—Applicability.*

When the order of the District Judge for filing of accounts under S. 5, Charitable and Religious Trusts Act, has not been complied with there is a breach of trust, by virtue of S. 6, which could be made the basis of a suit under S. 92, C. P. Code. Once such a suit is filed, the District Judge has jurisdiction to grant any or all the reliefs mentioned in S. 98 (1), C. P. Code. (*Sulaiman and Kendall, JJ.*) UMRAO SINGH *v.* HAR PRASAD. **A. I. R. 1930 All. 582.**

———*Declaration and injunction—Necessity for sanction.*

Though the sanction of the Collector is not necessary to a suit filed by a few members of a community, which merely seeks a declaration that certain properties are subject to a charitable and religious trust, such sanction becomes necessary when an additional relief is sought claiming an injunction restraining the defendants from preventing the plaintiffs from enjoying the uses and objects to which the properties have been dedicated. A. I. R. 1928 P. C. 16 ; 33 Cal. 789 ; A. I. R. 1929 Bom. 153 ; A. I. R. 1923 Bom. 67 ; A. I. R. 1921 P. C. 123 and 25 All. 631, Dist. (*Wild, A. J. C.*) FAKIR MAHOMED NANJI *v.* AGHA KHAN.

A. I. R. 1930 Sind 204.

——*Order as to scheme by Dt. Judge as* persona designata—*Appeal or revision, if lies.*

No appeal lies from an order of the District Judge as *persona designata* under a scheme of management of a charitable institution under S. 47 read with S. 2 and S. 100, nor does revision lie under S. 115. (*Macleod, C. J. and Madgavkar, J.*) LAMBODAR *v.* DHARANIDHAR.

28 Bom. L. R. 64 = 93 I. C. 195 = A. I. R. 1926 Bom. 167.

——*Applicability.*

Where it is found that the defendant is neither a constructive trustee nor a trustee *de son tort*, the suit under S. 92 against him is not maintainable. (*Rafique and Lindsay, J.*) BAL DEO DUTT *v.* GOPALJI.

21 A. L. J. 310 = 4 L. R. A. (Civ.) 190 = A. I. R. 1923 All. 247.

—S. 92—Compromise of Suit.

——*What is.*

Where in a suit under S. 92, C. P. Code, the plaintiffs through their counsel merely approved of the appointment of certain gentlemen as a committee of management,

Held, that this did not make the decree a consent decree, when in other matters decided by the Judge, there was no consent by either party to his conclusions. (*Zafar Ali and Jai Lal, JJ.*) MAHAMED ISHAKH *v.* MUHAMMED HUSAIN KHAN. **100 I. C. 838 = A. I. R. 1927 Lah. 382.**

——*Legality of.*

A judge has jurisdiction to pass a decree on the basis of compromise in a suit brought under S. 92, C.P. Code, O. 23, of the Code of Civil Procedure dealing with adjustment of suits does not exclude suits under S. 92. (*Newbould and Ghose, JJ.*) SYED ABU MAHOMED BARAKAT ALI *v.* ABDUR RAHIM. **80 I. C. 44 = A. I. R. 1925 Cal. 187.**

—S. 92—Co-Trustees.

——*Joint management—Suit to establish right—Applicability.*

Where one of the co-trustees sues to establish his joint right of management of the trust and its properties along with the defendants, the case does not foll within S. 92, C. P. Code. A.I.R. 1922 Mad. 17, Rel. on. (*Waller and Madhavan Nair, JJ.*) DURAI *v.* DURAISWAMI PILLAI.

39 M. L. T. 214 = 105 I. C. 194 = A. I. R. 1927 Mad. 948.

—S. 92—Express Trustee.

——*Applicability.*

A suit is maintainable under S. 92 against express trustees. (*Mukerji and Dalal, JJ.*) BEHARI LAL *v.* SHIV NARAIN. **84 I. C. 631 = 22 A. L. J. 866 = 5 L. R. A. Civ. 697 = 47 All. 17 = A. I. R. 1924 All. 884.**

——*Suit against former trustee in possession—Applicability.*

S. 92 would not apply to a suit in which plaintiffs assert that they have been appointed trustees already by the public, and that the defendants, the former trustees have been properly dismissed and they seek possession on the ground that the defendants are now mere trespassers. (*Walsh and Ryves, JJ.*) INAYAT HUSSAIN *v.* FAIZ MUHAMMAD. **71 I. C. 767 = 21 A. L. J. 191 = 45 All. 335 = 4 L. R. A. Civ. 142 = A. I. R. 1923 All. 319.**

——*Suit between rival claimants to trusteeship—*

Applicability.

Ordinarily the founder of a trust is entitled to provide for the management of the trust and to reserve to himself and his heirs the power to appoint trustees ; but if he exercises that power and appoints a trustee, the trustee cannot be removed except in the manner laid down in S. 92. Where the settlor has reserved no power to himself by the earlier deed to alter the scheme of management there laid down, the subsequent appointment of other persons cannot be upheld. The section provides for the institution of a representative suit by the beneficiaries to secure the proper administration of a public trust either by the removal of the existing trustees or by the settlement of a scheme, by which the object of the trust can be properly carried out. But if the suit is between persons who individually, claim a right to succeed to the office of trust, S. 92 has no application. 35 All. 459, 33 Cal. 789, Ref. (*Lindsay and Kanhaiya Lal, JJ.*) PUTTU LAL *v.* M. DAYA NAND.

68 I. C 786 = 44 All. 721 = 20 A. L. J. 712 = A. I. R. 1922 All. 499.

—S. 92—Forum.

——*Reference to arbitration—Validity of.*

Matters in difference between parties to litigation which affect private rights only may be referred to arbitration ; a suit under S. 92, C. P. Code, 1908, is not a suit for the determination of private rights as between the plaintiffs and the defendants and matters in difference in such a suit cannot be referred to arbitration. Jurisdiction to try a suit under S. 92 is confined to the District Court or any other Court empowered in that behalf by the Local Government within the limit of whose jurisdiction the whole or any part of the subject-matter of the trust is situated and cannot be exercised by arbitrators. (*Prideaux and Kotval, A. J. Cs.*) GANOBA *v.* NARAYAN. **72 I C. 1016 = 6 N.L.J. 7 = A.I.R 1923 Nag. 112.**

——*Additional District Judge—Bengal Civil Courts Act, S.* 8 (2).

An Additional Judge to whom, under S. 8 (2) of the Bengal Civil Courts Act (XII of 1887), is assigned the function of a District Judge relating to all suits cognizable by the District Judge under any Act in force for the time being is empowered to exercise the same power as the District Judge in suits under S. 92 of the Civil Procedure Code.

In such cases it is not necessary that the Court should be empowered by the Local Government, and "any other Court empowered in that behalf by the Local Government" in S. 92 of the Code, probably refers to Courts such as the Subordinate Judges' Courts. (*Chatterjee and Panton, JJ.*) MOHABAR RAHMAN *v.* ABDUR RAHIM. **48 Cal. 53 = 62 I. C. 115 = A. I. R. 1921 Cal. 210.**

—S. 92—Object of.

——The object of requiring sanction or permission before suits are instituted under S. 92 is to safeguard not only the rights of the public but also the rights of the institution and the trustees. The suit being a representative suit, it is necessary to see that the persons who come forward are persons who have an interest in the temple and persons who can be safely entrusted with the conduct of the suit. It is also for the benefit of the institution and of the trustees because it affords a safeguard against impecunious improper persons coming as plaintiffs and involving the trust in litigation and expenses and it is also a safeguard that the persons are substantial persons from whom if the suit fails the costs can be recovered and not merely men of straw. 21 Bom. 257 and 38 Mad. 1192, Rel. on. (*Kumaraswamy Sastri and Walsh, JJ.*) PITCHAYYA *v.* VENKATA

KRISHNAMACHARLU. **53 Mad. 223 = 30 M.L.W. 954 = 1929 M.W.N. 911 = 124 I.C. 220 = A.I.R. 1930 Mad. 129 = 58 M.L.J. 39.**

➛———Two conditions are necessary for the application of S. 92: first, there must be an alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, and, secondly the direction of the Court is deemed necessary for the administration of such trust. A suit brought by a charitable institution to recover the amount due to itself by the defendant's family, who have constituted themselves trustees of the fund liable to pay certain portion of that fund to the institution for the observance of the several festivals in which the institution is interested, does not fall within the provisions of S. 92, because, as soon as the amount is paid by the defendant's family they have no further interest in the administration of the fund so far as the institution is concerned. A.I.R. 1923 Bom. 67; 21 Mad. 406, Rel. on; A.I.R. 1924 Bom. 518; 23 Bom. 659; A.I.R. 1922 Mad. 17 (F.B.), Dist.; A.I.R. 1928 P. C. 16, Appl. (*Patkar and Murphy, JJ.*) MADHAVRAO ANANDRAO *v.* SHRI OMKARESHVAR GHAT. **119 I.C. 775 = 31 Bom. L. R. 192 = A. I. R. 1929 Bom. 153.**

———The words "public trust of a charitable and religious nature" should be given their ordinary meaning and cannot be made to vary according to the classification of trusts which may be adopted in different system of law.

The section does not affect substantive rights except in so far as it prescribes the manner in which they can be enforced. (*Banerji and Weir, JJ.*) MUHAMMAD SHAFIQ AHMAD *v.* MUHAMMAD MUJTABA. **111 I.C. 93 = 51 All. 30 = 26 A.L.J. 1016 = A. I. R. 1928 All. 660.**

———The provisions of S. 92 are wide enough to entitle the Court to direct an account against a trustee and to make an order on him to pay the amount found to be due on the taking of those accounts. 28 I. C. 836, Foll. (*Odgers and Curgenven, JJ.*) THUSHTU BALKRISHNA CHETTIAR *v.* V. KRISHNAMURTHI AIYAR. **100 I.C. 841 = 38 M.L.T. 143 = 1927 M. W. N. 202 = A.I.R. 1927 Mad. 416 = 52 M.L.J. 182.**

—S. 92—Parties.

———*Suit by some only of persons obtaining sanction—Maintainability.*

Where permission or sanction is given by name to more than two persons, that power should be exercised by them all; and a suit by some only of the persons to whom sanction is given under S. 92 will not lie. 29 M. L. J. 231 and 38 Mad. 1192, Rel. on. (*Kumaraswamy Sastri aud Walsh, JJ.*) PITCHAYYA *v.* VENKATA KRISHNAMACHARLU. **30 M. L. W. 954 = 1929 M.W.N. 911 = 53 Mad. 223 = A. I. R. 1930 Mad. 129 = 58 M.L.J. 39.**

———*Plaintiff trustee.*

A trustee is a person interested in the trust, and there is nothing in S. 92 to prevent his being a plaintiff. (1919) M. W. N. 522, Foll. (*Wallace and Madhavan Nair, JJ.*) BALAKRISHNA ODAYAR *v.* JAGANNADA CHARIAR. **87 I.C. 194 = A. I. R. 1925 Mad. 820 = 48 M.L.J. 534.**

———*Mutawalli—If necessary.*

In a suit instituted for the settlement of a scheme for Dargha, the mutawalli in possession and management is a necessary party. 6 M.L.W. 9; 36 Mad. 364, Appl. (*Odgers, J.*) GORI BIBI *v.* SARASAMAD MEER SAHEB. **A. I. R. 1929 Mad. 635.**

———*Board of trustees—Suit by one—Maintainability.*

Where under a scheme framed by a Court, the Board of Trustees was given liberty to apply to the Court for directions, the Board as a whole must apply and not one member of the Board. 34 Mad. 406; 26 Mad. 649; 26 Cal. 409, Dist. (*Coutts-Trotter, C. J. and Wallace, J.*) VEERAPPA CHETTIAR *v.* PADMANABHA NAIDU. **119 I.C. 469 = A. I. R. 1929 Mad. 625.**

———*Interested person—Right to apply.*

Where a scheme is settled, it is desirable that in addition to the trustee or any member of the board being at liberty to apply, permission to apply should be given to any person interested in the trust. (*Phillips and Ramesam, JJ.*) PICHAI PILLAI *v.* LINGAM IYER. **108 I. C. 199 = A. I. R. 1928 Mad. 268.**

———*Sanction to three—Suit by two—Maintainability.*

In a suit under S. 92 of the C. P. Code all the persons authorised to institute the suit constitute one plaintiff and all must combine to take any material step in the prosecution of the suit or appeal. A.I.R. 1925 Sind 1 and 29 M.L.J. 231, Rel. on. (*Zafar Ali and Jai Lal, JJ.*) MAHOMED ISHAR *v.* MAHOMED HUSSAIN KHAN. **100 I.C. 838 = A.I.R. 1927 Lah. 382.**

———*Alienees of trust property.*

Third party transferees of trust property can be impleaded in a suit under S. 92. 24 Cal. 418 and 28 All. 112, Foll. (*Sulaiman and Boys, JJ.*) RAMRUP GOSHAIN *v.* RAMDHARI BHAGAT. **89 I.C. 40 = 47 All. 770 = 23 A.L.J. 601 = 6 L.R.A.Civ. 352 = A. I. R. 1925 All. 683.**

———*Decree under—How far binding on persons not parties.*

Any decree passed in a suit under S. 92, C. P. Code, is binding not only on the trust and the trustees but also on all the worshippers at the temple. (*Kumaraswami Sastri, Madhavan Nair and Srinivasa Aiyangar, JJ.*) S. VEERARAGHAVA ACHARIAR *v.* V. PARTHASARATHY IYENGAR. **1925 M. W. N. 505 = A. I. R. 1925 Mad. 1070 (F.B.).**

———*Sanction to many—Suit by some, when lies.*

Ordinarily sanction granted to more than two persons cannot be availed of by any two of them without the others. But the death of a single relator or the dullness or dishonesty of one or more of them will not be fatal to the validity of the suit. Therefore in cases of difference between two or more relators the conducting of a suit or an appeal by one of them with the sanction of the Advocate-General will be valid provided the opposing relators are made parties. Moreover, under O. 1, R. 10, the single relator with the sanction of the Advocate-General can apply to the Court to and another relator to the record; this latter course should be adopted where the number of relators, owing to death or other causes, falls below two. (*Kennedy and Aston, A.J.Cs.*) VISHONDAS *v.* DAMOMAL. **76 I. C. 345 = A. I. R. 1925 Sind 1.**

———*Heir-at-law of trustee—If proper party.*

If a trust has been "created for public purposes of a charitable or religious nature" a suit will lie for settling a scheme "where the direction of the Court is deemed necessary for the administration of such trust" and the person who is the heir-at-law and in possession of the property which is impressed with the character of trust property has an interest in and is a proper party to such a suit. A suit against a person in possession of trust property does lie though defendant may not be a trustee either by appointment or *de son tort.* (*Spencer and Devadoss, JJ.*) VENKATANARASIMHA RAO *v.* SUBBA RAO. **73 I.C. 991 = 17 M.L.W. 31 = 32 M. L. T. 47 = 1923 M. W. N. 111 = 46 Mad. 300 = A. I. R. 1923 Mad. 376.**

———*Interested parties—Who are.*

Whether the plaintiffs have an interest within the meaning of S. 92 or not has to be determined upon the facts of each case bearing on the relation of the plaintiffs to the charity with reference to which the suit is brought. The mere fact that the plaintiff suing under S. 92, C. P. Code, is a Hindu and is entitled to worship in a temple would not give him interest enough to maintain a suit under S. 92, C. P. Code. But the fact that the plaintiffs belong to the family of the founder or are his descendants such as sons or grandsons through sons or daughters would naturally give them an interest in the family charity. 42 Mad. 360 and 40 Mad. 612, Ref. (*Abdul Rahim and Burn, JJ.*) VAITHINATHA AIYAR *v.* THYAGARAJA AIYAR. **68 I. C. 631 = 41 M. L. J. 20 = A. I. R. 1921 Mad. 563.**

—S. 92—Private Trust.

———*Scheme suit—Maintainability.*

The will of a Hindu testatrix addressed to her grandson directed that out of the income of specific property he should perform the worship of the family idols but there was no provision for the worship of the idols after the death of the grandson. The balance of the income was to be divided between the representatives of the three branches of her own family. In administration proceedings taken on the death of the grandson it was decided that out of the produce of the houses belonging to the estate of the testatrix, the worship of the idols should be performed and that the surplus be paid equally to the three branches of the family. This was adopted in a decree of 1888 to which the branch of the respondents of the family was a party.

Held, (1) there was no gift of the whole property to the idols; (2) the burdens of performing different duties which involved ownership were cast on the grandson appointed by their will; (3) no heritable *shebaitship* was established; (4) the representatives of the three beneficiaries under the will were entitled to the residue absolutely and in equal shares; (5) as the gift was a private trust the settlement of a scheme under S. 92, C. P. Code (1882) could not be ordered; and (6) the order in the administration suit was binding on all the parties and operated as *res judicata*. (*Lord Buckmaster.*) GOPAL LAL SETT *v.* PURNA CHANDRA BASAK. **67 I. C. 561 = 20 A. L. J. 625 = 36 C. L. J. 57 = 49 Cal. 459 = 27 C. W. N 174 = 24 Bom. L. R. 937 = 49 I. A. 100 = 16 M. L. W. 963 = A. I. R. 1922 P. C. 253 = 43 M. L. J. 116.**

———*Private Trust and Public Trust—Distinction.*

In the case of a temple and idol publicly constituted and publicly accessible in which the appearance may be what one may describe as ambiguous, one would expect and ought to insist upon clear evidence of permission given or license given and permission withheld, because it is equally true that a private individual may construct out of his private purse a private temple and idol retaining the control and management in his own hands and that of his family or some other selected individuals and yet so conduct himself as to provide conclusive evidence of dedication by implication and by conduct. There is a broad difference, when one comes to construe a dedication, between conduct which shows that the owner of the property is giving express permission from time to time to particular individuals and conduct which shows that he intends certain members of a class whom he desires to benefit to act indiscriminately without permission, that is to say as of right. A useful test for a Judge to apply to see whether the evidence satisfies the conditions of the private trust, is to ask himself whether any of the acts testified to by the witnesses could have

been prevented or penalised by proceedings for trespass. In private trust the beneficial interest is vested absolutely in one or more individuals who are, or within a given time, may be definitely ascertained. On the other hand public trust has for its object the members of an uncertain and fluctuating body and the trust itself is of a permanent and indefinite character and is not confined within the limits prescribed to a settlement of a private trust. (Woodroffe and Ameer Ali's Commentary on C. P. Code, S. 92, Lewin on Trust, Ch. II, P. 18, Ed. 12, Ref.) (*Walsh and Ryves, JJ.*) RAM DAS *v.* MT. BASANTI. **77 I. C. 97 = 20 A. L. J. 789 = A. I. R. 1922 All. 519.**

———*Applicability to.*

The Advocate-General is only concerned with public charitable trusts. He is not concerned with private trusts. (*Marten, J.*) ADVOCATE-GENERAL OF BOMBAY *v.* YUSUF ALI EBRAHIM. **24 Bom. L. R. 1060 = 84 I. C. 759 = A. I. R. 1921 Bom. 338.**

—S. 92—Public Trust.

———*Private Trust and Public Trust—Distinction—Temple whether public or private—Comparative evidence of other temples being public or private even if admitted by parties or held by Court to be proved should be excluded.*

In deciding whether a temple is public or private, even when the parties have admitted or when the High Court has judicially held that certain temples cited are public or are private, it is better to exclude such comparative evidence. If the feature emphasized is a general characteristic of a public temple or of a private temple then it must bear in its own character some indicia of its public or private nature, and in that case these indicia and not the fact that they appear in other temples are the real indicia of the nature of the temple in which they appear. (*Wallace and Thiruvenkatachariar, JJ.*) KELU ACHAN *v.* SIVARAMA PATTAR. **113 I. C. 635 = A. I.R. 1928 Mad. 879.**

———*Proof of—Inam proceedings.*

Inam proceedings are of great importance in deciding the question as to whether a temple is public or private. (*Wallace and Thiruvenkatachariar, JJ.*) KELU ACHAN *v.* SIVARAMA PATTAR. **113 I. C. 635 = A. I. R. 1928 Mad. 879.**

———*Proof of—Free use by public.*

Essentially the question whether a temple is public or private is one of fact to be decided on the evidence, evidence that is of dedication, if available, of actual user and of public repute. When all castes of the Hindu public for centuries have been freely using a temple and have never been debarred from using it and there is no evidence that they did so with permission, it would require strong evidence to persuade a Court that the temple is nevertheless intended for the use of one isolate caste or tarwad or family. (*Wallace and Thiruvenkatachariar, JJ.*) KELU ACHAN *v.* SIVARAMA PATTAR. **113 I. C. 635 = A. I. R. 1928 Mad. 879.**

———*Fraudulent withdrawal of suit—Binding nature of decree.*

Where the trust is a public trust persons interested in it cannot be bound by the result of a prior suit in which no decision was arrived at and which was withdrawn fraudulently. (*Phillips and Ramesam, JJ.*) PICHAI PILLAI *v.* LINGAM IYER. **108 I. C. 199 = A. I. R. 1928 Mad. 268.**

———*Jurisdiction of Civil Court.*

In absence of an express or constructive trust created for public purposes of a charitable or religious nature a Civil Court can take no action under the provisions of S. 92. (*Stuart, C. J. and Raza, J.*) RAM AUTAR *v.*

C. P. CODE (1908), S. 92—Public Trust.

RAM DASS. **101 I. C. 54 = A. I. R. 1927 Oudh 604.**

———*Proof of—Use, worship and offerings by public.*

The indicia of a public foundation must be carefully scrutinized and the existence of the obvious tests such as the use by the public, worship by the public and offerings by the public should be found out for determining whether an endowment is a public or private endowment. (*Das and Macpherson, JJ.*) DEOKINANDAN *v.* BRIJNANDAN. **76 I. C. 89 = 5 P. L. T. 231 = A. I. R. 1924 Pat. 502.**

———*Alienation of trustee—Suit for declaration without further relief—Maintainability.*

S. 92, C. P. Code, is intended to be an exhaustive statement of the law applicable to suits based upon any alleged breach of an express or implied trust created for public purposes of a charitable or religious nature. A relief by way of a declaration regarding the validity or invalidity of an alienation made by a trustee comes within the provisions of clause (*h*) of S. 92. Where declarations sought are of such a nature that they are not calculated to produce any effect whatever unless it be as a stepping stone to a fresh litigation, it would be acting against the general principles governing the proper exercise of discretion in such matters if relief by way of declaration is granted. (*Piggott and Walsh, JJ.*) MUFTI ALI JAFER *v.* FAZAL HUSAIN KHAN. **67 I. C. 659 = 44 All. 622 = 20 A. L. J. 557 = A. I. R. 1922 All. 349.**

———*Proof of intention of founder—Public purpose.*

"Public purpose" includes purpose, that is, an object or aim in which the general interest of the community as opposed to the particular interest of individuals is directly or vitally concerned. 29 Bom. 279 (P. C.), Foll. The Court has to find on the facts of each case what the intention of the founders of trust was. The fact that the control and managements were vested in the members of the family does not make the trust a private one when the beneficial interest does not vest in one or more individuals. (*Coutts and Sultan Ahmad, JJ.*) RAJESHWAR SINGH *v.* BASDEO NARAYAN SINGH. **1 P. L. T. 428 = 57 I. C. 270 = 1921 P. H. C. C. 6 = A. I. R. 1921 Pat. 511.**

—S. 92—Reliefs—Addition of claim.

———*Effect of.*

In deciding whether the suit is invalidated by reason of an omission as regards certain reliefs which are sanctioned by the Collector to whom an application was made to grant permission to file a scheme suit, the test is whether such an omission is a material omission from which it can be said that it so alters the scope or character of the suit, that if that matter was before the Collector when the sanction was given he would in all probability not have sanctioned suit in the form in which it is ultimately brought. 11 Mad. 148 and A. I. R. 1925 Mad. 636, Diss. from. But there is no reason why the mere addition of a claim should render the whole suit liable to be dismissed. It can be no worse than a case of misjoinder where parties will be confined to such portion of the claim as is not open to objection. (*Kumaraswami Sastri and Ramesam, JJ.*) SUDARSANA CHARYULU *v.* SURYANARAYANA. **107 I. C. 130 = 39 M. L. T. 628 = 27 M. L. W. 42 = A. I. R. 1928 Mad. 205.**

———A suit under S. 92 is not bad on the ground that though it is in accordance with the sanction, an additional prayer which has not been sanctioned was added and subsequently removed. 11 Mad. 148; 38 Mad. 1192 and 29 M. L. J. 231, Dist.; 21 Bom. 257, Ref. (*Phillips and Srinivasa Aiyangar, JJ.*) RAMANUJACHARYULU *v.* ALAPATI SRIRAMULU. **106 I. C. 134 = 26 M. L. W. 581 = 1927 M. W. N. 759 = A. I. R. 1927 Mad. 1033.**

—S. 92—Reliefs—Appointment of Receiver.

———*No prayer for removal of trustee—Power of court.*

In a suit under S. 92 the Court has power to appoint a Receiver and take the management of the temple out of the hands of the trustees appointed by the Temple Committee pending the disposal of the suit even though there is no prayer for his removal and though he cannot be removed except on a proper enquiry. (*Oldfield and Ramesam, JJ.*) KUPPUSWAMI *v.* SUBRAMANIAN. **68 I. C. 565 = 16 M. L. W. 927 = 1923 M. W. N. 75 = A. I. R. 1923 Mad. 224 = 41 M. L. J. 545.**

—S. 92—Reliefs—Appointment of Trustee.

———*Mutawali for wakf—Applicability.*

Where there is no mutwalli, the Court has power to appoint a mutwalli in respect of a wakf even without a suit under S. 92. A. I. R. 1925 All. 759; 26 Mad. 450 and 33 Cal. 789, Dist.; A. I. R. 1924 Cal. 441, Foll. (*Suhrawardy and Graham, JJ.*) ABDUL ALIM *v.* MT. ABIR JAN BIBI. **110 I. C. 416 = 55 Cal. 1284 = 32 C. W. N. 835 = A. I. R. 1928 Cal. 368.**

———*Power of court to add trustees.*

While in cases of disputed succession to hereditary trusteeship or in cases where the office of trustee is to be filled up owing to the death or removal of a trustee, the terms of the dedication or the usage followed, have to receive every consideration and are not to be departed from except for any cogent reasons; yet for the proper administration of trusts and the prevention of abuses or opportunities for breaches of trust, the interest of the institution ought to be the prime factor, and where in a suit under S. 92 for the framing of a scheme the interests of the institution demand it, there is nothing to prevent the Court from appointing additional trustees, in the place of a sole trustee, even where the deed of trust enjoins only one trustee at a time, so long as the rights of the members of the family to take part in the management can be given due effect to without detriment to the interests of the institution. A. I. R. 1926 Mad. 84; A. I. R. 1922 All. 285; A. I. R. 1923 Mad. 209; and A.I. R. 1917 P. C. 190, Dist.; A. I. R. 1916 P. C. 132 and 39 Mad. 700, Rel. on; 23 M. L. J. 134; (1918) M. W. N. 555; A. I. R. 1923 Pat. 420 and 40 I. C. 177, Ref. (*Kumaraswami Sastri and Curgenven, JJ.*) PANCHANADAM *v.* PARVATI AMMAL. **108 I. C. 649 = 1927 M. W. N. 405 = A. I. R. 1928 Mad. 955.**

—S. 92—Reliefs—Declaration.

———*Sanction if necessary.*

A prayer for a declaration that the property in suit is a public charitable property and not the personal property of the defendant is a prayer for relief not covered by S. 92. Such a suit therefore, though filed without the consent of the Advocate-General is maintainable. A.I.R. 1928 P.C. 16; 8 Bom. 432; 21 All. 187; 25 All. 631, Ref. (*Mirza, J.*) RAVISHANKAR *v.* NARSIDAS JEKISANDAS. **32 Bom. L.R. 205 = A. I. R. 1930 Bom. 167.**

———*Suit for, without prayer for further relief—Maintainability.*

Where a suit was brought by the plaintiff in a representative capacity on behalf of other members of the community for a declaration that a certain temple and lands dedicated to it constituted a public trust but with out any consequential relief, although it was admitted that the temple and the lands in question were in the possession of the defendants and a relief claiming them could have been prayed for.

Held, that mere declaratory decree cannot be granted. (*Carr and Cunliffe, JJ.*) P. C. THEVAR *v.* V. SAMBAN. **110 I. C. 595 = 6 Rang. 188 =**

A. I. R. 1928 Rang. 143.

———*Maintainability of suit.*

The requirement of S. 92 cannot be evaded by asking for a bare declaration under the Specific Relief Act. A. I. R. 1922 All. 349, Ref. (*Spencer, J.*) Immasimuthu *v.* Rev. Lutz. **97 I. C. 630 = 24 M. L. W. 286 = A. I. R. 1926 Mad. 1029.**

—S. 92—Reliefs—Decree for damages.

———*Scheme suit.*

Although in a scheme suit a decree for account may be passed against the trustee in office, a decree for damages for the loss caused to the devasthanam by the trustee's misconduct cannot be passed. (*Davadoss, J.*) Srinivasachariar *v.* Ramaswami Naicker. **92 I. C. 526 = A. I. R. 1926 Mad. 509.**

—S. 92—Reliefs—Enforcement of rights.

———*Public and Private—Enforcement of.*

Where the relief sought is of one of the kinds enumerated under S. 92, whether the distinction between the enforcement of public and private rights is still maintainable. 32 C. W. N. 482 (P. C.), Foll ; 24 Cal. 418 ; 32 All. 503 ; 35 All. 459 and 20 A. L. J. 712, Ref. (*Banerji and Weir, JJ.*) Muhammad Shafiq Ahmad *v.* Muhammad Mujtaba. **111 I. C. 93 = 51 All. 30 = 26 A. L. J. 1016 = A. I. R. 1928 All. 660.**

———*Procedure.*

S. 92 is mandatory and the reliefs specified in the section can only be enforced now by resort to the procedure of the section. The cases which before 1908 held to the contrary and decided that the founder of an endowment or his heirs had the right to sue the trustees for the due performance of the trust and to remove them and to appoint new trustees without invoking the aid of S. 92 are no longer good law. (*Mullick and Ross, JJ.*) Syed Diljan Ali *v.* Bibi Akhtari Begum. **88 I. C. 1035 = 4 Pat. 741 = 7 P. L. T. 4 = 1925 P. H. C. C. 194 = A. I. R. 1925 Pat. 544.**

—S. 92—Reliefs—Interpretation.

———The words "further or other relief" in cl. (*h*) must on general principles of construction be taken to mean relief of the same nature as in cls. (*a*) to (*g*) and they do not mean any relief other than those in (*a*) to (*g*) that the case of an alleged breach of an express or constructive trust may require in the circumstances of any particular case.

Where a suit relating to religious endowment does not claim any such relief as is specified in sub-S. (1), S. 92, the section is no bar to the maintainability of the suit without the sanction of the Advocate-General and in the Court of the Subordinate Judge instead of the Court of District Judge. (*Lord Sinha.*) Abdur Rahim *v.* Syed Abu Mohomed Barkat Ali Shah. **108 I. C. 361 = 55 Cal. 519 = 55 I. A. 96 = 9 P. L. T. 65 = 32 C. W. N. 482 = 27 M. L. W. 339 = 26 A. L. J. 464 = 30 Bom. L. R. 774 = 48 C. L. J. 55 = 1928 M. W. N. 926 = A. I. R. 1928 P. C. 16 = 54 M. L. J. 609.**

—S. 92—Reliefs—Omission of.

———*Maintainability of suit.*

Where sanction was obtained from the Collector under S. 93, C. P. Code, to file a suit not only for removing the trustee, but also "for declaring the alienations made by him null and void" and for recovering the trust properties from the alienee, but later the plaint omitted the two latter reliefs and asked only for the removal of the trustee, who was made the sole defendant in the suit,

Held, that since the relief asked for, in the plaint did not precisely correspond with the reliefs mentioned in the sanction order, or in other words, since the suit instituted differed from the one, for which sanction was given the plaint should be rejected. 11 M. 148, Foll. (*Madhavan Nair, J.*) Mohadeen Saheb *v.* Chinna Fakruddin. **85 I. C. 1045 = 21 M. L. W. 71 = A. I. R. 1925 Mad. 636.**

—S. 92—Reliefs—Possession.

———*Procedure—Execution.*

In a scheme suit Court passed a decree that a particular field be declared to be under trust for the benefit of the villagers and that the proprietary body of the village had a right of management as trustees. The plaintiff applied that a particular tenant was given a lease as per condition in the scheme and that he be put in possession as against the defendants.

Held, that a scheme once settled by a Court cannot be altered except by the Court, and that this would preclude suits between parties to establish a private right, which if established would interfere with a charitable scheme settled by the Court. 45 Bom 683 and 36 Mad. 364, Ref. Where a scheme has been settled by the Court, it is absurd to suppose that yearly suits must be brought to carry out that scheme. The direction in the scheme of this nature may be enforced in execution application by persons interested. 28 Mad. 319, Ref. (*Prideaux, A. J. C.*) Ranne *v.* Puna. **94 I. C. 326 = 9 N. L. J. 45 = A. I. R. 1926 Nag. 326.**

———*Claim for—Procedure.*

Where a suit under S. 92 includes a claim for possession, though no relief for recovery of possession can be granted in a suit under S. 92, the Court will not be justified in returning the plaint altogether. The Court may call upon the plaintiffs to amend the plaint by striking off the claim for possession or it may wait till it pronounces its judgment and may dismiss the claim with regard to that particular relief. (*Sulaiman and Boys, JJ.*) Ramrup Goshain *v.* Mahant Ramdhari Bhagat. **89 I. C. 40 = 23 A. L. J. 601 = 6 L. R. A. Civ. 352 = 47 All. 770 = A. I. R. 1925 All. 683.**

———*Power of Court.*

In a suit under S. 92 a decree for actual possession against transferees from the trustee cannot be properly passed. The words "granting such further or other relief as the nature of the case may require" refer to reliefs *ejusdem generis* and not to every possible relief which a Civil Court may grant. 24 Cal. 418, Diss. 28 All. 112, 35 Bom. 470 and 27 M. L. J. 266, Foll. ; 2 C. L. J. 431, Ref. (*Sulaiman and Boys, J.*) Ramrup Goshain *v.* Ramdhari Bhagat. **89 I. C. 40 = 47 All. 770 = 23 A. L. J. 601 = 6 L. R. A. Civ. 352 = A. I. R. 1925 All. 683.**

—S. 92—Reliefs—Power of Court.

———*Third parties.*

The Legislature does not intend to include relief against third parties in cl. (*h*) under the general words "further or other relief". (*Lord Sinha.*) Abdur Rahim *v.* Syed Abu Mohomed Barkat Ali Shaha. **108 I. C. 361 = 55 Cal. 519 = 55 I.A. 96 = 9 P. L. T. 65 = 32 C. W. N. 482 = 27 M. L. W. 339 = 26 A. L. J. 464 = 30 Bom. L. R. 774 = 48 C. L. J. 55 = 1928 M. W. N. 926 = A. I. R. 1928 P. C. 16 = 54 M. L. J. 609.**

———*Hereditary trustee.*

Where a hereditary trustee has been appointed it is not for the Court because it may think that it is undesirable that charitable funds should be administered by one man without control or even audit, to impose a control which was not a part of the original trust. But the Court has very wide powers under S. 92. A. I. R.

C. P. CODE (1908), S. 92—Reliefs—Restoration of trust property.

1916 P. C. 132, Foll. (*Schwabe, C. J. and Odgers, J.*) C. DORAIVELU MUDALIAR *v.* AUDIKESAVALU NAIDU. **70 I. C. 87 = 1922 M. W. N. 620 = A. I. R. 1922 Mad. 409.**

—S. 92—Relief—Restoration of trust property.

——Where the trust property lost can be traced to the possession of the tarwad, then and only then, can the tarwad be called upon to restore. A. I. R. 1921 Mad. 651, Ref. (*Wallace and Thiruvenkatachariar, JJ.*) KELU ACHAN *v.* SIVARAMA PATTAR.

113 I. C. 635 = A. I. R. 1928 Mad. 879.

——*No beneficial interests claimed by plaintiff—Court fees.*

Where in a suit under C. P. Code, S. 92 the plaintiff did not claim any beneficial interest in the properties but only said that on going through his accounts a sum which he estimated at a certain amount would be found due by the trustees to the trust and that the trustees should be asked to make good to the trust itself that amount of money and hand over possession of the immovable property.

Held, that these reliefs could not be treated as being part of the subject-matter in dispute between the parties; that they were merely ancillary reliefs, and that the relief claimed clearly fell under Art. 17 (6) of the 2nd Schedule of the old Court Fees Act. 11 M. 148, Diss. (*Krishnan, J.*) SUDALAIMUTHU PILLAI *v.* PERIA SOMASUNDARAM PILLAI. **87 I. C. 25 = 1925 M. W. N. 104 = A. I. R. 1925 Mad. 722 = 48 M. L. J. 514.**

—S. 92—Reliefs—Ultra vires.

——*Settling scheme—Reservation of permission to apply for reliefs.*

In a temple scheme settled by the Court the reservation by the Court to a person or persons to apply for a relief, which will come within S. 92, C. P. Code, is *ultra vires* ; but if such reservation does not offend in this way, or against any other provision of law, it may be useful or advisable for carrying out the provisions of the scheme already framed. A.I.R. 1926 Mad. 559 ; A.I.R. 1926 Mad. 557 ; A. I. R. 1925 Mad. 411, Appr. ; 28 Mad. 319 ; 30 Mad. 138 (P. C.) ; 24 M.L.J. 199 (P.C.), Expl. ; 43 I. C. 772 and A. I. R. 1923 Pat. 420, Diss. from. (*Phillips, Offg. C. J., Beasley and Ananthakrishna Aiyar, JJ.*) VEERARAGHAVACHARIAR *v.* ADVOCATE-GENERAL. **106 I. C. 665 = 51 Mad. 31 = 26 M. L. W. 728 = 1927 M. W. N. 816 = 39 M. L T. 422 = A. I. R. 1927 Mad. 1073 = 53 M. L. J. 792 (F.B.).**

—S. 92—Religious Trust.

——*Wakf—Applicability to.*

Under Mahomedan Law, Court has power of appointing a trustee directly without his having recourse to S. 92. A. I. R. 1924 Cal. 441 and A. I. R. 1916 P. C. 132, Rel. on. (*Wallace and Madhavan Nair, JJ.*) AMBALAVANA THAMBIRAN *v.* VAGEESAM PILLAI.

122 I. C. 455 = 1929 M. W. N. 744 = A. I. R. 1930 Mad. 226.

——*Operation of the Madras Hindu Religious Endowments Act—Effect of.*

The effect of S. 77 is to keep outside the operation of the Act any endowments, part religious, part secular, in respect of which the Board has not made an allocation to religious uses ; when that has been done the portion allocated becomes religious endowment amenable to the provisions of the Act and until it is done, no portion is so amenable. If this be so, S. 73 (2) does not take the trust out of the operation of S. 92, C. P. Code. (*Curgenven, J.*) RANGANAYAKI BAI AMMAL *v.* B. SHIVARAMA DUBAY. **122 I. C. 337 =**

C. P. CODE (1908), S. 92—Religious trust.

31 M. L. W. 849 = A. I. R. 1930 Mad. 216 = 58 M. L. J. 104.

——*Declaration of Trust Property—Applicability of.*

A suit for a declaration that the defendant is not the owner of the disputed house and that the house is property attached to the temple which is a religious trust, and as such is liable to user by the inhabitants of Gujrat town who profess Sanatan Dharam, together with an injunction restraining the defendant from devoting the property in suit to purposes other than religious and charitable is a suit which does not fall within the purview of S. 92, C.P.Code, and the sanction prescribed therein is not required for its institution. 66 P. R. 1892 and A. I. R. 1927 Lah. 350, Foll. (*Shadi Lal and Hilton, JJ.*) PARAS RAM *v.* SANT RAM. **120 I. C. 161 = A. I. R. 1929 Lah. 740.**

——*Wakf providing maintenance—Mismanagement.*

Where a wakf contains a clause for maintenance but the mutawallis in possession and management spend a bulk of the income of the endowment, not for the upkeep of the Durgha but for themselves and treat the property as if it was their own, the wakf is mismanaged and is not carried out in accordance with the intention of the founder. (*Odgers, J.*) GORI BIBI *v.* SARASAMED MEERSAHIB. **A. I. R. 1929 Mad. 635.**

——*Wakf property—Declaration as to nature of—Whether one under S. 92.*

Where in a suit all that the plaintiff claimed was that the character of the waqf property should be retained and that they should get a declaration from the court to that effect,

Held, that the suit was not of the nature contemplated by S. 92, C. P. Code. 66 P. R. 1892, Foll. ; 41 Cal. 749 ; 33 Cal. 789 ; 25 All. 631 ; 33 All. 760 ; 7 All. 178 ; 31 Ind. Cas. 236 ; 89 P. R. 1901 ; 110 P. R. 1907; 11 Mad. 148 ; 21 Bom. 257 ; 39 Bom. 510, Ref. (*Abdul Raoof, J.*) NIHAL SHAH *v.* MALAN.

99 I. C. 755 = 2 Lah. L. J. 457.

——*Express or constructive trust—Meaning of—Constructive trustees—Who are.*

" Any express or constructive trust " in S. 92 is not confined to what may be called the English Law sense, at all events as regarded the words "constructive trust". It means more than an express or specific trustee taking advantage of his position as such, *e. g.*, to grant leases in his own name or to make profits by means of unauthorized investments of trust property. It embraces all cases where the property is used for the purposes described subject to duties and obligations and a head of a mutt is one of these cases. The words "constructive trustees " include a person holding a particular fiduciary position whose doings as such can be enforced in a Court of law. This would include Mahants, Shebaits, Mutawallis, as their fiduciary positions " would be that of a manager or custodian of properties held for public purposes of a charitable and religious nature." Case-law discussed. (*Odgers and Jackson, JJ.*) NELLIAPPA ACHARI *v.* PUNNAIVANAM ACHARI.

101 I. C. 420 = 50 Mad. 567 = 25 M. L. W. 461 = 1927 M. W. N. 233 = 39 M. L. T. 37 = A. I. R. 1927 Mad. 614 = 52 M. L. J. 418.

——*Personal right of worshipper—Suit for infringement—Necessity for sanction.*

A purely personal right of worshippers and an infringement of such a right gives them a cause of action to sue without the necessity of impleading any other worshippers or getting sanction under S. 92, C. P. Code, or the Religious Endowments Act. One consideration which is relveant in coming to a conclusion whether a

personal right has been infringed so as to entitle a party to sue without reference to the other members of the community and without leave under S. 92 of the C. P. Code, or S. 14 of the Religious Endowments Act is whether, apart from the infringement of the right of the general body of worshippers, there is some damage to the plaintiff, special to and in which the other worshippers have no concern apart from the interest of every worshipper to see that a trustee performs his duties properly. The mere fact that in and for the purposes of giving relief to a plaintiff who has a cause of action personal to himself, the Court has to issue a mandatory injunction or give direction to the trustees, would not put the case within S. 92, C. P. Code, or S. 14 of the Religious Endowments Act. (*Kumaraswami Sastry and Reilly, JJ.*) BASHIKAR *v.* SRINIVASA THATHACHARIAR. **102 I. C. 328 =
38 M. L. T. 288 = 25 M. L. W. 575 =
A. I. R. 1927 Mad. 551 = 52 M. L. J. 541.**

——*Suit for charge of management—Views of majority—Original purposes of trust—Guide.*

The identity of a religious community described as a Church consists in the identity of its doctrines, creeds, confessions, formularies and texts. The bond of union of a religious association may contain a power in some recognized body to control, alter or modify the tenets or principles at one time professed by the association, but existence of such power must be proved. Although any man having a right to worship can bring a suit under S. 92, the right to worship connotes the profession by the would-be worshipper of the religion practised in the place of worship, and even though the views of the majority of the worshippers may change and develop to such an extent that they may wish to alter and even to make a radical change in the form of worship, they have no right to do so, and the minority, however small, which adheres to the original practices, retains the control and possession of the place of worship and its endowments. No question of the majority of persons can affect the question but the original purposes of the trust must be the guide. A.I.R. 1925 Lah. 189 (2) Ref. (*Harrison and Zafar Ali, JJ.*) BASANT DAS *v.* HEN SINGH. **94 I. C. 695 =
7 Lah. 275 = 27 P. L. R. 115 =
A. I. R. 1926 Lah. 100.**

——*Creation of, by a person out of subscriptions—Right of such person to direct management.*

Where a person collects subscriptions from various persons and builds a choultry or a temple he has a right to direct in what manner the institution should be managed and what right the trustees should have in the management of that institution. This is recognised by the Hindu Law. There is nothing illegal or improper in a person who builds a temple, whether out of his own funds or out of the funds collected by subscriptions or getting donations from people to create a trust and endow it, directing by the deed of endowment, in what manner and by whom it should be managed. (*Devadoss, J.*) VENKATARAMA CHETTIAR *v.* DAMODARAM CHETTIAR. **98 I.C. 208 = A.I.R. 1926 Mad. 1150 =
51 M. L. J. 457.**

——*Suit for office of* Mutawali—*Applicability of.*

A suit for an establishment of the right to act as *mutawalli* is cognisable by the ordinary Civil Court without any preliminary formalities. But it is otherwise where the appointment of a trustee has been recognised and it is sought to remove him for a breach of trust. (*Mullick and Ross, JJ.*) SYED DILJAN ALI *v.* BIBI AKHTARI BEGUM. **88 I. C. 1035 = 4 Pat. 741 =
7 P. L. T. 4 = 1925 P. H. C. C. 194 =
A. I. R. 1925 Pat. 544.**

——*Wakf—Constructions on wakf property—Suit by some members of public for demolition.*

Where the defendants had raised some constructions which interfered with the exercise of certain rights to which the public were entitled.

Held, that a suit, by persons who were members of the public affected and some of whom were also trustees of the *wakf* to which the rights mentioned referred, for the demolition of the constructions should be decreed. (*Daniels and Neave, JJ.*) MT. PUTLI KUNWAR *v.* PT. JANKI DAS. **81 I. C. 294 = 46 All. 813 =
22 A. L. J. 747 = 5 L. R. A. Civ. 603 =
A. I. R. 1924 All. 850.**

——*Nature of.*

S. 92 speaks of " any express or constuctive trust created for public purposes of a charitable or religious nature." It does not signify whether it is of a charitable nature or of a religious nature provided that it is one of these two and also that it is a public purpose. (*Spencer and Devadoss, JJ.*) VENKATANARASIMHA RAO *v.* SUBBA RAO. **73 I. C. 991 =
17 M. L. W. 31 = 32 M. L. T. 47 =
1923 M. W. N. 111 = 46 Mad. 300 =
A. I. R. 1923 Mad. 376.**

——*Suit for accounts by co-trustee—Applicability to.*

S. 92 was intended to govern suits by the public or by the Advocate-General, for the vindication of the rights of the public in charitable trusts *i.e.*, to govern representative suits brought for the benefit of the public to enforce a public right in respect of an express or constructive trust and do not apply to suits brought by persons to remedy a particular infringement of their own individual right. A. I. R. 1921 Mad. 403, Dist. The correct principle is that S. 92 governs suits for vindication of the rights of the public in public charitable trusts and has no application to suits for the vindication of the rights of management by hereditary trustees or to disputes between such trustees *inter se*, as to their turns of management. Two conditions have to be satisfied for the application of S. 92 (1) the suit should be one for the vindication of the rights of the general public in the charitable trust and (2) the relief should be all or any of the reliefs enumerated in clauses (*a*) to (*h*) in sub-section (1). (*Ayling, Offg. C. J., Oldfield, Kumaraswami Sastri, Ramesam and Odgers, JJ.*) APPANNA PORICHA *v.* NARASINGA PORICHA. **69 I. C. 304 = 45 Mad. 113 =
15 M. L. W. 18 = 30 M. L. T. 1 =
1921 M. W. N. 833 =
A. I. R. 1922 Mad. 17 = 41 M. L. J. 608 (F. B.).**

——*Suit for declaration of right for joint possession by an heir of founder against another in possession—No prayer for scheme—Maintainability of suit.*

The fact that the persons entitled to the office of the trustee may not be able to work harmoniously together is not a ground for dismissing a suit by one of the heirs of the founder for a declaration of his right to share in the management and for joint possession of the trust properties with the heir who is in present possession and management. If it is found that a scheme of management is necessary in the interests of the institution, such a scheme may be settled either by the heirs themselves or by resort to the Court. In the absence of such a scheme the plaintiff is entitled to the rights of the joint management and possession claimed in the plaint. (*Wallis, C. J. and Seshagiri, J.*) MEENAKSHI ACHI *v.* SOMASUNDARAM PILLAI. **59 I. C. 464 =
44 Mad. 205 = A. I. R. 1921 Mad. 388.**

—S. 92—Removal of Trustee.

——*Indebtedness.*

In the absence of evidence to show that a person

actually spent money on prostitutes or drink or drugs, his mere indebtedness is insufficient to justify an inference that he wasted money on such immoral purposes so as to render him unfit to be trustee of a temple. (*Banerji and King, JJ.*) BALMUKUND *v.* NANAKCHAND.
1929 A. L. J. 438 = 117 I. C. 828 = A. I. R. 1929 All. 433.

———*Neglect to keep accounts.*

Where a hereditary trustee is not positively dishonest and does not lack is the capacity for discharging his duties, the mere fact that he is guilty of petty neglect of duty and of not keeping proper accounts and mixing up trust account with his private accounts, is no adequate cause for removing him from his office. (*Banerji and King, JJ.*) BALMUKUND *v.* NANAKCHAND.
1929 A. L. J. 438 = 117 I. C. 828 = A. I. R. 1929 All. 433.

———*General Principles.*

In the case of removal of a trustee the Court should be guided by considerations of the welfare of the trust estate, and before a removal of the trustee is directed, a clear necessity for the intervention of the Court to save the trust property must be established. It is not every mismanagement or neglect of duty which will induce the Court to remove a trustee. There must be such gross negligence or misconduct as to evidence a want either of capacity or of fidelity which is calculated to put the trust in jeopardy. Failure in the discharge of duty on account of mistake or misunderstanding is not a ground for removal unless such failure shows want of capacity to manage the trust. A trustee may be removed if he fraudulently misapplies the revenues of the trust property and grossly misbehaves himself in the execution of the trust : for example, if he renews a lease for his personal benefit, purchases the trust property, concurs in a breach of trust, asserts a hostile title with knowledge that it was unfounded, fails to keep accounts, wrongfully alienates trust property, obstructs the management and wants only to waste the estate. (*Mookerjee and Rankin, JJ.*) AZIZU RAHMAN *v.* ALUDENNESSA.
A. I. R. 1928 Cal. 225.

———*Personal unfitness.*

A trustee can be held unfit to continue as trustee if his own personal acts or omissions, and not those of his predecessor, are such as would render him personally unfit. (*Wallace and Thiruvenkatachariar, JJ.*) KELU ACHAN *v.* SIVARAMA PATTAR. **113 I. C. 635 = A. I. R. 1928 Mad. 879.**

———*Personal claim to trust property.*

A Court is not called upon to remove a trustee merely because he has asserted that the trust is his private property as that attitude in itself cannot be characterized as a wilful breach of trust : 24 Mad. 243, Ref. (*Wallace and Thiruvenkatachariar, JJ.*) KELU ACHAN *v.* SIVARAMA PATTAR. **113 I. C. 635 = A. I R. 1928 Mad. 879.**

———*Alienation of trust property.*

Removal of a trustee who sets up his own right to the temple property and has alienated the trust property is proper. (*Phillips and Srinivasa Aiyangar, JJ.*) RAMANUJACHARLU *v.* ALAPATI SRERAMULU.
26 M. L. W. 581 = 1927 M. W. N. 759 = 106 I. C. 134 = A. I. R. 1927 Mad. 1033.

———*Refusal to remove—Revision.*

No appeal lies from an order of District Judge refusing to remove a trustee of a temple on an application of the worshippers under a scheme framed under S. 92 on the ground of various acts of misconduct and breach of trust, but the High Court can in revision direct fresh disposal of the application. (*Wallace and Madhavan Nair, JJ.*) S. LOGASIGAMANI MUDALIAR *v.* L. R. K. THEOGARAYA CHETTI. **99 I. C. 425 = A. I. R. 1927 Mad. 427.**

———*Tentative scheme—Procedure.*

Where a tentative scheme provides for the appointment but not the removal of the trustee appointed under it, such trustee cannot be removed except by a regular suit under S. 92. Any order removing such a trustee other than by a regular suit is without jurisdiction and is not appealable as it is not an order in execution. A. I. R. 1925 P. C. 155, Foll. (*Devadoss and Waller, JJ.*) BANGARAMMAL *v.* RAMANUJA IYENGAR.
94 I. C. 610 = A. I. R. 1926 Mad. 799.

———*Breach of trust.*

Per *Boys, J.*—Breaches of trust by the predecessor of the existing trustee cannot in themselves be regarded as breaches of trust by the present trustee, but if the present trustee could have taken steps to save the property from the consequences of the trust committed by his predecessor, his neglect to do so might in given circumstances constitute a breach of trust by him himself and naturally this would be still more so, if he continued to reap personally the benefit of his predecessor's breach of trust. 33 Cal. 789, Foll. (*Sulaiman and Boys, JJ.*) RAMRUP GOSHAIN *v.* MAHANT RAMDHAN BHAGAT. **89 I. C. 40 = 23 A. L. J. 601 = 6 L. R. A. Civ. 352 = 47 All. 770 = A. I. R. 1925 All. 683.**

———*Interests of trust—Justification.*

Once a person accepts an office of trusteeship the one governing consideration in his mind, the ruling motive for all actions, the one principle by reference to which all his acts should be determined, is the interest of the institution and that alone. Persons who, though holding a fiduciary position allow their actions to be prompted by any other considerations, motives or principles are as much guilty of breach of trust as persons who may be found actually guilty of misappropriating property belonging to the trust. Even though the evidence in a case against the trustees may not be sufficient to warrant, generally speaking, their removal from office on the ground of misconduct or negligence, still their removal may be ordered, if, in the opinion of the Court, such removal is necessary in the interests of the trust to be administered. *Letterstcd* v. *Broers* (1884) 9 A. C. 371, Foll. (*Kumaraswami Sastry, Madhavan Nair and Srinivasa Aiyangar, JJ.*) S. VEERARAGHAVA ACHARIAR *v.* V. PARTHASARATHY IYENGAR.
1925 M. W. N. 505 = A. I. R. 1925 Mad. 1070.

———*No misappropriation.*

When it is not proved that the defendant have misappropriated any of the temple income, and when it is found that they are as much interested as anyone else in maintaining the temple worship, it will not be for the benefit of the trust to remove them from office and put strangers who have no such interest in their place. 1923 Mad. 163, Foll. (*Spencer, Offg. C. J. and Srinivasa Aiyangar, J.*) A. V. M. RAMASWAMI CHETTIAR *v.* V. M. MUTHUKARUPPAN CHETTIAR.
86 I. C. 371 = A. I. R. 1925 Mad. 1011.

———*Interests of trust—Principles.*

It cannot be disputed that a mutwali should not be allowed to continue in office if his or her management of the institution is detrimental to the interest of the endowment. In removing a trustee the Court will be guided solely by considerations of the welfare of the trust and will not hesitate to remove a trustee who has purchased the trust property or concurred in a breach of trust or has wrongfully alienated trust property or shows a total lack of capacity to manage and neglect of duty. [5 Ves. 707 ; (1824) 1 Irish Rep. 74 ; 12 C. L. R. 370; 21 Mad. 10 ; 1918 M. W. N. 555, Ref.] (*Mookerji and*

Rankin, JJ.) JOYGUNNESSA BIBI *v.* MAJILULLAH MAMED PROMANIK. **81 I. C. 850 = 28 C. W. N. 781 = A. I. R. 1924 Cal. 1024.**

———*Setting up adverse title in suit.*

Where the managers vigorously contested the suit and put forward and tried to establish their own adverse and absolute title to the waqf property there were held liable to be removed from the management of the waqf. (*Harrison and Zafar Ali, JJ.*) HARJI MAL *v.* DEVI DITTA MAL. **77 I. C. 398 = 4 Lah. 364 = A. I. R. 1924 Lah. 107.**

———*Misconduct—Keeping mistresses—Gambling.*

A Mahant is a trustee for the purposes of S. 92, C.P. Code. The interpretation put in 44 M. 831 on the words "trust and trustee" is not intended to apply to those words as used in S. 92, C.P. Code. 44 M. 831, Expl. A Civil Court cannot of course interfere with the spiritual functions of the Mahant. He can continue to instruct disciples; but the Court can certainly remove him from the control of and connection with a religious or charitable endowment and prevent him from acting as Mahant of the temple in future. (45 Mad. 565, Foll.) The worshippers of the temple are the true beneficiaries in the endowment and are entitled to sue under S. 92. Where it was proved that the Mahant kept three mistresses before and that he still kept a hill woman by whom he has had several children and one of these was treated as his chela and was commonly spoken of as the chota Mahant, that he had in several cases allowed the property belonging to the trust to be sold in execution of small personal decrees against himself, and had admittedly been declared an insolvent and convicted for gambling.

Held, this was sufficient evidence to prove misconduct. (*Wazir Hasan and Neave, A. J Cs.*) MAHANT SARABJIT BHARTHI *v.* BABU GAURI NATH. **10 O. L. J. 619 = 80 I. C. 674 = 27 O. C 149 = A. I. R. 1924 Oudh 261.**

———*Setting up private ownership in suit.*

Where the whole of the litigation has substantially been occupied by an unfounded assertion supported by the concoction of accounts—an assertion by the trustee of private ownership in himself and a powerful resistance to the recovery of the properties for the trust which he administers—*Held* it is not open to the Court on any sound principles, either of administration or of law, to permit the continuance of the trustee in the office of *Dharmakirtha.* (*Lord Shaw.*) SRINIVAS CHARIAR *v.* EVALAPPA MUDALIAR. **68 I. C. 1 = 45 Mad. 565 = 16 M. L. W. 247 = 31 M. L. T. 1 = 49 I. A. 237 = 24 Bom. L. R. 1214 = 21 A. L. J. 250 = 27 C. W. N. 317 = 36 C. L. J. 524 = A. I. R. 1922 P. C. 325 = 43 M. L. J. 536.**

—S. 92—Right to sue.

———*Interest—Possibility of future worship.*

Mere general statements that persons following a certain faith go to an institution for worship, in absence of evidence to that effect cannot be considered sufficient to establish that the plaintiffs in particular possess the requisite interest in the institution for the purposes of S. 92. Nor can the bare possibility that the plaintiffs may have in future to resort to the institution for worship can give them a *locus standi* to maintain a suit under S. 92; A. I. R. 1924 P. C. 221 and 42 Mad. 360, Rel. on. (*Zafar Ali and Bhide, JJ.*) KIRPA SINGH *v.* AJAIPAL SINGH. **31 P. L. R. 424 = 11 Lah. 142 = 124 I. C. 305 = A. I. R. 1930 Lah. 1.**

———*Interest—Relation to founder—Visiting temple.*

Persons who are constant visitors of the trust temple and are also closely related to the founder of the trust are sufficiently interested in the trust property to maintain a suit against the trustee praying for his removal. (*Banerji and King, JJ.*) BULMAKUND *v* NANAK CHAND. **1929 A. L. J. 438 = 117 I. C. 828 = A. I. R. 1929 All. 433.**

———*Private capacity—Applicability to.*

A suit brought by the plaintiff in his private capacity to recover possession of the trust property from the persons who, he alleges, are trespassers, is not barred by S. 92: A. I. R. 1924 Bom. 518 and A. I. R. 1921 Bom. 297, Dist. (*Baker, J.*) KASHINATH MAHADER *v.* GANGUBAI KESHAV. **117 I. C. 523 = 31 Bom. L. R. 349 = A. I. R. 1929 Bom. 193.**

———*Right to control.*

Where the founder has laid down the persons in whom the right of control is vested, it is erroneous to hold that they alone can bring an action under S. 92. (*Shadi Lal, C. J. and Skemp, J.*) SHANKAR DAS *v.* NANAK CHAND. **116 I. C. 451 = A. I. R. 1929 Lah. 428.**

———*Collaterals of founder.*

Collaterals of the founder are such persons as have interest in the institution and so can sue under S. 92: A. I. R. 1924 P. C. 221; and A. I. R. 1925 Lah. 189, Rel. on. (*Shadi Lal, C. J. and Skemp, J.*) SHANKAR DAS *v.* NANAK CHAND. **116 I. C. 451 = A. I. R. 1929 Lah. 428.**

———*Persons entitled to food in chattram.*

When all the plaintiffs are persons who would be entitled to receive food, if they so wished, in chattram to which property was dedicated under the terms of the original trust deed.

Held, that they had sufficient interest in the trust within the meaning of S. 92. 42 Mad. 360, Dist. (*Phillips and Ramesam JJ.*) PICHAI PILLAI *v.* LINGAM IYER. **108 I. C. 199 = A. I. R. 1928 Mad. 268.**

———*Encroachment by trustees—Removal not prayed—Suit for preservation and administration by beneficiaries.*

Where a committee is appointed to look after the properties of a temple, the legal ownership of the properties appertaining to the temple is in the managing committee, and ordinarily it is that committee that can sue with respect to encroachments on trust properties; but where the encroachments are made by the trustees themselves over the trust property, the beneficiaries are entitled to sue the trustees in respect of the encroachments. It may be that the primary right of the beneficiaries under such circumstances is to seek removal of the trustees by a suit under S. 92, but there is no reason why they should not be allowed to waive that larger right, and while not seeking the removal of the trustees, claim for the preservation and due administration of the trust properties by those very trustees. 33 All. 660; 35 All. 197 and 41 Mad. 124, Rel. on. (*Iqbal Ahmad, J.*) MUKUND LAL *v.* MOHAN LAL. **101 I. C. 744 = A. I. R. 1927 All. 518.**

———*Public mosque—Nature of interest.*

The question whether a person interested in a public mosque simply as a person who has a right to worship therein, can institute a suit in respect of it in his individual capacity depends on the determination of the question in each particular case as to whether the plaintiff has or has not a cause of action which would entitle him to the relief which he claims. The question as to whether the suit will be maintainable at the instance of a particular plaintiff depends not upon any inherent right which one may have to worship in a mosque or a temple, upon the fact of his living in the vicinity or his

being a mere resident of the district. Every Mahomedan has a right apart from his right as member of the community to worship in a public mosque, but on that does not depend his right to maintain any and every suit in connexion with it. If there is an individual right in the plaintiff which has been violated, or if some injury to that right is threatened, the suit will lie. (*Case law fully discussed.*) (*Suhrawardy and M. N. Mukerji, JJ.*) DEBENDRANATH *v.* SEIKH SEFATULLA.
44 C. L. J. 339 = 31 C. W. N. 184 = 99 I. C. 205 =
A. I. R. 1927 Cal. 130.

——*Interest in trust.*

Section 92 enables any two or more persons that have an interest in the trust to sue for certain reliefs and it is not necessary that they should have been personally affected by any act done by the person or persons sued. It is sufficient that they have enough of an interest in the trust to see that the trust is properly conducted and that the terms whereby it is regulated are complied with. (*Kumaraswami Sastri and Curgenven, JJ.*) SINGARAM *v.* K. SRINIVASA AIYANGAR. **102 I. C. 270 =**
50 Mad. 726 = 25 M. L. W. 594 =
1927 M. W. N. 197 = 38 M. L. T. 253 =
A. I. R. 1927 Mad. 462 = 53 M. L. J. 545.

——*Mere worshipper.*

In respect of properties which form part of a public trust a mere worshipper can have no right by way of a suit to obtain possession of the properties. A. I R. 1925 Rang. 294, Appl. (*Harrison and Jai Lal, JJ.*) KUNDAN LAL *v.* TIRKHA RAM. **96 I. C. 934 =**
8 L. L. J. 231 = 27 P. L. R. 833 =
A. I. R. 1926 Lah. 425.

——*Udasi Shrine.*

Udasis constitute a separate sect of schismatics from the religion founded by Nanak. They are Hindus as well as Sikhs. Their mode of life, ritual and religious observances are materially different from those of the followers of Guru Gobind Singh; and therefore, such followers of Guru Gobind Singh, as do not profess to be Hindus, have no such interest in an Udasi shrine as is contemplated by S. 92, and are therefore not competent to maintain a suit under that section in respect of an Udasi shrine. (*Harrison and Zafar Ali, JJ.*) BASANT DAS *v.* HEM SINGH. **94 I.C. 695 = 7 Lah. 275 =**
27 P. L. R. 115 = A. I. R. 1926 Lah. 100.

——*Interest in trust—Meaning of.*

In order to entitle a plaintiff to sue under the section he must have a clear interest in the particular trust over and above that which millions of his countrymen may be said to have by virtue of their religion. The words "interest in trust" must mean a 'clear interest', that is to say, a present and substantial and not a remote and fictitious or purely illusory interest and further that interest, if the provision is not to be altogether illusory must arise from some special relation in which the plaintiff stands to the endowment in question as compared with the whole body of religious community throughout India. Proof of residence in the neighbourhood of the institution, will, no doubt be one way of establishing possession of an interest on the simple ground that those who live near to the institution will be most likely to take advantage of its benefits. The test of locality is only to be applied in relation to actual user of the temple or mosque by the inhabitants residing close to it. The question is a pure question of fact, and must be left to the Court to decide on a consideration of the particular circumstances of each case. 42 Mad. 360 (F.B.) and A.I.R. 1924 P. C. 221, Foll. (*Odgers and Madhavan Nair, JJ.*) MAHOMED KHAN *v.* KADIR BATCHA SAHEB. **92 I. C. 950 =**
23 M. L. W. 240 = A. I. R. 1926 Mad. 466.

——*Interest in temple trust—What constitutes.*

Persons belonging to neighbouring villages who attend the suit temple on important occasions and also celebrate at that temple their marriages are persons having an interest in the temple trust within the meaning of S. 92. The interest which the plaintiffs possess must be real and not remote, must be substantial and not illusory, must be an existing interest and not a mere contingency, and the mere circumstance that the plaintiffs do not habitually resort to a temple is not sufficient to debar them from exercising the right under the section. A. I. R. 1924 P. C. 221, Rel. on. (*Venkatasubba Rao and Madhavan Nair, JJ.*) SURYANARAYANA *v.* LAKSHMI NARASIMHAM. **91 I. C. 924 =**
1926 M. W. N. 40 = A. I. R. 1926 Mad. 267 =
49 M. L. J. 746.

——*Worshippers in a Dharmasala—Worshippers in a Sikh Dharmsala can sue under S. 92.*

In the case of a temple or a mosque as well as in the case of Dharmasala, persons entitled to attend there for purposes of worship are beneficiaries and must as such be held to possess a sufficient interest to support a suit under Section 92 of C. P. Code. Opinion of *Abdur Rahim, J.*, in 42 Mad. 360, Foll. (*Abdul Raoof and Harrison, JJ.*) NARINJAN SINGH *v.* KIRPAL SINGH
5 Lah. 455 = 85 I. C. 111 = A.I.R. 1925 Lah. 189 (2).

——*Mere worshipper—Claim for possession.*

In respect of properties which form part of a public trust, a mere worshipper cannot have the right of suit to obtain possession of the properties. He has no right to sue for any of the reliefs mentioned in S. 92 of the C. P. Code except in the manner prescribed by that Section. (*Case law referred to.*) (*Heald and Chari, JJ.*) SAW DURMAY *v.* BAGGAT SINGH.
89 I. C. 623 = 3 Rang. 213 =
A. I. R. 1925 Rang. 294.

——*Absence of interest.*

The Advocate-General's written consent will not entitle a party to sue unless he has an interest in the trust. (*Sir John Edge.*) VAIDYANATHA AYYAR *v.* SWAMINATHA AYYAR. **82 I. C. 804 = 51 I. A. 282 =**
35 M. L. T. 189 = 47 Mad. 884 =
22 A. L. J. 983 = 6 L. R. P. C. 17 =
26 Bom. L. R. 1121 = 40 C. L. J. 454 =
29 C. W. N. 154 = 20 M. L. W. 803 =
1924 M. W. N. 749 = 26 P. L. R. 1 =
A. I. R. 1924 P. C. 221 = 47 M. L. J. 361.

——*Female descendants of founder.*

Descendants in the female line from the founder of the charity have an "interest" therein within the meaning of S. 92 although they may not directly obtain any benefit from it. (*Sir John Edge.*) VAIDYANATHA AYYAR *v.* SWAMINATHA AYYAR.
82 I.C. 804 = 51 I. A. 282 = 35 M. L. T. 189 =
47 Mad. 884 = 22 A. L. J. 983 = 6 L. R. P. C. 17 =
26 Bom. L. R 1121 = 40 C. L. J. 454 =
29 C. W. N. 154 = 20 M. L. W. 803 =
1924 M. W. N. 749 = 26 P. L. R. 1 =
A. I. R. 1924 P. C. 221 = 47 M. L. J. 361.

——*Interest—Meaning of.*

It is wholly impossible to define with any degree of accuracy what exactly constitutes an interest as contemplated in S. 92. There is no doubt that it need not be a direct interest in the sense that only a beneficiary can institute a suit and that it must be a real, substantial and existing interest. Where a trust provided for the maintenance of widows and orphans of a certain caste and dedicated a building for the use of pilgrims as a *Dharamasala*.

Held, a suit by some members of the caste living in the *Mohalla* in which the institution was situate could maintain a suit. (*Broadway and Harrison, JJ.*) MURLIDHAR *v.* SULTAN SINGH. **73 I. C. 302= A. I. R. 1923 Lah. 518.**

—S. 92—Sanction.

———*Sanction not obtained against some of the defendants—C. P. Code.*

Where a suit under S. 92 was filed against three persons, but it appeared that the sanction of the Collector had been obtained against only one, *held*, that the court of appeal could direct the matter to stand over with a view to enable the plaintiff to obtain such sanction.

Held also, that such a lax practice on the part of litigants should generally be discouraged. (*Wallace and Anantakrishna Aiyar, JJ.*) RATHNASWAMI PILLAI *v.* ADIPURNAM PILLAI. **1930 M. W. N. 456.**

———*Notice.*

Held, that the Collector's order granting sanction under S. 92, C.P. Code, is not invalidated by want of notice to defendants. (*Wallace and Anantakrishna Aiyar, JJ.*) RATHNASWAMI PILLAI *v.* ADIPURNAM PILLAI. **1930 M.W.N. 456.**

———*Principles governing.*

The authority giving the sanction must consider the various aspects before giving the sanction and one important consideration should be as regards the status and position of those who come forward to represent the community. It would be more desirable, before giving the sanction that notice should be given to the institution or the trustees although it is not obligatory. (*Kumaraswamy Sastri and Walsh, JJ.*) PITCHAYYA *v.* VENKATAKRISHNAMACHARLU. **30 M. L. W. 954=1929 M.W.N. 911= 53 Mad. 223=124 I.C. 220=A.I.R. 1930 Mad. 129= 58 M. L. J. 39.**

———*Addition of parties—Fresh sanction, if necessary.*

Fresh sanction under S. 92 is not needed if the scope of the scheme suit is not enlarged by the addition of a new party. 6 L.W. 9; 12 L.W. 722 and A. I.R. 1926 Mad. 970, Foll. (*Odgers, J.*) GORI BIBI *v.* SARASAMED MEER SAHEB. **A. I. R. 1929 Mad. 635.**

———*Suit for mere declaration.*

No sanction under S. 92 is necessary for a suit for a mere declaration that the property in dispute is wakf and that the alienations thereof are void; A.I.R. 1927 Lah. 350, Foll. (*Addison and Bhide, JJ.*) HAIDAR HASAN *v.* ANJUMAN MUHAFIZ AUKAF. **113 I. C. 120=A. I. R. 1928 Lah. 888.**

———*Sanction for suit against alleged trustee—Addition of real trustee—Fresh sanction.*

P obtained sanction of the Collector under S. 92, C. P. Code, and sued *A* and *B*, the alleged trustees. A plea was raised that *M* was the real trustee and he was added as a defendant to the suit at the Court's instance, but without the sanction of the Collector.

Held, that the sanction of the Collector was necessary to maintain the suit against *M*. A.I.R. 1926 Mad. 970, Foll. (*Jai Lal, J.*) BAGGA SINGH *v.* TIRATH RAM. **116 I. C. 334=A. I. R. 1928 Lah. 717.**

———*Suit for declaration of right to appoint mutawali as founder.*

A suit by plaintiff for a declaration that he as founder of the wakf, is entitled to appoint mutawallis, the original mutawallis having died without making such appointment, and that he has made valid appointment in pursuance of such right does not require sanction under S. 92. (*Dalal and Pullan JJ.*) RUGGHAN PRASAD *v.* MT. DHANNO. **49 All. 435=25 A. L. J. 329= 99 I. C. 1045=A. I. R. 1927 All. 257.**

———*Declaration as to wakf property.*

Where all that the plaintiff prays for in his suit is a declaration that the property be declared to be a wakf, no sanction under S. 92 is necessary. 2 L. L. J. 457, Foll. (*Broadway and Zafar Ali, JJ.*) MIRAN BAKHSH *v.* ALLAH BAKHSH. **8 Lah. 111= 99 I.C. 756=28 P. L. R. 486= A. I. R. 1927 Lah. 350.**

———*Reliefs under section—Prayer not specific but implied.*

Where, though the plaintiffs do not expressly ask for the removal of the existing trustee from his trusteeship and for their appointment as new trustees and for a declaration that the properties have become vested in them but it is clear that the object of the suit is to get the dismissal of the old trustee and the appointment of the new trustees by the committee recognised by the Court and to recover the properties through Court from the trustees, the suit comes within the scope of S. 92 and sanction is necessary; O.S.A. 106 of 1925, Foll. (*Waller and Madhavan Nair, JJ.*) JAMBULINGA PATHAN *v.* AKILANDU ASARI. **26 M. L. W. 274=A.I.R. 1927 Mad. 886.**

———*Reliefs under section claimed—Suit for personal right.*

Where a suit is filed not for the purpose of vindicating any rights of the public as a public religious or charitable trust but only for the purpose of satisfying the personal or individual rights of the plaintiff as trustee, no sanction under S. 92 is necessary, though the reliefs claimed are those specified in S. 92. A.I.R. 1922 Mad. 17 (F.B.), Foll. (*Waller and Madhavan Nair, JJ.*) K. LAKSHMINARAYAN *v.* K. PUNNAYYA. **103 I. C. 134=A. I. R. 1927 Mad. 820.**

———*Objection to want of — Waiver—Object of sanction.*

Objection as to absence of sanction under S. 92 is not an objection that can be properly waived. The very object of insisting upon the sanction of a Collector or of the Advocate-General being obtained as a preliminary to a suit under S.92 is to secure that suits are not brought against trustees unless there is a *prima facie* case against them of breach of trust or unless circumstances exist which necessitate the Court's interference in the administration of the trust. (*Krishnan and Venkatasubba Rao, JJ.*) VARA PRASAD RAO *v.* GOPALACHARLU. **24 M. L. W. 419=1926 M. W. N. 626= 97 I. C. 462= A. I. R. 1926 Mad. 970.**

———*Sanction against non-trustee—Suit against real trustee—Maintainability.*

The object of this section will be defeated if it is left open to a plaintiff to get sanction against a person who is not the trustee and then use it afterwards against the real trustee. The personality of the trustee and the way in which he is dealing with the trust are matters of material consideration in granting sanction for a suit. (*Krishnan and Venkatasubba Rao, JJ.*) VARA PRASAD RAO *v.* GOPALACHARLU. **24 M.L. W. 419= 97 I. C. 462=1926 M.W.N. 626= A. I. R. 1926 Mad. 970.**

———*Alienation by widow of founder—Suit by reversioner—Proper remedy.*

The founder of a trust appointed himself as manager during his lifetime and his heirs after his death. Founder's widow after his death alienated the trust property. The plaintiff, who was the reversioner to the estate of the founder sued to recover property alienated by the founder's wife.

Held, that the widow could not be transposed as plaintiff and the plaintiff could not claim to be trustee. The proper remedy for the plaintiff was to sue for the removal of the widow from the trusteeship by a suit properly framed under S. 92, C. P. Code, after obtaining

Advocate-General's permission.

Held, further that plaintiff could not be allowed to do that in this suit as that would alter the nature of the suit. (*Spencer and Madhavan Nair, JJ.*) RAMASAMI GOUNDAN *v.* SINGAPERUMAL KADAVUL.
22 M.L. W. 701 = 1926 M. W.N. 117 = 92 I.C. 823 = A. I. R. 1926 Mad. 280 = 50 M. L. J. 42.

———*Suit after—Procedure under C. P. Code, O. 1, R. 8, if necessary.*

It cannot be seriously contended that the provisions of O.1, R. 8, are not merely of an enabling character. The condition precedent to the proper institution of a suit under S. 92, C. P.Code, is the obtaining of the sanction of the Advocate-General and no other condition for the maintainability of a suit is to be found in the Code. Previous to the amendment of S. 92 (formerly S.539 in the previous Code) by the C. P. Code, of 1908 no doubt the procedure under O. 1, R. 8 (formerly S. 30) was, in suits instituted otherwise than with the sanction of the Advocate-General or the Collector, deemed necessary in order to render the decree in the suit binding on all parties interested in or concerned in any manner with the trust. But the amendment of the law embodied in the present S.92, C.P. Code, has obviated the necessity for a representative suit. (*Kumaraswami Sastri, Madhavan Nair and Srinivasa Aiyengar, JJ.*) S. VEERARAGHAVA ACHARIAR *v.* V. PARTHASARATHY IYENGAR.
1925 M. W. N. 505 = A. I. R. 1925 Mad. 1070.

———*Suit by admitted trustee against non-trustee — Necessity for.*

A suit by an admitted trustee against one who is not a trustee for the recovery of trust property and submission of accounts is cognisable by the ordinary Civil Court without any preliminary formalities mentioned in S. 92. (*Mullick and Ross, JJ.*) SYED DILJAN ALI *v.* BIBI AKHTARI BEGUM. **88 I.C. 1035 = 4 Pat. 741 = 7 P.L.T. 4 = 1925 P. H. C. C. 194 = A.I.R. 1925 Pat. 544.**

———*Sanction for some reliefs — Suit comprising other reliefs—Effect of.*

Where plaintiff's suit asks for some reliefs sanctioned by Collector and others not so sanctioned, the whole suit should not be dismissed. It may be tried so far as the relief sanctioned by the Collector is concerned. (*Macleod, C.J. and Crump, J.*) SAKHARAM BALWANT *v.* LAXMAN TRIMBAK. **79 I. C. 200 = A. I. R. 1923 Bom. 428.**

———*Suit against co-trustee for accounts.*

A suit by a trustee or trustees of a public charitable or religious trust against a co-trustee for accounts and for delivery of account books and other papers does not fall within section 92 of the Code of Civil Procedure and may be brought without the sanction of the Advocate-General. 40 B. 3 Foll. A.I.R. 1922 Mad. 17 and 22 Bom. 496, Ref. (*Kotwal and Prideaux, A.J.Cs.*) AYUB KAREEM *v.* JAFFAR AYUB. **74 I.C. 45 = 6 N.L.J. 209 = A.I.R. 1923 Nag. 298.**

———*Suit for possession of trust property by worshippers—Maintainability—Suit for declaration as to trust property—Necessity for sanction.*

Where the worshippers of a temple sue for possession of temple property, the suit is not maintainable as *prima facie*, it is only the trustees who could claim that relief. They can however sue for a declaration that it is trust property and to such a suit S.92 will not apply. (*Broadway and Abdul Raoof, JJ.*) SALIG RAM *v.* BASSAO MAL. **67 I.C. 0 (2) = 1 Lah.L.J. 150 = 84 P. L. R. 1922.**

———*Suit for declaration as to public pathway—Applicability of section.*

Where plaintiff sues on behalf of the public for a declaration that a certain way is a public way and for mandatory injunction to remove certain obstruction the suit is one governed by O. 1, R. 8, and if Court's permission is obtained, recourse to Advocate-General is unnecessary. (*Panton, J.*) HARISH CHANDRA SAHA *v.* PRAN NATH CHAKRAVARTY. **69 I. C. 910 = 26 C. W. N. 587 = A.I.R. 1921 Cal. 405.**

———*Grant of by Collector—Consideration of matters specified in section.*

It is desirable that a Collector before granting sanction for a suit under Section 92 C. P. Code, should consider whether the trust is public trust, whether there are *prima facie* grounds for holding that there has been a breach of such trust and whether the persons suing are persons who have an interest in the trust. But his failure to consider these matters does not in any way invalidate a sanction granted by him. (*Shadi Lal, C. J. and Wilberforce, J.*) MAHOMED SHAFI *v.* ABDUL RAHIM.
60 I. C. 570 (Lah.).

—S. 92—Scheme—Amendment.

———*Procedure.*

Remedy of the parties interested in a trust, for the modification of a scheme, framed in a suit, by appointing additional trustees is not by an application in that very suit, but by a new suit under S. 92. (*Case Law considered.*) (*Rupchand Bilaram, A.J.C.*) ABDULLAH *v.* ABDULLAH HAROON. **21 S.L.R. 220 = 97 I. C. 398 = A. I. R. 1927 Sind 1.**

———*Order—Appeal, if lies.*

Where in a scheme suit under S. 92 a scheme is settled, the suit comes to an end and there is no decree to be executed and no application can be made as if it were in execution of the decree. 31 Mad. 406; 24 Bom. 45 and A.I.R. 1926 Mad. 130, Disappr. A. I. R. 1925 P. C. 155 and A.I.R. 1925 Mad. 411, Foll. Parties cannot give power to a Court to treat the matter in a particular way. (*Devadoss and Wallace, JJ.*) ABDUL HAKIM *v* MD. BURRAMUDDIN. **49 Mad. 580 = 95 I. C. 720 = 1926 M. W. N. 226 = A.I.R. 1926 Mad. 559.**

———*Majority of worshippers Bengalee Muhammedans —Proper scheme—Amendment in appeal.*

Where the worshippers attending a mosque consisted for the most part of Bengalee Mahomedans and a scheme was passed providing that three out of six trustees should be Bengalee Mahomedans.

Held, it was desirable under the circumstances that the Bengalees should have a majority and that the best settlement of the dispute would be attained by an increase in the number of trustees to seven with four reserved for Bengalees. Also as no objection had been taken to the number of six trustees in the grounds of appeal it was not desirable that such amendment of the scheme should be initiated on the decision of the appeal but it would be open to the appellants to apply to the lower Court for alteration. (8 L. B. R. 517 and 9 Bur. L.T. 141, Ref.) (*Robinson, C. J. and Lentaigne, J.*) FAZAL RAHMAN *v.* GULAM HOOSAIN ACHA.
2 Bur. L. J. 208 = 76 I. C. 788 = A. I. R. 1924 Rang. 134.

—S. 92—Scheme—Appointment of trustee.

———*Framing of Scheme—Reliefs under Religious Endowment Act S. 14—Difference.*

The reliefs granted under S. 14 of Act 20 of 1863 are slightly different from those accorded under S. 92 of the C. P. Code. The power of appointing a new trustee and of making a scheme for the administration of the property is restricted to S. 92 only. (*Mullick and Ross, JJ.*) SYED DILJAN ALI *v.* BIBI AKHTARI BEGUM.
88 I. C. 1035 = 4 Pat. 741 = 7 P. L. T. 4 = 1925 P. H. C. C. 194 = A. I. R. 1925 Pat. 544.

C. P. CODE, (1908).
—S. 92—Scheme—Framing of.

———*Propriety of clauses.*

The true test as to the legal propriety of a clause in a scheme is whether the relief granted by that Court is such a relief that if it was being sought before the scheme was sanctioned, it would have to be sought by suit under S. 92. A. I. R. 1926 Mad. 559, Foll. (*Wallace and Madhavan Nair, JJ.*) AMBALAVANA THAMBIRAN *v.* VAGEESAM PILLAI. **122 I. C. 455 = A. I. R. 1930 Mad. 226 = 1929 M. W. N. 744.**

———*Justifying circumstances.*

Where there is nothing to show that the puja has not been performed by the archakas, nor malversation is proved and the record does not show that the archakas set up any title in themselves to deal with the property as their private property :

Held, that there is no ground for a scheme being framed. (*Kumarasawmi Sastri and Devadoss, JJ.*) GURUNATHAN YOGI *v.* A. RAGHAVAYYA. **106 I. C. 375 = A. I. R. 1928 Mad. 401.**

———*'Direction of Court'—Meaning of—Appointment of Mutawali—If comprised in framing schemes.*

The words "where the direction of the Court is deemed necessary for the administration of any such trust" must be interpreted as meaning that where the Court has to give direction in the nature of framing a scheme or otherwise for the administration of the trust. The mere appointment of a mutawalli is not such a direction as is contemplated by the section: 33 Cal. 789, Dist : 23 C. W. N. 115 ; 47 Cal. 592 ; and A. I. R. 1924 Cal. 473, Ref. to. (*Suhrawardy and Graham, JJ.*) ABDUL ALIM *v.* MT. ABIR JAN BIBI. **55 Cal. 1254 = A.I.R. 1928 Cal. 368 = 32 C.W.N. 835 = 110 I.C. 416.**

———*Considerations.*

The Court should primarily look to the interests of the institution rather than the right of individuals in framing a scheme. Where the interests of the institution do require that certain trustees should be removed the Court can do so without actually finding that they are guilty of mismanagement provided their remaining as trustees is incompatible with the proper management of the institution or that the number of trustees is so large that it will not be possible for any scheme to work with all of them as trustees. In framing a scheme the Court should not lightly exclude the interests of hereditary trustees and others. But where the Court finds that their continuance could not be for the welfare of the institution and is not conducive to the proper working of the scheme it should not hesitate to remove them. But where they can be retained without any detriment to the institution the Court may do so : 4 L. W. 228. Foll. (*Devadoss, J.*) VENKATARAMA *v.* DAMODARAM' **98 I.C. 208 = A.I.R. 1926 Mad. 1150 = 51 M.L.J. 457.**

———*Further remedy.*

When the relief asked for and granted was the scheme alone, there is no reason for holding that the further remedy provided in the scheme need or can be asked for execution of the decree or that the order granting or refusing it is appealable as one passed under S. 47. When a suit is instituted in the words of S. 92, C. P. Code, to obtain a decree settling a scheme the relief must so far as the suit is concerned, be regarded to have been finally given and there remains nothing to obtain by way of execution. (1923) M. W. N. 133 and (1923) M. W. N. 78, Foll. ; 24 B. 45, Diss. (*Oldfield and Venkatasubba Rao, JJ.*) RANGANATHA *v.* KRISHNASWAMI. **75 I.C. 189 = 47 Mad. 139 = 18 M. L. W. 237 = 1923 M.W.N. 664 = A.I.R. 1924 Mad. 369.**

C. P. CODE, (1908), S. 92—Scheme—Power of Court.

———*Power of Court—Enquiry as to trust property.*

Under S. 92, C. P. Code, when the Court is asked to frame a scheme, one of the essential enquiries to be made is what are the properties belonging to the charity. For this purpose the Court is entitled to go into questions not arising directly in the suit. (*Abdur Rahim and Burn, JJ.*) VAITHINATHA AIYAR *v.* THYAGARAJA AIYAR. **68 I. C. 631 = A.I.R. 1921 Mad. 563 = 41 M.L.J. 20.**

—S. 92—Scheme—Interest of beneficiaries.

———In settling a scheme regulative of the conduct of an institution as the owners of moneys and property which it possesses, no doubt the institutional trust must be respected, but the sect and body of worshippers for whose benefit it was set up have the protection of the Court against their property being the subject of abuse, speculation and waste : A.I.R. 1916 P. C. 256, Foll. (*Lord Shaw*). SRIPATI PRASADJI BIHARI LALJI *v.* LAXMIDAS DUNGERBAI. **114 I.C. 10 = 1929 M.W.N. 417 = 31 Bom. L.R. 243 = 1929 A.L.J. 401 = 33 C.W.N. 352 = 29 M.L.W. 113 = A.I.R. 1929 P.C. 27.**

—S. 92—Scheme—Interpretation.

———No distinction can be drawn between the interpretation of an Act, and that of a scheme under S. 92, C. P. Code. District Court in such a scheme means not the person but the tribunal. (*Oldfield and Venkatasubba Rao, JJ.*) RANGANATHA *v,* KRISHNASWAMI. **75 I.C. 189 = 47 Mad. 139 = 18 M.L.W. 237 = 1923 M.W.N. 664 = A.I.R. 1924 Mad. 369.**

—S. 92—Scheme—Management.

———*Temple built on subscriptions—Right of the person building to hereditary management.*

If persons invite subscriptions on a representation that they would devote the subscriptions so collected to a particular purpose and they divert the subscriptions to some other purpose, the subscribers have a right to object to the funds being diverted to other purposes than those for which they were collected. But so long as the subscribers do not object to the person or persons collecting subscriptions for building or endowing any particular institution, the person or persons so building or endowing it have the right to provide for its management for all time to come. Where there is nothing in the evidence to show that the persons who gave subscriptions gave them on the understanding that the founders should not have the hereditary right of management, the founders can direct that the management should be hereditary in their families (*Devadoss, J.*) VENKATARAMA *v.* DAMODARAM. **98 I. C. 208 = A. I. R. 1926 Mad. 1150 = 51 M. L. J. 457.**

—S. 92—Scheme—Operation of.

———*Madras Hindu Religious Endowments Act, S. 75 —Retrospective effect of.*

S. 75, Religious Endowments Act cannot be construed as having a retrospective effect with regard to a scheme settled by a Court under S. 92 C. P. Code, before the enactment of the said Act. (*Srinivasa Ayyangar, J.*) CHINNAN CHETTIAR *v.* V. SUNDARESA AYYAR. **115 I.C. 54 = A.I.R. 1929 Mad. 322.**

—S. 92—Scheme—Power of Court.

———*Prayers outside the scope of the Sanction.*

In a scheme suit if any prayers are outside the scope of the sanction given under S. 92, no relief can be granted with reference to them 11 Mad. 148 Ref. (*Kumaraswamy Sastri and Walsh, JJ.*) PITCHAYYA *v.* VENKATAKRISHNAMACHARLU. **30 M. L. W. 954 = 1929 M. W. N. 911 = 53 Mad. 223 = A.I.R. 1930 Mad. 129 = 58 M. L. J. 39.**

———Where an institution is governed by scheme, the

C. P. CODE (1908), S. 92—Scheme—Power of Court.

power of Court to deal with matters arising under it being dependent upon the scheme itself, it has no jurisdiction to interfere except by some method provided by scheme itself even where trustee omits to comply with terms of scheme. A.I.R. 1926 Mad. 659 Rel. on. (*Curgenven, J.*) RAMALINGA MUDALIAR *v.* SUNDARA SASTRIGAL. **120 I. C. 874 = 1929 M.W.N. 300 = A.I.R. 1929 Mad. 526.**

———*Right of archaka to sue for salaries.*

Where a scheme is framed and under it permission is given to apply to the Court for direction for the proper management of the institution that does not empower the archakas of the temple to apply to the Court for payment of the salaries to which they are entitled under the provisions of the scheme, for there would be no means to execute the order. (*Phillips and Madhavan Nair JJ.*) ANKAYYA *v.* VENKATA RAMAYYA. **95 I.C. 5 = 1926 M.W.N. 283 = A.I.R. 1926 Mad. 655.**

———*Directions in* wakfnamah—*Departure.*

It must not be understood that the Court has no power to depart from the arrangement contemplated in the *Wakfnamah.* The institution of a suit under S. 92 attracts the jurisdiction of the Court, and the Court has complete power to make such appointment as it considers proper though the appointment may involve a departure from the arrangement contemplated in the constitution of the trust. There is no legal restriction in the power of the Court ; but although there is no legal restriction, the Court ought not to depart from the arrangement contemplated by the settlor except for a very strong reason. Where the deed of trust vested the power of appointment in the respectable *Shiahs* of Muzaffarpur and, they by a majority of votes, elected one, *A* as the *mutawalli* of the endowment:

Held the Court should have been more careful in enquiring whether it was necessary that the election of *A* be set aside, merely on the unwarranted suggestion of the other party, that *A* had procured his election by offering bribes to the electors. It cannot be said that because the trust-deed, does not contemplate a scheme, a scheme should not be framed by the Court. (*Das and Bucknill, JJ.*) MAHOMED WAHEB HUSSAIN *v.* SYED ABBAS HUSAIN. **71 I. C. 280 = 4 P. L. T. 326 = A.I.R. 1923 Pat. 420.**

—S. 92—Scheme—Power to alter or modify.

———*Alteration of Scheme.*

Where a scheme has been framed, any modification or alteration of the scheme is in effect a new scheme and power to frame a new scheme is given only subject to the condition laid down in S. 92. For the management of the affairs of a "pagoda" trustees were appointed for life under a scheme which the trustees had no power to vary. On the application of the trustees the lower Court changed the tenure to three years and appointed by election new trustees.

Held that the appointment of new trustees was illegal under S. 92 which lays down that in order to vary the terms of an express trust ; the proper course is for the Advocate-general or two or more persons with his permission to institute a suit to obtain such variation ; A. I. R. 1927 Mad. 1073 (F. B.), Foll.; A. I. R. 1928 Rang. 168, Dist. (*Das and Doyle, JJ.*) U PO MAUNG *v.* U TUN PE. **6 Rang. 594 = 114 I. C. 293 = A.I.R. 1929 Rang. 20.**

———The High Court has the power to alter or modify a scheme of management of an institution itself and so rules framed under such scheme are as liable to alteration or modification by High Court as any other provisions of the scheme itself. (*Fawcet and Madgavkar, JJ.*) SHANKARKAL *v.* DAKOR TEMPLE COMMITTEE.

C. P. CODE (1908), S. 92—Scheme—Procedure.

28 Bom. L. R. 309 = 94 I. C. 47 = A. I. R. 1926 Bom. 179.

———There is ample authority for the proposition that a Court which has sanctioned a scheme for the administration of a charitable trust is competent from time to time to vary the scheme as exigencies of the case may require. But it is not competent to the Court to vary the rules for succession of Sardar Panda or High priest which were determined in the original suit according to ancient usage. A variation in this respect cannot be taken to be a "modification of the scheme that may appear to be necessary or convenient." (*Mookerjee and Rankin, JJ.*) MANADANANDA JHA *v.* TARAKANANDA JHA PANDA. **76 I. C. 220 = 37 C. L. J. 281 = A. I. R. 1924 Cal. 330.**

—S. 92—Scheme—Procedure.

———*Decree in scheme suit—Appeal not represented in time—Application by interested persons to prosecute—Limitation.*

In a representative suit about a temple property certain persons, on behalf of the temple, filed an appeal which was returned for representation. It was not represented in time. Certain other persons interested in the temple property and in the result of the appeal then applied to the Appellate Court for taking the appeal on file and also paid fresh Court-fee. It was found that the non-representation of the appeal by the original appellants was not *bona fide.*

Held, the the fresh appellants should be considered as constructive parties and thus entitled to continue the appeal, and even assuming the representation was a fresh appeal, time should be excused under S. 5, Lim. Act. (*Kumaraswami Sastri and Devadoss, JJ.*) KUMARASWAMI *v.* LAKSHMANA. **108 I. C. 298 = 28 M. L. W 279 = A. I. R. 1928 Mad. 456 = 54 M. L. J. 629.**

———*Enforcement of clauses—Execution—Suit.*

There is no reason why there may not be some clause in the scheme which amounts to a direction to the defendant to perform some duty, such as the payment of money either at a point of time or periodically, and why such a direction should not be executable. Whether it is executable or not depends on the intention of the decree. While generally a scheme decree may be declaratory, specific parts thereof may contemplate execution. It is necessary to expressly provide for the enforcement of such a clause by execution, though where there is an express provision to that effect it makes matters clear, and such a provision except as to the removal of a trustee is not *ultra vires.* In the case of the removal of a trustee it may be that the only remedy is by a suit under S. 92. The presentation of a proper budget and payment of the moneys to the treasurer by kattalaidars, as directed by a scheme settled are matters intended to be enforced in execution. A. I. R. 1925 P. C. 155, Expl. ; A. I. R. 1924 Mad. 369, Diss. from ; 24 Bom. 45 and A. I. R. 1926 Mad. 659, Appr. ; Spencer, J., in A. I. R. 1926 Mad. 130, Diss. from. Even assuming that there is some doubt as to the intention of the scheme and that a suit is the proper remedy, it is clear that the suit is not a suit under S. 92 and does not require any sanction. Therefore, an application to enforce such duties from the kattalaidars can be treated as a suit under S. 47 (2) and thus the decision of the lower Court thereon is appealable. (*Ramesam and Cornish, JJ.*) THYAGARAJASWAMI *v.* BALAJEE AMMAL. **39 M. L. T. 579 = 27 M.L.W. 32 = 107 I.C. 136 = A.I.R. 1928 Mad. 61.**

———*Right of court to confirm elections—Order on application—Appeal, if lies.*

Where the Court reserves to itself the right to confirm elections held under a scheme framed by it and where application for confirmation is made by parties on one side in the suit and is opposed by parties on the other side, the order which the Court makes is not really an order in execution but is a decree in the suit itself and is, therefore, appealable as a decree under the Code. A. I. R. 1923 Mad. 284 ; 43 I. C. 772 ; and A. I. R. 1924 Cal. 330, Ref. ; 11 Mad. 26 (P.C.); 36 Bom. 47 ; 40 Bom. 509 ; National Telephone Co. *v.* Postmaster-General, (1913) A. C. 546 ; A. I. R. 1917 P. C. 71 ; A. I. R. 1924 Mad. 561; A. I. R. 1926 Rang. 25 (F.B.); A. I. R. 1927 Mad. 93 ; 7 Bur. L. T. 298 ; 24 Bom. 45; and 28 Mad. 319 ; Dist. (*Heald and Mya Bu, JJ.*) U. BA PE *v.* U. PO SEIN. **6 Rang. 97 = 110 I. C. 41 = A. I. R. 1928 Rang. 168.**

———*Oders in execution—Appeal.*

Orders passed by Court in relation to a scheme sanctioned in a scheme suit are not orders in execution and no appeal lies. A. I. R. 1925 P. C. 155 and A.I.R. 1926 Mad. 130 and 559, Foll. (*Ramesam and Madhavan Nair, JJ.*) VENUGOPAL REDDY *v.* MUTHUSWAMI KAVUNDAN. **102 I. C. 633 = A. I. R. 1927 Mad. 1110.**

———*Execution of scheme—Appeal—Revision.*

Where a scheme has been framd, no appeal lies from the order of Court in the matter of its execution (A. I. R. 1924 Mad. 369 Foll.). But where the order of the Court is without jurisdiction, revision will lie. (*Venkatasubba Rao and Jackson, JJ.*) VYTHELINGA MUDALIAR *v.* MAHADEVA IYER. **91 I. C. 794 = A. I. R. 1926 Mad. 659.**

—S. 92—Scheme—Right to apply.

———When liberty to apply is confined by a rule under the scheme decree to particular persons, no others have *locus standi* to apply and to permit others to apply is in effect to modify the scheme which is not permissible in law except by suit under S. 92. (*Wallace and Madhavan Nair, JJ.*) AMBALAVANA THAMBIRAN *v.* VAGEESAM PILLAI. **122 I. C. 455 = A. I. R. 1930 Mad. 226 = 1929 M. W. N. 745.**

—S. 92—Scheme—Right to sue.

———*Subscriber—Worshipper.*

In a scheme suit in respect of a temple a person who has contributed to the funds of the temple and is a worshipper at the shrine has sufficient interest to be plaintiff. Joining a person not entitled to sue does not affect the right of others who are entitled to sue. (*Spencer, Offg. C. J. and Srinivasa Aiyangar, J.*) A. V. M. RAMASWAMI CHETTIAR *v.* V. M. MUTHU KARUPPAN CHETTIAR. **86 I. C. 371 = A. I. R. 1925 Mad. 1011.**

—S. 92—Scheme—Separate schemes.

———*Temple properties and kattalai properties.*

Where there are temple properties and kattalai properties, there should be a separate scheme for the kattalai properties. Where the Kattalai properties are are devoted to certain special objects, although all the properties may vest in the idol, still the difference is well recognized between the properties belonging to the idol dedicated absolutely to it which form the properties of the temple and the kattalais or subordinate trusts whereby properties were endowed by worshippers for special objects, very often with special trustees to administer the trust. (*Kumaraswami Sastri and Curgenven, JJ*) PANCHANADAM *v.* PARVATI AMMAL. **1927 M. W. N. 405 = 108 I. C. 649 = A. I. R. 1928 Mad. 955.**

—S. 92—Scheme—Ultra Vires.

———*Scope of suit.*

A scheme which goes beyond what was decided in the scheme suit, and decides matters which come within the purview of S. 92 is so far *ultra vires.* A. I. R. 1927 Mad. 1073 (F. B.), Foll. (*Wallace and Madhavan Nair, JJ.*) AMBALAVANA THAMBIRAN *v.* VAGEESAM PILLAI. **122 I. C. 455 = A. I. R. 1930 Mad. 226 = 1929 M. W. N. 745.**

———*Provision to apply for modification of.*

Where a scheme is settled, direction for applying to Court for modification of terms thereof is *ultra vires* : A. I. R. 1927 Mad. 1073 (F. B.). (*Phillips and Ramesam, JJ.*) PICHAI PILLAI *v.* RAMESAM IYER. **108 I. C. 199 = A. I. R. 1928 Mad. 268**

———To empower the Court to exercise disciplinary jurisdiction over the trustees and punchayatdars of a religious institution is practically investing the Court with power of management of the institution. Such a provision cannot empower the Court to interfere in matters of internal arrangement, and parties cannot invest the Court with jurisdiction which it does not possess ; for under the Civil Procedure Code it is only suits of civil nature that can be entertained. A clause of this kind if held valid, would empower the Court to interfere in matters purely religious. (*Devadoss and Wallace, JJ.*) ABDUL HAKIM *v.* MD. BURRAMUDDIN. **49 Mad. 580 = 1926 M. W. N. 226 = 95 I.C. 720 = A. I. R. 1926 Mad. 559.**

———*Provision to apply for alteration.*

Per *Devadoss, J.*—A provision made for alteration by an application to the Court by the parties or by persons interested in their working does not give the Court jurisdiction to alter the scheme on an application made to it. When a scheme is settled the suit comes to an end. To say that any person could apply to alter the scheme once framed would necessarily mean that the suit is pending. It cannot be said that the suit is pending for all time from the mere fact that the scheme framed contains a provision that an application can be made for altering the scheme. It would be *ultra vires* of any Court to obtain jurisdiction by inserting a clause in the scheme whereby persons interested in the scheme or others are enabled to apply to the Court for the alteration of the scheme : A. I. R. 1925 Mad. 411, Foll. To empower the Court to exercise disciplinary jurisdiction over the trustees and panchayatdars of a religious institution is practically investing the Court with power of management of the institution. Such a provision cannot empower the Court to interfere in matters of internal arrangement, and parties cannot invest the Court with jurisdiction which it does not possess ; for under the Civil Procedure Code it is only suits of civil nature that can be entertained. A clause of this kind if held valid, would empower the Court to interfere in matters purely religious. (*Devadoss and Wallace, JJ.*) ABDUL HAKIM *v.* MD. BURRAMUDDIN. **49 Mad. 580 = 1926 M. W. N. 226 = 95 I. C. 720 = A. I. R. 1926 Mad. 559.**

—S. 92—Scope of.

———*Suit against head of mutt—Maintainability.*

A head of a Mutt is not a trustee in the English Law sense. The head of a mutt may be answerable as a trustee, "in general sense" for maladministration and he has to administer as trustee for general pious and religious purposes in view of the duties and obligations attached to his office. If these are not merely voluntary, *viz.*, if the head is bouud to carry them out, he must be answerable if he does not, notwithstanding that he may have a very wide discretion as to the application of the mutt funds and other properties for this purpose. If the public or a portion thereof are interested in the performance of these duties and obligations which are or ought to be employed at least as to some part of them in the maintenance of a public and religious and charitable endowment, the only way the public can

interfere is by a suit under S. 92, C. P. Code. The head of the mutt may have obligations similar to those of a trustee; he will almost invariably be under a legal obligation to support his disciples and perform the usual ceremonies: Case Law fully discussed. (*Odgers and Jackson, JJ.*) N. ACHARI *v.* PUNNAIVANAM.
101 I. C. 420 = 25 M. L. W. 461 = 1927 M.W.N. 233 = 50 Mad. 567 = 39 M. L. T. 37 = A. I. R. 1927 Mad. 614 = 52 M. L. J. 415.

———*Suit not under S. 92.*

Where a suit is not one under S. 92 of the C. P. Code, the question of the plaintiffs having committed any breach of trust or not does not arise. (*Lindsay and Sulaiman, JJ.*) RAMDAYAL *v.* MT. SARASWATI.
49 All. 191 = 25 A. L. J. 281 = 99 I.C. 568 = A. I. R. 1927 All. 526.

———*Public right.*

The real test whether S. 92 applies or not is whether the suit is fundamentally on behalf of the public for the vindication of a public right, or on behalf of a private individual for the vindication of his private rights: A. I. R. 1922 Mad. 17 (F. B.); 33 Cal. 789 and A.I.R. 1925 Mad. 820, Foll. A. I. R. 1925 Mad. 689 and 42 Mad. 668, Dist. (*Wallace, J.*) ALAGAPPA CHETTIAR *v.* ARUNACHALAM CHETTY. **97 I.C. 480 = A. I. R. 1927 Mad. 338.**

———Where the plaintiff is not suing for the vindication of any public right, but his suit is confined to a vindication of his own private right to be a co-trustee and co-manager of a kattalai, with the first defendant and others, his suit is not governed by S, 92, nor is such a suit prohibited by Act I of 1925. (*Wallace, J.*) ALAGAPPA CHETTIAR *v.* ARUNACHALAM CHETTY.
97 I.C. 480 = A. I. R. 1927 Mad. 338.

———*Suit to establish existence of trust.*

S. 92 regulates suits where there is a breach of an express or constructive trust created for public purpose of a charitable and religious nature; but a suit to establish the existence of the trust itself, where the whole question involved is whether such a trust exists or not, is not within the purview of S. 92. (*Das and Ross, JJ.*) KHURSAIDI BEGUM *v.* SECY. OF STATE.
5 Pat. 539 = 7 P. L. T. 679 = 1926 P. H. C. C. 145 = 94 I.C. 433 = A.I.R. 1926 Pat. 321.

———*Invalid Trust—Maintainability of suit.*

Where the defendant claims under a trust a suit under S. 92 is maintainable even though the plaintiffs challenge the appointment of the defendant as a trustee. 33 C. 789, Foll. (*N, R. Chatterjee and Chotzner, JJ.*) ABDUS SAKOOR *v.* ABDUL RAHIM. **86 I. C. 799 = A.I.R. 1925 Cal. 1106.**

———*Declaration as to trust property.*

A declaration that the properties specified are *waqf* properties is clearly within S. 92, and 28 All. 112. Foll. (*Sulaiman and Boys, JJ.*) RAMRUP GOSHAIN *v.* RANDHARI BHAGAT, **89 I. C. 40 = 47 All. 770 = 23 A.L.J. 601 = 6 L. R. A. (Civ.). 352 = A.I.R. 1925 All. 683.**

———*Private right.*

Where a plaintiff sues, not for the purpose of protecting the interest of the public but in order to enforce his own right as a Mahant or trustee, the suit does not fall within the purview of S. 92. 33 Cal. 789, 808, Foll. (*Le Rossignol and Marteneau, JJ.*) GANGA PURI *v.* MOHAN LAL. **73 I. C. 645 = 4 Lah. 295 = 5 L. L. J. 480 = A. I. R. 1924 Lah. 131.**

———*Admission as to—Existence af trust, if necessary.*

In order to make S. 539, C. P. C. 1882—(92 C. P. C., 1908) applicable it is not necessary that the existence of the trust for public, charitable or religious purposes alleged by the plaintiff should be admitted by the defendant. If the trust is disputed the question is decided by the Court upon evidence. Where a trustee not only mismanages the trust property but sets up a title adverse to the trust, there is no reason why S. 92 cannot be invoked. That section is wide enough and in clause (*h*), power is given to the Court to grant any relief as the nature of the case may require. The primary object of the provision is the administration of trust property by removing the trustee, appointing a new trustee or making such directions as may be necessary for the protection and management of the trust property. In order to secure that object it may be necessary for the plaintiff as a member of the public interested in the preservation and management of the trust property to seek for reliefs, such as a relief of declaratory nature. (1903) 25 All. 631, Expl; (1905) 2 C. L. J. 431; (1910) 9 I. C. 358, Foll. (*Jwala Prosad and Kulwant Sahay, JJ.*) DEO SARAN BHARTHI *v.* DEOKI BHARTHI.
80 I. C. 980 = 5 P. L. T. 305 = 3 Pat. 842 = A.I.R. 1924 Pat. 657.

———*Rival claimants.*

A suit wherein questions as between two rival claimants have to be determined is not within the purview of S. 92. (*Das and Macpherson, JJ.*) DEOKINANDAN *v.* BRIJNANDAN. **76 I. C. 89 = 5 P. L. T. 231 = A. I. R. 1924 Pat. 502.**

———*Suit by idol against trespassers.*

If the suit as filed is simply one by an idol in its juristic capacity against persons who are interfering unlawfully with its property or with its income, such a suit has nothing to do with S. 92, C. P. C. (*Pigott and Walsh, JJ.*) DARSHANLAL *v.* SHIVJI MAHARAJ BIRAJMAN. **71 I. C. 420 = 20 A. L. J. 977 = 45 All. 215 = 4 L. R. A. Civ. 50 = A. I. R. 1923 All. 120.**

———S. 92, restricts the powers of an individual to bring a suit of a particular nature without observing certain formalities, and therefore, when a point is taken that a particular suit is of a nature coming within the provisions of that section, before the Court can bar the suit for want of necessary sanction, the Court must be satisfied that the suit comes within the actual corners of the section. That section provides very distinctly that only in two cases does the section apply; either there must be an alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature or the direction of the Court must be deemed necessary for the administration of any such trust unless a suit falls clearly within the scope of S. 92 the mere fact that it resembles in certain respects a suit which may properly be brought under S. 92, can afford no good ground for holding that S. 92 should apply. (*Macleod, C.J. and Shah, J.*) NILKANTH DEORAO *v.* RAMKRISHNA VITHAL BHAT. **64 I. C. 353 = 46 Bom. 101 = 23 Bom. L. R. 876 = A. I. R. 1923 Bom. 67.**

———*Claim on personal right to possession—Applicability.*

Where, what the plaintiff claimed in his plaint did not altogether contemplate merely matters comprised in section 92, but he also claimed, as in his own right of succession, possession of the properties as well as the position of *mohunt* on the ground that the defendant had forfeited them owing, amongst other reasons, to the fact that he had married,

Held, that a claim for ejectment and possession of this character, being based upon an alleged personal right of the plaintiff, cannot be regarded as falling within the purview of section 92. (*Das and Bucknill, JJ.*) RAGHUNATH DAS *v.* SHEO KUMAR MISSIR.

67 I. C. 464=A. I. R. 1923 Pat. 309.

——*Absence of allegation that defendants are trustees—Maintainability of suit.*

Where there was no allegation whatever on the plaintiffs' side that the defendants were either appointed as, or ever took upon themselves the duties of trustees.

Held, defendants could not be charged with committing a breach of trust and that as they were trespassers pure and simple, having regard to the way in which they had dealt with the property, the proper course for the plaintiffs to proceed against them should have been by an ordinary suit in the Civil Court for ejectment. 21 All. 187, Foll. (*Ryves and Gokul Prasad, JJ.*) MUHAMMAD BUKSH *v.* PIARI. **62 I. C. 744= 19 A. L. J. 236=A. I. R. 1921 All. 116.**

——*Suit by pujari for share in offerings—Trustees* pro forma *defendants—Applicability.*

The plaintiff claimed to be one of the hereditary pujaris, and to have certain rights in virtue of his position as such in accordance with the usage of the institution to a certain part of the temple funds. It was common ground that the funds which plaintiff claimed, *viz.*, the offerings laid before the deity, belonged to the temple and were to be managed and administered by the members of the Devasthan Committee. But the plaintiff was the *pujari* of the temple and the defendants were the temple servants. The trustees were made *pro forma* defendants.

Held, that S. 92 applied. (*Shah and Crump, JJ.*) SET SAKHARAM DAJI *v.* GANU RAGHU. **45 Bom. 683=23 Bom. L. R. 125= 60 I. C 924=A. I. R. 1921 Bom 297.**

——A suit by the trustee of a temple is not exempt from the restrictive provisions of S. 92. (*Ayling, Coutts Trotter and Kumaraswami Sastri, JJ.*) SAMINATHA PILLAI *v.* SUNDARESA PILLAI. **62 I. C. 911=14 M. L. W. 238= A. I. R. 1921 Mad. 479.**

——*Private right.*

In order to bring a case within the purview of S. 92 the suit must be a representative one brought for the benefit of the public and to enforce a public right in respect of an express or constructive trust upon a cause of action alleging a breach of such trust or necessity for directions as to its administration against a trustee of such express or constructive trust and whether such trustee be so *dejure* or *de son tort* and for the particular relief mentioned. Suits brought not to establish a public right but to remedy a particular infringment of an individual right are not within the section. 33 Cal. 789, Foll. (*Coutts and Sultan Ahmad, JJ.*) RAJESHWARSINGH *v.* BASDEO NARAYAN SINGH **1921 P. H. C. C. 6=A. I. R. 1921 Pat. 511.**

—S. 92—Trespasser.

——Section 92, C.P. Code, has no application to suits where a plaintiff claims possession of the endowed property on the allegation that he is duly appointed trustee and that the defendant is a trespasser. A. I. R. 1923 All. 319; 35 All. 459 and A. I. R. 1922 All. 499, Foll. Section 92 has reference to those cases and to those cases alone, where there is an allegation of breach of any express or constructive trust created for public purposes of charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust. A. I. R. 1923 Bom. 67, Foll. (*Ashworth and Iqbal Ahmad, JJ.*) GANGA CHARAN *v.* RAM CHANDRA. **50 All. 165= 106 I. C. 389=25 A. L. J. 902= A. I. R. 1928 All. 33.**

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——*Suit against for scheme and appointment of trustee—Maintainability.*

A suit under S. 92, for settling the scheme and appointing a trustee, will lie against a person who repudiates the trust and sets up a right adverse to it; A. I. R. 1923 Mad. 376 and 13 Bom. L. R. 49, Rel. on. (*Venkatasubba Rao, J.*) ERLAPPA MUDALIAR *v.* T. BALAKRISHNIAH. **102 I. C. 74=39 M. L. T. 66= A. I. R. 1927 Mad. 710=53 M. L. J. 183.**

——*Trespassers in possession—Procedure—Applicability of C. P. Code O. 1, R. 8—Power of court to decree ejectment.*

If the plaintiffs, after their evidence is closed, succeed in establing that the defendants entered into possession as trustees, or have been acting *de facto* trustees of these properties, and that the properties are trust properties, then there can be no doubt that the suit under S. 92 would be maintainable. On the other hand if they altogether fail to establish such a character of the possession of the defendants, even then they have a right to ask the District Judge in case they prove that the properties are trust properties, to appoint new trustees, because no trustees exist. It is not incumbent on the plaintiffs to first bring a representative suit to recover possession of the properties under O. 1, R. 8, C. P. Code, and then, having obtained possession, ask the Judge to appoint trustees for the same. Where either a breach of trust has been committed, or where the direction of the Court is necessary for the administration of such trust persons interested in the trust can ask the Court to appoint new trustees. After such new trustees have been appointed, it would be open to them to take steps to recover possession of the property from the hands of the trespassers who may hold the properties. In a suit under S. 92 it is within the jurisdiction of the Court to first decide the question whether the property in dispute is or is not trust property. If the Court has jurisdiction to decide this question it is obvious that such a question ought to be decided in the presence of persons who are interested in denying the trust. If trespassers in possession are made defendants they cannot be said to have been improperly impleaded, though they might not be absolutely necessary parties. Even it if he held that the properties are trust properties and that the defendants are mere trespassers and have no right to retain possession thereof, the Court cannot order their ejectment. But there can be nothing to prevent the Court from declaring that the properties are trust properties, and they vest in the newly appointed trustees. 19 A. L. J. 236, Dist; 41 Cal. 749; 33 All. 660. Expl., 35 Bom. 470. Foll. (*Sulaiman and Daniels, JJ.*) LACHMAN PRASAD *v.* MUNIA. **89 I. C. 639= =47 All. 867=23 A. L. J. 795. 6 L. R. A. (Civ.) 405=A. I. R. 1925 All. 759.**

—S. 92—Trustee de son Tort.

——*Applicability.*

A suit under S. 92 will lie against a trustee *de son tort* who is a trustee *de facto* though not *de jure* but no relief can be granted against alienees of trust property in a suit under S. 92. (*Phillips and Venkatasubba Rao, JJ.*) P. N. MALKAJIGUNDA *v.* RAMASWAMI CHETTIYAR. **78 I. C. 950= A. I. R. 1925 Mad. 212.**

———*Applicability.*

Per *Dalal, J.*—Suit lies against trustees *de son tort* (*Mukherji and Dalal, JJ.*) BEHARI LAL *v.* SHIV NARAIN. **84 I. C. 631 = 2 A. L. J. 866 = 5 L. R. A. (Civ.) 697 = 47 All. 17 = A. I. R. 1924 All. 884.**

———A suit under S. 92 will lie against a person who, without title takes upon himself the character of a trustee, or in other words against a trustee *de son tort*, 33 Cal. 789 Ref. (*Rafique and Lindsay, JJ.*) RAM BILAS *v.* NITYA NAND. **69 I. C. 990 = 44 All. 652 = 21 A. L. J. 105 = A. I. R. 1922 All. 542.**

—S. 92—Miscellaneous.

———*Cls.* (a) *and* (b) *are distinct.*

Clauses (*a*) and (*b*) are distinct clauses: A. I. R. 1928 Cal. 368, Diss. from. (*Wallace and Madhavan Nair, JJ.*) AMBALAVANA THAMBIRAN *v.* VAGEESAM PILLAI. **122 I. C. 455 = 1929 M. W. N. 744 = A. I. R. 1930 Mad. 226.**

———*Application for directions—Scope of.*

Under the liberty clause in a scheme framed by a Court, an application for direction is maintainable only with regard to those questions which were left open by the Court for future determination and decision. Every other question can be raised by means of a suit under S. 92 only. An application was put in by a trustee under the liberty clause in a scheme, framed by Court, for directions as to whether after the passing of the Act II of 1927 the North Arcot District Committee formed under Act XX of 1863 had jurisdiction under the scheme to appoint a person as trustee of the temple.

Held, that the application would not lie because the question raised cannot be said to be one deliberately left open by the Court for future determination and decision. A.I.R. 1927 Mad. 1073, Expl. and Appl. (*Coutts Trotter, C. J. and Wallace, J.*) VEERAPPA CHETTIAR *v.* PADMANABHA NAIDU. **119 I. C. 469 = A. I. R. 1929 Mad. 625.**

———*Court-fees.*

Where the suit instituted was one under S. 92, C. P. Code, and the relief claimed was: (1) that the present Mahant may be removed and a new Mahant may be appointed in his place, and (2) that along with the Mahant so appointed a committee may be formed to fulfil the objects of the trust, the property of the trust may be made over to the new Mahant and the newly, appointed committee and the list of the said property may be prepared.

Held, that Art. 17, Cl. (vi), Sch. 2, Court-Fees Act, applied to the case as it was brought under the provisions of S. 92, C. P. Code, and there was nothing in the relief claimed which would take the case out of the purview of Art. 17, Cl. (vi) and so the Court-fee stamp of Rs. 10 was sufficient. 12 C. L.J. 211; 19 All. 60; 21 All. 200 and 97 P.R. 1918, Foll.; 40 Cal. 245 and 56 P. R. 1895, Dist.; 10 Cal. 599, Diss. and A. I. R. 1925 Mad. 722, Ref. to. (*Tek Chand and Agha Haidar, JJ.*) BELI RAM *v.* ISHAR DASS. **110 I. C. 264 = 8 Lah. 730 = 29 P. L. R. 97 = A. I. R. 1928 Lah. 113.**

———*Claim of private right—Alternative case of trust —Applicability.*

Where plaintiffs came to Court, alleging their proprietary title to certain properties in dispute, with an alternative case that these properties were held by them under a private trust.

Held, that this was not a proper suit in which the question of the true nature of the endowment should be determined finally. (*Lindsay and Sulaiman, JJ.*) RAMDAYAL *v.* MT. SARASWATI. **49 All. 191 = 25 A. L. J. 281 = 99 I. C. 568 = A. I.R. 1927 All. 526.**

———The Madras High Court Fee Rules 1925 do not exempt the payment of fees in respect of suits under S. 92, C. P. Code. (*Beasley, J.*) SWAMINATHA AIYAR *v.* GURUSWAMI MUDALIAR. **26 M. L. W. 378 = 105 I. C. 119 = A.I. R. 1927 Mad. 940 = 53 M. L. J. 457.**

—S. 94—Documents—Power to compel production of.

———The panchayat is a public body and the Code gives ample powers to the Court by arrest, imprisonment and attachment of property to compel the production of documents in their possession. (*Kumaraswami Sastri, Devadoss and Wallace, JJ.*) MOOKKA KONE *v.* AMMAKUTTI AMMAL. **108 I. C. 760 = 51 Mad. 1 = 27 M. L. W. 611 = A. I. R. 1928 Mad. 299 = 54 M. L. J. 174 (F.B.).**

—S. 94—Injunction disobedience of.

———*O. 39, R. 2 (3) applies.*

The drafting of R. 2 (3) of O. 39 is somewhat inartistic, but there is no doubt that it applies to disobedience generally of an injunction granted by the Court. It applies not only to disobedience of an order issued under Clauses (1) and (2) of that rule but has a more general application; it applies alike to disobedience of all the injunctions issued under S. 94. (*Venkatasubba Rao and Madhavan Nair, JJ.*) ADAIKKALA THEVAN *v.* IMPERIAL BANK, MADURA BRANCH. **95 I. C. 196 = A. I. R. 1926 Mad. 574 = 50 M. L. J. 401.**

—S. 94—Scope.

———S. 94 is governed by O. 39. (*Phillips, J*) VARADACHARLU *v.* NARASIMHA CHARLU. **92 I. C. 615 = 23 M. L. W. 85 = 1925 M. W. N. 886 = A. I. R. 1926 Mad. 258.**

—S. 94—Temporary Injunction.

———*When not granted.*

Temporary injunction restraining defendant from interfering with plaintiff's possession, cannot be granted on the ground of apprehended interference with collection of rent and breach of the peace. (*Walmsley and Mukerji, JJ.*) SACHANDRA LAL *v.* PANCHANON. **94 I. C. 871 = 30 C.W.N. 214 = A.I.R. 1926 Cal. 604.**

———Prima facie *case.*

On an application for an interlocutory injunction the Court has got to be satisfied that the applicant has made out a *prima facie* case that he is entitled to relief. (*C C. Ghose and Chotzner, JJ.*) COMMISSIONERS FOR THE PORT OF CALCUTTA *v.* SURAJ MULL JALAN. **112 I. C. 712 = 55 Cal. 978 = 32 C. W.N. 576 = A. I. R. 1928 Cal. 464.**

—S. 95—Applicability

———*Bombay High Court original side.*

S. 95 applies to the mofussil Courts, but does not apply to suits under the ordinary original civil jurisdiction of the High Court by virtue of R. 329 and therefore the amount of damages to be awarded to the defendant is not limited to Rs. 1,000. *Newcomen* v. *Coulson*, (1878) 7 Ch. D. 764, Foll.; 22 Bom. 42, Dist. (*Mirza, J.*) HAJI ABDUL REHMAN *v.* MUNJIBHAI KHATTAS & CO. **97 I. C. 763 = 28 Bom. L. R. 1077 = A. I. R. 1926 Bom. 523.**

—S. 95—Attachment not effected—Suit for damages.

———*Awardability of compensation.*

The plaintiff may be entitled to compensation, even though the attachment was not completed, if, notwithstanding that, he sustained injury by what was actually done. The absence of reasonable and probable cause for taking legal action in execution or otherwise is, some evidence, from which malice may be inferred. The termination of the proceedings in the plaintiff's favour, is essential, but this is applicable only to cases in which a distinct termination in favour of one party or other is possible, and not to a case in which the proceedings cannot end by their nature in any judicial disposal. (*Oldfield and Venkatasubba Rao, JJ.*) JOSEPH NICHOLAS *v.* M. R. SIVARAMA IYER. **66 I. C. 760 = 30 M.L. T. 269 = 1922 M. W. N. 242 = 15 M. L. W. 442 = 45 Mad. 527 = A. I. R. 1922 Mad. 206.**

——Mere procuring of an attachment before judgment does not of itself afford a cause of action for damages. It is an essential part of the cause of action in a suit for damages for the abuse of civil proceedings that the proceeding in which the process complained of is taken out, should have terminated in favour of the plaintiff or that the particular process complained of has been superceded or discharged. S. 95 is applicable only where the attachment is in fact effected and does not apply to a case where the attachment is applied for and has not in fact been levied. The remedy by way of a suit is allowed where the aggrieved party claims a larger compensation than Rs. 1,000. But that does not make the basis of the suit any way different from the basis on which compensation is allowed in the suit itself where the process has been wrongly put into effect, excepting that in a suit something more is required than under S. 95 and not that something less is required, namely, that under S. 95 it is sufficient to prove that attachment was applied for on insufficient grounds, while in a suit the plaintiff has to show not merely that it was applied for on insufficient grounds but that it was so done maliciously and without reasonable and probable cause. 39 Mad. 952, Rel. on. (*Taraporewala, J.*) KEDARNATH TULSIDAS *v.* BEHARI LAL JAGAMAL. **87 I. C. 1026 = 49 Bom. 629 = 27 Bom. L. R. 525 = A. I. R. 1925 Bom. 357.**

—S. 95—General damages.

——*Absence of evidence as to damage suffered.*

Where in an action for damages for arrest before judgment on insufficient grounds, no evidence as to damages suffered is given, the Court should award general damages. 3 L. W. 30, Rel. on. (*Spencer, J.*) ARUMUGAM *v.* KADIR MOHIDEEN. **24 M. L. W. 252 = 97 I. C. 684 = A. I. R. 1926 Mad. 962.**

—S. 95—Insufficient grounds.

——*Injunction granted after hearing both parties.*

It is doubtful whether an award of compensation can be made in a case where the order of injunction was passed after hearing both the parties and after it was found that there were sufficient grounds and the plaintiff has not ultimately failed in his suit. To allow a petition for compensation immediately after such main petition for injunction was disposed of and without fresh materials as for a review or such as may appear at the trial of the suit, will be generally to permit, a court to come to a conclusion inconsistent with and opposed to its prior order. Such an anomaly is not intended by S. 95. (*Ramesam, J.*) VENKATAPAYYA *v.* VENKATAPAYYA. **71 I. C. 450 = 17 M.L.W. 150 = A. I. R. 1923 Mad. 352.**

——*Want of probable cause.*

Apart from malice or want of probable cause, a plaintiff cannot recover damages in an independent suit upon mere proof that an injunction was granted to restrain him from doing what has since been held to be within his rights. 16 C.L.J. 34, Diss. If *A* maliciously and without probable cause brings a suit against *B* and without suppression of facts, mis-statements or other improper means, obtains an interlocutory injunction, an action will not lie at common law for the damage done to his business by the injunction. 42 Cal. 550, Foll. The granting of an injunction is a judicial act in the fullest sense; it is not a ministerial order or an order of course or mesne process or a necessary incident of any particular jurisdiction. There is nothing in the second sub-S. of S. 95 of the Code or in Art. 40, Limitation Act, 1908, which is inconsistent with the above proposition. (*Rankin, C.J. and C.C. Ghose, J.*) IMPERIAL TOBACCO CO. *v.* ALBERT BONNAN. **46 C. L. J. 455 = 106 I. C. 277 = A. I. R. 1928 Cal. 1.**

—S. 95—Suit for compensation.

——*Malice in law—Attachment of property of person not party to suit.*

The attaching creditor is liable in damages to the person whose property was wrongfully attached even if he has acted honestly. 33 All 306; A.I.R. 1926 All. 177 and A.I.R. 1925 Nag. 390, Foll. (*Johnstone, J.*) MUNSHI RAM *v.* LACHHI RAM. **112 I. C. 848 = A.I.R. 1929 Lah. 200.**

——*Maintainability.*

Where a temporary injunction is wrongfully obtained on insufficient grounds a suit for damages is maintainable. 9 W.R. 133 and 16 C.W.N. 540, Rel. on. (*B.B. Ghose and Cammiade, JJ.*) HAR KUMAR DE *v.* JAGAT BANDHU DE. **100 I. C. 318 = 53 Cal. 1008 = A. I. R. 1927 Cal. 247.**

——*Malice in law—Attachment of property of person not party to suit.*

There is a distinction between cases where the plaintiff in the suit for damages for wrongful attachment was a party to the suit in which the goods were wrongfully attached and cases where the plaintiff in the suit for damages was not a party to the suit in which the goods were attached. In the former case it is necessary to prove that the prosecution was undertaken maliciously and without reasonable and probable cause. In the latter case a suit will lie even although the attachment may have been made in good faith but wrongfully. 8 Bom. H.C.R. 177; 3 Beng. L.R. 413, Foll.: 32 Mad. 170; 35 Mad. 598; 1922 Mad. 206, Dist. 17 Cal. 436 (P.C.), Foll. (*Beasley, J.*) K. A ASSAN MAHOMED *v.* S. M. KADERSA ROWTHER. **2 Rang. 181 = 83 I. C. 433 = A. I. R. 1924 Rang. 302.**

——*Maintainability of—Malice.*

A separate suit for compensation in respect of tortious temporary injunction lies. Malice can be properly inferred on proof that there were no sufficient grounds for an application for temporary injunction and that the plaintiff has sustained some substantial injury. 186 P.R. 1895, Ref. to; 16 I.C. 443, Foll. (*Abdul Raoof and Abdul Qadir, JJ.*) L. EVANS ARTHUR MINCK OF MINCK & CO. **69 I. C. 523 = 45 P.L.R. 1922 = A. I. R. 1922 Lah. 303.**

—S. 96.

Appeal whether lies.
Consent.
Decree.
Ex-parte decree.
Finding of fact.
Interpretation.
Jurisdiction.
Right to appeal.

—S. 96—Appeal whether lies.

——*Departure from ordinary procedure—No appeal lies.*

Dispute regarding land—Parties ask for departure from ordinary course of procedure calling upon court to inspect spot and decide questions from oral statements at spot—Court deciding question accordingly—No appeal lies. (*Mukerji and Bennet, JJ.*)

JAGGU MAL v. BRIJ LAL. **122 I. C. 685 = 1930 A. L. J. 452 = A I. R. 1930 All. 127.**

———Prayer of party granted—No appeal lies at the instance of that party. (*Johnstone, J.*) MATHRA DAS v. BANK OF NORTHERN INDIA. **A. I. R. 1930 Lah. 190.**

———Land Acquisition Act, S. 30—Decision in reference under S. 30 though not under S. 54, is appealable under C. P. Code, S. 96. 40 Cal. 21; 10 C. W. N. 991; A.I.R. 1922 P.C. 80; B. L. R. Sup. Vol. 985; *National Telephone Co., Ltd.* v. *The Postmaster-General* (1913) A.C. 546 and A.I.R. 1924 Mad. 561, Rel. on. (*Devadoss and Jackson, JJ*)) A. MAHALINGA KUDUMBAN v. THEETHARAPPA MUDALIAR. **115 I.C. 345 = 29 M.L.W. 237 = 1929 M.W. N. 62 = A. I. R. 1929 Mad. 223 = 56 M.L.J. 387.**

———Suit compromised in appeal and judgment passed in terms of compromise—Some terms of compromise omitted from judgment—Omission corrected in the presence of both parties under S. 152—No second appeal lies, against the order correcting omission. 24 Mad. 646 Diss. from; 28 Cal. 171; 7 All. 875; 15 All. 121 and 31 Bom. 447, Foll.

Held further, that the court had jurisdiction to make the order it did under S. 152. 4 P.L.J. 205, Cons. (*Broadway, A. C. J. and Bhide, J.*) RAB NAWAZ v. ZAMAN. **119 I.C. 257 = 9 Lah. 176 = 30 P.L.R. 135 = A. I. R. 1928 Lah. 352.**

———Original decree dismissing a suit—Decree passed on review decreeing the suit—Appeal therefrom setting aside that decree and mentioning that suit be dismissed—Appeal from original decree does not lie. (*Lord Shaw.*) NEGI v. CHHAGU RAM. **89 I. C. 185 = 6 L. R. P. C. 128 = 26 P.L.R. 526 = A.I.R. 1925 P.C. 174 (2).**

———No appeal lies simply because finding on a particular matter was against appellant though suit against him was dismissed. (*Devadoss and Jackson, JJ.*) M. LATCHAYYA v. S. KOTTAMMA. **84 I. C. 945 = 20 M.L.W. 734 = 1925 M.W.N. 141 = A. I. R. 1925 Mad. 264 (2) = 47 M.L.J. 743.**

———*Costs—Question of principle must be involved.*

An order as to costs is ordinarily a matter in the discretion of the trial court and unless some question of principle is involved no appeal can ordinarily be entertained (*Sulaiman, J.*) LACHMI NARAIN v. MT. BRIJ RANI. **80 I. C. 39 = 5 L.R. A. Civ. 573 = A.I.R. 1924 All. 794.**

———*Appeal is only against decree.*

No appeal lies from judgment but only from decree where the order was to the effect that certain defendants are not liable for mesne profits. 14 I.C. 1006; (1920) Pat. 75, Foll. (*Mookerji and Rankin, JJ.*) INDRANI MUNDLE v. NAIMUDDIN SARDAR. **81 I.C. 527 = 39 C. L. J. 251 = A.I.R. 1924 Cal. 1006.**

———Where suit is dismissed, findings in judgments as between co-defendants not embodied nor implied in decree are not *res judicata* nor appealable.—C. P. Code, S. 96. (Case law discussed). (*Ramesam and Reilly, JJ*) P. VENKOBACHARULU v. S. RADABAYAMMA. **85 I. C. 868 = 1924 M. W. N. 867 = 22 M.L.W. 384 = A.I.R. 1924 Mad. 858 = 47 M.L.J. 612.**

———*Right of appeal.*

Where the point adversely decided to the defendant is correctly and substantially in issue and where in other proceedings the matter would be *res judicata*, it would be contrary to all principles of justice and equity to hold that he is precluded from agitating the matter in appeal merely because the suit was decided in his favour on some other ground. In suits where declaration and consequential relief are sought and the consequential relief is refused because the Court is against the plaintiff's rights which he seeks to declare, it would be better if the decree formally embodied the result of the declaration; but even if it does not do so but simply dismisses the suit the decree in substance is one where the declaration is refused 30 Mad. 447; 9 C.W. N. 584, Foll. 37 Mad 25, Dist. (*Kumaraswamy Sastri, J.*) VENKATESWARALU v. LINGAYYA. **83 I.C. 960 = 20 M.L.W. 63 = 1924 M.W.N. 491 = 47 Mad. 633 = A.I.R. 1924 Mad. 689.**

———Appeal dismissed—Respondent is not aggrived—He cannot appeal. (*Shadi Lal, C. J. and Abdul Qadir J.*) GOPAL DAS v. MT. ZAINALA BIBI. **77 I. C. 477 = A. I. R. 1923 Lah. 504.**

———There can be no appeal from an order regarding compromise, when it has become merged into a subsequent decree in terms of the compromise. (*Oldfield and Venkatasubba Rao, JJ.*) ALAMELU v. RAMA IYER. **70 I. C. 425 = 16 M. L. W. 440 = 1922 M. W. N. 495 = 31 M. L. T. 132 = A. I. R. 1922 Mad. 446 = 43 M. L. J. 290.**

—S. 96—Consent—Agreement.

———Parties agreeing to produce only documentary evidence and to be bound by the decision thereon—Decision is not open to appeal. Where in pursuance of an agreement between the parties the Court proceeds outside its ordinary jurisdiction the proper inference would be that there was to be no appeal from the decision as would be in the case if the trial were in the ordinary way. [*Burges* v. *Mortan*, (1896 A. C. 136) Rel. on.] But it does not follow that unless the Court has proceeded outside its ordinary jurisdiction a right of appeal always exists. (*Sulaiman, J.*) BALLABH DAS v. SRI KISHEN. **89 I. C. 586 = 6 L. R. A. Civ. 541 = A.I.R. 1926 All. 90.**

———Agreement arrived at during suit and signed by both parties—Decree passed in terms of the agreement—No appeal lies—C. P. Code, O. 23, R. 3. (*Macleod, C. J. and Madgavkar, J.*) GULABCHAND RAMSUKH v. RAMSUKH RAMPRATAP. **91 I. C. 294 = 27 Bom. L. R. 1279 = A. I. R. 1926 Bom. 39.**

———Where the parties give their consent to the Court as to the procedure which the Court is to adopt in matter of coming to a decision on the merits of the case and they also give their consent that such a decision will be binding on them, it is tantamount to saying that the decision will be final and no right of appeal will be exercised by the parties. The parties cannot resile from the agreement and an appeal is incompetent. S. 28, Contract Act, does not apply to the case and it is not necessary that the agreement should be considered to be an adjustment within the meaning of O. 23, or that the effect of the agreement should be to constitute the Court an arbitrator in the controversy: A. I. R. 1923 Mad. 444; 14 M. I. A. 203 (P. C.), Ref.; A. I. R. 1926 P. C. 139, Rel. on. (*Wazir Hasan and Pullan, JJ.*) BASHIR AHMED v. SADIQ ALI. **120 I. C. 826 = 6 O. W. N. 771 = A. I. R. 1929 Oudh. 451.**

———Where both parties to a suit agree in a particular matter to abide by the finding of the Court in respect to it, such finding is final and binding on the parties and no appeal lies against it, the decision in such cases being in the nature of an arbitrator's award. (*Prideaux, A. J. C.*) VITHABA v. PARASHRAM. **113 I. C. 365.**

———Parties agreeing to be bound by Court's finding—No appeal lies against finding. 29 Cal. 306, Ref. (*Banerji and Gokul Prasad, JJ.*) SHAHZADI BEGAM v. MUHAMMAD IBRAHIM. **59 I. C. 787 = 19 A. L. J. 14 = 43 All. 266 =**

A. I. R. 1921 All. 310.

—S. 96—Consent—Appeal.

———Decree in accordance with adjustment are decrees passed with the consent of parties within the meaning of S. 96 (3)—No appeal lies. (*Le Rossignol and Campbell, JJ.*) GURCHARAN SINGH *v.* SHIBDEO SINGH. **66 I. C. 258 = 3 Lah. 175 = A. I. R. 1922 Lah. 309.**

—S. 96—Consent—Award.

———Where the parties ask the Judge to dispose of a case on documentary evidence alone or request him to dispose of a case on the examination of the marks in a trade mark case, the Judge is not converted into an arbitrator so long as the parties have not bound themselves to abide by his decision. (*Kennedy, J. C. and Raymond, A. J. C.*) TILLOOMAL JESSOMAL *v.* HARBHAGWANDAS. **76 I. C. 309 = 18 S. L. R. 306 = A. I. R. 1924 Sind. 134.**

—S. 96 (3)—Consent—Compromise.

———Decree on compromise — Party verifying or admitting compromise on behalf of other without authority—Other party can appeal against decree. (*Stuart, C. J. and Wazir Hasan and Raza, JJ.*) MAHOMED RAZA *v.* RAM SAROOP. **118 I. C. 753 = 6 O. W. N. 604 = 4 Luck. 562 = A. I. R. 1929 Oudh 385 (F. B.).**

———*Nature of compromise—Appeal as to, lies.*

Roy, J.—Where the dispute is over the nature of a compromise, the appellant has a right in appeal to show what the compromise was. (*Mukerji and Roy, JJ.*) DWARKA NATH *v.* ATUL CHANDRA. **106 I. C. 509 = 46 C. L. J. 353 = A. I. R. 1928 Cal. 108.**

———*No appeal lies.*

Order recording compromise—Decree passed thereafter—Appeal filed afterwards from order recording compromise is incompetent—C. P. Code., S. 11. A. I. R. 1925 Cal. 218 ; 36 Cal. 726 ; 32 Cal. 1023 and 17 C. W. N. 868, Foll ; 10 M. I. A. 203 (P. C.) Ref. (*Suhrawardy and Cuming, JJ.*) BENGAL COAL CO., LTD. *v.* APCAR COLLIERIES LTD. **87 I. C. 248 = 29 C. W. N. 928 = A. I. R. 1926 Cal. 412.**

—S. 96 (3)—Consent—Finality of.

———*No appeal lies.*

Workmen's Compensation Act (VIII of 1923), Ss. 28 and 30—Commissioner has power to pass any decree or order by consent of parties—Such decree or order is not appealable. (*Marten, C. J. and Murphy, J.*) CHHIPA ALLARAKHA ISAKJI *v.* BAI SONA. **114 I. C. 372 = 30 Bom. L. R. 1610 = A. I. R. 1929 Bom. 68.**

———Where both the parties stated that the Court may inspect the locality in dispute and they will be bound by the decision on inspection and agreed not to give evidence,

Held, that a decree passed in accordance with that decision is a consent decree, not subject to provisions of Sch. 2, C. P. Code., and is final and non-appealable. A. I. R. 1925 All. 558 and 42 Mad. 625, Foll. (*Kanhaiya Lal, J.*) CHAIN SUKH *v.* RAM SARUP. **94 I. C. 7.**

———Consent given by pleader under mistake of fact —Order cannot be set aside unless grave injustice is likely to happen otherwise. (*Lord Sumner.*) JAMNABAI *v.* FAZALBHOY. **77 I. C. 355 = 40 C. L. J. 272 = 18 M. L. W. 437 = 26 Bom. L. R. 189 = 33 M. L. T. 376 = 5 L. R. P. C. 30 = A. I. R. 1923 P. C. 184 = 46 M. L. J. 160 = 47 M. L. J. 164.**

—S. 96—Consent—Objection.

———Objection by a consenting party to a compromise decree can be entertained only by review or by a separate suit for setting it aside but not by way of appeal. (*Greaves and Mukerji, JJ.*) MADHUSUDAN *v.* SATIS CHANDRA. **91 I. C. 620 = A. I. R. 1926 Cal. 512.**

—S. 96—Consent—Scope.

———Where counsel for defendant conceded that he was not prepared to contest what had been the previous finding of the District Judge, that finding having been maintained by the High Court in appeal in another case but about the same transaction and allowed the decree to be passed, such a decree is a consent decree and no appeal lies from it. A. I. R. 1920 P. C. 139, Foll. (*Addison, J.*) RAM LAL *v.* LAL CHAND. **109 I. C. 713 = 10 L. L. J. 333.**

———Does not apply to execution proceedings. 17 All. 106, Foll. (*Jwala Prasad and Foster, JJ.*) LACHHMAN LAL *v.* PADARATH SINGH. **79 I. C. 594 = 4 P. L. T. 735 = A. I. R. 1924 Pat. 346.**

———A decree passed with consent does not mean only a decree passed with the consent of the parties expressed at the moment the decree is passed. (27 M.L. J, 173 and 41 Mad. 233, Diss. from). So, a decree passed on the basis of a consent originally given but subsequently withdrawn is a consent decree. 27 M.L.J. 173 and 41 Mad. 233 Diss from. (*Sadasiva Aiyar and Coutts Trotter, JJ.*) GOVINDASAMI KADAVARAN *v.* KALIAPERUMAL. **66 I. C. 837 = 16 M. L. W. 155 = 1922 M. W. N. 83 = A. I. R. 1921 Mad. 696.**

—S. 96—Consent—What is not.

———The Court has jurisdiction to set aside an order made by consent which is not in the nature of final order or judgment but which is merely an interlocutory order in the suit, provided proper grounds are made out. Such order can be set aside by an application made in the same suit. *Mullins* v. *Howell*, (1879) 11 Ch. D. 763 ; *Ainsworth* v. *Wilding*, (1896) 1 Ch. 673 and A. I. R. 1921 Cal. 229, Rel. on ; 26 Bom. L. R. 189 and 26 Bom. L. R. 1153 (P.C.), Cons. (*Rangnekar, J.*) YUSUF I.A. LALJI *v.* ABDULLABHOY LALJI (No. 2). **32 Bom. L R. 667 = A. I. R. 1930 Bom. 362.**

———Where illegitimate daughters, though not entitled to maintenance from their father's family, were given a decree for maintenance by the trial Court in order to avoid any further litigation with the consent of the opposite party, but they appealed against the decree for maintenance,

Held, that it was not a consent decree, and since there was a breach of agreement on the part of the daughters, they are not entitled to maintenance. (*Phillips, O.C.J. and Anantha Krishna Ayyar, J.*) NAGARATHNAMAL *v.* CHINNU SAH. **1927 M. W. N. 750 = 107 I. C. 419 = A. I. R. 1928 Mad 127 = 53 M. L. J. 861.**

———Where in a suit under S. 92, C. P. Code, the plaintiffs through their counsel merely approved of the appointment of certain gentlemen as a committee of management,

Held, that this did not make the decree a consent decree, when in other matters decided by the Judge, there was no consent by either party to his conclusions. (*Zafar Ali and Jai Lal, JJ.*) MAHOMED ISHAR *v.* MAHOMED HUSAIN KHAN. **100 I. C. 838 = A. I. R. 1927 Lah. 382.**

———Consent to decree on Court's compulsion—Decree is not consent decree. (*Scott-Smith and Brasher, JJ.*) ALI AKBAR *v* SULTAN UL-MULK. **69 I. C. 653 = A. I. R. 1923 Lah. 129.**

—S. 96—Decree.

———*Decree amended on review—Need for filing fresh appeal.*

It is possible for a party to make an application for review and at the same time before that is decided to file an appeal. The right course where parties adopt simultaneous remedies or endeavour to do so if the review measures are successful to any extent whatever is that a new decree should be drawn against the decree as it appears in its final shape.

Per *Suhrawardy, J.*—In a proper case the Court may grant time to a party to file an appeal from the final decree in the place of the appeal from the original decree. (*Suhrawardy and Costello, JJ.*) ADITYA KUMAR *v.* ABINASH CHANDRA.

34 C. W. N. 1002.

——— *Consolidation of suits—One appeal enough.*

When two suits undoubtedly are in respect of the same transaction and have been connected by making the plaintiff in one, the defendants in the other, and *vice versa*, it must be assumed that they were consolidated, and even though separate copies of the judgment and the decree be placed on the record of the cases it must be held that there was one consolidated decree and it is not necessary for a party to file more than one appeal provided the party against whom he wants to press his appeal is impleaded as respondent, *pro forma* or otherwise. (*Sulaiman and Kendall, JJ.*) SHEOPUJAN RAI *v.* BISHNATH RAI.

1930 A. L. J. 842 = A. I. R. 1930 All. 706.

———*No cross-appeal when there is no decree.*

Where a suit is decreed against some of the defendants and dismissed against the minor defendants as they were not represented it is not at all open to the plaintiff to prefer a cross-appeal against such dismissal as it does not amount to a decree. (*Mukerji and Mallik, JJ.*) MOKSHUR MANDAL *v.* KHEDU MANDAL.

33 C. W. N. 742 = A. I. R. 1929 Cal. 669.

———*What is.*

To be "decree" decision must be final whichever way decided. (*Wallace and Madhavan Nair, JJ.*) GOVINDOSS KRISHNADOSS *v.* RAJAH OF KARVETNAGAR.

A. I. R. 1929 Mad. 404.

——— *Consent decree—When appeal lies.*

Where a compromise relates not only to property in dispute in the suit but also to other property, the order directing that a decree be passed in terms of the compromise not limited merely to the subject-matter of the suit, can be appealed against. (*Wild, J.C. and Rupchand Bilaram, A.J.C.*) MT. UMMAKULSUM *v.* GHULAM RASUL KHAN.

114 I. C. 101 = A. I. R. 1929 Sind 32.

———*Appeal against preliminary decree—Subsequent final decree does not affect.*

Where there has been a preliminary decree and a final decree and the dates permit the appellants to challenge both the preliminary decree and the final decree within the time allowed by law it is unreasonable to allow the appellant to avoid the provisions of the Court-Fees Act and obtain a reversal of the final decree by a circuitous method. The proper course is to allow the appellant a reasonable time within which to amend his appeal. 18 Bom. L.R. 76 and 18 Bom. L.R. 80 not Foll. Where the appeal against the preliminary decree was filed before the final decree was made and the date did not allow of an appeal against both the preliminary decree and the final decree,

Held, that subsequent passing of the final decree did not render the appeal against the preliminary decree nugatory but that the final decree being dependent on the preliminary decree if the latter was set aside the former would fall with it. 36 A. 532, F. B. and 17 C. W.N. 868, Foll. (*Kincaid, J. C. and Aston, A.J.C.*) **ISHAK** *v.* **FATMA.**

78 I. C. 978 = 18 S. L. R. 133 = A. I. R. 1925 Sind 178.

———*What is.*

An order rejecting the claim of a person to be the legal representative of a deceased plaintiff which does not conclusively determine the right of the parties in the suit is not appealable and therefore is revisable. (*Jackson, J.*) RUCKMANI AMMAL *v.* VEERASAMI AIYANGAR. **80 I.C. 942 = 35 M. L. T. 82 = 1924 M. W. N. 763 = A. I. R. 1924 Mad. 813 = 47 M. L. J. 370.**

—S. 96 (3)—Ex-parte decree.

———*Consent decree — Party not consenting may appeal.*

Where a consent decree is passed, a party who has not consented to the compromise by his abstention from appearance, is still a party to the decree and if he thinks that he is injured by the compromise behind his back, it is open to him to apply to have the decree against him set aside or to appeal against that decree which, although it is a consent decree so far as the other parties were concerned, is not a consent decree so far as he is concerned. 32 I. C. 849 ; 27 I. C. 242 ; and A. I. R. 1927 P. C. 57 ; Dist. (*Phillips and Ramesam, JJ.*) SIVARAMA IYER *v.* SUNDARARAJULU.

108 I. C. 784 = A. I. R. 1928 Mad. 922.

———*Appellate court is to look to the merits only.*

In an appeal from an *ex-parte* decree, the only question with which the appellate Court is ordinarily concerned is whether the evidence on the record is sufficient to support that decree, and that the question of due service of summons is the subject-matter not of an appeal from the decree but of the special proceeding under O. 9. (39 All, 143 and 27 Cal. 738, Foll.) (*Young, Offg. C. J. and Carr, J.*) RAJ CHANDRA DHAR *v.* MESSRS K. D. O. C. RAY. **2 Bur. L. J. 282 = 2 Rang. 108 = 79 I. C. 506 = A. I. R. 1924 Rang. 137.**

—S. 96—Interpretation.

———*Analogy of Letters Patent is not applicable.*

It does not follow that because an appeal lies under the Letters Patent there is similar appeal in the Code. The right of appeal is a right conferred only by express provision and in cases under the Code, unless the right is given by the Code, there can be no appeal, (*Heald, J.*) M. T. T. K. M. M. N. CHETTYAR FIRM *v.* K. P. A. N. M. FIRM. **120 I. C. 693 = A. I. R. 1929 Rang. 198.**

———*Continuing Judge's opinion prevails.*

Appeal from the mofussil—Differences of opinion between the two Judges of the High Court hearing the appeal—Confirming Judge's opinion prevails—Letters Patent (Madras), Cls. 15, 16 and 36. 45 Bom. 718 Expln. (*Venkatasubba Rao and Jackson, JJ.*) VENKATASUBBIAH *v.* VENKATASUBBAMMA. **86 I. C. 857 = 21 M. L. W. 721 = A. I. R. 1925 Mad. 1032.**

——— *Prayers granted in part—Appeal lies.*

Decree refusing exclusive but awarding joint possession aggrieves plaintiff. (*Suhrawardy and Graham, JJ.*) JANENDRA NATH MUSTAPHI *v.* DUKHIRAM SANTRA. **82 I. C. 386 = 28 C. W. N. 865 = 40 C. L. J. 90 = A. I. R. 1924 Cal 850.**

———*"Appeal" meaning of.*

The words an 'appeal' in S. 96 do not exclude the entertainment of a fresh appeal if the dismissal of the first appeal does not bar the hearing of the fresh appeal, 24 C. W. N. 1020 Dist. (*Das and Kulwant Sahay, JJ.*) SURAJDEO *v.* PARTAP RAI. **75 I. C. 284 = 4 P. L. T. 405 = 1923 P. H. C. C. 213 = 2 Pat. 739 = A. I. R. 1923 Pat. 514**

C. P. CODE, (1908), S. 96—Right to appeal.

———District Board's resolution that no appeal be preferred—It is no reason for throwing out appeal when preferred by Board itself as incompetent. (*Wazir Hasan, C. J. and Raza, J.*) DISTRICT BOARD, KHERI *v.* ABDUL MAJID KHAN. **A. I. R. 1930 Oudh 434.**

———*Is a substantive right.*

Interpretation of Statutes—Right to appeal is substantive right and cannot be taken away by subsequent enactment passed during pendency of action. A. I. R. 1928 All. 437, (F. B.), Foll.; *Colonial Sugar Refining Co. Ltd.* v. *Irving*, (1905) A. C. 369, Ref. (*Sulaiman and Kendall, JJ.*) SHEOPUJAN RAI *v.* BISHNATH RAI. **1930 A. L. J. 842 = A. I. R. 1930 All. 706.**

———*Exists in all civil proceedings.*

Right of appeal under C. P. Code exists in civil proceedings though not called suits unless expressly taken away. 10 C. W. N. 991; A. I. R. 1922 P. C. 80; *National Telephone Co., Ltd.* v. *The Post-Master General*, (1913) A. C. 546; A. I. R. 1924 Mad. 561, Rel. on. (*Devadoss and Jackson, JJ.*) MAHALINGA KUDUMBAN *v.* THEETHARAPPA MUDALIAR. **29 M. L. W. 237 = 1929 M. W. N. 62 = 115 I. C. 345 = A. I. R. 1929 Mad. 223 = 56 M. L. J. 387.**

———Finding against party—Decree in his favour not based on the finding—Party has no right of appeal. 11 Cal. 301 (P. C.) and A. I. R. 1922 P. C. 241, Foll.; 13 Cal. 17, Rel. on. (*Das and Adami, JJ.*) TANSUKH RAI *v.* GOPAL MAHTO. **8 Pat. 617 = 10 P. L. T. 643 = 119 I. C. 554 = A. I. R. 1929 Pat. 586.**

———*Party not consenting may appeal.*

There is nothing in O. 23, R. 3, or in O. 43, R. 1, Cl. (*m*) to suggest that if the Court fails to demand satisfactory proof of the alleged compromise, a party to the suit who is deprived of his right to contest the compromise, is also deprived of his right to appeal against the order. S. 96, Cl. (3) presupposes that the party appealing has consented to the decree being passed. It does not purport to deal with a case where the aggrieved party was not a consenting party and had never been asked by the Court whether he had consented to a decree being passed or not. In such a case he does not appeal against the decree passed by consent, but attacks the very foundation on which the decree is passed. S. 96 (3) does not bar a right of appeal by a person who denies that he was a party to the alleged compromise: A. I. R. 1926 Bom. 39, Dist. (*Wild, J. C. and Rupchand Bilaram, A. J. C.*) MT. UMMAKULSUM *v.* GHULAM RASUL KHAN. **114 I. C. 101 = A. I. R. 1929 Sind 32.**

———*Adverse findings.*

In a suit by a mortgagee against *A* for possession, mortgagor was joined for the express purpose of determining rights of all parties concerned. *A* denied title and possession of either Court holding that neither the mortgagors, nor the mortgagee had any title, dismissed the suit.

Held, that though the decree was formally in favour of the mortgagors there were findings against their contentions on which the Court acted dismissing the plaintiff's suit and therefore they had a right of appeal. 37 Mad. 25 Expl; A.I.R. 1924 Mad. 689, Foll. (*Krishnan, J.*) RAGHAVA AIYANGAR *v.* IRULA THEVAN. **24 M. L. W. 292 = 1926 M. W. N. 761 = 97 I. C. 346 = A. I. R. 1926 Mad. 974 = 51 M. L. J. 211.**

———*Party not consenting may appeal.*

Party not joining in the compromise can appeal if prejudicially affected. (*Mookerjee and Rankin, JJ.*) NIRODE CHANDRA BANERJEE *v.* PRAFULLA CHANDRA BANERJEE. **85 I. C. 168 = 40 C. L. J. 535 = A. I. R. 1925 Cal. 421.**

C. P. CODE, (1908), S. 97—Appeal against preliminary decree.

———*Competency.*

Where one of the issues, which the Judge of the Court below had to decide, was whether the case was covered by section 144, C.P.C. and he applied his mind to the question and decided it,

Held, that the appellant cannot be deprived of his right of appeal because one of his grounds for challenging the decree is that the decision on this issue was wrong. (*Daniels, J.*) CHHUTTAN *v.* JWALA PRASAD. **73 I. C. 602 = A. I. R. 1924 All. 64.**

—S. 97—Appeal after final decree.

———*After final decree appeal against preliminary decree alone is incompetent.*

After a final decree has been made, whether or not an appeal has been perferred against the preliminary decree, it is the duty of the party aggrieved by the final decree to prefer an appeal against the final decree and an appeal, therefore, against the preliminary decree, after the passing but before the signing of the final decree, and without challenging by appeal the final decree, is useless and cannot be entertained. (*Broadway, J.*) GANDA RAM *v.* SUNDAR LAL. **67 I. C. 278 = 82 P. L. R. 1922 = A. I. R. 1921 Lah. 265.**

—S. 97—Appeal against preliminary decree.

———No stay ordered—Final decree by lower Court—Appellant must appeal or at least inform of the final decree to the appeal Court when the appeal comes on for hearing. (*Macleod, C.J. and Coyajee, J.*) CHANDULAL MAGANLAL *v.* MOTILAL HARILAL. **92 I.C. 545 = 27 Bom. L. R. 1492 = A. I. R. 1926 Bom. 43.**

———Not affected by subsequent final decree—Appeal against preliminary decree—Passing of final decree will not render appeal incompetent. (*Newbould and Panton, JJ.*) MIA HOSSAIN KHAN *v.* SH. SAMIR. **68 I.C. 475 = A. I. R. 1923 Cal. 282 (1).**

———*If appeal is not filed, right to object is lost.*

Where the Court passed a preliminary decree in a partition suit and therein directed the Commissioner to take evidence and decide the question whether certain lands were *zerait* or *raiyat* and a party who did not object to the decree by way of appeal and who in fact submitted to the disposal by the Commissioner objected to the procedure, *held* that the appeal against the latter order embodying the Commissioner's report was barred by S. 97, C. P. Code. (*Das and Allanson, JJ.*) UGRA NARAIN *v.* HARIBUNS CHOWDHARY. **11 P. L. T. 456.**

———*Right to appeal is not affected by final decree.*

Per *Kulwant Sahay, J.*—The law not only gives an aggrieved party a right to appeal against the preliminary decree but it imposes the restriction that if he does not prefer an appeal against that decree he is precluded from disputing its correctness in an appeal against the final decree. There is no provision anywhere in the Code which takes away the right of a party to appeal against the preliminary decree if a final decree has been made before the appeal is preferred. 32 Cal. 1023, Expl. 18 C. L. J. 321, Diss. from; 18 C. L. J. 223, Appr. 36 All. 532, Rel. on. (*Das, James, and and Rowland JJ.*) WAJIHUNNISSA *v.* BANKE BEHARI SINGH. **11 P. L. T. 61 = A. I. R. 1930 Pat. 177 (F. B.)**

———*Appeal is competent.*

An appeal filed against a preliminary decree after the final decree is passed is competent even though no appeal

C. P. CODE, (1908), S. 97—Appeal against preliminary decree.

is filed against the final decree. 37 Mad. 29; 37 Mad. 455 and 36 All. 532, Rel. on. 36 Cal. 762 and A. I. R. 1921 Cal. 109, not Foll. A. I. R. 1928 Cal. 325, Ref. (*Jackson, A. J. C.*) ABDUL SATTAR *v.* BANS GOPAL.
120 I. C. 334 = A. I. R. 1929 Nag. 349.

———*Appeal does not nullify final decree.*

Filing of an appeal from preliminary decree after the passing of final decree cannot possibly have the effect of nullifying the final decree. A. I. R. 1926 All. 291, not Foll. (*Sulaiman and Banerji JJ.*) CHHANGA *v.* TIRHI. **107 I. C. 581 (1) = 26 A. L. J. 87 = A.I.R. 1928 All. 192.**

———Decree—Appeal against preliminary decree after passing of final decree—No steps taken to set aside final decree—Appeal is infructuous. A.I.R. 1925 Cal. 218 and A. I. R. 1925 Cal. 790, Foll. (*Suhrawardy and Duval, JJ.*) GOPAL CHANDRA *v.* ABDUR RAHIM.
54 Cal. 328 = 31 C. W. N. 550 = 103 I. C. 538 = A. I. R. 1927 Cal. 492.

———Appeal against preliminary decree is not maintainable if final decree passed before filing the appeal is not appealed against. 48 Cal. 1036, Foll; 22 C. L. J. 90, Dist., and 37 Mad. 29, not Foll. (*Newbould and Graham, JJ.*) RAMCHANDRA GOPE *v.* PARMESHWARI GOPIN. **91 I. C. 358 = A. I. R. 1926 Cal. 557.**

———Preliminary decree—Appeal against, after final decree does not lie. 36 C. 762, distinguished. 30 All. 479; 37 Mad. 455 and 18 C. L. J. 321. referred to. (*Hallifax, A. J. C.*) BIHARIDAS *v.* BAJARANJDAS.
67 I.C. 261 = A.I.R. 1922 Nag. 179.

———*Appeal is competent.*

An appeal from a preliminary decree is not incompetent even if a final decree is made before the appeal is presented. Nor is it necessary for a party aggrieved by a preliminary decree to appeal both from that decree and against the final decree in order to maintain his appeal against the preliminary decree, although the final decree apart from its being based on the preliminary decree may be otherwise correct. 36 All. 532 (F.B.). Rel. on; 17 C. W. N. 868, Appr.; (Case-law considered.) (*Rankin, C.J., C. C. Ghose, Buckland, B. B. Ghose and Mukerji, JJ.*) TALEB ALI *v.* ABDUL AZIZ.
50 C. L. J. 566 = 34 C. W. N. 66 = A. I. R. 1929 Cal. 689 (F. B.).

———*Right of appeal not taken away.*

Right of appeal from a preliminary decree cannot be taken away by a final decree being passed either before or after the person appeals from the preliminary decree. A. I. R. 1925 Cal. 790, Dist. (*B. B. Ghose and Cammiade, JJ.*) KASI NATH *v.* HIMMAT ALI.
48 C. L. J. 28 = 32 C. W. N. 858 = 117 I. C. 557 = A. I. R. 1928 Cal. 720.

———*If appeal as allowed, final decree falls to the ground.*

Under the C. P. Code (1908) a preliminary decree has an independent existence and by the appeal against the final decree one cannot attack the preliminary decree. The final decree is really dependent upon the preliminary decree, and if there is no appeal from the final decree but, the preliminary decree is set aside on appeal, the final decree will necessarily fall to the ground. (*B. B. Ghose. and Ray, JJ.*) MADHU SUDAN KUNDU *v.* CHHALIMADDIN AHAMMAD.
106 I. C. 128 = A. I. R. 1928 Cal. 167.

———*Appeal is incompetent.*

Appeal against preliminary decree only after final decree has been passed is incompetent. A. I. R. 1921 Lah. 265; 36 Cal. 762; 32 All. 225; 18 C. L. J. 321 and

C. P. CODE, (1908), S. 97—Final Decree.

A. I. R. 1921 Cal. 109, Foll.; 37 Mad, 455; 37 Mad. 29; 36 All. 532 (F. B.) and A. I. R. 1926 Lah. 534, Dist. (*Fforde and Zafar Ali, JJ.*) LAL CHAND *v.* THAKAR DAS. **107 I. C. 610 = A. I. R. 1928 Lah. 73.**

———*Appeal incompetent.*

Appeal from preliminary decree alone after passing of final decree is incompetent, 36 Cal. 762 and 18 C. L. J. 223, Foll.; 18 C. L. J. 321, Dist. (*Mookerjee and Buckland, JJ.*) KULADA PRASAD *v.* RAMANAND PATNAIK. **48 Cal. 1036 = 33 C. L. J. 414 = 25 C. W. N. 776 = 61 I. C. 923 = A. I. R. 1921 Cal. 109.**

—S. 97—Appeal from order granting application for final decree.

———Appeal from an order passed on an application for final decree in a mortgage suit against the judgment debtor who objected on the ground that he had satisfied the decree, is chargeable with *ad valorem* Court-fee and not only 8 annas. (*Kendall and Pullan, A. J. Cs.*) ASGHAR ALI *v.* MAHABIR.
84 I. C. 742 = 27 O. C. 225 = A. I. R. 1925 Oudh 102.

—S. 97—Appeal from preliminary order in execution.

———Appeal—Competency—Appeal from preliminary order in execution—Execution subsequently dismissed—Appeal is still maintainable—Execution will proceed as per appellate judgment. (*B. B. Ghose and Bose, JJ.*) KHATEMANNESSA BIBI *v.* UPENDRA CHANDRA.
115 I. C. 591 = A. I. R. 1928 Cal. 804.

—S. 97—Decision on preliminary issue.

———*Decision is not a "preliminary decree"*

The finding that a party is an agriculturist within the meaning of the Dekhan Agriculturists Relief Act is not by itself an adjudication which can be embodied in a decree, though it may result in the plaint being returned for presentation in the proper Court. So such finding is not a preliminary decree within S. 2 or S. 97, C. P. Code.

Per *Macleod, C.J.*—Issues of law on which a case may be disposed of most often raise questions of jurisdiction or of limitation. But a finding that the Court has jurisdiction or that the plaintiff has brought his suit within the time prescribed by the law of limitation, does not determine the rights of the parties with regard to all or any of the matters in controversy in the suit, it merely enables the court to proceed to inquire into those rights. So, too, an issue of *res judicata* found in the plaintiff's favour enables the Court to deal with the merits of the case. It cannot be said that decisions in the plaintiff's favour on such issues as these determine his right to sue which is a matter of controversy in the suit, for there is no such right known to law as the 'right to sue'. A plaintiff in a suit claims to be entitled to a remedial right on the consequences of an infraction of an antecedent right. *Holland's Jurisprudence* pp. 290 and 291, Ref. But an aggrieved party is not debarred from appealing at the end of the case from certain findings during the hearing of the case which merely decide that the suit must proceed, or which decided questions without disposing wholly or partially of the case. (*Macleod, C.J. and Fawcett, J.*) DATTATRAYA PURSHOTTAM *v.* RADHABAI BALKRISHNA TRIMBAK. **60 I. C. 885 = 23 Bom. L. R. 92 = 45 Bom. 627 = A. I. R. 1921 Bom. 220.**

—S. 97—Final decree.

———*Preliminary decree cannot be re-opened.*

At the time of the passing of the final decree Court has no power to go behind the preliminary decree in which the rights and liabilities of the parties had been determined. (*Banerji and King, JJ.*) KALLOO *v.* NIADAR SINGH. **115 I. C. 462 = 1929 A. L. J. 425 = A. I. R. 1929 All. 252.**

—S. 97—Final decree pending appeal.

——*Decree is valid.*

Appeal from preliminary decree pending—Final decree passed is valid—C. P. Code, S. 11 and O. 34, R. 5. Principle of *res judicata* would also apply to such case. A. I. R. 1926 All. 291, Expl. and not Foll.; 39 All. 641 and A. I. R. 1927 P. C. 25 and A. I. R. 1926 P. C. 93, Dist. (*Mukerji and Niamatullah, JJ.*) KHAIR-UN-NISSA BIBI *v.* OUDH COMMERCIAL BANK, LTD. **119 I. C 510 = 51 All. 640 = 1929 A. L. J. 480 = A. I. R. 1929 All. 287.**

——Appeal from a preliminary decree filed before passing of the final decree is competent and is not rendered nugatory by reason of a final decree having been passed and not being appealed against; 36 All. 532, Foll. (*Kinkhede, A. J. C.*) HARPRASAD *v.* CHHADAMI. **105 I. C. 567 = A. I. R. 1928 Nag. 68.**

—S. 97—No appeal from preliminary decree.

——*Final decree cannot go behind it.*

A Court cannot at the time of passing the final decree go behind its own preliminary decree where it has become final by not being appealed against. (1884) A.W.N. 215, Foll. (*Sen and Weir, JJ.*) RAM NARAIN *v.* RAM DAS. **111 I. C. 713 = 26 A. L. J. 1370 = A. I. R. 1929 All. 65.**

—S. 97—Orders for calculating and determining mesne profits.

——C. P. Code, Ss. 97 and 144—Order passed that party entitled to mesne profits—Another order determining amount—Second order appealed against when appeal against first order time barred—First order being appealable could not be attacked in appeal against second order. Lah. Case No. 917 of 1919, Foll. (*Jai Lal, J.*) GUL MUHAMMAD *v.* SALIZ ALI KHAN. **113 I. C. 270 = A. I. R. 1930 Lah. 24.**

—S. 97—Preliminary decree in redemption suit.

——An appeal against a preliminary decree in a redemption suit when filed before the passing of a final decree therein cannot be treated as an appeal against the final decree when such final decree has been passed. (*Dalal and Daniels, A. J. Cs.*) SETH SWAMI DAYAL *v.* MUHAMMAD SHER. **74 I. C. 485 = A. I. R. 1924 Oudh 299.**

—S. 97—Preliminary decree, what is not.

——Deccan Agriculturists' Relief Act, S.15—Decision that plaintiff is an agriculturist is not a preliminary decree. 39 Bom. 422; A. I. R. 1921 Bom. 220, Foll. (*Macleod, C. J. and Kangi, J.*) JAISHINGRAO MADHARAO RANU *v.* VENKATARAO SATWAJIRAO BHOSLE. **70 I. C. 728 = A. I. R. 1922 Bom. 336.**

—S. [illegible]—Provisions of personal decree in preliminary decree.

——*No appeal against preliminary decree—Right to object lost.*

The provision that if the net proceeds of the sale are insufficient to pay the amount decreed with interest and costs, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance gives the mortgagee an actual right the existence of which is detrimental to the mortgagor. A mortgagor is aggrieved by a preliminary decree containing such a provision and if he wants to take exception to it, he must appeal against the preliminary decree within the period of limitation. If he does not do so he is precluded from disputing the correctness of the preliminary decree upon

that point. (*Stuart, C.J. and Raza, J.*) LALA *v.* AMIR HAIDER KHAN. **123 I. C. 215 = 6 O. W. N. 969 = A. I R. 1930 Oudh 10.**

—S. 97—Right of second appeal after final decree.

——Second appeal, from preliminary decree, is not competent if appeal from final decree, is not filed. 48 C. 1036; 20 C. W N. 231, 18 C.L.J. 321 and 36 C. 762, Foll. (*Chatterjea and Pearson, JJ.*) MONOHAR PESHAKAR *v.* HARAN CHANDRA KARMAKAR. **71 I. C. 290 = A. I. R. 1924 Cal. 543.**

——Final decree passed—Appeal from preliminary decree already filed and dismissed—Right to second appeal is not barred by the passing of the final decree. A. I. R. 1925 Cal. 218, Ref. (*Duval and Mitter, JJ.*) DHARANI DHAR BORAL *v.* PANCHANAN SAHA. **101 I. C. 15 = A. I. R. 1927 Cal. 559.**

—S. 97—Single appeal from both decrees.

——Appeal suit for accounts—Preliminary and final decrees—Single appeal from both is permissible but court-fee merely in respect of final decree is not enough. If the appeal in a suit for accounts is from whole decree the appellant is bound by the plaintiff's valuation in the plaint. 39 Mad. 725, Foll. 22 All. 517 Diss. from. (*Spencer, J.*) DAMODAR PADHARO *v.* HARBANDHU PATNAICK. **70 I. C. 392 = 14 M. L. W. 389 = 1921 M. W. N. 558 = A. I. R. 1921 Mad. 406.**

—S. 97—Success in appeal from preliminary order.

——*Renders appeal against final decree unnecessary.*

An appeal against a preliminary order if allowed makes an appeal against the final order on the same grounds unnecessary, though another appeal may have to be filed if it has reference to what happened after preliminary order was passed. 37 Mad. 455, Rel. on. (*Ramesam and Cornish, JJ.*) ARUNACHALA AYYAR *v.* LOUIS DREYUS & CO. **39 M. L. T. 563 = 27 M.L.W. 267 = 1928 M. W. N. 132 = 107 I. C. 793 = A. I. R. 1928 Mad. 107.**

—S. 98—Applicability.

——Provincial Small Cause Courts Act, S. 25—In case of difference among Judges forming the High Court Bench, S. 98, C. P. Code does not apply but Cl. 36 of the Letters Patent applies and senior Judge's opinion prevails. Case-law discussed. (*Krishnan and Odgers, JJ.*) NAGAPPA PILLAI *v.* ARUNACHALAM CHETTY. **85 I. C. 1016 = 47 M. L. J. 876 = A. I. R. 1925 Mad. 281.**

—S. 98—Bombay Letters Patent, Clause 36.

——*No conflict between the Code and Letters Patent.*

Per *Das and Foster, JJ.*—There is no conflict between the Code and the Letters Patent. The special procedure indicated in the Letters Patent applies to Letters Patent appeals; the procedure indicated in S. 98 of the Code applies to appeals from Subordinate Courts. 43 Bom. 433, Foll. (*Dawson Miller, C. J. on difference between Das, J. and Foster, J.*) HITENDRA SINGH *v.* RAMESWAR SINGH. **88 I. C. 141 = 87 I. C. 849 = 4 Pat. 510 = 6 P. L. T. 634 = A. I. R. 1925 Pat. 625.**

—S. 98—Difference of opinion.

——Appeal from the mofussil—Differences of opinion between the two Judges of the High Court hearing the appeal—Confirming Judge's opinion prevails—Letters Patent (Madras), Cls. 15, 16 and 36. 45 Bom. 718 Expl. (*Venkatasubba Rao and Jackson, JJ.*) (ALLAMPATI) VENKATASUBBIAH *v.* CHUTTI VENKATASUBBAMMA. **86 I. C. 857 = 21 M. L. W. 721 = A. I. R. 1925 Mad. 1032.**

—S. 98—Effect on Letters Patent.

——Letters Patent (Bombay), Cl. 36—Cl. 36 is no controlled by C. P. Code., S. 98. (*Lord Buckmaster.*)

BHAIDAS SHIVDAS *v.* BAI GULAB. 60 **I. C.** 822= 45 **Bom.** 718=19 **A. L. J.** 409=23 **Bom. L. R.** 623= 30 **C. L. J.** 488=25 **C. W. N.** 605=48 **I. A.** 181= 14 **M. L. W.** 7=1921 **M. W. N.** 408= **A. I. R.** 1921 **P. C.** 6=40 **M. L. J.** 519.

—S. 98—Letters Patent, how far superseded.

———Per *Suhrawardy, J.* (*Walmsley, J. Contra*).—To the extent to which S. 98, C. P. Code, is inconsistent with clause 36 of the Letters Patent, the former has, by virtue of the power conferred on the Indian Legislature by clause 44 of the Letters Patent superseded or modified the latter. (*Walmsley, Newbould, C, C. Ghose, Suhrowardy and B. B. Ghose, JJ.*) BECHARAM CHOUDHURI *v.* PURNA CHANDRA CHATTERJEE.

88 **I. C.** 637=41 **C. L. J.** 456=29 **C. W. N.** 755= 52 **Cal.** 894=**A. I. R.** 1925 **Cal.** 845.

—S. 98—Old law.

———*New law—Point of law alone is to be answered by the 3rd Judge.*

Formerly the third Judge could dispose of the case generally, now he must decide the point of law referred and then dispose of the appeal, the referring Judges having indicated how it should be disposed of according to the possible answers to be given. The result is that under the present law a Judge may be asked to decide whether this or that applies when his opinion may be that neither does apply. The third Judge in this case having held that he did not concur with either of the Judges the differing Judges dismissed the appeal under clause (2), that is the part preceding the proviso. (*Woodroffe, J. on difference between Walmsley and Suhrawardy, JJ.*) JNANENDRA MOHAN DUTT *v.* UMESH CHANDRA GUHA. 26 **C. W. N.** 985= **A. I. R.** 1922 **Cal.** 544.

—S. 98—Procedure.

———Where an appeal is heard by two Judges and both agree upon reversal of the decree appealed from only as to a portion but differ as to the rest, the decree will be reversed as to the portion with respect to which the Judges have agreed on reversal and will be confirmed as to the rest, namely, with respect to which they have differed. Mad. Appeal No. 223 of 1920 Foll.; A. I. R. 1926 Lah. 65, Diss. from. (*Phillips, A. C. J. and Srinivasa Aiyangar, J.*) RAJAGOPALA NAIDU *v.* SUBBAMMAL. 51 **Mad.** 291=28 **M.L.W.** 158= 109 **I. C.** 153=**A.I.R.** 1928 **Mad.** 180= 54 **M. L. J.** 703.

—S. 98—Reference.

———*Powers of third Judge.*

Per *Woodroffe, J.*—Where two judges refer the point of law under S. 98 and the judge to whom it is referred agrees with neither, then he is competent only to express his opinion. (*Woodroffe, J. on difference between Walmsley and Suhrawardy, JJ.*) JNANENDRA MOHAN DUTT *v.* UMESH CHANDRA GUHA.

26 **C. W. N.** 985=**A.I. R.** 1922 **Cal.** 544.

———*Third judge is confined to the reference.*

Reference to third Judge on point of law—He cannot hear whole appeal and express opinion outside the reference. (*Kanhaiya Lal, J.C. and Daniels, A. C. J.*) HAKIM FAZAL AHMAD *v.* ENAYAT AHMAD.

68 **I.C.** 209=9 **O. L. J.** 219=25 **O. C.** 213= **A. I. R.** 1922 **Oudh** 189.

—S. 98—Rule and exception.

———The principle adopted by the Legislature in S. 98 is that the decree of the Subordinate Court must be confirmed unless the majority of the Judges composing the the appellate Bench concur in varying or reversing such decree. In other words, the confirmation of the decree appealed from is the rule, and its modification or reversal is only an exception. Where there is no complete agreement between the two Judges as to the variation or reversal of the decree passed by the trial Court, the case is governed by the general rule embodied in sub-S. (2) of S. 98 of the Code, and the decree of the Court of first instance should be confirmed. 41 Mad. 943, Dist. (*Shadi Lal, C. J. and Le Rossignol, J.*) PUNJAB AKHBARAT AND PRESS CO. *v.* OGILVIE.

7 **Lah.** 179=27 **P. L. R.** 50=8 **L. L. J.** 13= 93 **I. C.** 344=**A. I. R.** 1926 **Lah.** 65.

—S. 98—Section is rule of procedure.

———Per *Thiruvenkatachariar, J.*—Both S. 98, C. P. Code, and Cl. 36, Letters Patent, are mere rules of procedure, differing in that respect from Cl. 15, Letters Patent, which gives a right of appeal in certain cases from the decision of a single Judge or of a Division Bench. (*Kumaraswami Sastri, Ramesam and Reilly, JJ.*) DHANARAJU *v.* MOTILALDAGA.

52 **Mad.** 563=29 **M. L. W.** 823=116 **I. C.** 343= 57 **M.L.J.** 264=**A. I. R.** 1929 **Mad.** 641 **(F.B.)**.

—S. 98—Section when applicable.

———Appeal from Subordinate Court heard by a Bench of two Judges—Judges differing in opinion—Procedure is regulated by S. 98—All other cases are governed by Letters Patent (Lahore). Cl. 26. (Lahore). 45 Bom. 718 (P. C.) Expl. (*Shadi Lal, C. J. and Le Rossignol, J.*) PANJAB AKHBARAT AND PRESS CO. *v.* OGILVIE.

7 **Lah.** 179=27 **P. L. R.** 50=8 **L. L. J.** 13= 93 **I. C.** 344=**A. I. R.** 1926 **Lah.** 65.

—S. 98—When inapplicable.

———Per *Full Bench*—Whether the appeal is under C. P. Code, or under the Letters Patent, the procedure to be adopted in either case by the High Court in case of an equal division of opinion between the Judges is to be governed by Cl. 36. Letters Patent, and not by S. 98, C. P. Code. A. I. R. 1921 P. C. 6 and A. I. R. 1921 P. C. 80, Rel. on; case law discussed. (*Kumarswami Sastri Ramesam and Reilly, JJ.*) DHANARAJA *v.* MOTILAL DAGA. 116 **I. C.** 343=29 **M. L. W.** 823= 52 **Mad.** 563=57 **M.L J.** 264= **A.I.R.** 1929 **Mad.** 641 **(F.B.)**.

—S. 98—When section and not Letters Patent applicable.

———Appeal from subordinate Court—Bench hearing appeal differing in opinion—S. 98 applies and not Letters Patent (Cal.). Cl. 36, A. I. R. 1925 Cal. 845, Affirmed; 45 B. 718, Expl. (*Walmsley and Page, JJ.*) PRAFULLA KAMINI *v.* BHABANI NATH.

91 **I. C.** 897=52 **Cal.** 1018=**A. I. R.** 1926 **Cal.** 121.

—S. 98—When section does not apply.

———The natural place to find the rules governing the exercise of the appellate civil jurisdiction over the other Judges of the High Court would be the Letters Patent, while the natural place to find the rules governing the exercise of the appellate civil jurisdiction over the Civil Courts of the mofussil subject to the High Court would be the Civil Procedure Code. The Code makes no provision for an appeal within the High Court, that is to say, from a single Judge of the High Court. This right of appeal depends on cl. 15 of the Charter. Appeals under the Letters Patent are governed by the Letters Patent, and appeals under the Code are governed by the Code. Therefore when a Bench of two judges is hearing an appeal from the decision of a single judge of the same High Court whether on the original side or the appellate, and they differ in opinion, the opinion of the senior judge would prevail. 26 All. 10; A.I.R. 1921 P C. 6 Ref. (*Marten and Pratt, JJ.*) PANDEY DAGADU *v.* JAMNADAS CHATHMAL. 76 **I. C.** 317= **A. I. R.** 1923 **Bom.** 218.

———-Error as to Court-fees not affecting merits of the case or the jurisdiction of the Court does not justify reversal of decree. (*Lentaigne, J.*) D. S. ABRAHIM & CO. *v.* EBRAHIM. **84 I. C. 971 = 2 Rang. 462 = A. I. R. 1925 Rang. 65.**

—S. 99 —Error of procedure.

———*If affects merits section does not apply.*

Where during the pendency of execution proceedings of the original Court an appeal is preferred by the other party and the execution proceedings are kept pending and later on an appellate decree is passed, an application simply for revival of the execution proceedings by the party executing the decree, though bad in form, is merely an error of procedure which is curable under S. 99 of the Code. But where the decree of the appellate Court specifically states a condition, then that condition must be complied with and upon a failure to do so S. 99 is of no avail. (*Murphy and Broomfield, JJ.*) HARILAL DALSUKHRAM SAHEBA *v.* MULCHAND ASHARAM. **32 Bom. L. R. 300 = A. I. R. 1930 Bom. 225.**

———No man should suffer by an error of procedure committed by the court. (*Hasan and Misra, JJ.*) LAKHPAT SINGH *v.* SAT NARAIN SINGH. **5 Luck. 116 = 7 O. W. N. 655.**

—S. 99—Interpretation.

———The words " Misjoinder of parties or causes of action " in S. 99 do apply to a case in which there is a misjoinder both of parties and of causes of action. Rulings under the old Code are inapplicable on this point. (*Abdul Raoof and Martineau, JJ.*) TULSI RAM *v.* DINANATH. **89 I. C. 333 = A. I. R. 1926 Lah. 145.**

———Ss. 99 and 105 are not mutually destructive. (*Heald and Cunliffe, JJ.*) M. S. MAHOMED *v.* COLLECTOR OF TOUNGOO. **5 Rang 80 = 102 I. C. 379 = A. I. R. 1927 Rang. 150.**

—S. 99—Joint right of action.

———*Necessary party must be on record—Proper party may be added.*

The general rule is that if several persons have a joint right of action all must join in suing. If any of them will not come in as plaintiffs they must be added as defendants. Co-trustees are subject to the above rule. If some of several trustees bring a suit for possession of property without impleading their co-trustees and obtain a decree, the High Court on appeal may dismiss the suit or remand the case. Objections as to non-joinder should be taken under O. 1. R. 13 at the earliest opportunity and if so taken fall under two heads :—

(1) If it is absolutely necessary to have the absent party, he ought to be added unless the plaintiff refuses to add him when the suit should be dismissed. If the trial Court erroneously proceeds with the suit without following either of these courses the objection can be repeated on appeal.

(2) If it is not a case of imperative necessity but only a matter of convenience or expediency either the absent party may be added or the suit may be tried without him. (*Spencer and Ramesam, JJ.*) THINA SHANMUGA MOOPANAR *v.* MONA CHUNA NANA SUBBAYYA. **70 I. C. 645 = 15 L. W. 283 = 1922 M. W. N. 106 = 31 M. L. T. 266 = A. I. R. 1922 Mad. 317 = 42 M.L.J. 133.**

—S. 99—' Jurisdiction ' meaning.

———In S. 99 by ' jurisdiction of the Court " is meant the jurisdiction of the trial Court. (*Campbell, J.*) DUNI CHAND *v.* RAM DHAN. **93 I. C. 938 = A. I. R. 1926 Lah. 402.**

—S. 99—Material irregularity.

———*Allowing appeal on technicality is material irregularity.*

Where the lower Court acts with irregularity in the exercise of its jurisdiction in not paying heed to the provisions of S. 99 and that irregularity is material, in that it results in the appeal being accepted on a pure technicality, its decision is liable to be set aside in revision. (*Campbell, J.*) DUNI CHAND *v.* RAM DHAN. **93 I. C. 938 = A. I. R. 1926 Lah. 402.**

--S. 99—Merits not affected.

———Refusal of summons under O. 16, R. 1—Party producing copy of document sought to be produced in Court but neither proving that it was original nor that it was true copy—There was no miscarriage of justice due to refusal. (*B. B. Ghose and Bose, JJ.*) ABDUL BARI *v.* HRISHI KESH MITTRA. **49 C. L. J. 546 = A. I. R. 1929 Cal. 459.**

———*No permission under O. 1, R. 8—Mere technicality.*

In a previous suit by the Secretary of Religious Association the defendant objected that the suit was not maintainable under O. 1, R. 8 as the plaintiffs were not ' numerous.' But the Court overruled the objection and held that the suit was maintainable without the aid of that rule. In the subsequent suit the defendant contended that R. 8 was bar to the suit as permission of the Court was not obtained. It was clear from the proceedings of the Executive Committee of the Samaj that the Secretary was authorized to institute the suit and presumably the Executive Committee had authority to so authorize him.

Held, that as the questions raised in the previous and the subsequent suit were different ones, the subsequent suit was not barred by the principle of *res judicata*.

Held, further, that as the objection raised was technical and error did not affect the merits of the case or the jurisdiction of the Court the case would be covered by S. 99. A.I.R. 1923 P.C. 128, Rel. on. 11 C.L.J. 461, Ref. (*Suhrawardy and Jack, JJ.*) HRIDAY NATH ROY *v.* AKHIL CHANDRA ROY. **49 C. L. J. 357 = A. I. R. 1929 Cal. 445.**

———Company—Meeting—Validity of votes—Plaintiff disputing validity can claim inspection and discovery of documents—But refusal of inspection is not wrong so as to merit reversal by superior Court, where delay is bad and where inspection is not likely to benefit plaintiff. The restrictions in England in regard to the inspection of ballot papers in elections both to the House of Commons and in regard to Municipal elections, show there are some considerations against a free right of inspection of voting papers in a case like the present, though those restrictions being statutory cannot apply in India. (*Shah, Ag. C. J. and Fawcett, J.*) F. A. C. REBELLO *v.* CO-OPERATIVE NAVIGATION AND TRADING CO., LTD. **84 I. C. 363 = 26 Bom. L. R. 907 = A. I. R. 1925 Bom. 105.**

--S. 99—Merits when affected.

———Witnesses must be examined by the Judge himself in open Court—Judge's failure to examine them himself and allow them to be examined by some one else is an irregularity, defect or error but is no good ground for reversing the decision in the case as it does not affect the merits or the case or the jurisdiction of the Court. The fact that no objection was taken by any of the parties to the examination of the witnesses by the other is an additional reason for not setting aside the decision, because it may be presumed that all parties consented to the witnesses being so examined. (*Kulwant Sahay and Macpherson, JJ.*) BAKSIRAM MULCHAND *v.* DWARKA PRASAD. **115 I. C. 237 = 10 P. L. T. 474 = A. I. R. 1928 Pat. 438.**

———Court refusing to summon witnesses or to

examine witness produced—Order must be set aside as it affects the merits of the case. (*Batten, J. C. and Hallifax, A.J.C.*) BHAGCHAND *v.* MUSAJI.
68 I. C. 272 = A. I. R. 1923 Nag. 58.

—S. 99—Merits when not affected.

———Oudh Rent Act (1886), S. 108 (15) and (16)—Suit for arrears of revenue under Cl. (16)—Question of defendants' liability therefor enquired into—Plaintiff not prejudiced—Enquiry is proper.

Held, that the finding of the lower Court itself concluded the matter in issue and consequently the suit was untenable. (*Wazir Hasan, J.*) JAGANNATH *v.* UMRAI SINGH. **106 I. C. 569 = 4 O. W. N. 933 = A. I. R. 1927 Oudh 468.**

———Decision given without hearing arguments—Merits of case not affected nor the jurisdiction of the Court—Decree cannot be reversed. (*Raza, J.*) SRIRAM *v.* JAGAT NARAIN. **93 I. C. 291 = 13 O. L. J. 473.**

———The deposition of a handwriting expert signed by him and admitted in evidence does not vitiate the trial though it is not signed by the Judge. (*Batten, J. C.*) ALAM SINGH *v.* SETH GOPALDAS.
68 I. C. 664 = A. I. R. 1923 Nag. 7.

—S. 99—Misjoinder.

———*Must affect the merits for decree to be reversed.*

Under the provisions of S. 99 C. P. Code, it is not competent to the appellate Court to reverse the decree passed by the trial Court on the mere ground of misjoinder of parties and causes of action, more especially when there is no finding by the appellate Court that such misjoinder affected the merits of the case or the jurisdiction of the Court. (*Srinivasa Ayyangar and Jackson, JJ.*) EDEGA OBANNA *v.* KANIKI REDDI.
108 I. C. 544 = 1928 M. W. N. 82.

—S. 99—Multifariousness.

———Defect of multifariousness not affecting merits or jurisdiction—Appellate Court cannot interfere. (*Sulaiman and Kendall, JJ.*) GOWRI SHANKAR *v.* KESHAB DEO. **114 I. C. 881 = 1929 A. L. J. 204 = A. I. R. 1929 All. 148.**

—S. 99 -Non joinder affecting merits.

———When the merits of the case have been affected by the non-joinder of parties the section can have no application. (*Cuming and Panton, JJ.*) ABDUL RAHAMAN *v.* SALIMANNESSA BIBI. **89 I. C. 121 = A. I. R. 1926 Cal. 416.**

—S. 99—Non-joinder of party.

———Ejectment suit—Non-joinder is not fatal. (*Cuming and Chakravarti, JJ.*) BAIKUNTHA NATH DE *v.* SHAIKH HARI. **92 I. C. 899 = A. I. R. 1926 Cal. 592.**

———Where a receiver was a party in the trial Court and had acquiesced in the order but was not made a party in appeal,

Held, the defect was not fatal where the order in appeal was in favour of the receiver. (*Oldfield and Venkatasubba Rao, JJ.*) C. L. NARASIMHAM *v.* N. HANUMANTHARAO NAIDU.
70 I. C. 572 = 1922 M. W. N. 717 = A. I. R. 1922 Mad. 439.

—S. 99—Non-representation of minor.

———Non-representation of a minor by a guardian in a suit is not a defect curable by S. 99. (*Mukerjee, Ag. C. J. and Fletcher, J.*) SURENDRA NATH BOSE *v.* AGHORE NATH BOSE. **62 I. C. 464 = 25 C. W. N. 525 = A. I. R. 1921 Cal. 534.**

—S. 99—Omission to frame issue.

———If there is no issue framed on a question but the parties have adduced evidence and discussed it before the Court, and the Court decides it as if there was an issue about it, the decree need not be set aside in appeal on the ground merely that no such issue was framed. (*Fawcett and Madgavkar, JJ.*) SATYADHYANTIRTHA *v.* RAGHUNATH. **96 I. C. 827 = 28 Bom. L. R. 743 = A. I. R. 1926 Bom. 384.**

—S. 99—Order of remand when made.

———Where the trial Court considered each case or group of cases separately and dealt with the evidence relating to those cases or groups of cases separately, but the lower appellate Court did not deal with each case or group of cases separately,

Held, that the appeals were not properly dealt with by the lower appellate Court. (*Das and Kulwant Sahay, JJ.*) NAND LAL CHAUBE *v.* KESHO PRASAD SINGH. **78 I. C. 593 = 1923 P. H. C. C. 339 = A. I. R. 1924 Pat. 245.**

—S. 99—Plea as to paramount title.

———When the parties to a mortgage suit allowed a matter of paramount title to go to trial without objection, a reversal of the judgment of the first Court on the ground that the issue was not properly triable in the action should not be allowed. There cannot be said to be a flaw in the matter of jurisdiction. At the most there is an undue or unnecessary extension of the frame of the litigation and the scope of the enquiry. 33 Cal. 425, Rel. on, (*Findlay, J. C.*) BALAJI *v.* PANDURANG. **113 I. C. 884 = A. I. R. 1928 Nag. 306.**

—S. 99—Power through agent.

———*No fraud, but a formal defect in presenting the case to Court—S. 99 applies.*

Where *A*, authorised by *B* to file an application in a Court, gave and signed the vakalatnamah in *B*'s name as he himself was incompetent to file the application and *B* all the while accepted the authority given to the pleader by *A*,

Held, *A* could not file the application himself, and the only way to file it was to engage a pleader. Therefore the power to file the application included power to give and sign vakalatnamah. The rule with regard to entering appearance and filing applications and with regard to the appointment of pleaders for that purpose are no doubt salutary rules and certain formalities have to be performed. The rules are more or less strict and they are made no doubt with a view to prevent fraud. But when it is clearly proved that no fraud has been committed and that what has been done, has been done with full knowledge and acquiescence of the party himself, it was never intended by these rules, where some mere formal matter has not been complied with or where there has been some irregularity in presenting the case before the Court and where such formality or irregularity in no way affects the merits of the case that that should be taken as a matter of vital importance and probably for this very reason S. 99 of the C. P. Code was passed. (*Dawson Miller, C. J. and Kulwant Sahay, J.*) BANWARI RAI *v.* CHETHRU LAL RAI. **74 I. C. 1033 = 2 Pat. L. R. (Civ.) 174 = A. I. R. 1924 Pat. 114.**

—S. 99—Powers when not exercised.

———Appellant's case extremely weak—Court should not interfere under S. 99 with irregular order. (*Suhrawardy and Duval, JJ.*) NIRANKA SASHI ROY *v.* SWARGANATH BANERJEE. **90 I. C. 121 = A. I. R. 1926 Cal. 95.**

—S. 99—Remand when not proper.

———Where the judgment of the lower Court is based on inadmissible evidence, remand would be proper but where apart from the inadmissible evidence the Court is mainly influenced by the absence of evidence on behalf of the defendant and the positive evidence of plaintiff's witnesses it will serve no useful purpose to remand the case for a reconsideration of the evidence. 7 Cal. 293, Foll. (*Suhrawardy, J.*) FAIJADDIN *v.* AGNI KUMAR SARMA. **71 I. C. 300 = A. I. R. 1924 Cal. 370.**

—S. 99—Scope.

———S. 99 does not prevent the appellate Court from interfering on the ground of misjoinder or non-joinder which affects the jurisdiction of the trial Court. (*Reilly and Cornish, JJ.*) AMIRCHAND NAGINDAS & CO. *v.* RAOJI BHAI MOTI BHAI. **31 M. L. W. 757 = A. I. R. 1930 Mad. 714 = 58 M. L. J. 613.**

———Per *Suhrawardy, J.*—Question about the constitution of or the right to maintain a suit is not a question which arises in any proceeding in the suit and it is doubtful whether S. 99 applies to such a question. (*Suhrawardy and Jack, JJ.*) HRIDAY NATH ROY *v.* AKHIL CHANDRA ROY. **49 C. L. J. 357 = A. I. R. 1929 Cal. 445.**

—S. 99—Section when applicable.

———Where owing to permission by a Court to sue the defendants jointly, plaintiff lost opportunity of bringing separate suits within time,

Held, that S. 99 should be made applicable. (*Dalal, J. C.*) MANSA DIN *v.* MANNU LAL MAHARAJ. **83 I. C. 850 = 27 O. C. 35 = A. I. R. 1924 Oudh 337.**

———Failure of plaintiff to sign pleadings—No power of attorney given to agent—Objection not raised—S. 99 applies. (*MacColl, J.*) MA NGWE KIN *v.* MA HME. **74 I.C 100 = 1 Rang. 42 = A. I. R. 1923 Rang. 206.**

———Case not covered by R. 27—Additional evidence taken—Merits not affected—S. 99 applies. (*Fawcett, J. C. and Kemp, A. J. C.*) SHAH MAHOMED *v.* RAMZAN. **16 S. L. R. 17 = 66 I. C. 833 = A. I. R. 1921 Sind 155.**

—S. 99—View of Court as to onus wrong.

———But decision not affected on merits—Appellate Court will not interfere—Appeal. (*Kotval, A. J. C.*) GOWARDHAN DAS *v.* R. S. HARLAL RAMSUKH. **69 I. C. 541 = A. I. R. 1923 Nag. 62.**

—S. 99—Want of jurisdiction.

———Jurisdiction, want of—Appellate Court will interfere although no miscarriage of justice is caused. A. I. R. 1924 P. C. 95 : 51 Cal. 361, Rel. on. (*Mukerji, J.*) PEYARE LAL *v.* BANKE LAL. **95 I C. 406 = A.I.R. 1926 All. 650.**

—S. 99—What is only an irregularity.

———Omission to sign and to verify the plaint are mere irregularities within S. 99. 40 All. 147 ; 22 All. 55; 20 All. 442 ; A.I R. 1925 All. 79 ; A.I.R. 1928 Pat. 51 and A.I.R. 1929 Mad. 791, Foll. (*Hilton, J.*) DALELA *v.* MT. CHINTI. **A.I.R. 1930 Lah. 735.**

———An application for the substitution of the name of the legal representative of a deceased can be made to the Court to which the decree has been transferred for execution and in any case if the application is not made to the Court passing the decree it is a mere irregularity which is covered by S. 99. 22 Cal. 558 ; 35 Cal. 1047, Foll.; 17 All. 431 ; 19 All. 337 and 28 Mad. 466. Not Foll. (*Abdul Raoof and Fforde, JJ.*) MT. BEGAM BIBI *v.* BULAQI SHAH. **90 I. C. 1050 = 26 P. L. R. 740 = A. I. R. 1926 Lah. 34.**

———In lower Court case treated under Dekkhan Agriculturists' Relief Act—In appeal case not treated under that Act—Amendment of plaint not affecting

merits of case—Formality of amendment was dispensed with. 18 Bom. L. R. 763, Dist. (*Fawcett, Ag. C. J. and Mirza, J.*) CHANDIKAPRASAD *v.* SHIVAPPA. **113 I. C. 381 = 30 Bom. L. R. 1099 = A. I. R. 1928 Bom. 425.**

———*Signing plaint is merely procedure.*

The signing of a plaint is merely a matter of procedure and any defect therein is remediable at any stage of litigation even in the appellate Court, the reason being that the omission to sign or verify a plaint is not such a defect as can affect the merits of the case and can be remedied under S. 99, C. P. Code. 22 All. 55 ; 17 Cal. 580 ; 40 All. 147 and A. I. R. 1923 Rang. 206, Ref.

A plaint was signed by an agent of the plaintiff who was not authorized to sign plaints. An objection being raised by defendants, the plaintiff gave his agent power to sign the plaint, and ratified the signature already made by him. The plaintiff was exempted from personal attendance in Court.

Held, that the agent's signature by the plaintiff may be accepted as sufficient verification under O. 6, R. 14. (*Jwala Prasad, J.*) W. JOHNSTON *v.* RAMESHWAR SINGH BAHADUR. **104 I.C. 747 = 8 P. L. T. 820 = A. I. R. 1928 Pat. 51.**

———Preliminary decree passed—Order for making decree for sale absolute made but formal final decree not passed—Irregularity can be condoned under S. 99 if Court's jurisdiction or merits of case are not affected and the terms of the decree are otherwise ascertainable. 13 All. 343, Rel. on. (*Shah and Fawcett, JJ.*) CHHAGANLAL *v.* JAYARAM. **100 I. C. 956 = 51 Bom. 125 = 29 Bom. L. R. 107 = A. I. R. 1927 Bom. 131.**

———Failure to comply with the provisions of O. 32, R. 3 (4) is only an irregularity covered by S. 99 of the C. P. Code. and where such failure has not prejudiced the minor in any way, the proceedings are not vitiated. (*Stuart, J.*) SULTAN *v.* HARDHIYAN. **88 I. C. 294 = 6 L. R. A. Civ. 323 = A. I. R. 1925 All. 548.**

———When a decree is transferred to another Court for execution and after the execution proceedings are started, the judgment-debtor dies and the Court of transfer brings on the record the legal representative of the judgment-debtor and the legal representative acquiesces in the procedure and puts forward objections in the Court of transfer without challenging its jurisdiction to hear the objections, but no application under S. 50, C. P. Code, is made to the Court which passed the decree, no case of want of jurisdiction will arise but there would be an irregularity of procedure curable under the provisions of S. 99 of the C. P. Code. 28 Mad. 466, Dist.; 55 I.C. 812; Foll., 22 Cal. 558, Ref. to. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) KUER JANG BAHADUR *v.* BANK OF UPPER INDIA, LTD., LUCKNOW. **87 I. C. 21 = 12 O. L. J. 146 = 2 O. W. N. 73 = 28 O. C. 330 = A. I. R. 1925 Oudh. 448.**

———Where the power-of-attorney on the strength of which the suit was filed was not a general power of attorney within the meaning of the rule as framed by High Court for appearances within its jurisdiction,

Held, that it is only an irregularity in the proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court, and that there is no reason for disturbing the decree appealed from on that ground. (*Shah and Crump, JJ.*) GANPATI NANA POWAR *v.* JIWANABAI KOM SUBANNA. **76 I. C. 34 = 24 Bom. L. R. 1302 = 47 Bom. 227 = A. I. R. 1923 Bom. 44.**

——Where the mother actually appeared as guardian *ad litem* of her minor son and filed a compromise, agreeing to pay the decretal money within four months and the mortgagee agreed to exempt her from the costs of the suit and the compromise was entered into with the leave of the Court,

Held, from the fact that such sanction had been granted it may be inferred that everything necessary had been done to have the minor properly represented by a guardian *ad litem*. Where the Court by its action has given its sanction to the appearance of a person as such a guardian, the absence of a formal order of appointment is not necessarily fatal to the proceedings. Even omissions to serve the minors concerned or their mother personally are treated as mere irregularities covered by S. 99 of the Code of Civil Procedure and not errors fatal to the suit. 30 Cal. 1021; 23 O. C. 396, Foll.; 28 All. 137; 16 O.C. 261, Dist. (*Kanhaiya Lal, J. C.*) MATA GHULAM SINGH *v.* SITAL PRASAD.
74 I. C. 409 = 26 O. C. 113 = A.I.R. 1923 Oudh 206.

——Defect of signature does not justify reversal of the decree. The mere fact that pleadings are not duly signed does not invalidate them. (*Jwala Prasad and Adami, JJ.*) RAJA BRAJA SUNDAR DEB *v.* SIVARAJAN. **59 I. C. 282 = 1 Pat. L. T. 647**

S. 100.

Abandonment.
Acquiescence.
Additional evidence.
Admissibility of evidence.
Adverse possession.
Amendment.
Ancestral property.
Appreciation of evidence.
Benami.
Burden of proof.
Concurrent finding.
Consideration of evidence.
Construction of documents.
Costs.
Court fee.
Custom.
Damages.
Defective judgment.
Discretion.
Easement.
Error of law.
Finding of fact—*See* QUESTION OF FACT.
Fraud.
Grounds.
Inference from fact.
Jurisdiction
Legal necessity.
Limitation.
Marriage.
Minority.
Misconstruction of documents.
Misjoinder.
Misreading of evidence.
Misreading of judgment.
Mixed question of law and fact.
Nature of tenancy.
Negligence.
New plea.
Notice.
Nuisance.
Powers of Court.
Precedent.
Presumption.
Procedure.
Question of fact or finding of fact.
Question of law.
Religious endowment.
Second Appeal.
Sufficiency of evidence.
Sustainability.
Waiver.

—S. 100—Abandonment.

——Question as to abandonment is one of fact. (*Ross and Kulwant Sahay, JJ.*) PRATAP UDAI NATH *v.* MAHABIR SAHU. **88 I. C. 1032 = 4 Pat. 838 = 6 P. L. T. 500 = 1925 P. H. C. C. 320 = A. I. R. 1925 Pat. 741.**

—S. 100—Abandonment—Question of fact.

——Abandonment is a question of fact. (*Mitter, J.*) AMINADDIN SHEIKH *v.* CHANDRANATH SEN. **114 I. C. 153 = 48 C. L. J. 390 = A. I. R. 1929 Cal. 120.**

——Abandonment of a particular design of trade-mark depends on intention and is a question of fact. (*Broadway and Jailal, JJ.*) NOOR ILAHI MAQBUL ILAHI *v.* R. J. WOOD & CO. **9 Lah. 487 = 29 P. L. R. 615 = 113 I. C. 228 = A. I. R. 1928 Lah. 924.**

——The question as to whether there has been an abandonment of the land by the raiyat is primarily a question of fact depending upon a number of circumstances to be proved in each case. (*Chakravarti, J.*) SHEIKH MOHARAMDI *v.* SHEIKH ASMAT. **91 I. C. 493 = A. I. R. 1926 Cal. 751.**

——Question of abandonment is one of fact. (*C. C. Ghose and B. B. Ghose, JJ.*) SARAT CHANDRA MAJUMDAR *v.* PRASANNA KUMAR GOPE. **71 I.C. 304 = A. I. R. 1924 Cal. 366.**

——Abandonment is question of fact. (*Martineau, J*). AHMED YAR *v.* MUHAMMAD ALI. **3 Lah. L.J. 445 = A. I. R. 1921 Lah. 162.**

—S. 100—Abandonment—Question of law.

——Question whether facts amount to abandonment is one of law. (*Jailal, J.*) MUHAMMAD DIN *v.* KHUSHI MUHAMMAD. **A. I. R. 1930 Lah. 215.**

——Inference from facts found as to whether there was abandonment or not is a question of law. (*B. B. Ghose and Garlick, JJ.*) ASWANI KUMAR *v.* HAR KUMAR. **114 I. C. 482 = 32 C. W. N. 1111 = A. I. R. 1928 Cal. 891.**

——The effectiveness of the abandonment in law on the facts found, although not raised in the memorandum of appeal can be allowed to be questioned in second appeal as it involves a pure question of law. (*Abdul Raoof, J.*) RAJA *v.* SALABAT. **66 I. C. 935 = 3 Lah. L.J. 26 = A.I.R. 1921 Lah. 229.**

—S. 100—Abandonment—When contention barred.

——Point abandoned before lower appellate Court—Point though of law cannot be raised in second appeal. A.I.R. 1927 Oudh 37, Foll. (*Raza and Pullan, JJ.*) ABID HUSAIN *v.* RAM NIDH. **7 O.W.N. 523 = A.I.R. 1930 Oudh 268.**

——When a person does not state in his grounds of first appeal anything about marriage of *A* with *B*, he should not be allowed to urge in second appeal that the marriage took place and was valid. (*Jackson, A. J. C.*) GULABCHAND *v.* BHAIYALAL. **119 I.C. 698 = A. I. R. 1929 Nag. 343.**

——Finding of facts not questioned in first appeal cannot be raised in second appeal. (*Brown, J.*) MAUNG AUNG BAN *v.* MAUNG NGE. **A. I. R. 1929 Rang. 213.**

——The trial Court found that alienation of property

C. P. CODE, (1908), S. 100—Abandonment—When contention barred.

made by a person on behalf of his minor brothers was beneficial to the minors. The finding was not seriously impugned in the lower appellate Court.

Held, that such finding could not be assailed in second appeal. (*Shadi Lal, C. J. and Hilton, J.*) ILAM DIN *v.* BUTA. **120 I. C. 171 (Lah.).**

——*Ananthakrishna Aiyar, J.*—Though a party might not be bound by admissions made by his counsel on pure questions of law, yet on questions of fact, parties are bound by admissions made by their counsel whether the admissions be made in the course of the trial in the first Court or in the course of the hearing of the appeal before the lower appellate Court. 25 Mad. 367 (P.C.), Ref. A pleader's general powers in the conduct of an appeal include, in ordinary cases, the abandonment of an issue which in his discretion he thinks inadvisable to press and therefore an issue of fact abandoned by him in the lower appellate Court cannot be challenged in second appeal. (*Beasley and Ananthakrishna Ayyar, JJ.*) KOTAYYA *v.* SREERAMULU. **109 I. C. 178 = A.I.R. 1928 Mad. 900.**

——Contention given up in lower appellate Court cannot be raised in second appeal. (*Baker, J. C.*) NARAYAN *v.* BEHARILAL. **89 I.C. 18 = A. I. R. 1926 Nag. 160.**

——Point adumbrated in plaint but no issue raised nor evidence led—Point cannot be raised. (*Suhrawardy and Duval, JJ.*) GIRISH CHANDRA CHOUDHURY *v.* GOPAL CHANDRA PODDAR. **88 I. C. 477 = A. I. R. 1925 Cal. 1184.**

——A question of fact which is abandoned before the lower appellate Court cannot be raised in second appeal. (*Neave, A. J. C.*) RAM NIDH *v.* JANKI. **85 I. C. 387 = A.I.R. 1925 Oudh 510.**

——Question of law considered by Trial Court but ignored in appeal—High Court must take notice of such question. (*Misra, A. J. C.*) ASHRAF ALI *v.* CHANDRALPAL SINGH. **89 I. C. 563 = 12 O.L.J. 382 = 2 O. W. N. 529 = A.I.R. 1925 Oudh 506.**

——Where probably advisedly a plea was given up in the first Court by the party, he cannot be allowed to set up the plea in the Court of second appeal. (*Le Rossignol and Zaffer Ali, JJ.*) LAJJARAM *v.* SHAMBHU NATH. **79 I.C. 462 = 5 Lah. L. J. 14 = A. I. R. 1923 Lah. 252.**

——An objection not taken in either of the lower Courts cannot be entertained as a ground of second appeal, the more so if the respondents have had no notion, in the memo of appeal that it would be urged, (*Oldfield and Ramesam, JJ.*) SUBRAMANIAN PATTAR *v.* K. U. RAMAN. **69 I.C. 363 = 16 M. L. W. 620 = 31 M. L. T. 454 = A.I.R. 1922 Mad. 519 = 44 M.L.J. 596.**

——A finding on a question of fact not put in issue can be contested in second appeal. (*Shadi Lal and Martineau, JJ.*) CHANDU LAL *v.* LAKHMI CHAND JOWALA DUT. **85 I. C. 92 = 5 Lah. L. J. 49 = A. I. R. 1921 Lah. 256.**

—S 100 —Acquiescence.

——The question of waiver, acquiescence or estoppel is a question which can be examined by the High Court in second appeal. 21 All. 496 (P. C.), Ref. (*Mitter and Mallik, JJ.*) LAKSHMI CHARAN *v.* NABEDWIP CHANDRA. **116 I. C. 733 = 56 Cal. 201 = A.I.R. 1929 Cal. 437.**

——Acquiescence for long period giving rise to presumption of grant is question of law. (*Kinkhede, A. J. C.*) RUSHI BHIKU *v.* RUSHI SHEORAM.

C. P. CODE, (1908), S. 100—Additional evidence.

107 I. C. 522 = 23 N.L.R. 192 = A.I.R. 1928 Nag. 87.

—S. 100—Acquiescence—Question of law.

——The question whether there has been a representation amounting to acquiescence or not is a question of fact. 17 C.W.N. 833, Foll. (*Greaves and M. N. Mukerji, JJ.*) BHAGWAN DAS *v.* BISESWAR NATH. **100 I. C. 302 = 44 C. L. J. 434 = A. I. R. 1927 Cal. 220.**

——Acquiescence is not a question of fact but of legal inference from the facts found. 4 C. L. J. 198, Rel. on. (*Kinkhede, Offg. A. J. C.*) MURARILAL *v.* BALKISAN. **95 I.C. 636 = A.I.R. 1926 Nag. 416.**

——The question as to whether in a case there has been acquiescence is not one of fact but of legal inference from the facts found and therefore it is open to be considered in second appeal. (*Mukerji, J.*) BANESWAR BANDOPADHYA *v.* AMULYA CHARAN. **82 I.C. 309 = A.I.R. 1925 Cal. 288.**

——The findings of the lower Court are final upon the facts from which acquiescence might or might not be inferred. But acquiescence is not itself a question of fact, but of legal inference from the facts so found. (*Hallifax, A.J.C.*) SHANKER *v.* RANGUBAI. **71 I.C. 942 = A.I.R. 1924 Nag. 56.**

——Acquiescence is not a question of fact but of legal inference from the facts found. Hence second appeal will lie on the question. (*Hallifax, A. J. C.*) RAMRATAN *v.* SHEODATTARAI. **73 I.C. 137 = A.I.R. 1921 Nag. 167.**

—S. 100—Additional evidence.

——Where an appellate Court admitted certain documents in appeal but did not base its finding upon them, its finding of fact will not be interfered with in second appeal. (1912) M.W.N 821; (1921) P. H. C.C. 17; (1914) M. W. N. 795 and A. I. R. 1922 Cal. 185, Dist. (*Jackson, J.*) CHINNAYYA *v.* MANGAMMA. **92 I. C. 661 = A. I. R. 1926 Mad. 864.**

——*Exercise of discretion.*

If an appellate Court before whom an application for admitting fresh evidence is made, exercises its discretion and refuses to admit fresh evidence, the propriety of that order would not be a good ground for entertaining a second appeal. If however the lower appellate Court does not apply its mind to the question properly before it at all and feels that it is unable to admit fresh evidence because of some supposed insuperable difficulty in its way which, in fact, does not exist, then it cannot be said that the Court in the exercise of its discretion, has refused to admit fresh evidence and second appeal will lie. (*Sulaiman and Ryves, JJ.*) BADRI DAS *v.* HOSHIAR SINGH. **86 I. C. 761 = 47 All. 412 = 23 A. L. J. 193 = 6 L. R. A. Civ. 85 = A. I. R. 1925 All. 288.**

——*New plea.*

Namboodri litigants cannot adduce evidence of special usage varying Hindu Law, for the first time in second appeal. (*Jackson, J.*) T. M. NARAYANAN NAMBUDRI *v.* K. RAVUNNI NAIR. **84 I. C. 973 = 20 M. L. W. 876 = 35 M. L. T. 127 = 1924 M. W. N. 792 = A. I. R. 1925 Mad. 260 = 47 M. L. J. 686.**

——Where the first appellate Court issued a commission for the measurement of the plot in dispute and considered the report of the Commissioner along with other evidence on record without stating reasons for admitting the additional evidence and gave a finding,

Held, that the finding cannot be accepted as binding as it is partly based on inadmissible evidence. (**Gokul** *Prasad, J.*) KABUL *v.* KABOOL SINGH. **79 I. C. 408 = A. I. R. 1923 All. 413.**

———There is no precedent for allowing an appellant to lead evidence, which could have been led in the Court below in appeal. (*Macleod, C. J. and Kanga, J.*) MOTI CHAND RAOJI *v.* MANEKCHAND RAMCHAND GOJAR. **77 I. C. 515 = A. I. R. 1922 Bom. 147.**

—S. 100—Admissibility of evidence.

———Findings of fact arrived at on inadmissible evidence though clear are not final. (*Tek Chand and Agha Haidar, JJ.*) PRABH DAYAL *v.* RALLA RAM. **31 P. L. R. 198 = A. I. R. 1930 Lah. 672.**

———*Objection to.*

Admissibility of document is a question of fact—Objection to admissibility not taken in lower Courts cannot be taken in second appeal. (*Cuming and B.B. Ghose, JJ*). ALFOO *v.* BABURADI MIA. **97 I.C. 414 (Cal.).**

———The High Court will not in second appeal interfere with the order of the Court rejecting admission of documents when no reason has been shown for their non-production at the time they were rejected. (*Cuming and Chakravarty, JJ.*) NRISINHA CHARAN NANDI *v.* BATASI DASLU. **90 I. C. 602 = A. I. R. 1926 Cal. 106.**

———An erroneous omission to object to inadmissible evidence does not make it admissible. The omission to take objection to the admissibility of a document becomes fatal only in case where if the objection is taken in time, any defect in its admissibility can be cured and the document made admissible. In other cases objection as to inadmissibility can be raised even in second appeal though it was not raised in the lower Courts. 19 All. 76 (P. C.) Foll. (*Suhrawardy and Cuming, JJ.*) CHOONI LAL KHEMANI *v.* NILMADHAB BARIK. **86 I. C. 734 = 41 C. L. J. 374 = A. I. R. 1925 Cal. 1034.**

———Where certain evidence was held inadmissible by a second appellate Court, but there were other pieces of evidence relating to the finding by the lower Court, the second appellate Court remanded the case for decision on the other evidence, as it could not be sure that the lower Court was not influenced by the reception of the inadmissible evidence. A. I. R. 1922 Cal. 251, Foll. (*Suhrawardy and Cuming, JJ.*) CHOONI LAL KHEMANI *v.* NILMADHAB BARIK. **86 I. C. 734 = 41 C. L. J. 374 = A. I. R. 1925 Cal. 1034.**

———Question of law dealing with the admissibility and the legal effect of evidence will not as a general rule be entertained in second appeal in the High Court if they have not been taken at least at the stage of the first appeal in the court below. (*Neave and Daniels, JJ.*) RADHA KISHAN *v.* KEDAR NATH. **80 I. C. 874 = 46 All. 815 = 22 A. L. J. 761 = 5 L. R. A. Civ. 536 = A. I. R. 1924 All. 845.**

———Questions of law dealing with the admissibility and the legal effect of evidence will not as a general rule be entertained in second appeal if they have not been taken at least at the stage of first appeal. (*Mears, C. J. and Piggott, J.*) SAT NARAIN PRASAD *v.* Ram AUTAR. **78 I. C. 221 = 22 A. L. J. 153 = 5 L. R. A. Civ. 44 = A. I. R. 1924 All. 709.**

———A finding of fact can be challenged in second appeal, where the finding is vitiated by the fact that a document relied upon by the lower Court in support of its conclusion had not been proved according to the Evidence Act. (*Shadi Lal, C. J. and Le Rossignol, J.*) SRI RAM *v.* MT. CHANDO. **80 I. C. 705 = 6 L. L. J. 204 = A. I. R. 1924 Lah. 470.**

———When secondary evidence has once been admitted by the lower appellate Court, the High Court sitting in second appeal cannot reject it. (*Dalal, J C.*) BASHIRUDDIN KHAN *v.* MAHADEO SINGH. **79 I. C. 663 = 27 O. C. 26 = 11 O. L. J. 565 = A. I. R. 1924 Oudh. 306.**

———Refusal to admit document produced late is ground for second appeal. 12 C. W. N. 312, Foll. (*Ross, J.*) JAGDIP PANDEY *v.* MT. TAIBUNNISSA. **72 I. C. 397 = A. I. R. 1924 Pat. 208.**

———A though as ruled by the Judicial Committee in 23 I. A. 106 an erroneous omission in the Trial Court to object to an admission which was irrelevant did not make it relevant and admissible in evidence, still as explained in 1 C. W. N. 530, an objection that a document that *per se* is not admissible in evidence, has been improperly admitted in evidence cannot be entertained in the Court of appeal. If the objection had been taken in the Trial Court, it might have been met and the proceedings regularised. (*Mookerjee, C. J. and Rankin, J.*) SAYARUDDIN AKONDA *v.* SAMIRUDDIN AKONDA. **72 I. C. 985 = A.I. R. 1923 Cal. 378.**

———Error as to admissibility of evidence can be attacked in Second Appeal. (*Mookerjee and Chotzner, JJ.*) TARA KUMAR GHOSE *v.* KUMAR ARUN CHANDRA SINGH. **74 I. C. 383 = 36 C. L. J. 389 = A. I. R. 1923 Cal. 261.**

———Finding of fact on inadmissible evidence can be attacked in Second Appeal. (*Martineau, J.*) RAM LAL *v.* GHANASHAM DASS. **71 I. C. 825 = A.I.R. 1923 Lah. 150.**

———Inadmissible evidence which is at least material part of the basis of the finding, though it may not be the main part of it, renders remand necessary. The admission and consideration of improper evidence would not necessitate a remand if that evidence formed no more than a negligible part of the basis of the finding resting on it, because in that case it would be possible to say that the finding would undoubtedly be the same, even if the improper evidence were excluded. (*Hallifax, A.J. C.*) RAOJI *v.* WARLU. **77 I. C. 911 = 18 N. L. R. 182 = A. I. R. 1923 Nag. 107.**

———Finding of fact based on inadmissible evidence is bad—Evidence on record sufficient—High Court will itself arrive at findings. (*Stuart, J.*) SAKTOO MAL *v.* GOPAL CHAND. **66 I. C. 313 = A. I. R. 1922 All. 439.**

———Finding of fact based partly on inadmissible evidence can be assailed in second appeal. 5 A. L. J. 410 Rel. on. (*Broadway and Abdul Qadir, JJ.*) BALWANT SINGH *v.* BALDEO SINGH. **64 I. C. 929 = 2 Lah. 271 = A. I. R. 1921 Lah. 119.**

———*Wajib-ul-arz* rejected on erroneous view of law—High Court can interfere in second appeal. 4 O. L.J. 509 and 21 O. C. 334, Dist. (*Daniels, A. J.C.*) SWAMI DAYAL *v.* RAM DAS. **64 I. C. 86 = 24 O. C. 237 = A. I. R. 1921 Oudh 137.**

—S. 100—Adverse possession.

———*Mixed question of law and fact.*

The question of adverse possession is a mixed question of law and fact and it is always open to the Court of second appeal to examine the facts established in the case and to determine for itself whether they are sufficient to establish in law the adverse possession which is claimed on the basis of those facts. A. I. R. 1917 P.C. 33, Rel. on. (*Misra, J.*) BASHIR AHMED *v.* PARSHOTAM. **115 I. C. 440 = 6 O. W. N. 536 = A. I. R. 1929 Oudh 337.**

———*Inference as to.*

The decision of adverse or exclusive possession based on an inference of facts is open to second appeal as a legal conclusion to be drawn or not. In fact the proper legal effect of a proved fact is essentially a question of law. 19 Cal. 253 and A. I. R. 1918 P. C. 92, Foll. (*Fazl Ali and Chatterji, JJ.*) JAGEYANAND *v.* GIRJANANDA. **117 I. C. 644 = A. I. R. 1929 Pat. 590.**

——*Practice.*

Adverse possession is a mixed question of fact and law and cannot be allowed to be pleaded for the first time in the appeal, as a decision on it cannot be arrived at without giving the parties an opportunity of placing on the record all facts relevant thereto. (*Tekchand, J.*) MAULU *v.* BELI RAM. **102 I. C. 476 = A. I. R. 1927 Lah. 522.**

——*Mixed question of law and fact.*

The question of adverse possession is a mixed question of law and fact, and in dealing with this question the appellate Court has to consider the findings of fact arrived at by the lower appellate Court and then to see whether the inference which that Court has drawn from these facts was proper or not. (*Suhrawardy and Mukerji, JJ.*) SABITRI DASI *v.* NADIAR CHAND. **94 I.C. 38 = A. I. R. 1926 Cal. 881.**

——Whether adverse possession has been established or not, is a question of law. (*Addison, J.*) HAKIM ALI *v.* KARTAR SINGH. **98 I. C. 161 = 27 P. L. R. 89 = A. I. R. 1926 Lah. 482.**

——The finding of the lower Court on the question of adverse possession is not conclusive in second appeal. (*Wazir Hasan, A. J. C.*) INDRAPAL SINGH *v.* THAKUR DIN SINGH. **78 I. C. 895 = 10 O. L. J. 646 = 27 O. C. 77 = A. I. R. 1924 Oudh 266.**

——A finding that a house was occupied by the defendant's father adversely to the plaintiff landlord for more than 12 years before suit is finding of fact. 41 All. 669, Dist. (*Ryves and Daniels, JJ.*) BISHESHAR NATH *v.* ABDUL WAHID. **75 I. C. 672 = A. I. R. 1923 All. 382.**

——A finding that a possession is adverse is not a question of fact but a matter of legal inference drawn from the facts found. (*Hallifax, A. J. C.*) MT. MUNGA *v.* LACHMI PRASAD. **74 I. C. 51 = 6 N. L. J. 70 = A. I. R. 1923 Nag. 65.**

——The question of adverse possession, is a mixed question of fact and law. 19 Cal. 253, Referred to (*Chatterjee and Pearson, JJ.*) JOGENDRA NATH MUKERJEE *v.* RAJENDRA NATH BHATTA CHARJEE. **68 I. C. 200 = 26 C. W N. 890 = A. I. R. 1922 Cal. 54.**

——The question of adverse possession is a mixed question of fact and law and is open in second appeal so far as it is a question of inference to be drawn from the facts found by the lower Court. 19 Cal. 253 P, C. Foll. 20 C. 93 P.C.; 42 A. 152 P. C.; 24 Cal. 825; 21 B. 91; 33 B. 712, Rel. on. (*Mukerjee, Ag. C. J. and Fletcher, J.*) BALARAM GURIA *v.* SYAMA CHARAN MANDAL. **60 I. C. 298 = 33 C. L. J. 344.**

——Finding as to absence of adverse possession is one of fact. (*Martineau, J.*) MAHOMED AZIM KHAN *v.* SULTAN AHMED KHAN. **4 L. L. J. 309 = A. I. R. 1921 Lah. 264.**

—S. 100—Amendment of decree.

——A point relating to an amendment of decree is not a point which can be urged in second appeal. (*C. C. Ghose and B. B. Ghose, JJ.*) KALI PADA BOSE *v.* FANI BHUSAN ROY. **70 I. C. 173 = A. I. R. 1924 Cal. 363.**

—S. 100—Ancestral property—Finding as to.

——A finding as to the ancestral nature of certain property based upon mere conjectures and presumption is liable to be set aside in second appeal. A. I. R. 1924 Lah. 465, Foll. (*Broadway and Coldstream, JJ.*) NATHA SINGH *v.* MOHON SINGH. **97 I. C. 241 = 8 Lah. 30 = 8 L. L. J. 485 = 27 P. L. R. 721 = A. I. R. 1926 Lah. 659.**

——*Self-acquisition—Throwing into common stock.*

The question whether the self-acquired property of a member of a joint Hindu family has been thrown into the common stock or not is a question of fact. (*Odgers, J.*) RAMASWAMI *v.* RAJU. **96 I. C. 1051 = 1926 M. W. N. 635 = A.I.R. 1926 Mad. 963 = 51 M.L.J. 167.**

——*Finding of fact—Title to sue—Punjab Courts Act.*

Whether the property in dispute is ancestral is a finding of fact. Whether the plaintiffs as the collaterals in the sixth degree are entitled to sue is a finding on custom and cannot be questioned in second appeal without the production of the necessary certificate under the Punjab Courts Act. (*Abdul Raoof, J.*) MAULA DAD *v.* ALI. **76 I. C. 147 = 5 L. L. J. 449 = A. I. R. 1924 Lah. 263.**

——*Finding of fact—No evidence.*

A decision on the question on ancestral nature of land is one of fact, and ordinarily speaking such a finding cannot be assailed in second appeal. But if the finding has been arrived at on no evidence whatever on purely conjectural grounds such a finding can be gone into and examined by the High Court sitting in second appeal. 47 C. 107; 33 P. L. R. 1918, Relied on. (*Broadway and Abdul Qadir, JJ.*) MUNSHA SINGH *v.* UTTAM SINGH. **64 I. C. 428 = 4 Lah. L. J. 31 = A. I. R. 1922 Lah. 65.**

—S. 100—Appreciation of evidence.

——Practice—Appellate Court—Finding of fact based on credibility of witnesses and demeanour—Unsuccessful party seeking to reverse decision has heavy burden to discharge—Burden not discharged but finding reversed—Privy Council restored—Trial Court's findings. *Khoo Sit Hoh* v. *Lim Thean Tong*, (1912) A. C. 325, Rel. on. (*Lord Atkin.*) SITALAKSHMI AMMAL *v.* VENKATA SUBRAHMANIAN. **123 I. C. 557 = 34 C. W N. 593 = 32 Bom. L. R. 887 = 1930 M. W. N. 544 = A. I. R. 1930 P. C. 170 = 58 M. L. J. 629.**

——The finding of the lower appellate Court cannot be set aside merely on the ground that undue weight was laid on certain facts which it was proper to consider. (*Macnair, Offg. J. C.*) SITARAM *v.* DOMA. **119 I. C. 674 = A. I. R. 1929 Nag. 270.**

——Extremely strong grounds are necessary for interfering with the finding of the trial Judge who heard the witnesses, that they were unworthy of belief. (*Macnair, A. J. C.*) NARAYAN *v.* KHIWARAJ. **116 I. C 432 = A. I. R. 1929 Nag. 117.**

In second appeal the High Court cannot define the amount of weight to be attached to the evidence. (*Suhrawardy and Mukerjee, JJ.*) PRIYAMBADA DEBI *v.* PRIYA NATH. **95 I. C. 334 = 43 C. L. J. 327 = 30 C. W. N. 826 = A. I. R. 1926 Cal. 822.**

When the High Court is called upon to disturb findings of fact based entirely upon oral evidence, it should feel some hesitation before coming to a different conclusion from that of the Judge who heard and saw the witnesses deposing, especially when that course would involve giving credit to witnesses who have been disbelieved in the Court below, and when it involves accepting a story which, judged merely upon probabilities, sounds hard to accept. (*Spencer, Offg. C. J. and Viswanatha Sastri, J.*) VENKATARANGA AIYAR *v.* RAMASWAMI AIYAR. **93 I. C. 670 = 22 M. L. W. 786 = A. I. R. 1926 Mad. 173.**

———It is not sufficient for the lower appellate Court when it reverses the findings of the trial Court to merely differ from it as regards appreciation of only the oral evidence. It ought to consider the evidentiary value of the several documents on record filed by the parties. If it does come to any conclusion by misappreciation of evidence such finding is not binding in second appeal. (*Kinkhade, A J. C.*) YESHWANT *v.* DAULAT.
89 I. C. 663 = A. I. R. 1926 Nag. 129.

———*Expert evidence.*

Where it was possible that the expert evidence given on both sides was true,

Held, that the finding of the lower appellate Court could be considered afresh in second appeal. (*Sulaiman and Mukerji, JJ.*) MOHD. IBRAHIM *v.* MT. ALTAFAN.
47 All. 243 = 22 A. L. J. 1045 =
6 L. R. A. Civ. 55 = 83 I. C. 27 =
A. I. R. 1925 All. 24.

———*Witnesses—Credibility.*

Trial Court disbelieving witnesses with reference to certain statements—Appellate Court believing them as to other statements—No second appeal lies. (*Dalal, J. C.*) SANTU *v.* TARA. **85 I. C. 407 =**
A. I. R. 1925 Oudh 537.

———*Recitals in deeds.*

The question of weight and sufficiency to be attached to recitals in a deed as pieces of evidence is one of fact. 44 Cal. 186 (P. C.) Ref. (*Wazir Hasan, A. J. C.*) RAJA AMARPAL SINGH *v.* MT. CHANDRANI.
86 I. C 743 = 12 O. L. J. 134 =
A. I. R. 1925 Oudh 367.

———*Maps.*

The comparative weight to be attached to a "Thak" map and a Revenue Survey map is only a question of fact on which the decision of the lower appellate Court should not be disturbed. (*Suhrawardy and Chotzner, JJ.*) KALI PRASANNA BAHADURI *v.* RANI HEMANTA KUMARI DEBI. **79 I. C. 1038 =**
A. I. R. 1924 Cal. 977.

———*Oral Evidence.*

Where the lower Courts believed the oral evidence produced on behalf of the plaintiff in preference to that of the defendant on the question of possession even though the name of the plaintiff was not entered in the Khasra (revenue papers),

Held, that it could not be said that the Court acted wrongly in believing it in preference to the conclusion to be drawn from the absence of the plaintiff's name from the annual Khasras. (*Dalal, J. C.*) BHAIN SHANKAR DATT *v.* MANI RAM. **10 O. L. J. 643 =**
80 I. C. 457 = A. I. R. 1924 Oudh 265.

———*Documentary evidence.*

Weight to be attached to documentary evidence is a question of fact. The question whether a given document refers to the land in dispute is a question of fact. 42 All. 152 P. C. and 29 All. 203, Dist. (*Daniels, J.*) S. MOHAMMAD AHMAD *v.* BABU. **71 I. C. 762 =**
A. I. R. 1923 All. 442.

———*Signature—Genuineness of.*

Genuineness of signature—Evidence Act, S. 45—Comparison of handwriting—A finding based on comparison of signatures alone cannot be set aside in second appeal. 11 M. L. T. 424, Foll. (*Broadway and Moti Sagar, JJ.*) BALAK RAM *v.* MUHAMMAD SAID.
77 I. C. 872 = 5 L. L. J. 530 =
A. I. R. 1923 Lah. 695.

———*Misappreciation of the case.*

Finding of fact—First appellate Court misunderstanding the whole case—Re-hearing may be directed. 13 I. C. 445 Foll. (*Broadway, J.*) QADIR BAKHSH *v.* SHAMAS DIN. **73 I. C. 756 =**
A. I. R. 1923 Lah. 206.

———Where the High Court differed from the Lower Courts not only in the estimate of the evidence, but also with regard to the inferences derivable from documents produced in the case and other circumstances, their Lordships dealt with the case on its merits. (*Mr. Ameer-ali.*) JAGDEO NARAIN SINGH *v.* BALDEO SINGH.
71 I. C. 984 = 1923 M. W. N. 361 =
27 C. W. N. 925 = 3 P. L. T. 605 =
49 I. A. 399 = 36 C. L. J. 499 =
32 M. L. T. 1 = 2 Pat. 38 =
A. I. R. 1922 P. C. 272 = 45 M. L. J. 460.

———*Effect of admission—Misappreciation of.*

The misconstruction of a document which is the foundation of a suit, is a question of law, but the misconstruction of a document which is alleged to contain an admission, that is to say, a misappreciation of the meaning and effect of an admission, is not a question of law, which can be raised in second appeal. The High Court cannot look at the evidence to decide if the evidence that remains after the improperly admitted evidence is rejected, is sufficient to uphold the finding of the court below. (*Mookerjee, Ag. C.J. and Fletcher, J.*) UJIR ALI SIRDAR *v.* SHADHARI BEHARA.
68 I. C. 1003 = 35 C. L. J. 182 =
A. I. R. 1922 Cal. 185.

———*Oral evidence.*

The weight to be attached to oral evidence is not a matter for second appeal. (*Daniels, J. C.*) BHUDHAR SINGH *v.* BHIKHAN SINGH. **65 I. C. 370 =**
8 O. L. J. 629 = A. I. R. 1921 Oudh 256.

———*Documents held irrelevant, but examined.*

Where the opinion of the lower appellate Court as regards the relevancy of documentary evidence is erroneous, but it is nevertheless apparent that the evidence was examined and discussed and pronounced to be unreliable and insufficient, the High Court will not discuss the value of the evidence in second appeal. (*Lindsay, J. C.*) SANT BAKHSH *v.* GAJADHUR PRASAD.
61 I. C. 781 = 8 O. L. J. 202 =
A. I. R. 1921 Oudh 116.

—S. 100—Benami.

———The question of benami is purely a finding of fact and cannot be challenged in second appeal. (*Wazir Hasan and Pullan, JJ.*) SURAJ NARAIN SINGH *v.* NARBADA PRASAD. **5 O. W. N. 1122 =**
115 I. C. 99 = 4 Luck. 265 =
A. I. R. 1929 Oudh 83.

—S 100—Burden of proof.

———Question of fact—Finality attaching to question of fact can be disturbed in second appeal if *onus* wrongly put on parties—C.P. Code, S. 103. A I.R. 1929 P. C. 13, Rel. on. (*Graham and Mitter, JJ.*) CHAINTA DASYA *v.* BHALKU DAS.
51 C. L. J. 465 = A. I. R. 1930 Cal. 591.

———*Ignoring rule as to second appeal lies.*

Where the lower appellate court ignored the rule as to *onus* of proof in transactions entered into by *pardanashin* ladies, *held*, that the High Court could interfere in second appeal and remand the case for fresh disposal. (*Graham and Mitter, JJ.*) CHINTA DASYA *v.* BHALKU DAS. **51 C. L. J. 465 = A. I. R. 1930 Cal. 591.**

———Burden thrown on wrong party—Finding of fact is not binding—Privy Council gave finding of fact. (*Lord Atkin.*) PEDDI REDDI JOGI REDDI *v.* PANEM CHINNABI REDDI. **114 I. C. 5 =**
31 Bom. L. R. 264 = 56 I. A. 6 =
33 C. W. N. 233 = 49 C. L. J. 98 =
29 M. L. W. 86 = 52 Mad. 83 =
1929 M. W. N. 43 = A. I. R. 1929 P. C. 13 =

C. P. CODE, (1908), S. 100—Burden of proof.

56 M.L.J. 165.

———*Error of principle—Appeal lies.*

A decision based on an error of the principle as governing the question of *onus* will be set aside. (*Fforde and Campbell, JJ.*) THE FIRM GANDA SINGH *v.* NUR AHAMAD. **96 I. C. 820 = A. I. R. 1926 Lah. 653.**

———Onus *wrongly placed.*

Where the plaintiff has not been prejudiced in any way owing to the fact that the initial *onus* was wrongly placed upon him, *held*, that no reason for interference is made out. (*Shadi Lal, C. J. and Brasher, J.*) NAGINA SINGH *v.* MOTA SINGH. **69 I. C. 521 = A. I. R. 1924 Lah. 335.**

———The question of *onus* is one of law and so can be taken up in second appeal. (*Broadway, J.*) HAYAT *v.* ALI MOHAMMAD. **73 I. C. 216 = A. I. R. 1924 Lah. 195.**

———In order to maintain a contention of fact in second appeal and even more so in an appeal under the Letters Patent, it would be incumbent on the person raising it to plead and to show from the record, that documentary evidence establishing his contention of fact had either been disregarded by the Court of first appeal or misinterpreted. (*Piggott and Walsh, JJ.*) MATHURA PRASAD *v.* RAMESHWAR. **65 I. C. 371 = 44 All. 169 = 19 A. L. J. 964 = A. I. R. 1922 All. 312.**

———Question as to *onus* of proof is one of law. (*Broadway and Abdul Quadir, JJ.*) GOIDIT SINGH *v.* KARAM DUD. **77 I. C. 246 = 4 L. L. J. 199 = A. I. R. 1921 Lah. 199.**

———Question of *onus* of proof is one of law. (*Broadway and Wilberforce, JJ.*) GANGA RAM *v.* RULIA. **64 I. C. 901 = 2 Lah. 249 = 106 P. L. R. 1921 = A. I. R. 1921 Lah. 128.**

———A correct appreciation by an Appellate Court of a direction of the Lower Court as to the burden of proof, and a consequent arriving at a finding of fact must be accepted in second appeal. (*Sadasiva Aiyar and Spencer, JJ.*) SHANMUGA UDAYAR *v.* KANDASAMI ASARI. **59 I. C. 973 = 12 M. L. W. 170.**

———The question upon which party the *onus* of proving any particular point lies, is undoubtedly a question of law on which a second appeal lies. (*Scott-Smith, J.*) MT. NIAMAT BIBI *v.* MAHOMED FAIZ. **65 I. C. 745 (Lah.).**

—S. 100—Concurrent findings.

———Concurrent findings of the Courts of India that defendants were in possession, through their agents, of lands the proprietary title of which was the plaintiff at the time of the institution of the suit, rendering O. 1, R. 8, inapplicable when supported by ample evidence will not be disturbed in second appeal. (*Sir Lancelot Sanderson.*) (MAHANT) BHAGWANPURI *v.* SECRETARY OF STATE. **34 C. W. N. 849 = A. I. R. 1930 P. C. 232.**

———Where there exist concurrent findings of fact which support the judgment under appeal and there is evidence upon which these findings could have been reached, and there did not exist n the case any circumstances which would justify reviewing these findings, the appellant's case must be dealt with on the basis of these findings; *Robins* v. *National Trust Co.* (1927) A. C. 515, Foll. (*Lord Tomlin.*) MAFATLAL GAGALBAI *v.* JIWANLAL GIRDHARDAS. **118 I. C. 263 = 31 Bom. L. R. 1369 = 50 C. L. J. 336 = 30 M. L. W. 825 = A. I. R. 1929 P. C 205 = 57 M. L. J. 594.**

———Privy Council—Concurrent finding is no finding if based on error of law. (*Viscount Dunedin.*) POPE APPLIANCE CORPORATION *v.* SPANISH RIVER PULP AND PAPER MILLS, LTD. **116 I.C. 593 = A. I. R. 1929 P. C. 38.**

C. P. CODE, (1908), S. 100—Consideration of evidence—Omission.

———Concurrent findings of two lower Courts preclude High Court from interfering in second appeal. (*Kinkhede, A. J. C.*) KISAN *v.* TUKARAM TIDKE. **A. I. R. 1929 Nag. 180.**

———*Documents—Effect of.*

Lower appellate Court forming its opinion on legal effect of some of the documents—Correctness of its opinion can be challenged in second appeal. (*Kinkhede, A. J. C.*) DEOBIA *v.* RAJA JANARDHAN. **11 N. L. J. 21 = 111 I. C. 488 = A. I. R. 1928 Nag. 153.**

———Concurrent finding cannot be impugned. (*Raza, J.*) BIJRANG SINGH *v.* MT. ABADAN. **96 I. C. 283.**

———*Perverse findings.*

Ordinarily it is not possible on second appeal to go behind concurrent findings of fact, but where not only the findings are perverse in the sense that they were opposed to the weight of the oral evidence, but that it was due to the fact that the trial Court wholly ignored the entry in certain document, whilst the first Appellate Court entirely failed to realise its probative value, the High Court set aside the concurrent findings of fact. (*Pratt, J.*) MAUNG HLAMY *v.* MAUNG CHIT SU. **76 I. C. 449 = 1 Rang. 135 = A. I. R. 1923 Rang. 196.**

—S. 100—Consideration of evidence—Conjectures.

———Decision arrived at by ignoring oral evidence entirely proceeding on conjectures and relying on inadmissible evidence can be reversed. (*Johnstone, J.*) SHER SINGH *v.* THAKUR SINGH. **124 I. C. 337 = A. I. R. 1930 Lah. 150.**

———Where the conclusion of the lower appellate Court was arrived at, partly on a series of theories and assumptions, and partly due to his failure to realize the evidential value of certain document, the findings of fact are open to challenge in second appeal. (*Findlay, J. C.*) PANDURANG SHEO RAM *v.* SAMBHAJI. **99 I. C. 1046 = A. I. R. 1927 Nag. 392.**

—S. 100—Consideration of evidence—Interference.

———Where the lower Courts arrive at a finding when there is no evidence on the point, there is an obvious error of law which vitiates the judgment. The High Court can admit an appeal and is not confined to a consideration of the particular error which vitiates the judgment but the whole case is open for consideration. (*Chari, J.*) MA SA *v.* MA SEIN NI. **7 Rang. 751 = A. I. R. 1929 Rang. 257.**

———A finding of fact based on legally admissible evidence after due consideration thereof cannot be interfered with by the High Court in second appeal. (*Broadway and Campbell, JJ.*) BASHESHAR NATH *v.* MEHR CHAND. **79 I. C. 440 = A. I. R. 1923 Lah. 21.**

———Where the finding of an Appellate Court is based on evidence which is inadmissible, the High Court will interfere. (*Tudball and Stuart, JJ.*) SRI THAKURJI *v.* HIRDE NARAIN. **63 I. C. 811 (All.).**

———A finding of fact can be challenged in second appeal where the lower appellate Court has held that there is no evidence at all concerning a point while in fact there is such evidence. (*Chatterjee and Pearson, JJ.*) RAJESWARI DASI *v.* PULIN BEHARI. **25 C. W. N. 881 = 62 I. C. 647 = A. I. R. 1921 Cal. 71.**

—S. 100—Consideration of evidence—Omission.

———Finding based only on part of evidence legally on record is not legal and binding in appeal. (*Tek Chand, J.*) GHANGA LAL *v.* GIAN CHAND. **112 I. C. 385 =**

A. I. R. 1929 Lah. 145.

———Question regarding a person being a Karnavan—Previous judgment mentioning him as such—Failure of trial Court to take that judgment into consideration—Decision is vitiated and can be interfered within second appeal. (*Srinivasa Ayyangar, J.*) Narayanan Nair *v.* Paru Amma. **27 M. L W. 827 = 110 I. C. 593 = A. I. R. 1928 Mad. 826 = 54 M. L. J. 600.**

———Where the first appellate Court has omitted to notice material circumstances and the evidence in the case and has misdirected itself.

Held, that the High Court in second appeal can direct the case to be re-heard. (*Waller, J.*) Vyasa Rayar *v.* Subbarayar. **100 I. C. 306 = A. I. R. 1927 Mad. 493.**

———Findings of fact arrived at by the Court of first appeal should not be interfered with by the Court of second appeal merely on the ground that, on the evidence adduced in the case, it would have taken a different view from that taken by the Court of first appeal. They can, however, be held to be not binding as valid findings of fact if the Court of first appeal has omitted to take into consideration the most important evidence in the case or has taken an erroneous view of law in deciding the case, or has looked at the case from an erroneous point of view or where it has not arrived at that finding of fact after a fair, honest and full consideration of the evidence on the record. (*Misra, J.*) Hari Kishen *v.* Raghubar Dayal. **97 I. C. 853 = 1 Luck. 489 = 3 O. W. N. 645 = 13 O. L. J. 696 = A. I. R. 1926 Oudh 578.**

———Finding of fact can be set aside when lower Court has not considered whole of evidence or finding is not reasonably deducible from the evidence. 174 P.L.R. 1914 and 48 I.C. 742. Foll. (*Moti Sagar, J.*) Nagina Singh *v.* Jiwan Singh. **79 I. C. 107 = A. I. R. 1925 Lah. 87.**

———A finding on a question of fact would be binding if based on a proper consideration of all the material evidence otherwise the finding can be reversed. (*Kumaraswami Sastri and Waller, JJ.*) Secy. of State *v.* Nandappa Shetty. **86 I. C. 919 = 21 M.L. W. 227 = A. I. R. 1925 Mad. 447.**

———Finding without weighing evidence is not binding. (*Dalal, J. C.*) Mt. Maharaja *v.* Bajrang Bali. **87 I. C. 1040 = A. I. R. 1925 Oudh 747.**

———The weight to be given to one particular piece of evidence is a question for the Court which deals with the facts, and the omission to refer to a particular piece of evidence in the judgment is not a sufficient ground for setting aside a finding. (*Daniels, J. C.*) Shiva Prasad *v.* Lal Baksh Singh. **88 I. C. 490 = A. I. R. 1925 Oudh 691.**

———Where the evidence in a case has not been viewed as required by law, a point of law is raised and the question can be gone into in second appeal. (*Dalal, J. C.*) Zahid Ali *v.* Mt. Sahir Banu. **86 I. C. 101 = 12 O. L. J. 130 = 2 O. W. N. 10 = A. I. R. 1925 Oudh 384.**

———Where the first appellate Court omitted to note a very important document on record, its finding cannot be considered final. 33 A. 799. Dist. (*Gokul Prasad, J.*) Tika Ram *v.* Duba Shib Lal. **71 I. C. 992 = A. I. R. 1923 All. 401.**

———Where a finding of fact is arrived at upon no evidence, the finding is liable to be set aside in second appeal. A finding of fact to be binding on a Court of second appeal must be a judicial decision reached on a consideration of the whole of the evidence, and where it appears that all available evidence has not been considered the High Court will interfere and should interfere in second appeal. (*Broadway and Moti Sagar, JJ.*) Mausa Ram Gordhan Das *v.* Mangal Sain Duni Chand. **65 I. C. 497 = A. I. R. 1922 Lah. 149.**

———Where there are circumstances showing that the evidence on record has not been assessed at its true value and various important factors to be taken into consideration while appraising that evidence have not been considered the High Court would interfere. (*Prideaux, A.J.C.*) Lal Singh *v.* Parasram. **68 I. C. 332 = A. I. R. 1922 Nag. 226.**

———Failure of the appellate Court to consider evidence relied on by the trial Court is an error of law. (*Coutts and Das, JJ.*) Mt. Sonekuar *v.* Baidyanath Sahay. **3 Pat. L. T. 483 = A. I. R. 1922 Pat. 562.**

———Second appeal—Finding of fact—Whole evidence not considered—Finding is not binding. (*Coutts and Das, JJ.*) Girji Prasad *v.* Jugal Kishore. **70 I. C. 853 = A. I. R. 1922 Pat. 503.**

———Where the judgment of the court below is not satisfactory and the court has not come to a finding on a consideration of the whole evidence on the point, the case should be remanded for a re-hearing. (*Suhrawardy and Cuming, JJ.*) Isap Ali *v.* Satis Chandra Roy. **65 I. C. 504 (Cal.).**

———Lower Court not considering oral evidence at all and confining itself to documentary evidence—Findings of fact can be attacked. (*Dawson Miller, C. J. and Mullick, J.*) Bankhandi Rai *v.* Kishori Mandal. **61 I. C. 102 = 6 P. L. J. 72 = 2 P. L. T. 17 = 1921 P. H. C. C. 113 = A. I. R. 1921 Pat. 18.**

S. 100—Construction of Documents.

Double interpretation.
Finality.
Intention.
Legal effect.
Matter of law.
Meaning of words.
Misconstruction.
Nature of transaction.
Question of fact.
Question of law.
Sufficiency of evidence.
What is not.
Wrong interpretation.

—S. 100—Construction of documents—Double interpretation.

———Where there are two possible interpretations of terms or expressions in a deed or document and the Courts below have adopted one of the interpretations, High Court is not justified in refusing to accept that interpretation in second appeal : 46 I. C. 794 and A. I. R. 1923 Lah. 239, Rel. on. (*Bhide, J.*) Abdul Latif *v.* Rahmutullah. **123 I. C. 533 = A. I. R. 1930 Lah. 139.**

———Inferences of lower Court from documents cannot be questioned in second appeal though the High Court differs from inferences of the appellate Court. (*Wazir Hasan, A. J. C.*) Mt. Sitala *v.* Ram Bhukhan. **85 I.C. 967 = A. I. R. 1925 Oudh 611.**

———Reading of words in deed in one of two possible ways is a point of fact and no second appeal lies. (*Scott-Smith and Abdul Qadir, JJ.*) Nigahia Ram *v.* Bhagu Mal. **65 I.C. 580 = A. I. R. 1922 Lah. 240.**

—S. 100—Construction of document—Finality.

———Interpretation of document not being document of title is for Court of first appeal, and High Court cannot upset its decision in second appeal. (*Dalip Singh, J.*) Allah Ditta *v.* Khuda Baksh.

A. I. R. 1930 Lah. 691.

———The findings based upon construction of or inferences drawn from the documentary evidence, cannot be questioned in second appeal. (*Raza, J.*) SUKHDEO PANDE *v.* PROGDAT PANDE. **104 I.C. 760 = A.I.R. 1928 Oudh 18.**

———Findings based upon the construction of or inferences drawn from documentary evidence cannot be questioned in second appeal : *Chatnay* v. *The Brazilian Submarine Telegraph Company, Ltd.* (1891) 1 Q.B. 79 and A. I. R. 1923 P. C. 187, Foll. (*Stuart, C. J. and Raza, J.*) BADRI SINGH *v.* BAM BAHADUR SINGH. **100 I.C. 631 = 4 O. W. N. 165 = A. I. R. 1927 Oudh 541.**

———Where documents which are mere pieces of evidence are considered by the lower appellate Court in determining questions of facts, findings based on constructions of, or inferences drawn from, such documentary evidence cannot be questioned in second appeal : A. I. R. 1923 P. C. 187, Foll. (*Wazir Hasan and Raza, JJ.*) CHANDIKA SINGH *v.* BITHAL DAS. **99 I. C. 183 = 3 O. W. N. Sup. 277.**

—S. 100—Construction of document—Intention.

———It is not open to a Court in second appeal to re-assess the considerations which led the lower Courts to a particular conclusion as regards the intention of parties to a contract. (*Curgenven, J.*) RAMAYYA CHETTI *v.* MANNARU CHETTI. **A. I. R. 1930 Mad. 590.**

—S. 100—Construction of document — Legal effect.

———Question whether the terms contained in a correspondence amount to binding contract between the writers is one of law. *Cheveley* v. *Fuller*, 13 C. P. 122, Ref. (*C. C. Ghose and Page, JJ.*) CURRIMBHOY & CO. *v.* L. A. CREET. **123 I. C. 250 = 50 C. L. J. 208 = 57 Cal. 170 = A. I. R. 1930 Cal. 113.**

———A question of fact founded upon the effect of a series of documents or of one document quite apart from any difficulties of construction treating the documents as being narratives of events recorded in them cannot be challenged in second appeal. If, however, the question is concerning the construction of the documents which are transfers, and which are tendered to prove legal rights, then the finding of fact can be challenged in second appeal. A. I. R. 1923 P. C. 187 (P. C.), Foll. (*Mears, C. J. and King, J.*) GOSAIN *v.* PURAN SINGH. **95 I. C. 582 = 48 All. 588 = 24 A. L. J. 700 = A. I. R. 1926 All. 542.**

———A finding of fact based on the view taken by the Court as to the legal effect of a document is open to question in second appeal. (*Stuart and Boys, JJ.*) MEHARBAN SINGH *v.* PANNALAL. **89 I. C. 617 = 23 A. L. J. 869 = 6 L. R. A. Civ. 399 = A. I. R. 1926 All. 75.**

———Deed—Construction—Question was held to be one of law. (*Maung Gya, J.*) ABDUL RAHIM *v.* MAHOMMED CASSIM. **88 I. C. 314 = 4 Bur. L. J. 27 = A. I. R. 1925 Rang. 255.**

—S. 100—Construction of documents—Matter of law.

———Construction of documents is a matter of law which a Court in second appeal can properly go into. (*Mirza and Patkar, JJ.*) GIRDHARLAL MANSUKHBAI GANDHI *v.* KAPADVANJ MUNICIPALITY. **32 Bom. L. R. 610 = A. I. R. 1930 Bom. 317.**

—S. 100—Construction of document—Meaning of words.

———What the Commissioners resolved to do at their meeting, and what they meant in their resolution by the expression "assessment," is a question of fact. It cannot be said that the determination of the point depends on the construction of any document. The point depends on the record of the proceedings of the Commissioners. The meaning of his words is a question of fact in all cases. The effect of the words is a question of law. (*Cuming and B. B. Ghose, JJ.*) BHUBAN MOHAN *v.* DACCA MUNICIPALITY. **94 I. C. 231 = 53 Cal. 453 = 30 C. W. N. 405 = 44 C. L. J. 275 = A. I. R. 1926 Cal. 607.**

———Construction of document includes two things, namely, meaning of words and its legal effect—The former is a question of fact and the latter one of law. A. I. R. 1923 Lah. 626, Foll. (*Addison, J.*) DEVI CHAND *v.* JAI CHAND. **90 I. C. 1047 = 26 P.L.R. 605 = A. I. R. 1926 Lah. 21.**

———Meaning of a term in common language is a question of fact, but the effect in a document of the use of the term is one of law and challangeable in second appeal. *Chateney* v. *Brazilian Submarine Telegraph Company, Limited*, (1891) 1 Q. B. 79, Foll. ; A. I. R. 1923 All. 337, Dist. (*Ashworth, J.*) SITLA BAKHSH SINGH *v.* GULAB SINGH. **93 I. C. 927 = 13 O. L. J. 565 = 3 O. W. N. 213 = A. I. R. 1926 Oudh 260.**

———If extrinsic evidence is necessary and therefore admissible to determine the meaning of the words used in a document the construction of the document is a question of fact, which cannot be re-agitated in second appeal. But if the question is one of construction of the document upon the document itself, then it is a question of law which can be considered in second appeal. (*Greaves and Graham, JJ.*) PRASANNA KUMAR RAY *v.* ARUN CHANDRA SINGHA. **85 I. C. 693 = 29 C. W. N. 353 = A. I. R. 1925 Cal. 656.**

———Meaning of words is question of fact and their legal effect is question of law. 66 L. T. 739, Foll. (*Moti Sagar, J.*) SHANKAR DAS *v.* MANSA RAM. **78 I. C. 36 = A. I. R. 1925 Lah. 150.**

———The meaning of words is a question of fact in all cases ; the effect of the words is a question of law. *Chatenay* v. *Brazilian Submarine Telegraph Co., Ltd.*, (1891) 1 Q. B. 79, Foll. (*Stuart, J.*) BADRI PRASAD *v.* RAJ KUNWAR. **75 I. C. 686 = A. I. R. 1923 All. 337.**

———Meaning of words is a question of fact and effect of words is one of law. (1891) 1 Q. B. 79, Foll. A second appeal is not admissible merely because some portion of the evidence is in writing of which the meaning has been mistaken by the lower appellate Court. (*Campbell and Moti Sagar, JJ.*) DAL SINGH *v.* PLUIMAN. **80 I. C. 264 = A. I. R. 1923 Lah. 626.**

—S. 100—Construction of document—Misconstruction.

———*Interpretation of settlement record is a question of fact.*

The interpretation of an obscure settlement record is a question of fact. " The mere fact that a writing has to be read and understood in order to determine the answer to the question, does not of itself make the question one of law". 55 I. A. 380 ; 56 M. L. J. 1 (P. C.), Foll. The High Court has no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may be. 52 M. 538 = 57 M. L. J. 64 (P. C.), Foll. (*Mukerji and Bennet, JJ.*) GANGA BAKSH *v.* SHIBBA.

124 I. C. 26.

———A special appeal does not lie because some portion of the evidence may be in writing and the Judge makes a mistake as to the meaning of it. For instance a writing supposed to contain an admission may be put in as part of the evidence but a mistake in its meaning is not a misconstruction of a document upon which the special appeal will lie, if it is connected with other evidence affecting its construction. 19 W. R. 222, Foll. The misconstruction of a document which is the foundation of the suit, which is in the nature of a contract or a document of title is allowed to be a ground for a second appeal. (*Mookerjee and Chotzner, JJ.*) PRAN KISHORE TARAFDAR *v.* SARODA PROSAD PAKRASI.

72 I. C. 55 = 37 C. L. J. 580 = A. I. R. 1923 Cal. 358.

———Misreading of documents not of title is no point of law. (*Das, J.*) MAHABIR MISSER *v.* MT. ASO KUER. **67 I. C. 435 = A. I. R. 1923 Pat. 154.**

—S. 100—Construction of document—Nature of transaction.

———Question whether sale-deed is meant to be joint transaction making vendees jointly liable or is really several transactions making each vendee responsible for his share is a question of fact depending upon intention of parties—Contract Act, S. 43. In each case the point has to be determined by a reference to the sale-deed and any evidence of surrounding circumstances as to the intention of the parties. 6 P. R. 1914 ; 66 I. C. 466 ; 48 P. R. 1907 ; 6 P. R. 1909; A. I. R. 1928 Lah. 572 ; 19 All. 148; 8 All. 462 and A. I. R. 1924 Lah. 431, Ref. (*Zafar Ali and Dalip Singh, JJ.*) SHAM LAL *v.* GURBACHAN SINGH. **123 I. C. 283 = 31 P. L. R. 201 = A. I. R. 1930 Lah. 806.**

———A finding that a deed which is ostensibly one of gift is in reality a sale, is a finding of fact and as such cannot be challenged in second appeal. (*Sulaiman and Pullan, JJ.*) MT. MOHMUDA BIBI *v.* ABDUL HAMID. **120 I. C. 557.**

———The question as to whether, having regard to the terms of a promissory-note, any personal liability has been undertaken by the executant is a pure question of law to be decided with reference to the terms of promissory-note. (*C. C. Ghose and Buckland, JJ.*) SHYAM SUNDAR *v.* TITAGHUR PAPER MILLS CO., LTD.

106 I. C. 848 = 46 C. L. J. 566 = 32 C. W. N. 125 = A. I. R. 1928 Cal. 123.

———Where the question whether the transaction was a mortgage or sale does not depend merely upon the construction of the terms of the document but also upon the surrounding circumstances, the question is one of fact and not of law and so no second appeal is competent. 16 P. R. 1907 ; 36 P. R 1899 and 120 P. L. R. 1916, Foll.; 45 P. R. 1895, not Foll. ; 19 P. R. 1905, Dist. (*Bhide, J.*) GUL MAHAMMAD KHAN *v.* SHEIKH GULAM DASTGIR. **110 I. C. 428 = A. I. R. 1928 Lah. 667.**

———The question whether any particular stipulation is only by way of compensation or by way of penalty depends upon the construction of the particular document or contract and on the circumstances of each case. (*Srinivasa Aiyangar, J.*) RAMALINGA *v.* MEENAKSHISUNDARAM. **85 I. C. 261 = 21 M. L. W. 54 = A. I. R. 1925 Mad. 177 = 47 M. L. J. 833.**

———Whether an entry in the wajib-ul-arz is a record of an alleged custom or of a contract being a question of the construction of a document is a question of law which must be entertained in second appeal. (*Cuming, A. J. C.*) RAM KUMAR *v.* HAR PRASAD.

76 I. C. 1021 = A. I. R. 1925 Oudh 64.

—S. 100—Construction of document—Question of fact.

———The conclusions of Courts that the stipulation as to further security was a condition precedent to the liability of a particular person are conclusions of fact and cannot be called matters of law as being a legal construction put upon agreed words. (*Viscount Sumner.*) MD. ALI MAMOOJEE *v.* W. S. G. HARVE.

115 I C. 722 = 31 Bom. L. R 700 = 33 C. W. N. 675 = 29 M. L. W. 445 = A. I. R. 1929 P. C. 63.

———The question whether a certain sum was paid before a certain date, or then remained unpaid, is in itself a mere question of fact. The question what it was paid for, if it was paid at all, is *prima facie* a question of fact also. This is equally so whether an oral statement or a written record was made about it or whether an inference has to be drawn from the circumstances of the payment. It is only when the legal obligation as to the date of payment is brought into question that the question becomes one of law at all. Again, the mere fact that a writing has to be read and understood in order to determine the answer to the question does not of itself make the question one of law. Entries in books of account are in themselves only narratives of monetary transactions, expressed by arranging figures in a particular way for the purpose of showing the result of a series of payments and receipts or other similar transactions. Therefore, the question as to the proper construction to be put upon the entries in a jama wasil baki, though the meaning of some of the entries is found to be a matter of some difficulty, is not a question of law. The facts stated in the jama wasil bakis are materials from which, when their purport is gathered, the inference of fact is finally to be drawn, namely, whether or not certain and sufficient payments had been made and made in time. Errors in those accounts, and obscurity in the mode of keeping them and of posting the amounts mentioned, are no more than similar errors and obscurities would be in oral testimony, and present the same difficulties in drawing a conclusion, but that conclusion, when once it is arrived at, is one of fact and no question arises of legal problems turning on the construction of legal instruments. A. I. R. 1919 P. C. 60, Dist. (*Viscount Sumner.*) NARENDRA NATH DATTA *v.* ABDUL HAKIM. **111 I. C. 288 = 55 I. A. 380 = 48 C. L. J. 557 = 28 M. L. W. 847 = A. I. R. 1928 P. C. 243 = 56 M. L. J. 1.**

———Though it is quite true that the mere interpretation of a document standing by itself is rarely, if ever, a question of fact, it is equally true that where a document leaves part of the subject-matter ambiguous, evidence may be given on both sides to remove the ambiguity and then the interpretation thereof becomes a question of fact. (*Walsh and Kendall, JJ.*) PUTTULAL *v.* RAMCHANDAR. **103 I. C. 255 = A. I. R. 1927 All. 689.**

———The question of the construction of documentary evidence, apart from the construction of a document of title which is the foundation of a claim, is one of fact and not of law and cannot be agitated in second appeal. A. I. R. 1925 All. 39. Foll. (*Addison, J.*) DEVI CHAND *v.* JAI CHAND. **90 I. C. 1047 = 26 P. L. R. 605 = A. I. R. 1926 Lah. 21.**

———*Landlord and tenant—Record-of-rights describing dahiyak as abwab—Court looking into collection papers and holding entry to be wrong—Finding is one of fact.*

An entry in the record-of-rights classed the landlord's claim on account of dahiyak as an abwab. The lower appellate Court looked at the zamindari collection papers for many years and came to the conclusion that the presumption attaching to the record-of-rights had been rebutted and that the charge on account of dahiyak was not an illegal cess within the meaning of the Bengal Tenancy Act.

Held, that the finding of the lower appellate Court was one of fact based on evidence and could not be challenged in second appeal. (*Mullick and Ross, JJ.*) GONDA SINGH *v.* JITAN MAHTO. **88 I. C. 395= 6 P. L. T. 801=3 Pat. L. R. 109= A. I. R. 1925 Pat. 795.**

———Where admittedly the deed is on its face a lease and the question in dispute is merely whether the real contract between the parties was something different from the contract entered in the deed. *Held*, that the finding on this point is clearly a finding of fact. 37 I. C. 297. Ref. (*Martineau, J.*) KAPUR CHAND *v.* CHET RAM. **80 I. C. 494=5 Lah L. J. 541= A. I. R. 1924 Lah. 260.**

—S. 100—Construction of document—Question of law.

———Interpretation of a document is undoubtedly a question of law. (*Shadi Lal, C. J. and Agha Haider, J.*) ALI AHMAD *v.* KHAN MAHOMED. **120 I. C. 420=A. I. R. 1929 Lah. 833.**

———The question of interpretation of the terms of a document of title is one of law and is open to challenge in second appeal. 34 All. 579 (P. C.) and A. I. R. 1919 P. C. 60, Foll.: A.I.R. 1926 Lah. 672, Dist. (*Agha Haider and Bhide, JJ.*) DAYAL SINGH *v.* BELI RAM NATHU RAM. **115 I. C. 77=A. I. R. 1929 Lah. 38.**

———Whether a certain document is a will and not a gift or a family arrangement, depends upon the right construction of a document and involves a question of law. 34 All. 579, Foll. (*Kolhatkar, A. J. C.*) MAHADEO *v.* GANESHRAM. **113 I. C. 373= A. I. R. 1928 Nag. 308.**

———The question of a right construction of document and of legal inference to be drawn from a document are questions of law and can be considered in second appeal. 34 All. 579 (P. C.); 42 Bom. 344 and A. I. R. 1919 P. C. 60, Ref. (*Kolhatkar, A. J. C.*) KRISHNAJI KUNBI *v.* TUKARAM KUNBI. **111 I. C. 402= A. I. R. 1928 Nag. 289.**

———If the construction of a document is necessary for deciding a material question, it is a point of law on which a second appeal can lie, so the construction of a document as an instrument of title can be the subject of a second appeal. A. I. R. 1923 P. C. 187 (P. C.), Appl.; 34 All. 579 (P. C.), Foll. (*Fawcett and Madgavkar, JJ.*) GORDHANDAS *v.* DHIRAJLAL. **95 I. C. 81= 28 Bom. L. R. 467=A. I. R. 1926 Bom. 493.**

———Construction of report of Commissioner under O. 26, R. 10, is not a question of law. A. I. R. 1923 P. C. 187, Foll. (*Simpson, A. J. C.*) SUMER SINGH *v.* DALTHAMMAN SINGH. **90 I. C. 911=A. I. R. 1926 Oudh 151.**

———Construction of a title deed is a question of law. (*Kulwant Sahay, J.*) GANESH LALL *v.* BISESAR PANDEY. **88 I. C. 820=A. I. R. 1926 Pat. 49.**

———Practice—Fact and law—Interpretation of document is a question of law. (*Kinkhede, A. J. C.*) TULARAM *v.* MT. SUMRATI. **79 I. C. 621= A. I. R. 1924 Nag. 422.**

———In second appeal generally High Court should not consider whether or not the lower Courts have taken a right view of evidence in coming to findings of fact, but the construction of documents upon which the Courts below mainly base their view that a custom was shown, can certainly be considered by High Court in order to see whether their meaning has been rightly interpreted. (*Bucknill and Ross, JJ.*) NATHUNI RAI *v.* SIR

RAMESHWAR SINGH BAHADUR. **73 I. C. 629= 1 Pat. L. R. Civ. 289=A. I. R. 1924 Pat. 147.**

———So far as the nature of the contract is to be gathered from the language used, this is a question of construction which is a question of law. So far however as it is to be gathered from external facts proved in evidence, it is a question of fact. (*Ryves and Daniels, JJ.*) BISHAMBAR NATH *v.* MUHAMMAD UBAID ULLAH KHAN. **77 I. C. 572=45 All. 581= 21 A. L. J. 503=4 L. R. A. Civ. 433= A. I. R. 1923 All. 586.**

———Whether a condition in a deed is penal within S. 74, Contract Act, is a question of law. 18 I. C. 624, Dist. (*Scott-Smith, J.*) LACHHMAN *v.* SANTA. **64 I. C. 350=14 P.L.R. 1922=A.I.R. 1921 Lah. 212.**

———The construction of a deposition is what the Court thinks is proved by it and it is wrong to speak of it as a construction so as to make it a question of law. (*Abdul Raoof and Harrison, JJ.*) RAGGU MAL *v.* SITA RAM. **63 I. C. 575 (L.).**

—S. 100—Construction of document—Sufficiency of evidence.

———*Interference with a decision based on something which the Record-of-Rights does not contain is justifiable even if the Record-of-Rights is merely a document of evidence.*

If the Record-of-Rights is a document of title obviously it is open to the Court in appeal to construe that document. But it is open to the High Court in second appeal to interfere with a decision based upon the Record-of-Rights if the decision is founded on something which the Record-of-Rights does not contain even if the Record-of-Rights is not a document of title but merely a document of evidence. (*Mullick, Ag. C. J. and Kulwant Sahay, J.*) BHUPAL MISSIR *v.* SARBAN LAL. **91 I. C. 735=A. I. R. 1925 Pat. 725.**

———Construction of documents is not a question of fact—Facts insufficient for finding—High Court can interfere. (*Dhobly, A. J. C.*) KRISHNARAO *v.* NILKANTHA. **69 I. C. 800=18 N. L. R. 163= 5 N. L. J. 25=A. I. R. 1922 Nag. 52.**

—S. 100—Construction of document—What is not.

———Where the Courts holds that the document is so worded as to obscure its meaning and prevent the executants from grasping the fact that they were executing a deed of surrender, it is not an interpretation of a document and such finding does not involve a point of law. (*Jackson, A. J. C.*) GULABCHAND *v.* BHAIYALAL. **119 I. C. 698=A. I. R. 1929 Nag. 343.**

———Where the words are perfectly plain and the question is to what property they refer to that cannot be construed as a question of construction of a document and, therefore, cannot be argued in second appeal. (*Cuming and Chakravarti, JJ.*) MONOHAR MUKERJEE *v.* SURESH CHANDRA MUKERJEE. **91 I. C. 423.**

—S. 100—Construction of document—Wrong interpretation.

———C. P. Code, S. 100—Finding based on wrong interpretation is not binding. (*Stuart, C. J. and Misra J.*) FAQIR BAKHSH *v.* GHIRRAON. **113 I. C. 367= A. I. R. 1929 Oudh 241.**

—S. 100—Costs.

———If the lower appellate Court has no right to interfere with the order of the trial Court in the matter of awarding costs the decision of the lower appellate Court is contrary to law and is a proper subject for second appeal. But if the order of the trial Court is of such a nature as to be appealable to the lower appellate Court and the lower appellate Court's order is based upon a judicial discretion properly exercised, there can be no second appeal. The question as to whether a second appeal lies or does not lie is largely academic, for it is always necessary to examine the merits before the question is decided. (*Stuart, C. J. and Wazir Hasan, J.*) BISHUN NARAIN *v.* MAZHARUL HAQI. **107 I. C. 881 = 5 O. W. N. 35 = A. I. R. 1928 Oudh 224.**

———A question of costs cannot be allowed to be litigated in second appeal, where the two Courts below have taken the same view and when no substantial point on the merits arises in the case. (*Mukerji, J.*) DAMODAR DAS *v.* MUHAMMAD ISMAIL. **93 I. C. 1008 = A. I. R. 1926 All. 419.**

———Question of principle involved—Second appeal lies. 12 Cal. 179, Foll. (*Newbould and Cuming, JJ.*) RAMESHCHANDRA *v.* MOHIM CHANDRA. **68 I. C. 600 = 35 C. L. J. 156 = A. I. R. 1921 Cal. 604.**

———Interference with the discretion of the Trial Court by the Lower Appellate Court in the matter of costs, is a ground for interference in second appeal under S. 100. (*Walsh, J.*) HAKIM ZAHUR AHMAD *v.* FATEH ULLAH. **64 I. C. 962 = 3 U. P. L. R. (All.) 55.**

—S. 100—Court-fee.

———Plaintiff claimed possession of a house from a tenant holding over and paid court-fee under S. 7 (xi) (cc). The defendants raised the question of title and in consequence of their plea, the question of title had to be gone into. The defendants appealed but did not pay court-fee on the market value of the house. In second appeal defendants raised an objection that as court-fee was paid under S. 7 (xi) (cc) plaintiff should not have been given a decree on the basis of title.

Held, that as the objection had only been raised for the first time in second appeal and as appellants (defendants) in their appeal in the lower appellate Court only paid court-fees at the lower rate themselves, the question should not be re-opened, no defect of jurisdiction being involved. (*Findlay, J. C.*) BAPURAO *v.* NARAYAN KESHAV GHANDE. **103 I. C. 337 = A. I. R. 1927 Nag. 321.**

———An order in effect dismissing an appeal for deficiency in court-fee should be treated as on the same footing with rejection of a plaint for the purpose of determining whether it amounts to a decree or not and an appeal from such order is competent; and where the dismissal of the appeal raises a question of law, for example, as to the interpretation of the Court Fees Act, a second appeal will lie. A. I. R. 1922 Nag. 62, Rel. on. (*Kinkhede, A. J. C.*) GOVINDA *v.* BANSILAL. **98 I. C. 663 = A. I. R. 1927 Nag. 100**

—S. 100—Custom—Appreciation of evidence.

———Value to be attached to evidence for proving custom is entirely within jurisdiction of Court of first appeal and Court of second appeal cannot reverse finding, A. I. R. 1923 P. C. 70; A. I. R. 1927 P. C. 113 and A. I. R. 1926 Oudh 53, Dist. (*Srivastava, J.*) KRISHNA KUMAR *v.* MANZOOR ALI. **123 I. C. 51 = 7 O. W. N. 333 = A. I. R. 1930 Oudh 330.**

———In second appeal the Court should not only consider whether the evidence that is brought forward to prove custom is legally admissible evidence but whether the sum total of that evidence regarded from the point of quantum is of sufficient weight to justify the Court's coming to a conclusion that the custom has been proved. (*Mears, C. J. and Piggott, J.*) MT. DHOLA KUAR *v.* MATHURA SINGH. **75 I. C. 657 = A. I. R. 1923 All. 341.**

—S. 100—Custom—Existence of.

———Finding as to the existence of a custom to relieve the tenant of rent in respect of land allowed to lie fallow is a finding of fact which cannot be disturbed. (*Lord Tomlin.*) RAJA OF RAMNAD *v.* MANGALAM. **A. I. R. 1930 P. C. 234.**

———Where a question arises as to the existence or non-existence of a particular custom where the lower appellate Court has acted upon illegal evidence or on evidence which was legally insufficient to establish an alleged custom the question is one of law. 30 All. 311 (F.B.). Foll. (*Lindsay, J.*) MT. AISHA BEGAM *v.* DAULAT SINGH. **100 I. C. 605 = 8 L. R. A. Rev. 110 = A. I. R. 1927 All. 471.**

———The question of the existence of a custom is a mixed question of law and fact. (*Campbell, J.*) ABDUL QADAR *v.* ILAHI BAKSH. **92 I. C. 769 = A. I. R. 1926 Lah. 251.**

———*Sufficiency of evidence as to—Proof of elements of custom.*

A High Court cannot in second appeal be asked to go into the evidence produced in a case in order to see whether the evidence produced is sufficient to establish an alleged custom, when the lower appellate Court has reviewed the entire evidence and come to the conclusion that the evidence produced is insufficient to establish the custom. A custom, in order to be a valid and binding custom must be proved to be ancient and invariable, and it can always be argued in second appeal whether the evidence produced in the case fulfils these requirements and so far the question can be considered to be a question of law. It is one thing to say that the evidence produced in a case was not legally sufficient to prove a custom and quite the other thing to say that the evidence produced in the case which had been held by the lower appellate Court to be insufficient to prove the custom should be held in second appeal to be sufficient to prove the same. 40 Mad. 709, Dist; 29 Mad. 24, Diss. from; 45 Cal. 285; 28 All. 698; 22 Bom. 430; 17 O. C. 1; 32 All. 125; 4 O. C. 71; 2 O. L. J. 388 and 41 Mad. 374 (F. B.), Foll. (*Misra, J.*) HARI LAL *v.* BACHCHU LAL. **94 I. C. 987 = 3 O. W. N. Sup. 10 = A. I. R. 1926 Oudh 460.**

———A finding as to the existence of a local custom of privacy in any particular locality is a question of fact and cannot be attacked in second appeal. (*Fawcett, J. C. and Kemp, A. J. C.*) SHAH MAMOMED *v.* RAMZAN. **66 I. C. 833 = 16 S. L. R. 17 = A. I. R. 1921 Sind 155.**

—S. 100—Custom—Family custom.

———The decision of any tribal on family custom is a finding of fact which cannot be disturbed in second appeal. A.I.R. 1928 Oudh 301, Rel. on. (*Srivastava, J.*) KRISHNA KUMAR *v.* MANZOOR ALI. **123 I.C. 51 = 7 O.W.N. 333 = A.I.R. 1930 Oudh 330.**

—S. 100—Custom—Finality of.

———Finding as to particular custom should not be disturbed unless based on insufficient evidence or the necessary requisites are not established. (*Fawcett and Madgavkar, JJ.*) KASAMKHAN *v.* KAJI ABDULLA. **93 I. C. 135 = 50 Bom. 133 = 28 Bom. L. R. 49 = A. I. R. 1926 Bom. 153.**

———When the lower appellate Court holds that no question of custom is involved in a case and rejects an application for a certificate to enable the applicant to file a second appeal it is open to the second appellate Court to hold that a question of custom is involved and to remand the case to the lower Court to consider whether the certificate can be granted. 1924 Lah. 37 and 18 P. R. 1918, Foll. (*Abdul Raoof and Harrison, JJ.*) HAR PHUL *v.* BHAGWAL. **79 I. C. 488 = A. I. R. 1925 Lah. 82.**

—S. 100—Custom—Mixed question of law and fact.

———The question whether the evidence establishes an alleged custom is one of mixed fact and law. (*Madhavan Nair, J.*) SUNDARA BHATTAR *v.* MUNUSAMI MUDALI. **119 I. C. 476 = A. I. R. 1929 Mad. 751.**

———Questions of custom are mixed questions of law and fact. There may be findings as to the existence of a custom which are pure findings of fact, but all questions of interpretation involve an element of law.

Where there was no question that the documents relied on to establish custom were silent as to the rights of a father to inherit from his son, yet two diametrically opposite interpretations were placed by the parties on this omission.

Held, that this was a fit matter for second appeal. A. I. R. 1917 P. C. 33, Foll. (*Wazir Hasan and Pullan, JJ.*) KHALIL AHMAD KHAN *v.* MD. MUSTOFAKHAN. **112 I. C. 68 = 5 O.W.N. 275 = A. I. R. 1928 Oudh 269.**

———Finding as to custom is a mixed one of law and fact—But concurrent finding of lower Court will not generally be upset. (*Walsh, J.*) KISHUN SINGH *v.* GOBIND RAM. **93 I. C. 363 = A.I.R. 1926 All. 215.**

———Question of custom of transferability of house built by tenant on village abadi is one of fact and law and can be taken in second appeal. (*Kendall, A. J. C.*) BHIKARI LAL *v.* HADI ALI KHAN. **82 I. C. 810 = 11 O. L. J. 738 = A. I. R. 1925 Oudh 239.**

———A question of custom is a mixed question of law and fact and can be entertained for the first time in second appeal. (*Pullan, A. J. C.*) MAJID HUSAIN *v.* MT. SAFDARI BEGAM. **81 I. C. 1033 = A. I. R. 1925 Oudh 55.**

———The question of custom is one of mixed fact and law. Whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage is a question of law and in a second appeal an enquiry must be made whether all the attributes of a local custom have been established or not by evidence which is accepted by the lower Court. 45 Cal. 285, Foll. (*Dalal, J. C.*) MANNA LAL *v.* THAKUR JAI INDAR BAHADUR SINGH. **76 I. C. 774 = 26 O. C. 386 = A. I. R. 1924 Oudh 157.**

———Pre-emption—Finding on a question of custom, is a mixed question of fact and law. (*Rafique and Piggott, JJ.*) SHAMSHER SINGH *v.* PYARE LAL. **64 I.C. 956 = 20 A.L.J. R. 57 = A.I.R. 1922 All. 88.**

—S. 100—Custom—New plea.

———Where before the Subordinate Judge the whole case proceeded on the common ground that there did exist a definite custom that the *mohuntship* and possession of the properties of the Asthal were limited primarily to *Chelas* who were blood relatives of the deceased or the outgoing incumbent.

Held, that it is not possible to allow the respondent to raise the question as to the validity of this custom at the stage of appeal. (*Das and Bucknill, JJ.*) RAGHUNATH DAS *v.* SHEO KUMAR MISSIR. **67 I. C. 464 = A. I. R. 1923 Pat. 309.**

—S. 100—Custom—Proof of.

———Decision whether a custom is established is a question of fact. The weight or value of evidence is not a subject for discussion in second appeal. A. I. R. 1928 Oudh 121, Foll. (*Raza and Nanavutty, JJ.*) RAMA NAND *v.* MAHARAJI. **112 I. C. 142 = 5 O. W. N. 432 = A. I. R. 1928 Oudh 301.**

———Proof of custom is a question of fact. (*Stuart, C J. and Pullan J*) RAMPAL SINGH *v.* JAI RAM

SINGH. **107 I. C. 560 = 4 O. W. N. 1229 = A.I.R. 1928 Oudh 121.**

———Objections based on the grounds of insufficient evidence, or improper rejection of evidence. or as to the evidence taken as a whole amounting to insufficient proof in law of local custom, may be gone into in second appeal, but whether a specified instance is properly proved or not is a question of fact. (*Marten and Fawcett, JJ.*) RATILAL NATHALAL *v.* MOTILAL SANKALCHAND. **88 I. C. 891 = 27 Bom. L. R. 880 = A.I.R. 1925 Bom. 380**

—S. 100—Custom—Reasonableness.

———Per *Ramesam, J.*—A question whether a custom relating to a pathway is reasonable or unreasonable should be considered with reference to its extent relatively to the total extent of lands held by the owners of the servient tenements, and where the lower Court takes that fact into consideration in considering the question whether the custom is reasonable or unreasonable, it is not open to the Court sitting in second appeal to say that the finding of the lower Court is vitiated on account of such considerations.

Per *Odgers, J.*—One of the most important questions, if not the most important in considering whether or not a customary right is reasonable or not, is to see what effect it will have or what will be the extent of the burden on the servient tenement; for an easement or a right which when exercised obliterates so to say the servient tenement entirely, is clearly unreasonable. (*Ramesam and Odgers, JJ.*) PADDAYYA *v.* KRISHNAMURTHY. **103 I. C. 331 = 25 M. L. W. 773 = 38 M. L. T. 395 = A. I. R. 1927 Mad. 653 = 52 M. L. J. 674.**

———Customary right of way in agricultural tract set up—Whether custom is reasonable or not is a question of fact. (*Ramesam and Odgers, JJ.*) GOLI PADDAYYA *v.* CHALIKI KRISHNAMURTHY. **103 I. C. 331 = 25 M.L.W. 773 = 38 M. L. T. 395 = A. I. R. 1927 Mad. 653 = 52 M. L. J. 674.**

—S. 100—Custom—Sufficiency of evidence.

———A second appeal will be maintainable on a question of custom where a question is whether the lower appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged custom. (*Mukerji, J.*) HAR PRASAD *v.* HORI LAL. **116 I. C. 799.**

———Second appellate Court can consider sufficiency of evidence in law to establish a custom. 32 All. 125, Dist. (*Iqbal Ahmed, J.*) SHEO SHANKAR DAS *v.* RAM TAHAL KOERI. **102 I. C. 596 = A. I. R. 1927 All. 605.**

———Whether on evidence a custom is established is a question of fact but whether evidence is legally sufficient is a question of law. (*Banerji, J.*) MT. JOTI BALA DEBI *v.* SHEO LING SHAMI JANGAM. **99 I. C. 292 = A. I. R. 1927 All. 201.**

———Where a lower appellate Court has refused to accept oral evidence as sufficient to establish the existence of a custom its refusal cannot be reversed in second appeal but when it comes to the question of determining the legal point as to which of two *wajib ul-arzs* should be held to govern a case it is permissible to find that a custom exists where the lower Appellate Court found that no custom exists. (*Stuart, J.*) CHUNI *v.* BALDEO SINGH. **89 I. C. 89 = A. I. R. 1926 All. 153.**

———High Court can examine whether evidence in the case establishes a custom. (*Mears, C. J. and Sulaiman J.*) SYED TAJAMMUL HUSAIN *v.* BANWARI LAL. **88 I.C. 752 = 48 All. 77 = 23 A.L.J. 932 = A. I. R. 1926 All. 43.**

C. P. CODE, (1908), S. 100—Custom—Sufficiency of evidence.

———Whether single wajib-ul-arz establishes a custom is a question of fact. 4 O. C. 71 and 17 O. C. 1, Foll. (*Misra, J.*) GAJRAJ SINGH *v.* NANHU SINGH. **91 I. C. 942 = 13 O. L. J. 121 = 3 O. W. N. 69 = A.I.R. 1926 Oudh 143.**

———The question of custom is one of mixed fact and law and the point whether the facts found in any given instance prove existence of the essential attributes of a custom or usage is a question of law and in second appeal an inquiry can be made whether all the attributes of a local custom had been established or not by evidence accepted by the lower Court. A.I.R. 1924 Oudh 157, Ref. There is no difference between cases where custom is accepted and those in which the existence of the custom is not accepted. 21 O. C. 334, Rel. (*Dalal, J. C.*) RAZA HUSAIN KHAN *v.* SUBHANI. **90 I. C. 525 = 2 O. W. N. 838 = A. I. R. 1926 Oudh 53.**

———Whether alleged custom is supported by facts found, can be considered. (*Baker, J. C.*) MT. BASHIRBI *v.* ABDUL SATTAR. **82 I. C. 815 = A. I. R. 1925 Nag. 179**

———It is always open to the High Court in second appeal to see whether an opinion on custom which has been pronounced was based or not on sufficient evidence. 31 A. 557, Dist.; 30 A. 311 (F. B.); and 19 A.L.J. 104, Foll. (*Mukerji, J.*) ALI HUSAIN *v.* SYED MAZAHIR. **79 I C. 134 = 5 L. R. A. Rev. 115 = A. I. R. 1924 All. 477.**

———A second appeal lies on a question of custom where the question is whether the lower appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged custom. 30 All. 311. (F.B.), Foll. (*Mukerji, J.*) HAR PRASAD *v.* HARI LAL. **116 I. C. 799.**

———The question whether by custom a tenant is entitled to transfer the site of his house in the village abadi is a mixed question of law and fact and in the second appeal the question of sufficiency or insufficiency of the evidence in support of such a custom may be gone into. 30 All. 311, Foll. (*Mukerji, J.*) RAFIQ *v.* SHANKAR LAL. **87 I. C. 749 = A. I. R 1925 All. 718.**

———It is open in second appeal to go into the question of law as to whether the evidence which the lower appellate Court found sufficient to establish a custom was adequate for the purpose. But where a lower appellate Court found that the evidence was insufficient to establish a custom no point of law arose in second appeal that it was in fact sufficient. (*Stuart, J.*) SHAKIRA BIBI *v.* NANDAN RAI. **66 I.C. 613 = A. I. R 1922 All. 241.**

———High Court can only consider whether facts found by lower Court support custom. (*Oldfield and Ramesam, JJ.*) P. K. VATTOLI KALANDAR *v* K. V. PUTHURAM KALANDAR. **69 I.C. 570 = 14 M. L. W. 702 = 1921 M. W. N. 754 = A. I. R. 1921 Mad. 694 = 41 M. L. J. 437.**

—S. 100—Damages—Finding of fact.

———Finding of fact—Amount of damages—Question as to, is one of fact. But when the amount is fixed arbitrarily, it cannot be taken as an amount arrived at on a finding which is binding on the High Court. (*Sulaiman, J.*) JUGAL KISHORE *v.* RAM NARAIN. **80 I. C. 297 = A. I. R. 1923 All. 199.**

—S. 100—Defective Judgment.

———Where an appeal is decided *ex parte* by a District Judge against unserved respondents, High Court has jurisdiction in second appeal to reverse the appellate Court's decree on the ground that he was wrong in proceeding to decide the appeal *ex parte*. A. I. R. 1922 Lah. 439, Foll; 30 Mad. 54 and A. I. R. 1922 Bom. 267, Rel. on. (*Shadilal, C. J. and Broadway, J.*) HARBANS RAJ *v.* LAKHSHMA NAND. **117 I. C. 229.**

C. P. CODE, (1908), S. 100—Defective Judgment.

———*Rejection of admissible evidence.*

Exclusion from consideration of a piece of documentary evidence on the erroneous ground that the document was inadmissible in evidence for want of registration vitiates the finding of fact and a second appeal lies. (*Zafar Ali, J.*) ALI MUHAMMAD *v.* RAMLA. **108 I. C. 191 = 29 Bom. L. R. 287.**

———*Irrelevant decision.*

Where, in a rent suit, although the tenancy and rental dues were admitted and no plea of payment thereof was taken, but the Court dismissed the suit on the ground that the lands described in the plaint were not comprised in the tenancy.

Held, that it was not necessary for the Court to decide the question as to what lands were comprised in the tenancy and hence this irrelevancy of the decision made the judgment appealable. (*Cammiade, J.*) JATINDRA NATH *v.* INDU BHUSHUN. **100 I. C. 525 = A. I. R. 1927 Cal. 410.**

———*Wrong assumptions.*

Where the lower appellate Court has proceeded on wrong assumptions and it is doubtful what weight the lower appellate Court would have attached to the rest of the evidence if it had avoided these erroneous assumptions, the decree can be set aside in second appeal. (*Zafar Ali, J.*) KUNDAN LAL *v.* BALDEO SINGH. **103 I.C. 235 = A. I. R. 1927 Lah. 614**

———*Inadmissible evidence.*

Finding of fact based partly on inadmissible evidence. (*Shadi Lal, C. J. and Zafar Ali, J.*) LAJPAT RAI *v.* FAIZ AHMAD. **103 I. C. 889 = 8 Lah. 651 = 29 P. L. R. 74 = A. I. R. 1927 Lah. 448.**

———*Real points ignored—Bald pleas of parties recorded but parties not examined on the points—Real points in dispute ignored—Trial is vitiated and can be set aside in second appeal.*

Where only the bare or bald pleas of the parties are on record but there is no attempt to focus their contention by proper examination of parties by the Court with advertence to the law bearing on the point and the real points are missed, the trial is vitiated and decision is liable to be ignored even in second appeal. 47 Cal. 107 (P.C.) and A. I. R. 1924 Nag. 91. Foll. (*Kinkhede, A. J.C.*) GHASIA *v.* THAKUR RAMSINGH. **100 I. C. 855 = A. I. R. 1927 Nag. 180.**

———*Question of fact decided on precedent.*

Where the lower appellate Court decided a question of fact not upon the evidence before it, but holding that it was precluded from so doing by a previous finding of Court of superior jurisdiction upon similar facts in a case between different parties,

Held, that the Court committed a substantial error or defect in procedure which may possibly have produced error or defect in the decision of the case upon the merits and therefore a second appeal lay. (*Dawson Miller, C. J., Mullick, Das, Kulwant Sahay and Jwala Prasad, JJ.*) BALUNKI LAL *v.* SRI KUNJA BEHARI DEB. **105 I. C. 633 = 6 Pat. 698 = 9 P. L. T. 72 = A.I.R. 1927 Pat. 209.**

———*Scope of enquiry extended.*

The High Court is reluctant to interfere in cases where two Courts have held that fraud has been established. But where in determining whether there has or has not been any fraud, the lower Courts have gone outside the proper foundation for determination of such a question, the High Court should interfere in second appeal. (*Fawcett and Madgavkar, JJ.*) D. DHARMAPPA *v.* P. VENKAPPA. **91 I. C. 426 = 27 Bom. L. R. 1318 =**

A. I. R. 1926 Bom. 33.

———*Wrong conception of law.*

Finding as to uniform rate of rent for 20 years based on wrong conception of law—High Court can interfere. (*Walmsley and Mukerji, JJ.*) GULAM HUSAIN *v.* K. S. BONNERJEE. **95 I. C. 525=30 C. W. N. 520= A. I. R. 1926 Cal. 1169.**

———A second appeal would not lie merely on the ground that the lower appellate Court in reversing the Trial Court's judgment, failed to consider all the circumstances on which the judgment of that Court was founded. (*Wazir Hasan, A. J. C.*) SHEORAJ *v.* BECHEY LAL. **84 I. C. 470=A. I. R 1925 Oudh 313.**

———Finding of fact based only on local investigation cannot be sustained – Practice—Judgment. 52 I. C. 241 and 39 Mad. 501, Foll. (*Martineau, J.*) RALLA *v.* HARNAM SINGH. **79 I. C. 808= A. I. R. 1923 Lah. 208.**

———Judgment of reversal must show that the evidence and reasons of trial Court are considered. (*Adami, J.*) BHIKHU MANDAL *v.* BHIKEHAKAR DUTTA. **75 I. C. 780=2 Pat. L R. (Civ.) 32= A. I. R. 1923 Pat. 275.**

—S. 100—Discretion.

———Relief for declaration—No interference in second appeal. (*Niamatullah and Kisch, JJ.*) ISHRI PRASAD MISIR *v.* RAM KISHAN DAS. **A. I. R. 1930 All. 620.**

———*Wrong exercise of discretion—Second appeal lies.*

Where the lower appellate Court declined to extend the time under S. 5 of the Limitation Act on a ground which is untenable, the High Court can interfere in second appeal. (*Jai Lal, J.*) MAHOMED IQBAL *v.* LABHA MAL. **122 I. C. 575.**

———An appellate Court is always reluctant to interfere with the decision in a matter of discretion. (*Heald and Maung Ba, JJ.*) D. R. SAKLAT *v.* J. HORMASJEE. **121 I. C. 815=7 Rang. 561= A. I. R. 1929 Rang. 221.**

———*New plea.*

Where the lower appellate Court has in his discretion refused to allow a point, which had not been raised in the memorandum of appeal to his Court, to be taken at the hearing no second appeal lies against that exercise of discretion unless the discretion has been improperly or unjudicially exercised. (*Fforde and Zafar Ali, JJ.*) RALLIA SINGH *v.* PARSHOTAM SINGH. **107 I. C. 283=A. I. R. 1928 Lah. 536.**

———*Genuine document.*

Court rejecting an unsuspicious document on the ground of its late production—Discretion can be interfered within second appeal. 12 C. W. N. 312, Rel. on. (*Das and Fazl Ali, JJ.*) HURI RAM GOENKA *v.* LACHMI SINGH. **110 I. C. 821= A. I. R. 1928 Pat. 537.**

———*Harsh but legal exercise of.*

Summonses duly served—Witnesses not appearing—Plaintiff offering to bring them—Court insisting on warrants to be issued is not legally wrong although it is harsh—High Court declined to interfere under S. 100. (*Dalip Singh, J.*) GAJJOO MAL *v.* CHANDOO. **101 I.C. 257=A. I. R. 1927 Lah. 424.**

———*Jurisdiction.*

Interference on the question of jurisdiction is discretionary with the High Court. (*Findlay, J.C.*) RAJARAM *v.* MUKUNDRAO. **100 I. C. 37= A. I. R. 1927 Nag. 164.**

———*How to be exercised.*

The question as to the exercise of discretion is ordinarily one of fact. But such discretion must not be exercised arbitrarily but upon sound legal principles which govern the exercise of such discretion. 45 Cal. 94 (P.C.). Rel. on. (*Chakravarti, J.*) RAMDHANI *v.* KHAKSHARDAS. **92 I. C. 1031= A. I. R. 1926 Cal. 677.**

———*Proper exercise— No interference in second appeal.*

The question whether sufficient cause existed for the non-presentation of appeal within time in the lower appellate Court is primarily one for decision by that Court and the High Court will not interfere if the lower Court has exercised the discretion in a judicial manner. (*Tek Chand, J.*) DISTRICT BOARD, SHAHPUR AT SARGODHA *v.* SHAMAS DIN. **123 I. C. 83.**

———*Proper exercise— No interference in second appeal.*

The discretion under S, 5, is a judicial one and when it is not exercised after appreciation and consideration of such facts as are relevant and after application of the right principles to those facts, the High Court can interfere in second appeal. (*Shadi Lal, C.J. and Le Rossignol, J.*) BACHINT SINGH *v.* HARNAM SINGH. **94 I. C. 396=A. I. R. 1926 Lah. 445.**

———Justifiability of dismissal of servant—High Court cannot interfere if question is merely one of degree and not of principle. [4 Mad. H. C. 63, Foll.] But when the lower appellate Court has not proceeded on the right principles in coming to conclusion the High Court can interfere. (*Phillips, J.*) MADURA DEVASTHANAM *v.* SUNDARAM ANNAVI. **91 I. C. 525= 1925 M. W. N. 603=A.I.R. 1926 Mad. 57= 49 M. L. J. 516.**

———*Secondary evidence.*

Evidence Act, S. 65—Discretion as to admissibility should not be disturbed except in case of miscarriage. (19 Cal. 438 P. C., Foll.). (*Shadi Lal, C. J. and Fforde, J.*) CHUHA MAL *v.* HAJI RAHIM BAKHSH. **71 I. C. 568=18 P. W. R. 1923= A. I. R. 1924 Lah. 303.**

———*Rate of interest.*

Rate of interest -Finding as to, is one of fact—Discretion exercised by lower Court—Appellate Court will not interfere unless it be arbitrary—Appeal. (*Lindsay and Gokul Prasad, JJ.*) BINDESHRI PRASAD *v.* JAG PRASAD RAI. **69 I. C. 758= A. I. R. 1922 All. 335.**

———*Instalment decree.*

High Court will not interfere with discretion of lower Court in fixing the amount in instalments decree. (*Abdul Raoof and Martineau, JJ.*) BHUP CHAND *v.* UDE RAM. **66 I. C. 147=27 P. W. R. 1922= 5 L. L. J. 135=A. I. R. 1922 Lah. 355.**

—S. 100—Easement.

———*Question of fact.*

Finding as to acquisition of right to easement is finding of fact. (*Johnstone, J.*) DHARAM DAS *v.* A. V. VOLKERS. **A. I. R. 1930 Lah. 177.**

———*Question of law.*

The finding whether a right of easement has been acquired is finding of law and can be challenged in second appeal. (*Mukerji, J.*) CHOTEY *v.* DAL CHAND. **118 I. C. 225=A. I. R. 1929 All. 862.**

———Easements Act, S. 13—Question whether an easement is one of necessity is one of fact. (*Odgers, J.*) GOVINDA BATTA *v.* MARUVALA RAMA. **103 I. C. 862=A. I. R.1927 Mad. 963.**

—S. 100—Error of law.

———The refusal of the lower appellate Court to act under O. 41, R. 33 which is not peremptory but discretionary is not an error of law with which the second appellate Court is bound to interfere. (*Wallace, J.*) NARASIMHAM *v.* NARASINGA RAO.

C. P. CODE, (1908), S. 100—Finding of Fact.

123 I. C. 39 = A. I. R. 1930 Mad. 707.

—S. 100—Finding of Fact—*See* C. P. CODE, S. 100 —QUESTION OF FACT.

—S. 100—Fraud.

———Whether a transaction is fraudulent is question of fact. (*Raza, J.*) LACHMI NARAIN *v.* MT. NAZEER FATIMA. **94 I. C. 927 = A. I. R. 1926 Oudh 501.**

—S. 100—Grounds.

———Plea of law not raised in the grounds of second appeal—Court can allow the plea to be raised. (*Boys and Ashworth, JJ.*) SUNDAR RAI *v.* SURAJ BALI. **88 I. C. 1013 = 47 All. 932 = 23 A. L. J. 856 = 6 L. R. A. (Civ.) 483 = A. I. R. 1925 All. 783.**

———New ground of appeal on facts showing *prima facie* good claim can be allowed. 35 All. 211 (P. C.), Ref. to. (*Kanhaiya Lal and Sulaiman, JJ.*) L. CHHOTEY LAL *v.* CHANDRA BHAN. **80 I. C. 1041 = 45 All. 59 = A. I. R. 1923 All. 176.**

———*Plea of* res judicata *not raised in memorandum was allowed.*

A plea of *res judicata* was entertained in the second appeal though not taken in the memorandum of appeal. (*Campbell, J.*) MIR KHAN *v.* SHARFU. **74 I. C. 577 = 5 L. L. J. 163 = A. I. R. 1923 Lah. 560.**

S. 100—Inference from facts.

Double inference.
Erroneous.
Finality.
Finding of fact.
Fraud.
Intention.
Interest.
Marriage.
Nature of right.
Propriety of.
Question of fact.
Question of law.
Soundness.
Status.
Miscellaneous.

—S. 100—Inference from facts—Double inference.

———Two inferences possible from facts found—One drawn by lower Courts—No question of law arises. 21 Bom. 91; 46 I. C. 794; A.I.R. 1924 Nag. 160; A.I.R. 1926 Nag. 192; A. I. R. 1918 P. C. 92 and 42 Cal. 888, Rel. on. (*Mohiuddin and Subhedar, A. J. Cs.*) COMMISSIONER OF INCOME-TAX *v.* JAMBUDAS. **122 I. C. 379 = A. I. R. 1930 Nag. 200.**

———Where two alternative conclusions as to intention are possible and Court arrives at one of such conclusions, its conclusion is a finding of fact. (*Jai Lal, J.*) AJUDHIA PARSHAD *v.* MURLI DHAR MADAN LAL. **A. I. R. 1930 Lah. 936.**

———Decision of lower appellate Court drawing one out of two possible inferences cannot be challenged in second appeal. 21 Bom. 91, Foll. (*Kinkhede, A. J. C.*) E. I. RAILWAY & CO. *v.* BADRILAL. **90 I. C. 209 = A. I. R. 1926 Nag. 192.**

———Where two inferences from facts are possible and one is drawn by lower Court, Court of second appeal will not interfere. It is only when only one legal inference is possible and that has not been drawn that the second appellate Court might interfere. 21 Bom. 91, Ref. (*Kinkhede, A. J. C.*) MT. MATHURABAI *v.* LAL SINGH. **78 I. C. 112 = A. I. R. 1924 Nag. 160.**

———Finding of fact—Two inferences from fact possible—High Court is bound by lower Court's inference. (*Broadway, J.*) ABDUL GHANI *v.* ISHAR SINGH. **79 I. C. 814 = A. I. R. 1923 Lah. 239.**

—S. 100—Inference from facts—Erroneous.

C. P. CODE, (1908), S. 100—Inference from facts —Finding of fact.

———Survey Record-of-Rights is a piece of evidence and if the Court draws such inference from that evidence as it thinks proper, the High Court will not interfere in second appeal merely because it is urged that the construction put on the evidence is wrong. (*Fazl Ali, J.*) BUJHAI RAI *v.* RAM SEWAK. **A. I. R. 1930 Pat. 319.**

———Where legal conclusions have been erroneously deduced from ascertained facts there is an error of law which can be challenged in second appeal. (*Sen, J.*) BHAGWAN DAS *v.* TOWN MAGISTRATE, BUDAUN. **A. I. R. 1929 All. 767.**

———View of law based on facts incorrect—View of facts is not binding in second appeal. (*Kinkhede, A. J. C.*) DAULAT *v.* RAMAPPA. **90 I. C. 196 = A. I. R. 1926 Nag. 197.**

———Inference of law from admitted facts—High Court can interfere if inference is wrong. (*Mukerji, J.*) PEERJI MOBIB *v.* RAM CHANDER. **87 I. C. 64 = A. I. R. 1925 All. 796.**

———Inferences of fact that entries were unreliable cannot be interfered with as they are inferences of fact. (*Moti Sagar, J.*) POKHAR MAL *v.* JAI BHAGWAN. **85 I. C. 89 = 6 L. L. J. 311 = A. I. R. 1924 Lah. 719.**

———In second appeal it is not the business of the High Court to assess the value of evidence relied upon by the lower Appellate Court. A wrong inference from facts does not entitle the High Court to interfere. A finding of the lower Appellate Court as to a gift being incomplete for want of acceptance, at the time of its revocation, is one of fact and binding on the High Court. (*Dalal, A. J. C.*) NANHU *v.* RAM DAYAL. **74 I.C. 818 = A. I. R. 1924 Oudh 164.**

———Question of fact—High Court cannot interfere unless finding is wholly unreasonable. (*Kincaid, J. C. and Raymond, A. J. C.*) MT. PAWANDBAI *v.* CHATAN MAL. **15 S. L. R. 84 = 62 I.C. 1002 = A. I. R. 1921 Sind 20.**

—S. 100—Inference from facts—Finality.

———From the fact that lambardari dues were never paid, the decision that they were not due is not a finding of fact but an inference which can be interfered with in second appeal. (*Sulaiman, J.*) MOHAMMED ALI HUSAIN KHAN *v.* RAMESHWAR PRASAD. **10 L.R.A. (Rev.) 155 = 113 I. C. 746.**

———Inferences from facts or circumstances can be set aside only if they are wrong. (*Venkatasubba Rao, J.*) THIRUVENKATACHARLU *v.* ALTOO SAHEB. **50 M. L. J. 251 = 1926 M. W. N. 344 = 94 I. C. 458 = A. I. R. 1926 Mad. 511.**

———Delay is a question of fact, but the finding that it disentitles the plaintiff from certain relief is one of law and can be examined in second appeal. (*Kinkhede, A. J. C.*) ABDUL MAJUL KHAN *v.* BALAPPA. **82 I. C. 105 = A. I. R. 1925 Nag. 58.**

———The High Court cannot in second appeal question the correctness of the inferences from the facts of a case that the consideration for a bond sued on was the withdrawal of a non-compoundable case. (*Dawson Miller, C.J. and Kulwant Sahay, J.*) R. S. BION *v.* SHEOGULAM LAL. **74 I. C. 843 = A. I. R. 1924 Pat. 305.**

—S. 100—Inference from facts—Finding of fact.

———Punjab Pre-emption Act, S. 22 (4)—Plaintiff who was ordered to deposit purchase money filing security bond instead—Acceptance of the security bond does not imply that order for cash deposit is varied—Finding based on mere inference from acceptance of security bond is not one of fact. A. I. R. 1925 Lah.

209 and 67 P. W. R. 1916. Rel. on. (*Addison and Bhide, JJ.*) RAJA KHAN *v.* MUHAMMAD KHAN.
31 P. L. R. 327 = A. I. R. 1930 Lah. 567.

—S. 100—Inference from facts—Fraud.

———*Fraudulent transfer.*

Transfer of Property Act, S. 53—To hold a transaction fraudulent, the creditor need not have filed a suit—High Court will interfere if the inference from proved facts is that the transaction is fraudulent. (*Findlay, O. J. C.*) GAMU *v.* NATHU.
96 I. C. 356 = A. I. R. 1926 Nag. 494.

———Where certain facts are found and an inference of fraud is drawn, based upon the facts so found, it is open to the Court in second appeal to consider whether, as a matter of law, such an inference is justified by the facts found. If, however, the first appellate Court, which is the ultimate judge of fact refuses to draw an inference of fraud upon the facts so found by it, that decision cannot be questioned in second appeal, unless the facts found necessarily amount to fraud; even if, upon a consideration of all the circumstances, High Court might have drawn a different inference and come to a different conclusion, unless that inference necessarily followed from the facts proved, the High Court would not be entitled to disturb the findings of the first appellate Court. (*Dawson Miller, C. J. and Mullick, J.*) RAMDHURI CHOWDHURI *v.* DEONANDHAN PRASAD SINGH. **3 Pat. L. T. 501 = 77 I. C. 957 = 1922 P. H. C. C. 269 = 2 Pat. 65 = 1 Pat. L. R. 18 = A. I. R. 1922 Pat. 507.**

—S. 100—Inference from facts—Intention.

———Where the question involved (*e. g.* whether a certain transaction amounts to a sale or a mortgage) is not, simply of the proper construction of a document but of inference to be drawn from the deed and from other evidence as to the intention of the parties to the transfer, it is one of fact and cannot be challenged in second appeal; 45 P. R. 1895, Ref.; 120 P. L. R. 1916 and 16 P. R. 1907, Rel. on. (*Bhide, J.*) MUHAMMAD DIN *v.* NUR AHAMAD. **110 I. C. 762 = A. I. R. 1928 Lah. 930.**

———The question as to whether a landlord recognised a certain person's tenancy is a question of inference as to a state of mind on the part of the landlord and it is open to the High Court in second appeal to enquire as to whether the facts would go to prove recognition. (*Mukerji, J.*) SATISH CHANDRA GHOSE *v.* DEBENDRA NATH DEY. **85 I. C. 636 = A. I. R. 1925 Cal. 761.**

———A finding that the facts as found did not indicate an unequivocal declaration of intention on the part of any of the joint holders to hold his share separately is not a finding of fact but an inference of the legal effects of facts found and can be set aside in second appeal. (21 All. 496, Foll.) (*Hallifax, A. J. C.*) BED PRASAD *v.* NAKCHHED PRASAD. **21 N. L. R. 12 = 79 I. C. 884 = A. I. R. 1924 Nag. 410.**

—S. 100—Inference from facts—Interest.

———The finding that certain payments made by the mortgagors must be considered as payments made towards interest as such is a question of fact. (*Findlay, O. J. C. and Prideaux, A. J. C.*) GHULAM ABBAS *v.* GOVINDRAO. **91 I. C. 200 = A.I.R. 1926 Nag. 245.**

—S. 100—Inference from facts—Marriage.

———Whether the facts found justify the legal inference of valid marriage is not a question of fact. (*Jai Lal, J.*) KARTAR SINGH *v.* MT. LACHHMI.
28 P. L. R. 406 = 104 I. C. 702 = A. I. R. 1927 Lah. 811.

—S. 100—Inference from facts—Nature of right.

———The question whether possession is adverse or permissive may often be one of legal inference from documents; 42 All. 152 (P. C.) and A. I. R. 1923 P.C. 59, Foll. (*Kinkhede, A. J. C.*) YESHAVANT *v.* DAULAT. **89 I. C. 663 = A. I. R. 1926 Nag. 129.**

———Where from an open user continued without interruption for a period of over 20 years and not shown to be attributable to permission or sufferance on the owner's part. the final Judge of fact. *i. e.*, the first Appellate Court draws an inference or presumption that it is as of right, the High Court cannot interfere with the finding. (*Kinkhede, A. J. C.*) WASUDEO *v.* SHANKAR. **7 N. L. J. 232 = 85 I. C. 84 = A. I. R. 1925 Nag. 168.**

———Second appeal lies from decision that appellant who had agreed to sell land and had taken advance but had not conveyed registered title, had sold the land. (*Duckworth, J.*) MAUNG PO YIN *v.* MAUNG TET TU.
86 I. C. 205 = 2 Rang. 459 = A. I. R. 1925 Rang. 68.

—S. 100—Inference from facts—Propriety of.

———Finding as to occupation by a common ancestor based not on any direct evidence but on inferences drawn from other pieces of evidence—Question whether inferences are properly drawn can be raised in second appeal. A. I. R. 1927 P. C. 102 Foll. (*Bhide, J.*) RANBIR CHAND *v.* MANGAL SINGH. **116 I.C. 325 = 10 L.L.J. 455 = A.I.R. 1929 Lah. 198.**

———Finding of fact—Lower court misdirecting itself as to conclusions to be drawn—Finding is not binding. (*Ashworth, and Iqbal Ahmad, JJ.*) MT. BETI *v.* SIKHDAR SINGH. **50 All. 180 = 25 A.L.J. 1014 = 108 I. C. 721 = A. I. R. 1928 All. 39.**

———The question whether the lower court was justified in its inference from findings of fact must be regarded as one which is still open to consideration on second appeal. (*Coldstream, J.*) MT. JANNAT *v.* ABDUL RAHMAN KHAN. **112 I.C. 847.**

—S. 100—Inference from facts—Question of fact.

———Case of presumed contract — Finding of legal origin is one of fact. (*Anantakrishna Iyer, J.*) SHIVARAMIYYAH *v.* RAJAH OF VENKATAGIRI.
120 I. C. 743 = A. I. R. 1930 Mad. 339.

———Transfer of Property Act, S. 136—"Traffic in" connotes something more than a mere sale—Whether mere sale amounts to "trafficking in" is a question of fact. (*Das and Ross, JJ.*) HIRDAY NARAIN *v.* JUGAL PRASAD. **97 I.C. 373 = 8 P.L.T. 201 = A. I. R. 1927 Pat. 2.**

———An inference of fact from admitted entries in documents cannot be disturbed in secoud appeal unless the inference is perverse or illegitimate. (*Mukerji, J.*) MT. SHAM DEVI *v.* BHAGWAT DAYAL.
85 I. C. 584 = 6 L.R.A. Civ. 139 = A. I. R. 1925 All. 353.

———Question of inferences from documents other than documents of title is one of fact. (*Sulaiman, J.*) GUPTA NAND *v.* HARI SHANKAR. **78 I.C. 1016 = A. I. R. 1925 All. 39.**

———A finding based on inferences to be derived from documentary evidence is a finding of fact. 22 C. 609, Ref. (*Dalal, A. J. C.*) BINDESHRI PANDE *v.* SHEO RATAN PANDE. **74 I. C. 811 = A. I. R. 1924 Oudh 185.**

—S. 100—Inference from facts—Question of law.

———*Inference from facts when question of law and when question of fact stated.*

An inference from facts admitted or proved may, under certain circumstances, be a question of law, but is not necessarily a question of law and where the conclusion arrived at by the court below is one which hinges upon a balance of evidence produced in the case, the said conclusion is one of fact and not of law. (*Sen and Niamatullah, JJ.*) BHAGESWARI SINGH *v.* HINGU. **A. I. R. 1930 All. 218.**

———Question as to what is the legal inference from admitted facts is a question of law. A.I.R. 1918 P.C. 92, Foll. (*Beasley, C. J. Ramesam, Pandalai, Eddy and Cornish, JJ.*) S. A. SUBBIAH IYER *v.* COMMISSIONER OF INCOME-TAX, MADRAS.
A. I. R. 1930 Mad. 449 = 58 M.L.J. 581 (S.B.).

———Findings on questions of facts are undoubtedly binding on appellate court in second appeal. But inference from proved facts is always a question of law and therefore any inference drawn by lower appellate court from proved facts is not binding on appellate court if in arriving at that inference the lower appellate court has misdirected itself on any matter of law. (*Iqbal Ahmad, J.*) MOHAMMAD KAMIL *v.* MOHAMMAD SALIM.
119 I. C. 111 = A. I. R. 1929 All. 875.

———The question whether Rs. 100 is or is not a grossly inadequate consideration for a house which is found to be by the lower appellate court to be worth Rs. 200 is a question of law as it is an inference from proved facts. A.I.R. 1927 P.C. 102, Rel. on. (*Young and Bennet, J.*) PRAKASH NARAIN *v.* RAM CHARAN.
A. I. R. 1929 All. 872.

———Proper effect of proved fact is question of law—Appellate Court can draw inference from facts admittedly proved. A.I.R. 1927 P.C. 102, Rel. on. (*Bennet and Iqbal Ahmad, JJ.*) KORA MAL *v.* RAGHUBIR KONIA. **A. I. R. 1929 All. 861.**

———An inference from admitted or proved facts is a question of law. A.I.R. 1927 P.C. 102, Foll. (*Mukerji and Bennet, JJ.*) GOPI LAL *v.* ABDUL HAMID.
116 I. C. 91 = 26 A.L.J. 887 = A.I.R. 1928 All. 381.

———The proper effect of a proved fact is a question of law. A.I.R. 1927 P.C. 102, Foll. (*Ashworth and Iqbal Ahmad, JJ.*) MT. BETI *v.* SIKHDAR SINGH.
50 All. 180 = 25 A.L.J. 1014 = 108 I.C. 721 = A.I.R. 1928 All. 39.

———The proper effect of a proved fact is a question of law, and the question, whether a tenancy is permanent or precarious seems to be a legal inference from facts and not itself a question of fact and, therefore, a second appeal lies from it A.I.R. 1927 P.C. 102, Ref. (*Rankin, C. J. and Mitter, J.*) MONMOTHA NATH *v.* RAJESWAR RAI. **55 Cal. 355 = 32 C.W.N. 184 = 107 I. C. 81 = A.I.R. 1928 Cal. 315.**

———The proper legal effect of proved facts is a question of law. A.I.R. 1918 P.C. 92, Foll. (*Addison and Bhide, JJ.*) E.I. RAILWAY CO., CALCUTTA *v.* PIYARA LAL SOHAN LAL. **10 Lah. 360 = 30 P.L.R. 541 = 112 I.C. 736 = A.I.R. 1928 Lah. 774.**

———Correctness of conclusions drawn from a finding of fact is question of law. (*Broadway and Agha Haidar, JJ.*) D. JOHNSTONE *v.* MT. JAN BIBI.
111 I.C. 645 = A.I.R. 1928 Lah. 722.

———The proper effect of a proved fact is a question of law, and, therefore, the question whether a tenancy is permanent or precarious, is a legal inference from facts and not itself a question of fact. A.I.R. 1927 P.C. 102, Foll. (*Kinkhede, A.J.C.*) DEOLIA *v.* RAJE JANARDHAN. **11 N.L.J. 21 = 111 I C. 488 = A I.R. 1928 Nag. 153.**

———Inference from proved facts is question of law. (*Iqbal Ahmad, J.*) BACHAN SINGH *v.* BHIKA SINGH.
8 L.R.A. Rev. 229 = 106 I.C. 49 =

A.I.R. 1927 All. 601.

———Questions of law and facts sometimes are very difficult to disentangle but as the proper legal effect of proved facts is essentially a question of law, the High Court in Second Appeal is justified in interfering with them especially where the decision of the lower appellate Court reverses the judgment of the lower Court and does not show marks of having come into close quarters with it and met the reasoning therein. 16 M. L. J. 272 (P.C.), Foll. (*Kinkhede, A.J.C.*) NARAYAN *v.* NATHU.
10 N.L.J. 12 = 103 I.C. 486 = A.I.R. 1927 Nag. 166.

———The existence of legal necessity is a matter of inferences from facts found and the question whether the inferences are legal or not is a question of law. (*Kinkhede. Offg, A. J. C.*) PUNJABRAO *v.* RAMKRISHNA. **9 N.L.J. 70 = 95 I.C. 553 = A.I.R. 1926 Nag. 332.**

———Where the lower appellate Court found as a fact that the evidence established that there had been no change of rent for 48 years and then inferred that fixity of rent could be presumed.

Held, that it was an inference of law and could be questioned in second appeal. (*Das and Adami, JJ.*) KESHO PRASAD *v.* ISSER DUBEY.
71 I.C. 15 = 1 Pat. L.R. 32 = A.I.R. 1924 Pat. 373.

———Inference from fact is a question of law. (*Schwabe, C.J. and Wallace, J.*) ABDUR SALAM SAHIB *v.* KANDASAMI CHETTIAR.
71 I.C. 330 = 16 M.L.W. 473 = 1922 M.W.N. 639 = A.I.R. 1923 Mad. 54 = 43 M.L.J. 556.

———The question whether a particular section of an Act does or does not apply to the facts as found is a question of law. (36 All. 308 Dist. ; 26 All. 490, Ref.) (*Walsh and Ryves, JJ.*) MUL RAJ *v.* FAZEL IMAM.
74 I.C. 307 = 45 All. 520 = 21 A.L.J. 424 = 4 L.R.A. Civ. 234 = A.I.R. 1923 All. 583.

———While the District Court's decision as to the effect of the evidence must stand final as to the facts the soundness of the conclusions from those facts may involve matters of law and may be questioned by a Court of second appeal. The proper legal effect of a proved fact is essentially a question of law. 20 Cal. 93 and 46 Cal. 189, Foll. (*Broadway, J.*) PURAN *v.* LALA.
73 I.C. 795 = A.I.R. 1923 Lah. 216.

———Inference from given set of facts is question of law. (*Macleod, C. J. and Shah, J.*) SHANKAR DAJI *v.* DATTATRAYA VINAYAK.
45 Bom. 1186 = 23 Bom.L.R. 514 = 63 I.C. 248 = A.I.R 1921 Bom. 385.

—S. 100—Inference from facts—Soundness.

———Soundness of conclusions drawn from facts is matter of law. 20 Cal. 93 (P.C.), Rel. on. (*Macnair, Offg. J.C.*) SITARAM *v.* DOMA.
119 I.C. 674 = A.I.R. 1929 Nag. 270.

———Conclusion from finding of fact can be attacked. (*Broadway and Moti Sagar, JJ.*) BRIJ SINGH *v.* PARTAP SINGH. **77 I.C. 473 = A.I.R. 1923 Lah. 497.**

———The High Court is entitled in Second Appeal to consider the validity of the Lower Appellate Court's inferences from the facts found proved and to appreciate their weight for itself. 41 Mad. 374 (F. B.), Foll. (*Oldfield and Hughes, JJ.*) RAMAN *v.* MUTHU.
62 I.C. 534 = 13 M.L.W. 218 = 1921 M.W.N. 233 = A.I.R. 1921 Mad. 661 = 40 M. L. J. 301.

—S. 100—Inference from facts—Status.

———Inference that a woman is public prostitute drawn from findings of fact that certain women are "kept" women earning livelihood by selling their bodies, is one of law. 20 Cal. 93 ; A.I.R. 1918 P.C. 92

and A.I.R. 1927 P.C. 102, Ref. (*Shadi Lal, C. J. and Broadway, J.*) MUNICIPAL COMMITTEE, DELHI *v.* MT. MOTI JAN. **123 I.C. 536 = 31 P.L.R. 547 = A.I.R. 1930 Lah. 824.**

———Second Appellate Court can interfere with a finding as to the legal status of a party. (*Findlay, J. C.*) FAKIR *v.* DATTATRAYA KRISHNA. **101 I.C. 252 = A. I. R. 1927 Nag. 200.**

———Status as public prostitutes is a question of law. (*Jai Lal, J.*) MOTI JAN *v.* MUNICIPAL COMMITTEE, DELHI. **93 I.C. 827 = A.I R. 1926 Lah. 461.**

———Inferences as to jointness or disruption of joint Hindu family are findings of fact. The inferences drawn from facts admitted or proved as to the jointness or disruption of a joint Hindu family are themselves findings of fact. A.I.R. 1925 P.C. 49, Foll.; and as such whatever may have been omitted or disregarded or misunderstood or misappreciated, provided always the findings be based on evidence, those findings are conclusive so far as the High Court is concerned. (*Harrison and Jai Lal, JJ.*) PRABHU *v.* KALE. **27 P.L R. 223 = 97 I.C. 817 = A.I.R. 1926 Lah. 443.**

———The finding of the lower Appellate Court that there was a partnership as defined in the Contract Act is not a finding of fact by which the High Court is bound. The findings that are final are those on the facts from which the existence of the legal relationship of partners might or might not be inferred provided of course, they are not otherwise unsound. A servant whose remuneration varies with profits may be a partner in the popular sense but not in the legal sense. *Beniram* v. *Kundan Lal*, 21 A. 496 P. C., Foll (*Halifax, A.J.C.*) MOULA BUX *v.* MUHAMMAD AFZAL. **69 I.C. 781 = A.I.R. 1922 Nag. 96.**

—S. 100—Inference from facts—Miscellaneous.

———Where the facts are not in dispute the inference which the Court below draws from these facts and the legal standard of reasonable care set up by it are questions of law and the High Court can see whether the Court below was right in holding *e.g.* that the defendant in despatching baled jute in a boat with 20 or 30 leaks, 1 or 1 1-2 inches in length, through which water entered into the boat, the jute being left in the hold of the boat for 30 hours, complied with the requirements of S. 151, of the Contract Act merely because there was continuous pumping out of the water which had only the effect of saving the boat. (*Chatterjea and Cuming, JJ.*) LAKSHMI NARAIN BAIJINATH *v.* THE SECRETARY OF STATE FOR INDIA. **80 I.C. 279 = 27 C.W.N. 1017 = A.I.R. 1924 Cal. 92.**

———Findings of fact—No finding as to their effect—Remanding case for preparation of decree as per findings is not a proper order—Remand—Appellate Court must amend or uphold the decree. (*Piggot and Walsh, JJ.*) SHIAM SARAN *v.* BANARSI DAS. **66 I.C. 866 = 20 A.L.J. 258 = A.I.R. 1922 All. 192.**

—S. 100—Jurisdiction.

———Question of maintainability of suit cannot be raised in second appeal in first instance. (*Mukerji and Mitter, JJ.*) KADER BUX *v.* SALIMUDDIN HAZI. **50 C.L.J. 543 = A. I. R. 1930 Cal. 267.**

———New plea—Question of jurisdiction not raised in second appeal—Question can be raised in Letters Patent Appeal. A. I. R. 1924 P. C. 95, Foll. (*Mya Bu and Baguley, JJ.*) U AHSAYA *v.* U PYINNYA. **6 Rang. 783 = 114 I.C. 540 = A.I.R. 1929 Rang. 77.**

———When the Judge has no inherent jurisdiction over the subject-matter of the suit, the parties cannot by their mutual consent convert it into a proper judicial process. It is the settled practice of the Bombay High Court to entertain objections taken for the first time even in second appeal, and even in England the Court can raise the question of jurisdiction at any time in proceedings for divorce. (*Macleod, C.J., Marten and Crump, JJ.*) ALFRED WILKINSON *v.* GRACE EMILY NORAH WILKINSON. **77 I.C. 654 = 47 Bom. 843 = 25 Bom.L.R. 945 = A. I. R. 1923 Bom. 321 (F.B.).**

———Question of Jurisdiction for the first time in second appeal is competent. (*Broadway and Zafar Ali, JJ.*) RAM KISHAN *v.* RAMSHAN. **77 I.C. 532 = A.I.R. 1923 Lah. 551.**

———Question of jurisdiction cannot, but point of law not involving question of fact, can be raised in second appeal. 21 All. 446; 42 Cal. 72 = 41 I. A. 251 P. C. Ref. to. (*Gokul Prasad, J.*) BHIKARI SINGH *v.* JOKHAN. **66 I.C. 856 = A.I.R. 1922 All. 124.**

—S. 100—Legal necessity.

———Alienation—Question as to necessity is one of law. It is not possible to lay down a principle that in all tribes custom would recognise an alienation for a debt due from a previous holder of the land as a justifiable necessity. 19 P.R. 1915, Foll. (*Dalip Singh, J.*) UDHAM SINGH *v.* JAWALA SINGH. **100 I.C. 803 = A. I. R. 1927 Lah. 896.**

———Hindu Law—Alienation—Necessity—Finding as to existence of legal necessity can be examined in second appeal. 9 A.L.J. 63 Foll. (*Kinkhede, A.J.C.*) MOTIRAM *v.* TUKARAM. **96 I.C. 1006 = A.I R. 1926 Nag. 486.**

———Existence of necessity is question of fact—Whether lender should see to the application of money is a question of law. (*Simpson, A.J.C.*) SHEO BEHARI *v.* SHEO RATAN SINGH. **90 I.C. 345 = A.I.R. 1925 Oudh 740.**

———Alienation by Hindu widow—Enquiry by alienee, as to legal necessity—Sufficiency of enquiry is question of law. (*Dalal, J.C.*) RAMAN *v.* BARATI. **85 I.C. 489 = 27 O.C. 329 = A.I.R. 1925 Oudh 557.**

———Finding as to passing of consideration and existence of legal necessity is not one of fact. (*Moti Sagar, J.*) TARA CHAND *v.* RAHMAN SHAH. **75 I C. 674 = A.I.R. 1924 Lah. 689.**

———The finding of the Lower Appellate Court that one of the vendors was a cripple and incapable of working, and that his share of the price was required for his personal necessities, is a finding of fact and cannot be contested in second appeal. (*Martineau, J.*) RAM KISHAN *v.* KHIALI. **78 I.C. 148 = 6 L.L.J. 313 = A.I.R. 1924 Lah. 685.**

———Finding as to existence of necessity for alienation is a finding of fact. (*Moti Sagar, J.*) DALJIT SINGH *v.* HARI CHAND. **78 I.C. 11 = A.I.R. 1923 Lah. 669.**

———Finding as to necessity on wrong principles can be examined in Second Appeal. (*Broadway, J.*) ANOKH SINGH *v.* SAPURAN SINGH. **79 I.C. 980 = A.I.R. 1923 Lah. 660.**

———Question of necessity for an alienation may be one of fact or of law, and when the point raised is whether the Court below has infringed rules and maxims laid down by High Court and has decided on wrong principles as to the quantum of proof of necessity required, then the question is one of law. (*Campbell, J.*) PREM DAS *v.* SARBALAND. **79 I.C. 211 = A.I.R. 1923 Lah. 41.**

———Consideration and necessity—Finding as to, is one of fact. (*Le Rossignol and Wilberforce, JJ.*) HAKUMAT RAI *v.* WADHAWA SINGH. **4 Lah. L.J. 243 = A.I.R. 1922 Lah. 398.**

———The defendant cannot be allowed to raise in appeal the point of failure to prove legal necessity for the stipulated rate of interest when no such plea was taken in the Court below nor any issue raised on that point. (*Dawson Miller, C.J. and Adami, J.*) AINTHAN GOPE *v.* KHAKHAR SAHU. **67 I.C. 790 = 1 Pat. 612 = 3 Pat. L.T. 367 = A.I.R. 1922 Pat. 356.**

———Alienation of ancestral property by Hindu father—Finding as to legal necessity is a finding of fact. (*Abdul Raoof and Harrison, JJ.*) KAIQ SHAH *v.* DINA NATH. **63 I.C. 515 = 3 L.L.J. 491 = A.I.R. 1921 Lah. 304.**

—S. 100—Limitation.

———*Plea depending on facts.*

Plea of limitation though point of law but depending upon facts, if not raised in lower Courts or in memorandum of second appeal cannot be raised only at time of argument in second appeal. (*Mukerji and Mallik, JJ.*) AHAMADAR RAHMAN *v.* JAMINIRANJAN. **125 I.C. 607 = 57 Cal. 114 = A.I.R. 1930 Cal. 385**

———*Plea depending on facts.*

Limitation Act, S. 3—Court of appeal cannot take up the question of limitation *suo motu* when it depends on enquiry on facts—The plea must be raised in pleadings or put in issue. (*Tek Chand, J.*) LAJPAT RAI *v.* SOHNA. **115 I.C. 71 = 11 L.L.J. 91 = 30 P.L.R. 296 = A.I.R. 1929 Lah. 432.**

———*Plea depending on facts.*

Where the question of limitation depends upon the finding of fact relating to the possession of a party and the point was not raised before the lower Appellate Court, it is not open to the appellant to raise it in second appeal. (*Kulwant Sahay and Macpherson, JJ.*) MAHOMED SAYED KHAN *v.* ABDUL GAFOOR. **115 I. C. 680 = 10 P. L. T. 53.**

———*New plea.*

Plea—Even if raised for first time in second appeal must not be refused where facts necessary to support plea are admitted or apparent. (*Sen and Niamatullah, JJ.*) RANGA CHARYA *v.* GURU REVATI RAMAN ACHARYA. **114 I. C. 734 = 1929 A. L. J. 229 = A. I. R. 1928 All. 689.**

———*New plea.*

Plea of limitation should be allowed even for first time in second appeal but case cannot be remanded to find out facts for showing that claim is barred—Limitation Act, S. 3. (*Rankin. C. J. and C. C. Ghose, J.*) BAIKUNTHA NATH *v.* SHEIK AJIDULLA. **115 I. C. 606 = 32 C. W. N. 778 = A. I. R. 1928 Cal. 870.**

———*Mixed question of law and fact.*

Limitation is a mixed question of law and fact. (*Cuming and Page, JJ.*) ABDUL GAFUR *v.* ABDUL JABBAR. **97 I. C. 635 = A. I. R. 1927 Cal. 30.**

———*Plea depending on facts—Even a plea of limitation cannot be raised in second appeal for first time if defendant on evidence.*

Although questions of limitation being questions of law are not excluded from being heard in second appeal when they have not been raised in the lower courts, still where a question of law depends upon a finding of fact on evidence and that evidence has not been led in the trial court. High Court in second appeal will not deal with the question of law. (*Macleod, C. J. and Crump, J.*) DIGAMBAR GOVIND *v.* LAHYADEO BHAU DESHPANDE. **72 I.C 326 = 25 Bom. L.R. 245 = A.I.R. 1923 Bom. 254.**

—S. 100—New plea.

———Limitation, question of—Is one of law and can be raised in second appeal for the first time. (*Scott-Smith and Abdul Qadir, JJ.*) NIGAHIA RAM. *v.* BHAGU MAL. **65 I C. 580 = A. I. R. 1922 Lah. 240.**

—S. 100—Marriage.

———*Question of fact.*

The finding as to Karewa (a form of marriage) is one of fact. (*Addison, J.*) MT. MANBHARI *v.* RUP CHAND. **111 I. C. 712.**

———*Question of Law.*

Form of marriage is a question of law. (*Sulaiman and Daniels, JJ.*) MT. KISHAN DEI *v.* SHEO PALTAN. **48 All. 126 = 23 A. L. J. 981 = 6 L. R. A. Civ. 557 = 90 I. C. 358 = A. I. R. 1926 All. 1.**

———*Question of fact.*

Whether a valid marriage took place between the parties is a question of fact. (*Shadi Lal, C. J. and Zafar Ali, J.*) MT. NAWAB BIBI *v.* ALLAH DITTA. **73 I. C. 896 = 5 L. L. J. 505 = A. I. R. 1924 Lah. 188.**

———*Question of fact.*

Whether a marriage has been proved is a question of fact. (*Broadway and Martineau, JJ.*) RAM DAS *v.* MT. PANNA DEVI. **84 I. C. 1039 = 5 L. L. J. 117 = A. I. R. 1921 Lah. 201.**

—S. 100—Minority.

———*Question of fact.*

Question of party's minority cannot be re-investigated by High Court. (*Das, J.*) ALI HUSSAIN *v.* FAGUNI RAI. **86 I. C. 856 = 3 Pat. L. R. 16 = A. I. R. 1925 Pat. 367.**

—S. 100—Misconstruction of document.

———Finding based on misconstruction of document is liable to be set aside. (*Bhide, J.*) ABDUL LATIF *v.* RAHMATULLAH. **123 I. C. 533 = A. I. R. 1930 Lah. 139.**

-S. 100—Misjoinder.

———Objection as to misjoinder of parties cannot be taken for the first time in second appeal. (*Wallace and Srinivasa Ayyangar, JJ.*) RANGASWAMI *v.* SUNDARA PANDIA. **110 I.C. 548 = A.I.R. 1928 Mad 635.**

—S. 100—Misreading of evidence.

———Court of second appeal is not bound by finding of fact arrived at by erroneous and unwarranted assumption of facts and misreading of accounts. (*Tek Chand and Agha Haider, JJ.*) JIWANMAL GIANCHAND *v.* HARI RAM. **125 I.C. 623 = A.I.R. 1930 Lah. 712.**

———*Law or procedure.*

High Court can interfere with findings of fact when they result from misconstruction of document or misapplication of law or procedure. (*Fazl Ali and Chatterji, JJ.*) SAKALDIP SINGH *v.* IMRIT BASHI. **120 I. C. 292 = 10 P. L. T. 630 = A. I. R. 1930 Pat. 71.**

———*Obiter.*—Even a misreading of the evidence by a Court of fact is not a ground of second appeal. (*Suhrawardy and Jack, JJ.*) NAGENDRA NATH VASU *v.* KSHIRADAR RUIDAS. **113 I. C. 575.**

———Second appeal—Decision in lower appellate Court on supposed admission by plaintiff—Decision can be challenged in second appeal. (*Pullan, J.*) BHAGWAN BAKSH SINGH *v.* THAKUR DIN. **108 I. C. 102 = A. I. R. 1928 Oudh 333.**

———*Question of law.*

Inferences from incorrect construction—Finding can be considered. 34 All. 579 (P. C.), Foll. (*Ramesam and Venkatasubba Rao, JJ.*) RAMESWARAM DEVASTHANAM *v.* SECRETARY OF STATE. **39 M. L. T. 633 = 104 I. C. 781 = A. I. R. 1927 Mad. 1167.**

———Finding on the question of fact based on misappreciation of true meaning of "sharing in cultivation" is vitiated. (*Sulaiman, J.*) RAMDEO *v.* DHEO NAIK. **94 I. C. 190 = A. I. R. 1926 All. 465**

———Judgment of lower appellate Court based on misreading of evidence is liable to be set aside in second appeal. (*Jai Lal, J.*) LACHHMAN DAS *v.* RAMJI DAS. **95 I. C. 240 = A. I. R. 1926 Lah. 541.**

———High Court will interfere in cases where the lower Courts have misread evidence or overlooked important evidence or relied for their conclusion upon inadmissible evidence, or where they misdirected themselves as to any question of importance or where they relied upon personal knowledge or where they took a wrong view as to the onus of proof, or where they decided points not raised by the parties, or where they misconstrued important documents. When a Court misconstrues a document it relies upon a construction which it is not capable of bearing and such misconstruction leads not merely to a wrong view of the evidence but to relying upon what it considers to be an inference from the evidence which the evidence is not capable of bearing. The misconstruction of an important document, therefore, is a ground for interference. (*Devadoss and Waller, JJ.*) VELAYUDA GURU KAL *v.* ANNAMMAL. **24 M. L. W. 88 = 93 I. C. 307 = A. I. R. 1926 Mad. 652.**

———Original grant not produced—Inam register and inam patta are foundation of inamdar's title in the absence of original grant—Their misconstruction is ground for second appeal. A. I. R. 1923 P.C. 187, Ref. (*Devadoss and Waller, JJ.*) VELAYUDA GURUKAL *v.* ANNAMMAL. **24 M. L. W. 88 = 93 I. C. 307 = A. I. R. 1926 Mad. 652.**

———Findings based on mistaken view of pleadings are not binding. (*Misra, J.*) AHMAD SHARIF *v.* UMRAO BEG. **13 O. L. J. 536 = 3 O. W. N. 460 = 94 I. C. 779 = A. I. R. 1926 Oudh 353.**

———Misreading of documentary evidence— Finding is not binding. (*Kulwant Sahay, J.*) GANESH LALL *v.* BISESUR PANDEY. **88 I. C. 820 = A. I. R. 1926 Pat. 49.**

———*Misconception as to nature of claim.*

Misconception as to nature of claim—Second appeal lies. (*Martineau, JJ.*) NIRANJAN LAL *v.* GHULAM NABI. **6 Lah. L. J. 508 = A. I. R. 1925 Lah. 251.**

———Document wrongly read or misconstrued by lower Court—High Court will interfere if finding is vitiated. (*Devadoss, J.*) RAMA RAO *v.* APPU. **88 I. C. 924 = A. I. R. 1925 Mad. 1226.**

———A finding on an issue of a lower appellate Court which is based on a misconception of what the evidence is cannot be accepted in second appeal as a legal finding on it. 20 Bom. 753, Foll. (*Daniels and Neave, JJ.*) SUBEDAR *v.* DUBEY JAGAT NARAIN. **80 I. C. 25 = 46 All. 773 = 22 A. L. J. 739 = 5 L. R. A. Civ. 533 = A. I. R. 1924 All. 848.**

———*Misapplication of law.*

If the finding of fact of the lower appellate Court has been arrived at by misreading the evidence and misapplication of law, it can be interfered with in second appeal. (*Moti Sagar, J.*) THE FIRM JOWALA DASS *v.* UTTAM CHAND. **76 I. C. 553 = A. I. R. 1923 Lah. 585.**

—S. 100—Misreading of judgment.

———A finding can be contested in second appeal, if it is based on a misreading of the first Court's judgment. (*Scott-Smith and Fforde, JJ.*) MT. BASANTI *v.* CHANDA SINGH. **77 I. C. 475 = A. I. R. 1923 Lah. 502.**

—S. 100—Mixed question of law and fact —Abandonment.

———The question as to whether a certain provision in a lease is penal or not is a mixed question of law and fact and as a rule, it will not be permitted to be raised in second appeal if it is clear that it was abandoned in a subordinate Court competent to investigate questions of fact as well as of law. (*Fazl Ali and Chatterji, JJ.*) KUMAN DAS *v.* RADHIKA SINGH. **10 P. L. T. 669 = A. I. R. 1929 Pat. 717.**

—S. 100—Mixed question of law and fact—Alteration of document.

———The question whether an alteration is material or not is always dependent upon the nature of each transaction and it also depends upon the nature of the alteration and its juxtaposition in the particular' part of the document where it is interpolated and the new complexion the instrument is made to bear by reason of the alteration. It is not therefore a pure question of law. (*Kinkhede, A.J.C.*) HEMCHAND *v.* GOVIND. **86 I. C. 185 = 8 N. L. J. 1 = A. I. R. 1925 Nag. 243.**

—S. 100—Mixed question of law and fact—Dower.

———Amount of dower is a mixed question of law and fact. (*Neave, A.J.C.*) MT. ALIA BIBI *v.* MT. AMALIA BIBI. **89 I. C. 672 = A. I. R. 1926 Oudh 128.**

—S. 100—Mixed question of law and fact—Extent of interest.

———The question whether the purchaser purchased in the auction sale, held in execution of a decree, the individual interest of the judgment-debtor, or the entire interest of the judgment-debtor and his undivided sons in respect of the properties specified in the sale proclamation and sale certificate, is doubtless a mixed question of law and fact. Case-law considered. (*Devadoss and Sundaram Chetty, JJ.*) NATESA PATHER *v.* GANAPUTI SUBBA PATHER. **99 I. C. 838 = A. I. R. 1927 Mad. 311 = 52 M. L. J. 68.**

———Whether what the purchaser got at the Court sale was the entire family properties or only the father's share in a certain joint Hindu family, is a mixed question of law and fact. 13 Mad. 47 ; 27 Mad. 137 (P.C.) and 36 Mad. 325 (P.C.), Foll. ; 17 Cal. 584 (P. C.), and 22 Mad. 110 (P.C.), treated as overruled by later rulings. (*Spencer, J.*) NATESA PATHAR *v.* GANAPATHI SUBBU. **23 M. L. W. 349 = 94 I. C. 68 = A. I. R. 1926 Mad. 851.**

—S. 100—Mixed question of law and fact—Finality of.

———Deed—Finding based not on construction of deed alone but on other facts also—Finding cannot be reversed in second appeal. (*Martineau, J.*) ISHUQ LALL *v.* PIYARI LAL. **7 L. L. J. 74 = 26 P. L. R. 110 = 86 I. C. 595 = A. I. R. 1925 Lah. 344.**

—S. 100—Mixed question of law and fact—Fraudulent Transfer.

———A question as to whether a certain transfer was entered into with a view to defeat creditors is a mixed question of fact and law and could legally be decided in a Court of Second Appeal but it is undesirable to do so in the absence of findings of fact whatever on the part of the lower appellate Court. In second appeal it is for High Court to decide whether a right conclusion has been drawn on the facts found. (*Batten, J. C.*) POUNDUSA *v.* BAHENAKAI. **69 I. C. 193 = A. I. R. 1923 Nag. 124.**

—S. 100—Mixed question of law and fact—Limitation

———Whether the facts found attracted the operation of S. 14 of the Limitation Act is a mixed question of law and fact. (*Adami and Scroope, JJ.*) SHAIKH FAZLUL JAMIL *v.* SHAIK HELALUDIN.

C. P. CODE, (1908), S. 100—Mixed question of law and fact—Merger.

101 I.C. 674 = 8 P.L.T. 561 = A.I.R. 1927 Pat. 256.

—S. 100—Mixed question of law and fact—Merger.

———On confiscation a zemindari does not merge in the permanent right of the Government so as to create a new zemindari when the estate is re-settled with another. The question whether there was merger or not is a mixed question of law and fact, and it has to be determined upon a construction of the order of confiscation the interest which the Government was capable of holding in those days and upon various other matters. (*Greaves and Mukherji JJ.*) BIRENDRA KISHORE *v.* DURGA SUNDARI. **98 I. C. 211 = A. I. R. 1927 Cal. 136.**

—S. 100—Mixed question of law and fact—Nature of property

———The question whether land been proved to be communal is one of mixed fact and law. (*Venkatasubba Rao, J.*) RAMASWAMI AIYAR *v.* SECRETARY OF STATE. **1930 M.W.N. 515.**

———The question whether a certain property is a private or public property, held in trust for religious or charitable purposes, is a mixed question of law and fact. If the Court of first appeal has drawn wrong inferences from the facts established in the case, or has applied the law wrongly, the High Court would be competent to interfere with such finding in second appeal. 40 Mad. 709 ; 3 Mad. 284 (P. C.) and 1 Mad. 252, Rel. on. (*Misra, J.*) HARI KISHEN *v.* RAGHUBAR DAYAL. **97 I.C. 853 = 1 Luck. 489 = 13 O.L.J. 696 = 3 O. W. N. 645 = A. I. R. 1926 Oudh 578.**

———The question as to whether permanent tenancy can be presumed is a mixed question of fact and law. 46 Cal. 90, Foll. (*Mookerjee and Chotzner, JJ.*) MAKHAN LAL DE *v.* ARUN BALA DEVI. **73 I. C. 2 = A. I. R. 1924 Cal. 465.**

—S. 100—Mixed question of law and fact—Necessaries.

———The question of what are " necessaries " is not a pure question of law but is a mixed question of law and fact and cannot be allowed to be raised for the first time in second appeal. 36 Cal. 768 at 778, Foll. (*Kinkhede, A. J. C.*) TULSIRAM *v.* ANUSUYA. **78 I. C. 380 = A. I. R. 1924 Nag. 360.**

—S. 100—Mixed question of law and fact—Reasonable care.

———Whether vendee has acted with reasonable care under S. 41, T. P. Act, is a mixed question of law and fact. High Court will interfere only where strong reasons exist. (*Kendall, J.*) PUTTULAL *v.* RAM SINGH. **99 I. C. 1 = A. I. R. 1927 All. 158.**

—S. 100—Mixed question of law and fact—Reasonable cause.

———*Malicious prosecution.*

In malicious prosecution the existence of reasonable and probable cause is a question for the Judge and not for the jury. In India the balance of authorities is in favour of the view that the question is a mixed one of law and fact and the inference deducible from proved facts may be examined by the High Court on second appeal. 16 C. W. N. 540 ; 12 C. L. J. 410 and 28 Cal. 591. Ref. (*Mukerji, J.*) NAGENDRA NATH RAY *v.* BASANTA DAS BAIRAGYA. **57 Cal. 25 = A. I. R. 1930 Cal. 392.**

—S. 100 —Mixed question of law and fact—Hindu family—Status.

———Question as to jointness of Hindu family may be a mixed question of law and fact. A. I. R. 1922 All. 188, Rel. on. (*Kinkhede, A. J. C.*) BIRDICHAND LALCHAND *v.* POPAT LAL. **95 I. C. 183 =**

C. P. CODE, (1908), S. 100—Nature of tenancy.

A. I. R. 1926 Nag. 389.

———*Firm.*

The question whether a person is a partner or agent of a firm is a mixed question of law and fact, and therefore the High Court is entitled to test the correctness of the lower Court's conclusion by an examination of the relevant evidence in the case. (*Wallace and Madhavan Nair, JJ.*) CHOKALINGA CHETTIAR *v.* MUTHUSWAMI CHETTIAR. **87 I. C. 663 = 21 M.L.W. 541 = A. I. R. 1925 Mad. 768 = 48 M. L. J. 518.**

———*Hindu Family*

The question whether a Hindu family is joint or separate is not a pure question of fact but is a mixed question of law and fact, and it is open to a High Court to look into evidence to find out how far the evidence let in by the parties as to the status of the family is legal evidence and justifies the conclusions arrived at by the lower Court. 44 All. 602, Ref. (*Kinkhede, A. J. C.*) GANGADAKAS *v.* NARAYAN. **86 I. C. 505 = A. I. R. 1925 Nag. 284.**

—S. 100—Mixed question of law and fact—Stridhan.

———*Hindu Family.*

The question whether certain property is sulka stridhan or not is not a question of law, pure and simple. Unless evidence is led to show the circumstances under which the gift was made and that it was intended to be the price of the bride or given to the girl for services mentioned in the texts, the property cannot answer the description of sulka. (*Kendall and Niamatullah, JJ.*) BHALA RAM *v.* DHANI RAM. **111 I. C. 165 = 26 A. L. J. 1203 = A. I. R. 1929 All. 25.**

—S. 100—Mixed question of law and fact—Transferability.

———*Right to offerings.*

The question whether or not the right to collect the offerings made to the deity installed in a temple is transferable is not a pure question of law. The answer to the question must in every case depend on a variety of circumstances which can only be proved by evidence. (*Ashworth and Iqbal Ahmed, JJ.*) BALMUKUND *v.* TULARAM. **113 I. C. 242 = 50 All. 394 = 26 A. L. J. 185 = A. I. R. 1928 All. 721.**

—S. 100—Nature of tenancy.

———The question of permanent tenancy though it is to be decided on facts, is a legal inference from facts and therefore a question of law, which it is open to consider in second appeal. A. I. R. 1927 P. C. 102 and 22 Bom. L.R. 1214, Rel. on. (*Madgavkar and Murphy, JJ.*) MANSUKH PANACHAND SHAHA *v.* TRIKAMBHAI ICHABAI PATEL. **123 I. C. 492 = 31 Bom. L.R. 1279 = A. I. R. 1930 Bom. 39.**

———Proper effect of proved fact is question of law—Question whether tenancy is permanent is legal inference from facts and not a question of fact. A. I. R. 1927 P. C. 102, Foll. ; 32 Cal. 51 (P. C.), Ref. ; 8 Cal. 960, not Foll. ; 3 Cal. 696 and 25 Cal. 896 (F. B.). Cons. (*Rankin, C. J. and Mukherji, J.*) KAMAL KUMAR *v.* NANDALAL DUBEY. **116 I. C. 378 = 33 C.W.N. 211 = 56 Cal. 738 = A.I.R. 1929 Cal. 37.**

———Landlord and tenant—Permanent tenure—Court must decide whether a tenancy is permanent or not as an inference of law. A.I.R. 1925 Cal. 309 and 30 C.W.N. 709, Cons. (*Page and Mallick, JJ.*) NIBARAN CHANDRA DHARA MODUK *v.* KRISTO MOHAN KUNDU. **112 I.C. 180 = 32 C.W.N. 771 = 55 Cal. 1029 = A. I. R. 1928 Cal. 597.**

———Finding of permanent tenancy depending on inferences of fact—Finding can be challenged but not the facts found in support of the finding. A.I.R. 1927 P. C. 102, Rel. on. (*Bhide, J.*) ISHAR DAS *v.* BULAKI DAS **111 I. C. 76 =**

10 Lah. L. J. 251 = A. I. R. 1928 Lah. 720.

———The proper effect of a proved fact is a question of law. The question whether a tenancy is permanent or precarious is one of legal inference from facts and not itself a question of fact. (*Lord Blanesburgh.*) DHANNO MAL *v.* MOTI SAGAR. **101 I. C. 355 = 8 Lah. 573 = 54 I.A. 178 = 29 Bom. L. R. 870 = 31 C. W. N. 677 = 1927 M. W. N. 481 = 39 M.L.T. 161 = 25 A.L.J. 959 = 28 P.L.R. 658 = 26 M.L.W. 634 = A. I. R. 1927 P.C. 102 = 52 M. L. J. 663.**

———The question whether the tenants are raiyats ultimately depends on the question of fact and Court must look to the attendant circumstances. No importance can be attached to the mere form of the kabuliyat or to the use in it of the word "cultivator." Nor does the receipt of rent in which the tenant is described as a raiyat carry the matter any further. 45 Cal. 805 (P.C.); 46 Cal. 90 (P. C.) and 29 Cal. 707 (P. C.) Rel. on. (*Duval and Mitter, JJ.*) KARUNA CHANDRA DAS *v.* SECRETARY OF STATE. **100 I.C. 466 = A.I.R. 1927 Cal. 413.**

———Land whether parjaut—Finding is one of fact. (*Sulaiman and Mukerji, JJ.*) SRILAL GOAIKA *v.* KESHODAS. **87 I.C. 368 = A. I. R. 1926 All. 83.**

———Question of intention to create joint tenancy is one of fact, and so long as the Judge makes no inferences which are not justified in law, the finding of intention is one which cannot be interfered with in second appeal. (*Phillips, J.*) MUTHUKARUPPA MUTHIRIAN *v.* SIVA BHAGYATHAMMAL. **90 I.C. 880 = 22 M.L.W. 511 = A. I. R. 1926 Mad. 33 = 49 M. L. J. 358.**

———Though a substantial question of law may, and generally does, arise in determining whether a tenant is a *raiyat* or a tenure-holder, the point depends ultimately on questions of fact. 46 Cal. 90 (P.C.), Foll. In second appeal the High Court is not entitled to go behind the findings of fact of the lower appellate Court unless such findings result from the misconstruction of a document of title or the misapplication of law or procedure. 19 C. W. N. 270, Foll. Such findings cannot be assailed however gross and inexcusable the error therein if the lower appellate Court had before it evidence proper for its consideration in support of its finding. 18 Cal. 23 (P. C.), Foll. (*Miller, C. J. and Macpherson, J.*) TARNI SINGH *v.* SAT NARAIN. **90 I. C. 895 = 6 P. L. T. 787 = 1925 P. H C. C. 281 = A. I. R. 1926 Pat. 9.**

———The question of status of the tenant is a matter of inference as to whether certain legal conditions had been made out or not. 8 C. W. N. 774 (F. B.), Foll. ; 16 C. W. N. 725, Dist. (*Walmsley and Mukerji, JJ.*) JOGESH CHANDRA ROY *v.* TAZAR ALI. **85 I. C. 757 = A. I. R. 1925 Cal. 1238.**

———The finding that a holding was a joint holding of the parties is one of fact. (*Sulaiman, J.*) NOHAR AHIR *v.* PRATAB AHIR. **79 I. C. 367 = 21 A. L. J. 899 = 5 L. R. A. Rev. 1 = A. I. R. 1924 All. 231.**

———A decision on a question of the nature of the tenancy, *viz.*, whether it is a permanent one or a tenancy at will is a mixed question of law and fact and can be decided in second appeal. 44 Cal. 119 and 8 C. W. N. 774, Foll. (*Broadway and Abdul Qadir, JJ.*) MOTI SAGAR *v.* DHANNA MAL. **72 I. C. 177 = 29 P. W. R. 1922 = A. I. R. 1922 Lah. 329.**

—S. 100—Negligence.

———Finding of negligence on wrong principles is not binding. 94 I. C. 348 ; A. I. R. 1924 Lah. 594, Dist. (*Dalip Singh, J.*) MAHESH DAS *v.* DAULAT RAM. **118 I. C. 655 = 30 P. L. R. 128 =**

11 Lah. L. J. 82 = A. I. R. 1929 Lah. 314.

———Second appellate Court is not bound by deductions of lower Courts as to negligence—Whether certain facts constitute negligence is question of law. 18 Cal. 23 (P. C.) and 20 Cal. 93 (P.C.), Rel. on; 48 Cal. 1 at 16, Ref. Negligence cannot be imputed to a subsequent purchaser of a lease, who, if he had made ordinary inquiries that an ordinary prudent man would have made in purchasing the lease, would not have come across anything which would have put him on an enquiry of a prior sale of the lease. (*Baguley, J.*) MAUNG KYAING *v.* P. L. T. A. R. CHETTYAR FIRM. **116 I. C. 470 = 6 Rang. 643 = A. I. R. 1929 Rang. 17.**

———The finding of a lower appellate Court that there was no negligence is a finding of fact. (*Ashworth, J.*) BHAGWATI SARAN *v.* DEO SARAN SINGH. **107 I. C. 702 = 9 L. R. A. Rev. 23 = A. I. R. 1928 All. 166.**

———Whether facts established amount to "wilful neglect" is a question of law—Railways Act, S. 72. A. I. R. 1918 P. C. 92, Foll. (*Addison and Bhide, JJ.*) SECRETARY OF STATE *v.* GHANAYA LAL SRIKISHEN OF AMRITSAR. **111 I. C. 523 = 10 Lah. 329 = A. I. R. 1928 Lah. 837.**

———"Wilful neglect" is not a concrete fact which can be proved by direct evidence but is a matter of inference. The finding in a case is based on certain facts and the question for determination is whether those facts are sufficient to establish "wilful negligence" in law. (*Addison and Bhide, JJ.*) E. I. RY. CO., CALCUTTA *v.* PIYARA LAL SOHANLAL. **112 I. C. 736 = 10 Lah. 360 = 30 P. L. R. 541 = A. I. R. 1928 Lah. 774.**

———Question as to negligence of a solicitor is one of fact. (*Beasley and Curgenven, JJ.*) JULIEN MARRET *v.* MAHOMED KHALEEL SHIRAZI & SONS. **103 I. C. 31 = 1927 M. W. N. 213 = 39 M. L. T. 15 = A. I. R. 1927 Mad. 443 = 53 M. L. J. 375.**

———Negligence is question of fact. (*Stuart, C. J. and Raza, J.*) IQBAL NARAIN *v.* KAILAS NARAIN. **105 I. C. 565 = 1 L. C. 498 = A. I. R. 1927 Oudh 478.**

———Wilful neglect is not a pure question of law, and, therefore, if an appellate Court records a categorical finding of fact based on certain evidence and circumstances that finding cannot be questioned in second appeal. (*Mears, C. J. and Sulaiman, J.*) G. I. P. RY. CO. *v.* BINDRABAN. **96 I. C. 1046 = 48 All. 766 = A. I. R. 1926 All 394.**

———Whether particular facts found constitute gross negligence is a question of law. (*Odgers, J.*) SRINIVASACHARLU *v.* MUNIRATHNA NAIDU. **95 I. C. 707 = 1926 M. W. N. 350 = A. I. R. 1926 Mad. 905.**

———Question of law—Whether particular facts justify inference of wilful neglect is a question of law. (*Kinkhede, Offg. A.J.C.*) ABDUL KARIM *v.* SECRETARY OF STATE. **97 I. C. 195 = 9 N. L. J. 111 = A. I. R. 1926 Nag. 399.**

———Wilful neglect is a question of fact. A. I. R. 1924 Lah. 594, Foll. (*Jai Lal, J.*) B. B. & C. I. RY. *v.* FIRM MULCHAND SANWAL DAS. **94 I. C. 348.**

———What is gross negligence is a question of mixed law and fact, and the High Court can interfere with the findings of the lower appellate Court. Thus a finding of negligence attributed to the Court of Wards in representing a minor in not relying upon a previous judgment for the purpose of raising the plea of *res judicata* was set aside by the High Court. (*Devadoss, J.*) S. ANANDA RAO *v.* VENKATADRI APPA RAO. **85 I. C. 812 =**

1925 M. W. N. 75=A. I. R. 1925 Mad. 258= 47 M. L. J. 700.

———In a suit by co-sharers against lambardar for profits the question of negligence of lambardar is a question of mixed fact and law and it is open to review in second appeal. (*Lindsay and Kanhayalal, JJ.*) KUNJ BEHARI *v.* ABDUL HADI. **77 I. C. 1032= A. I. R. 1924 All. 613.**

———Finding that there was wilful neglect on the part of the Railway is a finding of fact. (*Martineau, J.*) SECRETARY OF STATE FOR INDIA *v* CHARANJIT LAL. **79 I.C. 428=6 Lah.L.J. 237= A.I.R. 1924 Lah. 594.**

———A finding that there was a gross negligence on the part of a lambardar involves a question of mixed fact and law and is open to review in second appeal. (*Lindsay and Kanhaiya Lal, JJ.*) ASAD ALI *v.* FAIYAZ ALI. **70 I.C. 591=A.I.R. 1922 All. 421.**

S. 100—New Plea.

Admissibility.
Admissibility of evidence.
Alteration of nature.
Construction of document.
Consideration of evidence.
Further evidence.
Inconsistent plea.
Legal representative.
Limitation.
Maintainability of suit.
Mixed question of law and fact.
Nature of transaction.
Notice.
Question of fact.
Question of law.
Partition.
Prejudice to opposite party.
Procedure.
Registration.
Restoration.
Validity of enactment.
Waiver.
Want of evidence.

—S. 100—New plea—Admissibility.

———Question of admissibility for want of registration or irrelevancy of document can be raised at any stage. (*Chakravarti, J.*) SABDI BEPARI *v.* SHEIKH BUDHAI. **82 I. C. 949=A.I.R. 1925 Cal. 370.**

—S. 100—New plea—Admissibility of evidence.

———The plea that according to Sec. 91, Evidence Act, oral evidence is inadmissible, cannot be raised for the first time in second appeal. (*Mears, C. J. and Piggott, J.*) JAIRAM DAS *v* RAJ NARAIN. **70 I. C. 953= 45 All. 21=20 A. L. J. 777=A. I. R. 1922 All. 493.**

—S. 100—New plea—Alteration of nature of suit.

———A new plea materially altering nature of the suit cannot be allowed to be put forward in second appeal. (*Nanavutty, J.*) BHOJ NATH *v.* SHIVA NANDAN. **A. I. R. 1930 Oudh 389.**

———Where a plaintiff did not come into Court claiming as the heir of his father,

Held, that he cannot be allowed to claim as such heir as it would be setting up a new case in second appeal. (*Tekchand, J.*) MEHRAN *v.* RAHIMI. **28 P.L.R. 181= 102 I.C. 426=A.I.R. 1927 Lah 426.**

———The plaintiff should be pinned down to the specific case he has set up in the plaint and should not be allowed to set up a new case in the second appeal for which there was no adequate investigation in the lower Courts. (*Mears, C.J. and Mukerji, J.*) PARTAP *v.* RAM SEWAK. **96 I. C. 304 (All.).**

———A tenant brought a suit claiming to be a ryot

under the Madras Estates Land Act to set aside an alleged sale of his holding against an inamdar, both in the Trial Court as well as in first appellate Court.

Held, that it was not open to the defendant in second appeal to contend that he was a ryot and that the plaintiff was an under-tenant under him and that the Madras Estates Land Act was not applicable as between them. (*Ramesam, J.*) BHUJENGE RAO *v.* PERIATHAMBI GOUNDAN. **92 I. C. 1047=A.I R. 1926 Mad. 635.**

—S. 100—New Plea—Alteration of nature.

———Suit by a Mahomedan widow on a pronote executed by her husband in lieu of dower cannot be allowed in second appeal to be converted into an administration action even though the widow is willing to confine her action to the dower amount and give up her claim to the loan evidenced by the note. (*Devadoss, J.*) DEWATHAMMAL *v.* PASARIAMMAL. **86 I. C. 367= A. I. R. 1925 Mad. 1064.**

———Plaint alleging title by purchase-decree on title by prescription given—Objection not raised in the lower Courts is not permissible in second appeal. 31 Mad. 531; 2 Cal. 418; Dist. and 14 Cal. 594, Foll. (*Odgers and Huges, JJ.*) MUKAMBIKA SHETTITI *v.* SHINDAYYA SETTI. **75 I.C. 613=18 M.L.W. 553= A.I.R. 1924 Mad. 116.**

———*Inconsistent pleas.*

A suit having been tried out on a certain basis in the Courts below, High Court would not allow the decision of those Courts to be interfered with upon a plea which was not merely not raised by the defendants in those Courts, but which is contrary to and inconsistent with the position there taken up by the defendants. (*Mears, C.J. and Piggott, J.*) IQBAL HAIDER *v.* MT. WASI FATIMA. **74 I.C. 1004=45 All. 53= A.I.R. 1923 All. 358.**

—S. 100—New plea—Consideration of evidence.

———Whether the sum tendered to satisfy a mortgage is sufficient or not is a question which cannot be allowed to be raised for the first time in second appeal. Similarly the question whether the money was kept ready after tender for payment is a question which requires consideration of evidence and cannot be allowed to be raised for the first time in second appeal. (*Coutts and Ross, JJ.*) JAG SAHU *v.* MT. RAM SAKHI KUER. **65 I.C. 666=3 Pat. L.T. 332=1 Pat. 350= 1922 P. H. C. C. 58=A.I.R. 1922 Pat. 167.**

—S. 100—New plea—Construction of document.

———When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon the facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But in any case Courts ought not to follow the course unless to their satisfaction the evidence upon which they have to decide establishes beyond a shadow of doubt that the facts if fully inquired into would have sustained the new plea. (*Kinkhede, A. J.C.*) NARAYAN *v.* MT. TULSHI. **80 I. C. 607= A.I.R. 1925 Nag. 104.**

———Question as to construction of lease is not allowed in second appeal if not raised in lower Court but a particular construction was assumed and the construction involved investigation into facts. (*Richardson and Suhrawardy, JJ.*) GOPAL CHANDRA PODDAR *v.* DWARIKA NATH DUTTA. **69 I.C. 655=A.I.R. 1924 Cal. 353.**

C. P. CODE, (1908), S. 100—New plea—Further—Evidence.

———Plea involving question of fact requiring evidence cannot be raised. (*Iqbal Ahmad, J.*) GANESH GIR *v.* SHEO MANGAL PANDEY. **101 I.C. 773 = L.R. 8 A. 89 Rev. = A.I.R. 1927 All. 763.**

———Plea of part performance cannot be allowed for the first time in second appeal where there is not sufficient evidence on the record to dispose of the plea. (*Mukerji and Ashworth, JJ.*) GANGA PRASAD *v.* SUKHDEO SAHU. **100 I.C. 566 = A.I.R. 1927 All. 344.**

———Question of law not requiring fresh investigation of facts can be allowed. (*Mukerji and Graham, JJ.*) DURGACHARAN *v.* AMBICA CHARAN. **54 Cal. 424 = 45 C.L.J. 191 = 101 I.C. 130 = A.I.R. 1927 Cal. 393.**

———Issue of fact requiring fresh materials cannot be raised. (*Daniels and King, JJ.*) MAHADEO PRASAD *v.* SHYAM SUNDER. **97 I.C. 342 = A.I.R. 1926 All. 707.**

———New point involving determination of new questions of facts cannot be raised in second appeal. (*Suhrawardy and Duval, JJ.*) PROMOTHO NATH MOOKERJEE *v.* AUNKUL CHUNDRA BANERJEE. **85 I.C. 875 = 29 C.W.N. 17 = 40 C.L.J. 564 = A.I.R. 1925 Cal. 225.**

———Question whether a particular defendant was a necessary party and could contest the suit is one of law and may be raised in second appeal if it does not involve the taking of further evidence. (*Moti Sagar, J.*) SHAMES-UD-DIN *v.* ALLAH DAD KHAN. **6 L.L.J. 351 = 82 I.C. 603 = A.I.R. 1925 Lah. 65.**

———A ground as to part-payments under S. 20 of the Limitation Act is one which necessarily involves the determination of a question of fact cannot be allowed for the first time in second appeal. (*Shah, Ag.C.J. and Crump, J.*) SATAPPA JAKAPPA *v.* ANNAPPA BASAPPA. **76 I.C. 115 = 47 Bom. 128 = 24 Bom. L. R. 1284 = A.I.R. 1923 Bom. 82.**

———Point involving evidence cannot be taken in second appeal. (*Marten and Pratt, JJ.*) SHRIDHAR LAXMAN DHEKME *v.* JANARDHAN BAPUJI KURAWDE. **72 I.C. 993 = A.I.R. 1923 Bom. 37.**

———Question of law depending on evidence cannot be raised. (*Pratt and Fawcett, JJ.*) DODDAVA KONU PARAHYA *v.* YELLAWA KONU YALLAPPA NINNI. **70 I. C. 417 = A. I. R. 1922 Bom. 233.**

—S. 100—New plea—Inconsistent plea.

———New and inconsistent plea raised in a second appeal by plaintiff—Plaintiff should not be given decree. (*Waller and Madhavan Nair, JJ.*) SRINIVASA VARADACHARIAR *v.* RANGANAYAKI AMMAL. **118 I. C. 291 = 30 M. L. W. 787 = A.I.R. 1929 Mad. 349.**

—S. 100—New plea—Legal representative.

———Impropriety of substitution of legal representative cannot be raised for first time in second appeal—Practice. (*Krishnan, J.*) HARIHARA IYER *v.* UKKANDAN VARIER. **81 I. C. 498 = A.I.R. 1925 Mad. 207.**

—S. 100—New plea—Limitation.

———An intention to dissolve a partnership may be inferred from circumstances showing that a partner has in fact abandoned his interests in the concern (49 P. W. R. 1916 Foll.); and where, upon material before it, the Court concluded that a partnership was dissolved in a certain year, the finding is one of fact and the question of limitation depending on such finding cannot be re-agitated in second appeal. (*Coldstream, J.*) BHAGWAN DAS *v.* FAZAL KHAN. **112 I. C. 375 = A.I.R. 1929 Lah. 154.**

———Facts not disputed—Question of limitation can be raised for the first time in second appeal. (*Iqbal Ahmed, J.*) MUNAWAR ALI *v.* JAGMILAN RAM. **99 I. C. 280 = A. I. R. 1927 All. 177.**

C. P. CODE, (1908), S. 100—New plea—Nature of transaction.

———Plea of bar by limitation raised without any fact —New plea of bar by adverse possession or under Art. 137 of the Limitation Act cannot be raised in Second Appeal. (*Das and Adami, JJ.*) KHUB LAL UPADHYA *v.* JUGDISH PRASAD SINGH. **69 I. C. 185 = 3 Pat. 23 = 3 P. L. T. 795 = A. I. R. 1922 Pat. 398.**

—S. 100—New plea—Maintainability of suit.

———A technical plea, that the suit was premature, should not be allowed to be taken for the first time in appeal. (*Broadway and Harrison, JJ.*) BUDHA MAL *v.* SHIB DAYAL. **71 I.C. 826 = A. I. R. 1924 Lah. 328.**

—S. 100—New plea—Mixed question of law and fact.

———Whether a partner was winding up a business and therefore had authority to bind the firm by his acknowledgment of a debt is a mixed question of law and fact and cannot be raised for the first time in second appeal. (*Dalip Singh, J.*) PAHUMAL NATHU MAL *v.* CHUNI LAL. **118 I.C. 529 = A. I. R. 1929 Lah. 266.**

———The question as to whether a gift is bad as offending against the doctrine of mushaa is a mixed question of law and fact and it cannot for the first time be raised in second appeal 35 Cal. 1 (P. C.) Rel. on. (*Cuming and Cammiade, JJ.*) RAICHUDDIN *v.* MT. WAIZ BIBI. **104 I. C. 126 = A. I. R. 1928 Cal. 49.**

———A mixed question of law and fact not relied on in the lower Courts cannot be raised for the first time in second appeal. (*Daniels, J.*) KUNJ BEHAR SINGH *v.* BANS GOPAL TEWARI. **97 I. C. 487 = A. I. R. 1927 All. 59.**

———The question whether a mortgage is properly executed is one of mixed law and fact and cannot be raised for the first time in the second Appellate Court. A. I. R. 1924 Mad. 513 Foll. (*Odgers, J.*) ERULANDI THEVAN *v.* S. SUBRAMANIA IYER. **97 I. C. 611 = 1926 M. W. N. 559.**

———Mixed questions of law and fact cannot be raised in second appeal for the first time. (*Kinkhede, A. J. C.*) RAGHUBAR PRASAD *v* SATTOO. **89 I. C. 1009 = A. I. R. 1926 Nag. 164.**

———Where a party claims to have riparian rights for the first time in appeal,

Held, he should not be allowed to put in the claim as it is a mixed question of law and fact. (*Odgers and Wallace, JJ.*) SECRETARY OF STATE FOR INDIA *v.* T. B. RAGHAVACHARIAR. **83 I. C. 1009 = 47 Mad. 861 = 47 M. L. J. 503 = 20 M. L. W. 815 = 1924 M. W. N. 820 = A. I. R. 1924 Mad. 913.**

———Whether arrears accrued owing to default of usufructuary mortgagee is a question of law and fact—Transfer of Property Act, S. 76. (*Daniels, J.*) RAM KARAN *v.* RAJA RAM. **84 I. C. 26 = L. R. 5 A. 225 (Rev.) = A. I. R. 1924 All. 877.**

———A new point may be allowed to be raised by a party for the first time in appeal or second appeal, if it is a pure question of law and does not take his opponent by surprise. But the position is very different when the new plea raises question of fact or mixed question of fact and law.

Held, the new plea cannot be allowed in second appeal. (*Mookerjee and Cuming, JJ.*) SECRETARY OF STATE *v.* UPINDRA NARAIN ROY. **71 I. C. 849 = 36 C. L. J. 336 = A. I. R. 1923 Cal. 247.**

—S. 100—New plea—Nature of transaction.

———Where the point raised in appeal for the first time was that a deed was not a will but a deed of gift which was inadmissible being unregistered,

Held, that the point involved a question of fact, and hence could not be raised in argument in appeal for the

C. P. CODE, (1908), S. 100—New plea—Notice.

first time. (*Bhide, J.*) Beli Ram *v.* Devi Chand.
117 I.C. 907 = A.I.R. 1929 Lah. 875.

—S. 100—New plea—Notice.

———Railways Act, S. 77—Absence of notice—New plea as to cannot be raised in second appeal (*Moti Sagar, J.*) Great Indian Peninsula Railway Co., Ltd. *v.* Firm Panna Lal Gopalji. **72 I.C. 779 = A. I. R. 1923 Lah. 609.**

—S. 100—New plea—Question of fact.

———Question whether instrument is materially altered is one of fact. (*Madhavan Nair, J.*) Venkateswara Iyer *v.* Ramanatha. **119 I. C. 472 = A. I. R. 1929 Mad. 622.**

———Point necessitating inquiry into facts cannot be raised. (*Ramesam, J.*) P. Gundappa *v.* K. Narasappa. **99 I. C. 691 = A. I. R. 1927 Mad. 455.**

———Where in a suit based on surrender by a widow defendant pleaded insanity in lower Courts and failed, it is not open to them to put further in second appeal a plea that the widow did not act with knowledge of what she was doing in effecting the surrender. (*Hallifax, A. J.C.*) Bikram *v.* Thakur Ganesh Singh. **99 I. C. 187 = 23 N. L. R. 1 = A. I. R. 1927 Nag. 129.**

———New point involving determination of question of fact cannot be allowed in second appeal. (*Walmsley and Suhrawardy, JJ.*) Krishtopada *v.* Chaitanya Charan Mandal. **69 I.C. 530 = 49 Cal. 1048 = 28 C. W. N. 92 = A. I. R. 1923 Cal. 274.**

———It is not open to the appellant to raise, for the first time in second appeal, an issue which would depend on facts. (*Suhrawardy and Cuming, JJ.*) Hriday Nath Mondal *v.* Tala Bewa. **65 I. C. 706 (Cal.).**

———Question of subrogation requiring reference to facts for determination cannot be raised for first time in second appeal. (*Chatterjee and Pearson, JJ.*) Ali Mahomed Khan *v.* Maharaj Bepari. **36 C. L. J. 186 = 64 I. C. 266 = A. I. R. 1921 Cal. 781.**

———An appellant cannot in Second Appeal raise a new question turning of facts not investigated by the lower Courts. (*Sanderson, C. J. and Richardson, J.*) Parikshit Mandol *v.* Chandra Mohan Dutta. **62 I. C. 761 (2).**

———A question of fact, not raised in the Courts below cannot be raised for the first time in Second Appeal. (*Sanderson, C. J. and Woodroffe, J.*) Dinesh Chandra Banerjee *v.* Romesh Chandra Das. **59 I. C. 316 (Cal.).**

———Question of payment of interest is one of fact. (*Hallifax, A. J. C.*) Jago *v.* Mahadeo. **59 I. C. 709 = A.I.R. 1921 Nag. 94.**

—S. 100—New plea—Question of law.

———Law point on face of record—Whether it can be allowed to be raised in appeal or not depends on circumstances of case and nature of point raised. A.I.R. 1927 Bom. 157 and 31 P. R. 1918, Foll. (*Hilton, J.*) Shadi Ram *v.* Amin Chand. **A. I. R. 1930 Lah. 937.**

———New points even of law cannot be allowed to be raised in second appeal when they were not taken in the lower Appellate Court, unless good ground is shown for failure to take them before. (*Boys and Sen, JJ.*) Maheshrey Tewari *v.* Jarbandkan Misir. **126 I. C. 18.**

———In second appeal, a Court will not take up a point of law for the satisfactory determination of which there is no material in the pleadings and judgments of the lower Courts. (*Ashworth, J.*) Sadho Kandu *v.* Mt. Jhinka Kuer. **116 I. C. 749 = A. I. R. 1929 All. 456.**

C. P. CODE, (1908), S. 100—New plea—Registration.

———A plea that the suit was barred by S. 47, C. P. Code, can be raised for the first time in second appeal, as it is a pure matter of law affecting the very validity of the suit : A. I. R. 1921 Mad. 420, Foll. (*Wallace, J.*) Lakshmana Dola Behara *v.* Jujisti Panda. **1928 M. W. N. 601 = 113 I. C. 547.**

———Question of law depending on other questions cannot be raised. (*Devadoss, J.*) Muhammad Aydross Cheria Koya Thangol *v.* Abdul Kadir. **38 M. L. T. 102 = 99 I. C. 367 = A. I. R. 1927 Mad. 411.**

———Question of law depending on findings of fact cannot be allowed for the first time in second appeal. (*Findlay, J. C.*) Nago Rao *v.* Mt. Alookhi. **104 I. C. 584 = A. I. R 1927 Nag. 351.**

———A pure question of law can be raised for first time in second appeal. (*Lindsay and Kanhaiya Lal, JJ.*) Nadir Husain *v.* Sidiq Husain. **86 I. C. 589 = 47 All. 324 = 23 A. L. J. 138 = L. R. 6 A. 19 Civ. = A. I. R. 1925 All. 361.**

———Plea of law patent upon record may be raised for the first time in second appeal. (*Campbell, J.*) Sohan Singh *v.* Santa Singh. **83 I. C. 768 = A.I.R. 1923 Lah. 491.**

———A pure question of law arising out of the findings of the Courts below and patent on the record can be raised for the first time in second appeal. 51 I. C. 588, Foll. The suit for arrears of maintenance cannot be changed into one for contribution in second appeal. (*Broadway, J.*) Diwan Chand *v.* Bishen Das. **67 I. C. 919 = 2 L. L. J. 255.**

———A new point which is not a pure question of law cannot for the first time be taken up in second appeal. (*Teunon and Newbould, JJ.*) Nilratan Mitra *v.* Abdul Gafur Gazi. **59 I. C. 3 = 32 C. L. J. 75.**

———New point of law can be taken but it should be on facts found by lower Court. (*Das and Adami, JJ.*) Raman Choubey *v.* Bacha Misir. **60 I. C. 393 = 2 P. L. T. 285 = A. I. R. 1921 Pat. 326.**

—S. 100—New plea—Partition.

———Suit for partition—Objection to maintainability on the ground of its being for partial partition cannot be raised for first time in second appeal. (*Ramesam, J.*) (Nagur) Pichai Rowther *v.* Rakkappa. **100 I. C. 202 = A.I. R. 1927 Mad. 528.**

———In a partition suit, a plea on the ground of inconvenience, cannot be urged in second appeal, if not urged in the lower Courts. (*Lindsay, J. C.*) Taja Mul Hussain *v.* Bande Raja. **7 O. L. J. 538 = 60 I. C. 433 = 23 O. C. 281.**

—S. 100—New plea—Prejudice to opposite party.

———Where, in the Lower Courts, had a plea been raised the opposite party might have produced evidence to rebut it, it is too late to raise it in second appeal. (*Newbould and Cuming, JJ.*) Tuka Meah *v.* Nabin Chandra Mazumdar. **65 I. C. 701 = A. I. R. 1923 Cal. 292.**

—S. 100—New plea—Procedure.

———Questions of procedure dependent on facts cannot be raised. (*Cuming and B. B. Ghose, JJ.*) Shib Narain Kaibarta Das *v.* Abdul Gani. **94 I. C. 417.**

—S. 100—New plea—Registration.

———The question whether the registration of a document is invalid on account of the inclusion of property simply for giving jurisdiction to the Sub-Registrar to register, cannot be allowed to be raised for the first time in appeal. (*Ramesam, J.*) Govindan Nayar *v.* Koipunthil Ammed.

C. P. CODE, (1908), S. 100—New plea—Restoration.

25 M. L. W. 327 = 98 I. C. 195 = A. I. R. 1927 Mad. 92.

—S. 100—New plea—Restoration.

———If a respondent first comes to know of the erroneous order restoring the appeal without any notice upon him, he can raise objection to its validity in second appeal. (*Dawson Miller, C. J. and Coutts, J.*) Suraj Pal Pandey *v.* Uttim Pandey. **63 I. C. 99 = 3 Pat. L.T. 117 = 1921 P. H. C. C. 337 = 6 P. L. J. 625 = A. I. R. 1922 Pat. 281.**

—S. 100—New plea—Validity of enactment.

———The question of the validity of the imposition of the personal tax under S. 85, Municipal Act, cannot be raised for the first time in the argument in the High Court. (*Mukerji and Mullik, JJ.*) Tarak Govinda Chowdhury *v.* Indu Jyoti Majimdar. **49 C. L. J. 383 = 33 C. W. N. 684 = A. I. R. 1929 Cal. 452.**

—S. 100—New plea—Waiver.

———It is not fair to ask that a lower Court's decision should be upset when the provisions of law relied on in the High Courts were never brought to the attention, much less pressed upon, the lower Court, and the lower Court has therefore, been given no opportunity of acceding to such argument. (*Boys, J.*) Bisheshwar Nath *v.* Narmadeshwar Prasad. **A. I. R. 1930 All. 726.**

———Non-compliance with O. 13 not complained at the earliest opportunity—Such plea cannot be raised in second appeal. (*Dalip Singh, J.*) Daulat Ram *v.* Ballu. **108 I. C. 374 = A. I. R. 1928 Lah 704.**

———A point which is not taken in the Trial Court or in the grounds of appeal in the lower Appellate Court, should not be allowed to be raised for the first time in second appeal. (*Martineau, J.*) Ladha *v.* Mt. Karam Devi. **98 I. C. 268 = 8 L. L. J. 430 = 27 P. L. R 628.**

———Question of law depending on question of fact not raised in lower Court was not allowed. (*Dawson Miller, C. J. and Foster, J.*) Ramishwar Narain Singh *v.* Mahabir Prasad. **5 Pat. 759 = 8 P. L. T. 124 = 1926 P. H. C. C. 225 = 96 I. C. 529 = A. I. R. 1926 Pat. 401.**

———Defendant cannot raise for the first time in second appeal a point which he did not raise in the written statement and as to which no issue was framed. (*Abdul Raoof, J.*) Shugan Chand *v.* Shikar Chand. **6 L. L. J. 467 = A. I. R. 1925 Lah. 192.**

———When a point is not taken in the lower Court, that is a conclusive bar on an appeal in High Court. As soon as it is established that the point ought to have been taken in the High Court of first instance the Court should refuse to allow it. (*Mears, C. J. and Banerji, J.*) Samsul Hasan *v.* Syed Hasan. **75 I. C. 612 = A. I. R. 1923 All. 430.**

———New point not raised in pleadings nor in the Lower Courts cannot be raised in second appeal. (*Woodroffe and Suhrawardy, JJ.*) Manmohan Ghose *v.* Sidheshwar Dubay. **76 I. C. 213 = 27 C. W. N. 218 = A. I. R. 1923 Cal. 177.**

———New plea cannot be raised in second appeal. (*Broadway and Brasher, JJ.*) Chhajju Mal *v.* Kundal Mal. **70 I. C. 838 = A. I. R. 1923 Lah 53.**

———New plea cannot be raised for the first time in second appeal. (*Macleod, C.J. and Coyajee, J.*) R. S. Potphode *v.* J. G. Yeshwantrao. **67 I. C. 322 = 24 Bom. L. R. 323 = 46 Bom. 966 = A.I.R. 1922 Bom. 329.**

—S. 100—New plea—Want of evidence.

C. P. CODE, (1908), S. 100—Powers of Court.

———A new point taken for the first time in second appeal before High Court without having any evidence on record or any finding to support it should not be allowed to be raised. (*Dawson Miller, C. J. and Coutts, J.*) Chandra Mohan Dutta *v.* Sasibala Dasi. **65 I.C. 277 = 1922 P. H. C. C. 39 = 3 Pat. L. T. 623 = A.I.R. 1922 Pat. 68.**

—S. 100—Notice.

———Question of sufficiency of notice, being one of pure fact, cannot be raised for first time in Letters Patent Appeal. 3 M. L. J. 222 ; A.I.R. 1925 Mad. 346; 29 Cal. 203; 31 Mad. 261 and 35 Bom. 407, Cons. A.I.R. 1924 Mad. 626 ; 27 Mad. 23; and A.I.R. 1921 Bom. 395, Ref. (*Wallace and Srinivasa Ayyangar, JJ. Afterwards Odgers and Wallace, JJ.*) Aiyanars and Kaniyala Swamigal Koti Devasthanam *v.* Periakaruppa Thevan. **30 M. L. W. 583 = 118 I. C. 279 = A. I. R. 1929 Mad. 617.**

———Railways Act, S. 140—Question whether notice was duly served is one of fact. (*Walsh, A.C.J. and Banerji, J.*) Chaturbhuj Ram Lal *v.* Secretary of State. **99 I.C. 622 = A. I. R. 1927 All. 215.**

———The question whether certain facts found amounted to giving notice within S, 70, Bengal Tenancy Act, or not is a question of law. (*Dawson Miller, C. J. and Foster, J.*) Dindayal Singh *v.* Raj Keshwar Naraiyan. **1926 P. H. C. C. 258 = 8 P.L.T. 221 = 98 I. C. 991 = A. I. R. 1926 Pat. 495.**

—S. 100—Nuisance.

———The finding that a public lane has not been narrowed down so as to cause damage to the residents in the lane is a finding of fact which cannot be called in question in second appeal in the High Court. (*Bennet, J.*) Bahal Singh *v.* Mohamad Yusuf. **118 I. C. 520 = A.I.R. 1929 All. 504.**

———Finding as to, existence of nuisance is one fact. (*Campbell, J.*) Mangtu *v.* Lachhi Ram. **90 I. C. 227 = 7 L. L. J. 192 = A.I R. 1925 Lah. 424.**

———Existence as to nuisance is a question of fact. (*Baker, J. C.*) Anandrao *v.* President, Municipal Committee, Nagpur. **89 I. C. 929 = A. I. R. 1926 Nag. 50.**

———Where the principles of law applicable have neither been ignored nor violated, a finding as to the existence of a nuisance is binding on the Court in second appeal. 31 I.C. 62 ; 106 P. R, 1888 ; 40 B. 401, Ref. (*Broadway and Abdul Quadir, JJ.*) Chiragh Din *v.* Karim. **64 I. C. 169 Lah.**

—S. 100—Powers of Court.

———Lower Court trying to fit facts with law—Finding of fact of lower Court can be set aside in second appeal. (*Mukerji and Bennet, JJ.*) Chuttan Teli *v.* Mt. Rajia Khatun. **A.I.R. 1930 All. 510.**

———An appeal to the High Court under S. 142 (3) is not a second appeal as contemplated by S. 100, C. P. Code, and the appeal is not restricted to questions of law only (*Cuming, J., contra*) : A.I.R. 1927 Cal. 802, Ref, (*Rankin, C. C, Ghose and Buckland, JJ.*) Corporation of Calcutta *v.* Jalejabasini Debi. **109 I. C. 618 = 47 C L.J 315 = 32 C.W.N. 378 = A.I.R. 1928 Cal. 450.**

———The Commissioner of Kumaun cannot go into a question of fact as an appellate Court in a second appeal in face of the provisions of Ss. 100, 101 and 102 of the C. P, Code, (*Walsh and Banerji, JJ.*) Nari Ranat *v.* Daulat Ram. **101 I.C. 695 = A.I R. 1927 All. 524.**

———Calcutta Muncipal Act, S. 142—Appeal to High Court under S. 142 is not a second appeal within S. 100, questions of fact can be gone into. ***Page, J.***

—The appeal to the High Court under S. 142 is not preferred under the Code of Civil Procedure but pursuant to the special jurisdiction conferred upon the Court of Small Causes and the High Court under the Calcutta Municipal Act. (*Page and Graham, JJ.*) CORPORATION OF CALCUTTA *v.* SHEIKH KUMUDDIN. **103 I.C. 533 =46 C.L.J 260= 31 C.W.N. 1040=55 Cal. 228= A. I. R. 1927 Cal. 802.**

———According to the amendment of S. 103, the High Court can decide, if there is sufficient evidence, a question of fact wrongly decided by the lower appellate Court, (*Sanderson, C. J., Panton and Graham, JJ.*) BROJENDRA KISHORE *v.* MOHUN CHANDRA. **99 I.C. 189=31 C.W.N. 32=A.I.R. 1927 Cal. 1.**

———Documentary evidence—Court will decide only admissibility and not their evidentiary value. (*Newbould and Graham, JJ.*) RAMKUMAR DAS *v.* HARNARAIN DAS. **92 I. C. 104=A.I.R. 1926 Cal. 727.**

———In an appeal against an order of remand the only grounds available to the appellant to attack the judgment are those which would be available to him in second appeal, (*Venkatasubba Rao and Madhavan Nair, JJ.*) SESHAMMAL *v.* KUPPANAIYYANGAR. **91 I.C. 462=A.I.R. 1926 Mad 475.**

———The fact that upon the evidence, High Court would have come to a different conclusion is no ground for second appeal. 46 Cal. 189 (P.C.), Foll. (*Kinkhede, A.J.C.*) E. I. RAILWAY & CO, *v.* BADRILAL. **90 I.C. 209=A.I.R. 1926 Nag. 192.**

———*Lower Appellate Court reversing finding of fact of primary Court must consider all important materials.*

If the Lower Appellate Court means to reverse the finding of the primary Court on any point, it should consider all the important materials on which that finding was based. It would be intolerable if a Court were required to give all its reasonings in its judgment, or notice all the evidence which influences its decision. But the position is wholly different where a Court takes upon itself to reverse a finding of the Trial Court on a question of fact. (*Mukerji, J.*) UMARAM GOGAI *v.* PUROK CHAND OSWAL. **85 I.C. 540= A.I.R. 1925 Cal. 993.**

———In a judgment of reversal it is not enough to say that in the opinion of the Appellate Court, the evidence is meagre and could not be relied on without giving any reason in support of that view. In such a case its finding of fact is not binding in second appeal. (*Suhrawardy and Chotzner, JJ.*) CHANDRAN MOHAN MAITI *v.* KINARAM MAITI. **79 I. C. 412=A.I.R. 1925 Cal 408.**

———It is quite open to High Court to find that the execution was witnessed by the attesting witnesses even though they may not speak to the fact, if there is other and satisfactory evidence on record to show that the attesting witnesses did witness the execution. 20 C. W. N. 192 Foll. (*Spencer and Devadoss, JJ.*) K. SAMA RAO *v.* LALCHAND. **71 I. C. 153= 1922 M. W. N. 708=32 M. L. T. 9= 17 M. L. W. 661=46 Mad. 64= A. I. R. 1923 Mad. 36=43 M. L. J. 745.**

———It is incumbent on an appellant to show that the judgment appealed from, is wrong. An Appellate Court can come to an independent decision on a point when the Lower Court decided it arbitrarily. (*Broadway and Martineau, JJ.*) FIRM P. D. BAHNWARI LAL *v.* DINA NATH KAPUR. **65 I. C. 464= A. I. R. 1922 Lah. 127.**

———Per *Dawson Mitter, C. J.*—It is not for the High Court, sitting in second appeal, even if it thinks that certain evidence had been improperly rejected by the lower Court, to weigh that evidence as against the evidences on the other side and arrive at a conclusion of fact upon the matter. There may be cases which in second appeal, the appellate court is entitled to decide itself, because the matter is so clear that no court acting reasonably can come to any conclusion but one. But if there is evidence on both sides, and the case does not come under S. 103, C. P. Code, the only possible thing to do, is to remand the case for determination of the question of fact, taking into consideration the evidence improperly rejected along with the other evidence in the case.

Per *Jwala Prasad, J.*—Once a second appeal has been properly laid, Rules 23, 24 and 25 under Orders 41 and 42 will apply for the disposal of that appeal. The finding of fact of the lower appellate court having been set aside under S. 100, C. P. Code, if evidence on the record is sufficient, there is nothing to prevent the High Court from going into evidence and determining the case finally under R. 24 of O. 41, S. 103, which has been added in the new Code (1908) has widened the power of the High Court to determine any issue not determined by the Court below after going into evidence. (*Dawson Mitter, C.J. and Jwala Prasad, J.*) LOCHAN RAI *v.* SANT PRASAD. **65 I. C. 536= 3 Pat. L. T. 303=A. I. R. 1922 Pat. 417.**

———In second appeal the Court is not in possession of all the evidence or in a position to be able to weigh it and see whether in fact apart from the objectionable evidence there was sufficient evidence to entitle the lower Court to come to the decision which it did, so as to enable the High Court to affirm that decision under S. 167 of the Evidence Act. (*Dawson Mitter, C.J. and Mullick, J.*) MT. SUMITRA KUER *v.* RAM KHAIR CHOWBEY. **1921 P. H. C. C. 17= A. I. R. 1921 Pat. 61.**

—**S. 100—Precedent.**

———Court in second appeal cannot reverse finding of lower Court on strength of authority not quoted in Courts below. (*Hilton, J.*) MUNSI RAM *v.* PURAN CHAND. **A. I. R. 1930 Lah. 737.**

—**S. 100—Presumption.**

———The question whether a statutory presumption is rebutted by the evidence is always a question of fact. 19 C. W. N. 1017 and A. I R. 1929 P. C. 286, Foll.; A. I. R. 1927 P.C. 102, Dist. (*Sir Benod Mitter.*) WALLI MOHAMMAD *v.* MOHAMMAD BAKSH. **122 I. C. 316=1930 A. L. J. 292= 32 Bom. L. R. 380=31 P.L.R. 145= 31 M. L. W. 321=11 Lah. 199=57 I. A. 86= A. I. R. 1930 P. C. 91**

———Presumption based on probabilities deduced from evidence is one of fact. A. I. R. 1928 Lah. 162, Dist. (*Hilton, J.*) DELHI SWADESHI CO-OPERATIVE STORES CO., LTD. *v.* B. B. & C. I. RY. CO. **A. I. R. 1930 Lah. 557.**

———Evidence Act, S. 114—Document creating obligation in hands of obligor—Court may presume that obligation is discharged—Failure to draw inference sustains second appeal. A. I. R. 1928 All. 16, Rel. on. (*Addison, J.*) UDEY SINGH *v.* HARI RAM. **121 I. C. 730=12 L. L. J. 21= A.I.R. 1930 Lah. 443.**

———Finding of fact based entirely on presumption arising out of a rule of Mahomedan Law can be attacked in second on the ground of the non-applicability of the rule. (*Johnstone, J.*) MT. RAHIM BIBI *v.* CHIRAGHDIN. **120 I.C. 495= A. I. R. 1930 Lah. 97.**

———*Validity of.*

Where finding of fact is based entirely on presumptions validity of presumptions can be examined in second appeal. (*Wazir Hasan, Ag. C. J. and Pullan, J.*) MT. GUJRATI KUNWAR *v.* BHAGWATIDIN SINGH. **118 I. C. 808 = A. I. R. 1930 Oudh. 17.**

———*Failure to evoke.*

The second Appellate Court is justified in interfering with a finding of fact of the lower Appellate Court, where the lower Appellate Court has failed to invoke a presumption of the nature illustrated in S. 114, Evidence Act, 9 W. R. 338 and 1 M. H. C. 131, Foll. (*Ashworth and Kendall, JJ.*) SITA RAM *v.* NANKU. **106 I. C. 250 = 50 All. 145 = 25 A. L. J. 833 = A. I. R. 1928 All. 16.**

———*Disregard of.*

Where the presumption of possession by an entry in the record-of rights in favour of a certain person is entirely disregarded, such a finding of fact can be set aside in second appeal. (*Cuming and Mukerji, JJ.*) MADHAB CHANDRA *v.* TILOTTAMA DASI. **110 I. C. 445 = A. I. R. 1928 Cal. 751.**

———Highway—Blind alley—Court may presume that the ownership vests in the owners of the adjacent houses —That presumption is an inference of fact. A.I.R. 1925 Bom. 27 Cons. (*Dalip Singh, J.*) SHIMBU DAYAL *v.* GAJJUMAL. **108 I.C. 610 = A. I. R. 1928 Lah. 709.**

———The question that an *ala malik* must be presumed to have rights in the *shamilat* is not a question of law. 35 P. R. 1919; 36 P. R. 1919; 68 P. R. 1916 Appl. (*Addison, J.*) DEVI CHAND *v.* JAI CHAND. **90 I. C. 1047 = 26 P. L. R. 605 = A. I. R. 1926 Lah. 21.**

———The presumption is that the person paying off a mortgage intends to keep it alive if it is for his benefit to do so: [10 Cal. 1035 (P.C.), Foll.] But the presumption of law as to intention is not irrebuttable [9 Cal. 961 (P. C.); 21 M. L. J. 180, 34 Mad. 119, Foll.] The question of intention is a question of fact. The inference in all cases has to be drawn from the circumstances of the cases themselves and the question cannot be re-agitated in second appeal. (*Phillips, J.*) TIRUVENGADAM PILLAI *v.* SABAPATHI PILLAI. **90 I. C. 767 = 1925 M. W. N. 608 = A. I. R. 1925 Mad. 1217 = 49 M. L. J. 361.**

———*Failure to draw.*

An open user continued without interruption for a period of over 20 years and not shown to be attributable to permission or sufferance on the owner's part is *prima facie* evidence of enjoyment as of right within the meaning of S. 26 of the Limitation Act. Failure on the part of Court to draw such a presumption will be an error of law making a second appeal competent. (*Kinkhede, A. J. C.*) NARAIN *v.* IKRAM. **85 I. C. 81 = A. I. R. 1925 Nag. 270.**

———A merely conjectural finding of the lower Appellate Court that the common ancestor of the parties occupied the land in suit is liable to be set aside in second appeal. (*Martineau, J.*) KISHEN LAL *v.* KANHAYA. **79 I. C. 970 = 5 Lah. L. J. 106.**

———It is for the Court of fact to determine whether the presumptions referred to under S. 114, Ill. (*f*) of the Evidence Act are to be drawn in a particular case or not. (*Mittra, A. J. C.*) RAMCHANDRA *v.* RAGHOJI. **17 N. L. R. 25 = A. I. R. 1921 Nag. 116.**

———The question whether the presumption of the correctness of the Record of Rights has been rebutted in a particular case is more a question of fact than of law. (*Suhrawardy and Cuming, JJ.*) YAKUB ALI CHOWDHURI *v.* RAJ KUMAR DUTTA. **65 I. C. 527 (Cal.).**

———Where on a consideration of the entire evidence in the case, the lower Appellate Court has come to the conclusion that the relationship of landlord and tenant

exists between the parties and that the presumption raised by an entry in the record-of-rights has been rebutted, the finding is one of fact with which the High Court cannot interfere in second appeal. (*Newbould, J.*) KARIM BUX *v.* DWARAKANATH KAR. **64 I. C. 190 (Cal.).**

———*Failure to draw.*

Though the finding on the question of legitimacy is one of fact, it would not be upheld in second appeal where the lower Appellate Court has ignored important pieces of evidence and the strong presumption of law in favour of legitimacy. (*Wilberforce and Le Rossignol, JJ.*) SULAKHAN *v.* SANTA SINGH. **60 I. C. 375 (1).**

—S. 100—Procedure.

———Agreement by both sides to proceed on the evidence before the Court and also before the Commissioner—Its violation by the Court, is a defect calling for interference in second appeal. (*Rankin, C. J. and Mitter, J.*) SAILENDRA NATH *v.* SATESH CHANDRA. **106 I. C. 841 = 46 C. L. J. 558 = A. I. R. 1928 Cal. 136.**

———Taking additional evidence without recording reasons and without calling upon the party to show its necessity, is a substantial error in procedure and such an order of the lower Appellate Court is open to second appeal. (*Rankin and Mukerji, JJ.*) KEBAL NAMADAS *v.* RAJANI KANT ROY. **81 I. C. 999 = 39 C. L. J. 261 = A. I. R. 1925 Cal. 98.**

———Misconception of law of evidence and wrong procedure vitiate finding. (*Mullick and Bucknill, JJ.*) SHEOPUNJAN RAI *v.* KESHO PRASAD SINGH. **76 I. C. 347 = 2 Pat. 919 = 5 Pat. L. T. 315 = A. I. R. 1924 Pat. 310.**

———Interpreting documents is a question of fact and not of law. Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final. 17 I. A. 127, Ref. (*Stuart, J.*) MAHOMED SHAKUR *v.* ABDUL GHANI. **71 I. C. 369 = A. I. R. 1923 All. 362.**

S. 100—Question or Finding of Fact.

Attestation.
Bona fides.
Change of Law.
Compromise.
Consideration.
Contract.
Different Inference.
Duty of Court.
Earnest Money.
Easement.
Evidence.
Execution.
Finality.
Fraud.
Foreign Law.
Grove.
Injunction.
Intention.
Interest.
Legal Effect.
Legitimacy.
Limitation.
Market Value.
Meaning of Words.
Mistake of Law.
Mistake or Error.
Nature of Property.
Nature of Transaction.
Negligence.
Notice.

C. P. CODE, (1908), S. 100—Question or Finding of fact.

Novatio.
Omission.
Ownership.
Possession.
Proof.
Reasonable or Probable Cause.
Rent, rate of.
Representation.
Right over property.
Status.
Tender.
Wakf.
Will.
Miscellaneous.

—S. 100—Question or finding of fact—Attestation.

———It cannot be said as a matter of law that a scribe cannot be an attesting witness. It is a question of fact which must be determined by a Court of fact. (*Suhrawardy and Duval, JJ.*) ACHOLA SUNDARI DEBI *v.* DOMAN SUNDARI DEBI. **90 I. C. 774 = A. I. R. 1926 Cal. 150.**

———*High Court has power to find that document was executed in witnesses' presence.*

It is quite open to High Court to find that the execution was witnessed by the attesting witnesses even though they may not speak to the fact, if there is other and satisfactory evidence on record to show that the attesting witnesses did witness the execution. 20 C. W. N. 192, Foll. (*Spencer and Devadoss, JJ.*) K. SAMA RAO *v.* FIRM OF MARWADI VANNAPI VAJINJI. **71 I. C. 153 = 46 Mad. 64 = 17 M. L. W. 661 = 32 M. L. T. 9 = 1922 M. W. N. 708 = A. I. R. 1923 Mad. 36 = 43 M. L. J. 745.**

—S. 100—Question or finding of fact—Bona fides.

———The finding that a document was genuine, is one of fact. 37 Mad. 455, Foll. (*Curgenven and Ananthakrishna Aiyar, JJ.*) MUTHIYAN CHETTI *v.* VAYYADAYAN. **108 I. C. 412.**

———Whether other proceedings were prosecuted diligently and in good faith is a question of fact—Limitation Act, S. 14. (*Campbell, J.*) GANGA RAM BISHEN DAS *v.* HARI RAM RAM LAL. **102 I. C. 628 = A. I. R. 1927 Lah. 909.**

———Question as to plaintiff's *bona fide* mistake is not one of fact. (*Suhrawardy and Graham, JJ.*) KHERODAMOYI DASI *v.* HABIB SHAHA. **82 I. C. 638 = 29 C. W. N. 51 = A. I. R. 1925 Cal. 152.**

———*Bona fides* is a finding of fact. 75 P. R. 1916, Foll. (*Abdul Raoof, J.*) MUNICIPAL COMMITTEE, FEROZPORE CITY *v.* MILKI RAM. **92 I. C. 602 = 7 L. L. J. 358 = 26 P. L. R. 641 = A. I. R. 1925 Lah. 505.**

———It is a question of fact whether a guardian is justified in entering into a compromise. (*Spencer and Odgers, JJ.*) ANNAPURNAYYA *v.* VENKATASUBRAMANIAM. **91 I. C. 742 = 22 M. L. W. 560 = A. I. R. 1925 Mad. 1285 = 49 M. L. J. 549.**

———Finding that certain arrangement was disadvantageous to the minors could not be said to have been made honestly and in good faith, is one of fact and cannot be assailed in second appeal. (*Broadway and Abdul Qadir, JJ.*) THAKUR *v.* JAWALA. **4 L. L. J. 40 = A. I. R. 1921 Lah. 291.**

———Finding that suit is not collusive—High Court cannot go behind the finding. 24 C. W. N. 201 (P. C.), Foll. 139 P. R. 1894 held not good law. 20 Cal. 93 (P. C.), Ref. (*Broadway, J.*) SARJU *v.* BUDHA. **59 I. C. 885 = 3 L. L. J. 86 = A. I. R. 1921 Lah. 45.**

———Good faith is a question of fact in each case. (*Fawcett, J. C. and Raymond, A. J. C.*) IBRAHIM *v.* FIRM OF GHULAM HUSSAIN. **62 I. C. 507 = 15 S. L. R. 11 = A. I. R. 1921 Sind 13.**

—S. 100—Question or finding of fact—Change of law.

———Where during the pendency of second appeal the Transfer of Property (Amendment) Act (1926) came into force rendering the finding of fact as to attestator's actually seeing the document signed irrelevant,

Held, that the High Court can consider the evidence in view of the altered aspect of the finding as to attestation. (*Kanhaiyalal and Ashworth, JJ.*) MT. MOHAMMADI BIBI *v.* KASHI UPADHYA. **96 I. C. 775 = A. I. R. 1926 All. 725 (2).**

———A decision of the lower Court which was right according to the view of the law then prevailing can be set aside in second appeal if the subsequent ruling of the Privy Council takes a contrary view. (*Kotval, A. J. C.*) CHOTARAM *v.* NARAYAN. **90 I. C. 210 = A. I. R. 1926 Nag. 49.**

—S. 100—Question or finding of fact—Compromise.

———Workman's Compensation Act (1923), S. 30—Whether parties to a suit agreed or not to a certain decree is a pure question of fact. (*Marten, C. J. and Murphy, J.*) CHHIPA ALLARAKHA ISAKJI *v.* BAI SONA. **114 I. C. 372 = 30 Bom. L. R. 1610 = A. I. R. 1929 Bom. 68.**

———The finding that there was a *bona fide* compromise in a pending litigation by a person is one of fact and cannot be challenged in second appeal. (*Addison, J.*) JAISHI RAM *v.* SUJA. **109 I. C. 776.**

—S. 100—Question or finding of fact—Consideration.

———The finding as to the nature of the consideration is one of fact and cannot be disturbed in second appeal. (*Jai Lal, J.*) SHANTI SARUP *v.* LALCHAND. **28 P. L. R. 388 = 103 I. C. 444 = 9 L. L. J. 319 = A. I. R. 1927 Lah. 530.**

———Finding as to consideration is one of fact. (*Broadway and Abdul Qadir, JJ.*) MOHOMED HUSSAIN *v.* RAM LAL. **71 I. C. 783 = 5 L. L. J. 198 = A. I. R. 1924 Lah. 39.**

—S. 100—Question or finding of fact—Contract.

———Question as to existence of natural love and affection was held to be one of fact. (*Srinivasa Ayyangar and Reilly, JJ.*) K. V. DESIKACHARIAR *v.* CHINNAMMAL. **110 I. C. 408.**

———The question whether time is or is not of the essence of a contract is one of fact and a finding thereon cannot be assailed on second appeal. (*Scott-Smith and Abdul Qadir, JJ.*) FAZAL ILAHI *v.* THE IMPERIAL CHEMICAL COMPANY. **67 I. C. 157 (Lah.).**

—S. 100—Question or finding of fact—Different inference.

———Finding of fact cannot be reversed in second appeal. (*Bennet and Iqbal Ahmad, JJ.*) BHAGWAN DAS *v.* BIBI IQBAL SULTAN. **118 I. C. 715 = 1930 A. L. J. 340 = A. I. R. 1929 All. 885.**

—S. 100—Question or finding of fact—Duty of Court.

———Practice—Lower Court should carefully consider entire material on record for giving finding of fact. (*Jai Lal, J.*) LOKU RAM *v.* ALLAH WASAYA. **123 I. C. 573 = A. I. R 1930 Lah. 12.**

———The High Court cannot in second appeal entertain an application for a review of judgment based on the ground that since the disposal of the appeal documentary evidence has been discovered which, if sufficiently proved, would have led the Court-below to come to a different finding, although had such evidence been dis-

C. P. CODE, (1908), S. 100—Question or Finding of Fact—Duty of Court.

covered before the disposal of the appeal the Court might have allowed the appellant to withdraw the appeal with a view to apply to the lower appellate Court for a review of judgment on the ground of the discovery of fresh evidence, (32 All. 71, Foll.) The question whether any particular record has been rightly or wrongly framed is certainly a question of fact and not a question of law. (*Lindsay and Rafique, JJ.*) MARIAM-UN-NISSA BIBI *v.* BABU RAM. **73 I. C. 1016 = 45 All. 458 = 21 A. L. J. 377 = 4 L. R. A. Civ. 416 = A. I. R. 1923 All. 541.**

———Where a second appeal was decided on questions of fact only,

Held, in L. P. Appeal that the judgment in the second appeal should be set aside. 36 All. 93 ; 239 P. L. R. 1914 ; 20 Cal. 93 (P. C.) and 29 Bom. 1 (P. C.). Dist.; 18 Cal. 23 P. C. ; 19 Cal. 249 (P. C.) ; 37 Mad. 443 (P. C.) and 46 Cal. 189 (P. C.) Foll. (*Leslie Jones and Wilberforce, JJ.*) HAYAT *v.* DITTU RAM RAJU RAM. **4 L. L. J. 464 = A. I. R. 1921 Lah. 341.**

———C. P. Code, S. 100—Finding of fact not based on evidence but surmise, is defective. (*Das and Adami, JJ.*) MAHESHWAR PRASAD SINGH *v.* BABU RAM RAI. **60 I. C. 308 = 2 P. L. T. 225 = 1921 P. H. C. C. 93 = A. I. R. 1921 Pat. 59.**

—S. 100—Question or finding of fact—Earnest money.

———Where there is no written contract, the point as to determination of what is and what is not earnest money, must be decided, according to the evidence on the record as a point of fact. (*Stuart and Sulaiman, JJ.*) MADHO DAS *v.* GOKUL DAS. **68 I. C. 761 = 20 A. L. J. 742 = A. I. R. 1922 All. 478.**

—S. 100—Question or finding of fact—Easement.

———The finding of a lower Court that the right of privacy possessed by a house-holder in respect of the house which he occupies has not been interfered with by his neighbour, is a finding of fact and cannot be disturbed in second appeal. 29 All. 582, not Foll. (*Stuart, C. J. and Raza, J.*) RAGHUBAR *v.* RADHA KRISHNA. **6 O. W. N. 940 = A. I. R. 1929 Oudh 535.**

———Finding as to privation of light not inconveniencing user so as to entitle him to injunction, is a finding of fact. (*Bhide, J.*) SOHAN SINGH *v.* JAGAT SINGH. **114 I. C. 698 = A. I. R 1928 Lah. 980.**

———Implied grant—Existence of, is a question of fact (*Dawson Miller, C. J. and Macpherson, J.*) SHEIKH ABDUL GHANI *v.* HARNAM SINGH. **90 I. C. 356 = 7 P. L. T. 260 = 1925 P. H. C. C. 250 = A. I R. 1925 Pat. 748.**

———A finding that no right of way was granted is a finding of fact. (*Martineau, J.*) GANGA RAM *v.* SITA RAM. **6 Lah. L. J. 176 = A. I. R 1924 Lah. 488.**

—S. 100—Question or finding of fact—Evidence —Absence of.

———Where a finding of fact as regards consideration was based not on circumstantial evidence but upon conjectures, *held*, that the High Court could set it aside in second appeal. (*Hilton, J.*) BANWARI LAL *v.* BHAG MAL. **12 Lah. L. J. 107.**

———*High Court can interfere.*

Where there is no evidence in support of a finding of fact, the High Court in second appeal can interfere with it. (*Suhrawardy and Patterson, JJ.*) BENGAL NAGPUR RAILWAY COMPANY *v.* MOOLJI SICKA & CO. **52 C. L. J. 235.**

———Finding is binding unless there is no evidence to support it. (*Sir Lancelot Sanderson.*) KRISHNA REDDI *v.* GANDAVARAM RAGHAVA REDDI. **32 C. W. N. 3 = 107 I. C. 449 =**

C. P. CODE, (1908), S. 100—Question or Finding of Fact—Evidence—Existence of.

A. I. R. 1927 P. C. 257 = 53 M. L. J. 700.

———Finding of fact not based on evidence is not final. 29 Bom. 1, P. C. ; 17 Cal. 875 (P. C.) ; 14 Cal. 740 (P. C.) and A.I.R. 1919 P. C. 29, Foll. (*Ramesam and Venkatasubba Rao, JJ.*) RAMESWARAM DEVASTHANAM *v.* SECRETARY OF STATE. **39 M. L. T. 633 = 104 I. C. 781 = A. I. R. 1927 Mad. 1167.**

———No evidence to support finding of fact—High Court will interfere. (*Dalal, J. C.*) HARI KISHEN DASS *v.* MAIKU LAL. **87 I. C. 959 = A. I. R. 1926 Oudh 37.**

———The High Court ought not to interfere in second appeal with a finding of fact so long as there is some evidence to support it, but where the lower Court has arrived at his findings without evidence and the trial is bad and the High Court will interfere. (*Mullick and Kulwant Sahay, JJ.*) THAKURJI SRI JUGAL SARKAR *v.* RAJ MANGAL PRASAD. **7 P. L. T. 547 = 94 I. C. 929 = A. I. R. 1926 Pat. 187.**

———Where a plaintiff bases his claim upon a title, the mere fact that the adjoining plot happened to be a courtyard or outer compound of a house and belongs to a certain person does not show that the plot on which the disputed house stands must also belong to that person. The finding to the effect being not based on legal evidence can be set aside in second appeal, (*Suhrawardy and Chotzner, JJ.*) AHIDANNABI *v.* NAGENDRA LAL GANGOPADHYA. **80 I. C. 903 = A. I. R. 1925 Cal. 302.**

———Evidence entirely absent—Finding will be set aside. (*Dalal, J. C.*) SHIV NARAYAN *v.* G. I. P. RAILWAY. **85 I. C. 338 = 27 O. C. 331 = A. I. R. 1925 Oudh 525.**

———Allegation in plaint not denied specifically in written statement and supported by evidence—Finding cannot be challenged. (*Ross and Sen, JJ.*) MAHAMUD ALAM *v.* NATHU SAHU. **85 I. C. 1024 = 2 Pat. L. R. Civ 284 = A. I. R. 1925 Pat 552.**

———A finding of fact on no evidence is liable to upset by High Court in second appeal. (*Wallace, J.*) SUPPAI GOUNDAN *v.* KANDASWAMY GOUNDAN. **80 I. C. 567 = 19 M. L. W. 560 = A. I. R. 1924 Mad. 617.**

———Decision which proceeds not on legal evidence but on mere conjectures can be attacked in second appeal. (*Bhide, J.*) JOHAGA *v.* BIRCHAND. **29 P. L. R. 410 = 112 I. C. 455 = A. I. R. 1928 Lah. 737.**

———Finding on mere conjectures can be upset in second appeal. (*Scott-Smith and Fforde, JJ.*) MT. BASANTI *v.* KABUL SINGH. **80 I. C. 329 = 6 L. L. J. 127 = A. I. R. 1924 Lah. 465.**

—S. 100—Finding of fact—Evidence —Doubtful.

———Doubtful evidence—High Court will not interfere unless injustice is caused or there is misapprehension of evidence. (*Dalal, J. C.*) THAKURAIN ANPURNA KUAR *v.* JAGESHAR MISRA. **87 I. C. 208 = A. I. R. 1925 Oudh 658.**

—S. 100—Question or finding of fact—Evidence —Existence of.

———Where there is legal evidence to support the findings of fact, the findings cannot be challenged in second appeal. (*Tek Chand and Agha Haidar, JJ.*) GHULAM MURTAZA *v.* NAGINA. **11 Lah. 410 = 31 Punj. L.R. 243.**

———A finding of fact based on legal evidence cannot be disturbed in second appeal. (*Tek Chand, J.*) AMAR DAS *v.* JALI. **121 I. C. 377 = A. I. R. 1930 Lah. 677.**

C. P. CODE, (1908), S. 100—Question or finding of fact—Evidence—Existence of.

———No Court of second appeal can entertain an appeal upon any question as to the soundness of the finding of fact by the Court of first appeal, and if, however, unsatisfactory it might be if examined, there is evidence to be considered, the decision of that Court must stand final and when the decision given is legal and not perverse or contrary to reason that cannot be challenged. 19 Cal. 249 (P. C.), Foll. (*Raza and Pullan, JJ.*) RAMANAND *v.* MURTAZA. **115 I. C. 448 = 4 Luck. 665 = 6 O. W. N. 206 = A. I. R. 1930 Oudh 176.**

———If the first appellate Court has evidence proper for its findings notwithstanding the statutory presumptions, then its findings of fact are final and conclusive. 18 Cal. 23 (P. C.) and 14 Cal. 740 (P. C.), Rel. on. (*Sir Binode Mitter.*) MIDNAPORE ZAMINDARI CO., LTD .*v.* SECRETARY OF STATE. **120 I. C. 56 = 30 M. L. W. 600 = 56 I. A. 388 = 51 C. L. J. 1 = 34 C. W. N. 1 = 32 Bom. L. R. 114 = A. I. R. 1929 P. C. 286 = 57 M. L. J. 849 (P.C.).**

———Second appellate Court can set aside a finding of fact not based on admissible or reasonable evidence. (*Ashworth and Sen, JJ.*) PADAM SINGH *v.* REOTI SARAN. **118 I. C. 372 = 1929 A. L. J. 873 = A. I. R. 1929 All. 481.**

———Finding of fact based on admissible evidence cannot be impugned. There is no jurisdiction to entertain a second appeal on the ground of even an erroneous finding of fact, however gross or inexcusable the error may seem to be. 18 Cal. 23 ; A. I. R. 1929 P. C. 152 ; A. I. R. 1929 P. C. 190, Rel. on. (*Raza, J.*) MUBINULNISSA *v.* ALI HUSAIN. **6 O. W. N. 652 = 119 I. C. 866 = A. I. R. 1929 Oudh 402.**

———Finding of fact based on some evidence cannot be disturbed. (*Boys and Ashworth, JJ.*) BHOGI RAM *v* KISHORI LAL. **50 All. 754 = 26 A. L. J. 696 = 115 I. C. 771 = A. I. R. 1928 All. 289.**

———If there is evidence to be considered the decision of the second Court, however unsatisfactory it might be when examined, must stand final. 42 Cal. 888, Foll. (*Kinkhede, A. J. C.*) E. I. RAILWAY & CO. *v.* BADRI LAL. **90 I. C. 209 = A. I. R. 1926 Nag. 192.**

———Findings of facts based on admissible evidence are not challengable in second appeal even though erroneous. 18 Cal. 23 (P.C.). Foll. (*Wazir Hasan and Raza, JJ.*) CHANDIKA SINGH *v.* BITHAL DAS. **99 I. C. 183 = 3 O. W. N. Sup. 277.**

———Where there is evidence upon which the lower court could come to a finding and no important evidence of any sort has been ignored, the finding of fact cannot be interfered with in second appeal. (*Scott-Smith and Abdul Raoof, JJ.*) RAM SINGH *v.* GANGARAM. **70 I. C. 202 = 3 Lah. 389 = 6 Lah. L. J. 513 = A. I. R. 1922 Lah. 356.**

—S. 100—Question or finding of fact—Evidence—Inadmissible.

———Finding based on inadmissible evidence is not binding. (*Kinkhede, A.J.C.*) BANAN *v.* RANJIT SINGH. **89 I. C. 752 = A. I. R. 1926 Nag. 99.**

—S. 100—Question or finding of fact—Evidence—Misdirection.

———A Court in second appeal is not to question the conclusion of fact arrived at by both the lower Courts based on legal evidence when no question of misdirection or law arises with regard to it. (*Srinivasa Iyengar and Curgenven, JJ.*) THATHACHARIAR *v.* SINGARACHARIAR. **109 I. C. 771 = A. I. R. 1928 Mad. 377.**

—S. 100—Question or finding of fact—Evidence—Misreading.

———Evidence not properly construed by lower Court

C. P. CODE, (1908), S 100—Question or finding of fact—Finality—Conjecture.

—Finding of fact cannot be challenged. (*Chevis, Ag. C J. and Abdul Raoof, J.*) JADU NATH *v.* RAMUN MAL. **4 Lah. L. J. 426 = A.I.R. 1921 Lah. 284.**

———Finding based on evidence misread or misunderstood can be reversed. (*Rafique and Ryves, JJ.*) MATHRA SINGH *v.* RAMPAZ SINGH. **61 I.C. 65 = 19 A. L. J. 149 = A. I. R. 1921 All. 212.**

—S. 100—Question or finding of fact—Evidence—Omission.

———Where a finding of fact has been arrived at by the lower appellate Court on the basis of only a portion of the evidence in the case and the most important evidence has been excluded from consideration, the High Court will interfere in second appeal. (*Bhide, J.*) KANSHI RAM *v.* BIR SINGH. **112 I.C. 461.**

———Finding of fact is binding only when arrived at after due consideration of all evidence oral and documentary. (*Mirza, J.*) ANANDPAL SINGH *v.* MAHABAL SINGH. **1 Luck. 458 = 29 O. C. 330 = 3 O. W. N. 352 = 95 I. C. 925 = 13 O. L. J. 586 = A. I. R. 1927 Oudh 95.**

———Finding of fact is not binding in second appeal if lower Court ignores valuable evidence. (*Walmsley and Mukerji, JJ.*) BHABATARINI *v.* ROY KIRAN CHANDRA. **91 I. C. 1026 = A. I. R. 1926 Cal. 603.**

—S. 100—Question or finding of fact—Evidence—Sufficiency.

———A finding of fact based partly upon inadmissible evidence cannot be challenged in second appeal if it appears from the record that the Court would have arrived at the same conclusion even if such evidence had been excluded. (*Tapp, J.*) MT. NAWAB BIBI *v.* SHER ZAMAN. **31 Punj. L. R. 214 = 123 I. C. 285.**

———The objection that a house being occupied by a person as an agriculturist was not liable to be attached was not raised at the earliest possible opportunity. The Court did not take into consideration that the delay threw a deal of doubt on the genuineness of the objection but found on other evidence on record that the house was so occupied.

Held, that the finding of fact based on other evidence on record is still good and binding on High Court in second appeal. A. I. R. 1924 Nag. 91, Rel. on. (*Subhedar, A. J. C.*) GANPAT *v.* RAMCHANDRA. **119 I. C. 677 = A. I. R. 1930 Nag. 11.**

———Unless it is shown that a finding of fact is not justified by the evidence in the case it cannot be challenged in second appeal. (*Greaves and Graham, JJ.*) JINNATENNESSA *v.* ABDUL HALIM MUNSHI. **82 I. C. 822 = A. I. R. 1925 Cal. 469.**

— S. 100—Question or finding of fact—Execution.

———Lower appellate Court's finding that the documents were properly executed is a finding of fact. (*Ashworth, J.*) JAIDEOSINGH *v.* DHOOM SINGH. **116 I. C. 740 = A. I. R. 1929 All. 419.**

—S. 100—Question or finding of fact—Finality—Concurrent.

———S. 100 says nothing about the findings of fact, concurrent or otherwise, and, therefore, a finding of fact by the lower appellate Court, though not concurrent, is final and cannot be interfered with in second appeal. 17 Cal. 291 (P. C.) ; 18 Cal. 23 (P. C.) and 20 Cal. 93 (P.C.), Rel. on. (*Baguley, J.*) MA PYA *v.* K.C. MITRA. **114 I.C 538 = 6 Rang. 586 = A.I.R. 1928 Rang. 303.**

—S. 100—Question or finding of fact—Finality—Conjecture.

———Findings of facts proceeding upon pure conjectures, unjustifiable assumptions and unwarranted inferences cannot be accepted as final in second appeal. A. I. R. 1926 Lah. 659 and A. I. R. 1924 Lah. 465, Rel. on.

C. P. CODE, (1908), S. 100—Question or finding of fact—Finality—Contradictory.

(*Tek Chand, J.*) KISHAN SINGH *v.* LACHHMAN DAS. **122 I. C. 109 = A. I. R. 1930 Lah 238.**

—S. 100—Question or finding of fact—Finality —Contradictory.

———A finding of fact which contradicts the other finding, is open to second appeal. (*Dalip Singh, J.*) SADHU RAM *v.* CHUHAR KHAN. **108 I. C. 521 = A. I. R. 1928 Lah. 690.**

—S. 100—Question or finding of fact—Finality —Different conclusions.

———Where the lower appellate Court has arrived at a conclusion which is permissible on the facts established it is not open to the High Court to set aside its finding on second appeal even if the second appellate Court is inclined to come to a different conclusion on those facts. (*Jai Lal, J.*) JAWAHAR SINGH *v.* SUNDER SINGH. **98 I. C. 876.**

—S. 100—Question or finding of fact—Finality —Duty of Court.

———It is to the public interest that there should be an end of litigation even at the cost of occasional error. If this rule is strictly enforced the parties know where they are, but if a High Court, every time it differs from the view of the Court below on a question of fact, is to seek out flimsy pretexts for treating the question as one of law, the whole policy of the law will be defeated. The parties will be encouraged to file second appeals on questions of fact on the ground that evidence has been ignored, that sufficient weight has not been given to a particular document or to an entry in patwari's papers and so forth. (*Daniels, J. C.*) AHMAD HASAIN *v.* MT. UMRAO FATIMA. **64 I. C. 223 = 24 O. C. 221 = A. I. R. 1921 Oudh 98.**

—S. 100—Question or finding of fact—Finality —Evidence.

———The question whether the parties intended the sale to include *Shamilat* is one of fact not of law. The finding of the lower Court on that point cannot be challenged in second appeal. (*Shadi Lal, C. J. and Agha Haider, J.*) HADAYAT KHAN *v.* GEHNA. **31 Punj. L. R. 195 = 123 I. C. 81.**

———A finding based on legal evidence that a compromise has been entered into in good faith is one of fact and cannot be challenged in second appeal. (*Tek Chand, J.*) RAM SINGH *v.* LAL SINGH. **121 I. C. 291.**

———A finding of fact based on legal evidence cannot be challenged in second appeal. (*Iqbal Ahmad, J.*) IRSHAD HUSAIN *v.* MAKUT MANOHAR. **100 I. C. 626 = A. I. R. 1927 All. 377.**

———A finding of fact arrived at on the evidence produced by parties cannot be interfered with in second appeal. (*Zafar Ali, J.*) ATA MAHOMED *v.* HARNAM SINGH. **99 I. C. 890 = A.I.R. 1927 Lah. 845.**

———Findings of fact, based on the evidence on record are unassailable and cannot be impugned in second appeal. (*Raza, J.*) NAROTAM DAS *v.* MUHAMMAD RAZU. **96 I.C. 14 = A. I. R. 1926 Oudh 522.**

———Finding of fact based on evidence cannot be contested. (*Scott-Smith and Martineau, JJ.*) FAZAL DAD *v.* UMAR BAKHSH. **88 I.C. 1019 = 7 Lah. L.J. 129 = 26 P. L.R. 167 = A. I. R. 1925 Lah. 377.**

———A finding of fact is final in second appeal if it is based on evidence. (*Campbell, J.*) GAJJA SINGH *v.* NATHA SINGH. **7 Lah. L.J. 70 = 26 P. L.R. 451 = 88 I.C. 588 = A.I.R 1925 Lah. 333.**

———A finding of fact upon the evidence cannot be questioned in second appeal. (*Ross and Kulwant Sahay, JJ.*) BARHAMDEO NARAYAN *v.* SALIGRAM SAHAY. **86 I. C. 141 = 6 P. L. T. 67 = 1925 P. H. C. C. 53 = A.I.R. 1925 Pat. 384.**

C. P. CODE, (1908), S 100—Question or finding of fact—Finality—Procedure.

———Where the lower Court has dealt with all the essential points in deciding the case and has also analysed the evidence and the main findings which determine the suit are warranted by the evidence on record, the Court of second appeal will not disturb his findings though they may be wrong. (*Prideaux, A.J.C.*) MT. SARASWATI BAI *v.* CADO RAO. **78 I. C. 887 = A. I. R. 1924 Nag. 240.**

———Where the lower appellate Court arrived at the finding on relevant evidence and certain admissible registered deeds that there was a partition,

Held, that being a finding of fact was conclusive. (*Stuart, J.*) SYED MOHAMMAD HAMEED *v.* SYED MANZUR HASAN. **69 I. C. 807 = A. I. R. 1922 All. 283.**

———Finding of fact cannot be disputed in second appeal. (*Lyle, A.J.C.*) NIAMAT ALI *v.* ASHIQ ALI. **67 I.C. 803 = 9 O. L. J. 127 = A. I. R. 1922 Oudh 96.**

—S. 100—Question or—Finding of fact—Finality —Excess of jurisdiction.

———Appellate Court cannot interfere if decision of lower Court though defective is based on findings of facts. But where the lower Court goes beyond findings of facts, and its decision is wrong, the appellate Court can interfere. (*Pullan, J.*) MAHOMED KHAN *v.* SHEO BHIKH. **6 O. W. N. 859 = 10 L. R. A. Rev. 358 = A. I. R. 1929 Oudh 447.**

—S. 100—Question or finding of fact—Finality —Interference.

———Where a finding of fact arrived at by a trial Court was upheld by the appellate Court in the following words: "After hearing both counsel I am not able to say that the decision is clearly wrong. It is certainly not perverse. Cogent grounds for upsetting it are not forthcoming. It must, therefore, prevail."

Held, that it was not an independent finding on the evidence such as can be treated as a finding of fact closing the door to a second appeal. (*Le Rossignol and Harrison, JJ.*) NIRBHE RAM *v.* MURARI LAL. **89 I.C. 662 = A.I.R. 1926 Lah. 158.**

———Quaint reasoning of lower Court—Finding can be reversed. (*Dalal, J.C.*) RAM BALI *v.* RAM ASRE. **86 I.C. 686 = 12 O. L.J. 105 = A.I.R. 1925 Oudh 386.**

—S. 100—Question or finding of fact—Finality— Privy Council.

———A finding of fact by lower appellate Court is binding on the Privy Council as on the High Court. (*Viscount Sumner.*) TEJPAL JAMNA DAS *v.* ERNEST V. DAVID. **111 I. C. 240 = 28 M. L. W. 204 = 32 O. W. N. 1146 = 48 C. L. J. 415 = A.I.R. 1928 P.C. 219 (P.C.).**

———Findings of first appellate Court are conclusive and the High Court and the Privy Council are bound to accept them without further enquiry. (*Lord Phillimore.*) BASIRAM SAHA ROY *v.* RAM RATAN ROY. **54 Cal. 586 = 54 I.A. 196 = 8 P.L.T. 255 = 101 I C. 359 = 1927 M. W.N. 437 = 31 C.W.N. 885 = 39 M.L.T. 170 = 26 M. L.W. 642 = A.I.R. 1927 P C. 117 = 53 M.L.J. 117 (P.C.).**

—S. 100—Question or finding of fact—Finality —Procedure.

———Findings of fact arrived at by the Court below not vitiated on any legal principle must be accepted as conclusive. (*Courtney Terrell, C.J. and Jwala Prasad, J.*) SURYA MULL MARWARI *v.* DWARKA PRASAD. **10 P. L. T. 138 = 115 I. C. 890 = A. I. R. 1929 Pat. 127.**

———Findings of fact are conclusive in second appeal if nothing is urged to show that they are in any manner vitiated by any error of law or procedure. (***Wazir***

Hasan, J.) RAM ADHIN *v.* RIASAT ALI.
95 I. C. 463 = 13 O. L. J. 146.

———A finding of fact which is not vitiated by any defect in procedure or by any wrong application of a principle of law cannot be interfered with in second appeal. (*Wazir Hasan, A.J.C.*) RAI BAJRANG BAHADUR *v.* BABU BADRI NATH. **70 I. C. 74 = 9 O. L. J. 497 = A. I. R. 1923 Oudh 26.**

—S. 100—Question or Finding of fact—Finality—Requisites of findings.

———Finding of fact obiter and indefinite can be ignored. (*Shadi Lal, C. J. and Hilton, J.*) UGGAR SEN *v.* KHUSHI RAM. **120 I. C. 5 = A. I. R. 1929 Lah. 653.**

———Findings of facts to preclude second appeal must be precise and definite. (*Wazir Hasan and Srivastava, JJ.*) LACHHMI NARAIN *v.* MANGAL PRASAD.
6 O. W. N. 801 = A. I. R. 1929 Oudh 453.

———While findings of fact cannot be questioned, the soundness of conclusions drawn from any facts may involve matters of law and may be questioned by a Court of second appeal. A party to an appeal is entitled to claim a clear, definite and specific finding on every issue of fact raised in the case, and if the finding is vague, indefinite or ambiguous, it is but right to insist on such a finding being given or to send an issue back in order that the question of fact might be determined on the evidence adduced in a manner not open to misconstruction or doubt. The finality given by law to a finding of fact, arrived at by a Court of first appeal, renders it necessary that the finding should be arrived at after due circumspection and be expressed in clear and definite terms. (*Lindsay and Kanhaiyalal, JJ.*) CHANNU DUTTA *v.* SWAMY GYANNANDJI. **90 I. C. 976 = A. I. R. 1926 All. 130.**

—S. 100—Question or Finding of fact—Finality—Miscellaneous.

———Finding of fact cannot be disturbed in second appeal. (*Shadi Lal C. J and Broadway, J.*) GHULAM HUSSAIN *v.* TULLA SHAH RAMSARAN.
120 I. C. 170 = A. I. R. 1930 Lah. 142.

———The finding that the settlement rent at the higher figure claimed is not binding on the defendant cannot be questioned in second appeal. (*Madhavan Nair, J.*) RAJAH OF VIZIANAGARAM *v.* P. APPALARAJU.
118 I. C. 497 = A. I. R. 1929 Mad. 673.

———A finding of fact cannot be gone into in second appeal. (*Tek Chand, J.*) GONDA SINGH *v.* BHANDA RAM SALIG RAM. **111 I. C. 791.**

———Court proceeding on wrong presumption in law but basing its finding on correct principles—Question cannot be reopened. (*Jackson, J.*) VENKAT RATNAMMA *v.* CHALASANI SREERAMULU.
25 M. L. W. 76 = 99 I. C. 981 = A.I. R. 1927 Mad. 331 = 52 M. L. J. 100.

———Finding of fact cannot be attacked. (*Kotval, A. J.C.*) NAMDEO *v.* GANOBA. **86 I.C 847 = 8 N. L. J. 29 = A. I. R. 1925 Nag. 271.**

———A simple finding of fact arrived at by the lower appellate Court could not be disturbed on second appeal. (*Shadi Lal, C. J. and Fforde, J.*) GIRDHARI *v.* ABDULLAH. **73 I. C. 232 = 7 P. W. R. 1923 = A. I. R. 1923 Lah. 236.**

———Issues of facts cannot be agitated in second appeal. (*Shadi Lal, C.J. and Brasher, J.*) MT. CHHOTO *v.* MT. SONA DEVI. **70 I.C. 299 = A.I.R. 1923 Lah. 11.**

———In second appeal, High Court will not interfere, on a question of fact. (*Batten, J. C.*) ALAM SINGH *v.* SETH GOPALDAS. **68 I. C. 664 = A. I. R. 1923 Nag. 7.**

———Findings of fact cannot be challenged in second appeal. (*Martineau, J.*) RAM LAL *v.* DIP CHAND.
60 I. C. 705 = 3 L. L. J. 231 = A.I.R. 1921 Lah. 211.

—S. 100—Question or finding of fact—Fraud.

———The finding that a certain debt is a fictitious debt is a finding of fact and cannot be challenged in second appeal. (*Addison, J.*) MOKHA *v.* ALFA.
110 I.C. 432.

—S. 100—Question or finding of fact—Fraudulent transfer.

———Whether a transaction *e.g. heba* is executed, is breach of S. 53 of the T. P. Act, with intent to defeat or delay creditors is a question of a fact and cannot be interfered with in second appeal. (*Sanderson, C. J. and Richardson, J.*) RAM KUMAR BANIKYA *v.* SAFIUNNESSA BIBI. **63 I. C. 169 (Cal).**

———A finding that a transfer was intended to defraud, defeat or delay the creditors is one of fact. (*Scott-Smith, J.*) ATTAR SINGH *v.* GULAM MOHAMMAD.
60 I. C. 527 (Lah.)

—S. 100—Question or finding of fact—Foreign law.

———Foreign law is a question of fact. (*Srinivasa Aiyangar, J.*) GANGADHARA SAH *v.* SWAMINATHA MUDALI. **92 I. C. 112 = 22 M. L. W. 679 = A. I. R. 1926 Mad. 218.**

—S. 100—Question or finding of fact—Grove.

———Transfer of Property Act, S. 63—Redemption suit—Mortgagee claiming compensation for guava grove of 75 trees from 7 to 11 years old—Lower Court finding it impracticable to remove trees with roots and allowing neither compensation nor removal of trees—Question as to removal of trees, being one of fact, High Court did not interfere. A. I. R. 1926 All. 67, Appl.; A.I.R. 1921 All. 353 (F.B.) Cons. (*Boys, J.*) AJODHYA *v.* INDRA. **113 I. C. 405 = A. I. R. 1929 All. 330.**

———Whether a particular property still retains the character of a grove is a finding of fact. (*Dalal, J.C.*) BASHIRUDDIN KHAN *v.* MAHADEO SINGH.
79 I. C. 663 = 27 O.C. 26 = 11 O.L.J. 565 = A.I.R. 1924 Oudh 306.

—S. 100—Question or finding of fact—Injunction.

———When an injunction is granted on a finding of fact it cannot be reversed in second appeal: 34 Cal. 718, Foll. (*Newbould and Graham, JJ.*) KIRTIBASH DUBEY *v.* INDIAN IRON AND STEEL CO. LTD.
91 I.C. 480 = A. I. R. 1926 Cal. 536.

—S. 100—Question or finding of fact—Intention.

———Intention of the executant of power-of-attorney not depending on interpretation of legal phraseology is a question of fact. (*Bhide, J.*) DOST MAHOMED *v.* GHULAM SHAH. **109 I. C. 380 = 30 P. L. R. 168 = A. I R. 1929 Lah. 90.**

———Intention is a matter of fact and not of law: 22 All. 149; A.I.R. 1916 P.C. 49 and A. I. R. 1924 P. C. 226, Foll. (*Mears, C.J. and Lindsay, J.*) MATHURA KURMI *v.* JAGDEO SINGH. **107 I. C. 33 = 50 All. 208 = 25 A.L.J. 970 = A. I. R. 1928 All. 61.**

———The question as to whether a person made a transfer of his property a few days before application for adjudication with intent to defeat or delay his creditors is not one of law but merely of fact: 102 P. R.

1916, Foll. (*Broadway and Jai Lal, JJ.*) BIHARI LAL *v.* CHUNI LAL. **107 I. C. 490 (Lah.).**

———Whether there was intention to partition is a question of fact. (*Wazir Hasan, J.*) RAM JAS *v.* SHEO NARAIN. **96 I. C. 357 = A. I. R. 1926 Oudh 614.**

———Intention to transfer shamilat land is question of fact. 57 P.R. 1915 not Foll. 3 P.R. 1917 Foll. (*Abdul Raoof and Moti Sagar, JJ.*) SHANKER DAS *v.* MALI. **63 I. C. 746 = 3 L.L.J. 569 = A. I. R. 1921 Lah. 263.**

—S. 100—Question or finding of fact—Interest.

———Whether a payment of interest can be said to be made "as such," is a question of fact in each case. (*Walsh and Kanhaiyalal, JJ.*) BANDHU SINGH *v.* KAYASTHA CORPORATION, GORAKHPUR. **93 I. C. 295 = A. I. R. 1926 All. 329.**

-S. 100—Question or finding of fact—Legal effect.

———Finding whether agreement is intended to settle immediate trouble or is binding for future is not one of fact as the legal effect of the agreement is involved. (*Boys and Bennet, JJ.*) RAM SINGH *v.* SUBHAN MOCHI. **116 I. C. 302 = 1929 A. L. J. 1083 = A.I.R. 1929 All. 519.**

—S. 100—Question or finding of fact—Legitimacy

———Finding as to legitimacy is one of fact. (*Iqbal Ahmed, J.*) MEWA RAM *v.* LAL SAHAI. **100 I. C. 650 = A. I. R. 1927 All. 410.**

—S. 100—Question or finding of fact—Limitation.

———Limitation Act, S. 12—Time between date when ready and when delivered cannot be excluded—The finding as to is one of fact. (*Moti Sagar, J.*) RAM SARUP *v.* ZORAWAR MAL. **73 I.C. 447 = A. I. R. 1923 Lah. 696.**

———Finding as to the time required for obtaining the copies is one of fact and cannot be attacked in second appeal. (*Martineau, J.*) BAWA SINGH *v.* THAKUR SINGH. **67 I. C. 478 = A. I. R. 1922 Lah. 423.**

S. 100—Question or finding of fact — Market value.

———The finding as to the market value is a finding of fact. (*Sulaiman and Kendall, JJ.*) DHANUKDHARI SINGH *v.* SURESH SINGH. **1930 A. L. J. 561 = A. I. R. 1930 All. 363.**

———The question of market value is one of fact and cannot be challenged in second appeal. (*Tek Chand, J.*) MAHDI *v.* MT. NADRAN. **111 I.C. 814 = A.I.R. 1929 Lah. 137.**

———Market value of a property is a question of fact unless an error of law in determining the market value is pointed out. (*Misra and Raza, JJ.*) ZAHIRUDDIN *v.* ALI HUSAIN. **118 I.C. 85 = 6 O.W.N. 264 = 4 Luck. 643 = A.I.R. 1929 Oudh 244.**

———Decision as to the market value of property is a question of fact and cannot be interfered with in second appeal. (*Dalal, J. C.*) HAR PERSHAD *v.* SHEOSHANKER. **90 I.C. 679 = A.I.R. 1926 Oudh 68.**

—S. 100—Question or finding of fact—Meaning of Words.

———Meaning of a particular word in a particular place is question of fact. (*Suhrawardy and Cuming, JJ.*) BASANT KUMAR KAPALI *v.* SATINDRA MOHUN TAGORE. **88 I.C. 377 = A.I.R. 1925 Cal. 1209.**

—S.100—Question or finding of fact—Mistake of law.

———Finding of fact not vitiated by error of law or procedure is conclusive. (*Wazir Hasan and Srivastava, JJ.*) MD. KHAN *v.* ABDUL RAHMAN KHAN. **6 O. W. N. 921 = A.I.R. 1929 Oudh 524.**

—S. 100—Question or finding of fact—Mistake or error—Evidence.

———*Held*, that the finding that the presumption as to entries in record-of-rights has been rebutted is one of fact and that it cannot be challenged in second appeal. 5 Lah. 84, Rel. on. (*Tek Chand and Aga Haidar, JJ.*) MARYAM *v.* NAGINA. **12 Lah. L. J. 161.**

———The decision of the first Appellate Court may or may not be correct on the merits, but the High Court has no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact however gross or inexcusable the error may seem to be. Nor can the High Court in second appeal consider the question of the quantum of evidence required to prove a fact. (*Shadi Lal, C.J. and Broadway, J.*) HARBANS SINGH *v.* BUR SINGH. **31 Punj. L. R. 381.**

———Finding of fact though erroneous cannot be disturbed if it is supported by evidence on record.

An erroneous finding of fact is a different thing from an order or defect in procedure. 18 Cal. 23 (P.C.), Rel. on. (*Sir Lancelot Sanderson.*) RAMJI PATEL *v.* RAO KISHORE SINGH. **117 I.C. 1 = 25 N.L.R. 121 = 30 M.L.W. 443 = 50 C.L.J. 197 = 31 Bom.L.R. 883 = 56 I.A. 280 = 1929 M.W.N. 452 = 33 C.W.N. 893 = 1929 A.L.J. 780 = A.I.R. 1929 P.C. 190 = 57 M.L.J. 205 (P.C.).**

———*Erroneous finding of fact based on proper evidence cannot be a basis of second appeal.*

An erroneous finding of fact, however gross or inexcusable the error may be, cannot be made the basis of a second appeal, provided the fact found is relevant and the finding is based on evidence proper for consideration: A.I.R. 1924 Nag. 91, Foll. (*Kelhatkar, A.J.C.*) MAHEPAT *v.* MUKUND RAO. **114 I.C. 454 = A.I.R. 1928 Nag. 329.**

———A finding of fact cannot be attacked in second appeal on the ground of insufficiency of evidence or on the ground of error though the error is gross and inexcusable. (*Raza, J.*) SANT BAKSH *v.* RAM NATH. **111 I.C. 376.**

———Finding of fact based on evidence—High Court in second appeal cannot interfere. (*Agha Haidar, J.*) PREMSINGH *v.* MD. KHURSHID. **103 I.C. 215 = A.I.R. 1927 Lah. 574.**

———Second appeal cannot be entertained even on erroneous findings of fact. (*Raza, J.*) SUCHIT *v.* MOHAMMAD HABIBULLAH. **99 I.C. 199 = A.I.R. 1927 Oudh 89.**

———In second appeal the High Court is not entitled to go behind the findings of fact of the Lower Appellate Court unless such findings result from the misconstruction of a document of title or the misapplication of law or procedure. (19 C.W.N. 270 Foll.) Such findings cannot be assailed however gross and inexcusable the error therein if the lower Appellate Court had before it evidence proper for its consideration in support of its finding. (18 Cal. 23 (P C.) Foll.) (*Miller, C.J and Macpherson, J.*) TARNI SINGH *v.* SATNARAIN MAHARAJ,. **90 I.C. 895 = 1925 P.H.C.C. 281 = 6 P.L.T. 787 = A.I.R. 1926 Pat. 9.**

———Findings of fact based upon admissible evidence cannot be impugned in second appeal on the ground that the finding is erroneous. (*Raza, J.*) KUNWAR BAHADUR *v.* NAIB. **100 I.C. 792 = 13 O.L.J. 590**

———Grossly erroneous finding of fact—No second appeal lies in absence of error in procedure, if lower Court had evidence before it. 18 Cal. 23, Foll. (*Moti Sagar, J.*) SHANKAR DAS *v.* MANSA RAM. **78 I.C. 36 = A.I.R. 1925 Lah. 150.**

———Finding of fact supported by evidence can't be questioned in second appeal, however erroneous it may be. (*Kinkhede, A.J.C.*) NARAYAN *v.* LAXMAN. **80 I.C. 885 = A.I.R. 1925 Nag. 111.**

———Pre-emption suit—First Appellate court deciding question of sale price on evidence on record— Second appeal does not lie. There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. 89 P.R. 1917 and 18 Cal. 23 P.C., Foll. (*Chevis and Scott-Smith, JJ.*) GANPAT RAI *v.* HARI RAM. **64 I.C. 297 = 3 L.L.J. 103.**

———Grossly erroneous finding of fact—Evidence considered by Lower Court—Finding cannot be upset. 18 Cal. 23 P.C.. Foll. (*Abdul Raoof and Harrison, JJ.*) BHAGWAN SINGH *v.* NIRANJAN SINGH. **3 L.L.J. 409 = 67 I.C. 436.**

———Finding of fact—High Court cannot interfere however erroneous the finding may be. 18 Cal. 23 (P.C.) and 46 Cal. 189 (P. C.), Foll. (*Curgenven, J.*) PATI NAGAMMA *v.* PULAPA VEERASAMI. **98 I. C. 869 = A.I.R. 1927 Mad. 217.**

———Question of fact — Even erroneous decision on facts will not be interfered with. A.I.R. 1921 Oudh 98, Ref. (*Raza, J.*) MUSTAFA HUSSAIN *v.* MT, SAIDUL NISAN. **3 O.W.N. (Sup) 282 = 99 I.C. 255 = A.I.R. 1927 Oudh 66.**

———Finding of fact though erroneous is not appealable. 24 O.C. 221, Foll. (*Raza, J.*) LACHHMI SINGH *v.* MT. BIJAIRAJ KUER. **98 I. C. 1035 (Oudh).**

———Finding of fact even grossly erroneous cannot be interfered with. 17 I.A. 122, Foll. (*Stuart, C.J. and Gokaran Nath Misra, J.*) PRAG NARAIN *v.* KALI CHARAN. **98 I.C. 1072 = 3 O.W.N. 299.**

———Even a finding of fact which is altogether erroneous will not be disturbed in second appeal. (*Ramesam, J.*) KRISHNAMACHARLU *v.* S. VIJAYASARATHY. **88 I.C. 646 = 22 M.L.W. 73 = 1925 M.W.N. 117 = A.I.R. 1925 Mad. 823 = 48 M.L.J. 467.**

———Finding of fact based on mistake of fact is not binding. (*Ryves and Gokul Prasad, JJ.*) HABIB KHAN *v.* FIDA HUSAIN. **71 I.C. 1017 = 4 L.R.A. Rev. 138 = A.I.R. 1924 All. 270.**

—S. 100—Question or finding of fact—Mistake or error—Grounds for interference.

———If it can be shown that the finding of the Court below is so based on an erroneous proposition of law that if the proposition be corrected the finding disappears, then in that case it is no finding at all. A I. R. 1927 P.C. 66, Foll. (*Srivastava, J.*) JANG BAHADUR SING *v.* KANHIALAL. **112 I.C. 166.**

———Misconception of law, pleadings and effect of evidence are grounds for interference. (*Kinkhede, Offg. A. J.C.*) MURARILAL *v.* BALKISAN. **95 I.C. 636 = A.I.R. 1926 Nag. 416.**

———Want of evidence or erroneous view of the law are the only grounds for interference. (*Suhrawardy and Graham, JJ.*) HARIRAM MAHATA *v.* MAHESH CHANDRA MAHATA. **80 I.C.290 = A.I.R. 1925 Cal. 169.**

———Interference not allowed when findings not wrong in law or without evidence. (*Dawson Miller, C.J. and Mullick, J.*) RAMSUNDER KUER *v.* SATRUHAN PRASAD CHAUDHARI. **75 I.C. 846 = A.I.R 1924 Pat. 591.**

———Mistake of law or want of evidence only will entitle setting aside. (*Dawson Miller, C.J. and Mullick, J.*) AJITI CHAUDHURI *v.* JANAK LAL CHAUDHURY. **75 I.C. 946 = 1923 P.H.C.C. 332 = A.I.R. 1924 Pat. 336.**

—S. 100—Question or finding of fact—Mistake or error—Legal.

———High Court can interfere with a finding of fact when it proceeds on an erroneous presumption of law. (*Bhide, J.*) HEM SING *v.* NARAIN SINGH. **A.I.R. 1929 Lah. 772.**

———Lower Appellate Court's conclusion on question of fact—It cannot be attacked in second appeal unless it is inference based on erroneous view of law. 24 Cal. 825, Foll. (*Jackson, A.J.C.*) LAXMAN SINGH *v.* BINRAJ. **117 I.C. 283 = A.I.R. 1929 Nag. 110.**

———Finding of fact cannot be interfered with unless vitiated by error of law. (*Kulwant Sahay and Macpherson, JJ*) HARLAL CHAUBEY *v.* RAMESHWAR NARAYAN SINGH. **7 Pat. 832 = 10 P.L.T. 36 = 119 I.C. 894 = A.I.R. 1929 Pat. 28.**

———Result arrived at by the lower Appellate Court on a wrong interpretation of law cannot be accepted as a finding of fact. (*Dalal, J.*) RAMADHAR PANDE *v.* AMARAJI. **117 I. C. 368 (Oudh).**

———A finding based upon an erroneous view of law is not binding in second appeal. (*Broadway and Agha-Haidar, JJ*) HIRA SINGH *v.* MT. MANGLAN. **9 Lah. 324 = 106 I.C. 877 = 29 P.L.R. 697 = A.I.R. 1928 Lah. 122.**

———A finding of fact should not be accepted by High Court if it is vitiated by errors of law, or misreading of the documentary evidence and based on inadmissible evidence. (*Ashworth and Misra, JJ.*) SIDHESHWAR *v.* GANGA SAGAR. **2 Luck. 172 = 96 I. C. 455 = 6 O.W.N. 1227 = 13 O.L.J. 61 = A.I.R. 1926 Oudh 464.**

———Lower Court making vital mistake on simple question of law in arriving at finding—Finding can be disturbed. (*Devadoss, J.*) DHANAMATHI AMMA *v.* JAYAKEERTHI NARAIN. **85 I. C. 958 = 22 M.L.W. 352 = A.I.R. 1925 Mad. 973.**

———Error of law vitiating conclusions of facts should be interfered with. (*Simpson, A. J. C.*) DHAUNTAL KHAN *v.* RAM LAL KALWAR. **10 O.L J. 412 = 75 I. C. 227 = A.I.R. 1924 Oudh 154.**

———Finding of fact inconsistent with facts accepted as established—Erroneous view of law—High Court will interfere. (*Piggott and Walsh, JJ.*) SABAL SINGH *v.* SALIK RAM SINGH. **67 I. C. 67 = 44 All. 602 = 20 A.L.J. 473 = A.I.R. 1922 All. 188.**

—S.100—Question or finding of fact—Mistake or error—Misdirection.

———Second appeal lies where a Court misdirects itself on a question of fact. (*Addison, J.*) UDEY SINGH *v.* HARI RAM. **121 I.C. 730 = 12 L.L.J. 21 = A.I.R. 1930 Lah. 443.**

———Findings of fact not properly arrived at through errors of record and misconstruction of documents are not binding and so case should be remanded. (*Fazl Ali and Chatterji, JJ.*) NIRMAL KUMAR *v.* SURJAN DUSADH. **A.I.R. 1929 Pat. 433.**

———Finding of fact arrived at upon an erroneous conjecture as to matters not on record can be interfered with in second appeal.) (*Mukerjee, J.*) ABDUL SADAM *v.* GUNENDRA KRISHNA ROY. **82 I. C. 974 = A.I.R. 1925 Cal. 452.**

———Unless it can be shown that the First Appellate Court has misdirected itself in point of law in dealing with the question of fact upon the evidence, there would be no ground for second appeal from its decision upon the question of fact, and for an appeal to the Privy Council from the judgment in second appeal of the High Court. (*Lord Sumner.*) MID. ZAMINDARI CO. *v.* UMA CHARAN **74 I. C. 482 = 40 C. L. J. 16 =**

C. P. CODE, (1908), S. 100—Question or finding of fact—Mistake or error—Misdirection.

29 C. W. N. 131 = 21 A. L. J. 723 = 25 Bom. L. R. 1287 = 4 L. R. P. C. 184 = 33 M. L. T. 291 = 1923 M. W. N. 832 = 4 P. L. T. 627 = A. I. R. 1923 P. C. 187 = 45 M. L. J. 663 (P.C.).

—S. 100—Question or Finding of fact—Mistake or error—Omission of evidence.

———Even grossly wrong finding can't be upset—Even main evidence need not be mentioned by first Appellate Court. A.I.R. 1923 Nag. 107 ; 9 Cal. 309 ; 7 All. 649, Diss. 2 N.L.R. 98; 29 Bom. 1; 14 Cal. 740; 17 Cal. 875, Foll.; 15 N. L. R. 97, Expl. (*Hallifax, A. J. C.*) TUKARAM *v.* CHINTARAM. **92 I. C. 327 = 20 N. L. R. 17 = A. I. R. 1924 Nag. 91.**

—S. 100—Question or Finding of fact—Mistake or error—Procedure.

———Under the Code of Civil Procedure no second appeal will lie except on the grounds specified in S. 100. An erroneous finding of fact is a different thing from an error or defect in procedure and there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact however gross or inexcusable the error may seem to be. 18 Cal. 23 (P. C.), Rel. on. (*Lord Tomlin.*) MAHIPATI SURYARAO *v.* SECRETARY OF STATE. **117 I. C. 481 = 1929 A. L. J. 702 = 33 C. W. N. 725 = 31 Bom. L. R. 866 = 30 M. L. W. 9 = 1929 M. W. N. 442 = 6 O. W. N. 503 = 56 I. A. 223 = 52 Mad. 538 = 50 C. L. J. 30 = A. I. R. 1929 P. C. 152 = 57 M. L. J. 64 (P.C.).**

———Where an appeal is decided *ex parte* by the lower Appellate Court the High Court has jurisdiction in second appeal to reverse the Appellate Court's decree on the ground that he was wrong in proceeding to decide the appeal *ex parte*. (*Shadi Lal, C. J. and Broadway, J.*) HARBANS RAI *v.* LAKSHMA NAND. **A. I. R. 1929 Lah. 294 = 117 I. C. 229 (Lah.)**

———There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however inexcusable the error may seem to be. Where there is no error or defect in procedure the finding of the first Appellate Court upon a question of fact is final if that Court had before it evidence proper for its consideration in support of the finding. (*Raza, J.*) MANZUR HUSAIN *v.* VIKALAT FATIMA. **91 I. C. 1046 = 13 O. L. J. 176 = A. I. R. 1926 Oudh 257.**

———An erroneous finding of fact is different from an error in procedure. Where there is no error or defect in the procedure the finding of fact by the Court of First Appeal is final if that Court had before it evidence proper for its consideration in support of its finding. (*Abdul Raoof and Harrison, JJ.*) RUGGU MAL *v.* SITA RAM. **63 I. C. 575 (Lah.)**

—S. 100—Question or finding of fact—Nature of property.

———Partnership—Question whether certain property is thrown into partnership assets is of fact. (*Lord Chancellor.*) JAFFAR ALI BHALOO *v.* STANDARD BANK OF SOUTH AFRICA LTD. **107 I. C. 453 = 47 C. L. J. 292 = 30 Bom. L. R. 762 = A. I. R. 1928 P.C. 135.**

———The issue on the point of the customary power of the Kamins to alienate abadi sites covers the question whether the village is a town or village, and can be agitated in second appeal. A. I. R. 1921 Lah. 121, Foll. (*Coldstream, J.*) PIARA SINGH *v.* JAWAHAR SINGH. **112 I. C. 402 = 10 L. L. J 360.**

———Record of rights—Permanent Settlement of 1793—Question if lands are included in Permanent Settlement is one of fact. 30 Cal. 291 Foll. (*Suhrawardy and Cammiade, JJ.*) MAYEUDDI *v.* MD. RAZZAB ALI. **100 I. C. 507 = A. I. R. 1927 Cal. 457.**

———Whether a place is a town or a village is a question of fact. (*Case Law referred.*) (*Addison, J.*) KARAM CHAND *v.* KARAM SINGH. **94 I. C. 127 = 8 L. L. J. 66 = 27 P. L. R. 73 = A. I. R. 1926 Lah. 542.**

———Finding as to character of a property is one of fact. (*Moti Sagar, J.*) BALBIR SINGH *v.* GOVIND. **79 I. C. 543 = A. I. R. 1923 Lah. 532.**

———Punjab Pre-emption Act—Whether a place is a town is a question of fact. It is to be decided upon the evidence and the particular circumstances of each case. It is not necessary that a custom prevailing in the town should apply to the *mohallas* or suburbs. (*Abdul Raoof, J.*) DIWAN CHAND *v.* NIZAMDIN. **75 I. C. 610 = A. I. R. 1923 Lah. 443.**

———A finding that a certain Dharmsala is private property is a finding of fact. (*Wilberforce and Abdul Qadir, JJ.*) SADHUDAS *v.* MUSHTAQ SHAH. **3 L. L. J. 514 = A. I. R. 1921 Lah. 343.**

—S. 100—Question or finding of fact—Nature of transaction.

———Where once a mortgage is admitted whether there is a subsequent sale or not is a question of fact, and that being so, the decision of the lower Appellate Court is final. A. I. R. 1923 P. C. 187, Rel. on and A. I. R. 1924 Lah. 444, Affir. (*Sir Benode Mitter.*) WALLI MOHAMMAD *v.* MOHAMMAD BAKSH. **122 I. C. 316 = 1930 A. L. J. 292 = 32 Bom. L. R. 380 = 31 P. L. R. 145 = 31 M. L. W. 321 = 11 Lah. 199 = 57 I. A. 86 = A. I. R. 1930 P. C. 91 = 59 M. L. J. 53 (P.C.).**

———The finding that the parties intended and effected a sale and not a mortgage by way of conditional sale is a finding of fact. A. I. R. 1924 Lah. 221, Rel. on. (*Addison, J.*) MD. SHAH *v.* JIWAN SHAH. **119 I. C. 767 = 11 L. L. J. 151 = A. I. R. 1929 Lah. 530.**

———Particular transaction is mortgage or sale is a question of fact. 104 P. L. R. 1908 ; 120 P. L. R. 1916 ; and A. I. R. 1924 Lah. 260, Foll. (*Abdul Raoof, J.*) PAL SINGH *v.* GANGA SINGH. **92 I. C. 42 = 26 P. L. R. 799.**

———Question as to whether a transaction amounts to mortgage by conditional sale or to an absolute sale is not a pure question of fact. (*Wallace, J.*) GANESH MUDALIAR *v.* GNANASIKHAMANI. **84 I. C. 505 = 20 M.L.W. 338 = 35 M. L. T. 87 = 1924 M. W. N. 643 = A. I. R. 1925 Mad. 37 = 47 M. L. J. 385.**

—S. 100—Question or finding of fact—Negligence.

———Evidince Act, S. 65 (c)—Question of sufficient reason for non-production required under S. 65 (c) is question of fact. (*Sulaiman and Kendall, JJ.*) GAYA PRASAD *v.* JASWANT RAI. **A. I. R. 1930 All. 550.**

———Suit for profits against Lambardar—Misconduct or negligence by Lambardar—Question is not purely one of fact—Agra Tenancy Act, S. 164. (*Ryves and Gokul Prasad, JJ.*) CHATTERJI KUNWAR *v.* GANGA SINGH. **60 I. C. 643 = 43 All. 29 = A. I. R. 1921 All. 314.**

—S. 100—Question or finding of fact—Notice.

———Question whether purchaser had notice of a charge on the property purchased is one of fact and binding on High Court in second appeal. (*Wazir Hasan and Misra, JJ.*) RAZIA BEGAM *v.* ISHRAT ALI. **117 I C. 405 = 6 O. W. N. 493 = A. I. R 1929 Oudh 316.**

C. P. CODE, (1908), S. 100—Question or finding of fact—Notice.

———Genuineness of an agreement or a party's having notice thereof is a question of fact. (*Raza, J.*) MANZUR HUSAIN *v.* VIKALAT FATIMA.
91 I. C. 1046 = 13 O. L. J. 176 = A. I. R. 1926 Oudh 257.

—S. 100—Question or finding of fact—Novatio.

———Contract Act, S. 62—Creditor instead of actually being paid, taking renewed pronote receiving some consideration as increased interest—Old debt is not paid off—Whether new is substituted in place of old is a question of fact. (*B. B. Ghose and Panton, JJ.*) KSHETRA NATH SIKDHAR *v.* HURSUKDAS BALKISSENDAS. **102 I. C. 871 = 45 C. L. J. 233 = 31 C. W. N. 703 = A. I. R. 1927 Cal. 538.**

—S. 100—Question or finding of fact—Omission—Judgment, whether vitiated.

———Where certain evidence was not relied upon before the lower Appellate Court and the same was not considered in arriving at the conclusion, *held*, that such omission did not vitiate the judgment. (*Hilton and Broadway, JJ.*) BAHAWAL-UD DIN *v.* GHULAM KHAN. **11 Lah. L. J. 381.**

—S. 100—Question or finding of fact—Ownership.

———The question as to who is the owner of a particular site is one of fact. (*Prideaux, A. J. C.*) ALLI SAHEB *v.* YASIN KHAN. **113 I. C. 886 (Nag.).**

———The question whether a particular site belonged to a private individual or to the Mahomedan public is a question of fact, and the lower appellate Court's finding on it cannot be questioned by High Court. 39 Mad. 304, Rel. on. (*Prideaux, A. J. C.*) ALLI SAHEB *v.* YASIN KHAN. **113 I. C. 886 (Nag.).**

———The question as to ownership is a question of fact which must be decided upon the evidence adduced. (*Phillips and Venkatasubba Rao, JJ.*) ASHTAMOORTHI NAMBUDRIPAD *v.* RAMA MUDALI
96 I. C. 915 = A. I. R. 1926 Mad. 1052.

———Findings as to who is owner and nature of defendant's possession are one of fact. (*Leslie Jones and Moti Sagar, JJ.*) ABDULLA *v.* FATEH MUHAMMAD. **62 I. C. 809 = A. I. R. 1921 Lah. 117.**

—S. 100—Question or finding of fact—Possession.

———Where defendant does not allege dispossession but that plaintiff had never been in possession, and plaintiff proves obtaining possession under a deed of *birt*, the finding that it must be presumed that the plaintiff has continued in possession ever since, cannot be disturbed in second appeal. (*Neave, A. J. C.*) SUBDHUN PANDE *v.* MAHESH PRASAD.
81 I. C. 588 = A. I. R. 1925 Oudh 170.

———The finding of the lower appellate Court that a mortgagee has never been in actual possession of the land, being one of fact cannot be contested in second appeal. (*Abdul Raoof and Martineau, JJ.*) NARAIN DAS *v.* JANAT BIBI. **67 I. C. 152 (Lah.).**

—S. 100—Question or finding of fact—Proof.

———Whether alleged mortgage is not proved is a finding of fact. (*Raza, J.*) MAHADEO LAL *v.* PIRTHIPAL SINGH. **96 I. C. 253 = A. I. R. 1926 Oudh 546.**

———Where the lower appellate Court came to a finding of fact that there was no evidence which had been produced in the case by the plaintiff sufficient to justify him in shifting the burden of proof on to the other side, the finding of fact arrived at cannot be disturbed in second appeal. (*Ashworth and Gokaran Nath Misra, JJ.*) INDARPAL SINGH *v.* KALLOO.
92 I. C. 670 (Oudh).

———Question of law and of fact are sometimes difficult to disentangle, but the question whether a fact has been proved, when evidence for and against has been properly admitted is necessarily a pure question of fact. (*Dalal, J.C.*) JAGANNATH PERSHAD *v.* BECHU.
27 O. C. 89 = 11 O. L. J. 77 = 5 L. R. Oudh 78 = 80 I. C. 327 = A. I. R. 1924 Oudh 349.

C. P. CODE, (1908), S. 100—Question or finding of fact—Proof—Special custom.

———*Held*, that the question whether by custom the under-raiyat's rights pass by inheritance is one of fact for purposes of second appeal. (*James and Chatterji, JJ.*) MUCHI RAM BAGAT *v.* BHALA RAM BHUMJI.
11 P. L. T. 539.

—S. 100—Question or finding of fact—Reasonable or probable cause.

———Suit for damages for malicious prosecution—Whether there was reasonable and probable cause is question of fact—If lower Courts after judicially considering evidence find against plaintiff, High Court cannot disturb finding nor can it certify case for Letters Patent Appeal—Letters Patent (Allahabad) Cl. 10. A. I. R. 1926 P. C. 46, Ref.; A. I. R. 1928 All. 337; (1889) A. W. N. 189; 11 A. L. J. 125, Dist. (*Boys, J.*) SITA RAM *v.* THAKUR PRASAD. **117 I. C. 619 = A. I. R. 1929 All. 429.**

———The finding as to absence of reasonable care and good faith is a finding of fact. (*Kinkhede, A. J. C.*). MOHMAD SUJAT *v.* MT. CHANDBI.
97 I. C. 988 = A. I. R. 1927 Nag. 41.

———Suit for damages for malicious prosecution—Plaintiff's innocence and defendant's having no reasonable cause for complaint is a question of fact and cannot be questioned in second appeal. (*Ashworth, A. J. C.*) ATMA RAM *v.* SHAMBHU DIN.
91 I. C. 112 (Oudh).

———Malicious prosecution—Suit for—Absence of reasonable or probable cause for prosecution is question of fact—Tort. 25 Bom. 332 and 28 Cal. 591, Foll. (*Dalal, Ag. J. C.*) MAHADEO PRASAD *v.* CHUNNI LAL. **86 I. C. 596 = 12 O. L. J. 88 = 2 O. W. N. 62 = 28 O. C. 387 = A. I. R. 1925 Oudh 359.**

———*Finding on insufficient grounds.*

A finding of fact that a deed is admissible, arrived at by the Appellate Court without sufficient grounds being shown, is subject to second appeal, if it has prejudiced the trial of the appeal. (*Piggott and Kanhaiya Lal, JJ.*) LOKMAN DAS *v.* GANGA SAHAI.
60 I. C. 96 (All.)

—S. 100—Question or finding of fact—Rent, rate of.

———The question generally, whether the tenant has held at a uniform rate of rent for more than 20 years or back to the time of the Permanent Settlement, is a question of fact and not a question of law. A.I.R. 1925 Cal. 632, Appl. (*Suhrawardy and Duval, JJ.*) DUKHA MIA *v.* JAGDISH NATH ROY.
90 I.C. 564 = A. I. R. 1926 Cal. 359.

———B. T. Act, S. 50—Proof of uniform rent for 20 years is a question of fact. (*Suhrawardy and Cuming, JJ.*) ALIMUDDIN MOLLAH *v.* KARIM BUX
86 I. C. 316 = 29 C. W. N. 500 = 41 C.L.J. 135 = A. I. R. 1925 Cal. 632.

—S. 100—Question or finding of fact—Representation.

———Whether tenancy was properly represented is a question of fact. (*Mitter, J.*) NARESH CHANDRA *v.* HAYDER SHEIKH. **49 C. L. J. 83 = 115 I. C. 180 = A.I.R. 1929 Cal. 28.**

———Whether one heir of deceased tenant represents whole tenancy—Question is one of fact. (*Chakravarti, J.*) SURMAN SHAIK *v.* NAFAR CHANDRA PAL. **91 I. C. 748 = A. I. R. 1926 Cal. 517.**

———Whether a person by any representation or by conduct amounting to representation induced another to do a certain act is a question of fact and the finding must be accepted in second appeal (*Venkatasubba Rao, J.*) MAHOMED BATCHA SAHEB *v.* ARUNACHELLAM CHETTIAR. **1925 M. W. N. 596 = 90 I. C. 875 = A. I. R. 1926 Mad. 39 = 49 M. L. J, 396.**

———Finding as to representation—Must be accepted in second appeal. (*Newbould and Panton, JJ.*) SUKHADAMOYI DASI *v.* ATUL CHANDRA ROY. **68 I. C. 203 = A. I. R. 1923 Cal. 165.**

———Whether particular misrepresentation affected one's mind or not is question of fact—Contract Act, S. 19. (*Sadasiva Aiyar and Spencer, JJ.*) RAGHAVA MANNADIAR *v.* SIVASANKARA MENON. **62 I. C. 764 = 13 M. L. W. 525 = 1921 M. W. N. 340 = A. I. R. 1921 Mad. 198.**

—S. 100—Question or finding of fact—Right over property.

———A finding that two houses have a common entrance from the street is a finding of fact not liable to be disturbed in second appeal. (*Moti Sagar and Martineau, JJ.*) BUTA RAM *v.* HARBHAGWAN, **6 L. L.J. 284 = A. I. R. 1925 Lah. 257.**

—S. 100—Question or finding of fact—Status.

———Question whether grant was made to one not holding kudivaram—Decision necessary to see whether civil suit lies—Question being purely of fact cannot be re-agitated in second appeal or revision. 20 C.L.J. 213, Rel. on,: 40 All. 674; 41 All. 602 and A.I.R. 1926 P.C. 142, Dist. (*Wallace, J.*) KISHEN PRASAD BAHADUR *v.* KOTTAKOTA DALAYYA. **116 I. C. 133 = A.I.R 1929 Mad. 259.**

———The finding of the first Court of appeal on the question of the plaintiff's status is a finding of fact which cannot be attacked in second appeal. A.I.R. 1923 Lah. 626, Foll. (*Addison, J.*) BHOLU *v.* SANT SARAN SINGH. **109 I. C. 458 = 29 P. L. R 162.**

———Question whether a certain person is a hereditary and exclusive joshi of a village is a question of fact. (*Prideaux, A.J.C.*) NATHU BOWA *v.* PANDURANG. **107 I. C. 911 = A. I. R. 1928 Nag. 150.**

———Whether certain persons are representatives is a question of fact. (*B.B. Ghose and Graham, JJ.*) MT. SUSHILASUNDARI *v.* TARA CHANDRA. **97 I. C. 489 = A. I. R. 1927 Cal. 81.**

———Whether certain persons acted as heirs or administrators in contracting a certain debt, is a question of fact. (*Coutts-Trotter, C. J. and Ramesam, J.*) A. P. R. K. R. V. VELLAYAN CHETTI *v.* VENUGOPAL CHETTI. **24 M. L. W. 842 = 97 I. C. 570 = A. I. R. 1927 Mad. 185.**

———It is a question of fact whether or not a caste was split up. (*Macleod, C. J. and Coyajee, J.*) FULCHAND *v.* HARILAL. **50 Bom. 124 = 27 Bom. L. R. 1503 = 92 I. C. 549 = A. I. R. 1926 Bom. 69.**

———Question of status of a party is one of fact. (129 P. L. R. 1912, Ref.) (*Campbell and Moti Sagar, JJ.*) DAL SINGH *v.* PLUIMAN. **80 I. C. 264 = A. I. R. 1923 Lah. 626.**

———The conclusion that the plaintiff was a full owner and not merely a *dohlidar* is clearly a finding of fact and cannot be impugned in second appeal. (*Moti Sagar, J.*) CHHITRU *v.* CHHAJJU **A. I. R. 1923 Lah. 611.**

———It is not necessary for a Court of first appeal to refer in detail to every piece of evidence on the record. So long as its judgment leaves no doubt that all the available evidence has been given due weight to, its findings on questions of fact cannot be attacked in second appeal. Whether or not there has been a separation of a joint Hindu family is a question of fact. (*Broadway and Abdul Raoof, JJ.*) NATHU SHAH *v.* HAVELI SHAH. **65 I. C. 475 = 16 P. W. R. 1922 = A. I. R. 1922 Lah. 140.**

———Question whether persons form members of Hindu joint family, is question of fact—Hindu Law—Joint family. (*Wilberforce and Abdul Qadir, JJ.*) MT. MAYA WANTI *v.* ISHAR SINGH. **67 I. C. 789 = 3 L. L. J. 552 = A. I. R. 1921 Lah. 267.**

—S. 100—Question or finding of fact—Tender.

———Finding as to tender being duly made cannot be contested. (*Scott-Smith, J.*) DALIP SINGH *v.* ISHAR. **7 L. L. J. 11 = 86 I. C. 250 = A. I. R 1925 Lah. 353.**

—S. 100—Question or finding of fact—Wakf.

———Whether particular property is wakf and is dedicated to public or charitable user is question of fact. When no error of law is shown to have been committed by the lower appellate Court its finding cannot be set aside in second appeal. 1 P. R. 1919 and 38 P. R. 1913, Rel. on. (*Tek Chand and Agha Haidar, JJ.*) SANT SINGH *v.* B. RALLIA RAM. **31 P. L. R. 372 = A. I. R. 1930 Lah. 744.**

— S. 100—Question or finding of fact—Will.

———A finding of fact at which a lower Appellate Court arrived is binding on the High Court. The Privy Council decision to the effect that a party setting up a *nuncupative* will should be required to prove "with precision the words on which he relies with every circumstance of time and place" must be read subject to their own subsequent decisions requiring a strict interpretation of the provisions precluding a second appeal to the High Court in this country on a question of fact. 5 N. L. R. 85, referred to. (*Hallifax, A. J. C.*) BHAWANIRAM *v.* DAMMAR SINGH. **66 I .C. 413 = 5 N. L. J. 183 = A. I. R. 1922 Nag. 46.**

—S. 100—Question or finding of fact—Miscellaneous.

———Existence of antecedent debt is question of fact and cannot be disturbed in second appeal. (*Simpson, A.J.C.*) BHAGWATI PRASAD *v.* LALL BAHADUR. **90 I. C. 404 = A. I. R. 1926 Oudh 33.**

———Whether properties are sufficiently specified, is a question of fact. (*Chatterjee and Cuming, JJ.*) NRIPENDRA NATH BHOWMICK *v.* BASANT KUMAR LAHIRI. **89 I. C. 207 = 29 C. W. N. 861 = A. I. R. 1925 Cal. 1195.**

———Finding capable of being interpreted both as finding of fact and of law—Untenability as finding of law—High Court is not bound to treat it as finding of fact. (*Mukerjee, J.*) UMARAM GOGOI *v.* PURUK CHAND OSWAL. **85 I. C. 540 = A. I. R. 1925 Cal. 993.**

———The finding that at the time of the sale the vendees were the only reversioners of the vendors then living, so that the plaintiff, the son of one vendor, if born after the sale would have no *locus standi* was held to be one of fact. (*Martineau and Harrison, JJ.*) RATNA *v.* SAWAN SINGH. **6 L. L. J 566 = A. I. R. 1925 Lah. 275.**

———*Presenting for registration.*

Presentation is a question of fact requiring no formality. (*Walsh, A. C. J. and Ryves, J.*) YASIN BIBI *v.*

SYED MUNAWAR HUSAIN. **92 I. C. 345 = 46 All. 743 = 22 A. L. J. 700 = 5 L. R. A. Civ. 524 = A. I. R. 1924 All. 799.**

——Whether lands were excluded in calculating peishcush is question of fact. (*Ayling and Odgers, JJ.*) T. VARAHALIAH *v.* VENKATA SURYA NARAYANA. **75 I. C. 465 = 18 M. L. W. 324 = 1923 M. W. N. 732 = A. I. R. 1924 Mad. 117.**

——Inference as to plea not raised in the case is not a finding of fact; but a mere opinion. (*Gokul Prasad and Sulaiman, JJ.*) RAM NAIN *v.* DEOKI MISIR. **69 I. C. 912 = 20 A. L. J. 756 = A. I. R. 1923 All. 75.**

——Mahomedan Law—Whether an illness constitutes *marz-ul-maut* is primarily a question of fact. But it may sometimes be a mixed question of law and fact for instance, where the question arises whether the facts found as to the physical condition of the deceased at the date of execution of the deed constitute the essential elements of *marz-ul-maut* as formulated by Mahomedan Jurists. (*Mookerjee and Buckland, JJ*) BIBI JINJIRA KHATUN *v.* MOHAMMAD FAKIRULLAH MIA. **67 I. C. 77 = 49 Cal. 477 = 26 C. W. N. 749 = 34 C L. J. 444 = A. I. R. 1922 Cal. 429.**

—S. 100—Question of law.

——Whether a transfer of occupancy right is a sale within the meaning of the term as used in the Punjab Pre-emption Act is a question of law. A. I. R. 1928 Lah. 667 and 930, Dist. (*Bhide, J.*) ALI AKBAR SHAH *v.* GHOGAR SHAH. **120 I. C. 683 = 31 P. L. R. 338 = A. I. R. 1930 Lah. 141.**

——Whether, on certain admitted facts, certain person is agent or not is question of law. (*Suhrawardy and Patterson, JJ.*) BENGAL NAGPUR RAILWAY COMPANY *v.* MOOLJI SICKA AND CO. **52 C. L, J. 235.**

——A new point of law may be raised for the first time in second appeal. (*S. K. Ghose, J.*) MOHIT KRISHNA *v.* PRANAB CHANDRA. **52 C. L. J. 68 = A. I. R. 1930 Cal. 616.**

——Where no question of any custom was involved and the decision of the case depended on the proper application of the judicial authorities cited before the Courts, the question was therefore a question of law and not a question of custom and so a second appeal was competent (*Zafar Ali and Jai Lal, JJ.*) PIR MAL *v.* TEJA SINGH. **117 I. C. 380 = 11 L. L. J. 110 = 10 Lah. 868 = 31 P. L. R. 93 = A. I. R. 1929 Lah. 426.**

——Where the facts are all admitted and the only question is what consequence would flow from them, the plea of estoppel is one of pure law and can be taken in appeal, though not taken in trial Court. A. I. R. 1925 Nag. 77 and A. I. R. 1927 Lah. 802, Dist. (*Harrison, J.*) MUKUND LAL *v.* MT. LORINDI BAI. **110 I. C. 190 (Lah).**

——The proposition that a point of law can always be taken in second appeal is limited to cases where the point of law does not require a finding of fact to support it. (*Mullick Ag. C.J. and Jwala Prasad, J.*) SUKUL LAKHPAT RAM *v.* RAGHU KOERI. **8 P. L. T. 850 = 105 I. C. 33 = A. I. R. 1928 Pat. 109.**

——The question whether son was effectively represented in a former suit is really a question of law and not one of fact. (*Ramesam, J.*) K. TATAYYA *v.* K. RAGHAVAYYA. **38 M. L. T. 107 = 99 I. C. 539 = A. I. R. 1927 Mad. 406.**

——Whether a tenant is entitled to occupy land appurtenant to his house is not a pure question of law. (*Stuart, C. J. and Gokaran Nath Misra, J.*) RAJKRISHNA *v.* SAHEB BAKHSH. **3 O. W. N. 937 = 98 I. C. 1044 = 8 L. R. A. Rev. 20 = A. I. R. 1927 Oudh 37.**

——*Quaere*: Whether questions determining status of tenure-holders are themselves question of law. (*Dawson-Miller, C. J. Mullick Das, Kulwant Sahay and Jwala Prasad, JJ.*) BALUNKI ROUT *v.* SIR KUNJA BEHARI DEB. **6 Pat. 698 = 105 I.C. 633 = 9 P. L. T. 72 = A. I. R. 1927 Pat. 209 (F. B.).**

——The conclusion that a certain process was not scientific involves a question of law. (*Kinkhede, A.J.C.*) SHEIKH SHAHABUDDIN *v.* VILAYAT ALIKHAN. **95 I. C. 614 = A. I. R. 1926 Nag. 435.**

——Omission by judgment-debtor to certify payment under O. 21, R. 2 is not always a pure question of law. (*Kinkhede, A.J.C.*) RAGHUBARPRASAD *v.* SATTOO. **89 I. C. 1009 = A.I.R. 1926 Nag. 164.**

——The question as to a stipulation being penal within S. 74 of the Contract Act is a question of law. (*Jackson, J.*) RAJAGOPALA PADAYACHI *v.* VARADARAJU PADAYACHI. **82 I. C. 751 = 47 M. L. J. 605 = 1924 M. W. N. 861 = A. I. R. 1925 Mad. 84.**

——Whether a previous decree can be rectified by a subsequent suit is a substantial question of law. (*Sanderson, C.J. and B.B. Ghose, J.*) BEPIN KRISHNA ROY *v.* PRYIABARATA BOSE. **71 I.C. 371 = A.I.R. 1923 Cal. 387.**

——Question of the award of future interest is discretionary with the Court and is not a pure question of law. 52 P.L.R. 1915, Foll. (*Moti Sagar, J.*) AGHA MUHAMMAD *v.* JODH SINGH. **77 I.C. 416 = A.I.R. 1923 Lah. 513.**

——Whether a word is used in a restricted sense is a point of law. (*Macleod, C. J. and Shah, J.*) EAST INDIAN RAILWAY CO *v.* DAYA BHAI VANMALIDAS. **67 I.C. 852 = 47 Bom. 18 = 24 Bom. L.R. 416 = A.I.R. 1922 Bom. 416.**

——New point of law requiring evidence cannot be allowed in second appeal. A deed of gift to be valid must be accepted by the donee; but nowhere was it suggested in the Court below that the deed was invalid, because it had not been accepted.

Held, it is not competent in second appeal therefore for the appellants to urge the invalidity of the gift on the ground of non-acceptance. (*Macleod, C. J. and Shah, J.*) TRIKAM LAL *v.* NAGENDAS JETH LAL. **A. I. R. 1922 Bom. 148.**

——Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law, so also is the question of admissibility of evidence and the question whether any evidence has been offered on one side or the other. (*Wazir Hasan, A.J.C.*) GHULAM SARWAR KHAN *v.* MOHAMMAD ALI KHAN. **65 I.C. 398 = 8 O.L.J. 609 = A.I.R. 1922 Oudh 98.**

——Whether certain place is a town or village is a question of law. A very important test to determine whether a place is a town or village is the presence or absence of a substantial bazar and the avocations of the majority of the inhabitants. (*Le Rossignol, J.*) MANSA RAM *v.* JOTI. **62 I.C. 808 = A.I.R. 1921 Lah. 121.**

—S. 100—Religious endowment.

——Existence of wakf is a question of fact. (*Martineau, J.*) ALI MUHAMMAD KHAN *v.* ALI AKBAR KHAN. **69 I.C. 415 = A.I.R. 1924 Lah. 382.**

—S. 100—Second appeal.

——Where a plaint presented to the first class Subordinate Judge was returned for presentation to the proper court and on appeal the District Judge affirmed the order, *held*, that a second appeal was not maintainable against the appellate order. (*Addison, J.*) RALLA SINGH *v.* AROORA MAL. **31 Punj. L.R. 178.**

———Lower appellate Court setting aside preliminary decree of trial Court but not actually passing decree—Second appeal lies. 8 C.W.N. 390 and 66 P. R. 1907, Rel. on; A.I.R. 1929 Lah. 476, Dist. (*Johnstone, J.*) LAL KHAN *v.* KASHMIRI LAL. **31 P.L.R. 386 = 124 I. C. 676 = A.I.R. 1930 Lah. 125.**

———Disposal of an appeal while a party was dead is a defect covered by (c). 2 L. L. J. 144; 48 I.C. 859, Appr. (*Addison, J.*) NATHU *v.* AMRAO SINGH. **117 I.C. 665 = 10 L.L. J. 497 = 30 P.L.R. 13 = A.I.R. 1929 Lah. 119.**

———Where a plaint was headed "Suit valued at Rs. 86 for enforcing an award" and *ad valorem* Court-fees had been paid accordingly, though at the conclusion of the plaint there was a prayer that the award may be ordered to be filed, but the prayer further asked that a decree be passed in accordance with its terms.

Held, that there was a suit for the enforcement of the award and not an application to file an award before the trial Judge and that a second appeal did therefore lie. 7 Bur. L. T. 279, Ref. (*Brown, J.*) GUNNU MEAH *v.* A. RAHMAN. **7 Rang. 136 = 117 I.C. 574 = A.I.R. 1929 Rang. 166.**

———An application for the ascertainment of the mesne profits is neither an application for execution of the decree, nor is it an application which is required by law to be made by the plaintiff as a condition precedent to the ascertainment of the mesne profits. In so far as the Court declines to ascertain the mesne profits and holds that the plaintiff's claim is beyond time under Art. 181 it is the formal expression of an adjudication conclusively determining the rights of the parties with regard to a matter in controversy in the suit within the meaning of S. 2, cl. (2), C. P. Code. In such a case the decision of the lower Court operates as a decision and, therefore, a second appeal lies. (*Patkar and Baker, JJ.*) SHANKER *v.* GANGARAM. **52 Bom. 360 = 30 Bom.L.R. 503 = 109 I.C. 734 = A.I.R. 1928 Bom. 236.**

———Finding of fact based partly on evidence which was legally inadmissible can be assailed in second appeal. A.I.R. 1921 Lah. 119, Foll. (*Tek Chand, J.*) HAKIM ALI *v.* AMRIK SINGH. **108 I.C. 264.**

———Bengal Tenancy Act, S. 153—Fraud not established but only alleged—No second appeal lies unless fraud is established. (*Page and Graham, JJ.*) ASWINI KUMAR DUTTA *v.* RAJ KUMAR. **103 I.C. 705 = 54 Cal. 1050 = A.I.R. 1927 Cal. 845.**

———The question whether there was suppression of sale processes can only be raised under S. 47, and therefore a second appeal lies. (*Suhrawardy and Page, JJ.*) RAMPADA NAG *v.* KANAI RAI. **44 C.L.J. 167 = 98 I.C. 206 = A.I.R. 1926 Cal. 1219.**

———An order on petition of appeal was as under: "The appeal being time-barred is not admitted."

Held, that the appeal should be held as dismissed and the order is appealable as a decree. (*B. B. Ghose and Chakravarti, JJ.*) ADARPRIYA CHOUDHRANI *v.* RAMPROTAP AGARWALLA. **44 C.L.J. 44 = 30 C.W.N. 926 = 98 I.C. 749 = A.I.R. 1926 Cal. 1105.**

———Decision that a particular question is not in dispute cannot be attacked in second appeal—Proper procedure is review, or the pleader should bring it to the notice of the Court. (*Cuming and B. B. Ghose, JJ.*) SHAMSUDDIN BISWAS *v.* MOLANNESSA BIBI. **95 I.C. 300 = A.I.R. 1926 Cal. 941.**

———No second appeal lies to the High Court from a decision of the District Judge under S. 16 of the Act (Bom. Act VI of 1888) 16 Bom. 408, Over-ruled. (*Macleod, C.J., Pratt and Crump, JJ.*) AMARSANGJI DUNGARJI *v.* DEEPSANGJI RAVABHAI. **49 Bom. 442 = 27 Bom. L.R. 345 = 87 I.C. 588 = A.I.R. 1925 Bom. 241 (F.B.)**

———Where a Court not competent to entertain and decide an appeal does so, the decision of that Court is clearly contrary to law and a second appeal lies from the decree of that Court. (*Tapp, J.*) BUDH SINGH *v.* BUDH SINGH. **121 I.C. 722.**

———If the lower appellate Court entertains an appeal which it has no jurisdiction to do an appeal will lie from the decree of that court. 20 C.W.N. 967 and 45 Cal. 926, Foll. (*Suhrawardy and Chotzner, JJ.*) WAJUDI PRAMANIK *v.* MAHOMED BALAI MORUL. **85 I. C. 576 = 30 C. W. N. 63 = A.I.R. 1925 Cal. 1032.**

———When a case is decided *ex parte* the remedy open to the party affected by the decision is threefold; first he may apply for restoration of the case; secondly, he may apply for a review of judgment, and thirdly, he may appeal from the decree. Even though other remedies are available against an *ex parte* decision to the aggrieved party second appeal can be preferred against that decision under S. 100 (2). (*Suhrawardy and Chotzner, JJ.*) KALI PRASANNO CHAKRAVARTY *v.* NAJABULLA JAMADAR. **80 I.C. 14 = A.I.R. 1925 Cal. 497.**

———Where, in defence to a suit for rent, it is pleaded by the tenant that the rent claimed by a landlord in respect of fruit trees is not payable, the question is one relating to the amount of rent payable and second appeal is allowable. (*Dawson Miller, C.J. and Mullick, J.*) RAMESHWAR SINGH *v.* SHEIKH WAZAL HAQUE. **78 I.C. 463 = A.I.R. 1925 Pat. 294.**

———If the parties disputing the sale are parties to the suit they approach the Court under S. 47 which decides the forum. The Court then proceeds according to its statutory powers. It may exercise its inherent jurisdiction under S. 151, or it may exercise its power under O. 21, R. 90. There is no second appeal when a Court approached under S. 47 acts under O. 21, R. 90. But when it is so approached and exercises its inherent power under S. 151 there is a second appeal. (*Jackson, J.*) AKSHIA PILLAI *v.* GOVINDRAJULU CHETTI. **84 I.C. 975 = 1924 M.W.N. 842 = A.I.R. 1924 Mad. 778 = 47 M.L.J. 549.**

———Companies Act (VII of 1913), S. 38—Question of title need not be decided but if decided appeal will lie. (*Walsh and Wallace, JJ.*) UNION INDIAN SUGAR MILLS CO., LTD. *v.* JAIBEO. **65 I.C. 291 = 44 All. 151 = 19 A.L.J. 937 = A.I.R. 1922 All. 258.**

———A second appeal will not lie in an execution matter, if a second appeal would not have laid in the suit itself. (*Piggot and Walsh, JJ.*) SANT PRASAD *v.* BHAWANI PRASAD. **60 I.C. 831 = 43 All. 403 = 19 A.L.J. 72 = A.I.R. 1921 All. 55.**

———Interest, rate of—Finding that rate hard and unconscionable—High Court will not interfere. (*Newbould and Panton, JJ.*) JYOTISH CHANDRA *v.* ATIT SAHA. **61 I. C. 275 (Cal.).**

———No second appeal lies merely because the lower appellate Court had no jurisdiction to hear the appeal, when the C.P. Code, does not allow such second appeal. (*Scott-Smith, J.*) MT. GUL BANO *v.* MD. ZUKAR KHAN. **62 I. C. 986 = 3 L. L. J. 463 = A. I. R. 1921 Lah. 156.**

———Lower Court entertaining appeal in matter in which no appeal lies—Remedy is by revision-petition and not by second appeal—C. P. Code, S. 115. (*Sadasiva Ayyar and Coutts-Trotter, JJ.*) RUKMANI AMMAL *v.* K. NARASIMHA IYER. **63 I. C. 730 = 14 M. L. W. 85 = 1921 M. W. N. 487 = A. I. R. 1921 Mad. 612 = 41 M. L. J. 54.**

———*Finding on insufficient grounds.*

A finding of fact that a deed is admissible. arrived at by the appellate Court without sufficient grounds being shown is subject to second appeal if it has prejudiced the trial of the appeal. (*Piggot and Kanhaiya Lal, JJ.*) LAKMAN DAS *v.* GANGA SAHAI. **60 I. C. 96 (All.).**

—S. 100—Sufficiency of evidence.

———Question whether description is sufficient to identify property is question of fact and cannot be raised in second appeal for the first time. (*Rankin, C.J. and Mukerji, J.*) PROMOTHA NATH MOZUMDAR *v.* NAGENDRA NATH MOZUMDAR. **33 C. W. N. 1211 = 125 I. C. 603 = A. I. R. 1930 Cal. 235.**

———A finding by a Judge as to alteration of a figure in a bahi which is based solely on his personal observation and not upon evidence by any expert or other evidence on record being based on no evidence is not final. (*Tek Chand, J.*) CHET RAM *v.* JOGI RAM. **31 P. L. R. 109 = A. I. R. 1930 Lah. 336.**

———A finding of fact, based on misdirection of law, can be reversed. The nature and quantum of evidence required to prove that what was once grove land has ceased to retain that character is a question of law. When a Court has misdirected itself on this point, it is impossible to maintain its finding as a finding of fact. (*Ashworth, J.*) DAROPADI *v.* MANNU LAL. **117 I. C. 616 = 10 L. R. A. Rev. 272 = A. I. R. 1929 All. 557.**

———When a person gets a decree, he is entitled to execute that decree against any property of the judgment-debtor and if the judgment-debtor alienates some of his property, he restricts the facility of the decree-holder to execute that decree. It is a question of fact whether his other property is of such an amount and so easily available for satisfaction of the decree as to render the disposal by the judgment-debtor of the particular property immaterial. (*Ashworth, J.*) GOPI CHAND *v.* JODHIRAJ DEOJIT. **116 I. C. 815 = A. I. R. 1929 All. 458.**

———High Court cannot set aside decision of fact in second appeal, nor can it question sufficiency of evidence. 7 Cal. 293, Rel. on. (*Jwala Prasad and Wort, JJ.*) KALI CHARAN SAHU *v.* JALDHARI RAUT. **10 P. L. T. 10 = 115 I. C. 674 = A. I. R. 1929 Pat. 98.**

———Findings of fact cannot be attacked on ground of error or insufficiency of evidence. (*Raza and Nanavutty, JJ.*) SAMRATH SINGH *v.* RAM MIT SINGH. **5 O. W. N. 510 = 110 I. C. 531 = A. I. R. 1928 Oudh 353.**

———Question of fact decided on insufficient evidence gives rise to question of law. (*Carr and Cunliffe, JJ.*) S. RAMANATHA REDDIAR *v.* COMMISSIONER OF INCOME-TAX. **6 Rang. 175 = 110 I. C. 601 = A. I. R. 1928 Rang. 152.**

———Whether there was undue influence or not is a question of fact—If evidence is not sufficient to justify finding, High Court will interfere. (*Devadoss, J.*) VENKATRAMA AIYAR *v.* KRISHNAMAL. **38 M. L. T. 1 = 99 I. C. 571 = 25 M. L. W. 550 = A I. R. 1927 Mad. 255 = 52 M. L. J. 20.**

———It is not proper for a Court in second appeal to lay down whether a piece of evidence is or is not sufficient to rebut the presumption raised under S. 50, that being a question of fact. (*Suhrawardy and Cuming, JJ.*) SATINDRA MOHAN TAGORE *v.* KAMARDDI MIJI. **88 I. C. 584 = A. I. R. 1925 Cal. 1133.**

———Meagreness or weakness of evidence is no ground for interference. (*Kotval, A. J. C.*) NAMDEO *v.* GANOBA. **86 I. C. 847 = A. I. R. 1925 Nag. 271 = 8 N. L. J. 29.**

———Sufficiency of rebutting evidence is a question of fact. 17 A. L. J. 345, Dist. (*Lindsay and Sulaiman, JJ*). RAMDAS RAI *v.* ABDUL GHAFUR. **74 I. C. 297 = A. I. R. 1924 All. 146.**

———Finding based on opinion of expert is not always a finding of fact. The opinions of experts are relevant but not conclusive as to the matters to which they relate; and where they materially differ their value and sufficiency may legitimately form the subject of consideration and scrutiny despite the acceptance of any of them by one Court or another. (*Kanhaiya Lal, J.*) MT. ALTAFAN *v.* IBRAHIM. **75 I. C. 502 = 21 A. L. J. 811 = 4 L. R. A. Civ. 561 = A. I. R. 1924 All. 116.**

———On second appeal, though the High Court has, generally speaking, no right to look at the evidence to decide whether the remaining evidence, after exclusion of evidence erroneously admitted, is sufficient to warrant the finding of the Court below, the case may be disposed of by the High Court without a remand where the lower Court has arrived at its conclusions upon other grounds. (*Mukerjee and Rankin, JJ.*) JAGADISH CHANDRA DE *v.* HARIHAR DE. **78 I. C. 219 = 40 C. L. J. 39 = A. I. R 1924 Cal. 1042.**

———Absence of evidence is question of law. (*Dawson Miller C. J. and Mullick, J.*) DHANRAJ *v.* FIRM SANEHI RAM PANNA LAL. **75 I. C. 928 = A. I. R. 1924 Pat. 687.**

———Finding of fact cannot be attacked on ground of insufficiency of evidence. (*Newbould and Panton, JJ.*) PROSANNA KUMAR BEDANTA TIRTHA *v.* MADHU BADYA. **68 I. C. 500 = A. I. R. 1923 Cal. 279.**

—S. 100—Sustainability.

———Misstatement not affecting the main points is no ground for interference. (*Ramesam, J.*) GOVINDA AYYAR *v.* SRINIVASA IYER. **105 I. C. 375 = A. I. R. 1927 Mad. 1181.**

———Where instead of passing first an order directing the award to be filed and then passing a decree in terms of it, the Court passed a composite order decreeing the plaintiff's claim in terms of it:

Held, that even if the order of the Court were taken to be an order recording a compromise, an appeal lies from that order and that such appeal must be treated as an appeal from an order, with the result that no second appeal lies. A. I. R. 1925 All. 404 Foll. (*Sulaiman and Mukerji, JJ.*) MUMTAZ ALI *v.* ALLAH BANDA. **92 I. C. 600.**

———Where the decision in favour of a party is based on a finding which is dead against the case set up by him, it is contrary to law and second appeal lies although the finding is one of fact. (*Coldstream, J.*) BAKSHI *v.* MT. MEHRAJO. **95 I. C. 298 = A. I. R. 1926 Lah. 535.**

———Scope—Question for consideration is not weight of evidence but whether there is any evidence for the finding. (*Dawson Miller, C. J. and Coutts, J.*) MUNSHI LAL *v.* MAHANTH RAMASIS PURI. **65 I. C. 175 = 3 Pat. L. T. 343 = 1 Pat. 246 = A. I. R 1922 Pat. 384.**

—S. 100—Waiver.

———The question whether there is a waiver in a particular case is a question of fact and the finding on that question cannot be challenged in Second Appeal. (*Kincaid, A. J. C.*) BAHADUR *v.* GELOMAL.

59 I. C. 607 = 14 S. L. R. 128.

—S. 102—Award.

——*Declaration of invalidity—Jurisdiction of Small Cause Court.*

Plaintiff paid a certain amount to defendant for compounding a non-compoundable offence out of Court. Subsequently parties referred the matter to arbitration and an award was made for the repayment of the amount so paid. The plaintiff sued to enforce the award, wherein the defendant challenged its validity. Plaintiff thereupon withdrew the suit and filed a fresh suit for declaration that the award was void and for recovery of the amount paid by him. It was contended that the addition of a prayer for a declaration did not prevent the suit from being of a small cause nature and no second appeal lay.

Held, that the suit was not of a small cause nature. The existence of the award made it impossible for plaintiff to sue for return of the money, which was the subject of the award, except by enforcement of the award or after setting it aside. So long as the award was in existence he could not sue for the return of the money and ignore the award. (*Pratt, J.*) MAUNG CHIT SU *v.* MAUNG SAN GYAW. **6 Rang. 238 = 111 I. C. 21 = A.I.R. 1928 Rang. 173.**

——*Enforcement of—Nature of suit.*

A suit to enforce an award is in essence a suit for specific performance of a contract, and is not of a Small Cause nature. (*Pratt. J.*) MA HLA GYI *v.* MAUNG SEIK PO. **1 Rang. 700 = 79 I. C. 718 = A.I.R. 1924 Rang. 192.**

—S. 102—Claim for jodi.

——*Nature of claim—Second appeal.*

A claim for *jodi*, *russums* and road cess is similar to a claim for rent, which is not of the nature of the cesses mentioned in Cl. 13, and no second appeal lies if the value of the claim is less than Rs. 500. (*Phillips, J.*) NARASIMHA *v.* GOVINDOSS. **90 I. C. 496 = 49 M.L.J. 185 = A.I.R. 1925 Mad. 1196.**

—S. 102—Claim under O. 21, R. 71.

——*Second appeal.*

Where the claim under O. 21, R. 71 was for less than Rs. 500.

Held, the application must be treated as one made in execution of a Small Cause Court decree and no second appeal will lie from such an application. (*Macleod, C.J. and Fawcett, J.*) RAJACHARYA *v.* CHEMANNA. **45 Bom. 223 = 59 I.C. 192 = A.I.R. 1921 Bom. 229.**

—S. 102—Criterion.

——*Nature of suit—Value.*

Where the nature of the suit as disclosed by the plaint was clearly one which made the suit cognizable by the Court of Small Causes and the value of the subject-matter of that suit was below Rs. 500, the appeal was barred under S. 102, C. P. Code. (*Hasan, J.*) BHAGWAN DIN *v.* JOWAHIR. **108 I.C. 898 = 5 O.W.N. 240.**

—S. 102—Decree on review.

——*Second appeal—Appeal against order granting review—Maintainability.*

An appeal allowed under O. 43, R. 1 (*w*) is only an appeal from the order granting the application for review and not an appeal from the final decree passed in the suit and therefore it would be absurd to allow a second appeal on the merits against a decree passed in a Small Cause suit of the value of less than Rs. 500, merely because the decree is one which has been passed in review. 41 Cal. 746 Rel. on. (*Chevis, J.*) KANSHI RAM *v.* KARAM NARAIN. **60 I.C. 259 = 3 L.L.J. 166 = A.I.R. 1921 Lah. 124.**

—S. 102—Execution.

——*Nature of suit—Value—Second appeal.*

Where the suit is one of a Small Cause Court nature below Rs. 500 in value, no second appeal lies against an order in execution of a decree in such a suit. (12 All. 579 and 30 Bom. 113, Foll.) (*Kanhaiya Lal, J.*) SURAJMAN CHAUBE *v.* ANJORE SHUKUL. **79 I.C. 605 = 46 All. 73 = 21 A.L.J. 861 = 4 L.R.A. Civ. 591 = A.I.R. 1924 All. 263.**

——*Order in—Second appeal.*

No second appeal lies in a matter of execution in a suit which is of a Small Cause nature. 12 Mad. 116; 30 Mad. 212; 42 All. 200; 43 All. 403 Ref. to. (*Wallace and Madhavan Nair, JJ.*) VEERARAYAN *v.* AYYAKUTTI. **90 I.C. 794 = 48 M.L.J. 499 = A.I.R. 1925 Mad. 742.**

——*Order in—Second appeal.*

Where the suit is one of a small cause nature and the claim is valued at less than Rs. 500, no second appeal lies even in the matter of execution. (17 Cal. 631 and 18 C. L. J. 538, Diss. (*Spencer and Devadoss, JJ.*) PITCHAYYA *v.* YARALGADDA ANKINEEDU. **76 I.C. 750 = 18 M.L.W. 739 = 33 M.L.T. 125 = A.I.R. 1924 Mad. 367 = 45 M.L.J. 651.**

—S. 102—Execution in Munsiff's Court.

——*Order in—Second appeal.*

No second appeal will lie in respect of an order made in execution proceedings relating to matters governed by S. 102, even when the decree is transferred for execution to a Munsif's Court: 12 All. 579, Foll. (*Dalal, J.*) MT. MENDHA KUNWAR *v.* GANGA SARAN SAHU. **103 I.C. 344 = A.I.R. 1927 All. 740.**

—S. 102—Execution in regular Court.

——*Suit of Small Cause nature—Appeal—Second appeal.*

Where a decree passed by a Court of Small Causes was transferred to a Sub-Judge's Court for execution as it involved the sale of immovable property, it must be supposed under S. 42 that the decree was passed by the Court executing it and its order would be subject to the same rules in respect of appeal as if the decree had been passed by itself. First appeal would, therefore, lie against such order, but a second appeal would be barred by S. 102, the original suit being of a nature cognizable by the Court of Small Causes. 19 C.W.N. 1085; 30 Bom. 113; 31 All. 1; 11 Mad. 130; 25 Cal. 872; and 37 M.L.J. 303; Rel. on: 30 Bom. 212 and (1889) P.J. 278, Ref. (*Patkar and Baker, JJ.*) MARIA URSULA *v.* PANA MAVALAJI & CO. **30 Bom.L.R. 1447 = 114 I.C. 861 = 53 Bom. 46 = A.I.R 1928 Bom. 534.**

—S. 102—Execution proceedings.

——*Small Cause decree—Second appeal.*

No second appeal lies in execution proceedings of a Small Cause decree for less than Rs. 500. (*Sulaiman, J.*) RAMRAJ *v.* MT. UMRAJI. **93 I.C. 292 = A.I.R. 1926 All. 345.**

—S. 102—Plea of mandatory injunction.

——*Nature of suit.*

A suit is not a suit of a Small Cause Court nature if it includes a plea for a mandatory injunction. A judgment does not operate as *res judicata* where the Munsiff in his capacity of an officer hearing a suit of a Small Cause Court nature is not competent to try the later suit. Apart from his capacity as an officer trying suits of a Small Cause Court nature he may be competent to try the later suit but the combination of two functions in the same officer does not affect the question of competency. (*Stuart, J.*) SHAKIRA BIBI *v.* NANDAN RAI. **66 I.C. 613 = A.I.R. 1922 All. 241.**

—S. 102—Question of title.

——*Suit of small cause nature—Second appeal.*

C. P. CODE, (1908), S. 102—Rent suit.

The nature of suit is to be decided on the plaint. In a suit which was originally instituted as a small cause suit by a zamindar against an Inamdar claiming a certain sum as damages for use and occupation, the defendant in his written statement raised the question of plaintiff's title and the suit was thereupon taken to the original side of the Munsif's Court and tried as such:

Held, that the suit did not cease to be a small cause suit and no second appeal lay though incidentally a question of title was raised by the defendant. 17 Cal. 541; 22 Mad. 149; 3 Mad. 192 (F.B.), Rel. on; A.I.R. 1926 Mad. 656, Doubted and Dist.; 23 Mad. 547; 36 Mad. 18; 19 Mad. 329; and A.I.R. 1922 Mad. 352; Ref. (*Odgers, J.*) BAPAYYA *v.* VISWA SUNDARA RAO.

30 M.L.W. 365=116 I.C. 114=
A.I.R. 1929 Mad. 389.

—S. 102—Rent suit.

———*Applicability.*

Suits for recovery of rent other than house rent being excepted from the cognizance of a Court of Small Causes the provisions of Section 102 of the Civil Procedure Code do not apply to them. (*Mullick, and Atkinson, JJ.*) SACCANAND TEWARI *v.* DEB NATH MANGHI. **1922 (P.H.C.C.) 154=A.I.R. 1922 Pat. 184.**

———*Land-holder and ryot—Jurisdiction of Small Cause Court.*

Both under the Madras Estates Land Act which definitely excludes the jurisdiction of all Civil Courts and on the true construction of S. 15 of the Provincial Small Cause Courts Act, a Small Cause Court has no jurisdiction over a suit for rent by a land-holder against his ryot, and therefore the provisions of S. 102 of the C. P. Code do not apply to such a suit. 23 Mad. 547 Ref. to, 7 Bom. 100 Dist. (*Sadasiva Iyer and Napier, JJ.*) SRI VARADARAJA SOORU HARISCHANDRA DEO BAHADUR ZAMINDAR OF TARLA *v.* KANDA BARIKIVADU. **63 I. C. 8=15 Mad. L. W. 150=**
44 Mad. 697=1921 M.W.N. 565=
A.I.R. 1922 Mad. 119=40 M.L.J. 466.

———*If "Land Suit"—Bengal Civil Courts Act, S. 2.*

A suit for rent of land is not a "land suit' within the meaning of S. 2 and therefore if the value does not exceed Rs. 500 no second appeal lies under S. 11. 24 Cal. 449; 2 L.B.R. 124, Dist. 3 L.B.R. 90; 42 Cal. 638 Diss. and 23 Mad. 547 Foll. (*Heald and Rutledge, JJ,*) MA PAN *v.* MAUNG NE U. **91 I.C. 639=3 Rang. 390=**
A.I.R. 1926 Rang. 19.

———*Money suit on—Nature of suit—Absurd prayer for injunction—Jurisdiction of Small Cause Court.*

A suit for money to be recovered on foot of a simple bond remains a suit cognizable by a Court of Small Causes in spite of an additional absurd and fictitious prayer for an injunction to restrain defendant from transferring his immovable property. 28 All. 293; 21 Bom. 248; 25 Bom. 625 and 24 Mad. 508, Foll. (*Mukerji and Boys, JJ.*) HARBANS DEO RAI *v.* RAJ KUMAR RAI. **1930 A.L.J. 1043=**
A.I. R. 1930 All. 702.

S. 102—Small Cause Suit—Jurisdiction.

———*Applicability of Prov. S. C. C. Act, Sch. 2, Cls. 26 and 2.*

After *A* brought a property to sale *B* applied for rateable distribution and it was granted. A then was allowed to bid on satisfying *B*'s decree. When he had bought the property, the sale was set aside at the instance of a third party. A sued *B* to recover from him Rs. 270 paid in satisfaction of his decree.

Held, no second appeal lies as the suit does not fall either under Clause 2 or 26 of Prov. S. C. C. Act. (*Lindsay and Daniels, JJ.*) KESHO SARAN *v.* KHAIRATI LAL. **74 I.C. 836=21 A.L.J. 248=**

C. P. CODE, (1908), S. 102—Suit for compensation for cutting trees.

45 All. 359=4 L. R. A. (Civ.) 146=
A. I. R. 1923 All. 310.

—S. 102—Small Cause Court nature.

———*Determination of.*

A suit is cognizable by the Small Cause Court if in respect both of its character and of the amount or value of its subject-matter it is within the jurisdiction of the Court. The value or amount is not that actually recoverable or ascertained at the trial, but that claimed by the plaintiff and set out in the plaint. (*Page, J.*) CHANDMULL KANGORIA *v.* DEBI CHAND.

80 I. C. 317=51 Cal. 62=28 C. W. N. 6=
A. I. R. 1924 Cal. 405.

—S. 102—Small Cause Suit tried on Original Side.

———*Second appeal—Revision.*

Where a suit for less than Rs. 500 was of a small cause nature and was tried by the Munsif on the Original Side and the decision was confirmed in appeal, the High Court refused to interfere in revision and to remand the suit for retrial on the Small Cause side.

Held also that no second appeal lies. 33 Mad. 323 and 34 Bom. 171, Dist. (*Spencer and Ramesam, JJ.*) BHUVANAPALLI SUBBAYYA *v.* RAJAH OF VENKATAGIRI. **66 I. C. 207=14 M L. W. 349=**
A.I.R. 1922 Mad. 352=42 M.L.J. 116.

—S. 102—Subsequent changes.

———*Plaint of original nature—Amendment into small cause nature—Second Appeal.*

The course of appeal is determined by the character of the plaint as originally made and is not affected by the plaintiff subsequently dropping or being unable to seek relief with regard to a part of his claim. A. I. R. 1925 Bom. 440 and 22 M. L. J. 47 Rel. on. A plaintiff sued a defendant for ejectment. But later he withdrew his prayer for ejectment and confined his claim merely to recovery of rent, the amount of which was below Rs. 500. It was contended that no second appeal could lie from the decision in that case because after the withdrawal of the prayer for ejectment the suit assumed a character of a small cause.

Held second appeal would lie. (*Tek Chand, J.*) BANARSI DAS *v.* MUHAMMAD HUSSAIN.

115 I. C. 858=A. I. R. 1928 Lah. 764.

—S. 102—Subsequent change in suit.

———*Giving up claim—Nature of suit if altered.*

Where a suit as framed is not a suit of a small cause nature, it does not attain that character, if the plaintiff in the course of hearing gives up a part of his claim. (*Macleod, C. J. and Coyajee, J.*) GANAPPA PUTTA HEGDE *v.* HAMMAD SAIBA. **89 I. C. 59=**
49 Bom. 596=27 Bom. L. R. 637=
A.I.R. 1925 Bom. 440.

—S. 102—Suit for choutarji dues.

———*Nature of—Applicability of Prov. S. C. C. Act, Sch. 2, Cl. 13.*

A suit to recover choutarji dues which are in the nature of a jodi is a suit of a small cause nature. There is no difference in principle between inam jodi paid to a zamindar and sub-inam jodi paid to an inamdar as would make Art. 13 applicable to the latter while not applicable to the former: 21 Mad. 243 Foll. 39 Bom. 131; Dist. (*Wallace, J.*) KRISHNA MAHANTY *v.* GANGADHAR PADHI. **103 I.C. 120=**
38 M. L. T. 385=1927 M. W. N. 748=
A. I. R. 1927 Mad. 670=52 M.L.J. 706.

—S. 102—Suit for compensation for cutting trees.

———*Applicability of Prov. S. C. C. Act, Sch. 2 Art. 35 (ii)—Second appeal.*

The defendant was prosecuted by the plaintiff's for the cutting of trees and acquitted. It had been found that the defendants had right for some portion of the trees.

Held the mere taking of trees by the Defendants would not of itself amount to theft or criminal misappropriation unless this was done with dishonest intention. The criminality of the act of the Defendants will therefore depend on the intention with which this act was done and not whether the particular act was saved by the provisions of Chap. IV of the Indian Penal Code. The case does not come within Art. 35 (*ii*) of Second Schedule of the Provincial Small Cause Courts Act and therefore no second appeal lies. (*Cuming and Panton, JJ.*) (MIRZA) DILBAR HUSAIN *v.* SADARUDDIN CHOUDHURY. **77 I.C. 77 = 27 C. W. N 469 = A. I. R. 1923 Cal. 568.**

—S. 102—Suit for compensation in Small Cause Court.

——*Representation in ordinary Court—Second appeal*

Suit for compensation for damage done to plaintiff's property by the wrongful act of the defendant of digging a pit close by and letting water accumulate there was originally presented to the Court of Small Causes but that Court returned it for presentation to the ordinary Civil Court on the ground that it involved a question of title. The first Court decreed the claim to the extent of Rs. 10. The decision was appealed against by the defendant but his appeal was unsuccessful.

Held that a second appeal did not lie 25 Bom. 625 and 32 Bom. 560, Foll. (*Kinkhede, A. J. C.*) BAPU SURYABHAN *v.* KISAN. **107 I. C. 193 = A. I. R. 1928 Nag. 136.**

—S. 102—Suit for contribution.

——*Prov. S. C. C. Act*, (1887) *Sch.* 2. *Cl.* 41. *Second appeal.*

A suit to recover by way of contribution a share of the decretal amount paid by the plaintiff is a suit of a Small Cause nature and not one falling under Cl. 41 and where the value of the suit is less than Rs. 500 no second appeal lies. (*Sulaiman, J.*) MOHAMED SHERKHAN *v.* CHAMMAN KHAN. **94 I.C. 949 = A.I.R. 1926 All. 456.**

—S. 102—Suit for damages against tenant holding on.

——*Second appeal.*

A suit by a landlord for damages for use and occupation on the footing that the defendants are tenants holding over and are trespassers in the eye of the law is cognizable by a Small Cause Court and if the value of the suit does not exceed Rs. 500, a second appeal does not lie in the suit. (*Ramesam and Venkatasubba Rao, JJ.*) ANNAMDEVULU THATA *v.* AHMADULLA KHAN. **90 I. C. 401 = 22 M. L. W. 528 = A.I.R. 1925 Mad. 890 = 48 M.L J. 701.**

—S. 102—Suit for declaration of title to fish and damages.

——*Second appeal.*

The suit, which was merely a suit for damages after declaration of title to fish and not to the tank, being a suit for money less than the sum of rupees five hundred, no second appeal was held to lie. (*Woodroffe and Ghose, JJ.*) ARADHAN MONDAL *v.* ABHOYA CHARAN MANDAL. **68 I.C. 626 = A. I. R. 1923 Cal. 321.**

—S. 102—Suit for excess amount paid under decree.

——*Nature of suit—Second appeal.*

Where a suit was filed by the judgment-debtor for recovery of excess of the decretal amount paid to the decree-holder under fraud and cheating.

Held that the suit is not of a small cause nature and a second appeal is entertainable. (*Rankin, C. J. and Mukerji, J.*) RADHACHARAN *v.* KAILASH CHANDRA. **115 I.C. 581 = A. I. R. 1928 Cal. 776.**

—S. 102—Suit for grazing fee.

——*Second appeal.*

No second appeal lies in a suit for recovery of less than five hundred rupees claimed as grazing fee. There can be no claim for rent unless there is a tenancy and there can be no tenancy unles a right to the land has been given to the grantee. 20 C.L.J. 227 Rel.on. (*Mookerji A. C. J. and Fletcher, J.*) JATINDRA MOHAN LAHIRY *v.* ABDUL AZIZ MIA. **59 I. C. 595 = 32 C.L.J. 83.**

—S. 102—Suit for interest on mortgage money.

——*Prov. S.C.C. Act Sch. II, Art. 8—Second appeal.*

A suit only for the interest on the mortgage money due to the mortgagee is one triable by a Court of Small Causes and there is no second appeal from the decision in the case. (*Scott Smith J.*) PARDUMAN CHAND *v.* GANGA RAM. **66 I.C. 285 (Lah.).**

—S. 102—Suit for money for permissive possession of land.

——*Second appeal.*

In a suit for money due for use and occupation on the ground of premissive possession the Small Cause Court passed an order under S. 23, Provincial Small Cause Courts Act, returning a plaint.

Held, that on proper construction of plaint no second appeal did lie. A. I. R. 1926 Mad. 622 Rel. on. (*Anantakrishna Ayyar, J.*) SESHAMMA *v.* BUTCHIRAJU **120 I. C. 370 = A. I. R. 1929 Mad. 781.**

—S. 102—Suit for price of articles supplied.

——*Nature of suit—Second appeal.*

A suit for price of coal supplied under an agreement is in the nature of a Small Cause suit and where the amount sued for is below Rs. 500 no second appeal lies. (*N. R. Chatterjee and Panton, JJ.*) DHAR AND COMPANY *v.* SIB NARAYAN SINGH. **59 I.C. 188(Cal).**

—S. 102—Suit for price of crop.

——*Nature of suit—Second appeal.*

A suit for the price of the paddy alleged to be cut and misappropriated by the defendant not amounting to a criminal offence is a suit of a nature cognizable by Courts of Small Causes and if under the value of Rs. 500 no second appeal lies. (*Cuming and B. B. Ghose, JJ.*) KADER SHEIKH *v.* NAJUMADDI SHEIKH. **44 C. L. J. 190 = 97 I.C. 556 = A. I. R. 1926 Cal. 1230.**

—S. 102—Suit for produce of land.

——*Nature of suit.*

A suit for the produce which defendant 'had taken from the land which he had entered and forcibly worked, or its value,' is not one for accounts and is of a small cause nature. (*Pratt, J.*) MAUNG HLA DIN *v.* MAUNG KYAW GALE. **5 Rang. 388 = 104 I.C. 818 = A. I. R. 1927 Rang. 262.**

—S. 102—Suit for recovery of offerings to a shrine

——*Second appeal.*

A suit to recover offerings for a shrine from a person wrongfully appropriating them falls under Art. 18 of the Second Schedule, as it relates to a trust, and also probably under Art. 35 (ii), so that it is an unclassed suit, and not a small cause, and a second appeal, therefore, lies. (*Martineau, J.*) NIHAL SINGH *v.* SECRETARY GURUDWARA. **92 I.C. 731 = A.I.R. 1926 Lah. 228.**

—S. 102—Suit for rent and damages.

——*Second appeal.*

A suit, instituted for rent under a lease agreement or alternatively for damages for use and occupation, is a suit of small cause nature and it would not cease to be so even when transferred to the original side, question of title having been raised. And if such suit is of value of less than Rs. 500 no second appeal lies. 22 Mad. 149 and A.I.R. 1926 Mad. 622. Foll. (*Odgers, J.*) RAMANUJA

C. P. CODE (1908), S. 102—Suit for value of share in produce.

JEEK SWAMIGAL *v.* SAMI NADAR. **119 I.C. 386= A.I.R. 1929 Mad. 525.**

—S. 102—Suit for value of share in produce.

——*Nature of suit—Second appeal.*

The possession of one co-sharer is deemed to be on behalf of all in law and neither such possession nor receipt of profits can be considered wrongful. Failure of the co-sharers to give other co-sharers their share of the profits is, however, wrongful. Art. 31, therefore, does not apply to suit by certain co-sharers for recovery of the value of their share of the produce realized by other co-sharers in possession of their joint land, there being no " wrongful " receipt of profits. Such a suit if its value for jurisdiction is less than Rs. 500 is a suit of a small cause nature and no second appeal from it is competent. (*Bhide, J.*) BUDHA RAM *v.* RAM CHAND. **A.I.R. 1930 Lah. 613.**

—S. 102—Transfer of suit under S. 23 of Provincial Small Cause Courts Act.

——*Nature of suit—Effect on.*

The transfer of a suit under S. 23 does not and cannot change its nature and it is the nature of the suit which is the test under S. 102, C. P Code and O. 43, R. 1 (v). C.P. Code. A first appeal is, therefore, valid, but under S. 102, C.P. Code a second appeal is barred. (*Wallace and Madhavan Nair, JJ.*) MIKKILI ANKAYA *v.* ALAPARTI KATTAMMA. **23 M. L. W. 518= 94 I.C. 77=A.I.R. 1926 Mad. 622.**

—S. 103—Applicability.

——*Appeal against decree—Subsequent declaration in favour of appellant in original suit—Second appeal.*

A suit for profits instituted in the revenue Court was dismissed by the revenue Court on the ground that the plaintiff had no title to the property, but on appeal to the District Judge it was held that he was entitled to sue and the case was remanded under O. 41, R. 23. There was no appeal against the remand order. A decree was passed after remand, whereupon the defendant appealed. Before the hearing of the appeal he obtained a declaration from the Civil Court that he was owner and in possession of the property in suit. The District Judge thereupon held that he was bound by the Civil Court's declaration and decreed the appeal and dismissed the suit.

Held, that though the District Judge cannot go back on his own decision, yet, as the matter opened up completely on second appeal, the High Court would be bound to take notice of the decree of the Civil Court and to act accordingly. A. I. R. 1922 All. 356, Foll. (*Dalal, J.*) MT. UMA DEVI *v.* GUR NARAIN. **103 I.C. 349= A. I. R. 1927 All. 694.**

——*Findings of fact—Onus of proof wrongly laid.*

Although the findings of fact of the lower Appellate Court are findings conclusive on the Court of second appeal, where that Court misplaces the burden of proof on a party, it is permissible for the Court of second appeal to examine the finding which is not binding on it because of wrong onus placed on a party. A. I. R. 1929 P. C. 13, Rel. on. (*Graham and Mitter, JJ.*) CHINTA DASYA *v.* BHALKU DAS. **A.I.R. 1930 Cal. 591.**

—S. 103—Construction of document.

——*Issue as to title—Determination of.*

Court of second appeal can decide a question of title itself if left undetermined by the lower Court whether it was a question of fact or law, under S. 103 read with Order 41, R. 25. Where the question of title rests purely on interpretation of certain documents and the legal inferences to be drawn from them, it is not a question of fact alone and the High Court can interfere and decide it itself. 27 C. W. N. 245, 42 All. 152, Foll. (*Wazir Hasan, A. J. C.*) INDRAPAL SINGH *v.* THAKUR DIN SINGH. **10 O. L. J. 646= 78 I. C. 895=27 O. C. 77=A.I.R. 1924 Oudh 266.**

C. P. CODE, (1908), S. 103—Finding on inadmissible evidence.

—S. 103—Documentary evidence not considered.

——*Second appeal.*

Where lower Court fails to consider documentary evidence, High Court can give a finding itself. (*Stuart and Sulaiman, JJ.*) MUNNA LAL *v.* E. I. RY. CO. **82 I. C. 772=A.I.R. 1923 All. 71.**

—S. 103—Failure to consider.

Where the Court below fails to determine a question as regards the concealment and removal of property by judgment-debtor, in order to apply R. 40, O. 21. it is open to the Appellate Court in second appeal under S. 103 to decide the question after a consideration of the evidence in the case, instead of making a remand to the lower appellate Court for reconsideration of the appeal. (*Kulwant Sahay and Macpherson, JJ.*) BANK OF BIHAR *v.* BIHARI PRASAD. **118 I. C. 312= A.I.R. 1929 Pat. 728.**

—S. 103—Failure to decide.

——*Question of fact.*

Where the Trial Court did not decide a question of fact but the evidence on record was sufficient for the purpose and there was already a very great delay, the High Court decided the fact itself. (*Mears, C. J. and Stuart, J.*) RAM PRASAD *v.* SUMER NATH PANDE. **76 I. C. 12=21 A. L. J. 33=45 All. 191= A.I.R. 1923 All. 134.**

—S. 103—Failure to give finding.

——Under S. 103 the High Court can give a finding of fact only when none has been given in the lower Appellate Court; where one has been given but is found to be illegal the only course open to the High Court under that section is to remand the case for a fresh decision. (*Hallifax, A. J. C.*) MANBODH *v.* HIRASAI. **93 I. C. 650=A.I.R. 1926 Nag. 339.**

—S. 103—(As amended by Act VI of 1926)—Finding of fact.

——*Second appeal, when lies.*

Under the provisions of Act VI of 1926, S. 103 gives the High Court on second appeal, if the evidence on the record is sufficient, power to determine any issue of fact necessary for the disposal of the appeal not only in cases where that question of fact has not been disposed of by the lower Court, but also in cases in which it has been wrongly determined by such Court by reason of any illegality, omission, error or defect such as is referred to in sub-S. (1) of S. 100. (*Dawson Miller, C. J. and Foster, J.*) KISHUN DAYAL *v.* ISHWARNATH. **102 I.C. 391=8 P. L. T. 74= A.I.R. 1927 Pat. 167.**

—S. 103—Finding of fact on wrong presumption.

——It is a wrong presumption to hold that the mortgagee has only to allege that the original instrument is lost and if the Court comes to the conclusion that there was a mortgage, the mortgagee is relieved from the duty of affirmatively making out the terms of the contract, because the Court may presume that any contract which they set up is true. And a finding based upon such a presumption is vitiated by an error of which the High Court can, if it pertains to facts, take notice under S. 103, C. P. Code. (*Venkatasubba Rao and Madhavan Nair, JJ.*) C. AHAMAD HAJI *v.* MAYAN. **57 M. L. J. 789=30 M. L. W. 1045= A.I.R. 1930 Mad. 65.**

—S. 103—Finding on inadmissible evidence.

——If the second Appellate Court considers the finding of the lower Appellate Court to be unsatisfactory because it was based on inadmissible document, a fresh

finding on the rest of the evidence should be called for. (*Phillips and Madhavan Nair, JJ.*) VENKATARAMANUJACHARYULU *v.* APPALACHARYULU.
24 M. L. W. 227 = 97 I.C. 785 = A. I. R. 1926 Mad. 1003.

—S. 103—Fresh finding not given after remand.

———Where a Court in second appeal remands a case after vacating a finding on an issue and fresh finding is called for but is not given by the lower Court, the appellate Court is perfectly entitled to determine the issue as one of fact under S.103. (*Venkatasubba Rao and Madhavan Nair, JJ.*) MEYYAPPAN SERVAI *v.* SELLAPPA CHETTIAR. **A. I. R. 1930 Mad. 489.**

—S. 103—Improper admission of additional evidence by lower Court.

———Where the lower Appellate Court has admitted additional evidence improperly, the High Court can itself dispose of the case only in such cases where independently of the evidence improperly admitted the lower Court has apparently arrived at its conclusion upon other grounds. A. I. R. 1924 Cal. 1042; 35 Cal. 701 and 23 Cal. 179, Rel. on. (*Cuming and Page, JJ.*) TIRTHAMAYI DASSI *v.* ATTIKULLA. **98 I.C. 129 = A. I. R. 1927 Cal. 140.**

—S. 103—Onus of proof wrongly laid—Misappreciation of evidence.

———Where the lower Appellate Court has approached the case from a wrong standpoint of burden of proof and has consequently failed to appreciate the evidentiary value or the importance of certain documents, and under-estimated the bearing they had on the question in issue, the Court of second appeal may come to an independent finding on the question. (*Kinkhede, A. J. C.*) ABDUL *v.* G. I. P. RAILWAY **98 I. C. 236 = 9 N. L. J. 152 = A. I. R. 1926 Nag. 489.**

—S. 103—Remand for re-hearing.

———Where an issue has been raised and determined, it is not within the competence of High Court in second appeal to remand the case for a re-hearing upon that very issue. (*Dawson Miller, C. J. and Mullick, J.*) GANPAT RAO BANKA PURI *v.* RAJ KUMAR SINGH.
67 I. C. 494 = 1 Pat. 639 = A. I. R. 1922 Pat. 575.

—S. 103—When not applicable.

———High Court has power to determine a question of fact in order to save a remand. (*Das and Kulwant Sahay, JJ.*) KULDIP NARAIN *v.* RAM LAL.
7 Pat. 260 = 107 I. C. 821 = A. I. R. 1928 Pat. 318.

———Where the question has been determined by the lower Court, and that decision cannot be supported because it is based in part on evidence improperly admitted, S. 103 does not apply. (*Mukerjee and Rankin, JJ.*) JAGADISH CHANDRA DE *v.* HARIHAR DE.
78 I. C. 219 = 40 C.L.J. 39 = A.I.R. 1924 Cal. 1042.

—S. 103 (as amended by Act VI of 1926, S. 2)—Wrong decision.

———According to the amendment of S. 103, the High Court can decide, if there is sufficient evidence, a question of fact wrongly decided by the lower Appellate Court. (*Sanderson, C. J., Panton and Graham, JJ.*) BROJENDRA KISHORE *v.* MOHIM CHANDRA.
31 C. W. N. 32 = 99 I. C. 189 = A. I. R. 1927 Cal. 1 (F. B.).

—S. 104.

Appeal, whether lies.
Arrest.
Award decree.
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Modification in Award.
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—S. 104—Appeal, whether lies.

———*Order under C. P. Code, S.* 151.

There is no specific provision in the Code for an appeal from an order passed under S. 151, and an appeal from such an order does not lie, for a right of appeal cannot be assumed unless expressly conferred by law. (*Bhide. J.*) MUHAMMAD AKBAR KHAN *v.* AMAR NATH. **122 I. C. 102 = 31 P. L. R. 477 = 12 L. L. J. 71 = A. I. R. 1930 Lah. 789.**

———*Order granting review.*

There can be no appeal from an order granting an amendment as such unless in deed it be considered as sometimes it has been considered as a question of review in which case it may be possible to maintain an argument that there can be an appeal from that order. (*Rankin, C. J. and B. B. Ghose, J.*) NAGENDRA NATH *v.* AMBICA CHARAN. **50 C. L. J. 12 = 33 C. W. N. 958 = A. I. R. 1929 Cal. 676.**

———*Order giving or refusing leave to bid under C.P. Code, O.* 21, *R.* 72.

An order giving or refusing leave to bid at an execution sale is only a ministerial order and not appealable. 38 Cal. 717 (P. C.), Rel. on. (*Kumaraswami Sastri and Walsh, JJ.*) ULAGANATHA MUDALIAR *v.* M. ALAGAPPA MUDALIAR. **122 I.C. 161 = A. I. R. 1929 Mad. 903.**

———*Order granting interest on money in court.*

Order granting mortgagee interest on mortgage money for the time during which sale proceeds of mortgage property are lying in Court, is not appealable but is revisable. (*Heald and Otter, JJ.*) S. A. S. CHETTIAR FIRM *v.* U MUN DIN. **118 I. C. 416 = A. I. R. 1929 Rang. 127.**

———*Order under Succession Act.*

Orders passed by the District Judge under the Succession Act (*e.g.* order under S. 292) are appealable to the High Court and such appeals are governed in procedure by the provisions of the C. P. Code, relating to appeals. 39 Cal. 563, Doubted and Dist.; A. I. R. 1924 Rang. 237, Cons. (*Otter and Pratt, JJ.*) U. PO HNIT *v.* MG. BO GYI. **118 I. C. 401 = A. I. R. 1929 Rang. 109.**

———*Decree under C. P. Code, Sch.* 2, *Para.* 20.

An appeal lies against an ex-parte decree passed in an application filed under para. 20, Sch. 2 of the Code. 38 All. 297, Foll.; A. I. R. 1924 Pat. 603, Dist. (*Ramesam and Jackson, JJ.*) SELVARAYAN SAMSON *v.* S. AMALORPAVANADAM. **112 I. C. 691 = 29 M. L. W. 490 = A. I. R. 1928 Mad. 969 = 55 M. L. J. 262.**

———*Order refusing to execute award.*

An order refusing to execute an award under the Co-operative Societies Act holding that it was a mere nullity is appealable. A. I. R. 1924 Cal. 117; A. I. R. 1924 Lah. 544 and A. I. R. 1922 Bom. 377 (2), Rel. on. (*Addison, J.*) AHAMADYAR *v.* CO-OPERATIVE CREDIT SOCIETY. **97 I. C. 288 = 8 L. L. J. 310 = 27 P. L. R. 706 = A. I. R. 1926 Lah. 547.**

———*Order removing from record names of parties who died before suit.*

No separate appeal stamped as an appeal from an order lies against an order removing from the record the names of persons who admittedly died before the suit was instituted. (*Campbell, J.*) GAURISHANKAR *v.* MADAN GOPAL. **97 I. C. 192 = 8 L. L. J. 324 =**

27 P. L. R. 735 = A. I. R. 1926 Lah. 513.

———*Order under C. P. Code, O. 23, R. 1.*

No appeal lies from an order passed under O. 23, R. 1 allowing a suit to be withdrawn with liberty to bring a fresh suit. (*Wazir Hasan, A. J. C.*) BISHU NATH *v.* RAM PARSHAD. **88 I. C. 1029 = A. I. R. 1926 Oudh 185.**

———*Order setting aside award.*

An order, under the Arbitration Act, setting aside an award is not appealable. (*Kincaid. J. C. and Kennedy, A. J. C.*) MESSRS. G. P. GUNNIS & CO. LTD. *v.* MESSRS. AMANMAL TULSIDAS. **79 I. C. 920 = A. I. R. 1925 Sind 218.**

———*Conditional or provisional order.*

An order which is either conditional or provisional and does not result in a final decree is not appealable. (*Walsh and Ryves, JJ.*) KANHAIYA *v.* KANHAIYA LAL. **79 I. C. 363 = 46 All. 372 = 22 A. L. J. 345 = 5 L. R. A. Civ. 238 = A. I. R. 1924 All. 376.**

———*Order of arrest or attachment before judgment.*

An appeal lies both from an order of arrest before judgment and from that of attachment before judgment. It is true that an order of arrest is not one of the appealable orders enumerated in O. 43, R. 1 but the right is given specifically by S. 104, C. P. Code, and being a statutory right conferred by the body of the Code is not a matter of procedure and would not be taken away by rules contained in the schedule. Moreover its omission from O. 43 does not necessarily mean that it does not exist; in fact its inclusion would be superfluous, the order not being exhaustive in its terms. (*Duckworth and Godfrey, JJ.*) K. O. M. SYED HOOSEIN *v.* S. R. M. M. C. T. CHETTIAR FIRM. **84 I. C. 270 = 2 Rang. 362 = 3 Bur. L. J. 159 = A. I. R. 1924 Rang. 361.**

———*Order under Arbitration Act, S. 19.*

No appeal lies under S. 104, C. P. C. from an order passed under S. 19 of the Arbitration Act staying a suit. 1 S.L.R. 86 F.B.; 28 A. 349, Foll. 45 B. 245; 16 S. L. R. 174, Appr. (*Kincaid, J. C, Aston and Madgavkar, A. J. Cs.*) FIRM OF MENGHRAJ KHIALDAS *v.* LANGLEY BILLIMORIA AND CO. **81 I. C. 759 = 17 S. L. R. 195 = A. I. R. 1923 Sind 38 (F.B.).**

———*Order under Arbitration Act, S. 19.*

No appeal lies from an order staying a suit under S. 19 of the Arbitration Act. (*Kemp, A.J.C. on difference between Kincaid, J.C. and Madgavkar. A. J. C.*) SODAWATERWALA *v.* MESSRS. VOLKART BROS. **82 I. C. 81 = A. I. R. 1923 Sind 25.**

———*Order under C. P. C., O. 23, R. 1.*

An order granting permission to a plaintiff to withdraw a suit under O. 23, R. 1 is not a decree and is therefore, not appealable. (*Abdul Raoof and Martineau, JJ.*) SANT RAM *v.* MT. SAHIB KAUR. **65 I. C. 719 = A. I. R. 1922 Lah. 267.**

———*Order refusing withdrawal of execution.*

An appeal does not lie against an order of a Munsif rejecting the decree-holder's petition to withdraw his execution case. (*Jwala Prasad and Ross, JJ.*) RAM PRASAD RAI *v.* MAKESH KANT CHAUDHARY. **65 I. C. 122 = 1 Pat. 232 = 3 Pat. L. T. 445 = A. I. R. 1922 Pat. 525.**

———*Order granting leave to sue receiver.*

An order giving leave to sue a receiver for damages aused by his negligence is not appealable. (*Macleod, .J. and Heaton, J.*) SHRINIVAS KUPPUSWAMI *v.* CWAZ. **59 I. C. 421 = 45 Bom. 99 = A. I. R. 1921 Bom. 427.**

. 104—Arrest,

—*Order issuing arrest warrant.*

order issuing a warrant for the arrest of a judgment-debtor in execution of a decree, falls under S. 47 and is appealable as a decree under S. 96 though not under S. 104 (1) (*h*). (*Scott-Smith, J.*) MEHR CHAND *v.* RAM LAL. **73 I. C. 766 = A.I.R. 1924 Lah. 360.**

—S. 104—Award, decree.

———*Scope of appeal.*

In appeal from a decree based on an award no objection can be taken except in so far as the decree is not in accordance with the award. (*Zafar Ali and Jai Lal, JJ.*) BANSI LAL *v.* GOPAL LAL. **122 I. C. 90 = 10 Lah. 688 = 30 P. L. R. 722 = A. I. R. 1930 Lah. 102.**

———*Appeal if lies.*

Where the decree appealed against was not in excess of the award and where the award had been made on a reference through the Court under Schedule II to the Code of Civil Procedure,

Held, the award cannot be treated either as a compromise under rule 3 of Order 43, or an order appealable under S. 104 (1) (*f*) of the Civil Procedure Code. (*Pratt and Fawcett, JJ.*) MAHOMED VALLI ASMAL *v.* VALLI ASMAL. **79 I. C. 723 = 26 Bom. L. R. 171 = A. I. R. 1924 Bom. 324.**

—S. 104—Award, filing of.

———*Order on application—Appeal if lies.*

An order filing or refusing to file an award in an arbitration without the intervention of the Court is not and cannot be regarded as a decree, A. I. R. 1926 Lah. 403 and 29 Cal. 167 (P. C.), Dist. (*Broadway and Jai Lal, JJ.*) AGYA SINGH *v.* SUNDAR SINGH. **107 I. C. 756 = 9 Lah. 380 = A. I. R. 1928 Lah. 137.**

———*Order on application—Appeal, if lies.*

Where an order directing an award to be filed and a decree in accordance with the award were not separately passed but the Court disposed of the whole case by a single order.

Held, that the appeal was in substance an appeal from an order directing the award to be filed, and as such was competent. 38 All. 380 and 42 All. 185, Ref. (*Sulaiman and Daniels, JJ.*) JAGAT PANDE *v.* SARAWAN PANDE. **88 I. C. 76 = 47 All. 743 = 23 A. L. J. 440 = 6 L. R. A. Civ. 350 = A. I. R. 1925 All. 404.**

———*Implied order.*

Where at the hearing of an application for filing an award under C. P. Code, Sch. II, P. 20, the objections of the opposite party are overruled and the Court eventually passes a decree in accordance with the award, though there is no order in so many words that the award be filed, the decision of the Court dismissing the objection must be held to amount to an order filing an award. The right conferred by the Legislature cannot be defeated by the mere fact that no express order filing the award was made. (*Shadi Lal, C. J.*) FIRM SHANKAR DAS NAND LAL *v.* FIRM AMIR CHAND LAKHMI DAS **88 I. C. 533 = 7 L. L. J. 91 = 26 P. L. R. 466 = A. I. R. 1925 Lah. 321.**

———*'Order filing the award'—Meaning of.*

'Order filing the award' does not mean the order by which the arbitrators are directed to send their award or bring their award to Court before the objections have been lodged or disposed of; but an order filing an award is passed after the objections have been disposed of and an appeal does lie from an order filing an award even if in consequence the decree has to be set aside. In this connection the provisions of S. 104 (*f*) should be observed and paragraph 21 (2) Sch. II of the Code should be treated as a dead letter. (*Harrison, J.*) GHULAM MUSTAFA *v.* GHULAM SADIQ. **73 I. C. 820 = A. I. R. 1924 Lah. 231.**

C. P. CODE, (1908), S. 104—Award, filing of.

———*Arbitration through Court—Applicability.*

Where an award was given by arbitrators with the intervention of the Court and the defendants after filing objections were absent on an adjourned date and the Court passed the decree in the terms of the award and dismissed the application under O. 9, R. 13 to set aside the award.

Held, no appeal lay against the order and that S. 104 (*f*) did not apply as the arbitration was with the intervention of the Court. (*Das and Adami, JJ.*) ROSHAN LAL MARWARI *v.* FIRM OF BRIDHI CHAN SRI LAL. **83 I. C. 26 = 1924 P. H. C. C. 170 = 3 Pat. 839 = 6 P. L. T. 212 = A. I. R. 1924 Pat. 603.**

———*Appeal against order—Power of Court.*

The effect of S. 104 (1) (*f*) seems to give a right of appeal against the decision of the Court on the question whether the award should be filed or not. Paragraph 21 (2) of the Second Schedule allows an appeal also if the decree of the Court does not correctly interpret the award and on an appeal under this provision the decree can be corrected so as to bring it in accordance with the award. But when the decree does correctly interpret the award then there is no appeal against the decree ; in other words, when an award has lawfully been made there is no appeal against the decision of the arbitrators. The Court has invariably to go into the merits of the decision contained in the award. It is limited to the three questions whether there has been a reference ; whether there has been an award and whether any grounds under paras. 14 and 15 have been proved, (*Carr, J.*) MAUNG TUN U *v.* MAUNG PO SHOK. **76 I. C. 504 = 1 Rang. 265 = A. I. R. 1923 Rang. 199.**

———*Arbitration through Court—Appeal.*

S. 104 (1) (*f*), C. P. Code provides for an appeal against an order filing or refusing to file an award in an arbitration without the intervention of the Court and applies to an award filed under Sch. II, para. 21, C. P, Code. No appeal lies against an order filing an award made in pursuance of an order of reference made by the Court and filed under para. 19 of Sch. II. (*Shadi Lal, C. J. and Wilberforce, J.*) TEHLA MAL *v.* DHANA MAL. **60 I. C. 590 (Lah.).**

-S. 104—Award, refusing to file.

———*Meaning of—Remittal for re-consideration.*

S. 104 (1) (*f*) contemplates only final orders and an order remitting an award to the arbitrators with the direction that they should make a fresh award in compliance with the agreement of reference does not amount to refusal to file an award under S. 104 (1) (*f*) and is not appealable. (*Shadi Lal, C. J.*) FAZAL DIN *v.* DIAL SINGH. **96 I. C. 779 = A. I. R. 1926 Lah. 658.**

———*Procedure.*

An order refusing to file an award under the Arbitration Act is appealable. Where there is nothing to the contrary in the rules framed under S. 20, or where no such rules have been framed, the ordinary procedure of the C. P. Code is followed. 45 Cal. 502, Dist. 18 A. L. J. 652 ; 42 All. 552 and 5 Bur. L. T. 155 ; Ref. (*Piggott and Walsh, JJ.*) NAINSUKH DAS *v.* GAJANAND SHYAMLAL. **61 I. C 269 = 19 A. L. J. 132 = 43 All. 348 = A. I. R. 1921 All. 273.**

—S. 104—Court fee.

———*Order refusing to set aside award—Appeal—Proper court-fee.*

An order refusing an application to set aside the award when the reference was in a suit pending before the Court, is not appealable, but such an order is analogous to an order filing an award under Cl. (21). Therefore Court-fee stamp of Rs. 4 is sufficient : Lahore Civil Revn. No. 814 of 1926 ; A. I. R. 1928 Lah. 137 and A.I.R. 1929 Lah. 367, Rel. on.; 4 P.L.R. 1911, Dist. (*Jai Lal, J.*) HARBHAJAN SINGH JAIRAM SINGH *v.* KALUMAL BASHESHAR NATH. **111 I. C. 145 = A. I. R. 1929 Lah. 369.**

C. P. CODE, (1908), S. 104—Modification in award.

———*Appellate order refusing to file award—Revision—Proper fee.*

Petitioner's application for filing an award was accepted by trial Court. The order was reversed in appeal. Petitioner filed a revision petition and stamped it with a Court-fee stamp of Rs. 4.

Held, that the order was revisable and that the Court-fee was sufficient. (*Zafar Ali and Jai Lal, JJ.*) KANHAYA LAL *v.* DAULAT RAM. **110 I. C. 302 = A. I. R. 1929 Lah. 367.**

———*Order under cl.* (f)*—Appeal—Proper fee.*

For the purposes of Court-fees an appeal from an order under S. 104 (*f*), C. P. Code, would be governed by Art. 11, Sch. 2, Court-Fees Act. A. I. R. 1927 All. 771, Rel. on. (*Broadway and Jai Lal, JJ.*) AGYA SINGH *v.* SUNDAR SINGH. **9 Lah. 380 = 107 I. C. 756 = A. I. R. 1928 Lah. 137.**

———*Order filing award—Appeal—Proper fee.*

For an appeal under S. 104 (*f*) against an order filing an award without the intervention of the Court, the requisite Court-fee stamp is of eight annas. (*Walsh and Iqbal Ahmad, JJ.*) SARWAN PANDE *v.* JAGAT PANDE. **103 I. C. 315 = 25 A. L. J. 741 = A. I. R. 1927 All. 771.**

—S. 104—Interlocutory order.

———*Appeal—Second appeal.*

No appeal lies from an interlocutory order and where such appeal has been entertained and disposed of, no second appeal will lie. (*Broadway, J.*) GANDA RAM *v.* SUNDAR LAL. **67 I. C. 278 = 82 P. L. R. 1922 = A. I. R 1921 Lah. 265.**

———*Direction to commissioner—Appeal.*

An order after passing of the preliminary decree in a partition case directing Commissioners who had been appointed in the case to ascertain the value of certain property and to take possession of it, is not appealable, being merely an interlocutory order, and as there can be only one preliminary decree in a suit. 35 All. 159 and 20 C. L. J. 476, Rel. on. (*Daniels, J C. and Dalal, A.J.C.*) JAGMOHAN DAS *v.* INDAR PRASAD. **65 I. C. 983 = 24 O. C. 366 = A. I. R. 1921 Oudh 224.**

—S. 104—Modification in award.

———*Decree on modified award—Second appeal.*

A decree is in accordance with an award within the meaning of para. 16, Sch. 2, if it is in accordance with the award as modified under para. 12, though it may not be in accordance with the original award. Para. 16 lays down that the Court shall proceed to pronounce judgment according to the award. When an award is modified under para. 12, the only award according to which the judgment can be pronounced is the modified award. No second appeal therefore lies from decree on such award there being no decree in excess of the award. (*Addison, J.*) MAZHAR ALI *v.* FATEH DIN. **120 I. C. 673 = 31 P. L. R. 337 = A. I. R. 1930 Lah. 219.**

———*Grounds of appeal.*

An appeal from a decree passed in the words of an award, in so far as the decree relates to the modifications and corrections made in the award, clearly lies under S. 104 (*c*). But the appeal must be limited to the modifications and corrections only and no other grounds can be urged in the appeal. 25 P. R. 1902, Rel. on. ; A. I. R. 1927 Lah. 362, Ref. (*Tekchand and Da Singh, JJ.*) KAIKABAD *v.* KHAMBATTA. **A. I. R. 1930 Lah. 26**

———*Appeal.*

After an award was signed by arbitrators but bef it was filed in Court one of the arbitrators added in the award the word " Rest of the plaintiffs' claim should be dismissed with costs." When the award was filed the Court finding that the award was not clear as regards the costs remitted it to arbitrators The arbitrators amended the award and parties were made to pay their own costs in the suit. The Court ignored both the interpolation by one of the arbitrators before first filing the award and the amendment after it was remitted and passed a decree with proportionate costs.

Held: the order fell under S. 104 (1) (*c*) and was appealable. (*Broadway and Fforde, JJ.*) ANANT RAM *v.* GURDITTA MAL. **7 Lah. 327= 8 L. L. J. 460=27 P. L. R. 541=98 I. C. 336= A. I. R. 1926 Lah. 519.**

——*Second appeal.*

When in the course of the trial of a case the parties referred the matter to arbitration and the arbitrator awarded costs to the plaintiff, but the Court refused to allow such costs in terms of the award, though it accepted the award.

Held, that the order is one falling within S. 104 (1) (*c*) and no second appeal lies. (*Misra, J.*) MANI LAL *v.* SAJJAD HUSAIN. **13 O. L. J. 144=93 I. C. 272= A. I. R. 1926 Oudh. 370.**

—S. 104—Revocation of Reference.

——*Order, if appealable.*

Where under para. 17 of 2nd Schedule, C. P. Code, order is made filing an agreement, but on finding that arbitrators were not willing to act the Court revokes the order of reference and dismisses the suit, the order is not appealable. (*Sulaiman and Daniels, JJ.*) HAFIZ ZAHUR AHMAD *v.* TASLIM-UN-NISSA. **48 All. 27=23 A. L. J. 891=6 L. R. A. Civ. 575= 89 I. C. 404=A. I. R. 1926 All. 55.**

—S. 104—Right to appeal.

——*Order filing award—Award decree—Appeal against order.*

S. 104 of the Code clearly gives a right of appeal against an order to file the award, and the fact that a judgment has been pronounced and decree drawn up does not render the order to file the award incapable of appeal. 19 C. W. N. 948, Foll. (*Mullick and Kulwant Sahay, JJ.*) SHAIKH MUHAMMMAD KHALIL *v.* SHAIKH ABDUL RAHIM. **93 I. C. 261= 4 Pat. 670=7 P. L. T. 644=A. I. R. 1925 Pat. 810.**

—S. 104—Scope.

——The provisions in sub-S, 2 of S. 104 deal with internal appeals within the limits of British India. The application to file an award may be made in the Court of the Subordinate Judge. If any dispute arises, and the amount at stake is below a certain figure, the appeal would lie from him to the District Judge. If it were above that figure, it would lie to the High Court. The provision is intended to prevent any appeal beyond the District Judge where the sum in dispute is small. In this respect it runs parallel with S. 100, which limits second appeals from appellate decrees by District Judges. That section deals with decrees only while the decisions on arbitration questions are styled orders. There is therefore nothing in S. 104 to take away the general right of appealing to the Crown given by S. 109. (*Lord Phillimore.*) RAM LAL HARGOPAL *v.* KISHANCHANDRA. **83 I.C.531=5 L.R.P.C. 216=1924 M.W.N. 79= 7 N.L.J. 62=34 M.L.T. 62=19 M.L.W, 549= 20 N.L.R. 33=51 I.A. 72=22 A.L.J. 386= 51 Cal. 361=26 Bom. L. R. 586=28 C,W.N. 977= A. I. R. 1924 P.C. 95=46 M.L.J. 628 (P. C.).**

——The object of the Legislature in enacting sub-S. (2) was to make it clear that there was no second appeal under the Code from the orders specified in sub-S. (1) of S. 104, and that sub-S. (2) was not intended to override the express provisions of the Letters Patent. S. 104 does not take away by implication the right of appeal conferred in express terms by the special provision relating to appeal to be found in the Letters Patent. (*Shadilal, C. J. and Harrison, J.*) RULDU SINGH *v.* SANWAL SINGH. **67 I. C. 388=3 Lah. 188= A. I. R 1922 Lah. 380.**

—S. 104—Second appeal.

——*Order under O. 43, R. 1.*

No second appeal is allowed from the result of appeal under O. 43, R. 1 (*a*). The Court cannot, framing his order as an order passed under O. 41, R. 23, permit an appeal which would not otherwise lie. If the argument that where the Judge purports to pass an order under O. 41, R. 23, an appeal is permissible by virtue of O.43, R. 1 (*u*), is allowed there would be a conflict between Cl. (*a*) and Cl. (*u*) of O. 43, read in the light of S. 104. (*Mukerji and Boys, JJ.*) MOTI LAL *v.* NANDAN. **121 I. C. 545=1930 A. L. J. 454= A. I. R. 1930 All. 122.**

——*Order under O. 43, R. 1.*

No second appeal lies from decision on appeal under provisions of O. 43, R. 1 (*j*). A. I. R. 1923 Lah. 592, Ref. (*Addison, J.*) RAHMATULLAH *v.* LADHU SHAH. **120 I. C. 684=11 L. L. J. 546=31 P. L. R. 57= A. I. R. 1930 Lah. 208.**

——*Order under O. 21, R. 92.*

Where a decree-holder objected to the sale by which he had purchased a property. his case being that he had agreed to purchase it at the estimated value put down by him and which had been accepted by the Court, namely, Rs. 500 and therefore if the sale be said to have taken place as recorded by the amin for Rs. 1,358, then great loss would result to him, and where the Court of first instance dismissed the objection, no second appeal lies to the High Court under S. 104 (2) as the order dismissing the objection was under O. 21, R. 92 and the appeal was an appeal under O. 43. (*Banerji and King, JJ.*) GENDA MAL *v.* NARSINGH DAS. **115 I. C. 636=A.I. R. 1929 All. 553.**

——*Order refusing to file award.*

No appeal lies against the appellate order of the District Judge, dismissing an application for filing an award. (*Fforde and Tek Chand, JJ.*) BRIJ LAL & CO. *v.* ROSAN LAL. **120 I.C. 277= A.I.R. 1929 Lah. 507.**

——*Order recording compromise.*

The Code provides for an appeal from an order recording compromise, which forms the basis of a consent decree, and this is apparently intended to be the proper procedure for a party who wishes to challenge the validity of a compromise on the ground of want of consent, etc.. The Code does not, however, allow a second appeal in such cases. 41 Mad, 233, Diss. from; A. I. R. 1921 Mad. 696, Ref. (*Bhide, J.*) NAHAR SINGH *v.* KHAZAN SINGH. **119 I. C. 422= A.I.R. 1929 Lah. 472.**

——*Suit dismissed on a preliminary ground — Case remanded in appeal—Appeal preferred on the remand order—Maintainability of second appeal.*

A suit was filed for declaring ineffectual certain execution proceedings. It was dismissed by the Subordinate Judge on the ground that plaintiff having preferred no appeal from the decree, the present suit was not maintainable. On appeal by the plaintiff the District Judge held that the suit was maintainable and remanded the case under O. 41, R. 23. Against this order of remand a miscellaneous appeal under O, 43, R. 1(*u*) was preferred by the defendant. It was contended that the order passed by the trial Court was really one rejecting the plaint, that the appeal to the District Judge by the plaintiff must be considered to have been filed under O. 43, and no further appeal lay against the order of the District Judge as laid down in S. 104, Cl. (2).

Held, that the order of the trial Court was not one rejecting the plaint, under O. 7, R. 11, but was clearly one dismissing the suit on a preliminary point and the appeal preferred by the plaintiff himself to the District Judge was filed not under O. 43, C. P.Code, but under S. 96 against the decree passed by the Subordinate Judge and therefore the appeal was competent. (*Tek Chand, J.*) AMAR SINGH *v.* CHHAJJU MUL.

108 I.C. 55 = A.I.R. 1928 Lah. 766

———*Order under O 43, R. 1 (g).*

Where though the memorandum of appeal filed by appellants in the Court of the District Judge purported to be one under S. 96, O. 21, R. 92, and O. 43, R. 1 (*j*), C. P. Code, in reality the appeal lay only under the last provision.

Held, that no second appeal lay under S. 104 (2). 168 P.R. 1919 : A.I.R. 1923 Lah. 592, and 4 P.W.R. Rev. 1912, Foll. (*Tek Chand, J.*) MANIGIR *v.* HAZARIGIR.

10 L. L. J. 161 = 108 I. C. 391 = A. I. R. 1928 Lah. 414.

———*Order setting aside or refusing to set aside sale.*

No second appeal lies against an order setting aside or refusing to set aside a sale, although the matter is one between the decree-holder auction purchaser and judgment-debtor. A.I.R. 1926 Cal. 798 (F.B.). Expl. (*Mukerji and Roy, JJ.*) SATYENDRA NATH CHOUDHARY *v.* CHARU CHANDRA MAJUMDER.

104 I. C. 188 = 45 C. L. J. 557 = A. I. R. 1927 Cal. 657.

———*Order under O. 21, R, 92.*

No second appeal lies against an order of an appellate Court, confirming a sale or refusing to set aside a sale under O. 21, R 92. (*Moti Sagar, J.*) NANAK CHAND *v.* MT. JAMANA DEVI.

91 I. C. 213 = A.I.R. 1926 Lah. 204.

———*Order returning plaint.*

Section bars second appeal from an order returning plaint. (*Martineau, J.*) HAYAT ALI KHAN *v.* ISHAR DASS,

89 I.C. 384 = A.I.R. 1926 Lah. 141.

———*Order setting aside sale under O. 21, R. 90.*

No second appeal lies against an order of District Judge reversing order of Sub-Judge and setting aside sale under O. 21, R. 90. (*Das and Ross, JJ.*) BAIDYANATH SARKAR *v.* PRABHABATI DASI,

78 I. C. 315 = 5 P.L.T. 443 = A.I.R. 1924 Pat. 803.

———*Appellate order under O. 43, R.1 (a) and remand.*

There is no second appeal against an appellate order setting aside an order returning a plaint to be presented to the proper Court and remanding the case for trial on the merits, 33 All. 479 and 101 P. L. R 1913, Foll. (*Broadway, J.*) FIRM OF BHAWANI SAHAI KANSHI RAM *v.* FIRM OF HARBANS SINGH GOPAL DAS,

68 I.C. 304 = 2 L. L.J. 587.

———*Appellate order setting aside sale.*

No appeal can lie from an appellate order, setting aside a sale because S. 104, sub-section (1), Cl. (ii) read with Order 43, Clause (*j*), of the Code allows only a single appeal from the order passed by the Court executing the decree under O. 21, R. 92. A possessory-mortgagee holds an interest in immovable property sufficient to justify the application of Order 21, Rule 89, of the Code of Civil Procedure to his case. (*Kanhaiya Lal, J.C.*) JAGMOHAN SINGH *v* BACHCHA,

66 I. C. 929 = 25 O.C. 78 = 9 O.L.J. 50 = A. I. R. 1922 Oudh 146.

———*Order under O. 43, R. 1 (j).*

No second appeal lies from an order under O. 43, R. 1 (*j*). (*Scott-Smith, J.*) MST. GUL BANO *v.* MUHAMMAD ZAKAR KHAN.

62 I. C. 986 = 3 L. L. J. 463 = A.I.R. 1921 Lah. 156.

———*Application to set aside sale under O. 21, Rr. 90 and 22—Second appeal from order under O. 21, R. 90 if lies.*

Although no second appeal lies from an order on an application under O. 21, R, 90, still where the application to have the sale set aside in a combined application under O. 21. R. 90, as well as under O. 21, R. 22 and an appeal lies so far as the decision under O. 21, R. 22 is concerned, High Court can deal with the order passed under O. 21, R. 90. (*Jwala Prasad and Adami, JJ.*) DAS NARAYAN SINGH *v.* MIR MAHOMED YUSUF.

61 I.C. 823 = 2 P.L.T. 401 = 6 P.L.J. 319 = 1921 P.H.C.C. 181 = A.I.R. 1921 Pat. 145.

———*Appellate order reversing order returning plaint.*

An order of an appellate Court reversing an order of the lower Court returning a plaint for presentation to the proper Court is not open to second appeal. (*Abdul Raoof, J.*) RAM LAL ISHAR DAS *v.* SALIQ RAM.

59 I. C. 2 = 7 P W.R. 1921.

———*Order returning plaint—Appeal from—Order remanding the case for trial—Further appeal—Competency.*

Where on appeal from an order returning a plaint to be presented to the proper Court, an order was passed remanding the case to the trial Court, no further appeal therefrom is competent. Nor is it liable to revision. (*Sulaiman and King, JJ.*) ULFAT RAI *v.* TULSHI PRASAD.

125 I.C. 581.

—S. 104—Stay.

———*Appeal—Arbitration Act, S. 19.*

Order granting stay of suit pending arbitration is appealable. (*Mukherji and Dalal, JJ.*) FIRM KACHURI MAL KALYAN MAL *v.* FIRM WALI MD. ABDUL LATIF.

47 All. 179 = 22 A.L.J. 1031 = 5 L. R. A. Civ. 756 = 85 I.C. 341 = A. I. R. 1925 All. 154.

—S. 105.

- **Error.**
- **Ex parte decree.**
- **Final order or decree.**
- **Interlocutory order.**
- **Interpretation.**
- **Irregularity.**
- **Powers of Court.**
- **Remand.**
- **Second appeal.**

—S. 105 —Error.

———*Law or fact.*

The error, defect or irregularity referred to in S. 105 must be either in law or procedure and not in matters of fact. Case-law discussed. (*Adami and Chatterji, JJ.*) BALDEO LALL *v.* MT. MATISARA KUER.

9 Pat. 102 = A. I. R. 1930 Pat. 266.

———*Law or fact.*

Any error, defect or irregularity in any order under S. 105 is an error, defect or irregularity in law or procedure and not an incorrect finding of fact. 12 All. 200 and 27 Bom 162, Ref. (*Page and Mallik, JJ.*) FAJAR BANOO *v.* RAHIM BAX.

32 C.W.N. 1050 = 115 I. C. 184 = A.I.R. 1929 Cal. 26.

———*Order setting aside ex parte decree.*

Not only can an order setting aside an *ex parte* decree not be questioned on appeal but, any error, etc. made by a Court in setting aside such an *ex parte* decree is not an error affecting the decision of the case within the meaning of S. 105. (*Harrison, J.*) SUNDER SINGH *v.* NIGAHIYA. **72 I. C. 410 = A.I.R. 1923 Lah. 425.**

—S. 105—Ex parte decree.

———*Propriety of order setting aside* ex parte *decree against some only—Objection in appeal.*

S. 105 can have no operation to a case where the *ex parte* decree is set aside and the point is raised that the decree should not have been set aside at all because an order so passed merely ensures a hearing upon the merits and cannot be considered to be an order affecting the decision of the case. But where a case cannot be properly decided, because the decree has been set aside only against some of the defendants but should have been set aside also against others, order should be considered an order affecting the decision of the case and in a case like that, S. 105 can clearly be invoked. 22 Cal. 981 ; 25 All. 280 ; 9 C.W.N. 584 ; A.I.R. 1925 Cal. 473 ; A.I.R. 1925 Cal. 711 and A.I.R. 1927 Rang. 150, Dist. ; 34 All. 592, Ref. (*Adami and Chatterji, JJ.*) BALDEO LALL *v.* MT. MATISARA KUER. **9 Pat. 102 = A.I.R. 1930 Pat. 266.**

———*Order setting aside award—Appeal.*

A case of setting aside an award cannot be distinguished from the setting aside of an *ex parte* decree. An order, therefore, setting aside an award can be assailed in appeal from the final decision whether the order affects the decision of the case on merits or not. The words "on the merits" should not be read in S. 105. A.I.R. 1925 Lah 466, not Foll. ; A.I.R. 1921 Lah. 145, Dist. ; 97 P.R. 1912, Foll. (*Dalip Singh, J.*) LACHMAN SINGH *v.* NAMAN. **18 I.C. 434 = A.I.R. 1929 Lah. 174.**

———*Order setting aside—If one affecting decision.*

An order setting aside an *ex parte* decree cannot be challenged in an appeal from decree passed ultimately in the suit, as an erroneous order accepting an application to set aside an *ex parte* decree does not affect the decision on its merits. A.I.R. 1925 Lah. 466 ; A.I.R. 1925 All. 426, Foll. ; 18 Bom. 35 and 34 All. 592, Dist. (*Crump, and Baker, JJ.*) DHONDH NARAYAN *v.* VAMAN GOVIND **103 I.C. 262 = 51 Bom. 495 = 29 Bom. L.R. 925 = A. I. R. 1927 Bom. 455.**

———*Order setting aside—If one "affecting decision".*

The propriety of an order setting aside an *ex parte* decree can be questioned in an appeal against the subsequent decree in the same suit on the ground that the improper making of such an order involves an error, defect or irregularity in or an order affecting the decision of the case. 25 All. 280 and A.I.R. 1925 Lah. 466, Diss. from. (*Heald and Cunliffe, JJ.*) M.S. MAHOMED *v.* COLLECTOR OF TOUNGOO. **5 Rang. 80 = 102 I C. 379 = A.I.R. 1927 Rang. 150**

———*Order refusing to set aside—Refusal of adjournment—Objection in appeal—Maintainability.*

Where an adjournment is improperly refused and an *ex parte* decree is passed and where an application to set aside the *ex parte* decree is dismissed, the propriety of the order refusing adjournment can be questioned in an appeal from the *ex parte* decree and the decree can be set aside, apart from any question raised in any application under O. 9, R. 13, as to whether the defendants had sufficient cause for non-appearance on the date on which the decree was passed. (*Ross and Kulwant Sahay, JJ.*) S. N. MULLICK *v.* GANGA GOPE. **91 I.C. 167 = 7 P. L. T. 381 = 1925 P. H. C. C. 199 = A. I. R. 1925 Pat. 534.**

———*Order setting aside—Objection in appeal.*

Order setting aside *exparte* decree cannot be challenged in appeal from the decree in the suit. 24 All. 464 ; 25 All. 280 ; 3 A. L. J. 30 ; 14 A. L. J. 610, Foll. ; 34 All. 590, Dist. (*Lindsay and Sulaiman, JJ.*) BENAIK

RAO *v.* PUTAIN SINGH. **79 I. C. 69 = 5 L. R. A. Civ. 335 = A. I. R. 1924 All. 929.**

———*Order setting aside* ex parte *final decree—Objection in appeal.*

An order setting aside the *ex parte* final decree in a mortgage suit while not disturbing the *ex parte* preliminary decree in the same suit, is an order affecting the decision of the case and the propriety of the order can be challenged in an appeal against the final decree passed in the suit. (*Wallace and Jackson, JJ.*) ATHMASA RAWTHER *v* GANESAN. **85 I. C. 808 = 35 M.L.T. 131 = 1924 M.W.N. 884 = 20 M.L.W. 954 = A. I. R. 1924 Mad. 890 = 47 M. L. J. 641.**

———*Error in setting aside—If one " affecting decision of the case."*

Any error, etc., made by a Court in setting aside an *ex parte* decree is not an error affecting the decision of the case within the meaning of S. 105. (*Harrison, J.*) SUNDER SINGH *v.* HIGAHIYA. **72 I. C. 410 = A. I. R. 1923 Lah. 425.**

—S. 105—Final order.

———*Appeal—Objections against preliminary order—Maintainability.*

The order of the Court is the order that is embodied in the formal order drawn up and issued by the Court generally, more especially is this so with the Courts of record such as the original side of the High Court. An appeal against the final order must be deemed to include all the points decided in a preliminary order for the purpose of that order (*Spencer, O. C. J. and Srinivasa Aiyangar, J.*) P. SATYARAZU *v.* GUNTUR COTTON JUTE AND PAPER MILLS CO., LTD. **85 I. C. 333 = 48 Mad. 267 = 21 M. L. W. 136 = A. I. R. 1925 Mad. 199 = 47 M. L. J. 710.**

———*Remand order -Appeal to Privy Council.*

Where the trial Court ordered partition on the basis of a certain family arrangement between the parties, but the High Court in appeal held that the family arrangement was not binding and the case was remanded to effect partition according to the personal law of the parties.

Held, that the remand order was not a final order within S. 109, that O. 43, R. 1 (*a*) does not apply to appeals to Privy Council and therefore no leave can be granted to present an appeal to Privy Council. (*Hallifax and Kotval, A. J. Cs.*) FAKRHUDDIN *v.* FARID KHAN. **88 I. C. 69 = 22 N. L. R. 132 = A. I. R. 1925 Nag. 349.**

———*Operation of—Order on Commissioner's report—Reversal in appeal—Effect of.*

A final decree giving directions or ordering costs of Commissioner will remain effective notwithstanding the decision of the appellate Court reversing the order on objections to the Commissioner's report, though the appellate Court's decision was given after the final decree and though in Law the lower Court was incompetent to give directions and deal with costs until disposal of the appeal from the order on objections. (*Macleod, C. J. and Crump, J.*) ELIAS HAJI AHMED *v.* HAJI ESMAIL SAIT. **72 I. C. 401 = 25 Bom. L. R. 237 = A. I. R. 1923 Bom. 200.**

—S. 105—Interlocutory order.

———*No appeal—Objection.*

An error, defect or irregularity in the order may be set forth as a ground even where the interlocutory order is one from which no appeal lies. (*Adami and Chatterji, JJ.*) BALDEO LALL *v.* MT. MATISARA KUER. **9 Pat. 102 = A. I. R. 1930 Pat. 266.**

———*Order setting aside award—Objection in appeal from final decree.*

The decision by the trial Court setting aside an award is decision which affects the merits of the case inasmuch as the rights of the parties relating to the subject-matter of the suit will be differently settled if the award is allowed to stand. The Court of appeal can therefore on appeal from the final decree enquire into the propriety of the order setting aside the award. 14 W. R. 327 and 31 Mad. 345, Foll.; A. I. R. 1925 Cal. 766; A. I. R. 1927 Bom. 455; A. I. R. 1925 Lah. 466 and A. I. R. 1925 All. 426, Dist.; 11 Cal. 172; 26 Bom. 551 and 8 C. W. N. 390, Expl. and Appr.; 37 All. 456 A.I.R. 1925 All. 458 and A. I. R. 1925 All. 566, Appl. (*Suhrawardy and Graham, JJ.*) BAMA CHARAN DAS *v.* GADADHAR DAS. **56 Cal. 21 = A.I.R. 1929 Cal. 322.**

——*Defect in procedure—Objection in appeal.*

Where service report showed that the notice of appeal was served on sons of the respondents on the identification of the serving peon himself, there was no other identifier but the person swore to an affidavit as to the service. The Court wrongly directed the appellants to file an affidavit in proof of service and dismissed the appeal as against these respondents for failure to file such an affidavit. The case was then transferred for hearing before other Court which dismissed the appeal as against all respondents on the ground that it had already been dismissed against some of the respondents. Against this order of dismissal there was second appeal which was objected to.

Held, that as the defect in procedure had affected the decision of the case, the appellant was entitled to raise the point as a ground of objection in memorandum of appeal. (*Fazl Ali and Chatterji, JJ.*) RAM LAL *v.* KALI PRASAD. **120 I. C. 304 = 10 P. L. T. 589 = A. I. R. 1929 Pat. 609.**

——*What is—Order after decree—Appeal.*

An interlocutory order in the proper sense is an order which is passed between the date on which the plaint is filed and the date on which the decree is drawn up. An order passed after the decree on an application for amendment of the decree cannot be treated as an interlocutory order and an appeal therefrom is not incompetent. (*Lindsay and Banerji, JJ.*) DAMBER SINGH *v.* CHHEDU SINGH. **114 I. C. 41 = 26 A. L. J. 166 = A. I. R. 1928 All. 194.**

——*Costs to unsuccessful party—Acceptance of costs—Appeal.*

If an interlocutory order is made in favour of one party but for some reason costs are allowed unconditionally to the unsuccessful party, the unsuccessful party is not precluded from questioning the order on appeal by accepting the costs of the hearing. (*B. B. Ghose and Mallick, JJ.*) NALINAKHA SINHA *v.* RAM TARAN. **104 I.C. 151 = 46 C.L.J. 51 = A.I.R. 1927 Cal. 733.**

——*Order impleading a person.*

An order impleading a person in appeal is not an appealable order, but can be challenged in the appeal from the order finally passed in the appellate Court. (*Sulaiman and Daniels, JJ.*) FIRM SHIAM LAL JOTI PRASAD *v.* DHANPAT RAI. **88 I.C. 493 = 47 All. 853 = 23 A. L. J. 757 = 6 L. R. A. Civ. 386 = A. I.R. 1925 All. 768.**

——*Order superseding award—Objection in appeal.*

An order made in a pending case, superseding an award and directing the suit to proceed on the merits can be questioned in an appeal from the decree passed in the suit. A. I. R. 1925 All. 458, Foll. (*Sulaiman and Daniels, JJ.*) RUDRA PRASAD *v.* MATHURA PRASAD. **89 I.C. 173 = 47 All. 916 = 23 A. L. J. 656 = 6 L. R. A. Civ. 459 = A.I. R. 1925 All. 566.**

——*Order setting aside abatement—Objection in appeal.*

Unless the interlocutory order affects the merits of the case, it cannot be challenged in an appeal against the decree in the case. Where a final decree was challenged on the sole ground that the order setting aside the abatement of the suit which (the order) proceeded the decree was unjustifiable,

Held, that the order did not affect the merits of the case and that it could not be challenged in an appeal from the decree in the case. 13 A. L. J. 1089, Foll. (*Mukerji and Boys, JJ.*) BABU RAM *v.* BANKE BEHARILAL. **87 I. C. 211 = 47 All. 555 = 23 A. L. J. 444 = 6 L. R. A. Civ. 297 = A. I. R. 1925 All. 426.**

——*Order setting aside abatement—Objection in appeal.*

The order setting aside the abatement of a suit cannot be questioned in appeal from the decree in suit, whether such order is passed before or simultaneously with the decree. (*Suhrawardy and Cuming, JJ.*) SAYMA BIBI *v.* MADHUSUDAN MOHANTA. **52 Cal. 472 = 29 C. W. N. 675 = A. I. R. 1925 Cal. 766.**

——*Order refusing permission to withdraw.*

The expression 'affecting the decision of the case' means affecting the decision of the case on its merits. Order refusing permission to the plaintiff to withdraw his suit with liberty to bring a fresh suit is not an order which affects the decision on the merits and does not fall within the provisions of S. 105, C. P. Code. The interlocutory orders which can be challenged in an appeal against the final decree are of such a nature as would or might have induced the Court to alter its decision; for instance an order refusing to admit a document which is in law admissible, or to examine a witness or to issue a commission or some such act which is calculated ultimately to influence the decision of the Court on the merits. 22 Cal. 981 and 8 C. L. J. 308, Foll. (*Suhrawardy and Cuming, JJ.*) NISHI KANTA SARKAR *v.* UMAR LAL SARKAR. **86 I.C. 1029 = 41 C. L. J. 186 = A. I. R. 1925 Cal. 711.**

——*Order setting aside abatement.*

Order setting aside the abatement and allowing substitution of heirs of deceased party cannot be questioned in appeal from the decree in the suit whether such order is passed before, or simultaneously with the decree, such an order not being one which affects the decision of the case with reference to its merits within S. 105. (*Suhrawardy and Cuming, JJ.*) MOHAMED NURU AMIN *v.* MANOHAR SARAN DEB MOHANTA. **85 I. C. 100 = 40 C. L. J. 588 = A.I. R. 1925 Cal. 473.**

——*Order setting aside abatement of appeal.*

An order of lower appellate Court setting aside abatement of appeal caused by default of appellants to apply to bring legal representatives of a deceased respondent on record, is an order affecting the decision of a case within S. 105 (1) and can be set forth as a ground of appeal. 34 All. 592 and 37 All. 456, Foll. 25 All. 280 and 40 P.R. 1916, Diss. from. 26 Mad. 604 and 31 Mad. 345, Ref. (*Abdul Raoof and Moti Sagar, JJ.*) AJUDHIA PRASAD *v.* IMAM-UD-DIN. **71 I.C. 587 = A.I.R. 1923 Lah. 230.**

——*No appeal—Objection in appeal from decree.*

Any error in any order affecting the decision of the case passed in an unappealable interlocutory order before the decree may be set forth as a ground of objection in the appeal from the decree. (*Oldfield and Venkatasubba Rao, JJ.*) RAMASWAMI AIYAR *v.* SUBRAMANIA

AIYAR. **74 I.C. 804=16 M. L. W. 297=43 M L. J. 406=46 Mad. 47=A. I. R. 1923 Mad. 147.**

——*No appeal—Objection in appeal from decree.*

Where there is some unappealable interlocutory order, its irregularity or any defect in it, may be raised when the decree is appealed from, so far as it affects the decision of the case, although an appeal from the order may have been dismissed on the ground of its being unappealable. (*Walsh and Ryves, JJ.*) SHANKAR LAL *v.* MAHAMMAD AMIN. **66 I. C. 920=44 All. 534=20 A.L.J. 349=A.I.R. 1922 All. 118.**

—S. 105—Interpretation.

——*'Affecting the decision of the case'*

'Affecting the decision of the case' within S. 105 means affecting the decision of the case on merits. 52 Cal. 472, Ref. (*Page and Mullick, JJ.*) FAJAR BANOO *v.* RAHIM BUN. **32 C. W. N. 1020=115 I. C. 184=A. I. R. 1929 Cal. 26.**

——*If controlled by C.P. Code, S.* 105 (2).

Article 15 of the Letters Patent is not controlled by S. 105, C. P. Code. And it is open to a person though he does not appeal against the order of remand, to attack it in his appeal against the final decree. (*Waller and Madhavan Nair, JJ.*) V. SRINIVASA VARADACHARIAR *v.* RUNGANAYAKI AMMAL. **118 I. C. 291=30 M. L. W. 787=A. I. R. 1929 Mad. 349.**

——Sections 99 and 105 are not mutually destructive (*Heald and Cunliffe, JJ.*) M. S. MAHOMED *v.* COLLECTOR OF TOUNGOO. **102 I. C. 379=5 Rang. 80=A. I. R. 1927 Rang. 150.**

——It is not necessary to read into S. 105, additional words on the merits. (*Heald and Cunliffe, JJ.*) M.S. MAHOMED *v.* COLLECTOR OF TOUNGOO. **102 I. C. 379=5 Rang. 80=A. I. R. 1927 Rang. 150.**

——*'Decision'*

Per *Lindsay, J.*—The word "decision" in S. 105 (1) must necessarily be taken to mean the decision upon the merits 22 C. 981, 24 A. 464, 25 A. 280; Foll. 34 A. 592, Diss.

Per *Daniels, J.*—An illegal order and in consequence the illegality committed in passing that order, affects the decision of the case, if the order passed by the trial Court is one "but for which the decision might have been other than it was." Opinion of Piggott, J. in 43 All. 564 F. B. Foll. (*Lindsay, Sulaiman and Daniels, JJ.*) RAM SARUP *v.* GAYA PRASAD. **90 I. C. 180=48 All. 175=24 A. L. J. 56=6 L. R. A. Civ. 601=A. I. R. 1925 All. 610 (F.B.).**

——*'Final'—Applicability to P.C. appeals.*

S. 105 does not apply to appeals to His Majesty in Council and does not supply a guide to the interpretation of the word "final" in S. 109. (*Spencer, O. C. J. and Devadoss, J.*) J. J. BRITO *v.* S. S. BRITO. **78 I. C. 938=19 M. L. W. 458=34 M. L. T. 112=1924 M. W. N. 380=A. I. R. 1924 Mad. 701=46 M. L. J. 357.**

——*'Save as otherwise expressly provided'*

The words "Save as otherwise expressly provided" in S. 105 of the Code would seem to directly contemplate appeals from orders of a character provided for elsewhere than in the Civil Procedure Code and to include appeals allowed under other laws such as the Probate and Administration Act. (*Pratt and MacColl, JJ.*) HAJI PU *v.* TIN TIN. **2 Rang. 117=80 I. C. 746=A. I. R. 1924 Rang. 237.**

——*"Affecting the decision of the case."*

The words "affecting the decision of the case" mean affecting the decision of the case "with reference to the merits of it." 22 Cal. 981 and 24 All. 464, Foll. Karamat Hussain, J., in 34 All. 592, not Foll. An order superseding arbitration is not one which affects the decision of the case with reference to the merits of it and even if the order is wrong the error cannot be made a ground of objection in the appeal from the final decree. (*Martineau, J.*) BUDHU RAM HONDA RAM *v.* RAMZAN. **59 I. C. 676=3 L. L. J. 59=38 P. L. R. 1921=A. I. R. 1921 Lah. 145.**

—S. 105—Irregularity.

——*Order setting aside award—Objection in appeal from decree.*

Order setting aside an award though not appealable can be taken as a ground in appeal if it amounts to a defect or irregularity affecting the decision of a case A.I.R. 1925 Lah. 465, Dist. A.I.R. 1921 Lah. 145, not Foll. (*Jai Lal, J.*) HARBHAJAN SINGH *v.* MEWA SINGH. **110 I. C. 748=A.I.R. 1928 Lah. 753.**

—S. 105—Powers of Court.

——*Re-opening of question decided before calling for finding.*

Though parties have no right to insist upon re-opening questions that had been decided before calling for a finding, yet it is open to the Court to do so if it thinks fit and it cannot be said to act without jurisdiction if it goes back upon the position taken by it previously so long as the case is not out of its hands. (*Krishnan and Odgers, JJ.*) MALLIAH *v.* GANGANNA. **94 I. C. 226=A.I.R. 1926 Mad. 830.**

——*Appeal from* Ex-parte *decree—Remand.*

When a suit is decided *ex parte*, an Appellate Court to which an appeal from the decree is preferred has jurisdiction to reverse the decree of the lower Court on the ground that such Court was wrong in proceeding to decide the case *ex parte* and has also power to remand the suit for re-hearing. 30 M. 64 F.B. Foll. The Code of Civil Procedure must in view of Ss. 100 (2), 105 (1) and (2) and S. 107, be held to permit a remand by an Appellate Court not in the particular case set forth in Order 41, rule 23, but also in all cases where there has been any error, defect, or irregularity which has vitiated the whole decision of the case, provided that procedure under Order 41, rules 24 and 25, does not meet the case. A.I.R. 1922 All. 254; A.I.R. 1922 All. 226, Dist. But an order of remand cannot be made under rule 23 of Order 41 unless the case has been disposed of without entering into the full merits by reason of a decision on law or fact which has prevented the case from being tried to the end. (*Ashworth, J.C.*) SHEIK FARZAND ALI *v.* EKADASHI. **73 I. C. 591=26 O. C. 10=10 O. L. J. 36=A.I.R. 1923 Oudh 177.**

—S. 105—Remand—Binding nature of.

——*Points not decided in remand order.*

The Trial Court dismissed the suit as barred by S. 33 of the Madras Act II of 1894. The appellate Court reversed this decision and remanded the suit. While doing so, the appellate Court also dealt with S. 27 (4) of the same Act and held that the suit was not barred by it. There was no appeal from the Order.

Held, that in second appeal on decision after remand, the defendants could not raise the defence that S. 27 (4) was a bar to the suit. (*Devadoss, J.*) DORAISWAMY IYER *v.* THIRUVENGADA MUDALIAR. **86 I. C. 608=A. I. R. 1925 Mad. 916.**

——*Points not decided in remand order.*

A remand judgment is not conclusive on points not specifically decided therein beyond possibility of revision 32 Bom. 432 Dist. (*Pullan and Ashworth, A. J. Cs.*) LACHMIPAL SINGH *v.* BAGWAT SINGH. **85 I. C. 468=A. I. R. 1925 Oudh 527.**

C P. CODE, (1908), S. 105—Remand— Binding nature of.

———*Finding in remand order.*

Where the High Court remands a case to the lower Court for retrial and there is no appeal from the decision of the High Court, the finding of the High Court at the time of remand is binding in the appeal from the decision of the lower Court after remand. (*Dawson Miller, C. J, and Macpherson, J.*) PARMESHWAR SINGH *v.* MT. SUREHA KUER. **88 I. C. 495= 6 P. L. T. 805=1925 P.H.C.C. 185= A.I.R. 1925 Pat. 530.**

———*Point of law decided in remand order.*

In the case of keeping the appeal pending in the Appellate Court and remanding the case for further findings on an issue not decided, the Court, when the matter comes up for final consideration, can disregard the reasons given for remanding the case ; but a decision on a point of law by a Court of co-ordinate jurisdiction is final in so far as it sets aside the decision of the lower Court and lays down the law to be followed by that Court on remand. (*Dawson Miller, C.J. and Ross, J.*) (RAI) BRIJ RAI KRISHNA *v.* CHATHA SINGH.

76 I.C. 136=4 P.L. T. 35=A. I. R. 1923 Pat. 226.

———*Point raised but not referred to in remand.*

Where a remand was ordered on one of the two points raised, any one of which would have been sufficient to dispose of the case, the remand order must be deemed to have confirmed the decision on the other point. (*Lord Phillimore.*) SRIPAT SINGH DUGAR *v.* RAI HARIRAM GOENKA. **74 I. C. 597= 26 C. W. N. 739=31 M. L. T. 38= 16 M. L. W. 447=1922 M.W.N. 671= A.I.R. 1922 P.C. 51.**

———*Appeal from decree on a preliminary issue—Case remanded for decision on merits—Decree passed on merits after remand—Order of remand appealable.*

A suit was brought to recover damages upon the footing that the defendant had dispossessed the plaintiffs from the land of which the plaintiffs were entitled to possession. The trial Court held that the suit was not maintainable without the establishment of the plaintiffs' title to the property, and upon that preliminary issue passed a decree dismissing the suit on the 6th November, 1925. The plaintiffs appealed, and by the order of 13th May, 1926 the appellate Court reversed the decree of the trial Court and remitted the case to the trial Court to be reheard upon the merits. The case having been returned to the trial Court was re-heard on 7th August, 1926 and was contested by the parties on the merits. On 13th August, 1926 a decree was passed in favour of the plaintiffs. Thereafter, on 24th August, 1925, the defendant, preferred an appeal to the High Court from the order of remand which had been passed on 13th May, 1926,

Held, that it was not open to the defendant in the circumstances to prefer an appeal against the order of remand, inasmuch as that he did not take any objection to the order of remand and he did not prefer an appeal against the final decree. 32 Cal. 1023; 12 C. W.N. 590; 15 C.W.N. 830; 36 Cal. 762; 17 C. W. N. 868; 30 All. 479 and 37 Mad. 29, Foll.

Held further, that the *ratio decidendi* of the above cases was not affected by the Code of 1908. 15 C. W.N. 830, Foll. (*Page and Graham, JJ.*) SABIN *v.* HAJRA BIBI. **55 Cal. 506=110 I.C. 347= A.I.R. 1928 Cal. 325.**

———*Point decided in order of remand.*

A question once decided by the appellate Court in the order of remand cannot be re-agitated in the stage of appeal after the return of the finding pursuant to the remand order. (*Madhavan Nair, J.*) U. NALUPURA-

C. P. CODE, (1908), S. 105—Remand—Objection.

TATIL IBRAINE *v.* PARAMESHWARA BAVANNAVAR. **85 I.C. 996=22 M.L.W. 460= A. I. R. 1925 Mad. 1019.**

———*No appeal.*

A party who accepts erroneous order of remand and does not appeal against it cannot afterwards change it. (*Hallifax, A.J.C.*) GANGARAM *v.* KANHAILAL. **80 I. C. 626=A. I. R. 1925 Nag. 185.**

———*No appeal.*

S. 105, sub-S. (2) provides that, notwithstanding the provision contained in sub-S. (1), where any party aggrieved by an order of remand made after the commencement of the Code, from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness. This provision was inserted to nullify the effect of decision of a Full Bench, 29 Cal. 758, where it had been ruled by a majority that the validity of an order of remand or of a preliminary decree may be assailed either by a direct appeal or by way of an appeal against the final decree. That view was based on the opinion expressed by the Judicial Committee in the case of *Mohesshur Singh* v. *The Bengal Government*, 7 M. I.A. 283. (*Mookerjee and Rankin, JJ.*) BISAI NATH *v.* TARA NATH DEB. **72 I. C. 588=A. I. R. 1923 Cal. 385.**

———*Points decided in remand order.*

Points decided by remand order cannot be reconsidered at final hearing. (*Krishnan and Venkatasubbarao, JJ.*) VENKATARAMA AIYAR *v.* AIYASAMI AIYAR. **69 I.C. 673=1922 M.W.N. 657= 16 M. L. W. 552=31 M. L. T. 465= A. I. R. 1923 Mad. 67=43 M.L.J. 340.**

———*Appeal from decree after remand.*

Where a decree after remand is appealed against, the appellant cannot question the correctness of the remand order. (*Chatterjee and Panton, JJ.*) MURARI CHANDRA DE *v.* DINA NATH CHANDRA.

63 I. C. 845 (Cal.).

———*No appeal.*

Where an order of remand purports to be made under O. 41, R. 23, C,P, Code. it is the duty of a party adversely affected to appeal against the order. Otherwise the order would be final. (*Scott-Smith, J.*) MT. NIAMAT BIBI *v.* MAHOMED FAIZ. **65 I. C. 745 (Lah.).**

———*Point of law decided in remand order.*

The same Appellate Court cannot pronounce (except where it is moved by an application for review) a different opinion on a relevant question of law from that which it held in a previous stage of the same case and on which earlier opinion it based its decision remanding the suit to the lower Court. 32 Mad. 318 and 32 M.L.J. 271. Foll. (*Sadasiva Iyer and Napier, JJ.*) VASTAD MUSHKIR SAIB *v.* KARNAM CHOWDAPPA.

62 I.C. 703=14 M.L.W. 236=40 M. L.J. 528.

———*Points not raised before or decided by remand order.*

Where a case comes up for final hearing after remand, points not raised when case was formerly before the Court, cannot be raised. Also the lower Court cannot consider points that had been abandoned before the Appellate Court passing order of remand or had been decided by the order of remand. (*Macnair, A.J.C.*) GOPAL RAO *v.* NEMICHAND. **61 I. C. 575= A.I.R. 1921 Nag. 129.**

—S. 105 —Remand— Objection.

———*Appeal from order of remand—Scope of.*

The provision in S. 105 (2) confines the scope of the appeal from an order of remand under O. 41, R. 23, to the question of the correctness of the order of remand, which may be impeached either on the ground that the remand itself was illegal as the decision of the first

Court was not on a preliminary point or on the ground that the decision of the preliminary point by the appellate Court is erroneous. No other questions can be raised in such appeal, whatever bearing they may have upon the merits of the appellants' case. However, neither party will be precluded from raising any other question which may be legitimately open to him, if and when the case comes before the High Court subsequently. (*Wallace and Thiruvenkatachariar, JJ.*) JAINUL ABIDEEN *v.* HABIBULLA. **27 M. L. W. 483 = 109 I. C. 130 = A. I. R. 1928 Mad. 430.**

———*No appeal against order of remand—Objections to grounds of remand—Maintainability in appeal from decree.*

If the grounds on which an order of remand which has not been appealed against, are liable to be attacked on a second appeal against the decree passed after the remand, then the prohibition against disputing the correctness of the order of remand becomes meaningless. If, therefore, the correctness of the order cannot be challenged, the grounds on which it was based are equally immune from attack. 1 B.L.R. 231, Rel. on. (*Darwood, J.*) YAN LIN *v.* MYAT SAN. **113 I. C. 803 = 6 Rang. 506 = A. I. R. 1928 Rang. 297.**

———*Inadmissibility of document consented to.*

A party to an appeal consenting to an order of remand, being made to enable the other party to show that a certain document is admissible in evidence under some of the provisions of the Evidence Act, cannot object in second appeal that the document is not admissible in evidence by reason of S. 105 (2). (*Greaves and B. B. Ghose, JJ.*) JOYNAL KARIKAR *v.* MULLUKCHAND MULLICK. **91 I. C. 287 = A.I. R. 1926 Cal. 509.**

———*Order returning plaint—Second appeal.*

An order returning the plaint under R. 10 of O. 7 is not a decision of the case on a preliminary point and an appeal is provided against such an order under O. 43, R. 1, Cl. (*a*) and as the order passed by the Appellate Court becomes final under S. 104, Cl. (2), S. 105 does not preclude the aggrieved party from disputing the correctness of the remand order in second appeal if he is otherwise entitled to do so. 2 L. L. J. 587; 33 All. 479; A.I.R. 1925 Bom. 431, Rel. on. (*Phillips and Madhavan Nair, JJ.*) VENKATANARASU *v.* KOTAYYA. **1926 M.W.N. 613 = 97 I. C. 790 = 24 M.L.W. 630 = A.I.R. 1926 Mad. 900 = 51 M. L. J. 119.**

———*Order returning plaint—Second appeal.*

An order of remand in appeal from an order returning plaint under O. 7, R 10, is not an order affecting the decision of the case within S. 105 (1) and therefore its propriety cannot be questioned in second appeal under S. 105 (1). (*Phillips and Madhavan Nair, JJ.*) VENKATANARASU *v.* KOTAYYA. **1926 M.W.N. 613 = 97 I.C. 790 = 24 M.L.W. 630 = A.I.R. 1926 Mad. 900 = 51 M.L.J. 119.**

———*No appeal.*

An appellant, who is aggrieved by an order of remand from which an appeal lies but who has not appealed therefrom is thereafter precluded from disputing its correctness. (*Kinkhede, A.J.C.*) RAGHUBAR PRASAD *v.* SATTOO. **89 I. C. 1009 = A.I.R. 1926 Nag. 164.**

———*Administration suit by widow—Plea of divorce by son—Remand by High Court holding divorce not proved—No appeal from remand order—Objection before Privy Council.*

An administration suit by a Mahomedan widow against her son was dismissed by the Original Court on the ground that she had been divorced—The High Court on appeal.

Held, that no divorce had been proved, and remanded the suit to the Original Court for decision on the merits.

Held, that the provisions of S. 105 (2) of the Code will not debar the son from raising the question before the Privy Council, when the whole case had been decided, though there had not been any appeal from the order of remand. (*Robinson, C. J. and Baguley, J.*) MA MI *v.* KALENTHER AMMAL. **84 I. C. 519 = 3 Bur. L. J. 248 = A.I.R. 1925 Rang. 147.**

———*No appeal.*

Where on appeal by the plaintiff the case is remanded on the ground that the burden of proof was on the defendants and not on the plaintiff, S. 105 (2) precludes the defendants from questioning the correctness of that decision in second appeal. (*Hallifax, A.J.C.*) DAN *v.* HAMPRASAD. **82 I. C. 645 = A. I. R. 1923 Nag. 283**

———*Point not raised before remand order.*

Where a point which goes to the root of the suit is not argued before an appellate court it must be taken to have been abandoned and if an appeal is preferable and no appeal is preferred the party who abandoned the point should not be allowed to re open it subsequently. (*Dawson Miller, C.J. and Mullick, J.*) RAJA WAZIR NARAIN SINGH *v.* BHIKARI RAM. **68 I. C. 363 = 3 P. L. T. 765 = 1922 P. H. C. C. 321 = 2 Pat. 207 = A. I. R. 1923 Pat. 45.**

———*Findings in remand order—Objection in appeal from decree.*

Neither the remand order nor the findings which are the basis of the remand order can be attacked in an appeal from the decree in pursuance of the order of remand. 32 Mad. 318 Foll. (*Brown, A. J. C.*) MAUNG PO KAING *v.* MA TOK. **70 I. C. 893 = 4 U. B. R. 93 = 1 Bur. L. J. 231 = A. I. R. 1923 Rang. 29.**

———*Remand order by single Judge of High Court.*

A remand order under O. 41, R. 23, passed by a single Judge of the High Court in second appeal cannot be questioned subsequently in the appeal from the order passed after remand. (*Piggott and Walsh, JJ.*) MASIHUNNISSA BIBI *v.* KANIZ SUGHRA BIBI. **60 I. C. 975 = 19 A. L. J. 139 = 43 All. 377 = A. I. R. 1921 All. 276.**

—S. 105—Second Appeal.

———*Partition suit—No appeal from preliminary decree—Objections in appeal from final decree.*

It is not open to an appellant in an appeal against the final decree in a partition suit to attack preliminary decree, which might have been directly challenged by an appeal. An Appellate Court, however, shall consider, in an appeal against the final decree in a partition suit, whether the preliminary decree was capable of enforcement; in other words, whether it afforded an adequate basis for the final decree as actually made. (*Mookerjee and Rankin, JJ.*) TARAPRASANNA *v.* KALIKAMOHAN. **75 I. C. 319 = 38 C.L.J. 111 = A. I. R. 1924 Cal. 80.**

———*Custom—Punjab Courts Act, S. 40—Appeal on certificate.*

There can be no appeal from an order of remand under O. 41, R. 23 of the Code of Civil Procedure, where the question involved is one of custom. As the appellant would have a right of second appeal from the decree of the Appellate Court only if he were to obtain a certificate under Sub-S. (3) of S. 40 of the Punjab Courts Act, it could not be said definitely that an appeal would lie from the decree of the Appellate Court. The question of custom therefore can be agitated in second appeal from the final decree if the certificate is obtained. (*Scott-Smith and Fforde, JJ.*) MT CHANDA *v.* MIRAN BAKSH. **73 I. C. 650 = 5 L.L. J. 392 =**

A. I. R. 1923 Lah. 535.

—S. 107—Adding party.

———Reading O. 1, R. 10 along with S. 107 (2) there is no doubt that the appellate Court has power to transfer a respondent to the array of appellants and pass a decree in his favour under O. 41, Rr. 4 and 33 in case it is just and equitable. (*Sulaiman and Kendall, JJ.*) GOPI NATH *v.* RUP RAM.

A. I. R. 1930 All. 786.

———*Power of Appellate Court.*

A person, who was not a party to the original suit, not only cannot be added as a respondent by the Appellate Court under O. 41, R. 20, but he cannot be so added even under S. 107, as that section being expressly subject to such conditions and limitations as may be prescribed, is subject to the conditions of R. 20, O. 41; 3 P.L.J. 409; 8 C. W. N. 404, not Foll.; A. I. R. 1925 All. 768; A. I. R. 1923 Lah. 490, Foll.; A. I. R. 1921 Mad. 172 (F.B.), Expl. and Dist. (*Baker, J.*) MONJIRAM INDRCHANDRA *v.* MANEKLAL MANSUKHBHAI.

119 I. C. 654 = 53 Bom. 598 = 31 Bom. L. R. 672 = A. I. R. 1929 Bom. 353.

———The High Court has ample power in the interest of justice to add parties, or to transpose a party from one category to another; 4 C. W. N. 58, Dist.; 10 Bom. 227, not Foll. (*Suhrawardy and Mullick, JJ.*) SURYA KANTA JANA *v.* TARAK NATH JANA.

98 I. C. 822 = 44 C. L. J. 243 = A. I. R. 1927 Cal. 37.

—S. 107—Additional evidence.

———The power to admit additional evidence should be exercised by a Court of appeal with much caution and only in suits where it is satisfied that in the interests of justice it should be exercised, and such additional evidence when admitted will be evidence which, if produced at the trial would have been admissible. (*Sir John Edge.*) MUHAMMAD KHALEEF SHIRAZI AND SONS *v.* LES TANNERIES LYONNASISES.

49 Mad. 435 = 53 I. A. 84 = 3 O. W. N. 568 = 94 I. C. 767 = 1926 M. W. N. 495 = 24 M. L. W. 115 = 44 C. L. J. 67 = 28 Bom. L. R. 1391 = 31 C. W. N. 1 = A. I. R. 1926 P. C. 34 = 51 M. L. J. 570 (P.C.).

—S. 107—Amendment of appeal.

———Although an appeal directed against a dead man is not appeal, if the name of such dead man appears on the petition of appeal instead of his legal representatives, through a *bona fide* error the petition of appeal can be allowed to be amended under the provisions of O. 1, R. 10, read with Ss. 107 and 153. (*Niamatullah, J.*) CHATUR PRASAD BARA BACHA *v.* BAIJNATH PRASAD

123 I. C. 824 = A. I. R. 1930 All. 131.

—S. 107—Appeals.

———R. 10 applies to appeals by virtue of S. 107. (*Hallifax, A. J. C.*) NARAYAN *v.* TUKARAM.

74 I. C. 93 = 8 N. L. J. 63 = A. I. R. 1923 Nag. 310.

—S. 107—Final determination of case.

———An Appellate Court will not insist on deciding a case finally if the appellant is satisfied with the order of remand proposed by the Court, although it is possible for the Court to so decide the case; 3 Bom. 204 and 45 Bom. 718 (P. C.), Foll. (*Shadi Lal, C. J. and Le Rossignol, J.*) PUNJAB AKHBARAT AND PRESS CO., *v.* OGILVIE. **7 Lah. 179 = 27 P. L. R. 50 = 8 L. L. J. 13 = 93 I. C. 344 = A. I. R. 1926 Lah. 65.**

—S. 107—Improper remand.

———In a suit the trial Court found that the plaintiff had no cause of action and dismissed the suit. On appeal by the plaintiff the Subordinate Judge held that the principle of *Tweedle* v. *Atkinson* (30 L. J. Q. B. 265) would apply to the case and remanded it for trial by the first Court.

Held: A remand on the general ground that the trial Court had not considered all the circumstances of the case was not proper. (*Devadoss and Waller, JJ.*) SUPPU CHETTI *v.* ARUNACHALAM CHETTIAR.

1926 M. W. N. 5 = A. I. R. 1926 Mad. 1065.

—S. 107—Leave to withdraw.

———Under S. 107 (2) an Appellate Court has power to allow withdrawal of suit under O. 23, R. 1, provided it sets aside the decree of the first Court. 40 Mad. 259, Foll; A. I. R. 1925 P. C. 55 and 47 All. 158 (P. C.), Dist. (*Findlay, O. J. C.*) MANGLIA *v.* JAGANNATH.

95 I. C. 424 = A. I. R. 1926 Nag. 444.

———An Appellate Court has jurisdiction in an appeal pending before it to give leave to the plaintiff to withdraw from a suit with permission to bring a fresh suit in respect of the same subject-matter. 44 Cal. 367, Diss. from; 35 Bom. 261 Dist. 40 Mad. 259 (F. B.) and 44 Bom. 598, Foll. (*Shah and Crump, JJ.*) SHEIKH HASSAN *v.* MAHOMAD ALI. **45 Bom. 206 = 59 I. C. 210 = A. I. R. 1921 Bom. 278**

—S. 107—Negligence by party.

———*Power of Appellate Court to direct fresh evidence to be taken.*

Where a party in spite of his treatment by Court with indulgence has been persistently defying the orders of the trial Court in not personally appearing and in not adducing evidence there is no reason for remanding the case for fresh trial as no litigant can be allowed to abuse the process of Court. (*Shadilal, C. J. and Bhide, J.*) GHULAM ABBAS *v.* SULTANSHAH. **116 I. C. 180 = 30 P. L. R. 93 = A. I. R. 1929 Lah. 444.**

—S. 107—Remand.

———*Preliminary point—Power of Appellate Court.*

Where the trial court held a certain piece of evidence irrelevant and the Appellate Court held it relevant and remanded the case, it was held that the remand was on a preliminary point. (*Schwabe, C. J., Oldfield and Coutts Trotter, JJ.*) MALAYATH VEETIL RAMAN NAYAR *v.* C. KRISHNAN NAMBUDRIPAD.

69 I.C. 828 = 45 Mad. 900 = 16 M.L.W. 425 = 1922 M.W.N. 589 = 31 M.L.T. 208 = A. I. R. 1922 Mad. 505 = 43 M. L. J. 354 (F.B.).

—S. 107—Suppression of evidence.

———*Reliance on burden of proof by opponent—Powers of Appellate Court.*

Where many issues were raised but not proved and inconsistent pleas were also raised and best documentary evidence presumably available and probably decisive one way or another was not produced,

Held, that the Appellate Court was justified in reversing the judgment of the trial Court since the conduct indicated a design of opponent to take advantage of the abstract doctrine of the burden of proof upon a plaintiff in ejectment. A. I. R. 1917 P. C. 6, Ref. (*Lord Blanesburgh.*) RAMESHWAR SINGH *v.* BAJIT RAI PATHAK.

114 I. C. 592 = 1929 A. L. J. 261 = 49 C. L. J. 308 = 33 C. W. N. 430 = 29 M. L. W. 501 = 6 O. W. N. 423 = 31 Bom. L. R. 721 = 11 P. L. T. 101 = A. I. R. 1929 P.C. 95 = 57 M. L. J. 565. (P.C.)

S. 109.

Applicability.
Certificate.
Decree.
Final order.

C. P. CODE, (1908), S. 109—Applicability.

Fit case.
Interpretation.
Leave to appeal.
"On Appeal" meaning of.
Remand order.
Right to appeal.
Scope.
Special leave.
Substantial Question of law.

—S. 109—Applicability.

———*Question of right to open two small windows.*

A case which relates to the right to open two small windows in a loft or gallery in a house cannot be said to be a fit case to be certified under S. 109 (c); 15 Bom. L. R. 1021, Rel. on. (*Patkar and Baker, JJ.*) LALLUBHAI PRAGJI *v.* BHIMBHAI DAJIBHAI.
119 I. C. 782 = 53 Bom. 552 = 31 Bom. L. R. 632 = A. I. R. 1929 Bom. 341.

———*Final order—Refusal to appoint receiver—Maintainability of.*

In a mortgage deed, the mortgagee was given the right in the event of suit being filed, to apply for the appointment of a Receiver to take possession of the land and the deed provided that he might do that without any further consent on the part of the mortgagor. Owing to certain complications due to other legal proceedings, the High Court on appeal refused to appoint a Receiver in the mortgage suit by the mortgagees.

Held, that this was not a final order within the meaning of Section 109 (a) of C. P. Code. The appointment of a Receiver is in no way a matter which finally determines the rights of the parties. The fact that a Receiver had already been appointed by another High Court and that therefore if another Receiver were appointed according to the mortgagee's wishes, there would apparently be conflict of jurisdiction between the two Courts and therefore a question would arise as to what was to be done in such contingency was held to be not in itself sufficient to require the exercise of jurisdiction under Section 109 (c), 22 Cal. 928 and 13 C. L. J. 507, Ref. to. (*Dawson Miller, C. J. and Foster, J.*) MAGNI RAM BUNGAR *v.* SRIDHUR CHOUDHURY.
82 I. C. 178 = 6 P. L. T. 119 = A. I. R. 1925 Pat. 173.

———*No general question involved.*

S. 109 (c) of the C. P. Code is inapplicable where the question is concerning the parties alone and no general interest is involved. (*Kanhaiya Lal and Daniels, A. J. C's.*) SHANKAR BAKSH SINGH *v.* UDIT NARAYAN SINGH. **61 I. C. 131 = 8 O. L. J. 1 = A. I. R. 1921 Oudh 30.**

—S. 109—Certificate.

———*Ordinary case of redemption—Value less than Rs. 10,000—Issue, if justifiable.*

The High Court may be able to certify, in exceptional circumstances, under O. 45, R. 3 appeals from its final decision which are of value less than Rs. 10,000. But in an ordinary case of redemption involving a question of no general principle, as to whether certain terms of a mortgage-deed constituted a clog on the equity of redemption a certificate cannot be granted there being no exceptional circumstances to justify it. (*Raza and Pullan, JJ.*) UDWAT SINGH *v.* SARFARAZ SINGH. **6 O. W. N. 211 = 116 I. C. 208 = A. I. R. 1929 Oudh 243.**

———*Issue of, when justified—Case of public or private importance or general interest.*

Clause (c) of S. 109, C.P. Code, was intended to meet special cases, such, for example, as those in which the point in dispute was not measurable by money, though

it might be of great public or private importance. To determine whether a case is of great public or private importance, though it is left entirely in the discretion of the Court, is a judicial process, which could not be performed without the special exercise of that discretion evinced by the fitting certificate. The discretion thus vested in the Court, has been always very sparingly used. (*Kanhaiya Lal, J. C. and Dalal, A. J. C.*) MOHAMMAD KARIM KHAN *v.* MIRZA SADIQ HUSAIN.
10 O. L. J. 289 = 71 I. C. 339 = A. I. R. 1924 Oudh 81.

———*Power to issue—Limitations.*

Where the property involved is of large value and the decree of the High Court reverses findings of the trial Court on questions of fact and where the evidence relied upon by the High Court was not before the trial Court and where a question of procedure with somewhat unusual character is involved and it is possible that a higher tribunal might take a different view in respect thereto, *held*, that in these circumstances the High Court ought to certify the case as fit one for appeal. S. 109 (c) imposes no limitations on the power of the Court to certify a case as a fit one though the power ought to be used very sparingly. (*Dawson Miller, C. J. and Mullick, J.*) MAN SINGH *v.* MAHA RANI NAWALKHBATI. **75 I. C. 58 = 5 P. L. T. 17 = 2 Pat. L. R. A. Civ. 48 = A.I.R. 1924 Pat. 468.**

———*Value of appeal—Certificate how far conclusive.*

The ruling provision as to certificates of value applicable, at the time the appeal was filed, was No. 2 of Schedule to Order in the Council of 10th April, 1838, which was to the effect that the certificate should be deemed conclusive of value and not liable to be questioned on appeal by any party. *Banarsi Pershad* v. *Kashi Krishna Narayan*, 23 All. 227 (P. C.), Ref. to. (*Lord Shaw.*) RATHAKRISHNA AYYAR *v.* SUNDERSWAMY IYER. **74 I. C. 584 = 16 M. L. W. 18 = 45 M. 475 = 31 Mad. L. T. 31 = 49 I. A. 211 = 27 C. W. N. 1 = 20 A. L. J. 937 = 36 C. L. J. 450 = A. I. R. 1922 P. C. 257 = 43 M. L. J. 323 (P. C.).**

———*Plaintiff knowingly valuing claim at certain figure—Court-fee paid on that basis in all the courts—Increased value—Proof of—Leave to appeal.*

Where the plaintiff was aware that a large sum was due to him but all the same valued his claim at Rs. 2,500 and paid court-fee on that basis in all the courts, *held*, that he could not apply for leave to appeal to the Privy Council on the footing that the suit did in fact involve a claim for more than Rs. 10,000. (*Rankin, C. J. and C. C. Ghose, J.*) RADHARANI DASSYA *v.* PURNA CHANDRA SARKAR. **34 C. W. N. 671.**

———*Final order—Order adding joint decree-holders as parties to execution—Maintainability of appeal.*

Where an execution case was started by one of several decree-holders, and the others thereupon applied to be added as parties and the execution Court made an order that they should be added as executing decree holders in the case together with the appellant and the High Court upheld the decision in revision,

Held, the order sought to be appealed from was not a final order determining the rights of the parties in any matter in controversy in the suit. The right of the parties in so far as their claim to share in the benefit of the decree itself was in their favour jointly. The order was one which related to procedure only. No leave could be granted to appeal to His Majesty in Council. (*Dawson Miller, C. J. and Mullick, J.*) PRAKASH CHANDRA SARKAR *v.* BRINDABAN CHANDRA SARKAR. **67 I. C. 991 = 3 Pat. L. T. 781 = 1922 P. H. C. C. 296 = A. I. R. 1922 Pat. 611.**

C. P. CODE, (1908), S. 109—Certificate.

——*Order as to—Validity of order of lower Court recording compromise—Issue of, if justified.*

An order made by the High Court after contest by both the parties, which decides one way or the other whether an order by a lower Court recording a compromise agreement was a valid order is not an order by consent, and therefore a certificate can issue as to the fitness of the case to be taken to the Privy Council. (*Dawson Miller, C. J. and Adami, J.*) RAJ KISHORE DAS *v.* RAM GULAM SAHU. **62 I. C. 235=3 Pat. L. T. 61= 6 P. L. J. 171=1921 P. H. C. C. 193= A. I. R. 1922 Pat. 256.**

——*Grounds of issue—Mention of.*

When any certificate is granted under O.45 it is of the utmost importance that the certificate should show clearly on the face of it upon which ground it is based or if it is intended to come under S. 109 (*c*), that the discretion conferred by S. 109 (*c*) was invoked or was exercised. (*Lord Buckmaster.*) RADHAKRISHNA AIYAR *v.* SWAMINATHA AIYAR. **44 Mad. 293=48 I.A. 31= 19 A. L. J. 161=23 Bom. L. R. 718= 33 C. L. J. 277=25 C. W. N. 630=13 M.L.W. 321= 1921 M. W. N. 119=60 I. C. 85=29 M. L. T. 418= A. I. R. 1921 P. C. 25=40 M. L. J. 229 (P.C.).**

—S. 109—Decree.

——*Decree of High Court under S. 91 (3) of Rangoon City Municipal Act—Appeal to Privy Council—Appeal against decisions of special tribunals—Limitations.*

In the case of special and often technical enactments, if a person or a Court is specifically designated to determine disputes arising out of the application of such enactments. the Court or person is not functioning in an ordinary, but in an extraordinary manner and parties to any litigation arising thereunder will not be permitted to appeal further than these specially appointed persons or tribunals. A decree of the High Court under S. 91 (3) of the Rangoon City Municipal Act is not a final judgment, decree or order within the meaning of Art. 37 of the Letters Patent or S. 109 of the C. P. Code and is not appealable to His Majesty in Council. 40 Cal. 21 ; 37 Bom. 506 and A. I. R. 1926 Rang. 25 (F.B.), Rel. on. (*Pratt, C. J. and Cunliffe, J.*) MADAN THEATRES, LIMITED *v.* CORPORATION OF RANGOON. **4 Rang. 508=6 Bur. L. J. 1= 99 I. C. 994=A. I. R. 1927 Rang. 88.**

——*Testamentary case—Appeal to Privy Council.*

A decree of the High Court in a testamentary matter is appealable to His Majesty in Council when the case is that if it were an ordinary civil case it would be appealable under S. 109. 40 Cal. 21 (P. C.), Expl.; 10 L. B. R. 22, not Foll. (*Devadoss and Waller, JJ.*) PARAMASWAMI AIYANGAR *v.* PICHAMMAL. **49 Mad. 954=1926 M. W. N. 931=97 I. C. 836= A. I. R. 1926 Mad. 986=51 M. L. J. 299.**

——*Order directing final decree to be passed in accordance with the preliminary decree passed by the Privy Council—Appeal to Privy Council—Maintainability.*

An order of the High Court passed on an application to pass a final decree according to the preliminary decree of the Privy Council, or to transfer it to the sub-Court for passing a final decree, is not a final judgment within the meaning of S. 109 of the C. P. Code, and therefore no appeal lies to the Privy Council from such order. Such order is also of course not a final decree. (*Krishnan and Odgers, JJ.*) S. GANGARAJU BAHADUR *v.* V. RAMACHANDRA DEO. **20 M. L. W. 753= A. I. R. 1925 Mad. 187.**

—S. 109 —Final order—Dismissal for default.

——*Dismissal of application for restoration—Appeal.*

Order, dismissing application for restoration of the appeal dismissed for default, is not a decree or final order passed in appeal nor an order passed in the exercise of the original civil jurisdiction of the High Court and so no appeal lies to Privy Council from the order. 37 I. C. 832, Foll. (*Young, Offg. C.J. and May Oung, J.*) MAUNG SAW MYAING *v.* MG. SEIN. **2 Bur. L. J. 294= 79 I. C. 504=A. I. R. 1924 Rang. 208.**

—S. 109—Final order—Forma pauperis.

——*Refusal of leave to appeal.*

An order refusing leave to appeal *in forma pauperis* is not a final order within the meaning of S. 109(*a*): 8 C. W. N. 296 (F.B.), Ref. (*Dawson Miller, C. J. and Foster, J.*) RAM PRASAD SHA *v.* MT. FULPATI KUER. **6 Pat. 67=100 I. C. 886=A.I.R. 1927 Pat. 175.**

——*Refusal of leave to appeal.*

Order rejecting an application to appeal as pauper is not a final order as it is even then open to the applicant to file the appeal on payment of Court-fees. (*Daniels, J. C. and Wazir Hasan, A. J. C.*) MT. SUNDER BAHU, *v.* MT. MAHANDEI. **88 I. C. 575=2 O.W.N. 393= A. I. R. 1925 Oudh 548.**

—S. 109—Final order—Interlocutory.

——*Order setting aside compromise.*

An order by which a Court sets aside a compromise is an interlocutory and not a final order within S. 109. A. I. R. 1922 Bom. 383, Foll. Appeals on matters interlocutory in their nature should be allowed to be preferred to His Majesty in Council only when their decision will practically put an end to the litigation and finally decide the rights of the parties. 42 All. 174 and 1918 P. H. C. C. 1, Rel. on. (*Mears, C. J. and Lindsay, J.*) BHAWATI DAYAL *v.* MT. DHAN KUNWAR. **48 All. 329= 24 A. L. J. 331=92 I.C. 1027=A.I.R. 1926 All. 311.**

—S. 109—Final order—Meaning of.

——*Order of remand.*

Whether the order of remand passed by High Court in any particular case operates as final order or not depends on its own facts. The test question to be asked is: Does the order of remand finally dispose of the rights of the parties ? Leave cannot be granted in a case where the order of remand decides an important point of law but leaves another equally important point undecided. It is not the order of the lower Court but of the High Court that must be looked at for the purpose of determining whether it finally disposed of the right of the parties. A. I. R. 1920 P. C. 86. *Issacs v. Sabstein*, (1916) 2 K.B. 139, Rel. on ; 15 Bom. 155 (P.C.) and 17 All. 112 (P. C.), Dist. (*Percival, J. C. and Rupchand A. J. C*) CHUHERMAL MULCHAND *v.* MT. PAPURBAI. **123 I. C. 231= A. I. R. 1930 Sind 254.**

——*Final order, what is — Determining factor whether the order decides the cardinal issues in the suit —Matter of procedure if can be a cardinal issue.*

The determining factor is not the effect on the suit, a decision in favour of the applicant would have, if the proposed appeal to the Privy Council were successful, but the immediate effect on the suit of the order sought to be appealed against. An order is a " final order " within the meaning of S. 109 (*a*) only if it decides, or has the effect of deciding the cardinal issue in the suit (that is an issue going to the foundation of the suit) and thus disposes of the rights of the parties in the litigation, it being permissible to examine not only the order, but the circumstances of the case with a view to ascertaining the effect of the order on the suit. It is the nature of the order sought to be appealed against, that determines the right to appeal, and an order is a "final order" within the meaning of S. 109 (*a*) only if it puts an end to the litigation between the parties or disposes so substantially of the matters in issue between them as to leave merely subordinate or ancillary matters for decision.

Held, the order of the High Court did not amount to a "final order." The test is not whether the decision of the trial Court, if restored by the Privy Council, would put an end to the suit altogether. The determination of the matter depends not only upon the nature of the issue itself but also upon its importance as compared with that of the other points arising in the suit. The test laid down by the Privy Council in 47 C. 918 is by no means a certain one; a matter of procedure can never be treated as a cardinal point in the suit. Nor can an issue, which does not dispose of the rights of the parties belong to that category. There may, however, be other issues in a case which deal with the rights of the parties, but every one of them cannot be held to be a cardinal point. It is impossible to lay down any hard and fast rule which would solve the problem in every case, and it is the duty of the Court to determine in each case whether the order sought to be appealed against, comprises a decision on a crucial issue which goes to the root of the case or whether it is a mere interlocutory order. 15 Bom. 155 ; 17 All. 112 ; 22 All. 220 and 47 Cal. 918, Foll. *Issacs & Son* v. *Sabstein*, (1916) 2 K. B. 139 ; *Salaman* v. *Warner*, (1891) 1 Q.B. 734 and *Bozsom* v. *The Altrincham Urban District Council*, (1903) 1 K.B. 547, Foll (*Shadi Lal, C. J. Broadway and Harrison, JJ.*) SULTAN SINGH *v.* MURLI DHAR. **80 I. C. 366 = 5 Lah. 329 = 6 Lah. L. J. 240 = A. I. R. 1924 Lah. 571.**

——*Suit for dissolution of partnership and accounts —Liability to account declared by High Court—Appeal.*

An order is final under S. 109, if it finally disposes of the right of the parties to the action though it may not formally conclude the proceedings. Where the High Court finally decided the plaintiff's right to obtain an account between the parties and ordered the lower Court to pass a preliminary decree and take further proceedings according to law, the order is final within the meaning of S. 109 and not merely 'interlocutory'. (*Oldfield and Ramesam, JJ.*) SATHAPPA CHETTY *v.* S. N. SUBRAMANIAN CHETTY. **71 I. C. 334 = 16 M. L. W. 718 = 31 M. L. T. 385 = A. I. R. 1922 Mad. 510 = 43 M. L. J. 758.**

——*Decision on cardinal issue.*

The decision of the High Court on a cardinal issue in the suit is a final decree within S. 109. Where the High Court held that the suit was not barred by *res judicata* as had been decided by the lower Court and recommended the case, and where from the pleadings it appeared that if the Judicial Committee were to uphold the decision of the first Court it would finally dispose of the main issues in the suit even though there might be subordinate enquiries to be made in the suit.

Held, that the decision of the High Court was a final decree within S. 109. 17 All. 112 (P. C.) and 35 Cal. 618, Foll. (*Sanderson, C. J. and Richardson, J.*) KHAGENDRA NANDAN *v.* SAHAYRAM CHUCKERBUTTY. **25 C. W. N. 896 = 62 I. C. 776 = A. I. R. 1921 Cal. 177.**

——*Order holding that a person is competent to apply for probate—Appeal to Privy Council.*

An order is final within the meaning of S. 109 of the Civil Procedure Code if it finally disposes of the rights of the parties. An order which merely decides that an incorporated body is a juridical person legally competent to discharge the functions of an executor and as such to apply for probate but which leaves outstanding the question whether being competent to apply it is entitled to grant of probate is not a final order within the meaning of S. 109 of the Civil Procedure Code. (*Lindsay, J. C. and Wazir Hasan, A. J. C.*) SRI KRISHNA DAS *v.* THE BENARES HINDU UNIVERSITY. **23 O. C. 324 = 60 I. C. 208.**

—S. 109—Final order—Remand.

——*Trial Court holding temple private — High Court holding public—Remand order if appealable.*

Where a scheme suit brought under S. 92 was dismissed by the trial Court on the ground that the suit temples were private temples, but the High Court finding that the temples were public remanded the case to the trial Court, the decision of the Court was not final adjudication within the meaning of S. 109. 13 Mad. 349; 38 Mad. 509, (1918) M.W N. 844; 8 Bom. 548; 25 All. 629 and 33 All. 391, Rel. on ; 15 Bom. 155 (P.C.), Dist. and A. I. R. 1922 Mad. 510, not Foll. (*Phillips and Odgers, JJ.*) MUNDANEHERI KOMAN *v.* ACHUTHAN NAIR. **117 I. C. 300 = A. I. R. 1929 Mad. 308.**

——*Order setting aside compromise decree—Appeal.*

Order directing that a compromise decree passed under O. 23, R. 3 be set aside and the suit proceeded with, from the stage at which the compromise was filed, is not a final order. Case-law discussed. (*Dawson Miller, C. J. and Foster, J.*) F. A. SAVI *v.* SABITRI THAKURAIN. **6 Pat. 282 = 8 P. L. T. 615 = A. I. R. 1927 Pat. 363.**

——*Order setting aside abatement and directing rehearing.*

Where an application to set aside abatement of suit by excusing delay of two days in making it was rejected and in appeal from the order, the High Court accepted the appeal and directed the lower Court to re-hear the application.

Held, that the order of remand was not a final order. *Solomon* v. *Warner*, (1891) 1 Q. B. D., 734, Foll. (*Mears, C. J. and Piggott, J.*) MUMTAZ UD DAULA *v.* R. R. SKINNER. **47 All. 335 = 23 A. L. J. 19 = 6 L.R.A. Civ. 175 = 86 I. C. 161 = A. I. R. 1925 All. 263**

——*Suit dismissed due to plaintiffs' want of* locus standi—*Appeal*—Prima facie *case held made—Case remanded for further hearing—Order if appealable.*

Where the lower Court had dismissed the plaintiffs' suit on the ground that they had no *locus standi* and the High Court on appeal held that the plaintiffs had *prima facie* sufficient interest to entitle them to an investigation of the case which they made and that the facts had not been sufficiently ascertained to justify the dismissal of the suit on the preliminary point of *locus standi* and remanded the suit.

Held, that it was only a mere order of remand under O. 41, R. 23 and not a final order within the meaning of S. 109. (*Sanderson, C. J. and Richardson, J.*) HARI NARAYAN DE *v.* HARI BHUSAN DE. **78 I. C. 117 = A. I. R. 1925 Cal. 574.**

——*Order of remand deciding main point in the case —Appeal.*

Ordinarily an order of remand is merely an interlocutory order ; but, that does not finally decide the question, and if the order in question has the effect of deciding finally the cardinal point in the suit, it must be held to be a final order from which leave to appeal should be granted. Where the suit was an administration suit by a Mahomedan widow, and the defence thereto was that she had been validly divorced,

Held, that the main point in dispute between the parties was whether the plaintiff had been legally divorced or not. The decision on that point in defendant's favour would put an end to the whole suit, and so the point was the cardinal point in the suit and an order of remand by the High Court, relating to the point must be held to be a final order within S. 109, C. P. Code. 38 Mad. 509; 38 All. 391, 25 All. 629; 15 Bom. 155; 17 All. 112; 35 Cal. 618, Foll. (*Robinson, C. J. and Baguley, J.*) MA MI *v.* MI KALENTHER AMMAL.

84 I. C. 519 = 3 Bur. L. J. 248 = A. I. R. 1925 Rang. 147.

———*Order of remand going to the root of the case—Appeal.*

In execution of a mortgage decree the decree-holder applied to the Court below for the preparation of a decree for unsatisfied balance, under O. 34, R. 6. The judgment-debtors objected that the application for a decree under O. 34, R. 6 was statute barred. The execution Court upheld this contention and dismissed the application of the decree-holders. On appeal, the High Court held that the application was within time. The order of the Court below was therefore set aside and the execution Court was ordered to re-admit the application of the decree-holders on to its file of pending applications and to dispose of it according to law.

Held, that it is not certain that the order of the High Court might not fairly be described as a final order within S. 109. Certificate was granted especially since the remand order went to the root of the case. 17 All. 112, Foll. ; 6 A. L. J. 786 and 33 All. 391, Dist. (*Mears, C. J. and Piggott, J.*) SHANT LAL *v.* RAJ NARAIN.

79 I. C. 87 = 45 All. 741 = 21 A. L. J. 683 = 4 L. R. A. (Civ.) 577 = A.I.R. 1924 All. 119.

———*Order of remand deciding subsidiary issue—Appeal.*

An order of remand, which does not finally determine the rights of the parties but merely disposes of a subsidiary issue, the determination of which necessitates the continuation of the trial is not a final order within the meaning of S. 109 (*c*); 15 Bom. 155 ; 17 All. 112, Dist., 40 Cal. 635. Foll. (*Kanhaiya Lal, J. C. and Dalal, J. C.*) MOHAMAD KARIM KHAN *v.* MIRZA SADIQ HUSAIN.

10 O. L. J. 289 = 71 I. C. 339 = A. I. R. 1924 Oudh 81.

———*Order setting aside—Decree on compromise and directing lower Court to try suit on merits—Appeal if lies.*

The trial Court in this case passed a decree upon a certain compromise which was arrived at between the plaintiff and defendant No. 2. On appeal by defendant No. 1 the decree was set aside by High Court and the lower Court was directed to proceed with the suit in the ordinary course, as if there had been no compromise. Plaintiff asked for a certificate for leave to appeal to His Majesty in Council from the order.

Held, the order is not a final order within the meaning of S. 109 but only an interlocutory order. The word 'final' is used in its ordinary sense and therefore means an order which puts an end to the litigation between the parties or at all events disposes so substantially of the matters in issue between them as to leave merely subordinate or ancillary matters for decision. (*Shah, Ag. C. J. and Crump, J.*) SHANKAR BHARATI *v.* NARASINHA BHARATI.

69 I. C. 80 = 47 Bom. 106 = 24 Bom. L. R. 925 = A. I. R. 1922 Bom. 383.

———*Order of remand not deciding cardinal point in the case—Appeal.*

An order of remand is not ordinarily capable of being the subject of an appeal to His Majesty in Council, being interlocutory and not final within the meaning of S. 109. It can only be regarded as a final order and capable of appeal if it has the effect of finally deciding some cardinal point in the suit. 23 All. 220 (P. C.), Relied on.

A sued for declaration that he was the sole owner of the suit property free of any encumbrance and that he was in possession of it as owner. *B* contended that as he (*B*) was in possession, a suit merely for declaration was not competent. The suit was dismissed. In appeal, it was found that *A* was in possession of a portion of the property and that he was a co-sharer with *C* who was in possession of other portions and the case was remanded for trial on merits.

Held, that the order of remand did not finally decide any cardinal point in the suit and no appeal lay to the Privy Council, nor was the case a fit one for certifying under cl. (*c*), (*Scott-Smith and Broadway, JJ.*) MEHR CHAND *v.* LABHU RAM.

60 I. C. 522 = 2 Lah. 106 = 65 P.L.R. 1921 = A. I. R. 1921 Lah. 203.

—S. 109—Final order—What is not.

———*Scheme suit—Defendant trustee dying—Order holding the suit not to abate as regards settling of scheme.*

Pending a suit for the removal of the defendant trustee from his alleged trusteeship and for framing a scheme, the trustee died and it was held that the whole suit abated. In appeal to the High Court, it was held that so far as the removal of the alleged trustee was concerned, the suit must abate on the death of that trustee, but in so far as the suit was for the framing of a scheme, the suit did not abate and could be continued against the succeeding trustee.

Held, that the order was not a final order under S. 109. 47 Cal. 918 (P.C.); A. I. R. 1925 All. 263 and A. I. R. 1924 Lah. 571, Rel. on. (*Phillips and Krishnan JJ.*) VYTHILINGA *v.* ARUMUGA.

23 M. L. W. 695 = 94 I. C. 966 = A. I. R. 1926 Mad. 748 = 50 M. L. J. 552.

———*Order extending time for appeal.*

Order extending the time for presenting an appeal to the High Court under S. 5 of the Limitation Act, and thus admitting the appeal is not a final order within the meaning of S. 109, C. P. Code, though an order refusing such extension would amount to a final order. (*Das and Adami, JJ.*) H. G. PEREIRA *v.* E. I. RY.

7 P. L. T. 256 = 90 I. C. 723 = A. I. R. 1926 Pat. 102.

———*Order not record alleged compromise but to proceed with suit.*

An order that an alleged compromise should not be recorded and that the suit should proceed in the usual way is not a "final order". 10 M. I. A. 340, Ref.

Per *Rankin J.*—Whether the character of finality can be rightly claimed in respect of an order must be determined with reference to the precise relation in which it stands to the proceeding before the Court 13 C. L. J. 90, Foll. (*Sanderson, C. J. and Rankin, J.*) SURENDRA NATH MITTER *v.* SM. TARUBALA DASSI.

89 I. C. 94 = 29 C. W. N. 832 = A.I.R. 1925 Cal. 857.

———*Order refusing to aset side order restoring suit to file.*

An order passed by the High Court refusing to set aside an order of the Court below restoring to file a suit is not a final order within the meaning of S. 109. (*Spencer, Og. C. J. and Devadoss, J.*) J. J. BRITO *v.* S. S. BRITO.

78 I. C. 938 = 19 M. L. W. 458 = 34 M. L. T. 112 = 1924 M. W. N. 380 = A. I. R. 1924 Mad. 701 = 46 M. L. J. 357.

———*Income-tax Act* (1918), *S. 51—Order under S. 51—Appeal to Privy Council—General right—Princi-*

ples discussed.

No statute, Imperial or Indian, is to be found, giving expressly, or by implication, a right of appeal, either with or without the leave of the High Court of Bombay, to His Majesty in Council from a decision or order made or judgment given by the High Court under the provisions of the 51st section of the Indian Income-tax Act of 1918, neither can any such Statute be found giving a general right of appeal to His Majesty in Council from the orders or judgments of any clause of Courts, as the 3rd section of the English Appellate Jurisdiction Act, 1876 gives a general right of appeal to the House of Lords from the judgments or orders of the Courts therein mentioned. The words "original jurisdiction" in Cl. 39 of Letters Patent (Bombay) are only used in contradistinction to the words "made on appeal" mentioned earlier in the clause. The appeal is competent if the decision and order of the High Court under S. 51 of the Income-tax Act are within clause 31 of the Letters Patent. It must be either a final judgment or a final decree or a final order. A final judgment as understood in English litigation is nothing more than that there should be a proper *litis contestatio* and a final adjudication between the parties to it on the merits When a case is stated for the "opinion' of the Court, that would serve *prima facie* to indicate that the order made by the Court was only advisory. Where the case is referred for the "decision" or "determination" of a question, there is a *prima facie* difficulty in holding that the order embodying this determination or decision is advisory, but the use of these words or one of them is not decisive. The decision, judgment or order made by the Court under S.51 of the Income-tax Act is merely advisory and not in the proper and legal sense of the term final, and an appeal from it is incompetent. (*Lord Atkinson.*) TATA IRON AND STEEL CO., LTD., *v.* CHIEF REVENUE AUTHORITY, BOMBAY. **74 I. C. 469= 4 L. R. P. C. 170=1923 M. W. N. 603= 25 Bom. L. R. 908=21 A. L. J. 675= 50 I. A. 212=18 M. L. W. 372=47 Bom. 724= 39 C. L. J. 16=28 C. W. N. 307=33 M. L. T. 301= A. I. R. 1923 P. C. 148=45 M. L. J. 295 (P.C.).**

———*Order in civil extraordinary application—No final disposal of rights.*

The substantial portion of the order which the applicants complained of in their petition for leave to appeal to His Majesty in Council was really passed on the Civil Extraordinary application, but did not finally dispose of the rights of the parties and the suit was left at practically the stage at which it was when filed.

Held, it cannot be said that this is a final order within the meaning of S. 109 (*a*) or that it is a final judgment within the meaning of Cl. 39 of the Letters Patent. (*Shah and Crump, JJ.*) SHRINIWAS LAXMIPATI RAO *v.* HANMANT SRINIWAS DESHPANDE.

79 I. C. 210=A. I. R. 1923 Bom 39.

———*Order granting review.*

An order granting a review is not a final order, and no leave to appeal to His Majesty can be granted from such an order. (*Oldfield and Ramesam, JJ.*) P. S. NARAVANA IYER *v.* BIYARI BIVI. **69 I. C. 977= 16 M. L. W. 623=1922 M. W. N. 731= 32 M.L. T. 98=A. I. R. 1923 Mad. 57= 43 M. L. J. 559.**

———*Final order, meaning of—Order determining the competency of a person to apply for probate without deciding the right to grant.*

An order to be final must finally determine the rights of the parties. An order which only determines the competency of an incorporated body as a judicial person, to apply for probate but does not determine whether it would be entitled to a grant of it if it applies is not final within S. 109. (*Lindsay, J. C. and Wazir Hasan, A. J. C.*) SRI KRISHNA DAS *v.* BENARES HINDU UNIVERSITY. **60 I. C. 208=23 O. C. 324.**

—S. 109—Fit case.

———*Question of general importance—Right to carry procession.*

Where a declaration that Mahomedans should be authorized to take out "duldul" procession on 4th day of Moharram of every year without any obstruction or interference is the relief sought for, the matter is of general importance to both the communities Hindus and Mahomedans and is in language of S. 109, otherwise a fit case for appeal to His Majesty in Council. (*Mears, C. J. and Sen, J.*) SUBHAN MOCHI *v.* BABU RAM SINGH. **122 I C. 415= A. I. R. 1930 All. 121.**

———*Question of general importance—But the law already settled by Privy Council.*

Although a matter may be of general importance, if the question of law involved in the appeal has been settled definitely by a judgment of the Privy Council the case should not be sent to Privy Council for a fresh decision on the same point. (*Mears, C. J. and Mukerji, J.*) RAM KUMAR *v.* MUHAMMAD SALIM.

1929 A. L. J. 241=A. I. R. 1929 All. 339.

———*Meaning of—No merit in appeal—Third party's rights affected.*

Under S. 109 (*c*) the High Court must be satisfied that the case is a fit one for appeal ; that means that the High Court must be satisfied that having regard to all the circumstances of the case it is right and proper to grant the certificate of leave. The mere fact that the point raised in the appeal affects third parties is no ground for enabling a person, whose case is devoid of merit, to further agitate the question. (*Ramesam and Venkatasubba Rao, JJ.*) RAMALINGA MUDALI *v.* RAMASWAMY IYER. **119 I. C. 595= A. I. R. 1929 Mad. 696.**

———*High Court affirming judgment of lower Court —High Court ignoring rule regarding recitals in ancient documents.*

Where High Court affirms the judgment of lower Court and gives a finding against a party in respect of the existence of necessity for the alienations of lands made by a Hindu widow without advertence to the rule regarding recitals in ancient documents laid down by the Judicial Committee, a petition praying for a certificate under S. 109 (*c*) may be granted, as the point raised is one of law. A. I. R. 1920 P. C. 64 ; A. I. R. 1916 P. C. 110 ; A. I. R. 1925 Mad. 673 and A. I. R. 1926 Mad. 692, Ref. (*Venkatasubba Rao and Madhavan Nair, JJ.*) TAYAMMA *v.* VARADACHARYULU.

A. I. R. 1929 Mad. 827.

———*Point not of public or private importance—If otherwise fit—Determination by Board of two Abidi years to be previous year for assessment—Objection to such order but not showing that there were other assessees making similar account—Leave to appeal.*

The Central Board of Revenue determined the period of the two Abidi years which ended during one calendar year to be the previous year for the purpose of assessment. It was contended by the assessee that it was not within the competence of the Board to pass such an order. The sum in dispute was about Rs. 20,000. It was not shown that there were other assessees who took as their previous year a year which is consistently less than calendar year.

Held, that the point in dispute was not of great public or private importance and the case could not be

certified to be otherwise fit for appeal to Privy Council. 23 All. 227 (P. C.) and A. I. R. 1927 P. C. 242, Ref. (*Macnair, Offg. J. C. and Jackson, A. J. C.*) M. E. R. MALAK *v.* COMMISSIONER OF INCOME-TAX.
120 I. C. 409 = A. I. R. 1929 Nag. 336.

——*Point of law settled by Full Bench.*

Where a point of law has been settled by a Full Bench so far as the Court in which leave for appeal is prayed, the fact that there is conflict between that Court and some other High Court does not render the case fit one for appeal to Privy Council. (*Waller and Madhavan Nair, JJ.*) PUNNAYYA *v.* LAKSHMI-NARAYANA. **109 I. C. 167 = A. I. R. 1928 Mad. 448.**

——*Question as to necessity of registering document containing option of re-purchase.*

A case involving the question as to the necessity of registering the documents giving an option of repurchase was held a fit case for appeal to Privy Council as the execution of documents with an option of repurchase is very common, and a considerable amount of litigation comes before the Courts in connection with them and the law on the question of necessity of registering such documents has not been clear in view of conflicting decisions. (*Fawcett and Madgavkar, JJ.*) JEVANGIRI GURU *v.* GAJANAN NARAYAN.
100 I. C. 143 = 50 Bom. 753 = 28 Bom. L R. 1437 = A. I. R. 1927 Bom. 19.

——*Decree generally not appealable.*

Where a decree passed by the High Court is such that had it been passed by a Subordinate Court, no appeal would have laid to the High Court, no leave would be granted for an appeal to His Majesty in Council against such a decree of the High Court. (*Wazir Hasan and Simpson, A. J. Cs.*) JAGMOHAN SINGH *v.* SHEO MANGAL SINGH. **90 I. C. 332 = A. I. R. 1926 Oudh 17.**

——*Question of limitation—No serious divergence of judicial opinion.*

Where the question involves was one of limitation and it appeared that there was no serious divergence of judicial opinion on the points, *held*, that it was not a fit case for appeal to the Privy Council under S. 109 (*c*) inasmuch as it did not involve a substantial question of law. (*Tekchand and Agha Haidar, JJ.*) THE MUNICIPAL COMMITTEE, LAHORE *v.* MAYA RAM.
121 I. C. 506 = 31 Punj. L. R. 17.

——*Questions of public importance or private importance to both parties—Mere question about construction of agreement.*

What is contemplated by S. 109 (*c*) is a class of cases in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases, or in which, while the right in dispute is not expressly measurable in money, it is of great public or private importance to both parties. General questions connected with the mere construction of agreements, which do not raise either far-reaching questions of law or matters of dominant public importance are not allowed to be the subject of appeal to Privy Council. Dispute between two rival temples belonging to two different sections of the Hindu community about the right of one of them to hold their processions in the streets of Madras turning on the construction of an agreement between the temples made many years ago was held to render the case a fit one. (*Schwabe, C. J. and Coleridge, J.*) N. KESAVA MUDALIAR *v.* GOVINDACHARIAR. **76 I. C. 811 = 18 M L. W. 348 = 1924 M. W. N. 3 = A.I. R. 1924 Mad. 231 = 45 M. L. J. 514.**

——*Question of great importance.*

For the grant of a special certificate the questions involved must be not merely substantial but must be of great public or private importance. 24 All. 174, 6 Bom. L. R. 403 at p. 406, 39 M. 843 at p. 845, Foll. The powers of co heirs and the doctrine of *lis pendens* are not matters of such importance as to make the case a fit one for appeal. (*Robinson, C. J. and Mac Gregor, J.*) MAUNG THWE *v.* A. L. A. R. CHETTY FIRM.
68 I. C. 690 = 11 L. B. R. 335 = 1 Bur. L. J. 62 = A. I. R. 1923 Rang. 71.

—S. 109—Interpretation.

——*Redemption decree—Appellate Court fixing a later date—Appellate decree if one of reversal.*

A decree of a High Court affirming a decree for redemption passed by a lower Court but fixing a later date for redemption and allowing the interest at bond rate to run from the expiry of the date fixing by the lower Court till the date fixed by the High Court, does not make the decision one of reversal. (*Mullick, Ag. C. J. and Jwala Prasad, J.*) MAHADEO LAL *v.* DALIP NARAYAN SINGH. **106 I. C. 243 = 9 P. L. T. 393 = A. I. R. 1928 Pat. 190.**

——*S. 104—If restricts S. 109.*

The provisions in sub-S. 2 of S. 104 deal with internal appeals within the limits of British India. The application to file an award may be made in the Court of the Subordinate Judge. If any dispute arises, and the amount at stake is below a certain figure, the appeal would lie from him to the District Judge. If it were above that figure, it would lie to the High Court. The provision is intended to prevent any appeal beyond the District Judge where the sum in dispute is small. In this respect it runs parallel with S. 100, which limits second appeals from appellate decrees by District Judges. That section deals with decrees only while the decisions on arbitration questions are styled orders. There is therefore nothing in S. 104 to take away the general right of appealing to the Crown given by S. 109. (*Lord Phillimore.*) RAMLAL HARGOPAL *v.* KISANCHANDRA. **83 I. C. 531 = 1924 M. W. N. 79 = 7 N. L. J. 62 = 34 M. L. T. 62 = 19 M. L. W. 549 = 20 N. L. R. 33 = 51 I. A. 72 = 22 A. L. J. 386 = 51 Cal. 361 = 26 Bom. L. R. 586 = 28 C. W. N. 977 = 5 L. R. P. C. 216 = A. I. R. 1924 P. C. 95 = 46 M. L. J. 628 (P.C.).**

——*'Affirming'.*

The decision of the appellate Court affirms the decision of the Court below if the decree is affirmed, even though the appellate Court may have reached the same conclusion on different grounds. (*Daniels and Lyle, A. J. Cs.*) MOHAMMED ALI KHAN *v.* GAZANFAR ALI KHAN. **70 I. C. 283 = 25 O. C. 277 = A. I. R. 1923 Oudh 49.**

—S. 109—Leave to appeal.

——*Question of law—Subject-matter not capable of being valued in money.*

The mere existence of a substantial and important question of law does not justify certification under S. 109 (*c*). Leave to appeal under that section can be granted when the subject-matter in dispute is also such as cannot be reduced into actual terms of money. A. I. R. 1921 P. C. 25, Rel. on.; 23 All. 415 (P. C.), Ref. (*Macnair, Offg. J. C. and Munie, A. J. C.*) CHUNNILAL *v.* GULABCHAND. **128 I. C. 430 = 12 N. L. J. 170 = A. I. R. 1930 Nag. 91.**

——*Community assessed for its income—Reference answered against the community—Leave to appeal to the Privy Council sought—Question whether constitution of the community amounts to a trust of wakf.*

A provision in S. 109, Cl. (*c*), C. P. Code, is clearly intended to meet special cases, such, for example, as those in which the point in dispute is not measurable by money, although it may be of great public or private importance.

The representative and head of the Atba-e-Malak Badar community residing at Mehdibagh Nagpur, was assessed with a sum of Rs. 2,000 as the income-tax payable on assessed income of the community for a certain year, and the reference, which was made under S. 66, Income-tax Act (XI of 1922), by the Commissioner of Income-tax, Central Provinces, was answered against the community and leave to appeal to their Lordships of the Privy Council was sought.

Held, that leave should be granted as an all-important legal question was involved as to the nature of the constitution of the community and as to whether its constitution amounted to a trust or a wakf. 23 All. 227 (P. C.) ; 38 All. 188 ; 15 Bom. L. R. 1021 and A. I. R. 1924 Mad. 231, Foll. (*Findlay, J. C. and Prideaux, A. J. C.*) MD. IBRAHIM RAZA *v.* COMMISSIONER OF INCOME-TAX. **109 I. C. 129 = A. I. R. 1928 Nag. 202.**

——*Interlocutory orders—Exceptional cases of great public or private importance.*

Chatterjea, J.—The power of the Court to deal with applications under Cl. (*c*) of S. 109 should be exercised only in exceptional cases of great public or private importance.

Rankin, J.—Although interlocutory orders are within the ambit of Cl. (*c*) of S. 109 and their having some public or private importance may take the place of a high money value as a ground for leave to appeal, does not give the party complaining a right to take the matter to England but the desirability of taking interlocutory orders on appeal to England involves practical considerations of a special character. 21 C. L. J. 281 and A. I. R. 1922 Cal. 479, Expl. (*Chatterjee and Rankin, JJ.*) BINOY KRISHNA MUKARJI *v.* SATISH CHANDRA GIRI. **103 I. C. 561 = 31 C. W. N. 540 = A. I. R. 1927 Cal 481.**

——*Income-tax Act (XI of 1922) amended by (24 of 1926), S. 66-A (2)—Question of great public or private importance.*

The newly added S. 66-A (2) to the Income-tax Act is in terms the same as S. 109 (*c*) of the C. P. Code. Inasmuch as a reference under S. 66 of the Income-tax Act postulates the existence of a question of law, it is perfectly clear that the intention of the Legislature in adding S. 66-A to the Income-tax Act was to enable an appeal to His Majesty in Council in cases in which the High Court could certify that the question of law involved was one of great private or public importance. 23 All. 227 ; A. I. R. 1924 Mad. 231 ; A. I. R. 1923 Mad. 232 ; A. I. R. 1921 Pat. 33, Ref. (*Broadway and Zafar Ali, JJ.*) DELHI AND GENERAL MILL CO. *v.* COMMISSIONER OF INCOME-TAX. **100 I. C. 97 = 8 Lah. 269 = 28 P. L. R. 443 = A. I. R. 1927 Lah. 181.**

——*Law already settled by Privy Council.*

When there is a Privy Council decision setting the law on a point, the case annot be certified as a fit case involving a substantial question of law. (*Mears, C. J. and Lindsay, J.*) RAGUBIR SINGH *v.* NATHUMAL. **92 I. C. 1013.**

——*Decree not open to objection under O. 47, R. 7.*

Where a decree passed by the High Court on review was not open to objection on some ground recognised by O. 47, R. 7 the case cannot be certified as a fit case under C. P. Code, S. 109 (*c*). (*Wazir Hasan and Simpson, A. J. Cs.*) JAGMOHAN SINGH *v.* SHEOMANGAL SINGH. **90 I. C. 332 = A. I. R. 1926 Oudh 17.**

——*Probate proceedings—Opposite party recognizing applicant to be proper party—Right of applicant to appeal.*

The applicant filed a caveat in the Court of first instance and the opposite party did not apply to have caveat discharged. In other words the opposite party recognized that the applicant was a proper party to the probate proceedings. The opposite party appealed to High Court and he made the applicant party respondent to the appeal. The opposite party succeeding in appeal the applicant applied for leave to appeal to Privy Council.

Held, the High Court was not competent to enter upon the question whether the applicant had any *locus standi* to maintain the application. (*Das and Adami, JJ.*) GENDANONI DEBYA *v.* RAGHUNANDAN SINGH. **91 I.C. 768 = 7 P.L.T. 287 = 1925 P. H. C. C. 337 = A. I. R. 1925 Pat. 712.**

——*'Private importance'—Matter of small value.*

The duty of the Court if it thinks that the case is a fit one for consideration by His Majesty in Council where it would not be right to call upon one party whose financial interest in the matter is too small to incur the risk of the costs of the appeal, is to refuse leave and to leave the appellant, if so advised to apply to the Privy Council for special leave.

Per *Coutts Trotter, J.*—Where amounts at stake in the cases are in themselves small, the most satisfactory order would be to allow the appellant to appeal and get his principle settled for him on terms of paying all the other sides' costs in any event ; but this Court has no power to make such an order. It is best to regard their Lordships of the Judicial Committee when they speak of "private importance" as meaning private importance to both parties to the litigation and not only to one of them. (*Schwabe, C. J., Coutts Trotter and Kumaraswami Sastri, JJ.*) RAJA OF RAMNAD *v.* TIRUNEELAKANTAM. **72 I. C. 250 = 32 M. L. T. 126 = 17 M. L. W. 775 = 1923 M. W. N. 415 = A. I. R. 1923 Mad. 232 = 44 M. L. J. 217.**

——*Question whether decision of Inam Commissioner or surveyor is binding on owners of estates is not—If one of general importance.*

The petitioner for leave to appeal to His Majesty wanted to raise the question whether or not the decision of the Inam Commission in 1865 and that of Deputy Superintendent of Survey 1876 as regards the surveys made in the private estates were binding on the owners of those estates and of the adjacent lands. *Held*, neither of these questions has affected or is likely to affect any large number of persons. The case does not involve any question the decision of which might result in a precedent governing numerous other cases or in which the right in dispute is of great public or private importance. (*Oldfield and Spencer, JJ.*) ALAGAPPA CHETTY *v.* NACHIAPPAN. **69 I. C. 385 = 1922 M. W. N. 683 = 16 M. L. W. 517 = 31 M. L. T. 335 = A. I. R. 1923 Mad. 125 = 43 M. L. J. 728.**

——*Interlocutory order of general importance.*

The " order " is obviously intended to be not merely a final "order", and the expression is wide enough to include any order. Where there is involved a matter of real importance namely, as to whether the Court has jurisdiction to make an order, the case is a fit one for appeal to His Majesty in Council under S. 109 (*c*). (*Sanderson, C. J., Thomas and Richardson, JJ.*) SHIVA PRASAD SINGH *v.* RANI PRAYAG KUMARI DEVI. **70 I. C. 519 = 26 C. W. N. 819 = A. I. R. 1922 Cal. 130.**

——*Order refusing to enrol person as legal practi-*

tioner—Legal Practitioners Act, S. 13.

An order of High Court refusing to enrol a person as legal practitioner comes under its disciplinary or administrative powers and no leave to appeal to His Majesty can be granted. 4 Pat. L. J. 423, Foll. (*Dawson Miller, C. J. and Adami, J.*) SUDHANSU BALA HAZRA, *In re.* **70 I. C. 172 = 1 Pat. 590 = 4 P. L. T. 229 = A. I. R. 1922 Pat. 603.**

——*Order of High Court refusing to require Commissioner to state a case.*

Proceedings connected with the assessment of income-tax normally and mainly are concerned with issues of fact and where neither the Commissioner nor the High Court is of opinion that any question of law has arisen in the course of the assessment, it may be that the legislature did not think it convenient or desirable that the Judicial Committee should be called upon to review an order which in the opinion of the High Court turned solely upon questions of facts. Therefore, the High Court has no jurisdiction to grant leave to appeal to His Majesty in Council from an order of the High Court under S. 66 (3) refusing to require the Commissioner to state a case. 40 Cal. 21 (P. C.), Rel. on.; A. I. R. 1927 P. C. 242; 2 Income tax Cases 30; A. I. R. 1921 Bom. 378 and A. I. R. 1923 P. C. 138, Ref. (*Page, C. J. and Ba U, J.*) CHETTYAR E. M. FIRM *v.* COMMISSIONER OF INCOME-TAX. **A. I. R. 1930 Rang. 274.**

——*Appeal against final decree—Objections to points decided in order of remand.*

A suit claiming a right of pre-emption was dismissed on the ground that the right of pre-emption could not be claimed under Mahomedan law in Burma. On appeal the High Court held, on 13th October, 1925, that under Mahomedan law the right of pre-emption did exist and remanded the case. The case then went for trial on the merits and was eventually decreed in favour of the plaintiff, and after considering the case on the merits, the High Court dismissed the appeal on the 23rd May 1927. The application for leave to appeal was filed not only on the points decided in May 1927 but also on the points decided in October 1925.

Held, that it was not competent for the petitioner to challenge the correctness of the order of October 1925 and that leave to appeal on this ground could not be given. (*Rutledge, C. J. and Brown, J.*) SYED KHAN *v.* SYED EBRAHIM. **110 I. C. 386 = 6 Rang. 169 = A. I. R. 1928 Rang. 132.**

——*Forma pauperis.*

An application for leave to appeal to Privy Council in *forma pauperis* is not maintainable. (*Ramesam and Venkatasubba Rao, JJ.*) MAHOMED USEF *v.* BALA TIRPURA SUNDARAM. **115 I. C. 832.**

—S. 109—On appeal—Meaning of.

——*Order in—Revision.*

An order passed by the High Court in exercise of its revisional jurisdiction under C. P. Code, S. 115, is not an order passed "on appeal". (*Lindsay and Kanhaiyalal, JJ.*) SURAJ SINGH *v.* PHUL KUMARI. **90 I. C. 904 = 48 All. 226 = 23 A. L. J. 997 = A. I. R. 1926 All. 202.**

—S. 109—Remand order.

——*Suit for partition—Remand to effect partition—Appeal, if lies.*

Where that trial Court ordered partition on the basis of a certain family arrangement between the parties, but the High Court in appeal held that the family arrangement was not binding and the case was remanded to effect partition according to the personal law of the parties;

Held, that the remand order was not a final order

within S. 109, that O. 43, R. 1 (*a*) does not apply to appeals to Privy Council and therefore no leave can be granted to present an appeal to Privy Council. (*Hallifax and Kotval, A. J. Cs.*) FAKHRULDIN *v.* FARIDKHAN. **88 I. C. 69 = 22 N.L. R. 132 = A. I. R. 1925 Nag. 349.**

—S. 109—Right to appeal.

——*Defendant neither filing written statement, nor taking any part in defending the suit or the appeal to High Court.*

A defendant who did not put in any written statement or take any part in the suit in the trial Court or take any part in the appeal to High Court and who chose to leave his interests entirely in the hands of the real defendants who applied and obtained a certificate for appeal to Privy Council, is not entitled to present a separate appeal to Privy Council. (*Dawson Miller, C. J. and Adami, J.*) NIRBARAN CHANDRA CHATTERJI *v.* PARTAB UDAI NATH SAHI DEO. **60 I. C. 500 = 2 P.L.T. 173 = 1921 P. H. C. C. 129 = A. I. R. 1921 Pat. 134.**

—S. 109—Scope.

——The powers granted under S. 109 (*c*) should be sparingly used. (*Dawson Miller, C. J. and Foster, J.*) F. A. SAVI *v.* SALITRI THAKURAIN. **6 Pat. 282 = 8 P. L. T. 615 = A. I. R. 1927 Pat. 363.**

——*Question of inadmissibility of unstamped acknowledgment.*

The question whether an acknowledgment was given in order to supply evidence of the debt itself within the meaning of Art. 1, Sch. I of the Stamp Act and being not stamped is not admissible in evidence, is not a question of public importance or of great private importance nor a precedent which would govern numerous other cases. (*Schwabe, C. J. and Ramesam, J.*) ANANTLAL DAMANI *v.* SURJIMULL MURLIDHAR. **78 I. C. 165 = 19 M. L. W. 372 = 34 M. L. T. 1 = 1924 M. W. N 319 = A. I. R. 1924 Mad. 616 = 46 M. L. J. 239.**

——*Order refusing application under Sec. 45—Specific Relief Act.*

An appeal lies to Privy Council from an order refusing an application under S. 45, Specific Relief Act of the Special Bench of the High Court. 26 Bom. 896 and 28 Bom, 253, Rel. on. (*Macleod, C. J. and Shah, J.*) ALCOCK ASHDOWN CO., LTD. *v.* CHIEF REVENUE AUTHORITY, BOMBAY. **64 I. C. 959 = 23 Bom. L. R. 1132 = A. I. R. 1921 Bom. 378.**

—S. 109—Special Leave.

——*Suit for defamation—No great importance.*

Cases to which Cl. (*c*) of S. 109 applies are those which involve questions, as for example those relating to religious rights, and ceremonies, to caste and family rights, or such matters as the reduction of the capital of companies, as well as questions of wide public importance in which the subject-matter in dispute cannot be reduced into actual terms of money. A.I.R. 1921 P. C. 25, Foll. Where the applicant sued for damages for defamation and his suit was dismissed in appeal on the ground of privileged communication.

Held, special leave should be refused to him as the case was not one of great importance to the general public. (*Rutledge, C. J. and Brown, J.*) MAUNG BA THAN *v.* DISTRICT COUNCIL OF PEGU. **6 Rang. 43 = 109 I. C. 697 = A. I. R. 1928 Rang. 187.**

——*Madras Estates Land Act* (1908), *S.* 52 (3)—*Contention that 'decreed' means decreed under Act.*

The contention that 'decreed' in S. 52 (3) of the Madras Estates Land Act (1908) means decreed under that Act, and that no former decree could have any operation, is not of sufficient weight to justify granting leave to appeal. (*Lord Buckmaster.*) RADHAKRISHNA AIYAR *v.* SWAMINATHA AIYAR. **44 Mad. 293 = 19 A. L. J. 161 = 23 Bom. L. R. 718 = 33 C. L. J. 277 = 25 C. W. N. 630 = 13 M. L. W. 321 = 1921 M. W. N. 119 = 60 I. C. 85 = 48 I. A 31 = 29 M. L. T. 418 = A. I. R. 1921 P. C. 25 = 40 M. L. J. 229 (P. C.).**

———*Construction of section of a Tenancy Act——Decision affecting incidentally rights of holders of tenures.*

It is not enough for granting special leave to appeal under S. 109 that a decision upon the construction of a section of a Tenancy Act such as Bengal Tenancy Act or Orissa Tenancy Act or any other, will affect incidentally the rights of those who have holdings or tenures subject to one or other of those Acts. (*Miller and Adami, JJ.*) MRITUNJOY PRAHARAJ *v.* BALMAKUND KANUNGOE. **61 I. C. 663 = 6 P. L. J. 125 = 2 P. L. T. 657 = A. I. R. 1921 Pat. 33.**

—S. 109—Substantial question of Law.

———*General rules.*

In dealing with an application for leave to appeal to the Privy Council it is the duty of the High Court under the provisions of S. 110, C. P. Code, to determine where a point of law arises for discussion on appeal to His Majesty-in-Council whether there is any substance in that point. In order to entitle the appellant to appeal there must be not merely a question of law but a substantial question of law in the appeal which it is sought to prefer to His Majesty-in-Council. (*Miller, C.J. and Adami, J.*) MT. HIRA BIBI *v.* LACHMI NARAYAN. **106 I. C. 362.**

———*Dispute between riparian owners as to right to water.*

The majority of cases between riparian owners as to the right to water in a channel give rise to questions of law or at all events to mixed questions of law and fact. (*Dawson Miller, C. J. and Adami, J.*) DULHIN SHYAM SUNDER *v.* MT. BIBI QASIMAN. **106 I. C. 538 = A. I. R. 1928 Pat. 191.**

———*Construction of document interesting parties alone.*

The words "substantial question of law" mean question of general importance and they do not include the question of the construction of a document in which the parties alone are interested. 10 O.C. 308; 24 All. 174 ; A.I.R. 1926 Oudh 381 and A. I. R. 1924 All. 559, Foll. (*Stuart, C. J. and Hasan, J.*) JAGDEO SINGH *v.* DEPUTY COMMISSIONER, PARTABGARH. **98 I. C. 164 = 3 O. W. N. 841.**

———*Effect of S. 47, C. P. Code on a particular case.*

The effect on a particular case of S. 47, C. P. Code, as debarring the plaintiff from proceeding by suit instead of in execution of a decree already obtained is not a question of law of general interest. The fact that leave has already been granted in respect of another case, involving the same question as the one in question, does not render it a fit case. 5 I. C. 583 Not Foll. (*Oldfield and Krishnan, JJ.*) SETHUPATHI *v*, ARUNACHALAM. **73 I. C. 217 = A.I. R. 1923 Mad. 602 = 44 M. L. J. 424.**

———*Order dismissing appeal as barred and refusing to extend time under Limitation Act, S. 5.*

An order dismissing an appeal as barred by limitation prescribed therefor after further refusing an application under S. 5 of the Limitation Act to admit the appeal after the prescribed time, is " passed on appeal" under S. 109.

Per *Woodroffe, J.* (*Sanderson, C. J.*, doubting). The appeal involves a substantial question of law. (*Sanderson, C. J. and Woodroffe, J.*) PROMOTHO NATH *v.* W. A. LEE. **33 C.L.J. 128 = 62 I. C. 216 = A. I. R. 1921 Cal. 415.**

S. 110.

- **Affirming Judgment.**
- **Applicability.**
- **Connected appeals.**
- **Connected suits.**
- **Consent decree.**
- **Construction.**
- **Cross appeals.**
- **Grounds for granting leave.**
- **Reserving Judgment.**
- **Substantial question of law.**
- **Valuation.**

—S. 110—Affirming Judgment.

———*Decree on award not in conformity with award as part unenforceable due to lapse of time being omitted —On appeal decree made in conformity with award—No substantial alteration—Decree one of affirmance in substance—Leave to appeal.*

The dispute between the parties in a suit was referred to arbitration and the arbitrator gave an award to the effect that the defendant should within time fixed by the arbitrator, give possession of a certain property to the plaintiff and that in default he should pay Rs. 13,000 to him. The defendant filed objections to the award which were all disallowed by trial Court and the award was ordered to be filed. But the Judge being of opinion that as at the time when he passed the order filing the award the date fixed by the arbitrator for delivering possession of the property had expired, considered that it was unnecessary to incorporate in the decree a direction relating to the delivery of possession and therefore he granted a decree to the plaintiff for Rs.13,000. The defendant preferred an appeal to the High Court and that appeal was accepted partly inasmuch as the decree was modified so as to bring it in conformity with the award. The defendant thereupon applied for leave to appeal to His Majesty in Council.

Held that the alteration made in the decree by the High Court was not of substantial nature ; on the contrary it being in substance a decree of affirmance and also as there was no question of law involved leave could not be granted : A. I. R. 1922 All. 243 ; 22 P. R. 1915 ; A. I. R. 1922 All. 89 and A. I. R. 1926 Nag. 245, Ref. (*Zafar Ali and Jailal, JJ.*) BANSI LAL *v.* GOPAL LAL. **10 Lah. 688 = 122 I. C. 90 = 30 P. L. R. 722 = A. I. R. 1930 Lah. 102.**

———*Trifling account adjustments made—Judgment agreeing with findings of the Court below—Leave to appeal.*

Where some trifling account adjustments are made in the matter of interest and the like, but the judgment on all essential points agrees with the findings of the Court below on the merits, the judgment must be treated as an affirming one : A. I. R. 1921 All. 270 ; A. I. R. 1922 All. 89, Ref. ; A. I. R. 1922 Cal. 316 and 8 C. W. N. 294, Foll. (*Findlay, J.*) S. R. PANDIT *v.* W. R. PANDIT. **110 I. C. 855 = A. I. R. 1929 Nag. 85.**

———*Suit on mortgage-deed—Claim decreed but interest after institution of suit disallowed—Appeal by mortgagor—Cross-appeal against disallowed interest by mortgagee—Decree as to interest modified in favour of mortgagee—Leave to appeal.*

In a suit on mortgage-deed, both parties were aggrieved by the direction of the lower Court as to interest and both of them took objections to the directions regarding interest which affected them respectively by appeal and cross-appeal. The appellate Court disposed of the objections of both the parties by a single decree modifying the decree of the lower Court in favour of the mortgagee and to the prejudice of the mortgagor appellants. The order read "It is ordered and decreed that this appeal be and hereby dismissed with costs and the cross-appeal be allowed. The decree of the Court below modified to this extent that interest at the bond rate shall run on the principal up to the expiry of the period of grace." In the lower Court interest up to the date of suit was allowed.

Held, that the decree of the lower Court as to interest was not affirmed but modified and the decree of the appellate Court from which an appeal to His Majesty in Council is sought is consequently a decree not of affirmance but of reversal on the question of interest involved in litigation. (*Jwala Prasad and Rowland, JJ.*) JAMUNA PRASAD *v.* JAGARNATH.
117 I. C. 193 = A. I. R. 1929 Pat. 561.

——*Suit for setting aside wakf—Allegations that deed was executed under undue influence that wakf was illusory and that there was no transmutation of possession and that certain house belonged to wakf—Court of first instance deciding all questions in plaintiff's favour and decreeing suit and also granting decree for mesne profits against the mutwali—On appeal High Court holding that house did not belong to wakf and that mutwali was entitled to remain in possession until matter was determined by Court and setting aside decree as to mesne profits—On main question Court affirming decree of trial Court but setting aside finding as to undue influence and on question of deed being illusory—Court agreeing that there was no transfer of possession as required by law—Judgment if one of affirmance.*

A suit to set aside a wakf deed executed by one *B* was brought by an heir of *B*. It was alleged that the deed was executed under the undue influence of one *A* and *Z*, and secondly that the deed was wholly illusory and had no substance in point of fact, and thirdly that there was never such transmutation of possession as required by law. It was also claimed that a certain house did not belong to *Z* but to *B*. The Court of first instance decided all points in favour of the plaintiff and gave him a decree substantially as claimed by him. The Court also gave him a decree for mesne profits against *A* who claimed to have succeeded to the office of mutwali on the death of *B*. The High Court on appeal by *A* and *Z* held that the house in question belonged to *Z*. To this extent the High Court varied the decree of the Court of first instance. The High Court also held that *A* was entitled until the matter was determined by a Court of justice to remain in possession of property and administer the estate in accordance with the strict terms of the deed. In this view the High Court set aside the decree for mesne profits passed against *A*. To this extent also this Court varied the decree passed by the Court of first instance. On the main question, however, the Court affirmed the decree of the Court of first instance; but in doing so it set aside the findings of the Court of first instance both on the question of undue influence and also on the question whether the wakf deed was illusory. It agreed, however, with the Court of first instance in holding that there was not such transfer of possession as the law required and that consequently the wakf deed could not be given effect to.

Held, that the decree appealed from could not be regarded as having affirmed the decision of the Court immediately below. (*Das and Wort, JJ.*) ALI LAMIN *v.* MAHOMED AKBAR ALI KHAN. **116 I. C. 541 = 9 P. L. T. 731 = A. I. R. 1928 Pat. 609.**

——*Affirmance of lower Court's decree.*

In order to affirm the decision of the Court below within the meaning of the section it is sufficient for the appellate Court to affirm the decree: 25 All. 109 (P.C.). Foll. (*Stuart, C. J. and Raza, J.*) BISUHNATH KUAR *v.* SHEO BAHADUR SINGH. **102 I. C. 433 = 4 O. W. N. 613 = A. I. R. 1927 Oudh 535.**

——*Different findings but decree confirmed.*

When the High Court maintains the decree of the lower Court, it affirms the decision of the lower Court even though the two Courts differ in their findings on certain issues. 25 All. 109 (P. C.), Foll. (*Martineau and Zafar Ali, JJ.*) DHANPAT RAI *v.* KAHAN SINGH.
92 I. C. 479 = 26 P. L. R. 614.

——*Decree varied partly—Application for leave only from that part affirming the lower Court's decree.*

Where some variation in the decree was effected by the Appellate Court and the applicants desire to appeal against the decision in so far as the Court affirmed the decision of the lower Court.

Held, that the decision of the Appellate Court is one affirming the decision of the lower Court within S. 110. (*Findlay, O. J. C. and Prideaux, A. J. C.*) GHULAM ABBAS *v.* GOVINDRAO. **91 I. C. 200 = A. I. R. 1926 Nag. 245.**

——*Decision is based on different grounds.*

Where the High Court in dismissing an appeal proceeded in some respects, on grounds different from those adopted by the Trial Court, the decision of the High Court amounts to an affirmation of the decree of the First Court within the meaning of S. 110, 24 O. C. 164 Foll. (*Dalal, J. C. and Neave, A. J C.*) MD. SHER KHAN *v.* MT. KAMAL-UN-NISSA. **83 I. C. 90 = A. I. R. 1925 Oudh 219.**

——*Decree affirming decree of the Court below with variation.*

The Trial Court decided that in the suit, as framed, it was not open to it to direct a conveyance to the plaintiffs of the mortgaged properties. Judges of High Court came to the conclusion that in that suit as framed, it was open to the Judge of First Court to direct a conveyance of the mortgaged property to the plaintiffs and they directed by their judgment that the mortgaged properties should be included in the conveyance.

Held, under the circumstances, it is impossible to hold that the decree of High Court affirmed the decision of the Court below, and it is not necessary for the petitioner to show that any substantial question of law is involved. (*Sanderson, C.J. and Richardson, J.*) NAGENDRABALA DASI *v.* DINANATH MAHISH. **70 I. C. 933 = 26 C. W. N. 651 = A. I. R. 1923 Cal. 215.**

——*Affirmance with variation.*

Neither a variation made on the merits in petitioner's favour nor a variation as to costs not touching the merits of the case against the appellant can make the decree in appeal any the less an affirming one. (*Spencer and Krishnan, JJ.*) VADIVELAMMAL *v.* RAJARATNAM MUDALIAR. **16 M. L. W. 262 = 30 M. L. T. 337 = A. I. R. 1923 Mad. 30.**

——*Modification in favour of applicant—Other portions concurrent—Decree if an affirming one.*

Where the modification is in favour of the applicant and does not afford him a right to appeal and there is in substance an adverse concurrent decision of both of the Courts as regards the portion of the claims which is decided against him, the decree of the High Court is an affirming decree. (*Mears, C. J. and Banerji, J.*) CHANDRASEKHAR *v.* MT. AMEER BEGAM.
66 I. C. 721 = A. I. R. 1922 All. 243.

——*Lower Court decree affirmed with slight modification as to rate of interest—Decree, if one of affirmance—Leave to appeal.*

When the High Court, in a mortgage-suit, affirmed the decree of the Lower Court as to the substance, but merely changed the rate of interest, on application for leave to appeal to His Majesty.

Held, the modification of the decree as to the rate of interest was a modification in favour of the applicant as to which he could not appeal. Therefore his application for leave to appeal related to the portion prejudicial to him but which was a decree affirming the decision of the Court below and not modifying it. Looking to the substance, the subject-matter of the appeal to His Majesty in Council, was that portion of the decree in respect of which the decree of the High Court was a decree in affirmance of decree of the Court below. Therefore the applicant was not entitled as of right to appeal to His Majesty in Council. (*Mears, C. J. and Banerji, J.*) KAMAL NATH *v.* BITHAL DAS. **64 I. C. 916 = 44 All. 200 = 20 A. L. J. 9 = A. I. R. 1922 All. 89.**

———*Confirmation except as to costs—Decree, if one of affirmance.*

Where the High Court merely exercises its discretion as regards the costs of the suit in the lower Court and it entirely confirms the decision of the lower Court on the merits of the case, its decree merely affirms the decision of the Court below within the meaning of S. 110. (*Sanderson, C. J. and Mookerjee, J.*) CHAITANYA CHARAN SET *v.* MOHAMMAD YUSUF. **66 I. C. 407 = 34 C. L. J. 299 = A. I. R. 1922 Cal. 316.**

———*No question of law—Leave to appeal.*

As the High Court held that there was legal necessity for a portion, it varied the decree of the lower Court, allowing the whole claim in favour of the plaintiff reversioner on the ground that the sale was without legal necessity. The defendant-purchaser applied for leave to appeal to His Majesty in Council.

Held, no question of law arose and value of the appeal is value of the property as to which legal necessity was proved. (*Dawson Miller, C. J. and Mullick, J.*) BISHUN PRASAD SINGH *v.* NARSINGH DAS. **68 I. C. 663 = 3 Pat. L. T. 550 = A. I. R. 1922 Pat. 555.**

———*High Court's decree confirming finding as to defendant's liability but slightly altering amount due—Decree if one of affirmance.*

In a suit on hundis, both the Courts concurred in holding that the person who signed the hundis for defendant was authorized to do so and thus the one defence raised by the defendant was decided against him by both Courts. But the High Court modified the decree by deducting a certain amount due to 'an admitted mistake in the decree and by allowing to plaintiff interest at a higher rate. The plaintiff thus obtained in the result a decree for a slightly higher amount than that decreed by the lower Court.

Held, that the lower Court's decree was modified by that of the High Court and so the latter was not a decree of affirmance.

Where the decree of the highest Court in India does not affirm the decree passed by the lower Court, the Court is not entitled to consider the extent to which the said decree has been modified, 9 I.C. 1040 and 10 O.C. 65, Foll. (*Mears, C. J. and Gokul Prasad, J.*) BHAGWAN SINGH *v.* ALLAHABAD BANK, LTD. **64 I. C. 3 = 19 A. L. J. 3 = 43 All. 220 = A. I. R. 1921 All. 270.**

———*Decree affirmed on different grounds.*

It is sufficient for the purpose of S. 110 in order to "affirm the decision of the Court below" to affirm the decree, though the affirmation may not proceed on the grounds on which its judgment was passed. 25 All. 109 (P.C.), Foll. (*Kanhaiyalal and Daniels, A. J. Cs.*)

AHMAD MIRZA BEG *v.* MT. ABADI BEGAM. **63 I.C. 292 = 24 O.C. 164 = A.I.R. 1921 Oudh 111.**

—S. 110—Applicability.

———*Order dismissing appeal for contempt—Leave to appeal.*

A person in contempt cannot be heard in prosecution of his own appeal until he purges his contempt, and his appeal, as it is not proper to keep the other party before the Court for an indefinite period, *i.e.*, till he purges his contempt, can be dismissed. A petition, therefore, for leave to appeal to Privy Council against such dismissal is not maintainable: *Ricketts* v. *Morington*, (1834) 7 Sim. 200 and *Gordon* v. *Gordon*, (1904) P. 163, Dist.; *Republic of Libera* v. *Imperial Bank*, 9 Ch. App. 569, Rel. on. (*Phillips and Reilly, JJ.*) PALANIAPPA CHETTY *v.* RAMAN CHETTY. **117 I.C. 724 = 1928 M.W.N. 462 = A. I. R 1929 Mad. 672.**

———*'Otherwise fit'—Question when debt becomes bad.*

The question whether an assessee has an absolute option to decide in what year a debt due to him or any of that debt is to be treated as irrecoverable and therefore to affect an amount of profits received in that year is of great public importance and the case is "otherwise" fit for appeal to the Privy Council: A.I.R. 1927 P.C. 242 and 23 All. 227 (P.C.), Ref. (*Macnair, Offg. J. C. and Jackson, A. J. C.*) COMMISSIONER OF INCOME-TAX, NAGPUR *v.* S. M. CHITNAVIS. **119 I.C. 689 = A. I. R. 1929 Nag. 265.**

———*Decree—Judgment of High Court granting probate.*

Judgment of High Court granting probate is a decree and a final decree, and an appeal lies to Privy Council: 12 B.L.T. 87, Diss. from: 21 Cal. 1 (P. C.); 22 Cal. 519 (P. C.); 23 Cal. 1 (P. C.); and 24 Cal. 30, Ref. (*Rutledge, C.J. and Carr, J.*) VELLASWAMY SERVAI *v.* L. SEVARAMAN SERVAI. **99 I.C 759 = 5 Rang. 119 = 5 Bur. L. J. 176 = A. I. R. 1927 Rang. 56.**

———*Suit to recover enhanced rent of occupancy holding—If involves claim or question to or respecting the holding.*

In a suit for recovery of rent at an enhanced rate under S. 30 of the Bengal Tenancy Act as well as for additional rent under S. 52 of that Act against an occupancy tenant, the holding is not the subject-matter of the suit and of the appeal. The subject-matter of the suit and of the appeal is the plaintiff's claim to recover the enhanced rent and the additional rent under S. 52. A.I.R. 1923 P.C. 102, followed. Neither does such suit involve directly or indirectly a claim or question to or respecting the holding within S. 110. (*Sanderson, C.J. and Walmsley, J.*) PROMADA NATH ROY BAHADUR *v.* BASIRUDDIN QUAZI. **82 I.C. 744 = A.I.R. 1925 Cal. 414.**

———*Claim inclusive of interest* pendente lite *and amount provided by O. 34, R. 2 is Rs.* 10,000.

Where all that is sought to be added to the definite ascertainable amount at the date of the filing of the plaint is interest *pendente lite* and the amount provided for under O. 34, Rr. 2 and 4, if those three amounts when added together exceed Rs. 10,000, the case is one within the section. (*Mears, C. J. and Piggott, J.*) GAJADHAR MAHTON *v.* AMBIKA PRASAD TIWARI. **69 I.C. 645 = 45 All. 133 = 20 A.L.J. 903 = A. I. R. 1923 All. 78.**

———*Subject-matter if includes property covered by other similar deeds.*

Where on the record it is not clear whether the judgment will govern other similar deeds like the one in suit, the property covered by the other deeds is not part of subject-matter. (*Sanderson, C.J. and B. B. Ghose, J.*)

BHUPENDRA NARAYAN SINGH *v.* NURPUT SINGH. **84 I.C. 581 = 27 C. W. N. 204 = A. I. R. 1923 Cal. 451.**

———*General rule.*

The conditions imposed by the first paragraph of the section are meant to apply to all cases where nothing is involved in the decision except that which is the subject matter of the suit. In such cases the second paragraph of the clause can have no operation and both the conditions imposed by the first paragraph must be complied with. 44 Cal. 119 Expl. 39 Mad. 843 Rel. on. (*Dawson Miller, C.J. and Coutts, J.*) RAMYAD SINGH *v.* RAMBILAS SINGH. **62 I.C. 959 = 2 P.L.T. 463 = 1921 P.H.C.C. 229 = 6 P.L.J. 596 = A. I. R. 1921 Pat. 229.**

———*Final order—Order setting aside a dismissal of suit for default.*

An order of the High Court setting aside an order dismissing the suit for want of prosecution is a final order within S. 110. 21 C.L.J. 279 Foll. 23 All. 220 (P.C.) Dist. (*Dawson Miller, C. J. and Adami, J.*) LACHMI NARAIN MARWARI *v.* BALMAKUND MARWARI. **60 I.C. 479 = 6 P.L.J. 116 = 2 P.L.T. 155 = A.I.R. 1921 Pat. 37.**

—S. 110—Connected Appeals.

———*High Court's decree in main appeal affirming lower Court's decree—Cross-appeal allowed and composite decree drawn up—Right to appeal to Privy Council.*

Where the High Court's decree in the main appeal confirms that of the lower Court, the mere fact that a cross-appeal has been allowed and the lower Court's decree modified accordingly does not give the right of appeal to the appellant who otherwise would not have that right. 16 A.L.J. 864, Foll. (*Phillips and Odgers, JJ.*) RAMANATHAN *v.* SUBRAMANIAN. **97 I. C. 592 = 24 M.L.W. 455 = 1927 M.W.N. 65 = A.I.R. 1926 Mad. 1024 = 51 M. L. J. 295.**

—S. 110—Connected suits.

———*Suits decided by distinct judgments—Appeal to Privy Council.*

The two suits in question involved substantially the same questions for determination, and were determined in first Court by two distinct judgments but in the High Court they were no doubt originally heard together and decided by one judgment. But afterwards in one appeal there was an application for review of that judgment and eventually that appeal was reheard on review and another judgment was given.

Held, the suits cannot be said to be decided by one judgment, though the judgment on review did not in any way modify the other portion of the earlier judgment in any way. (*Oldfield and Krishnan, JJ.*) SETHUPATHI *v.* ARUNACHALAM. **73 I.C. 217 = A.I.R. 1923 Mad. 602 = 44 M.L.J. 424.**

—S. 110—Consent decree.

———*Agreement of parties—Question of fact or law.*

A dispute as to whether two parties have agreed or not to a certain decree is not in general a question of law. Still less is it a substantial question of law. It is in general a pure question of fact. (*Marten, C. J. and Murphy, J.*) CHHIPA ALLARAKHA ISAKJI *v.* BAI SONA. **114 I.C. 372 = 30 Bom. L.R. 1610 = A.I.R. 1929 Bom. 68.**

—S. 110—Construction.

———*Consent decree—No substantial question of law.*

Where the question related to the construction of a consent decree and it appeared that the Court had given certain directions regarding the enforcement of the decree.

Held, that there was no substantial question of law

involved so as to sustain this grant of leave to appeal to the Privy Council. (*Rankin, C. J. and Buckland, J.*) RAJA PRAMATHA NATH MALIA *v.* V. H. LOW & CO. **51 C.L.J. 270.**

———*"Indirectly"—Meaning of.*

A suit is not said to involve claim 'indirectly" simply because similar questions may arise in other estates or in connection with other like things in the same province. If the decision of an issue in a particular case makes the decision of the same issue in other cases *res judicata*, or some such similar connexion can be shown, then alone the value of other disputed matters may be taken into account: 45 Mad. 475 (P.C.), and A. I. R. 1926 Mad. 696, Rel. on. (*Kumaraswamy Sastri and Ramesam, JJ.*) SECRETARY OF STATE *v.* SANNIDHIRAJU SUBBARAYUDU. **1929 M.W.N. 602 = 30 M.L.W. 946 = A.I.R. 1929 Mad. 780 = 57 M.L.J. 477.**

———*"So far as may be" in S. 66-A (3) of the Income-tax Act—Privy Council appeal.*

The words "to be a fit one for appeal to His Majesty in Council" coupled with the words "so far as may be" in para. 3, S. 66-A, exclude from any right of appeal cases which fall within the requirements of S. 110 of the Code and are operative to confine that right to cases which are certified to be otherwise fit for appeal to His Majesty in Council: A.I.R. 1927 P.C. 242, Foll. (*Macnair, Offg. J. C. and Jackson, A. J. C.*) M.E.R. MALAK *v.* COMMISSIONER OF INCOME-TAX. **120 I.C. 409 = A.I.R. 1929 Nag. 336.**

———*"Subject-matter"—"Property"—Meaning of.*

The words "subject-matter" and "property" used respectively in Cls. 1 and 2 cannot be treated as synonymous terms. The word "property" in Cl. (2) is used there with a view to indicate property not in suit or dispute, which may be, directly, or indirectly, involved: A.I.R. 1925 P. C. 159, Foll. (*Kinkhede and Staples, A. J. Cs.*) SETH BHAWARLAL *v.* LACHMANDAS. **A.I.R. 1929 Nag. 75.**

———*"Immediately below"—Meaning of.*

The words "immediately below" in S. 110 do not necessarily mean "subordinate to." Where, therefore, a Division Bench of the High Court affirms a decision of a single Judge, and the case involves no question of law, no leave can be granted: 33 Cal. 918 (P.C.), Foll. 43 Cal. 90, Diss. from. (*Shadi Lal, C. J. and Zafar Ali, J.*) MINNA HEATHERLY *v.* B. C. SEN. **109 I.C. 863 = A.I.R. 1928 Lah. 537.**

———*"Directly or indirectly"—Meaning of.*

The words "directly or indirectly" cannot possibly be stretched to cover a claim which is quite distinct in its character and to which there is an irrelevant reference in the plaint. They refer to suit in existence and not to suits in *gremio futuri*. 24 All. 236 Appl. (*Rutledge, C.J. and Chari, J.*) BON KWI *v.* S.K.R.S.K.R. FIRM. **95 I.C. 377 = 5 Bur. L.J. 45 = A.I.R. 1926 Rang. 128.**

———*Principles.*

No real mischief can arise from not allowing a very wide construction of S. 110 because such cases, if worthy of being tried by a higher tribunal, can always be dealt with under sub-section (*c*) of S. 109. (*Lord Dunedin.*) UDOYCHAND *v.* GUCZDAR & CO. **88 I. C. 445 = 22 M.L.W. 255 = 30 C.W.N. 98 = 27 Bom.L.R. 867 = 52 Cal. 650 = 52 I. A. 207 = 41 C. L. J. 623 = A. I. R. 1925 P. C. 159 = 49 M. L. J. 20 (P. C.).**

———*" Decision "—Affirms.*

The word ' decision ' means the decision of the suit by the Court. It is not necessary that the Appellate Court should also affirm the grounds of fact upon which the judgment was based. It is immaterial that appellate

Court comes to a different conclusion on the question of fact, if the conclusion is affirmed. (*Robinson, C. J. and MacGregor, J.*) SEN, S. N. *v.* ABDUL AZIZ TAR MAHAMAD. **77 I. C. 400 = 11 L. B. R. 410 = 1 Bur. L. J. 215 = A. I. R. 1923 Rang. 55.**

———" *Involve directly......of Rs.* 10,000 *in value* " —*Meaning of.*

The words " must involve, directly or indirectly, some claim or question to or respecting property of upwards of Rs. 10,000 in value " in S. 110, evidently refer to questions arising between parties to the suit and not to questions affecting the title of one of the parties to the suit or suits that can hereafter be brought but are not now pending. (*Spencer and Kumaraswami Sastri, JJ.*) RAJA OF RAMNAD *v.* KAMITH RAVUTHAN. **66 I. C. 686 = 1922 M. W. N. 46 = 15 M. L. W. 140 = 30 M. L. T. 42 = A.I.R. 1922 Mad. 34 = 42 M. L. J. 78.**

—S. 110—Cross-appeals.

———*Appeal and memo of cross-objections—When constitute separate cross-appeals and the judgment in one affirming and the other reversing.*

The memorandum of objections can be treated as a separate cross-appeal only if the appeal and the memorandum of objections are such as must be treated as forming two independent proceedings relating to distinct sets of facts.

Plaintiff sued the trustee of a temple asking for a general account with respect to the trusteeship, but alleged in the plaint eight specific charges of malversation. In the lower Court the subject-matter of the trial was the eight specific charges, some of which were found in favour of the trustee and the others against him. The trustee appealed with respect to the charges found against him and the plaintiff filed his cross-objections. The High Court, however, holding that there was no liability for general account dismissed the whole suit.

Held, that the appeal and the cross-objections could not be treated as two independent appeals inasmuch as the eight charges were not independent but only particulars of the same claim for general account; and consequently the decree of the High Court could not be split up so as to hold that one part of it, *viz.*, about cross-objections was affirming judgment and the other about appeal a reversing one, and therefore though cross-objections alone related to an amount below Rs. 10,000 the whole suit was for over Rs. 10,000; certificate ought to be granted. 41 Mad. 904 (F.B.); A.I.R. 1921 Mad. 405; A.I.R. 1926 Mad. 1024; 8 C. W. N. 294; A.I.R. 1927 Cal. 543 and 1916 M.W.N. 122, Discussed. (*Phillips and Odgers, JJ.*) K. SHANMUGASUNDARA MUDALIAR *v.* S. RATNAVELU MUDALIAR. **121 I.C. 16 = 29 M.L.W. 623 = 1929 M. W. N. 304 = 52 Mad. 521 = A.I.R. 1929 Mad. 429 = 56 M.L.J. 476.**

—S. 110—Grounds for granting leave.

———*Mortgagee succeeding in his mortgage suit except on question of interest—Both mortgagee and mortgagor appealing to High Court—Mortgagor's appeal dismissed and that of mortgagee accepted—Mortgagor applying for leave under S.* 109—*No question of law.*

The mortgagee sued the mortgagor for ejectment, arrears of rent and interest thereon. The suit was decreed except on the question of interest. From this decision both parties appealed to the High Court. The appeal of the mortgagor was dismissed and that of the mortgagee was accepted with a variation as to the question of interest. The mortgagor applied for leave to appeal to His Majesty in Council from this appellate decision.

Held, that the variation in the appellate decree took place as a result of the decision of the appeal filed by the mortgagee and it could not entitle the mortgagor to the certificate asked for, unless he was able to show that a substantial question of law was involved. 97 I. C. 592 and 16 A.L.J. 864, Foll.; A. I. R. 1929 Pat. 551 and A.I.R. 1922 M. 429, Dist. (*Zafar Ali and Bhide, JJ.*) ASA RAM *v.* KISHEN CHAND. **123 I.C. 523 = 31 P.L.R. 236 = A.I.R. 1930 Lah. 554.**

—S. 110—Leave to appeal.

———*Decree of High Court partly affirming and partly varying decree of lower Court—Appeal against item of Rs.* 18,000 *for appeal on which leave was asked affirmed—No question of law.*

Court of the first instance decreed plaintiff's claim in part. On appeal the High Court modified the decree by finding a sum of Rs. 2,488 due by the defendants to the plaintiff. In both Courts an item of Rs. 18,000 referred to as a havala item was refused. Plaintiff moved the High Court for leave to appeal to the Privy Council as regards that item. There was no question of law involved.

Held, that under the circumstances on true construction of S. 110 it is necessary that as the decree appealed from affirmed the decision of the Court below, on this item, the appeal must involve some substantial question of law before it can be admitted. A.I.R. 1925 P.C. 60; A.I.R. 1921 All. 270, Dist. (*Marten, C. J. and Murphy, J.*) KAPURJI MAGNIRAM *v.* PANNAJI DEBICHAND. **119 I.C. 771 = 31 Bom L.R. 619 = A.I.R. 1929 Bom. 359.**

———Forma pauperis—*Application by community.*

High Court cannot grant leave to appeal to His Majesty in Council *in forma pauperis* especially when the petition for leave is on behalf of a whole community because the whole community cannot be said to be poor. 42 Mad. 32, Foll. (*Ramesam and Venkatasubba Rao, JJ.*) MUHAMMAD USEOF *v.* VADLAMANNATY BALA TIRPURASUNDARAM. **115 I. C. 832 (Mad).**

———*Misapplication of law.*

It is only when a case is of larger importance and the principle, when finally decided by their Lordships of the Privy Council, will be of benefit not only to the people who are directly involved in the litigation, but to a considerable body of other people that leave to appeal should be granted. Misapplication of law to the particular facts of the case is not a fit ground for granting leave to appeal to His Majesty in Council, A.I.R. 1921 P.C. 25; 23 All. 227 (P.C.); A.I.R. 1928 All. 61, Foll. But see A. I. R. 1927 P. C. 110. (*Mears, C. J. and Mukerji, J.*) RUCHCHA SAITHWAR *v.* HANSRANI. **50 All. 640 = 108 I. C. 238 = 26 A.L.J. 336 = A.I.R. 1928 All. 220.**

———*Concurrent finding but for different reasons.*

Where there are concurrent findings as to a question of fact, though for different reasons, it is nevertheless a finding of fact, and leave to appeal to the Privy Council will not be granted. (*Beasley and Curgenven, JJ.*) JULIEN MARRET *v.* MD. KHALEEL SHIRAZI AND SONS. **103 I.C. 31 = 1927 M.W.N. 213 = 39 M.L.T, 15 = A.I.R. 1927 Mad. 443 = 53 M.L.J. 375.**

———*Affidavit as to value of property—No counter-affidavit filed—Grant of certificate.*

Where an affidavit that the decree involves a claim respecting property exceeding ten thousand rupees in value, is filed and there is no counter-affidavit by the respondents, the High Court may assume that petitioners affidavit is correct. (*Shadi Lal, C.J. and Le Rossignol, J.*) WAZIR CHAND *v.* NATHU RAM. **94 I.C. 554 =**

C. P. CODE, (1908), S. 110—Leave to appeal.

26 **P.L.R.** 123 = **A. I. R. 1926 Lah. 416.**

———*Settled Buddhist law—Right of lesser wife living apart from her husband—No substantial question of law.*

The decisions of the Rangoon High Court following, as they do, successive decisions of the Highest Court in Upper Burma are consistent with the law was stated in the Manukye Dhamma that Vol. X, S. 42 as regards the rights of an inferior or lesser wife when living apart from her husband and should be regarded as setting the law on the point and is not a substantial point of law. (*Rutledge, C.J. and Brown, J.*) MA THAN *v.* MA KYIN. **94 I.C. 464 = 3 Rang. 656 = A.I.R. 1926 Rang. 111.**

———*Appeal to High Court dismissed for want of prosecution.*

Where the applicant's appeal to the High Court is dismissed for want of prosecution, leave to appeal to the Privy Council cannot be granted. (*Rutledge, C. J. and Brown, J.*) MA THAN *v.* MA KYIN. **94 I.C. 464 = 3 Rang. 656 = A.I.R. 1926 Rang. 111.**

———*Party transferring her interest in subject-matter of suit to a third person—No substantial point of law involved.*

Where though the application was made in the name of the party to appeal but the party had parted with all interest in the subject-matter of the suit,

Held, that in these circumstances unless the High Court were satisfied that a substantial point of law was involved, it would not be disposed to assist a gambler in litigation at the expense of the legal heirs to the estate. (*Rutledge, C. J. and Brown, J.*) MA THAN *v.* MA KYIN. **94 I.C. 464 = 3 Rang. 656 = A.I.R. 1926 Rang. 111.**

———*Declaration that a document is void—Value over Rs. 10,000—Grant of certificate.*

The High Court reversed the decree of the trial Court and granted a declaration that the deed in question was void, and that the plaintiff was entitled to the possession of the property mentioned in the deed.

Held, that it is not necessary for the purpose of an application for leave to appeal to His Majesty to inquire into the question as to whether the property actually handed over to defendant applicant is worth Rs. 10,000 or not, if whatever the value of that property may be, it is clear that the whole of the property as to which the question arose in the appeal and in respect of which the decree has been passed in High Court is worth more than Rs. 10,000, and that certificate to appeal must therefore issue. (*Shah and Crump, JJ.*) PYARIBIBI *v.* HASANALLI. **A.I.R. 1923 Bom. 59.**

———*Disciplinary proceedings—Suspension of Vakil from practice.*

No leave to appeal to His Majesty in Council can be granted against an order suspending a Vakil from practice, which is a disciplinary matter and not a judgment. (*Schwabe, C. J., Coutts-Trotter, Kumaraswami Sastri, Krishnan and Ramesam, JJ.*) RAGHAVA REDDI, *In re.* **69 I.C. 290 = 16 M.L.W. 328 = 1922 M.W.N. 530 = 31 M.L.T. 173 = A.I.R. 1922 Mad. 440 = 43 M.L.J. 382 (F. B.).**

———*Grant based on exercise of discretion—Contents of certificate.*

Certificates, when they are made in exercise of the discretion conferred, should make plain upon their face that the discretion has in fact been exercised. (*Lord Buckmaster.*) MAHARAJ BAHADUR SINGH *v.* BALCHAND CHOWDHURY. **62 I. C. 320 = 13 M. L. W. 365 = 1921 M. W. N. 87 = 2 P. L. T. 132 = 29 M. L. T. 156 = A. I. R. 1921 P.C. 128 (P.C.).**

C. P. CODE, (1908), S. 110—Substantial question of law—Adoption.

———*Affirming judgment—Substantial question of law involved—But value less than Rs. 10,000—Grant of leave.*

If the value is less than Rs. 10,000 and the would-be appellant to His Majesty in Council has lost his case in both the lower Courts he cannot, except in very exceptional cases, get a certificate though a substantial question of law is involved. (*Robinson, C.J. and Macgregor, J.*) ALIBHAI MAHOMED *v.* B. I. S. N. CO., LTD. **62 I. C. 71 = 10 L. B. R. 307.**

—S. 110—Reversing judgment.

———*Part of decree affirmed and part varied—Value of appeal.*

Where decision of the appellate Court affirms part of the decree of the lower Court and is at variance as to a part, appeal is not limited to part at variance only. A.I.R. 1925 P. C. 60, Expl. (*Jwala Prasad and Rowland, JJ.*) JAMUNA PRASAD *v.* JAGARNATH. **117 I. C. 193 = A. I. R. 1929 Pat. 561.**

———*Substantial alteration—Incidental or unsubstantial alteration—Test.*

A decree which substantially alters the decree of the Court below cannot be said to be decree affirming that decision. In cases where the variation is of unsubstantial nature or of incidental character as in the case of the costs the decree passed is a decree of affirmance. Limitations have been placed upon the principle that in construing a decree as to whether it is one of affirmance or of reversal or variation one should look to the substance of the decree and see what is the subject-matter of the appeal to His Majesty in Council. (*Jwala Prasad and Rowland, JJ.*) JAMUNA PRASAD *v.* JAGARNATH. **117 I. C. 193 = A. I. R. 1929 Pat. 561.**

———*Mortgage decree—Extension of period of grace in appeal.*

In every case, when an appeal is preferred against a preliminary mortgage decree, a decision by the appeal Court dismissing the appeal renders the mortgagor liable to a larger sum. Much more so is this the case when the period of grace is extended, but the order of the High Court cannot be regarded as an order of reversal for purposes of S. 110. (*Mullick, Ag. C. J. and Wort, J.*) MOHAMMAD TAHARA ALI KHAN *v.* DALIP NARAIN SINGH. **103 I. C. 703 = A. I. R. 1927 Pat. 379.**

S. 110—Substantial question of law.

Adoption.
Compromise.
Construction of documents.
Custom.
Discretion.
Dismissal.
Evidence.
Execution.
Interpretation.
Limitation.
Mortgage.
Pre-emption.
Specific performance.
What is not.

—S. 110—Substantial question of law—Adoption.

———*Suit by widow—Subsequent adoption reserving right of management to widow—Adopted boy not impleaded—Leave to appeal.—No question of law.*

The question, whether a suit was not maintainable, because a previous action commenced by the predecessor in interest of the plaintiff had abated under O. 22, R. 9, is not a substantial question of law within the meaning of S. 110. A suit was instituted by a Hindu widow in possession of the estate of her late husband. During the pendency of the suit she adopted a son. At some stage in the trial the question was raised whether, after this adoption, it was not incumbent upon the lady to bring upon the record as plaintiff in the suit the name of the minor boy and then to continue the action as his next friend. The contention was repelled by the trial Court. There was at the time of the adoption an agreement between the lady herself and the father of the boy, the effect of which was to vest the management, at any rate, of the estate in the hands of the lady until the boy should attain majority.

Held the question whether the widow could be allowed to proceed with the suit was not substantial question of law. (*Mears, C. J. and Piggott, J.*) BU ALI KHAN *v.* (RANI) SUJAN KUER. **75 I. C. 100 = 45 All. 667 = 21 A. L. J. 665 = 4 L. R. A. Civ. 298 = A. I. R. 1924 All. 66.**

—S. 110—Substantial question of law—Compromise.

———*Hindu widow as executrix.*

The question as to whether a Hindu widow *qua* executrix can compromise, is not a substantial question within the meaning of S. 110. (*Sanderson, C. J. and Panton, J.*) SUDHIR CHANDRA *v.* INDUMATI CHAUDHURANI. **43 C. L. J 206 = A. I. R. 1926 Cal. 711.**

—S. 110—Substantial question of law—Construction of documents.

———*Inalienability of property.*

The question as to whether the mortgaged property is Ghatwali and inalienable is a point of law as it depends upon construction of documents on the record. (*Jwala Prasad and Rowland, JJ.*) JAMUNA PRASAD *v.* JAGIRNATH. **117 I.C. 193 = A. I. R. 1929 Pat. 561.**

———*Difficulty.*

Construction of a difficult document such as an indemnity bond is a mixed question of law and fact; and as regards the law it is a substantial question. (*Beasley and Curgenven, JJ.*) JULIEN MARRET *v.* MAHOMED SHIRAZI & SONS. **1927 M. W. N. 213 = 39 M. L. T. 15 = 103 I. C. 31 = A. I. R. 1927 Mad. 443 = 53 M. L. J. 375.**

———*Circumstances.*

The interpretation of a document may amount to a substantial question of law but that depends on the circumstances of every document. (*Dalal, J. C. and Neave, A. J. C.*) MD. SHER KHAN *v.* MT. KAMAL-UN-NISSA. **83 I. C. 90 = A. I. R. 1925 Oudh 219.**

———*General interest.*

The interpretation of documents involving a substantial question of law and of general interest only justifies grant of leave. 12 All. 387, Foll. (*Mears. C. J. and Piggott, J.*) BISHAMBAR NATH *v.* MD. UBAIDULLAH. **79 I. C. 213 = 46 All. 227 = 5 L. R. A. Civ. 158 = A. I. R. 1924 All. 559.**

———*When important.*

Mere questions of construction of particular documents cannot be treated as questions of general importance or substantial questions of law within the meaning of S. 110. (*Kanhaiya Lal, J. C. and Simpson, A.J.C.*) SARSUTI PRASAD *v.* MUNSHI EHTISHAM ALI. **73 I. C. 407 = A. I. R. 1922 Oudh 214.**

—S. 110—Substantial question of law—Custom.

———*Sufficiency of evidence.*

Whether the evidence produced to establish the custom of the adoption of a daughter's son in the city of Nagpur amongst the Maharashtra Brahmins was sufficient does not amount to substantial question of law within S. 110. A. I. R. 1924 Lah. 473, Rel. on. (*Baker, J. C. and Prideaux. A. J. C.*) JAGESHWAR TUKARAM *v.* PANDURANG. **90 I. C. 270 = A. I. R. 1926 Nag. 215.**

———*Question of forfeiture on alienation of Karamkari and Adimayavana tenures—General interest.*

The question whether the permanent tenures known as Karamkari and Adimayavana in Malabar have the incident of forfeiture on alienation attached to them by custom or not is a substantial question of law and one of general interest in Malabar. Leave may be granted in these cases under S. 109 (*c*), as the question raised is a substantial question of law of general interest in Malabar and as the same question arose in second appeals in which High Court had already given leave. The question whether a custom has been established or not is a question of law though it has to be inferred from the facts proved. A. I. R. 1922 M. 274 (F. B.), Ref. (*Krishnan and Venkatasubba Rao, JJ.*) RAJA OF CALICUT *v.* KANNAN NAIR. **72 I C. 918 = 17 M. L. W. 445 = A. I. R. 1923 Mad. 443.**

—S. 110—Substantial question of law—Discretion.

———*Discretion—Right or wrong exercise of discretion.*

A wrong exercise of discretion in refusing to grant leave under Clause 12 of the Letters Patent to file an additional written statement is not a substantial question of law. Whether discretion has been rightly or wrongly exercised by the High Court may in some cases involve a question of law; but it cannot be said that any substantial question of law within the meaning of Clause 3 of Section 110 of the C. P. Code would arise in such a case. (*Macleod, C.J. and Shah, J.*) GOVINDLAL BANSILAL *v.* BANSILAL MOTILAL. **77 I. C. 941 = 24 Bom. L. R. 196 = A. I. R. 1922 Bom. 11.**

———*Time to make up Court-fee.*

The Court has discretion to grant or refuse to grant time for making up deficient Court-fee, and whether a Court has used proper discretion in a particular case is a substantial question of law. (*Shadi Lal, C. J. and Moti Sagar, J.*) SAGAR CHAND *v.* DEWAT RAM. **63 I. C. 222 (Lah.).**

—S. 110—Substantial question of law—Dismissal.

———*Laches and irregularities in filing—No question of law.*

Where the High Court dismissed an appeal on the ground of laches and certain irregularities in filing the appeal on the part of the appellant;

Held, that the only question for the Judicial Committee being whether the High Court was right in dismissing the appeal in the exercise of discretion, there was no substantial question of law involved. (*Sanderson, C. J. and Mookerjee, J.*) MARIUM BEGUM *v.* BANKU BEHARY. **33 C L. J. 131 = 62 I. C. 205 = A. I. R. 1921 Cal. 94.**

—S. 110—Substantial question of law—Evidence.

———*Affirming judgment — Subject-matter over Rs. 10,000.*

Although subject-matter of a suit may be above Rs. 10,000, if the decree of the lower Court is affirmed by the High Court and there is no variation of any kind in the substantive portion of the decree except the awarding of costs in original suit, there is no right of appeal to the Privy Council unless the suit involves some substantive question of law. 10 O. C. 65, Affirmed. (*Stuart, C. J. and Raza, J.*) MATHURA SINGH *v.* BADRI NARAIN SINGH. **5 O. W. N. 1076 = 114 I. C. 320 = A. I. R. 1929 Oudh 43.**

C. P. CODE, (1908), S. 110—Substantial question of law—Evidence.

———*Partition suit—Lower Court granting certain share—High Court on appeal increasing it—No further grievance to plaintiff—Proof of question of law.*

If the two Courts, High Court and lower Court, are at one upon the matter which is to be in debate before the Privy Council, then it is a case of a decree which affirms the decision of the Court immediately below. Where the amount is a question in dispute, the fact that the Courts differ and that the higher Court differs in favour of the applicant, may not mean that the decision is one of affirmance, but where in a suit for partition, the lower Court granted certain share and High Court increased it further, so that the plaintiff has no further grievance in that matter, he cannot, without showing a substantial question of law, have a right to litigate upon other points upon which both the Courts have been in agreement. A. I. R. 1925 P. C. 60, Not Foll. ; 8 C. W. N. 294 (P. C.), Foll. (*Rankin, C. J. and C. C. Ghose, J.*) NARENDRA LAL DAS *v.* GOPENDRA LAL DAS. **45 C. L. J. 426 = 31 C. W. N. 572 = 103 I. C. 65 = A. I. R. 1927 Cal. 543.**

———*Admission of further evidence on a point given up in the lower Court.*

The term 'decision' means the decree or order passed and not the reasons given for passing such decree or order Affirming decree does not mean affirming judgment, *i.e.*, the grounds of the decree need not be precisely stated ; therefore, even when there are no concurrent findings of fact cl. 3 of S. 110 may apply and in that case some substantial question of law will have to be shown to have been involved in the appeal. Where the appellate Court allows an issue to be re-opened which had been given up and permits further evidence to be taken that by itself is not a sufficient substantial question of law especially where the applicant was in no way prejudiced by the procedure adopted by the appellate Court. (*Dawson Miller, C. J. and Mullick, J.*) MAN SINGH *v.* MAHARANI NAWALHBATI. **75 I. C. 58 = 5 P. L. T. 17 = 2 Pat. L. R. Civ. 48 = A. I. R. 1924 Pat. 468.**

———*Affirming judgment with variation by consent.*

Where the decree of the High Court is one of affirmation except as regards a variation made in the lower Court's decree with the consent of the persons trying to appeal to the Privy Council, those persons must show that some substantial question of law is involved. (*Sanderson, C. J. and Richardson, J.*) UMA CHARAN *v.* KANAI LAL. **25 C. W. N. 775 = 66 I. C. 621 = A. I. R. 1921 Cal. 81.**

—S. 110—Substantial question of law—Execution.

———*Decree transferred for execution—Application for substitution made to second Court—Maintainability of, if a question of law.*

The question, whether an application made for substitution to a Court to which execution is transferred is, according to law, a substantial question of law within S. 110. (*Dalal, J. C. and Misra, A. J. C.*) JANG BAHADUR *v.* BANK OF UPPER INDIA, LTD., LUCKNOW. **88 I. C. 552 = A. I. R. 1925 Oudh 728.**

—S. 110—Substantial question of law—Interpretation.

———*Difference of opinion.*

A question in order to be a substantial question of law must be a question of law in respect of which there may be a difference of opinion. A. I. R. 1924 Lah. 473 and A. I. R. 1921 All. 214, Foll. (*Addison and Bhide, JJ.*) FEROZE DIN *v.* NAWAB KHAN. **110 I. C. 258 = 9 Lah. 581 = 29 P. L. R. 529 = A. I. R. 1929 Lah. 55,**

C. P. CODE, (1908), S. 110—Substantial question of law—Interpretation.

———*Law on particular point unsettled.*

Where a law on a particular point does not seem to have ever been laid down by the Privy Council, the question does not cease to be a material question of law merely because cases involving somewhat similar points have been dealt with by the Privy Council so as to disentitle a party to leave appeal to Privy Council. A. I. R. 1928 All. 61, Dist.; 24 Mad. 377; A. I. R. 1914 P. C. 27; A. I. R. 1916 P. C 139 and A. I. R. 1924 Rang. 214 (F. B.), Ref. (*Heald and Mya Bu, JJ.*) MAUNG SHWE AU *v.* MA THE NU. **7 Rang. 271 = 119 I. C. 218 = A. I. R. 1929 Rang. 280.**

———*General or particular importance.*

A substantial question of law, within the last clause of S. 110, does not mean a substantial question of general importance, but a substantial question of law as between the parties in the case involved. A. I. R. 1927 P. C 110, Ref. (*Lord Parmoor.*) GURANDITTA *v.* T. RAMDITTA. **55 Cal. 944 = 55 I. A. 235 = 32 C. W. N. 817 = 29 P. L. R. 429 = 48 C. L. J. 119 = 28 M. L. W. 66 = 5 O. W. N. 668 = 109 I. C. 723 = 30 Bom. L. R. 1384 = 26 A. L. J. 1215 = 1928 M. W. N. 917 = A. I. R. 1928 P. C. 172 = 55 M. L. J. 651 (P. C.).**

———*Application of settled law.*

The application of well-defined legal principles to a particular set of facts is not a question of law which can fairly be described as substantial. (*Mears, C. J. and Lindsay, J.*) MATHURA KURMI *v.* JAGDEO SINGH. **50 A. L. J. 208 = 25 A. L. J. 970 = 107 I. C. 33 = A. I. R. 1928 All. 61.**

———*General interest.*

Whether, where a case involves a substantial question of law within S. 110, the question should be of general interest. A. I. R. 1927 P. C. 110, Ref. (*Mears, C. J. and Lindsay, J.*) BHAGWANT LAL *v.* SRI RAM CHANDRA NAIK. **103 I. C. 654 = A. I. R. 1928 All. 19.**

———*General importance.*

The phrase "substantial question of law" in S. 110, C. P. Code, means a substantial question of law as between the parties to the proceeding and not merely one of general importance. (*Findlay, J. C.*) VINAYAK NARAYAN *v.* SAKHARAM LAXMAN. **106 I. C. 531 = A. I. R. 1928 Nag. 114.**

———*Meaning of.*

The term "substantial question of law" merely means such a question as between the parties in the case involved. A. I. R. 1927 P. C. 110, Foll. (*Findlay, J.C. and Macnair, A. J. C.*) RAMLAL LODDI *v.* INDRARAJ SINGH. **23 N. L. R. 156 = 106 I. C. 366 = A. I. R. 1928 Nag. 76.**

———*General importance.*

A substantial question of law does not mean a question of general importance but the words "substantial question of law" mean a substantial question of law as between the parties in the case involved. (*Viscount Dunedin.*) RAGHUNATH *v.* DY. COMMR., PARTABGARH. **2 Luck. 93 = 54 I. A. 126 = 31 C. W. N. 495 = 4 O. W. N. 515 = 102 I. C. 889 = 26 M. L. W. 70 = 1927 M. W. N. 519 = A. I. R. 1927 P. C. 110. (P. C.).**

———*Inheritance of "Lawa-jama" in Berar—Question of public importance.*

The question whether the inheritance of the cash allowances known comprehensively in Berar as "lawajama" is governed by the Inam Rules or by the law relating to ordinary pensions, was held to be a question of considerable public importance. (*Hallifax and Mitchell,*

C. P. CODE, (1908), S. 110—Substantial question of law—Interpretation.

A. J. Cs.) SAHEBRAO *v.* JAYWANT RAO.
96 I. C. 751 = A. I. R. 1927 Nag. 63.

———*Re-opening of settled account for mistake.*

Where the question of mistakes in a settled account was not raised in the pleadings nor considered in the trial Court and no evidence was given to explain the mistakes, but the High Court on appeal considered the mistakes to be sufficient to enable the Court to re-open that account,

Held, that the question whether mistakes, which though not material, are sufficient in the circumstances to entitle the Court to re-open a settled account, is a question of law and the manner in which the case was conducted in the trial Court, that is to say, no question being raised therein as to mistakes and no opportunity being given to the parties to explain the alleged mistakes, is also in itself a question of law of sufficient importance for determination by a higher tribunal. (*Dawson Miller, C. J. and Kulwant Sahay, J.*) HIRA LAL SAHU *v.* LACHMI PRASAD NARAINSINGH.
102 I. C. 752 = A. I. R. 1927 Pat. 311.

———*Difference of opinion.*

A substantial question of law means a question of law in respect of which there may be a difference of opinion. A. I. R. 1924 Lah. 473, Foll. (*Martineau and Zafar Ali, JJ.*) DHANPAT SINGH *v.* KAHAN SINGH. **92 I. C. 479 = 26 P. L. R. 614.**

———*Binding nature of a document by Hindu widow.*

Where the question between the parties was whether certain documents executed by a Hindu widow were binding on the estate and the reversioner,

Held, that the question was not a substantial question of law and that the case was not otherwise fit for appeal to His Majesty in Council. (*Mears, C. J. and Lindsay, J.*) BHAGWANT LAL *v.* SRI RAM CHANDRA NAIK.
103 I. C. 654 = A. I. R. 1928 All. 19.

———*Difference of opinion.*

A question of law in respect of which there may be a difference of opinion constitutes a substantial question of law within S. 110. (*Baker, J. C. and Prideaux, A. J. C.*) JAGESHWAR TUKARAM *v.* PANDURANG.
90 I. C. 270 = A. I. R. 1926 Nag. 215.

———*Difference of opinion.*

In order to justify the grant of a certificate for leave to appeal to His Majesty in Council, the High Court must be satisfied that a substantial question of law is involved in the case; that is to say, a question of law in respect of which there may be a difference of opinion. 43 All. 513, Ref. (*Baker, J. C. and Prideaux, A. J. C.*) NAGARMAL *v.* ABDUL RAHMAN.
89 I. C. 941 = A. I. R. 1926 Nag. 5.

———*Proposition of law.*

The point of law for granting leave for appeal to Privy Council must be a question of law and not merely a proposition of law. (*Hasan, Raza and Kendall, JJ.*) MT. SARTAJ KUAR *v.* MAHADEO BAKHSH.
1 Luck. 265 = 29 O. C. 215 = 3 O. W. N. 557 = 95 I. C. 193 = A. I. R. 1926 Oudh 381 (F. B.).

———*No substantial question of law need be involved if there is a small variation by the Appellate Court in the Lower Courts' decree.*

Where the appellate Court increased the amount of maintenance payable to defendant from Rs. 800 to Rs. 1,200 a year and in other respects confirmed the Lower Court's decree.

Held, for purposes of appeal to Privy Council no substantial question of law 'need be Involved, as the lower Court's decree was not 'affirmed' but 'varied' by the appellate Court. (*Lord Dunedin.*) ANNAPURNABAI *v.* RUPRAO. **86 I. C. 504 = 51 Cal. 969 = 51 I. A. 319 = A. I. R. 1925 P. C. 60 (P. C.).**

C. P. CODE, (1908), S. 110—Substantial question of law—Limitation.

———*General interest—Debatability.*

Where the grounds of appeal raise questions of law but they are not substantial in the sense that they are debatable, of general interest or without previous decisions of their Lordships of the Privy Council to guide Indian Courts, leave cannot be granted. (*Dalal and Neave, A. J. Cs.*) HARI KISHEN DAS *v.* MAHAMAD SHAFI. **85 I. C. 409 = A. I. R. 1925 Oudh 545.**

———*Difference of opinion.*

The question whether the evidence produced to establish certain custom is sufficient though technically a question of law is not a substantial question of law justifying grant of certificate for appeal to Privy Council. A substantial question of law is one in respect of which there may be a difference of opinion. 43 All. 513, Ref. (*Abdul Raoof and Campbell, JJ.*) GOKAL CHAND *v.* SANWAL DAS.
78 I. C. 417 = 5 Lah. 260 = 6 L. L. J. 180 = A. I. R. 1924 Lah. 473.

———*General interest.*

The question involved must generally be important in the way that the decision of them will affect a large number of persons. (*Batten, J.C.*) MOHAN LAL BALBHADRA *v.* BISSESARDAS DAGA. **73 I.C. 221 = A.I.R. 1923 Nag. 272.**

———*Question involving discretion.*

The exercise of discretion under S. 90 of the Evidence Act cannot be considered to involve any substantial question of law within the meaning of S. 110 of the C.P. Code. (*Kanhaiya Lal and Daniels, A.J.Cs.*) SHANKAR BAKHSH SINGH *v.* UDIT NARAIN SINGH.
61 I.C. 131 = 8 O.L.J. 1 = A.I.R. 1921 Oudh 30.

—S. 110—Substantial question of law--Limitation.

———*Deduction of period of pendency of opponent's suit—Question if substantial.*

After institution of *B*'s suit *L* brought a cross-suit or another suit to establish his right to an easement. At the time when *L* brought his suit, which was some months later than the institution of the opponent's suit, the period of 20 years had elapsed and it was held that it was not open to him to add on to the period which had expired at the time of the institution of the opponent's suit, subsequent period after the institution of that suit.

Held, that although there was a point of law it was not a substantial question of law. (*Patkar and Baker, JJ.*) LALLUBHAI PRAGJI *v.* BHIMBHAI DAGIBHAI.
119 I.C. 782 = 53 Bom. 552 = 31 Bom. L.R. 632 = A.I.R. 1929 Bom. 341.

———*Refusal to exercise discretion to extend time for payment of court-fee—Question if substantial.*

The question of law need not be one of importance, but must be a substantial question of law between the parties to the case, where the trial court, in the exercise of its discretion, refuses to extend the time for putting in court-fees, it can hardly be said that the question is a substantial question of law arising between the parties to the case. It is more a question between the court and the plaintiff. A.I.R. 1927 P.C. 110, Foll.; 5 Lah. 260, Not Foll. (*Harrison and Dalip Singh, JJ.*) GODHA MAL *v.* PREM SINGH. **110 I.C. 179 = A.I.R. 1928 Lah. 560.**

———*Revival after* 1871 *of claim barred by limitation before* 1871.

The revival after 1871 of a claim to malikana which had been barred by limitation before 1871 on the ground of its being a claim to an interest in land is not

a substantial question of law within S. 110. (*Dawson Miller, C.J. and Kulwant Sahay, J.*) RAMNIRANJAN CHAUDHURY *v.* GOBARDHAN THAKUR.
85 I.C. 8 = 1 Pat. L.R. 314 = A. I. R. 1924 Pat. 271.

—S. 110—Substantial question of law—Mortgage.

———*Mortgage not registered by company—Question if one of law.*

The question whether a mortgage which is not registered in accordance with the provisions of S. 109 can be repudiated by the company itself while it is a going concern, is not a substantial question of law within S. 110, C.P. Code, as the law on the question is perfectly clear, namely that such a mortgage cannot be repudiated by the company itself. *In re Monolithic Building Company*; *Tacon* v. *The Company*, (1916), 1 Ch. 643, Dist. (*Heald and Mya Bu, JJ.*) AUNG BAN ZEYA *v.* CHETTIAR FIRM. **104 I.C. 326 = 6 Bur. L.J. 160 = 5 Rang. 585 = A.I.R. 1927 Rang. 288.**

———*Right of prior mortgagee in possession to apply under O. 21, R. 89—Question if one of law.*

Whether a prior mortgagee in possession can apply under O. 21, R. 89 to set aside a sale where such a sale has taken place in pursuance of a decree obtained by a subsequent mortgagee of a simple mortgage in a suit to which the prior mortgagee was not a party and whether cl. (*b*) of S. 72, T.P. Act applies to such a sale are substantial questions of law within the meaning of S. 110, C.P. Code. (*Wazir Hasan and Simpson, A.J.Cs.*) JAGAN NATH SINGH *v.* JAG JEWAN DAS.
91 I.C. 93 = 2 O.W.N. 860 = A.I.R. 1926 Oudh 17.

—S. 110—Substantial question of law — Pre-emption.

———*Question whether demand was immediate if one of law.*

Where there was an interval of perhaps a minute between the time when the pre-emptor heard of the sale and the time when he made the demand, the High Court held that this was to all intents and purposes an immediate demand by the pre-emptor. It was argued on an application for leave to appeal that this view was opposed to the strict letter of the law as laid down in a passage from the Hedaya, and that the right of pre-emption is a special right and is of such a nature that all the technicalities prescribed by law must be strictly complied with before it can be exercised.

Held, that from this point of view the point is an arguable one and it is an important point of law affecting the right of Mahomedans generally and that there is a substantial point of law, on which leave to appeal should be granted. (*Rutledge, C.J. and Brown, J.*) SYED KHAN *v.* SYED IBRAHIM. **6 Rang. 169 = 110 I C. 386 = A. I.R. 1928 Rang. 132.**

———*Estate comprising in part, however small, of movable property—Question of applicability of law of pre-emption if one of law.*

The point whether, with regard to an estate comprising in part however small of movable property the law of pre-emption applies, is a substantial point of law. (*Rutledge, C.J. and Brown, J.*) SYED KHAN *v.* SYED EBRAHIM.
6 Rang. 169 = 110 I. C. 386 = A. I. R. 1928 Rang. 132.

—S. 110—Substantial question of law—Specific Performance.

——— *Question of the exercise of discretion under S. 21 (g), Specific Relief Act, if one of law.*

Whether the first Court exercised a reasonable discretion in granting the decree for specific performance

having regard to the terms of S. 21 (*g*), and whether any discretion was left to grant such a decree involves a substantial question of law and satisfies the requirements of S. 110, C. P. Code. (*Findlay, J.C. and Prideaux, A. J. C.*) INDRAJ SINGH *v.* KOMAL RAJ SINGH.
A. I. R. 1928 Nag. 292.

—S. 110—Substantial question of law—What is not.

A substantial question of law does not mean a substantial question of general importance but a substantial question of law as between the parties in the case involved (54 I. A. 126, Foll.) (*Patkar and Baker, JJ.*) MAHOMEDALLI ISUBHAI *v.* ABDUL RAHIM.
112 I. C. 430 = 32 Bom. L. R. 1189.

———*Question relating to immaterial findings.*

Where in a suit some findings involve questions of law, but they are quite immaterial to the decision of that suit which of itself does not involve any question of law, no appeal lies to the Privy Council. (*Findlay, J.C.*) S. R. PANDIT *v.* W. R. PANDIT. **110 I.C. 855 = A. I. R 1929 Nag. 85.**

———*Untenable point of law.*

The proposition that, although the point of law may be obviously untenable, if the decision in the case turns upon it, that point would be a substantial point of law, is not tenable. (*Venkatasubba Rao and Reilly, JJ.*) ANEECHAND NAGIN DOSS & CO. *v.* RAOJI BHAI MOTI BHAI. **39 M. L. T. 655 = 107 I. C. 643 = A. I. R. 1928 Mad. 233.**

———*Inferences from fact.*

Whenever the decision of a certain fact is based to some extent on inferences from other facts it cannot be said that a substantial question of law is involved. (*Findlay, J.C. and Macnair, A.J.C.*) RAMLAL LODHI *v.* R. B. INDRARAJ SINGH. **23 N. L. R. 156 = 106 I. C. 366 = A. I. R. 1928 Nag. 76.**

———*Question not directly decided but well established from other cases.*

Although a point has not ever been directly decided by any decision of Courts in India, if it is well established upon the principles which have been laid down in such cases, it is no substantial question of law for decision by a higher tribunal. (*Dawson Miller, C. J. and Mullick, J.*) SOMAR SINGH *v.* DEVENANDAN PRASAD SINGH. **110 I. C. 483 = A. I. R. 1928 Pat. 581.**

———*Question of time limit to certify adjustment of decree settled by a Full Bench.*

The question whether there is a time limit for a decree-holder to certify adjustment under R. 2 is not a substantial question of law when a Full Bench of the Bombay High Court (11 Bom. 6, F. B.) specifically decides it and its judgment is obviously correct. (*Stuart, C. J. and Wazir Hasan, J.*) PRAKASH SINGH *v.* ALLAHABAD BANK, LTD. LUCKNOW BRANCH.
98 I C. 1069 = 3 O. W. N. 987 = A.I.R. 1927 Oudh 43.

———*Matter already settled by Privy Council decision.*

Where authoritative decisions of the Privy Council exist on a matter and that matter is re-agitated in any Court, that matter can no longer be said to remain a substantial question of law. (*Hasan, Raza and Kendall, JJ.*) MT. SARTAJ KUAR *v.* MAHADEO BAKHSH.
1 Luck 265 = 29 O. C 215 = 3 O. W. N. 557 = 95 I C. 193 = A. I. R. 1926. Oudh 381 (F.B.).

———*Question as to intention of legatees signing as witnesses.*

The question whether the legatees signing the will as witnesses did not intend to attest the will is not a substantial question of law. (*Daniels, J. C. and Wazir Hasan, A. J. C.*) SHIAM SUNDAR SINGH *v.* JAGANNATH SINGH. **88 I.C. 579 = 2 O.W.N. 394 = A.I.R. 1925 Oudh 541.**

——*Question of procedure disallowing new plea in second appeal.*

Where the suit was one for specific performance of a contract for sale and had been instituted on the last possible day of limitation that is to say, exactly three years from the date of the contract for sale and it was strongly contended for the first time in second appeal that under these circumstances a decree for specific performance ought not to be granted more especially as there was an alternative plea for relief by way of damages, and the High Court decided that as a matter of procedure it was not right or proper to permit the plea to be raised at the stage of second appeal,

Held, that a point of procedure of this sort is not a proper one for an appeal to His Majesty in Council. (*Mears, C.J. and Piggott, J.*) OUDH NARAYAN SINGH *v.* KAULESHWAR SINGH. **76 I. C. 516 = A. I. R. 1923 All. 463.**

——*No public importance.*

Where from the record it is not clear whether resumptions by several strangers were for exactly the same grounds as those in suit, the case does not involve questions of wide public importance. (*Sanderson, C.J. and B. B. Ghose, J.*) BHUPENDRA NARAIN SINGH *v.* NURPUT SINGH. **84 I. C. 581 = 27 C .W. N. 204 = A. I. R. 1923 Cal. 451.**

S. 110—Valuation.

Acquiescence.
Computation of.
Costs.
Interest.
Mesne profits.
Objection to.
Practice.
Standard of.

—S. 110—Valuation—Acquiescence.

——*Plaintiff under valuing his suit—Defendant acquiescing in the valuation—Effect of.*

The plaintiffs valued their suit at less than Rs. 10,000 and defendants objected to the valuation but did not press their objection and the suit was decided, plaintiff's valuation being accepted. Defendants put the same value on their appeal to the District Judge and their appeal was allowed. Plaintiffs appealed to the High Court and the decree of the District Judge was reversed. Defendants applied for leave to appeal to His Majesty in Council and applied for a report under O. 45, R. 5, contending that the value of the subject-matter was more than Rs. 10,000.

Held, that the defendants acquiesced in the valuation placed upon the subject-matter of the suit by the plaintiffs and obtained the advantage of an appeal to the lower appellate Court as a ground for appeal to His Majesty in Council, and having regard to the facts of the case it is not one in which High Court ought to refer the matter to the Court of first instance for a report as to the value of the subject-matter of the suit. (*Sanderson, C. J. and Buckland, J.*) RAMESHWAR KHEMKA *v.* SIDDESHWAR GHOSH.
101 I. C. 901 = 45 C.L.J. 225 = A.I.R. 1927 Cal. 418.

——*Valuation of trial Court not challenged by appeal or by cross objections.*

When the decision is given against a party he must be taken to have acquiesced in it if he neither by appeal nor by cross objections questions the trial Court's decision before the appellate Court. The valuation of the subject-matter in dispute in the original Court must be held to be binding upon the party and it is not open to such party on an application for leave to appeal to the Privy Council to re-open that question. 6 Bom. L.R. 403, Appl. (*Rutledge, C.J. and Brown, J.*) M. E. MOOLLA *v.* LEAN SHIAMSWAMY.
4 Rang. 92 = 5 Bur. L. J. 23 = 96 I. C. 107 = A.I.R. 1926 Rang. 138.

——*Under-valuation by plaintiff—Decision of three Courts on that basis—Repudiation for purpose of appeal to Privy Council.*

The plaintiff having deliberately undervalued his suit in the Court of first instance and having thus obtained the decision of three Courts in this country upon his claim, cannot be allowed to repudiate his valuation fixed upon the market value of the property, for the purpose of obtaining the decision of a fourth tribunal. (*Oldfield and Spencer, JJ.*) ALAGAPPA CHETTY *v.* NACHIAPPAN. **69 I.C. 385 = 31 M.L.T. 335 = 16 M.L.W. 517 = 1922 M.W.N. 683 = A.I R. 1923 Mad. 125 = 43 M.L J. 728.**

——*No objection as to valuation—Effect of.*

Defendants who accept the value of property for purposes of jurisdiction cannot be heard to question that value subsequently. The value of the property is a question of fact. It is not proper for a party by an admission as to a lower valuation to suffer an appeal to be heard by a single Judge and then to claim a higher valuation for the purpose of obtaining an appeal to the Privy Council. (*Ashworth and Simpson, A. J. Cs.*) BHAGWATI PRASAD *v.* ACHHAIBAS SINGH.
74 I.C. 214 = 9 O.L.J. 531 = 26 O. C. 24 = A.I.R. 1923 Oudh 93.

—S. 110—Valuation—Computation of.

——*Lessee—Building—Liability to removal.*

The question whether a decree involves indirectly a claim respecting property of the value of Rs. 10,000 or upwards within S. 110 (2) must be determined with reference to the actual circumstances at the time and not to a mere possibility. Where the tenant who had constructed building to the value of Rs. 25,000 on the land demised the value of which was only Rs. 4,000, brought a suit for the specific performance of an agreement for renewal but only got a decree entitling him to hold the land for his life,

Held, the question involved a claim to the land itself worth only Rs. 400, and that the requisites of S. 110 were not complied with. The possibility of the removal of the structures at some future time if and when the landlord chooses to evict him was too remote. (34 M. 535; Mulla C. P. Code 8th Edition, p. 298 Comm. upon: 43 M.L.J. 728; 44 Cal. 119; 35 A. 445; 33 M. L. J. 481; 6 L.L.J. 78, Ref. to. (*Patkar and Baker, JJ.*) MAHOMEDALI ISABHAI *v.* ABDUL RAHIM.
32 Bom. L. R. 1189.

——*Easement right.*

In case of easement to light and air, in considering whether the leave to appeal to His Majesty in Council under Cl. 2. S. 110, it is not the value of the whole property which is to be taken into consideration but the value of the easement: 6 Bom. L.R. 403, Foll. (*Patkar and Baker, JJ.*) LALUBHAI PRAGJI *v.* BHIMABHAI DAJIBHAI. **119 I. C. 782 = 53 Bom. 552 = 31 Bom. L. R. 632 = A.I.R. 1929 Bom. 341.**

——*Contract of sale.*

The consideration or price payable under the contract of sale must alone determine the value of the subject-matter in dispute on appeal to His Majesty is

Council. (*Kinkhede, and Staples, A. J. Cs.*) SETH BHAWARLAL *v.* LACHMANDAS.
A. I. R. 1929 Nag. 75.

———*Suit for specific performance of contract—Relief for possession only ancillary.*

Where a suit is one for obtaining the main relief of specific performance of the contract of sale, and the relief of possession is regarded as an ancillary relief flowing from the main relief, relief of specific performance need not be separately valued. (*Kinkhede and Staples, A.J.Cs.*) SETH BHAWARLAL *v.* LACHMANDAS.
A.I.R. 1929 Nag. 75.

———*New machinery brought on property during pendency of suit for specific performance.*

If during the pendency of a suit for specific performance of a contract of sale, new machinery is brought on the premises in suit, of which no mention is made in the pleadings or in evidence, or even at argument, its value cannot be taken into account. Nag. Misc. Petn. No. 58 of 1927, Dist. (*Kinkhede, and Staples, A.J.Cs.*) SETH BHAWARLAL *v.* LACHMANDAS.
A.I.R. 1929 Nag. 75.

———*Inam wet land.*

Where the subject-matter of the suit was an inam wet land, *held* in estimating the value of such land for purposes of Privy Council appeal, house sites in the vicinity should be excluded from consideration and only cultivable lands in the vicinity should be relied upon. (*Waller and Madhavan Nair, JJ.*) PUNNAYYA *v.* LAKSHMINARAYANA. **109 I.C. 167 = A.I.R. 1928 Mad. 448.**

———*Under-valuation by plaintiff—Estoppel.*

The mere fact that a low valuation is put on a plaint for the purpose of Court-fee and consequently for the purpose of jurisdiction should not be allowed to operate as estoppel against the plaintiff on the question of value for the purpose of Privy Council appeals and the High Court is entitled to go into the real value for the purpose of considering whether a certificate should be granted when it is not a case in which the higher valuation would have meant that the trial would have to be in a different Court. 1 I.A. 84 (P.C.) and 1 I.A. 317 (P.C.), Dist. (*Rankin, C. J. and Mukerji, J.*) SATISH CHANDRA JOARDAR *v.* BIRENDRA NATH ROY.
99 I. C. 921 = 44 C. L. J. 572 = 31 C. W. N. 268 = A. I. R. 1927 Cal. 225.

———*Wrong valuation by plaintiff himself.*

The plaintiff is not absolutely precluded from contending that his valuation in the plaint is wrong. The Court will merely treat his admission as a strong piece of evidence against him. A. I. R. 1925 Mad. 1223, Dist. (*Ramesam and Venkata Subba Rao, JJ.*) VENKATARAYUDU *v.* VENKANNA. **104 I. C. 577 = A. I. R. 1927 Mad. 862.**

———*Suit for redemption and possession—Value of property.*

Although for purposes of Court-fees the value of suits for the recovery of the property mortgaged is "the principal money expressed to be secured by the instrument of mortgage," the mortgage-money is not the basis of the valuation for purposes of jurisdiction. In such cases the value of the mortgaged property should be the basis: 5 L.B.R. 208 and 1 L.B.R. 96, Appr. (*Heald and Cunliffe, JJ.*) MA HLA SAING *v.* M SU WE.
105 I.C. 412 = 5 Rang. 499 = A.I.R. 1927 Rang. 304.

———*Subject-matter incapable of valuation.*

The second clause of S. 110 might apply if the matter in dispute is incapable of valuation as in the case of easements. In such a case the value of the matter in suit to the applicant should be considered. Per *S. Aiyangar, J.* in 39 Mad. 843, Foll. (*Rutledge, C. J. and Brown, J.*) M. G. MOOLLA *v.* LEAN SHIAN SWAY.
96 I. C. 107 = 4 Rang. 92 = 5 Bur. L.J. 23 = A.I.R. 1926 Rang. 138.

———*Partnership suit.*

On principle it can make no difference on the point of valuation for purposes of appeal to Privy Council whether a suit is a partition suit or a partnership suit. It is the value of the appellant's share and not the whole of the property that determines the value of the subject-matter. (*Shah, Ag. C.J. and Kincaid, J.*) NARIMAN RUSTOMJI MEHTA *v.* HASHAM ISMAYAL.
85 I. C. 191 = 49 Bom. 149 = 26 Bom. L. R. 1261 = A. I. R. 1925 Bom. 137.

———*Applicability of Suits Valuation Act.*

The rules under the Suits Valuation Act in accordance with which the land in suit is valued for the purposes of jurisdiction in the Lower Courts do not apply in determining the value for the purposes of S. 110 of the Civil Procedure Code but it is the market value which has to be ascertained. (*Abdul Raoof and Martineau, JJ.*) NAWAZ ALI *v.* ALLU.
75 I. C. 520 = 4 Lah. 185 = 6 L. L. J. 44 = A. I. R. 1924 Lah. 82.

———*Value of annuity or of property charged.*

The 110th section of the Code of Civil Procedure, 1908 applies to the value of the annuity which is sought to be recovered, not to the value of the property upon which that annuity is charged. (*Lord Atkinson.*) ABID HUSSAIN *v.* AHMAD HUSSAIN. **75 I. C. 502 = 26 Bom. L. R. 731 = 1923 M. W. N. 590 = 18 M.L. W. 146 = 26 O. C. 216 = 28 C.W.N. 289 = 33 M.L.T. 232 = 10 O.L.J. 288 = A. I. R. 1923 P. C. 102 = 45 M.L.J. 253 (P.C.).**

———*Ejectment suit.*

Where in an ejectment suit it was found that the monthly rent of the premises was Rs. 275 and capitalised at twenty years' purchase the value of the property will be over Rs. 10,000, *held* that the certificate to appeal to His Majesty from the decree in the suit must be granted. (*Macleod, C.J. and Coyajee, J.*) KASTUR BHAI MANIBHAI NAGARSETH *v.* HIRALAL D. NANAVATI.
67 I.C. 938 = 24 Bom. L.R. 350 = A. I. R. 1923 Bom. 23.

———*Mortgage suit—Appeal by co-sharer in equity of redemption—Value of appeal.*

For purposes of appeal to P. C. by one of two co-mortgagors, the value of the subject-matter is the value of entire claim of the mortgagee at the date of suit together with interest and not only the share of the co-mortgagor seeking to appeal, when that co-mortgagor is not claiming a title paramount to the mortgagee. 28 All. 488 (P. C.), Dist.

Whether a previous decree can be rectified by a subsequent suit is a substantial question of law. (*Sanderson, C. J. and B.B. Ghose, J.*) BEPIN KRISHNA ROY *v.* PRIYABARATA BOSE. **71 I.C. 371 = A. I. R. 1923 Cal. 387.**

———*Dispute as to nature of tenancy.*

Where the subject matter of the suit was the question whether the applicants were permanent tenants of the site, or mere tenants at will, and the plaintiff laid no claim whatever to the buildings on the site and indeed his prayer was that the said buildings should be removed,

Held, the matter in dispute between the parties was solely the nature of the tenancy of the site.

The second paragraph of S. 110 means that the suit must to satisfy its conditions involve rights and claims to property, which rights and claims are worth Rs.10,000 or upwards, not that the rights affect properties whose

value is Rs. 10,000 or more. (*Broadway and Abdul Qadir, JJ.*) DHANNA MAL *v.* LALA MOTI SAGAR.
75 I.C. 654 = 6 L.L.J. 78 = A.I.R. 1923 Lah. 286.

———*Decree for small property—Incidental finding as to large property—If decree involve indirectly question regarding large property.*

No exact or rigid construction of the word 'indirectly' can be given. It must inevitably be a question of degree whether the relation between the decree or order and the claim or question is established with sufficient closeness to be in an indirect relation. Where there was no more than an incidental finding in the judgment of High Court as regards the boundary line except in so far as it determined the ownership of the plots which were directly in dispute ; *held* that because of such a mere incidental finding, the decree or final order cannot be said to involve indirectly any question regarding the larger extent. (*Oldfield and Spencer, JJ.*) ALAGAPPA CHETTY *v.* NACHIAPPA. **69 I. C. 385 = 1922 M. W. N. 683 = 16 M. L. W 517 = 31 M L. T. 335 = A. I. R. 1923 Mad. 125 = 43 M. L. J. 728.**

———*Cause of action different against defendants—Appeal against one—Value of appeal.*

Where the cause of action against one defendant is distinct and different from the causes of action against the other defendants, the fact that a joint suit is brought cannot make the value of the subject-matter of the appeal against him to the Privy Council higher than what is decreed against him. (*Spencer and Krishnan, JJ.*) VADIVELAMMAL *v.* RAJARATNAM MUDALIAR. **16 M.L.W. 262 = 30 M.L.T. 337 = A.I R. 1923 Mad. 30.**

———*Suit for declaration as Rajput*

Plaintiff sued for declaration that he was a Rajput by caste and valued his suit for purposes of jurisdiction at Rs. 11,000.

Held, that it could not be said that the value of the subject-matter of the suit amounted to Rs. 10,000 or that the decree involved any claim or question to or respecting property of like amount or value. The words "the decree must involve, directly or indirectly, some claim or question to or respecting property of like amount or value" in S. 110 of the Civil Procedure Code refer to some specific property and do not contemplate property which a party may be desirous of acquiring. The valuation for purposes of jurisdiction is not always the real value of the subject-matter of the suit for purposes of S. 110 of the Civil Procedure Code. (*Chevis and Scott-Smith, JJ.*) GHULAM RASUL KHAN *v.* SECY. OF STATE. **65 I. C. 239 = 26 P.L.R. 1922 = 2 Lah. 297 = 116 P.L.R. 1921 = A. I. R. 1922 Lah. 131.**

———*Decree for redemption and for Rs. 7,000—Appeal by mortgagee claiming Rs. 2,000 due to himself—Value of appeal if over Rs. 10,000.*

Plaintiff sued to redeem his mortgaged property. He claimed that all the money due had been paid from the usufruct and that there was a large surplus which was due to him. The Trial Court held that the entire mortgage-money had been paid and decreed plaintiff's claim for possession and for a surplus amounting to Rs. 9,012-12-8. The defendant appealed to the High Court to be relieved of the surplus awarded to plaintiff and claimed a sum of Rs. 2,073 due on the mortgage. The decree of the Trial Court was modified in the High Court to the extent of reducing the surplus awarded to 7,910-11-7. The defendant then applied for leave to appeal to His Majesty.

Held, that the value of the subject-matter, including the surplus awarded *viz.* Rs. 7,910-11-7 amounted to Rs.9,983-11-7 since in the memorandum of appeal to the High Court the defendant had claimed only Rs. 2,073 on the mortgage and had not claimed possession of the property. It not being alleged that the appeal affected a question relating to property exceeding Rs. 10,000 in value, no leave to appeal could be granted under S. 110 although the decree of the High Court varied the decree of the Court below. (*Kanhaiya Lal, J.C. and Simpson. A.J.C.*) SARSUTI PRASAD *v.* MUNSHI EHTISHAM ALI. **73 I.C. 407 = A. I. R. 1922 Oudh 214.**

———*Dispute as to Rs.* 1300 *realised in execution—Unexecuted balance over Rs.* 10,000—*Grant of leave.*

Where further applications for execution were time-barred and the sum realised in execution as to which there was dispute between joint decree-holders was only Rs. 1,300 though the unsatisfied balance under the decree executed was Rs. 10,000.

Held, leave could not be granted to appeal to His Majesty. (*Dawson Miller, C.J. and Mullick, J.*) PRAKASH CHANDRA SARKAR *v.* BRINDABAN CHANDRA SARKAR. **67 I. C. 991 = 3 Pat. L. T. 781 = 1922 P. H. C. C. 296 = A. I. R. 1922 Pat. 611.**

———*Partition suit—Decree affecting plaintiffs' share and also that of some of the defendants—Value of appeal.*

Where in a partition suit the decree affects the interests not only of the plaintiffs who are appealing but of some of the defendants, the value of the subject-matter within S. 110 is the value of the property and not that of the plaintiffs' share therein. 6 Bom. L.R. 403 and 20 Mad. 289, Dist. 10 C.W.N. 564, Foll. (*Dawson Miller, C.J. and Adami, J.*) KULDIP NARAIN SINGH *v.* RAGHUNANDAN SINGH. **60 I.C. 844 = 2 P.L.T. 386 = A. I. R. 1921 Pat. 502.**

———*General Rule.*

The proper construction to be placed upon S. 110 in so far as it relates to the amount or value of the subject-matter of the suit, must be taken to be the amount or value which the plaintiff either obtained or, had he been successful, would have obtained in his suit at the date when the decree was passed. 3 P.L.J. 377, Foll. (*Dawson Miller, C. J. and Adami, J.*) MATHURA PRASAD SINGH *v.* RAM PRASAD TEWARY. **60 I. C. 523 = 2 P.L.T. 340.**

—S. 110—Valuation—Costs.

———*If included in subject-matter of suit.*

The costs of the suit are in no sense the subject matter of the suit in the Court of first instance and ought not to be added to the value of subject-matter in order to bring the valuation up to the appealable amount under the provisions of S. 110. (*Dawson Miller, C.J. and Adami, J.*) EAST INDIA RY. COMPANY *v.* BADRI NARAIN. **6 Pat. 444 = 104 I. C. 267 = 8 P.L.T. 714 = A.I.R. 1927 Pat. 328.**

—S. 110—Valuation—Interest.

———*When included in subject-matter.*

Where in a suit for property including promissory notes which in the plaint are described as of their face value and so valued together with the other subject-matter in dispute, the amount of Rs. 10,000 cannot be reached, but if to the face value of the promissory notes is added the interest up to date of the decree of the first Court, then the sum of Rs. 10,000 is exceeded.

Held, that the interest could not be so added to bring the case within S. 110 ; 39 Mad. 843, Appr. (*Viscount Dunedin.*) MANGAMMA *v.* MAHALAKSHMAMMA. **121 I. C. 513 = 34 C. W. N. 235 = 51 C.L.J. 168 = 1930 M.W.N. 193 =**

32 Bom. L.R. 517 = 53 Mad. 167 = 57 I.A. 56 = A.I.R. 1930 P.C. 44 = 58 M. L. J. 184 (P. C.).

———*When included in subject-matter.*

The amount of interest which a Court may allow in the exercise of its discretion but which is not claimable as of right, cannot be included in the value under S.110. 42 All. 445, Rel. on. (*Kinkhede and Staples, A. J. Cs.*) SETH BHAWARLAL *v.* LACHAMANDAS.

A. I. R. 1929 Nag. 75.

———*When included in subject-matter—Interest from filing plaint up to decree.*

Where interest is claimed in the plaint such interest as accrues during the period between the filing of the suit and the decree is part of the subject matter of the suit and the amount of such interest can be regarded as part of the amount or value of the subject-matter of the suit in the Court of first instance within the meaning of S. 110; 39 Mad. 843, Dist, (*Heald and Rutledge, JJ.*) V. S. T. THAMSUNDASEEN *v.* S. M. A. R. R. M. CHETTY FIRM. **3 Rang. 405 = 91 I. C. 647 = A. I. R. 1926 Rang. 45.**

———*If included in subject-matter—Interest from filing plaint up to decree.*

Interest from the date of the plaint to the decree can be included for the purposes of S. 110. The proper construction to be placed on S. 110 must be taken to be the amount of value which the plaintiff either obtained, or had he been successful, would have obtained in his suit at the date when the decree was passed, 60 I.C, 523, Foll. (*Oldfield and Ramesam, JJ.*) RAGHUNATHASWAMI IYENGAR *v.* GOPAL RAO.

74 I. C. 596 = 1922 M. W. N. 652 = 16 M.L.W. 682 = 32 M. L. T. 1 = A. I. R. 1923 Mad. 135 = 43 M. L J. 622.

———*When included in subject matter—Interest up to decree.*

Where the amount due on the date of the suit is Rs. 9776, but interest up to the date of the decree and further interest to the date of payment is also claimed in the plaint, and the amount by which the amount said to be due on the date of the suit fell short of Rs. 10,000 by Rs. 224, and this amount represented interest for about 3 1/2 months, and there was no possibility of a decree being granted within 3 1/2 months,

Held, the amount for which a decree was asked amounted to Rs. 10,000. 33 C. 1286, 44 C. 119 and 3. P.L.J. 377, App. 39 M. 843; 24 A 174; 3 P.L.J. 317, Dist (*Batten, J.C. and Hallifax, A.J.C.*) SETH MAGANMAL *v.* DARCARILAL. **72 I. C. 395 = A. I.R. 1923 Nag. 239.**

———*When included in subject matter—Interest after trial court's decree.*

Under S. 110 in order to compute the value of the subject matter in suit the amount of interest accruing subsequent to the decree of the trial Court should not be taken into consideration. 8 M. I. A. 166 (P. C.); 24 All. 174 (P. C.) Foll. 33 Cal. 1286; 3 P. L. J. 377 and 14 C. W. N. 872, Dist. (*Dawson Miller, C. J. and Coutts, J.*) RAMYAD SINGH *v.* RAMBILAS SINGH.

62 I. C. 959 = 2 P. L. T. 463 = 1921 P. H. C. C. 229 = 6 P. L. J. 596 = A. I. R. 1921 Pat. 229.

—S. 110—Valuation—Mesne profits.

———*If included in subject-matter.*

In ascertaining the amount or value of the subject-matter of a suit, in the Court of first instance, for the purpose of S. 110, where the suit involves a claim for mesne profits, the mesne profits which might be awarded by the Court, whether they had actually accrued at the date when the suit was instituted or whether they were future mesne profits should be taken into consideration. (*Das and Kulwant Sahay. JJ.*) GUJU MAHTO *v.* RAGHU SINGH. **117 I. C. 189 = A. I. R. 1929 Pat. 547.**

———*If included in subject-matter.*

In arriving at the value of the suit for the purposes of S, 110, the Court is entitled to take into account not merely the mesne profits claimed up to the date of the suit but also the future mesne profits and in any case up to the date of the decree of the trial Court. A. I. R. 1921 Pat. 115; 3 P. L. J. 377; and 14 C. W. N. 872; Foll. (*Miller, C. J and Mullick, J.*) SHAMA KANT LAL *v.* RAMDHAN PURI. **107 I. C. 828.**

———*Mesne profits after High Court's decree—If part of subject-matter.*

Mesne profits subsequent to the date of the High Court decree, which have been awarded to the decree-holders cannot be taken into consideration in making an estimate of the value under paragraph 2. (*Fawcett and Madgavkar, JJ.*) SESHAGIRI *v.* MANJAYYA.

94 I. C. 755 = 50 Bom. 160 = 28 Bom. L. R. 454 = A. I. R. 1926 Bom. 265.

———*Mesne profits and interest—Distinction.*

There is no distinction between interest and mesne profits in respect of claims to include them in the subject matter of the suits. 39 Mad. 843, Foll. (*Heald and Rutledge, JJ.*) V. S. T. THAMSUNDASEEN *v.* S. M. A. R. R. M. CHETTY FIRM. **91 I. C. 647 = 3 Rang. 405 = A. I. R. 1926 Rang. 45.**

———*When part of subject-matter.*

In ascertaining the amount or value of the subject-matter of a suit in the court of first instance for the purpose of S. 110, where the suit involves a claim for mesne profits, the mesne profits which might be awarded by the court whether they had actually accrued at the date when the suit was instituted or whether they were future mesne profits, should be taken into consideration in assessing the value of the subject-matter of the suit. (14 C. W. N. 872 and 3 P. L. J. 377, Foll.) Where past as well as future mesne profits are awarded in the decree of the lower Court but only the profits up to the institution of the suit are calculated, and calculation of future profits is postponed till the final decision of appeal, such future profits are not to be excluded in computing the valuation of the appeal under S. 110. (*Miller, C. J. and Adami, J.*) IMAMUDDIN KHAN *v*, KISHUNDEO NARAIN MAHATA. **63 I. C. 492 = 2 P. L. T. 675 = 6 P. L. J. 246 = A. I. R. 1921 Pat. 115.**

—S. 110—Valuation—Objection to.

———*Estoppel.*

If a party takes advantage of the valuation put upon the subject matter by the other party, he cannot be permitted to allege that the original valuation was incorrect. (*Ramesam and Venkatasubba Rao, JJ.*) M. VENKATARAYUDU *v.* VENKANNA. **104 I. C. 577 = A. I. R. 1927 Mad. 862.**

—S. 110—Valuation—Practice.

———*Interference by Privy Council.*

The Privy Council will not interfere with any question of valuation unless it can be shown that some item has improperly been made the subject of valuation or excluded therefrom, or that there is some fundamental principle affecting the valuation which renders it unsound. (*Lord Buckmaster.*) CHARAN DEO *v.* AMIR KHAN.

57 I. C. 606 = 48 Cal. 110 = 47 I. A. 255 = 18 A. L. J. 1095 = 22 Bom. L. R. 1370 = 3 P. W. R. 1921 = 28 M. L. T. 149 = 2 U. P. L. R. 124 = 25 C.W. N. 289 = 13 M. L. W. 49 = A. I. R. 1921 P. C. 50 = 39 M. L. J. 195 (P. C.).

C. P. CODE, (1908).

—S. 110—Valuation—Standard of.

———*Claim in suit for less than Rs.* 10,000—*Findings on questions relating to other property valued at more than Rs.* 10,000 *recorded but not necessary for decision of suit—Value of appeal.*

Where the real claim in suit is not more than Rs. 10,000, the mere fact that the Court has recorded findings on other questions relating to other property worth more than Rs. 10,000, not at all necessary for the decision of the suit, does not make the subject-matter of the suit, worth more than Rs. 10,000. (*Findlay, J. C.*) S. R. PANDIT *v.* W. R. PANDIT. **110 I. C. 855= A. I. R. 1929 Nag. 85.**

———*Valuation at date of suit or appeal.*

In a case coming under Cl. (1), S. 110, the conjunction " and " cannot be read as " or " so that, besides the value of the subject-matter of the suit in the Court of first instance at the date of the institution of the suit, the value of the subject-matter in dispute on appeal to His Majesty in Council at the date of the decree from which the appeal to His Majesty in Council is to be made, must be taken into consideration. 24 All. 174 (P. C.) ; 8 M. I. A. 169 (P. C.) and 42 All. 445, Foll. (*Kinkhede and Staples, A.J.Cs.*) SHETH BHAWARLAL *v.* LACHAMANDAS. **A. I. R. 1929 Nag. 75.**

———*Amount of appellate decree.*

In a case coming under Cl. (2), S. 110, the value of the property referred to in it must be determined with reference to the date of the decree from which the appeal to His Majesty in Council is to be made. 44 Cal. 119 and 44 Bom. 104, Rel. on. (*Kinkhede and Staples, A. J. Cs.*) SETH BHAWARLAL *v.* LACHAMANDAS. **A. I. R. 1929 Nag. 75.**

———*Suit for right of way.*

Where the plaintiff claimed a right of way over a piece of land valued at Rs. 1500 and forming a part of a survey number valued at Rs. 10,000, the plaintiff having a right to fence the way from the remaining land, *Held* the dispute could not be said to relate to the whole of the survey number and therefore plaintiff's claim was not of the value of Rs. 10,000. (*Ramesam and Cornish, JJ.*) KRISHNAMURTHI *v.* GOBI PADDAYYA. **111 I. C. 795=A. I. R. 1928 Mad. 785.**

———*Dispute between riparian owners as to right to water—Valuation of claim for appeal to Privy Council.*

Para. 2, S. 110, C.P. Code relates not only to claims to property of Rs. 10,000 in value but to questions respecting property of the like amount and there is no doubt that that part of the section was introduced to cover claims relating to property of considerable value where the actual value of the relief claimed can only with difficulty be assessed, for instance, in cases where an injunction is sought regarding dealing with certain valuable property or in a case where the rights of irrigation are sought by one side and denied by the other in the case of a village of very considerable area and value. (*Dawson Miller, C. J. and Adami, J.*) MT. DULHIN SHYAM SUNDER *v.* MT. BIBI QASIMAN. **106 I. C. 538=A. I. R. 1928 Pat. 191.**

———*Under-valuation by plaintiff—Estoppel.*

The mere fact that a low valuation is put on a plaint for the purpose of Court-fee and consequently for the purpose of jurisdiction should not be allowed to operate as estoppel against the plaintiff on the question of value for the purpose of Privy Council appeals and the High Court is entitled to go into the real value for the purpose of considering whether a certificate should be granted when it is not a case in which the higher valuation would have meant that the trial would have to be in a different Court. 1 I. A. 84 (P. C.) and 1 I. A. 317 (P.C.), Dist.

C. P. CODE, (1908), S. 110—Valuation—Standard of.

(*Rankin, C. J. and M. N. Mukerji, J.*) SATISH CHANDRA *v.* BIRENDRA NATH. **99 I. C. 921=44 C. L. J. 572= 31 C. W. N. 268=A. I. R. 1927 Cal. 225.**

———*Mortgage suit for more than Rs.* 10,000—*Property sought to be excluded from mortgage security worth less than Rs.* 10,000—*Appeal against order excluding such property—Value for appeal.*

The plaintiffs sued for the enforcement of a mortgage claim amounting to Rs. 36,000 and odd against several properties. The defendants who were impleaded as subsequent mortgagees of a certain plot denied that it was covered by the plaintiffs' mortgage. [On appeal by the defendants who valued the appeal at Rs. 9,000, the High Court held that the plot was not included in the plaintiffs' mortgage. The plaintiffs applied for leave to appeal to the Privy Council.

Held, that the subject-matter in dispute was really the whole debt for purposes of valuation for Privy Council appeal. A. I. R. 1923 Cal. 387, Rel. on ; A. I. R. 1916 P. C. 18 ; Dist. ; *Manley* v. *Palache*, (1896) 73 L.T. 98, Ref. (*Mullick, Ag. C.J. and Wort, J.*) ARJUN DAS *v.* DWARKA PRASAD SINGH. **103 I. C. 831=A. I. R. 1927 Pat. 391.**

———*Petitioner praying leave in respect of decision involving a claim of Rs.* 3,900 *only.*

A dispute arising out of a contract of sale was referred to arbitrators ; the arbitrators were unable to agree and *ex parte* awards were made, one in favour of the petitioner for Rs. 81,000 and odd, the other in favour of the respondents for Rs. 3,900 and odd. Subsequently the High Court on application of the respondents, set aside the award in favour of the petitioner. The petitioner then raised a suit to set aside the award in favour of the respondents. The High Court in its original jurisdiction set it aside, but on appeal the Appeal Court reversed and dismissed the suit. The petitioner applied for leave to appeal, but this was refused upon the ground that the sum involved was neither directly nor indirectly of the value of Rs. 10,000.

Held, that the case neither fell within para 1 nor para 2 of S. 110 and that the petition was rightly refused. (*Lord Dunedin.*) UDOY CHAND *v.* GUZDAR & CO. **88 I.C. 445=22 M. L. W. 255=30 C. W. N. 98= 27 Bom. L. R. 867=52 Cal. 650=52 I. A. 207= 41 C.L.J. 623=A.I.R. 1925 P. C. 159= 49 M.L.J. 20 (P.C.).**

———*Suit for declaration without consequential relief.*

On an application by the defendant for leave to appeal to the Privy Council against the appellate decree in a suit where the suit was for declaration without consequential relief falling under Sch. II, Cl. 17 of the Court-Fees Act. the value given in the plaint for purposes of jurisdiction must be held to be the market value of the subject matter of the suit, and where it has been stated to be Rs. 10,000 the defendant having accepted the valuation so given, it is not open to the plaintiff to show that the value of the subject-matter is less than Rs. 10,000. (*Ramesam and Venkatasubba Rao, JJ.*) RATTAYYA *v.* BRAHMAYYA. **91 I. C. 572= A. I. R. 1925 Mad. 1223=49 M. L. J. 309.**

———*Order indirectly involving claim over Rs.* 10,000.

Where the applicant's interest in the property was less than Rs. 10,000 but the property in dispute was worth over Rs. 10,000 leave to appeal was granted. (*Macleod, C. J. and Fawcett, J.*) APPAYA PADADAYA *v.* LAKHAMGOWDA. **72 I. C. 127=25 Bom. L.R. 77= A.I.R. 1923 Bom. 176.**

———*Value in suit and in appeal.*

To satisfy the requirements of S. 110 the subject-matter in the Court of first instance must be Rs. 10,000, and in addition the amount or value of the subject matter on appeal must also be Rs. 10,000 or upwards or the decree must involve some claim or question to or respecting property of like amount or value. The latter provision is to be read as an alternative to the second restriction in the earlier part of the section and is not intended to be a separate provision so as to do away with the first paragraph of the section. The amount or value of the subject-matter of a suit is clearly the amount the plaintiff claims together with, at most, interest that had accrued up to date of decree. (*Robinson, C. J. and MacGregor, J.*) MAUNG THWE *v.* A.L.A.R. CHETTY FIRM. **68 I. C. 690 = 11 L. B. R. 335 = 1 Bur. L. J. 62 = A. I. R. 1923 Rang. 71.**

———*Certificate how far conclusive.*

The ruling provision as to certificates of value applicable at the time the appeal was filed, was No. 2 of Schedule to Order in the Council of 10th April, 1838, which was to the effect that the certificate should be deemed conclusive of value and not liable to be questioned on appeal by any party. *Banarsi Pershad* v. *Kashi Krishna Narayan*, 23 All. 227 (P.C.) Ref. to. (*Lord Shaw.*) RATHA KRISHNA AYYAR *v.* SUNDERSWAMY IYER. **74 I. C. 584 = 45 Mad. 475 = 20 A. L. J. 937 = 36 C. L. J. 450 = A. I. R. 1922 P. C. 257 = 43 M. L. J. 323 (P.C.).**

———*Easement right.*

In the case of an easement, the value of which falls much below Rs. 10,000, there is no right of appeal although it affects property worth over Rs. 10,000. (*Macleod, C.J. and Fawcett, J.*) MANILAL JUGALDAS *v.* BANUBIN FRAMJI. **63 I. C 588 = 23 Bom. L. R. 374 = A. I. R. 1921 Bom. 266.**

———*Final order affecting property over Rs.* 10,000.

Where the value of the suit in Trial Court exceeded Rs. 10,000 but the Court awarded a decree for less than Rs. 10,000 as damages for the tort complained of, *viz.*, the erection of the bund and the alleged consequent inundation of plaintiff's paddy-fields, and on appeal the decree was set aside, thereby preventing the plaintiffs from suing again for its removal and forcing them to acquiesce for the future in the alleged extensive damage to their fields worth more than Rs. 10,000,

Held, that the decree or final order involved indirectly a question respecting property worth over Rs. 10,000 and an appeal under S. 110 was competent. 6 Bom. L.R. 403; 4 Pat. L.J. 415, Dist. 39 Mad. 843 and 35 All. 445, Foll. The second paragraph of S. 110 is intended to deal with property other than that forming part of the actual subject-matter in dispute and which would be affected by the final decree or order. (*Robinson, C. J. and Duckworth, J.*) MAUNG BYA *v.* MAUNG KYI NYO. **66 I. C. 606 = 11 L. B. R. 152 = A. I. R. 1921 L. B. 48.**

—S. 111 and Letters Patent, Ss. 39, 44—Single judge's decree.

———By S. 44 of the Letters Patent, the Letters Patent are subject to imperial legislation. Since the amendment of the Letters Patent the judgment of a single Judge sitting in revision is not appealable to two Judges and therefore may be regarded as a final decree of a High Court from which, had it stood alone, a right of appeal to the Privy Council will be competent by S. 39 of the Letters Patent. But it is subject to S. 111, C. P. Code and so no appeal lies to the Privy Council from the decree of a single Judge of a High Court. (*Krishnan and Wallace, JJ.*) SATYANARAYANA VARAPRASADA RAO *v.* BHASHYAKARULU RAO. **75 I.C. 604 = 46 Mad. 958 = 18 M. L. W. 655 = 1923 M. W. N. 719 = A. I. R. 1924 Mad. 399 = 46 M. L. J. 117.**

—S. 113—"Court."

———*Deputy Commissioner.*

Reference made by a Deputy Commissioner for a decision as to the legality of an action of a Subordinate Judge in the matter of the issue of a temporary injunction is not a reference made by a 'Court' within the meaning of the Code. 22 O. C. 319, Rel. on. (*Stuart, C. J. and Raza, J.*) DEPY. COMMSR., BARABANKI *v.* MD. AHSAN ALI. **113 I. C. 800 = 5 O. W. N. 891 = A.I.R. 1928 Oudh 485.**

—S. 113—Reference—Ground for.

———Where it was perhaps somewhat difficult to hold that the Judge making the reference entertained any reasonable doubt as to what his decision should be, or as to what decision was correct, but the respondent withdrew any objection on this ground, as he said the questions that arose would affect a very large number of cases and must affect a very large amount of money, reference was entertained. (*Robinson, C. J. and May Oung, J.*) E. E. DAWOODJEE AND SONS *v.* RANGOON MUNICIPALITY. **76 I.C. 519 = 1 Rang. 220 = A. I. R. 1923 Rang. 193.**

—S. 114—Review.

———*Grounds.*

Erroneous view of evidence or of law is no ground for review. (*S. K. Ghose, J.*) GURUPADA HALDAR *v.* UPENDRA NATH MUKERJEE. **A. I. R. 1930 Cal. 701.**

———*Letters Patent appeal.*

The provisions of S. 114 and the rules under O. 47, apply to an application for review of a decree in any appeal under the Letters Patent. 40 Mad. 651, Foll. (*Shah, J.*) RATANCHAND KHINCHAND *v.* DAMJI DHARSEY. **101 I. C. 766 = 29 Bom. L. R. 371 = A. I. R. 1927 Bom. 232.**

———*Effect of.*

The decree made on the review even if it does not modify the decree originally passed, is a new decree superseding the original one and therefore no appeal can lie from the decree originally passed. 28 All. 240; 34 All. 282; 44 Cal. 1011 and 140 P. R. 1919. Rel. on. (*Mukerji, J.*) NIBARAN CHANDRA SIKDAR *v.* ABDUL HAKIM. **107 I. C. 751 = A. I. R. 1928 Cal. 418.**

———*Subsequent events.*

The decree of the Privy Council reversing the decree of the High Court is no ground for review of the judgment passed prior to the decision of the Privy Council, on the strength of the judgment of the High Court. The ground of amendment must be something which existed at the date of the decree and the section does not authorise the review of a decree which was right when it was made, on the ground of the happening of some subsequent event. 24 Mad. 1 (P.C.) Foll. (*Kumaraswami Sastri, J.*) GANNABATHULA VENKAMMA *v.* GANNABATHULA RANGA RAO. **70 I. C. 741 = A. I. R. 1922 Mad. 227 = 43 M. L. J. 33.**

———*Revision from.*

Ordinarily an order rejecting an application for review is not open to revision. (*Broadway, J.*) TOLA RAM *v.* CHANDU MAL TOTA RAM. **71 I. C. 160 = A. I. R. 1924 Lah. 400.**

———*After appeal.*

In the exercise of the inherent powers it is not open to the High Court to disregard the express provisions of the Code and entertain an application for review of a judgment against which an appeal was preferred to His Majesty in Council but was dismissed for want of prosecution. (*Shah, J.*) RATANCHAND KHIMCHAND *v.*

C. P. CODE, (1908), S. 114—Review.

DAMJI DHARSEY. **101 I.C. 766 = 29 Bom. L.R. 371 = A. I. R. 1927 Bom. 232.**

———*Probate proceedings.*

The powers of review given by the Code of Civil Procedure can be exercised by a Court which has been dealing with a contentious matter in proceedings for the grant of letters of Administration. (*Carr and Brown, JJ.*) KYONE AOE *v.* KON SOON SUN. **91 I. C. 509 = 3 Rang. 261 = A. I. R. 1925 Rang. 314.**

—S. 115.

Addition of parties.
Amendment of decree.
Amendment of plaint.
Appeal.
Arbitration.
Award.
Case.
Court-fee.
Criminal prosecution.
Delay.
Discretion.
Error of law.
High Court.
Illegality.
Interlocutory Order.
Jurisdiction.
Leave to sue.
Limitation.
Material irregularity.
Misconstruction.
Mistake.
New plea.
Order.
Other remedy.
Revision.
Record of case.
Right to apply.
Scope of.
Subordinate Court.
Withdrawal of suit.

—S. 115—Addition of parties.

———Persons applied to be made defendants to a suit brought for specific performance of a contract of sale of certain field on the ground that they were members of a joint Hindu family along with the defendants and were interested in the field. The application was dismissed.

Held, that there was no case decided and the only inconvenience which was sought to be avoided was a possibility of multiplicity of judicial proceedings which was not sufficient to call for extraordinary interference. A. I. R. 1924 Lah. 425 ; A. I. R. 1928 All. 97 and A. I. R. 1928 Cal. 114, Rel. on. (*Munje, A. J. C.*) SAMBHA *v.* DESRU. **121 I. C. 672 = A. I. R. 1930 Nag. 51.**

———It is not a case of failure to exercise jurisdiction justifying interference in revision if the lower Court rejects an application under O. 1, R. 10, C. P. Code, on the ground that it was made too late. (*Richardson, J.*) RAMCHARAN MOHAJAN *v.* JIBAN CHANDRA SARMA. **64 I. C. 563 (Cal.).**

———An order refusing to make a person a defendant can be revised under S. 115. 12 O. C. 405 Ref. 13 O. C. 109 and 15 O. C. 304, Rel. on. (*Nanavutty, J.*) GOPI NATH *v.* MUMTAZ ALI. **6 O. W. N. 118 = 116 I. C. 58 = A. I. R. 1929 Oudh 148.**

———High Court will not interfere in revision with an order refusing an application for addition of a party as a co-respondent in a suit under the Indian Divorce Act. (*B. B. Ghose and Mallick, JJ.*) MALILAL *v.* PREMI LYALL. **54 Cal. 1038 = 107 I. C. 475 = A. I. R. 1928 Cal. 114.**

C. P. CODE, (1908), S. 115—Amendment of decree.

———*Conflict of findings—Possibility of.*

Although ordinarily High Court in revision should not interfere with the order of the trial Court refusing to add a person as party defendant, still if such person is necessary to avoid likelihood of conflicting findings High Court should, setting aside trial Court's order, add that person as defendant. (*Venkatasubba Rao, J.*) BAVAJEE *v.* ANNAPURNAMMA. **115 I. C. 812 = A. I. R. 1929 Mad. 403.**

———*Necessary party—Failure to implead.*

The order of the District Judge who decides the case without joining a necessary party on an erroneous view of the law is open to revision. A. I. R. 1926 P. C. 142 ; 50 I. C. 914 ; A. I. R. 1923 Cal. 394 and 44 C. L. J. 565, Foll. (*Tek Chand, J.*) MANIGIR *v.* HAZARI GIR. **10 L.L.J. 161 = 108 I.C. 391 = A.I.R. 1928 Lah. 414.**

———*Remedy.*

Where in the case of devolution of an interest during the pendency of a suit the Court orders addition of parties under O. 22, R. 10, the proper remedy of the party dissatisfied with such order is to prefer an appeal under O. 43, R. 1 (*l*) and not to invoke the aid of S. 115. (*Panton and Mullick, JJ.*) MIDNAPORE ZEMINDARY CO. *v.* NARESH NARAIN ROY. **104 I. C. 842 = 54 Cal. 716 = A. I. R. 1927 Cal. 844.**

———*Remedy.*

S. 115 is clearly not applicable where the lower Court has refused in the exercise of its jurisdiction to add a party as plaintiff. Possibly S. 107 of the Government of India Act might apply to cases where the result is a denial of the right of fair trial. (*Mullick and Ross, JJ.*) KALI RAI *v.* TULSI RAI. **93 I. C. 932 = 4 Pat. 723 = 7 P. L. T. 499 = A. I. R. 1926 Pat. 207.**

———Where in a proceeding to set aside an *ex parte* decree the heirs of a deceased plaintiff were not made parties to the application, but the Court comes to the finding that it was not necessary to bring his heirs on the record, the finding cannot be interfered with under S. 115. (*Kulwant Sahay, J.*) SHAMSHER NARAIN SINGH *v.* MOHAMMAD SALE. **90 I. C. 329 = A. I. R. 1926 Pat. 29 (2).**

—S. 115—Amendment of decree.

———*Decree in accordance with judgment—Remedy.*

Where in a mortgage suit a judgment contains two contradictory directions as regards the decree and the decree is technically in accordance with the earlier and operative part of the judgment, no application under S.152 for the amendment of the decree lies. There is also no revision against an order rejecting such an application. The proper course for the decree-holder is to renew their application under O. 34 R. 6. (*Tek Chand, J.*) DEVI DAS *v.* MT. ROHAN BAI. **A. I. R. 1930 Lah. 589.**

———*Clerical error.*

An accidental slip or omission or a clerical mistake both in judgments and decrees can be corrected under S. 152, and if this correction is not allowed then a revision lies under S. 115 (*b*) to the High Court. (*Addison, J.*) GANESH DAS *v.* KAKI BAI. **A.I R. 1929 Lah. 400.**

———As an amended decree supersedes the original decree and against the amended decree an appeal lies, no revision lies against an order amending the decree. 7 All. 276 and 411, Foll. (*Cuming and Page, JJ.*) ALICE MAUD *v.* J. C. GALSTAUN. **45 C. L. J. 213 = 31 C.W.N. 615 = 98 I. C. 89 = A.I.R. 1927 Cal. 114.**

———The Court has jurisdiction to refuse amendment and the failure by the Court to exercise this jurisdiction on the ground that it had no such power amounts to material irregularity in the exercise of its jurisdiction, so that revision of its order is permissible. (*Sulaiman and Daniels, JJ.*) PITAN LAL *v.* BALWANT SINGH. **88 I. C. 396 = 23 A. L. J. 518 =**

6 L. R. A. Civ. 423=A. I. R. 1925 All. 556.

———*Discretion.*

Where a Dt. Judge, in the exercise of his discretion vested in him under S. 152, refused to correct a decree passed by a Court subordinate to him and confirmed by him on appeal on the ground that the applicant was guilty of laches: *Held*, that the discretion was rightly exercised and that the High Court would not interfere. (*Mukerji and Dalal, JJ.*) KISHORI MOHAN *v.* CHHANGA LAL. **47 All. 44=5 L. R. A. Civ. 753= 82 I. C. 1030=A. I. R. 1925 All. 187.**

——Where an amendment under S. 152, C. P. Code was wrongly refused and led to gross injustice,

Held, revision should be allowed. 17 M. 410; 31 B, 138; Foll. (*Zafar Ali, J.*) CHANDRA SINGH *v.* FATEH CHAND. **76 I. C. 198=A. I. R. 1924 Lah. 621.**

—S. 115—Amendment of plaint.

———The Court has power to grant leave to amend the plaint based on a hundi into one based on the original cause of action and an order allowing such amendment is not liable to be set aside in revision. (*Johnstone, J.*) BISHEN SAHAI *v.* ABDUL SATTAR. **A. I. R. 1930 Lah. 559.**

———The High Court will interfere in revision in a matter of procedure where the Court has acted with material irregularity by granting leave to amend a plaint, where such leave should not have been granted. A. I. R. 1927, Lah. 71, Rel. on. (*Walsh, J.*) IBRAMSA ROWTHER *v.* MD. ESUF. **120 I. C. 887= 30 M. L. W. 557=A. I. R. 1930 Mad. 322.**

———Order 6, Rule 17, confers ample powers upon the Court to amend the pleadings; and where the trial Judge has, after examining the arguments advanced on both sides, granted leave to amend the plaint, revision would not be allowed though his conclusion may be wrong in law. 11 Cal. 6 (P. C.), Foll (*Shadi Lal, C.J. and Zafar Ali, J.*) DUNCAN STRATTON & CO. *v.* COANKA COTTON SPINNING & WEAVING MILLS LTD. **9 L.L.J. 357=103 I.C. 701=A. I. R. 1927 Lah. 847.**

———*Discretion.*

The question of amendment is a question of discretion with the Court and unless High Court is satisfied that the discretion was exercised on entirely wrong lines or in fact the lower Court refused a jurisdiction vested in it, High Court will not be justified in interfering under S. 115. (*Greaves and Panton, JJ.*) LLOYDS BANK *v.* SUROJIMULL JALAR. **30 C. W. N. 928= 98 I. C. 751=A. I. R. 1926 Cal. 1112.**

———The order of the lower Court refusing a just prayer for amendment of plaint based on a mortgage bond executed for the balance of the running accounts by the insertion of an alternative prayer for relief on the footing of the accounts themselves is liable to be set aside in revision, as the lower Court cannot be said to have rightly exercised its jurisdiction in refusing that prayer. (*Wallace, J.*) NALLAPERUMAL PILLAI *v.* PONNAYA MUDALIAR. **24 M. L. W. 400= 1927 M. W. N. 256=97 I. C. 936= A. I R. 1926 Mad. 1124.**

———*Discretion.*

An amendment of the plaint is within the discretion of the Court and the High Court will not interfere in revision against an order allowing an amendment of the plaint where the amendment does not change the character of the suit or involve any material injustice to the defendant. (*Odgers, J.*) S. RAMAKRISHNA PILLAI *v.* KRISHNASWAMI PILLAI. **68 I. C. 167= 15 M. L. W. 667=1922 M. W. N. 521= A. I. R. 1922 Mad. 321.**

———There is no right to apply in revision against an order permitting the plaintiff who sues for a bare declaratory decree to amend his plaint so as to include a prayer for the consequential relief of possession. (*Godfrey, J.*) MA E *v.* MA E *Alias* MA MIN E. **86 I.C. 509=4 Bur. L.J. 1=A.I.R. 1925 Rang. 199.**

———The refusal of a Court to exercise its lawful power, so as to deprive the plaintiff of what apparently was a vital plea is a material irregularity justifying interference in revision under Section 115. Therefore the order of a Court refusing to permit a plaintiff to amend his plaint by adding that at the date of the sale sought to be set aside by him on the ground of its having been brought about by undue influence and fraud, he was a minor, can be set aside in revision. (*Jackson, J.*) SOMASUNDARA BHATTAR *v.* MUTHU THEVAR. **80 I.C. 278=A.I. R. 1925 Mad. 188.**

———Refusal to allow amendment is revisable. 7 N.L. R. 130; 15 N.L.R. 125. Rel. on. (*Kinkhede, A. J. C.*) SHANKAR *v.* MURARJI. **78 I. C. 510= A.I.R. 1925 Nag. 195.**

—S. 115—Appeal—Appeal incompetent—Practice.

Thiruvenkatachariar, J.—If the error committed by the lower Court is one of the nature specified in S. 115 and the ends of justice require interference on the part of the High Court there can be no objection for treating the appeal memorandum as a civil revision petition, when the appeal fails on the ground that no appeal lies. (*Madhavan Nair and Thiruvenkatachariar, JJ.*) T. KAKAMMA *v.* T. CHANDRASEKHARA SOMAYAJULU. **119 I.C. 705=A.I.R. 1929 Mad. 205.**

———It is an established practice that the High Court can treat a memorandum of appeal as an application for revision when no appeal lies. (*Ashworth and Mukerji, JJ.*) TEJ SINGH *v.* GHASI RAM. **102 I.C. 236= 49 All. 812=25 A.L.J. 606=A.I.R 1927 All. 563.**

———Where no appeal lies from an order, the memorandum of appeal can be treated as an application for revision. (*Page and Graham, JJ.*) BANKA BEHARI *v.* BIRENDRA NATH. **55 Cal. 219=47 C.L.J. 69= 103 I.C. 864=A.I.R. 1927 Cal. 850.**

———Where no appeal lies an appeal to the High Court may be treated as an application for revision. (*Ashworth, J.C.*) FARZAND ALI *v.* EKADASHI. **73 I.C. 591=26 O.C. 10=10 O.L.J. 36= A.I.R. 1923 Oudh 177.**

———Second appeal in a matter in which there is not a first appeal is incompetent. The remedy against the order passed by the lower appellate Court in an appeal in such matter is not by second appeal but by revision petition. (*Sadasiva Aiyar and Coutts Trotter, JJ.*) (APPLA) RUKMANI AMMAL *v.* KUTTUVAVA NARASIMHA IYER. **63 I. C. 730= 14 M.L.W. 85=1921 M.W.N. 487= A.I.R. 1921 Mad. 612=41 M.L J. 54.**

—S. 115—Appeal—Conversion of.

———The High Court is entitled in the exercise of its discretion to convert a second appeal into a revision and interfere. (*Teunon and Abdul Majid, JJ.*) MAHATAP DASI *v.* MADHU SUDAN SAHA. **64 I.C. 712 (Cal.)**

———It is always open to the High Court to allow an application under S. 115, C. P. Code, to be converted into an appeal. (*Mukerji and Graham, JJ.*) J. C. GALSTAUN *v.* F. E. DINSHAW. **31 C.W.N. 653= 102 I. C. 513=A.I.R. 1927 Cal. 581.**

———The High Court has power to convert a Memorandum of Appeal into a revision-petition in a suitable case. (*Sadasiva Aiyar and Coutts Trotter, JJ.*) (APPLA) RUKMANI AMMAL *v.* KUTTUVAVA NARASIMMA IYER. **63 I.C. 730= 14 M.L.W. 85=1921 M.W.N. 487=**

A.I.R. 1921 Mad. 612 = 41 M.L.J. 54.

—S. 115—Arbitration—Appointment irregular.

———An order under the last portion of R. 17 (4) directing a party to nominate an arbitrator or appointing one itself, can be passed only when an order under the earlier portion ordering an agreement to be filed is in existence and where such an order is passed without an order under earlier portion, it is liable to be revised. (*Harrison, J.*) SHIBE DIAL *v.* ALI BAKHSH. **94 I.C. 483 = A.I.R. 1926 Lah. 505.**

—S. 115—Arbitration—Finding as to misconduct.

———Where the procedure or jurisdiction of the Judge is not attacked but only his findings as to misconduct of the arbitrator, there is no right of revision. 29 Cal. 167 (P.C.); 92 P.R. 1903; 88 P.R. 1902 (F.B.); 89 P.R. 1902. (F. B.) Ref. (*Addison, J.*) GOBIND LAL *v.* DARBARI LAL DEVI KISHAN. **119 I.C. 721 = 11 L.L.J. 275 = A.I.R. 1929 Lah. 688.**

—S. 115—Arbitration—Misconstruction.

———When the question was whether the parties by their agreement of reference to arbitration had agreed that the arbitrator might supplement his knowledge by listening to *ex parte* statements behind the back of the parties and the lower Court decided that the terms of the agreement did not empower the arbitrator to act as he did, in appeal it was opened that the Court below had misinterpreted the terms of the agreement of reference,

Held, the appellate Court ought not to interfere in revision. (*Piggott and Walsh, JJ.*) GANGA SAHAI *v.* BALDEO SINGH. **65 I. C. 779 = 20 A. L. J. 117 = A.I.R. 1922 All. 64.**

—S. 115—Arbitration—Order to continue.

———Where the controversy between the parties is whether the arbitration should be superseded or should be continued and the sole arbitrator refusing to act and the Court settles that controversy by directing that the arbitration should continue and appointed another person to act as arbitrator, the order is one deciding a case within the meaning of S. 115. (*Sen and Niamatullah, JJ.*) JAGANNATH SAHU *v.* CHEDI SAHU. **115 I.C. 611 = 51 All. 501 = 1929 A. L. J. 182 = A.I.R. 1929 All. 144.**

—S. 115—Arbitration—Reference.

———The High Court can interfere in revision if necessary in cases where reference to arbitration has been made contrary to the provisions of C. P. Code, Sch. 2, para. 1, and the question whether the Court had jurisdiction to grant a decree in terms of the award was involved and decided by trial Court. A.I.R. 1922 Sind 1 and A. I. R. 1927 Sind 239, Foll. (*Percival, J. C. and Wild, A.J.C.*) SUGNOMAL VASAND MAL *v.* PERUMAL. **A.I.R. 1930 Sind 256.**

———A Court acts without jurisdiction in referring a dispute to arbitration where a party interested in the dispute does not join in making the reference, and with material irregularity in not affording an opportunity to a party to file objections within the statutory period and the order can be set aside in revision. (*Tek Chand, J.*) AHMAD *v.* SARDARA. **114 I.C. 712 = A.I.R. 1929 Lah. 171.**

———*Power to make order of reference attacked — High Court can revise the order—C. P. Code, Sch. 2, para.* 1.

Where the jurisdiction of the Court to make the order of reference is attacked, the High Court has power to revise the order in revisional jurisdiction. (*B. B. Ghose and Cammiade, JJ.*) JOTINDRA NATH *v.* MANINDRA NATH. **44 C.L.J. 224 = 98 I.C. 803 = A.I.R. 1927 Cal. 52.**

—S. 115—Arbitration—Stay.

———Where the Court, wrongly holding that the parties were bound to refer the dispute between them to arbitration, stayed the suit,

Held, High Court could interfere in revision. (*Fawcett and Mirza, JJ.*) TATYA RAOJI *v.* HATHI BHAI BULAKHIDAS. **52 Bom. 420 = 30 Bom.L.R. 661 = 111 I.C. 641 = A.I.R. 1928 Bom. 275.**

—S. 115—Arbitration—Supersession of.

———An order superseding an arbitration is a final order so far as the parties to the case are concerned. Therefore, when such an order is passed by a Small Cause Court Judge, the High Court can revise the order. 13 O.C. 109; 15 O. C. 304, Foll.; A.I.R. 1925 All. 566 Diss. from. (*Gokaran Nath Misra, J.*) CHANDRIKA DAT RAM PANDEY *v.* SHYAM LAL. **100 I.C. 429 = 13 O.L.J. 507.**

———*Private inquiries by arbitrator is not misconduct if authorised by agreement of reference—Order superseding arbitration holding it to be misconduct is without jurisdiction—Revision lies.*

Where the parties had expressly authorised the arbitrator to arrive at a decision, either of his own personal knowledge, or in whatsoever manner he might think proper and the Court below superseded the award on the ground of misconduct of the arbitrator because he had made "private inquiries about subject-matter in dispute behind the backs of the parties,"

Held, that the Court below acted illegally and with material irregularity, in thus ignoring the terms of the agreement of reference to arbitration by which the parties had in fact given the arbitrator the widest possible powers and had expressly bound themselves to abide by his decision in What-soever manner he might see fit to arrive at it and that the case fell within the revisional jurisdiction of the High Court (*Piggott and Walsh, JJ.*) HUSAIN BAKSH *v.* LACHMAN DAS MATHRA DAS. **64 I.C. 934 = 20 A.L.J. 125 = A.I.R. 1922 All. 69.**

—S. 115—Award—Decree passed on.

———A party is entitled to be protected by the law against a decision by arbitrators on points not referred to therein at all and against a decree of Court based on such a decision, all the more so because he has no right of appeal. (*Wallace and Madhavan Nair, JJ.*) RAMASWAMI CHETTY *v.* VENKATARAMA AIYAR. **91 I.C. 745 = A.I.R. 1926 Mad. 201 = 49 M.L.J. 523.**

———An application can be entertained under S. 115 against a decree passed in terms of an award, 29 Cal. 167, Expl. 36 Bom. 105, Foll. (*Macleod, C. J. and Crump, J.*) BHIKALAL GIRDHARLAL *v.* ACHRATLAL LALLUBHAI. **87 I.C. 910 = 49 Bom. 535 = 27 Bom.L.R. 423 = A.I.R. 1925 Bom. 341.**

———A revision lies against a decree passed upon an award, where the Court which passed the decree committed an error in procedure or has misused the jurisdiction prescribed by the Civil Procedure Code (89 P. R. 1902 (F.B.) Foll.) Where the finding of the lower Court has proceeded on a misconception of evidence, this would be an error in procedure justifying the interference in revision. (*Martineau, J.*) DELHI CLOTH AND GENERAL MILLS CO., LTD. *v.* KIDARI PERSHAD CHHEDI LAL. **64 I.C 363 = 22 P.L.R. 1922 = A.I.R. 1921 Lah. 396.**

—S. 115—Award—Filing of.

———The order of the appellate Court setting aside the order of the trial Court and rejecting the application to file an award is revisable. (*Zafar Ali and Jai Lal, JJ.*) KANHAIYA LAL-SITA RAM *v.* DAULAT RAM-NAUBAT RAI. **110 I.C. 302 = A.I.R. 1929 Lah. 367.**

———An order filing an award not appealable under para. 16, Sch. 2 cannot be set aside in revision. (*Dawson Miller, C.J. and Mullick, J.*) BHOLANATH RAY *v.* BATA KRISHTA RAY. **1926 P.H.C.C. 161 = 7 P.L.T. 739 = 95 I.C. 321 = A.I.R. 1927 Pat. 135.**

———Revision lies from the order of a Judge directing an award to be taken off the file. (*Kincaid, J. C., Aston and Madgavkar, A.J.Cs.*) MESSRS. G. P. GUNNIES & CO. LTD. *v.* AMANMAL TULSIDAS. **83 I.C. 353 = 17 S.L.R. 133 = A.I.R. 1924 Sind 75 (F. B.).**

———Filing an award by a Court having no jurisdiction to entertain a suit on the cause of action, with respect to which the award was made, is a good ground for revision. (*Kennedy, J.C. and Raymond, A.J.C.*) FIRM OF KHALSA BROTHERS *v.* HARI RAM SRI RAM & CO. **83 I. C. 539 = 17 S.L.R. 164 = A.I.R. 1924 Sind 29.**

———*No notice of.*

A High Court has jurisdiction under S. 115 of the Civil Procedure Code to interfere with a decree passed in terms of an award where no notice was given of the filing of the award as required by Sch. II, para. 10, C. P. Code. (*Teunon, J.*) GOPI NATH MUKERJEE *v.* NARESH CHANDRA MITRA, **63 I.C. 243 (Cal.).**

—S. 115—Award—Objections to.

———*Invalid reference.*

Where the award made by the arbitrators on reference is impeached on the ground that the reference itself is bad, the High Court can revise the proceedings and, if necessary, set aside the order of reference with the result that the award will fall through. (*Mukerji and Banerji, JJ.*) MAHADEO PRASAD *v.* BADRI DAS RAMSARUP. **50 All. 955 = 110 I. C. 881 = 26 A. L. J. 1009 = A. I. R. 1928 All. 740.**

———*Not signed by one arbitrator.*

The High Court in the exercise of its revisional jurisdiction, cannot set aside the decree passed in accordance with an award on the ground that one of three punchas refused to sign the award. (*Iqbal Ahmed, J.*) PRABHU DAYAL *v.* MUNSHI LAL. **100 I. C. 76 = A. I. R. 1927 All. 573.**

———If a Court refuses to hear a valid objection properly raised before him or entertains matters which are outside its jurisdiction, then the High Court can interfere under section 115 not with the arbitrators, nor with the award, but with the exercise of the jurisdiction of the Court in dealing with the application. (*Walsh, Ag. C. J. and Ryves, J.*) GOBIND SINGH *v.* BHIRGUNATH. **82 I. C. 16 = 46 All. 686 = 22 A. L. J. 676 = 5 L. R. A. Civ. 465 = A. I. R. 1924 All. 788.**

———A Munsif who has jurisdiction to decide objections to an award cannot, even if he has come to a wrong conclusion on a question of law or fact, be said to have acted illegally or with material irregularity. His decision cannot therefore be interfered with in revision. (*Abdul Raoof, J.*) SHEO NATH *v.* BEG RAJ. **73 I. C. 558 = A. I. R. 1923 Lah. 194.**

———Where the objection as to non-joinder is not taken in the memorandum of objections to the award presented in the lower Court and it is not shown that the parties not joined in reference were necessary parties to the suit between the plaintiff and the petitioner, the High Court will not interfere in revision. (*Spencer, J.*) BHAGAVANULU *v.* SEETHARAMASWAMI. **73 I. C. 202 = 17 M. L. W. 424 = 32 M. L. T. 298 = 1923 M. W. N 296 = A. I. R. 1923 Mad. 502 = 44 M. L. J. 359.**

———Where the Court has considered the objections to the award and has come to a wrong decision as to whether there had been any irregularity on the part of the arbitrator, no revision lies under S. 115, C. P. Code, although it is not the law that in no possible case could a revision be entertained against a decree passed in accordance with an award if the procedure of the Lower Court had been altogether irregular and illegal. (*Daniels, A. J. C.*) SHEO PALTAN *v.* SUKHDEO SINGH. **74 I. C. 401 = 26 O. C. 107 = A. I. R. 1923 Oudh 235.**

———*No time for objections.*

Where the Court has not followed the procedure laid down by the Code and does not allow a party the time which the law allows him, to make objections, but proceeds to pass at once a decree in accordance with the award, then it cannot be said that there is any defect in the award itself, and under sub-para, (2) of para. 16 no appeal would lie, but the High Court may exercise its discretion under S. 115. 29 Bom. 285, Foll. 29 All. 584 Dissented from. (*Macleod, C. J. and Fawcett, J.*) RAVIBHAI KASHIBHAI *v.* DAHYABHAI ZABERBHAI PATEL. **59 I. C. 811 = 45 Bom. 832 = A. I. R. 1921 Bom. 32.**

—S. 115—Award—Partial award—Jurisdiction.

———Certain arbitrators who were authorized to make a separate award from time to time in a partition suit made a partial award and on objection by the parties, refused to proceed further. The trial Court did not pass decree on it. One of the parties applied to the High Court for revision of this order.

Held (by Cuming, J.) the judge had jurisdiction to pass an order refusing a decree on a partial award ; the High Court has no power to interfere under S. 115. (Roy, J.) dissenting.

Roy, J.—If the parties agreed to abide by the decision of the arbitrators in respect of the whole of the dispute and if the arbitrators had power to make a partial award from time to time the award which they actually made must be effective and cannot be set aside by refusing to pass a decree on it and a decree ought to have followed on the award already made. In such cases High Court has power to interfere with interlocutory orders. (*Cuming and Roy, JJ.*) ASIM KRISHNA DEB *v.* SAILESH CHANDRA. **106 I. C. 93 = A. I. R. 1928 Cal. 174.**

—S. 115—Award—Setting aside.

———It is doubtful whether proceedings relating to the setting aside of an award in a suit is a case within the meaning of S. 115 so that the order refusing to set aside the award can be revised. A. I. R. 1929 Lah. 369, Doubted ; 4 P. L. R. 1911, Appr. ; A. I. R. 1924 Lah. 425, Ref. (*Addison, J.*) GOBIND LAL *v.* DARBORI LAL DEVI KISHEN. **119 I. C. 721 = 11 L. L. J. 275 = A. I. R. 1929 Lah. 688.**

———A revision lies from an order refusing to set aside an award. (*Jai Lal, J.*) HARBHAJAN *v.* KALU MAL. **111 I. C. 145 = A. I. R. 1929 Lah. 369.**

———Where the Court passes an order setting aside an arbitrator's award and resumes hearing of the suit for decision no application for revision can lie in respect of such order as there has been no decision of a case and the order is clearly an interlocutory order. A. I. R. 1923 Bom. 402, Foll.; 5 All. 293 and 26 Bom. 551, Ref. A. I. R. 1926 Oudh 307 and A. I. R. 1926 Oudh 383, Dist. (*Stuart, C. J. and Srivastava, J.*) GANGA PERSHAD *v.* RAM NARAIN. **6 O.W.N. 813 = A. I. R. 1929 Oudh 493.**

———No revision lies against an order superseding an award made in a pending case and directing the suit to proceed on the merits. 43 All. 564 and A.I.R. 1925 All. 458, Foll. (*Sulaiman and Daniels, JJ.*) RUDRA PRASAD *v.* MATHURA PRASAD. **89 I. C. 173 = 47 All. 916 = 23 A. L. J. 656 =**

6 L. R. A. Civ. 459 = A. I. R. 1925 All. 566.

———*Pending suit—No revision lies.*

No revision is maintainable from an order setting aside an award. (*Mukerji and Dalal, JJ.*) MUHAMMAD FAKHRUDDIN *v.* RAHIMULLA. **85 I. C. 502 = 47 All. 121 = 6 L. R. A. Civ. 22 = A. I. R. 1925 All. 458.**

—S. 115—Case—Adjournment.

———The order of the Court refusing to adjourn the case for enabling the defendant to pay court-fee fixed on his counter-claim is not revisable, no case having been decided. 19 A. L. J. 583, Foll. (*Piggott and Walsh, JJ.*) CHAKKHAN LAL *v.* KANHIYA LAL. **69 I.C. 921 = 20 A. L. J. 1005 = 45 All. 218 = 4 L. R. A. Civ. 40 = A. I. R. 1923 All. 118.**

—S. 115—Case—Amendment.

———The application for leave to amend is not a case, and therefore, no revision can lie against an order refusing to grant leave to amend either under S. 25 of the Provincial Small Cause Courts Act, or under S. 115 of the Code. (*Wazir Hasan, A.J.C.*) BADRI PRASAD *v.* MURLI DHAR. **77 I.C. 553 = A.I.R. 1925 Oudh 254.**

—S. 115—Case—Appointment of next friend.

———The question as to whether a particular person should or should not be the next friend is really ancillary to the suit itself and, it is a case finally decided qua that particular proceeding. It stands on the same footing as giving or refusing leave to sue as a pauper, and therefore, under S. 115 High Court has power to interfere. A. I. R. 1924 Lah. 425; A. I. R. 1924 All. 561; 23 Cal. 723; A. I. R. 1926 Lah. 642 and A. I. R. 1927 Lah. 56, Ref. (*Harrison and Dalip Singh, JJ.*) SADAQAT ALI KHAN *v.* MOHAMMAD SAJJAD ALI KHAN. **113 I. C. 901 = 30 P. L. R. 17 = 11 L. L. J. 130 = A. I. R. 1929 Lah. 257.**

—S. 115—Case—Costs.

———A mere direction that the defendant should sign the pleas and verify them according to law would probably not be open to revision but when that direction is accompanied by an order that the defendant, is to pay a certain sum as costs the order is a decision of a case with which the High Court can interfere in revision. (*Martineau, J.*) BALWANT SINGH *v.* TEJ BHAN. **64 I.C. 207 (Lah.).**

—S. 115—Case—Evidence.

———The order of Court overruling the contention that according to the law governing the parties an oral will is not valid, and directing the parties to produce evidence with respect to the oral will is not tantamount to the decision of a "case" and cannot be revised under S. 115. A. I. R. 1924 Lah. 425 (F. B.). Foll. (*Bhide, J.*) TOMLINSON *v.* WILLIAMS. **A. I. R. 1930 Lah. 448.**

—S. 115—Case—Fees of Commissioner.

———An incidental order fixing the remuneration of a Commissioner appointed to examine accounts does not amount to the decision of an case. (*Daniels and Wazir Hasan, A. J. Cs.*) GIRDHARI GOPAL *v.* PANDIT LACHIMI NARAIN. **76 I. C. 503 = A. I. R. 1924 Oudh 348.**

—S. 115—Case—Incidental order.

———Any orders, on matters, arising incidentally in the course of the hearing, the object of which is to bring on the record or to exclude from it materials upon which the decision is to be based are not by themselves decisions in a case which can be revised until the case is finally concluded: 12 O. C. 405, Foll. A Munsif passed an order in a suit that certain issues must be argued and decided before evidence was heard on the other issues. His successor held that it was necessary to hear the full case on the merits before pronouncing judgment and passed an order to that effect.

Held, that the order did not amount to a decision of a case within S. 115. (*Kendall, A. J. C.*) DEPUTY COMMR. LUCKNOW *v.* BHIKARI SING. **89 I. C. 772 = A. I. R. 1926 Oudh 185.**

—S. 115—Case—Issue of Commission.

———The order of refusal to issue a commission does not appear to be a case decided within the meaning of S. 115, C. P. Code. 14 S. L. R. 28; 44 Bom. 619; A. I. R. 1927 Bom. 664 and A. I. R. 1924 Lah. 425, Rel. on.; A. I. R. 1927 Sind 264, Foll. (*Percival, J. C. and Aston, A. J. C.*) SPENCER & CO. *v.* EDULJI. **23 S. L. R. 403 = 116 I. C. 97 = A. I. R. 1929 Sind 92.**

—S. 115—Case—Jurisdiction—Place of suit.

———A merchant residing at Akola who had had dealings with the defendant *an adtia* at Bombay sued in Akola for rendition of account and for such balance as may be found due. The trial Court found that the contract of agency took place at Bombay but that in a Pakki Adat system primarily the place for payment is where the constituent resides unless such constituent chooses to get paid in any other place and therefore, *held*, that the suit had been correctly laid at Akola. On revision against that decision, *held* that the High Court would interfere where a refusal to interfere might result in deplorable waste of public time and parties' money if they are forced to await the issue of a decree. A too narrow view of the meaning of the word 'case' in S. 115 should not be taken. (*Prideaux and Kinkhede, A.J.Cs.*) SHEOPRATAP SHRINIVAS *v.* SUKHDEO KANHAI YALAL. **79 I.C. 168 = A. I. R. 1924 Nag. 292.**

———Where on the objection of the defendant that the Court has no jurisdiction to entertain the suit, the Court decides it has jurisdiction, the order does not amount to a decision of a case and no revision lies against it. (*Abdul Raoof, J.*) COLONY FLOUR MILLS *v.* FIRM BHAI SANT SINGH. **71 I. C. 487 = 5 L. L. J. 140 = 11 P. W. R. 1923 = A. I. R. 1923 Lah. 414.**

———One of the pleas taken in defence to a certain suit was that the Court had no jurisdiction to entertain the suit which should have been filed in the Civil Court at a different place. The Munsif instead of trying all the issues raised in the case proceeded to receive evidence and hear arguments on the question of jurisdiction only. He disposed of the issue of jurisdiction against the defendants. A formal order was drawn up later on, embodying the decision of the issue. The defendants preferred an application in revision from the said order, seeking the interference of the High Court under S. 115, C. P. Code.

Held (Per *Piggott, Ryves* and *Gokul Prasad, JJ.*—*Rafiq* and *Walsh, JJ.*, Dissenting) that no case had been decided within S. 115 and that no revision lay. 41 All. 602, Overruled. (Legal connotation of the term 'case' elaborately discussed. (*Rafiq, Piggott, Walsh, Ryves and Gokul Prasad, JJ.*) BUDDHOO LAL *v.* MEWA RAM. **63 I. C. 15 = 43 All. 564 = 19 A. L. J. 558 = A. I. R. 1921 All. 1 (F. B.).**

———An order of the Court determining the question of jurisdiction is not a decision of a case, either under S. 115 of the C. P. Code or S. 44 of the Punjab Courts Act, and is not open to revision. 41 All. 602, Diss. from. (*Martineau, J.*) SAWAN MAL *v.* KANHAIYA LAL GOPAL DAS. **59 I. C. 680 = 45 P. L. R. 1921 = A. I. R. 1921 Lah. 184.**

—S. 115—Case—Meaning of.

———*Explained—Order superseding arbitration is revisable.*

The word "case" does not necessarily mean suit but

can mean a proceeding. If any proceeding in a suit has terminated, it is a case decided within the meaning of S. 115, although the suit itself has not been finally disposed of. Thus the order superseding the reference to arbitration on an application made for the purpose amounts to an order deciding a case and as no appeal lies from it, it is open to revision. A. I. R. 1921 All. 1 (F. B.), Disc., A. I. R. 1925 All. 610 (F. B.) and 36 All. 354, Rel. on. (*Sulaiman and Niamatullah, JJ.*) BHOLA NATH *v.* RAGHUNATH DAS.
1929 A. L. J. 918 = 51 All. 1010 = A. I. R. 1929 All. 743.

———The word "case" is more comprehensive expression than the word "suit." Whereas all cases are not suits, every suit is at least a case. 'Case' referred to in S. 115, must be considered to be 'case' which has been decided. (*Sulaiman and Niamatullah, JJ.*) SUMATRA DEVI MT. *v.* HAZARI LAL. **A. I. R. 1930 All. 758.**

———The words "case decided by a Court" mean a matter which has been disposed of effectually by the Court and not merely for the time being. A purely *ad interim* order that does not effectually dispose of the matter before the Court would not be case decided. A. I. R. 1917 P. C. 71, Foll. (*Mukerji and Young, JJ.*) MOHAMMAD ABDUL WAHID KHAN *v.* RADHA KISHUN. **121 I. C. 267 = 51 All. 957 = 1929 A. L. J. 911 = A. I. R. 1929 All. 581.**

—S. 115—Case—Order under.

———*Charitable and Religious Trusts Act (XIV of 1920), S. 10.*

An order asking defendant to deposit money in Court under S. 10 of Act (XIV of 1920) is a 'case' within S. 115 and revision lies. (*Brasher, J.*) KIRPAL SINGH NIRANJAN SINGH. **69 I. C. 658 = A. I. R. 1924 Lah. 408.**

—S. 115—Case—Preliminary issue.

———Refusal of a Court to try the plea of *res judicata* as a preliminary issue cannot be revised as no case is decided and no question of jurisdiction is involved in the action of the Court. (*Wazir Hasan, J. C.*) GAJADHAR LAL *v.* REOTI RAMMAN.

—S. 115—Case—Resumption of suit.

———An order by which proceedings are resumed in suit which had been stayed under S. 10, is a "case decided" within the meaning of S. 115; 6 O. L. J. 96; A. I. R. 1924 Lah. 425 (F. B.) and 13 O. C. 109, Rel. on. (*Stuart, C. J., Wazir Hasan and Gokaran Nath Misra, JJ.*) SAHDEO SINGH *v.* MT. CHANUN KUER. **111 I. C. 161 = 5 O. W. N. 604 = 80 I. C. 628 = A. I. R. 1925 Oudh 179.**

—S. 115—Case—Remand.

———No revision lies from an order of remand by lower appellate Court as there is no case decided. (*Macleod, C. J. and Crump, J.*) THAKURDAS TRIBHUVANDAS *v.* LALLUBHAI TRIBHUVANDAS. **75 I. C. 102 = 25 Bom. L. R. 452 = A. I. R. 1923 Bom. 401.**
3 Luck. 650 = A. I. R. 1928 Oudh 355 (F. B.).

—S. 115—Case—Setting aside ex parte decree.

———Proceeding consequent on an application for setting aside a decree *ex parte* are not a mere branch of a suit, but since they involve the reversal of a final order and decree in a suit, they are in themselves a case. (*Campbell, J.*) PIROJ SHAH *v.* ARIB SHAH. **95 I. C. 124 = 7 Lah. 161 = 8 L. L. J. 267 = 27 P. L. R. 321 = A. I. R. 1926 Lah. 379.**

———When an *ex parte* decree is passed, the suit is terminated, and it remains terminated until the proceedings on the applicattion to set aside the decree come to an end. There is no suit pending, either when the application is presented, or when the order disposing of it is passed, and the proceedings, since they involve the reversal of a final order and decree, are themselves a case. C. R. No. 429 of 1925, decided on 8th December, 1925, Foll. (*Campbell, J.*) WIRU RAM *v.* AMER CHAND. **94 I. C. 117 = 8 L. L. J. 170 = 27 P. L. R. 710 = A. I. R. 1926 Lah. 344.**

———The High Court can interfere in revision with an appellate order directing the setting aside of a decree *ex parte* as the order is a 'case' within S. 115 and not a mere interlocutory order. (*Lindsay, Sulaiman and Daniels, JJ.*) RAM SARUP *v.* GAYA PRASAD. **90 I. C. 180 = 48 All. 175 = 24 A. L. J. 56 = 6 L. R. A. Civ. 601 = A. I. R. 1925 All. 610 (F. B.).**

—S. 115—Case—Stay of suit.

———Where the Court below decides that it should proceed with a suit, it does not decide a case within the meaning of S. 115 and no revision lies. The question whether the trial of a particular suit or issue should go on or should be stayed, is no question on the merits of the case but relates to a matter of procedure. A. I. R. 1921 All. 1 (F. B.), Ref. (*Mukerji and Niamatullah, JJ.*) L. BALKRISHNA *v.* RAM KISHUN. **121 I. C. 97 = 1930 A. L. J. 235 = A. I. R. 1929 All. 957.**

———No revision lies against an order refusing to stay a suit under S. 10 of the C. P. Code, there being no case decided within S. 115. A.I.R. 1923 L. 69; A.I.R. 1922 L. 54, 42 A. 409 and 43 A. 564, F. B., Rel. on. (*Abdul Raoof, J.*) BAGH SINGH *v.* BHAGWAN DAS. **75 I. C. 101 = A. I. R. 1924 Lah. 567.**

———Order of the lower Court staying a suit under S. 10, C. P. Code, is an interlocutory order and not a 'case' decided and no revision lies. (42 All. 409 and 60 P. R. 1897, F. B., Ref.) The word 'case' does not in every case mean the whole case but may mean a particular branch of a case for which an independent remedy or a different procedure is provided by the Code. (*Moti Sagar, J.*) RAM CHAND-DIWAN CHAND *v.* PRITHURI CHAND & CO. **73 I. C. 247 = A. I. R. 1923 Lah. 615.**

———An application under S. 10 of the C. P. Code for the stay of a suit is not a "case," and that an order for stay passed on that application is not a decision of a case within the meaning of that word in S. 115. 42 All. 409, Foll. 60 P. R. 1897 (F. B.), Diss. from. (*Martineau, J.*) ISHAR DAS *v.* BUTA MAL DURGA DAS. **67 I. C. 870 = 4 L. L. J. 425 = A. I. R. 1922 Lah. 54.**

—S. 115—Case—Striking out part of the claim.

———Plaintiff sued for possession of certain properties; part of them uuder-proprietary interest and part occupancy interest in different plots of land. The first Court granted a decree, but the appellate Court was of opinion that a suit for the recovery of occupancy land, even from strangers who are not landlords did not lie in the Civil Court. It thereupon passed an order that the plaintiff should strike out from her plaint her claim for possession of the occupancy lands.

Held, that the order of the lower Court amounted to an order in a case because it finally settled the matter whether a suit for the possession of occupancy land did lie in the Civil Court or not and that the Judge had no jurisdiction to pass the order which he did because such an order was not necessary for the ends of justice to prevent any abuse of the process of the Court. (*Dalal, J. C.*) MT. MALUKA *v.* PATESHUR SINGH. **85 I. C. 703 = A. I. R 1925 Oudh 604.**

—S. 115—Case—Transfer.

———Where the original Court decides that it has no jurisdiction and sends the suit to District Judge for transfer, and the District Judge passes an illegal order for transfer, there is a case decided and revision lies.

A. I. R. 1924 Lah. 425 (F. B.), Dist. (*Johnstone, J.*) AMIR CHAND *v.* BUTI SHAH. **A. I. R. 1930 Lah. 195.**

———Order for transfer is decision of a case within the section and is revisable. 60 P. R. 1897 (F. B.), Foll. (*Martineau, J.*) LABHU RAM *v.* KARTA RAM. **78 I. C. 614 = A. I. R. 1925 Lah. 189.**

—S. 115—Court-fee.

———Court has no inherent jurisdiction to consolidate Civil Revision Petitions in cases which have been disposed of by a single judgment of the lower Court so as to enble the party to file one vakalat in the petitions and pay one process fee for the common respondents. A. I. R. 1930 Mad. 376, Rel. on. (*Kumaraswami Sastri, Curgenven and Walsh, JJ.*) VAITHILINGA, *In re.* **123 I. C. 606 = 53 Mad. 262 = 31 M. L. W. 294 = A. I. R. 1930 Mad. 381 = 58 M. L. J. 521.**

———Order relating to question of Court-fee cannot be interfered with in revision if it is favourable to the plaintiff and is the only ground of revision. A. I. R. 1929 Mad. 191, Rel. on.; A. I. R. 1925 Mad. 713; A. I. R. 1926 Mad. 678 and A. I. R. 1928 Mad. 416, Dist. (*Venkatasubba Rao and Reilly, JJ.*) KATTIYA PILLAI *v.* RAMASWAMIA PILLAI. **119 I. C. 35 = 29 M. L. W. 584 = 1929 M. W. N. 286 = A. I. R. 1929 Mad. 396 = 56 M. L. J. 394.**

———Although Civil Revision Petition lies when the decision of the lower Court with regard to Court fee payable is unfavourable to the plaintiff, it does not lie when such decision is in plaintiff's favour as such decision, though to the detriment of the revenue, is not against defendant, and as the mistake can be corrected by appellate Court under S. 12 of the Court-fees Act. A. I. R. 1926 Mad. 678; A. I. R. 1925 Mad. 713: A. I. R. 1928 Mad. 416; A. I. R. 1928 P. C. 188. Rel. on.; A. I. R. 1925 Cal. 814, Foll. (*Venkatasubba Rao, J.*) MAHOMED ELLIYAS *v.* MT. RAHIMA BEE. **114 I. C. 842 = 29 M. L. W. 42 = A. I. R. 1929 Mad. 191 = 56 M. L. J. 302.**

———Although the High Court might be competent to interfere with an erroneous decision of a subordinate Court directing the plaintiff to pay additional Court-fee such an order will be revised by High Court only in exceptional cases particularly when there is no other remedy available to the injured party and when the order complained against is such as calculated to cause irreparable loss to such a party or amounts to denial of jurisdiction. Each case has to be considered on its own circumstances. 1 P. L. T. 5; 51 I. C. 581; A. I. R. 1926 Mad. 768; A. I. R. 1924 Pat. 673 and 14 C.W.N. 932, Ref.; 4 P. L. J. 191 and 4 P. L. J. 195, Dist. (*Fazl Ali, J.*) MAHARAJ BAHADUR *v.* RAJA PRITHI-CHAND. **119 I. C. 78 = 10 P. L. T. 464 = A. I. R. 1929 Pat. 427.**

———Where a Judge, on an erroneous view of the Court-fee payable refuses to proceed with the suit until the proper Court-fee is paid, he fails to exercise jurisdiction, as a party is entitled to have his case tried if he paid the Court-fee. In such cases the order is revisable. Case-law considered. (*Kumaraswami Sastri and Wallace, JJ.*) KULANDAI *v.* INDRAN RAMASWAMI. **108 I. C. 539 = 51 Mad 664 = 27 M.L.W. 286 = A.I.R. 1928 Mad. 416 = 55 M.L.J. 345.**

———The High Court should not interfere under S. 115 in respect of an order passed by the Court below on a question of Court-fees. A. I. R. 1926 Mad. 768, Foll. (*Waller, J.*) CHINNASAMI PILLAI *v.* PAVAYEE AMMAL. **102 I. C. 877 = A.I.R. 1927 Mad. 1162.**

———An order of the lower Court assessing the Court-fee payable upon a petition and allowing the petitioners certain time within which to pay it does not decide a "case" within S. 115 and is not revisable. A different set of considerations might arise if the court on failure to make the payment dismissed the petition. A. I. R. 1926 Mad. 768, Rel. on. (*Curgenven, J.*) KOTILINGAM *v.* BOARD OF COMMISSIONERS, RELIGIOUS ENDOWMENTS. **104 I.C. 145 = 39 M.L.T. 220 = A. I. R. 1927 Mad. 1021 = 53 M.L.J. 452.**

———Revision will lie against an order demanding additional Court-fees. (*Hallifax, A.J.C.*) HARIHAR RAO *v.* SALU BAI. **103 I. C. 268 = 10 N.L.J. 106 = A.I.R. 1927 Nag. 256.**

———No revision will lie from an interlocutory order directing the payment of an additional Court-fee. 5 Pat. L. J. 400 and 51 I. C. 581, Rel. on. (*Phillips, J.*) ACHA *v.* SANKARAN. **95 I.C. 424 = 23 M.L.W. 752 = 1926 M.W.N. 444 = A. I. R. 1926 Mad. 768 = 50 M.L.J. 497.**

———High Court will interfere in revision with the orders of the lower Courts deciding what Court-fee is payable. (*Venkatasubba Rao, J.*) KARUPANNA THEVAR *v.* ANGAMMAL. **96 I. C. 129 = 23 M.L.W. 581 = A. I. R. 1926 Mad. 678 = 51 M.L.J. 67.**

———Where plaintiff valued his suit for injunction at Rs. 150, the value of the property involved being Rs. 300, and lower appellate Court held that under S. 7, sub-S. (4), cl. (*c*) of the Court Fees Act the valuation was reasonable,

Held, that the lower appellate Court had jurisdiction to decide the matter and High Court will not interfere. (*Adami, J.*) JANKI SAHAY *v.* LALBEHARI LAL. **94 I.C. 103 = 1926 P.H.C.C. 102 = A. I. R. 1926 Pat. 334.**

———The Court is empowered under the law to revise the valuation put by the plaintiff and if on such revision, it is of opinion that the valuation is insufficient or arbitrarily low, it has jurisdiction to fix the proper value. But where a Court determines the valuation according to its judgment or holds that plaintiff's valuation is correct it does not commit such an error of law as to entitle the High Court to interfere under S. 115, C. P. Code. (*Suhrawardy and Duval, JJ.*) G. M. FALKNER, OFFICIAL ASSIGNEE *v.* MIRZA MAHOMED. **86 I. C. 853 = 29 C. W. N. 627 = A. I. R. 1925 Cal. 814.**

———Where the question is as to whether a suit falls under Court Fees Act, S. 7, cl. 4 (*c*) or 2nd schedule, Art. 17-A (1) and the lower Court in the course of the suit has decided the matter in one way, the High Court can interfere in revision and set aside the decision. (*Venkatasubba Rao, J.*) VENKATA RAMANI AIYAR *v.* NARAYANASWAMI AYYAR. **87 I.C. 660 = 21 M.L.W. 649 = 1925 M.W.N. 276 = A. I. R. 1925 Mad. 713 = 48 M.L.J. 688.**

———An order directing that the Court-fee paid by the plaintiff on a plaint is sufficient is open neither to appeal nor to revision. (*Adami and Macpherson, JJ.*) KANHAIYA LAL *v.* BALDEO LAL. **85 I.C. 538 = A. I. R. 1925 Pat. 703.**

———Wrong order regarding Court fees leading plaintiff to seek permission to continue to sue *in forma pauperis* is revisable. (*Kinkhede, A.J.C.*) MANAJI *v.* SITARAM. **81 I.C. 643 = 7 N. L. J. 91 = A.I.R. 1924 Nag. 105.**

———An order directing a party to pay *ad valorem* fees on the amount at stake in his miscellaneous appeal, instead of the fixed fee of eight annas, which he had actually paid is a "case decided" within the meaning of S. 115. *Held also*, that an order directing the dismissal of such appeal if the Court-fee is not paid is a refusal to exercise jurisdiction and is therefore revisable. (*Oldfield, J.*) SUDALI MUTHU *v.* SUDALI MUTHU. **71 I.C. 173 = 1922 M.W.N. 831 = 17 M. L. W. 623 = A. I. R. 1923 Mad. 270.**

———No revision lies against a decision of a Subordinate Court on a question of valuation determining the amount of Court-fee inasmuch as no case has been decided by the Court below within the meaning of S. 115. An error of law is a good ground for second appeal but not a ground for revision. (*Prideaux, A. J. C.*) GOVINDA *v.* DAJI. **65 I. C. 327 = A. I. R. 1922 Nag. 128.**

———When there is another course open and no irremediable harm can be suffered by the interlocutory order directing additional Court-fee to be paid, High Court will not interfere with it. 1 Pat. L.T. 5. (*Coutts and Adami, JJ.*) LATCHMIPATI KUMARI *v.* NAND KUMAR SINGH. **1921 P. H. C. C. 166 = A.I.R. 1921 Pat. 180.**

—S. 115—Criminal prosecution.

———The parties are apt to say in their pleadings things not strictly true but by such statements they do not render themselves liable for prosecution for perjury. Where the Judge so misconceives the operation and function of a written statement as to imagine that because something is put in in a written statement which is in a sense not true and something is omitted from the written statement, that of itself constitutes offence under S. 193, Penal Code, the High Court is not only justified in exercising but is bound to exercise its power in revision to set aside the order. (*Suhrawardy and Costello, JJ.*) RASH BEHARY RAY *v.* EMPEROR. **A.I.R. 1930 Cal. 639.**

———Where a Munsif, under S. 476, refused to direct a complaint to be made on the view that he had no jurisdiction in the matter, and an appeal was taken to the District Judge under S. 476-B, who, without deciding the question whether the Munsif had jurisdiction or not, purported to act under the section,

Held, that the District Judge erred in holding this view. It was also an error with respect to procedure. It is a material irregularity and the High Court should interfere in such a matter under S. 115. (*Rankin, C.J. and Chotzner, J.*) KANAI LAL *v.* MUKHAN LAL. **109 I.C. 211 = 55 Cal. 836 = 47 C. L. J. 277 = 10 A.I.Cr. R. 167 = 29 Cr.L.J. 483 = A. I. R. 1928 Cal. 237.**

———Proceedings before a Subordinate Judge in an appeal under S. 176-B, Cr. P. Code, transferred to him by a District Judge from an order of a Munsif under S. 476, Cr. P. Code, can be declared to be null and void under S. 115, C.P. Code, though not under S. 439, Cr. P. Code, the Court of a Subordinate Judge not being a Criminal Court. (*Stuart, C. J. and Raza, J.*) BESMILLAH KHAN *v.* SHOKIR ALI **114 I.C. 812 = 4 Luck. 155 = 30 Cr.L.J. 382 = 5 O.W.N. 882 = A. I. R. 1928 Oudh 494.**

———Where a Civil Court refused to make a complaint under Cr. P. Code, S. 476, but the appellate Court directs the complaint to be filed, the order of the appellate Court is revisable only when it is brought within C.P. Code, S. 115. 26 All. 249, Expl. (*Ashworth, J.*) ABDUL HAQ *v.* SHEO RAM. **100 I. C. 376 = 28 Cr.L.J. 296 = 25 A.L.J. 569 = 49 All. 536 = A. I. R. 1927 All. 334.**

———An appellate order by a Civil Court confirming refusal to lodge a complaint by its subordinate Court is not open to revision by High Court under S. 439, Cr.P. Code, as the order is not of a Criminal Court. It is also not revisable under S. 115 if conditions of S. 115 are not fulfilled. 17 O. C. 25 and 40 Cal. 477, Rel. on. (*Stuart, C.J.*) NAWAB ALI *v.* MADHURI SARAN.

99 I. C. 48 = 3 O.W.N. 905 = 28 Cr.L.J. 16 = 7 A.I.Cr.R. 240 = 7 A.I.Cr.R. 47 = A.I.R. 1927 Oudh 14.

———Where the Sub-Deputy Collector, after enquiry, refused the application of the opposite party for prosecution of petitioner under Penal Code, S. 471, but on appeal the Collector set aside the order of the Sub-Deputy Collector and made a formal complaint under S. 200, Cr. P. Code, for the prosecution of the petitioner,

Held, that the Collector was clearly acting as a Revenue Court and he was exercising judicial powers in setting aside the order of the Sub Deputy Collector and in making a complaint under S. 200 and was therefore subject to the superintendence of the High Court and his order is revisable under S. 115, C. P. Code, as also under S. 107 of the Government of India Act. (6 Pat. L.J. 178, Ref.) (*Mullick, J.*) FAUJDUR RAI *v.* EMPEROR. **90 I. C. 445 = 7 P. L. T. 199 = 26 Cr.L.J. 1565 = A. I. R. 1926 Pat. 25.**

———An order passed in exercise of jurisdiction under S. 476, Cr. P. Code, by a civil Court cannot be revised under S. 115, C. P. Code. (*Kennedy, J. C. and Tyabji, A.J.C.*) GERIMAL *v.* SHEWARAM. **95 I.C. 316 = 20 S.L.R. 90 = 27 Cr.L.J. 780 = A. I. R. 1926 Sind. 215.**

———The High Court can only interfere with the order of District Judge revoking the order of the Munsif granting sanction for the prosecution of a party for perjury either under S. 115, C.P. Code or under S. 107 of the Government of India Act. But the fact that the Judge has considered the matter from a wrong point of view is not by itself a sufficient ground for interference. (*Newbould and Suhrawardy, JJ.*) JAIMUDDIN *v.* KERAMATULLA. **71 I.C. 595 = 24 Cr.L.J. 179 = A.I.R. 1924 Cal. 641.**

———Where there has been no excess of jurisdiction nor failure to exercise jurisdiction in refusing sanction under S. 195, Cr. P. Code, on the facts it is difficult to say that the case can be brought within the last clause of S. 115, C. P. Code.

Per *Cuming, J.*—S. 115, C.P. Code, obviously refers to civil matters and civil matters only. It is found in C. P. Code, and can have no application in criminal matters. (*Ghose and Cuming, JJ.*) SARAT CHANDRA MANDAL *v.* RAM SASHI ROY. **69 I.C. 153 = 36 C.L.J. 265 = 26 C.W.N. 1016 = 23 Cr.L.J. 665 = A.I.R. 1923 Cal. 45.**

———In an appeal against an order of sanction to prosecute the applicant for giving false evidence, the only judgment passed was "The application is rejected."

Held, that an order like this passed in a sanction for prosecution case, amounts to refusal to consider the question and would amount to a material irregularity. (*Gokul Prasad, J.*) ABDUL AZIZ *v.* TARACHAND. **60 I. C. 800 = 19 A. L. J. 291 = A. I. R. 1921 All. 86.**

—S.115—Delay.

———An application for revision should not be entertained when filed after considerable delay unless good cause is shown for delay in filing it. (*Misra, J.*) JAGANNATH *v.* BIKARMAJIT SINGH. **10 L. R. A. Rev. 204 = A.I.R. 1929 Oudh 383.**

———Mere lapse of time is no ground for rejecting revision petition where the petitioner could not be imputed with laches or negligence. (*Wallace and Srinivasa Aiyangar, JJ.*) MUTHU CHETTIAR *v.* NARAYANAN. **110 I. C. 63 = 51 Mad. 672 = 28 M.L.W. 297 = A.I.R. 1928 Mad. 528 = 55 M.L.J. 274.**

———Delay of nearly seven months in filing the application would in itself be a sufficient ground for declining to accept it. (*Daniels, J.*) G. I. P. Ry. *v.* Kunj Behari Lal. **92 I. C. 993 = A. I. R. 1926 All. 228.**

———A revision which is filed after a long delay of more than three years cannot be entertained unless some good reason is shown for the delay. (*Dalal, J. C.*) Mahadeo Prasad *v.* Mt. Ganeshi. **86 I. C. 329 = A. I. R. 1925 Oudh 608.**

———An application for revision made more than a year after the order complained of was passed will not be accepted unless some good reason can be shown for the delay. (*Daniels, A. J. C.*) Binda Prasad *v.* Banarsi Das. **10 O. L. J. 205 = 77 I. C. 115 = A. I. R. 1923 Oudh 272.**

———Though the High Court as a rule does not entertain revision petitions after three months, in proper cases the discretion of the Court could very well be exercised in excusing the delay. (*Devadoss, J.*) Yagnasami Iyer *v.* K. Chidambaranath Mudaliar. **65 I. C. 732 = 16 M. L. W. 760 = 1922 M. W. N. 130 = A. I. R. 1922 Mad. 63.**

———A High Court may and frequently will refuse to interfere in revision where there has been undue delay in bringing the matter before it. (*Daniels, A. J. C.*) Mahabali Parshad *v.* Balbhadar Singh. **64 I. C. 303 = 24 O. C. 282 = A. I. R. 1921 Oudh 141.**

—S. 115—Discretion—Adjournment.

———No revision lies against an order requiring the plaintiff to pay certain damages on condition of getting an adjournment, with an order that the case will not be taken up unless the amount is paid. (*Daniels, J. C.*) Narendra Bahadur Singh *v.* Pearay Lal. **64 I. C. 211 = 24 O. C. 215 = A. I. R. 1921 Oudh 23.**

—S. 115—Discretion—Clerical error.

———When there is a mistake purely of an arithmetical nature, Court cannot refuse to correct it. The matter is not one of discretion and the High Court will, therefore, correct the same in revision. 3 M. L. W. 499 and A. I. R. 1925 All. 187, Dist. (*Ramesam, J.*) (Chennamangalath Illath) Govindan Nambiar *v.* Janala Perikamanna Illath) Kesava Vadhyan. **114 I. C. 635 = A. I. R. 1930 Mad. 421.**

—S. 115—Discretion—Court-fee—Time for.

———Under S. 149 the Court has discretion to grant time for payment of deficient Court-fee and the propriety of the exercise of that discretion cannot be challenged in revision. (*Wadegaonkar, A. J. C.*) Mahomed Galif *v.* Abdul Rahim. **89 I. C. 419 = A. I. R. 1926 Nag. 156.**

—S. 115—Discretion—Curator—Appointment of.

———Where the District Judge held that in his discretion, in view of the delay which had occurred in applying, the case was not a suitable or advisable one for even appointing a curator, much less for putting the applicant in possession.

Held: that whether or not the discretion was wisely exercised, it is not the function of the High Court to determine. (*Findlay, J. C.*) Sakharam Laxman *v.* Vinayak Narayan. **102 I. C. 622 = A. I. R. 1927 Nag. 258.**

—S. 115—Discretion—Evidence.

———*Exercise of revisionary power is discretionary.*

Whether the Court will exercise its powers of revision is a matter to be determined in its discretion according to the circumstances of the case under review. Where, in recording evidence in the Lower Court, the provisions of O. 18, Rr. 5, 8 and 14 were not complied with, but it was not shown that the evidence was not fairly and accurately recorded, the High Court will not interfere in

revision to set aside the order on the ground that there was no legal evidence. (*Page, J.*) Promode Nath *v.* Harishee Bagdhi. **55 Cal. 1084 = 113 I. C. 833 = A. I. R. 1929 Cal. 78.**

———Trial Court rejected application to allow further evidence without exercising judicial discretion. Appellate Court failed to consider ground of appeal.

Held, the trial Court's judgment should be set aside. (*Heald, J.*) U Nge *v.* Mg. Tun Hlaing. **3 Bur. L. J. 125 = A. I. R. 1924 Rang. 318.**

———Where an appellate Court in the exercise of the discretion vested in it by O. 41, R. 27 of the C. P. Code refused to admit additional evidence offered three days after the argument was closed, the High Court would not interfere with its order in revision. (*Suhrawardy and Cuming, JJ.*) Haricharan Karanjai *v.* Bahar Sheikh. **67 I. C. 252 (Cal.).**

—S. 115—Discretion—Extension of time.

———An order extending time for performance fixed in a decree for specific performance is not revisable unless discretion is wrongly exercised. (*Heald and Mya Bu, JJ.*) Ko Ba Chit *v.* Ko Than Daing. **5 Rang. 615 = 6 Bur. L. J. 216 = 105 I. C. 467 = A. I. R. 1927 Rang. 311.**

———Where under a compromise decree, time is fixed for payment of the decretal amount, the Court can extend the time for payment if in its discretion, it thinks that time is not of the essence of the contract, and such an order extending the time is not subject to revision. (*Mullick and Bucknill, JJ.*) Mt. Nand Rani Kuer *v.* Durga Dass Narain. **82 I. C. 505 = 2 Pat. 906 = 1924 P. H. C. C. 122 = 5 Pat L. T. 401 = A. I. R. 1924 Pat. 387.**

—S. 115—Discretion—Inherent power.

———Exercise of powers under S. 151, C. P. Code is purely discretionary with a Court and if the lower appellate Court has refused to exercise these powers, High Court will not interfere in revision unless the order is perverse or illegal. 40 Mad. 793, Foll. (*Moti Sagar, J.*) Punjab Banking Company, Ltd. *v.* Diwan Dhanpat Rai. **75 I. C. 487 = A. I. R. 1923 Lah. 506.**

—S. 115—Discretion—Instalments.

———Omission to give reasons by a Court for granting instalments is after all an irregularity and the discretion exercised by the Court below in that respect ought not lightly to be interfered with. [22 C. W. N. 601, Foll.] Where the question is one of discretion the ground why it was refused in one case is not relevant in other cases. (*Kanhaiya Lal, J.*) Joku Singh *v.* Chunnoo Lal. **5 L. R. A. Civ. 784 = 83 I. C. 133 = A. I. R. 1925 All. 218.**

—S. 115—Discretion—Issues.

———*Amendment of.*

The Court has discretion to amend or alter the issues at any time before passing the decree under O. 14, R. 5. No revision lies against such an amendment. Where a Court avails itself of a discretion which the Code permits, however injudicious the exercise of that discretion may have been, no infraction of law or procedure is entailed and therefore no revision under S. 115 would lie. (*Walsh, J.*) Alagiri Nayakkar *v.* Guruswami Nayakkar. **113 I. C. 313 = 1928 M. W. N. 836.**

—S. 115—Discretion—Review.

———Failure to exercise the discretion of admitting the application for review after time, upon an insufficient ground falls under S. 115. (*Ashworth, J.*) Hari Lal *v.* Parmeshri Das. **100 I. C. 727 = A. I. R. 1927 All. 386.**

———An order refusing to grant a review is not open to revision. The granting of a review is a matter peculiarly within the discretion of the Judge who passed the decree. No other Judge can hear such an application and if the Judge who tried the case refuses to grant a review, his order is by rule 7 of Order 47 expressly declared not to be appealable and hence no revision should be permitted. (*Daniels, A. J. C.*) JAG MOHAN SINGH *v.* MATAL BADAL. **74 I. C. 351= 9 O. L. J. 623=A. I. R. 1923 Oudh 153.**

—S, 115—Discretion—Sale.

——*Validity of.*

The Court has got discretion to decide whether the sale of a holding is voidable or not under S. 173 (3) of the Bengal Tenancy Act and its decision is not revisable unless serious prejudice has been caused. (*Suhrawardy and Duval, JJ.*) BROJENDRA NATH MUKERJEE *v.* JADUNATH PALTA. **80 I. C. 708 = A. I. R. 1925 Cal. 293.**

—S. 115—Discretion—Security.

Security for the full amount of the decree under O. 21 R. 29, being within the discretion of the Court, High Court will not interfere in revision, unless the discretion was improperly used. (*Percival, J. C. and Rupchand, A. J. C.*) JIVANDAS VIRBHANDAS *v*, KHEMCHAND RAMDAS. **116 I. C. 101=A. I. R. 1929 Sind 110.**

—S. 115—Discretion—Withdrawal of suit.

———In order to induce the High Court to interfere with a discretionary order by the subordinate court permitting the plaintiff to withdraw part of his claim with liberty to bring another in respect of it, it should be shown that the order is not supported by any consideration of justice or by any provision of law. (*Suhrawardy and Costello, JJ.*) SYED SADEQ KEZA *v.* NAWAB BAHADUR OF MURSHIDABAD. **34 C. W. N. 578.**

———Where a Court purports to exercise a discretion which the law does not give it, except in circumstances not shown to exist, the Court must be deemed to have acted without jurisdiction. Thus where the court after holding that the suit should fail because the plaintiffs had failed to prove an important document, permitted the plaintiff to withdraw a suit with liberty to bring another, *held*, the Lower Court had no discretion in the matter and that the order should be set aside. (*Ashworth, J.*) MAHABIR PRASAD *v.* MAHOMED ALI KHAN. **25 A. L. J. 870=103 I. C. 229= A. I. R. 1927 All. 704**

———No revision lies from an order under O. 23, R. 1, where the Court passing the order has exercised its discretion. 40 All. 612, Foll.; A. I. R. 1925 All. 466, Dist. (*Daniels, J.*) KANTA PRASAD *v.* RAM RATAN. **24 A. L. J. 721=96 I. C. 480= A. I. R. 1926 All. 548.**

———Where the plaintiff's application for leave to withdraw had been made in the first instance to the trial Court and rejected by that Court and the suit was dismissed but the appellate Court granted such leave,

Held, that the appellate Court was reconsidering a matter upon which the trial Court had pronounced a judicial opinion. As the Judge had recorded his opinion that there was a formal defect in the frame of the suit and that there were otherwise sufficient grounds in law for allowing the plaintiff to withdraw and to institute a fresh suit on the same subject-matter, a judicial discretion was undoubtedly exercised and that it was not for the High Court in revision to pursue the matter further. (*Piggott and Walsh, JJ.*) RATAN LAL *v.* MOHAMMAD HAMIDULLAH KHAN. **60 I. C. 899= 19 A. L. J. 47=A. I. R. 1921 All. 65.**

—S. 115—Error of law.

Admission of evidence,

Award.
Burden of proof.
Exclusion of evidence.
Extension of time.
Jurisdiction.
Limitation.
Misapplication of law.
Misconstruction of law.
No ground.
Omission to apply law.
Purchase by decree-holder's pleader.

—S. 115—Error of law –Admission of evidence.

———Where a Court erroneously holds that certain documents are admissible but arrives at its finding independently of such documents, its finding cannot be said to be vitiated by such admission. (*Kulwant Sahay, J.*) SHAMSHER NARAIN SINGH *v.* MOHAMMAD SALE. **90 I. C. 329=A. I. R. 1926 Pat. 29.**

—S. 115—Error of law—Award.

———Where an application to set aside an award was dismissed as barred by limitation without considering the provision of the Limitation Act, S. 12 (4) as to deduction of time required for obtaining a copy of the award :

Held, there was no question of jurisdiction and revision was not competent. (11 C. 6 P. C. ; 41 C. 323 and 16 M. L. T. 438, Foll. A. I. R. 1923 M. 435 and A.I.R. 1921 Mad. 157, Dist. (*Curgenven, J.*) MANGAMMA *v.* PEDA AMMANNA. **26 M.L.W. 15=101 I.C. 514=A.I.R. 1927 Mad. 660.**

———The question, whether or not the award was valid, is one especially reserved for the decision of the court passing such decree, and even if it has erred on a question of law in coming to a decision on that point, that in itself is not a ground for revision. (*Iqbal Ahmad, J.*) PRABHU DAYAL *v.* MUNSHI LAL. **100 I. C. 76=A.I.R. 1927 All. 573.**

———Where an objection as to the legality of the award on the ground of absence of the sanction of Court for the reference to arbitration on behalf of minors is taken, and the Court holds the reference and the award to be valid, is decision, even if erroneous, is on a point of law and not open to revision for S. 115 is not directed against conclusions of law or facts in which the question of jurisdiction is not involved. (*Kennedy, J.C. and Raymond, A.J.C.*) EMNABAI *v.* FAKIR MAHOMED. **15 S. L. R. 165=65 I. C. 50= A. I. R. 1922 Sind. 1.**

—S. 115—Error of law—Burden of Proof.

———A revision is competent where the Courts below deal with the case under an entire misapprehension as to the law on the subject. Where, in a suit on the basis of a bond, the Courts below,though at one stage fully conscious of the fact that it is for the defendant to prove want of consideration, proceed on the assumption, when actually deciding the case, that it is for the plaintiff to prove affirmatively that the consideration in respect of the bond had been paid by him, the burden of proof being wrongly placed, the decree should be set aside. (*Jai Lal, J.*) DODA SHAH *v.* LAL. **31 P. L. R. 284=A. I. R. 1930 Lah. 572.**

———Revision will lie where the Appellate Court takes a different view as to burden of proof but does not give the party on whom it places the burden, opportunity to produce evidence. (*Ross, J.*) RAMPARICHAN SINGH *v.* BIRANJI PRASAD SINGH. **72 I.C. 157=4 P. L. T. 245=1923 P. H. C. C. 269= A.I R. 1923 Pat. 295.**

—S. 115—Error of law—Exclusion of evidence.

———Where by an error of law the Court excludes

C. P. CODE, (1908), S. 115—Error of law—Exclusion of evidence.

certain evidence from consideration, the evidence being the main evidence in the case, then there is such material irregularity in the exercise of jurisdiction as may lay the judgment open to revision. (*Dalip Singh, J.*) RAM DITTA MAL RAM DHAN *v.* KESAR DAS.

119 I. C. 417 = A. I. R. 1930 Lah. 177.

——Under section 115 mere error of law in excluding evidence does not give the Court jurisdiction to interfere (*Greaves, J,*) GULAM SOBHAN *v.* ALI HOSSEIN BAHADDAR. **65 I. C. 696 = A. I. R. 1923 Cal. 322.**

—S. 115—Error of law—Extension of time.

——No revision lies against an order refusing extension of time under S. 5 of the Limitation Act where it ought to be extended as at the best it amounts to an error of law. 24 I. C. 872, Foll. (*Dalip Singh, J,*) JAGAN NATH *v.* MUNNAI LAL.

98 I. C. 892 = A. I. R. 1927 Lah. 43.

—S. 115—Error of law—Jurisdiction.

——Where the question of law involved is a question of jurisdiction, the High Court has power to interfere under S. 115 even when the lower Court has committed only a mistake of law. 15 Bom. 148, Foll. (*Patkar and Baker, JJ.*) NANDLAL *v.* KISANLAL.

30 Bom. L. R. 1391 = 112 I. C. 734 = A. I. R. 1928 Bom. 548.

——*Assumption of.*

Though an erroneous decision on a question of law or fact after jurisdiction has once been legally assumed would not be a ground for interference under S. 115, yet, if it is the very basis and foundation of jurisdiction in its limited sense, as distinguished from powers, it at once comes within the purview of S. 115. 4 P.L.J. 340. Ref. (*Macpherson, J.*) B. & N. W. R. RY. & CO. *v.* MD. ABDUL HALIM. **11 Pat. L.T. 384 = 122 I. C. 153 = A. I. R. 1930 Pat. 528.**

——*Assumption of.*

An error of law which amounts to a usurpation of authority in the act of rejection of a petition for review of order confirming auction sale calls for interference under S. 115. 46 Cal. 962, Rel. on. (*Kinkhede, A. J. C.*) SUNDERABAI *v.* BAPUNA.

116 I. C. 65 = A. I. R. 1929 Nag. 305.

—S. 115—Error of law—Limitation.

——Even if a case is not decided on a question of fact, the decision as to limitation does not open the way to a revision, where the Court below have not acted with material irregularity in the exercise of the jurisdiction vested in them. 165 P. W. R. 1917, Dist. (*Johnstone, J.*) NUR AHMAD *v.* HAMID KHAN.

123 I. C. 571 = A. I. R. 1930 Lah. 112.

——An erroneous view of law on the question of limitation is not by itself a ground for revision. (*Mukerji and Roy, JJ.*) TAMIRANNESSA BIBI *v.* MT. KACHHIMAN BEWA. **32 C. W. N. 98 = 106 I. C. 561 = A. I. R. 1928 Cal. 202.**

——An error on a question of limitation is not necessarily such an error as would bring the case within the purview of S. 115. 37 Bom. 387; A.I.R. 1926 Pat. 266; A. I. R. 1924 Pat. 37 and A.I.R. 1922 Oudh 129, Appr.; 50 I. C. 5 and Civil Rule No. 950 of 1923, Doubted. (*Mukerji, J.*) SATISH CHANDRA DE *v.* RAKHAI CHANDRA SAHA.

47 C. L. J. 62 = 107 I. C. 733 = A. I. R. 1928 Cal. 189.

——An erroneous decision of the lower Court on the question of limitation is not a sufficient ground for interference in revision. 4 N.L.R. 184; 11 N. L. R. 99 and 13 N. L. R. 116, Foll. (*Findlay, J.C.*) MADHO RAO *v.* GOVIND RAGHOBA.

103 I. C. 113 = A.I.R. 1927 Nag. 389.

C. P. CODE, (1908), S. 115—Error of law--Misapplication of law.

——Where the trial Judge, in a carefully reasoned judgment, decided, after considering the various authorities, the suit is to be time barred, the fact that the Judge had arrived at incorrect interpretation of the authorities is no ground for interference by the High Court. A. I. R. 1926 Oudh 519, Foll. (*Raza, J.*) SHEOPAL *v.* CHITORIA. **4 O. W. N. 1123 = 107 I. C. 191 = A.I.R. 1927 Oudh 615.**

——Where a Court, in dealing with an application to set aside an abatement, fails to take into consideration the period of limitation fixed by law for applying to set aside the order, the order setting aside the abatement is bad and will be set aside in revision. (*Suhrawardy and Cuming, JJ.*) HEM KANTA *v.* MANOJ PROVA SINGHA. **87 I. C. 173 = A. I. R. 1926 Cal. 444.**

——A High Court cannot interfere under S. 115 merely because the lower Court wrongly decided that the suit was barred by limitation or on the principle of *res judicata*. (*Addison, J.*) HARDWARI MAL *v.* CHIRONJI LAL. **93 I. C. 855 = A.I.R. 1926 Lah. 355.**

——Judgment of a Subordinate Court may be upset on a question of limitation in revision. 16 O. C. 45. Rel. on. (*Neave and Kendalal, A.J.Cs.*) MT. MOHUNYA *v.* PANNA LAL. **79 I. C. 848 = 11 O. L. J. 513 = A. I. R. 1925 Oudh 34.**

——Where the lower Court granted the application to set aside the *ex parte* decree, which was on the face of it barred by limitation,

Held, that the order was erroneous in law, but it is not open to the High Court to interfere in the exercise of its revisional jurisdiction under S. 115. (*Moti Sagar, J.*) SURJIT SINGH *v.* LEIUT. CAPT. C. J. TORRIE. **76 I. C. 14 = A. I. R. 1924 Lah. 666.**

——Where the Court held that the applicants were not entitled to get the sale set aside because they had failed to serve the auction purchaser with a notice under O. 21, R. 92 within one month of the sale,

Held, that this was a wholly erroneous view of the law of limitation, but all the same it was a decision arrived at with jurisdiction and it cannot be revised under S. 115. 40 A. 425. Ref. (*Mullick and Bucknill, JJ.*) (MT.) BIBI ZAINABI *v.* PARAS NATH.

75 I. C. 430 = 2 Pat. 800 = 4 P. L. T. 491 = 1 Pat. L. R. 361 = A.I.R. 1924 Pat. 37.

——Where there is no mistake in computing the period of notice but error in holding that 15 days inclusive of the first were sufficient, it is an error of law and there is no sufficient ground for review. (*Adami, J.*) AKSHAY KUMAR *v.* M. L. AGARWAL.

A.I.R. 1922 Pat. 308.

—S. 115—Error of law—Misapplication of law.

——*Necessary party—Non-joinder of.*

The order of the District Judge who decides the case without joining a necessary party on an erroneous view of the law is open to revision. (*Tekchand, J.*) MANIGIR *v.* HAZARIGIR. **10 Lah. L. J. 161 = 108 I. C. 391 = A. I R. 1928 Lah. 414.**

——Where the lower Court has misapplied the law by treating a case of compensation for deficiency of the land sold as one of mistake of fact and on that footing rescinded the contract, the order can be revised. (*Duckworth, J.*) U PAN *v.* MAUNG PA TU.

5 Bur. L. J. 206 = 100 I. C. 327 = A. I. R. 1927 Rang. 90.

——If a Court, upon an erroneous view of the scope of a section of the Civil Procedure Code applies it to a case to which it has no application, such a Court would act without jurisdiction, and High Court would, in the circumstances, be prepared to interfere. A. I. R. 1922 Nag. 115, not Foll. (*Findlay, O. J.C.*) PANDURANG

C. P. CODE, (1908), S. 115—Error of law—Misapplication of law.

GOVIND *v.* MAIFUZBHAI.
92 I. C. 40 = A. I. R. 1926 Nag. 257.

———Ex parte *decree—Refusal to set aside.*

Where a District Judge on appeal against an order refusing to set aside an *ex parte* decree, has misunderstood and misapplied the law, he has committed a material irregularity in the exercise of his jurisdiction, and his order is open to revision by the High Court. (*Campbell, J.*) FIRM MAGHI MAL KHARAILIRAM *v.* FIRM GOPI RAM RAM CHAND.
75 I.C. 1020 = A.I.R. 1924 Lah. 603.

———In a suit by one partner against another, the validity of service is governed by the provisions of O. 5, R. 25 and not by O. 30, R. 3, or O. 5, R. 13. But even if the lower Court has misapplied the provision of law applicable to such a case, it is at best a matter of law which the Court had jurisdiction to decide rightly or wrongly and the High Court will not interfere with it in revision. (*Coutts and Macpherson, JJ.*) MAHABIR PRASAD BHAGAT *v.* BALKISHUN DAS. **62 I. C. 927 = 1922 P. H. C. C. 76 = 3 P. L. T. 29 = 1 Pat. 48 = A. I. R. 1922 Pat. 376.**

—S. 115—Error of law—Misconstruction of law.

———If a Court refuses to exercise a jurisdiction vested in it by law upon a misapprehension of the law or an erroneous construction of a statute, the High Court can interfere in revision. (*Mallik, J.*) KANAI LAL SABUI *v.* PURNA CHANDRA CHATTERJI.
34 C. W. N. 733.

———Where the Court interpreted the words "on roads or streets within half a mile of a public or private market" appearing in Ss. 28 and 52 as not necessarily meaning the edge of either side of, or part of roads or streets, the error of the Court is more than an error in law for he has overlooked the canon of interpretation that any statutory provision in the nature of a taxation clause should be interpreted literally in favour of the subject and so the High Court will interfere in revision. (*Brown, J.*) U SAN WIN *v.* U YAN NYEIN.
120 I. C. 698 = A. I. R. 1929 Rang. 210.

———An erroneous decision, whether on a point of fact or on a point of law, is not sufficient reason for revision. It is necessary under S. 115, C. P. Code, at least to show that some jurisdiction has been irregularly exercised. 40 Mad. 793 (P.C.), Dist. and also Foll. An erroneous idea of the meaning of any section or enactment, such as Art. 75 of the Lim. Act will not justify an application in revision. (*Ashworth, A. J.C.*) BANKEY LAL *v.* RAM LAL. **86 I. C. 918 = 12 O. L. J. 112 = A. I.R. 1925 Oudh 373.**

—S. 115—Error of law—No ground.

———*Construction of document.*

When there are two possible views of the meaning of the words used in the document, but the trial Court and the appellate Court have taken one, whether the High Court agrees with that view or not, it is not open for it to take the question up in revision. No revision can be entertained on a wrong decision on a question of law. (*Harrison, J.*) MATWAL DAS *v.* NAND LAL.
107 I. C. 273 = A. I. R. 1928 Lah. 284.

———*C. P. Code, S. 115—Question of law wrongly decided—Revision does not lie.*

A wrong decision on a pure question of law to the effect that payment to one of two joint promises did not operate as valid payment when the judge has applied his mind to the question and decided it to the best of his ability is not sufficient to bring a case within the provisions of the S. 115. (*Daniels, J.*) BHOLA NATH *v.* RAM SAHAI. **71 I. C. 472 =**

C. P. CODE, (1908), S. 115— Error of law—No ground—No question of jurisdiction.

A. I. R. 1923 All. 465.

———*Discretion.*

An alleged wrong view of law regarding the correct provision of the Court Fees Act applicable to the suit, the appellate Court having full discretion, is not a ground for interference in revision. (*Batten, J.C.*) MT. BARI BHAN *v.* KUNDAN SINGH.
71 I. C. 31 = A. I. R. 1922 Nag. 264.

———*Error in deciding question of fact.*

The mere fact that the lower Court errs in applying the proper test to decide a question of fact would not make the point a question of law or a ground of revision; at best this could only be held to be an error of law. (*Dalip Singh, J.*) ALLAH DITTA *v.* SECRETARY OF STATE. **106 I. C. 829 = A.I.R. 1928 Lah. 102.**

———*Limitation.*

A mistake of law even as regards limitation does not entitle the aggrieved party to the remedy of revision. A revision does not lie on the ground that burden of proving that an application was within time was placed on the wrong party. 4 N.L. R. 184, Appl. (*Subhedar, A. J.C.*) MT. RAHMATBI *v.* BADRIDAS.
120 I. C. 414 = A. I. R. 1930 Nag. 88.

—S. 115—Error of law—No ground—No question of jurisdiction.

———There is no right of revision against a mistake of law apart from a question of jurisdiction. A.I.R. 1927 Rang. 20, Ref. (*Addison, J.*) BELI RAM *v.* PADAM SAIN. **116 I. C. 221 = A. I. R. 1929 Lah. 26.**

———Where a Court which had jurisdiction to hear an appeal hears it, and while disposing of the appeal in the exercise of his jurisdiction he comes to a wrong conclusion on point of law, it does not amount to acting in the exercise of jurisdiction "illegally or with material irregularity". 11 Cal. 6 (P.C.) and A. I. R. 1917 P.C. 71, Foll. (*Dhavle, J.*) SHEOPUJAN *v.* BIRNA PANDEY.
A. I. R. 1929 Pat. 633.

———S. 115 does not contemplate a case where there has been an error of law in deciding a matter the decision of which was for the Court in the regular exercise of jurisdiction. 11 Cal. 6 (P.C.), Rel. on; A.I.R. 1924 Cal. 801 and A.I. R. 1925 Mad. 587, Dist. (*Rowland, J.*) JIWAN RAM RAMCHANDRA *v.* SITA RAM KHEMKAR. **118 I. C. 141.**

———Erroneous decisions by the lower Courts on points of law or fact cannot be revised under S. 115 of the C. P. Code if no question of jurisdiction is involved. (*Subhedar, A.J.C.*) ABBASALI *v.* BADRI PRASAD.
116 I. C. 660.

———S. 115 applies to jurisdiction alone, the irregular exercise of it or the illegal assumption of it. It is not directed against conclusions of law or fact in which the question of jurisdiction is not involved, however gross and palpable the errors of law may be. A.I.R. 1917 P.C. 71, Foll. (*Bhide, J.*) RAM RAKHA *v.* BUTA.
113 I.C. 539 = 30 P. L. R. 230.

———An erroneous decision of a point of law, not connected with the exercise of jurisdiction will not give a right to apply in revision. Therefore a Court wrongly allowing a time-barred application cannot be said to be acting either without, or in illegal or irregular exercise of its jurisdiction. 40 Mad. 793 (P.C.) and 17 All. 422, Rel. on. (*Ashworth, J.*) BABURAM *v.* MUNNA LAL.
100 I. C. 638 = 49 All. 454 = 25 A. L. J. 399 = A.I.R. 1927 All. 358.

———S. 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved and therefore the High Court cannot interfere in such a case. A.I.R. 1917 P.C. 71, Foll. ; 33 Cal. 487 and A.I.R. 1924 Cal. 487, Dist. (*Rankin, C.J. and D. N. Mitter, J.*) NAWAB BAHADUR OF MURSHIDABAD *v.* BHUPENDRA NARAIN. **46 C.L. J. 527 = A. I. R. 1927 Cal. 965.**

———S. 115 should be confined and strictly confined to cases in which there has been material irregularity so far as jurisdiction is concerned and either a failure to exersise a jurisdiction vested in the Court or a wrong exercise of such jurisdiction. It is wrong to utilize the section to correct errors of law and not merely errors of procedure. (*Greaves and Panton, JJ.*) LLOYDS BANK, LTD. *v.* SUROJIMULL JALAR. **30 C. W. N. 928 = 98 I.C. 751 = A.I.R. 1926 Cal. 1112.**

———Where the lower Court has not exercised its jurisdiction illegally or with material irregularity, the High Court cannot interfere under S. 115 in spite of the decision of lower Court being erroneous on a point of law. (*Kinkhede, Og. A. J. C.*) DADAN KHAN *v.* NAMDEO. **96 I.C. 251 = A.I.R. 1926 Nag. 472.**

———An error of law in coming to a decision is no ground for revision where the decision is come to in exercising jurisdiction vested by law. (*Cuming, J.*) JOGENDRA NATH KAR *v.* SUBHIR CHANDRA ROY. **95 I.C. 838 (Cal.).**

———A mere error of law is not necessarily an illegality and is not an exercise by a Court of a jurisdiction not vested in it by law so as to entitle the person aggrieved to apply for revision. (*Moti Sagar, J.*) FIRM GURDITTA SHAH-HARI *v.* RAM LAL. **91 I.C. 379.**

———The High Court will not ordinarily interfere with a finding of fact in revision. Erroneous decision on a question of law which the lower appellate Court has jurisdiction to try, is no ground for interference in revision. (*Simpson, A. J. C.*) GAJADHAR *v.* AULAD HUSAIN. **90 I.C. 373 (Lah.) = A.I.R. 1926 Oudh 80.**

———It is well settled that where a Court has jurisdiction to determine a question and it has determined that it cannot be said to have acted illegally or with material irregularity simply because it has come to an erroneous decision. The High Court will not interfere under S. 115, C. P. Code, merely because the lower Court had wrongly decided that a suit was barred by limitation or that it was barred as *res judicata* or because the lower Court had proceeded upon an erroneous construction of the sections of an act, or had misunderstood the effect of a document in evidence or had excluded evidence which it ought to have admitted. S. 115 applies to jurisdiction alone, the irregular exercise of it or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. Jurisdiction according to the exact conception of it formed by the Roman lawyers consists in taking cognizance of a case involving the determination of some jural relations, in ascertaining the essential points of it and in pronouncing upon them. An enquiry into whether the jurisdiction exists is not an exercise of jurisdiction over the case itself, but an investigation of another question altogether, that of whether the considerations of cognizance are satisfied. 11 Bom. 488 (1887), Foll. (*C. C. Ghose, J.*) THE EAST INDIAN RY. CO. *v.* KANAI LAL. **80 I.C. 205 = 28 C. W.N. 292 = A. I. R. 1924 Cal. 493.**

———The High Court should not interfere in revision on the ground that there has been a serious error in law in coming to a finding in a matter in which the Court had jurisdiction. (*Newbould and Panton, JJ.*) RAJENDRA NATH ROY *v.* SHEIKH ABDUL. **68 I. C. 430 = A.I.R. 1923 Cal. 280.**

—S. 115—Error of law—No ground—Precedents.

———Where the Subordinate Judge decided a question following a decision of the Madras High Court which was directly in point, the Patna High Court refused to interfere in revision although it would have taken a different view on that point. (*Das and Adami, JJ.*) RAGHUNANDAN PRASAD *v.* BHAGWAT SAHAY. **86 I. C. 626 = 6 P. L.T. 504 = 3 P. L.R. 18 = 1925 P. H. C. C. 43 = A. I. R. 1925 Pat. 372.**

—S. 115—Error of law—No ground—Presentation of plaint to proper court.

———Erroneons decision on a question of law is no ground for revision. Decision of the lower appellate Court on appeal from an order of trial Court directing presentation of the plaint to the proper Court is not open to revision though erroneous as it is a question of law and it had jurisdiction to try it. (*Simpson, A.J.C.*) HAIDRI KHANAM *v.* AHMAD ALI. **90 I. C. 430 = A.I. R. 1926 Oudh 31.**

—S. 115—Error of law—No ground—Miscellaneous.

———The fact that the Court makes a mistake in law is not sufficient to warrant High Court's interference in revision. (*Heald, J.*) MA KWI *v.* MA ON MAY **119 I. C. 749 = A. I. R. 1929 Rang. 187.**

———An error of law is no ground whatever for the High Court interfering under S. 115. 41 Cal. 323; 11 Cal. 6 (P.C.); 39 Cal. 473, Foll. (*Cuming and Mallick, JJ.*) JYOTINDRA NATH *v.* SOUNDRA NATH. **46 C.L.J. 182 = 31 C. W. N. 818 = 103 I. C. 468 = A. I. R. 1927 Cal. 928.**

———An error of law in the judgment of a lower Court is not a ground of revision. (*Dalip Singh, J.*) RAM BILAS *v.* SHEO NATH. **100 I.C. 3 = A. I. R. 1927 Lah. 862.**

———The giving of an erroneous decision on a point of law is not an irregularity or illegality and so is not a ground for revision ; a decision on a question of onus cannot be attacked in revision. 102 P.R. 1912, Foll. (*Martineau, J.*) MT. BARKAT BIBI *v.* ABDUL AZIZ. **92 I. C. 46 = 26 P. L. R. 783.**

———Gross errors of law are not revisable under S. 115, C.P. Code, though they are revisable under S. 25 Sm. C. C. Act. (*Sulaiman, J.*) MATHURA PRASAD *v.* B. B. AND C. I. RAILWAY. **78 I. C. 434 = 5 L. R. A. Civ. 252 = A.I.R. 1924 All. 691.**

———A mere error of law is no ground for exercising the powers of revision. (*Cuming, J.*) HARI CHARAN *v.* BIRENDRA NATH. **70 I.C. 541 = 35 C. L. J. 327 = A. I. R. 1921 Cal. 749.**

———Even if the lower Court had committed an error of judgment or of law the High Court cannot interfere under S. 115, C.P. Code. (*Suhrawardy and Ghose, JJ.*) GURUDAS KUNDU CHOWDHURY *v.* DASARATHI HALDAR. **65 I. C. 512 (Cal.).**

—S. 115—Error of law—Omission to apply law.

———Where the order of the lower appellate Court overlooks the question of limitation entirely in deciding the appeal, the High Court can interfere in revision. (*Brown, J.*) MAUNG SAN *v.* MA SHIN. **A.I.R. 1929 Rang. 304.**

———Order of dismissal of an application to set aside an award on the ground that it was barred by limitation without any reference to the proper article applicable or the wording of it, is liable to be set aside in revision. (*Srinivasa Aiyangar, J.*) SANJIVAPPA *v.* VENKATANARAPPA. **100 I.C. 634 = A.I.R. 1927 Mad. 436 = 52 M. L. J. 357.**

———Where the lower Court fails to decide the pleas of jurisdiction and limitation raised by defendant in his written statement, revision lies. (*Campbell, J.*) THA

C. P. CODE. (1908), S. 115—Error of law—Omission to apply law.

KAR DAS *v.* FIRM BHOLA SHAH DUNI CHAND. **95 I.C. 4 (Lah.).**

———Where the lower Court dismissed the application on the ground that the claim was barred by limitation overlooking the provisions of S. 6 (1) of the Limitation Act, revision was allowed. (*Das, J.*) MA SHEWE U. *v.* MA SHIN. **92 I. C. 775 = 4 Bur. L. J. 146 = A.I.R 1925 Rang. 381.**

———The omission by a lower Court to consider the effect of a prior decision is a good ground for revision. (*Young, J.*) MAUNG LEE GALE *v.* PROHTADO BARICKAN. **84 I. C. 199 = 3 Bur. L. J. 127 = A. I. R. 1925 Rang. 37.**

———Where there is nothing in the judgment of the Lower Court to indicate that it considered at all the point as to limitation in setting aside an *ex-parte* decree, High Court will interfere in revision. (*Das and Bucknill, JJ.*) MODE NARAIN SINGH *v.* BIKRAM SINGH. **84 I. C. 1028 = 4 P. L. T. 545 = A. I. R. 1924 Pat. 36.**

———Where a Court has applied its mind to the law and decides wrongly, then there is no ground for revision; but where it disregards some provision of law, and has not applied its mind to that provision, then there is ground for revision. (*Young, J.*) RASU *v.* KATTARA. **82 I. C. 658 = 2 Rang. 202 = A. I. R. 1924 Rang. 349.**

—S. 115—Error of Law—Purchase by decree-holder's pleader.

———A purchaser by the decree-holder's pleader for himself may be attacked on principle and may be, in certain cases avoided, but it is not an error of law or jurisdiction if the Court does not avoid it. 15 Mad. 389, Ref. (*Wallace, J.*) RAMIAH THEVAN *v.* ATHMANATHA AYYAR. **117 I. C. 727 = A. I. R. 1929 Mad. 624.**

—S. 115—High Court—Bombay High Court.

———*Bombay Regulation II of* 1827, *S.* 5.

It is competent under Bombay Rugulation II of 1827 to the Bombay High Court to call for the proceedings of any subordinate Civil Court, and to issue such orders thereon as the case may require, although the same is repealed by Act XII of 1873, by virtue of Ss. 106 and 130 of Government of India Act, 1915; but such a power should be exercised only in very exceptional cases. 40 Bom. 86 and A. I. R. 1924 Bom. 65, Foll. (*Marten, C. J. and Blackwell, J.*) BOMBAY STEAM NAVIGATION CO., LTD. *v.* VASUDES RAO BABURAS KAWAT. **106 I. C. 470 = 52 Bom. 37 = 29 Bom. L. R. 1551 = A. I. R. 1928 Bom. 5.**

—S. 115—High Court—Discretion.

———*Sufficiency of evidence.*

In a suit for damages against railway company for consignment lost in transit, the High Court has discretion to interfere in revision and determine whether the evidence on which trial Judge has decided the case could be said to be reasonably sufficient to justify him in drawing the inference required by a " risk note" and so fix liability on railway company. (*Kemp, Ag. C. J. and Murphy, J.*) B. B. & C. I. RY. *v.* RAJNAGAR SPINNING CO. **31 Bom. L. R. 1426 = 54 Bom. 105 = A. I. R. 1930 Bom. 129.**

———Where no substantial injury has been done, the High Court is not justified in using its discretionary powers either in appeal or revision to subvert the decision of the lower Court. (*Shadi Lal, C. J. and Johnstone, J.*) FAUJA SINGH *v.* LAL SINGH. **120 I. C. 174 (Lah.).**

———Under the provisions of S. 115 the interference by the High Court is discretionary. The power is one of superintendence by the High Court. Under no circumstances of want or wrong assumption of jurisdiction, or of illegality, or irregularity is the Court bound to interfere even though the decision which is sought to be revised may be in conflict with any principle of law. The Court's interference will be influenced by the justice of the case and not by any mere irregularity, want of jurisdiction or wrong pronouncement on a point of law by a subordinate Court. (6 C. L. R. 234; 20 B. 630; 24 Cal. 133; 9 Bom. 97; 21 All. 152, Foll.) (*Dalal, J. C. and Simpson, A. J. C.*) MAQBUL HUSAIN *v.* ESTATE OF SHAFIQ-UZ-ZAMAN. **89 I. C. 225 = 12 O. L. J. 626 = 2 O. W. N. 543 = A. I. R. 1926 Oudh 28.**

C. P. CODE, (1908), S. 115—High Court—Interlocutory orders.

—S. 115—High Court—Election dispute.

———In a suit in an election dispute, High Court cannot interfere in revision with the lower Court's order on grounds which involve nothing more nor less than appreciation of evidence, and decide for itself on the question of fact whether the votes were valid or not valid. The High Court has to confine itself to the question of jurisdiction only. (1927) M. W. N. 842; A. I. R. 1926 Mad. 319; A. I. R. 1925 Mad. 12C7; A. I. R. 1928 Mad. 199 and A. I. R. 1925 Mad. 1207, Rel. on. (*Curgenven, J.*) APPU PILLAI *v.* NATARAJA PILLAI. **A. I. R. 1930 Mad. 225 (2).**

—S. 115—High Court—Enquiry by.

———The High Court is not confined to any enquiry as to the jurisdiction exercised by the lower Appellate Court alone. But it has got power to enquire whether the Court of first instance has failed to exercise its jurisdiction or not. (*Dalal, J. C.*) ABDULLAH *v.* MAHAMMAD NAZIR. **80 I. C. 694 = A. I. R. 1925 Oudh 163.**

—S. 115—High Court—Error of fact and law.

———The correctness or error in a decision on a question of fact and law committed by the subordinate Courts will not give jurisdiction to the High Court to interfere under its revisional powers. (*Mookerji and Boys, JJ.*) JAGMOHUN SINGH *v.* RAM KHILAWAN DUB. **1929 A. L. J. 961 = 119 I. C. 859 = A.I.R. 1929 All. 683.**

—S. 115—High Court—Ex parte decree.

———Where, on the date of hearing, the defendant was absent and the pleader reported no instructions in the suit and a decree was passed;

Held, that the party must be deemed as absent, as the pleader ceased to act on his original vakalat and the decree, though on the merits, is nevertheless an *ex-parte* decree and High Court cannot interfere in revision; 41 Mad. 286 and A. I. R. 1925 Mad. 21 (F. B.), Foll.; A. I. R. 1927 Mad. 109, Dist. (*Wallace, J.*) FIRM OF R. B. PODDAR *v.* THATHA CHARIAR. **1927 M. W. N. 897 = 107 I. C. 815 = A. I. R. 1928 Mad. 234.**

———*Patna—High Court.*

Where the High Court has sent for the record of a case and the case is before it for order, it would not be exercising a wise discretion if the High Court did not dispose of the matter, the question of discretion being merely concerned with the stage at which the matter should be determined. The Patna High Court has adopted the established practice of the Calcutta High Court of interfering with Interlocutory orders in revision. (*Chapman and Atkinson, JJ.*) NAURATAN LAL *v.* WELFORD JOSEPH STEPHENSON. **1922 P. H. C. C. 79 = A. I. R. 1922 Pat. 359.**

—S. 115—High Court—Interlocutory orders.

———In matters of amendments and Court-fees and such like, interference by the High Court would gene-

C. P. CODE, (1908), S. 115—High Court—Interlocutory orders.

rally save the parties considerable expense and the Courts considerable loss of time, and it is desirable that the High Court should interfere in proper cases. (*Krishnan, J.*) SOBHANADRI APPA RAO *v.* VENKATARAMAYYA. **38 M. L. T. 33 = 98 I. C. 458 = A. I. R. 1927 Mad. 212.**

—S. 115—High Court—Jurisdiction.

———*Disposal of case pending revision.*

Pending a revision petition in the High Court filed against the order of the Lower Court rejecting a pauper application and demanding court-fees, the Lower Court dismissed the case for want of prosecution and for non-payment of court-fees. It was urged that in face of that order, the High Court had no longer any jurisdiction to decide the revision on its merits.

Held, that the lower Court's order, did not operate to deprive High Court of its jurisdiction to dispose of the petition of revision on its merits, as it was neither a judgment nor a decree, nor a decision within the meaning of O. 17, R. 3, C. P. Code. It was also not an order of rejection of the plaint, because it did not conform to the requirements of O. 7, R. 11 (*c*). (*Kinkhede, A. J. C.*) KISAN *v.* MANJAI. **10 N. L. J. 177 = 105 I. C. 30 = A. I. R. 1928 Nag. 24.**

—S. 115—High Court—Powers of.

———*Charitable and Religious Endowments Act* (*XIV of* 1920), *S.* 12.

The acts of a District Judge under Act XIV of 1920 are open to correction by the High Court under its revisional jurisdiction exercisable under S. 115, C. P. Code. (*Mukerji and Young, JJ.*) MOHAMMAD ABDUL WAHID KHAN *v.* RADHA KISHUN. **1929 A. L. J. 911 = 121 I. C. 267 = 51 All. 957 = A. I. R. 1929 All. 581.**

———High Court cannot in revision correct an error of judgment. (*Mukerji and Young, JJ.*) MOHAMMAD ABDUL WAHID KHAN *v.* RADHA KISHUN. **1929 A. L. J. 911 = 121 I. C. 267 = 51 All. 957 = A. I. R. 1929 All. 581.**

———*Election.*

High Court has jurisdiction to revise an order passed in connexion with an election petition under the Municipal Election Rules; A. I. R. 1927 Mad. 935 Rel. on. (*Jackson, A. J. C.*) GOKAL PRASAD *v.* GOVINDRAO SUBHEDAR. **12 N. L. J. 82 = 119 I. C. 682 = A. I. R. 1929 Nag. 282.**

———*Election.*

In cases of gross miscarriage of justice, the High Court, as the Court of supervision, would have power to revise the lower Court's order on an election petition. Though the statutory tribunal to give a final decision with regard to the election may be the lower Court, still if the High Court should find on revision that, by reason of any misdirection of itself or misconstruction of any important provision of law or rule, the decision of the lower Court has been a decision on a basis different from that contemplated by the statutory provisions, then the High Court would, apart altogether from any question of jurisdiction or material irregularity affecting it, have the power to revise the order. (*Srinivasa Aiyangar, J.*) CHELLASWAMI KONAR *v.* K. SANGAMA NAYAKAR. **103 I. C. 821 = A. I. R. 1927 Mad. 935.**

———High Court cannot direct in its revisional jurisdiction that an application under O. 9 should be treated as an application for review under O. 47. (*Rankin, J.*) SAFITANNESSA *v.* MEGH LAL. **43 C. L. J. 285 = 94 I. C. 172 = A. I. R. 1926 Cal. 735.**

———*Madras Estates Land Act, S.* 42.

C. P. CODE, (1908), S. 115—High Court—Powers of.

The Revenue Divisional Officer refused to enhance the rent in an application made under S. 42 of the Madras Estates Land Act. An appeal was preferred to the Collector and the same was dismissed. A revision petition was filed to the Board of Revenue and another revision petition to the High Court. The Board of Revenue held that it had no power to revise the order of the Collector.

Held, that the High Court had power to interfere in revision.

Held also, that the Board of Revenue had power to revise the order of a revenue officer if he happens to be the Dt. Collector himself. Where the Dt. Collector himself acts as appellate authority he cannot revise his own order and there is nothing in the Code to say that the Board cannot interfere. (*Kumaraswami Sastry, J.*) GOPALA MANNADIAR *v.* PALANI GOUNDAN. **96 I. C. 768 = 1925 M. W. N. 489.**

———*Postponing trial.*

If the effect of an order of the trial Court indefinitely postponing the trial of an issue of fact is an almost certain loss of material testimony to plaintiff as well as defendant the High Court will interfere in the exercise of its powers of superintendence though S. 115 of the Code may not apply. (*Mullick and Ross, JJ.*) BHIMNATH MISRA *v.* JAGARNATH PRASAD. **7 P. L. T. 82 = 89 I. C. 814 = 1925 P. H. C. C. 294 = A. I. R. 1925 Pat. 674.**

———*Order—Novel form of.*

Where a subordinate Court has an express jurisdiction to pass an appealable order but has gone out of its way to invent a novel form of procedure, and consequently makes an order for which no appeal is provided in the Code, the High Court will be ready to consider whether this course is really necessary and will not hold itself precluded from setting aside the order by taking a strict view of the provisions of S. 115. (*Dalal and Simpson, A. J. Cs.*) BHAGWAN BAKHSH SINGH *v.* SURENDRA BIKRAM SINGH. **10 O. L. J. 209 = 74 I. C. 335 = A. I. R. 1924 Oudh 11.**

———*Transfer.*

Where a case is transferred, the High Court in revision has authority to re-transfer it to the original Court without requiring the formality of having the plaint filed in the Court to which the case is transferred as a preliminary to the application for re-transfer. (*Piggott and Walsh, JJ.*) NAND RAM SAHU *v.* MT. HIRA DEI. **21 A. L. J. 86 = 73 I. C. 495 = 4 L. R. A. Civ. 311 = A. I. R. 1923 All. 249.**

———*Hearing refused.*

Whenever the High Court is of opinion that the Court below has refused to hear a party on the merits without just grounds, it is entitled to interfere. (*Macleod, C. J. and Kanga, J.*) BACHUBHAI JHIVAD *v.* IBRAHIM ISAK MOTIWALA. **24 Bom. L. R. 744 = 69 I.C. 169 = 47 Bom. 11 = A. I. R. 1922 Bom. 207.**

———*Causes of action.*

The High Court can reverse an order directing the plaintiff to elect whether he will proceed with one or the other of the two causes of action joined in his plaint. 5 L. W. 207, Foll. (*Oldfield and Venkatasubba Rao, JJ.*) ARUNACHALAM CHETTIAR *v.* ARUNACHELLAM. **16 M. L. W. 175 = 69 I. C. 966 = 1922 M. W. N. 453 = A. I. R. 1922 Mad. 436 = 43 M. L. J. 218.**

———*Conflicting orders.*

Where the Small Cause Judge returned a plaint which had been first presented to, and returned by the Munsif to be presented before the former, and the Munsif adhered to his previous order.

C. P. CODE, (1908), S. 115—High Court—Powers of.

Held, The High Court is entitled to make such an order as would enable the plaintiff to have his action tried. (*Ross, J.*) RAZAUR RAHMAN *v.* ATHAR HUSSAIN. **2 P. L. T. 739 = 64 I. C. 496 = A. I. R. 1922 Pat. 368.**

—S. 115—High Court—Question of fact.

The question, whether a party's pleader was authorized to make the statement, that his client would abide by the decision of the High Court in another suit, is one of fact, which it is not competent for High Court to interfere with in revision. (*Walsh, J.*) VENKATARAYUDU *v.* SURYA RAO. **120 I. C. 742 = A. I. R. 1929 Mad. 416.**

—S. 115—High Court—Rangoon High Court.

———The power of revision of the Rangoon Court in respect of the Small Cause Court is given by S. 25 of Burma Act VII of 1920 which is not limited to the three grounds specified in S. 115, C.P. Code. (*Rutledge, C.J. and Maung Ba, J.*) SAKEENA BIBI *v.* C. STEPHENS. **4 Rang. 221 = 97 I. C. 1025 = A. I. R. 1926 Rang. 205.**

—S. 115—High Court—Rateable distribution.

———The High Court will not interfere in revision with orders disallowing or allowing claims to rateable distribution except in very exceptional circumstances. (*Chevis, J.*) BHAGAT RAM KALYAN DAS *v.* MANGAT RAM SHIBBU RAM. **60 I. C. 371 (Lah.).**

—S. 115—High Court—Refusal to interfere.

———Where a suit of Small Cause nature was tried on the ordinary side, the High Court refused to interfere in revision : A. I. R. 1924 Nag. 17, Foll. (*Findlay, J. C.*) RAJARAM *v.* MUKUND. **100 I. C. 27 = A. I. R. 1927 Nag. 164.**

—S. 115—High Court—Restoration of suit.

———The High Court has Jurisdiction to revise an order of the Lower Court restoring a suit dismissed for default. (*Mukerji and Niamatullah, JJ.*) FAQIR CHAND *v.* HARKISHUN DAS. **117 I. C. 111 = 51 All. 908 = A.I.R. 1929 All. 599.**

—S. 115 —High Court—Retrial.

———No appeal lies from an order of District Judge refusing to remove a trustee of a temple on an application of the worshippers under a scheme framed under S. 92 on the ground of various acts of misconduct and breach of trust, but the High Court can in revision direct fresh disposal of the application. (*Wallace and Madhavan Nair, JJ.*) S. LOGASIGAMANI MUDALIAR *v.* L. R. K. THEAGARAYA CHETTI. **99 I. C. 425 = A. I. R. 1927 Mad. 427.**

———Where the lower Court's order had left the matter in a muddle so much so that both the parties believed the matter to be pending, the case was sent back to the lower Court. (*Walsh and Ryves, JJ.*) GAYA PRASAD *v.* FIRM MATHU LAL BUDHA LAL. **5 L. R. A. Civ. 319 = 78 I. C. 1050 = A. I.R. 1925 All. 202.**

—S. 115—High Court—Revenue proceedings.

———*Agra Tenancy Act, Ss.* 167 *and* 177, *per Boys, J.*

There is nothing in S. 167 precluding the hearing by the High Court under S. 115 of the C. P. Code, of a revision of an order passed by a District Judge under S. 177 of the Tenancy Act ; and it is reasonable that the High Court should have such power, and to hold that it has such power is in accord with S. 193 of the Tenancy Act. (*Sulaiman and Boys, JJ.*) KEHRI SINGH *v.* THIRPAL. **92 I. C. 282 = 48 All. 104 = 23 A. L. J. 965 = A. I. R. 1926 All. 113.**

———The High Court has no power to interfere in revision under S. 115 of the C. P. Code, or otherwise, with any order that has been passed originally or in appeal by a revenue Court or by a District Judge in reference to questions decided under the provisions of the Agra Tenancy Act, No. 2 of 1901. 42 All. 83, Foll. (*Stuart, J.*) MANOHAR *v.* MANGAL DAS. **87 I. C. 351 = A. I. R. 1925 All. 800.**

———*Oudh Rent Act, S.* 119.

The plaintiffs filed certain suits for rent which were heard by an Assistant Collector of the second class. On appeal his decrees were confirmed by the Collector. There were further appeals to the District Judge, which were unsuccessful. The defendant then applied in revision under S. 115, C. P. Code for the discharge of the decree passed by the District Judge.

Held, that an application for revision to the High Court in these circumstances is not maintainable. (*Kanhaiya Lal, J. C.*) KALI BAKHSH SINGH *v.* BHAGWANDAS. **72 I. C. 1023 = 10 O. L. J. 191 = 5 L. R. Oudh 17 = A. I. R. 1924 Oudh 16.**

———*Agra Tenancy Act*, (1901), *S*, 58 (*b*).

The plaintiff brought a suit in the Revenue Court under S. 58 (*b*) of the Agra Tenancy Act. The Trial Court dismissed the suit holding that it was not maintainable in the Revenue Court. The plaintiff appealed to the District Judge and he reversed the decree of the Assistant Collector and remanded the case for trial of the remaining issues. Defendants applied for revision of the order of remand. *Held*, that no revision lay to the High Court. 41 All. 28, Foll. 42 All. 83 and 14 A. L. J. 281, Dist. (*Ryves, J.*) SAQIB HUSAIN *v.* NAND KISHORE. **63 I C. 891 = 19 A L. J. 596 = A I. R. 1921 All. 236.**

—S. 115—High Court—Sale—Setting aside of.

The High Court can interfere in revision if an application under O. 21, R. 89 has been wrongly admitted on the ground that it was not made by a person interested to apply. 44 M. 554 (F.B.), App. (*Odgers, J.*) SUBBA REDDI *v.* VASIREDDI JAYARAMAYYA. **76 I. C. 853 = 17 M. L. W. 680 = A. I. R. 1923 Mad. 659.**

—S. 115—High Court—Substantial justice.

———Restoration of suit as a matter of grace after finding that there was no sufficient cause is wrong. High Court in revision found that there was sufficient cause and allowed restoration to prevent defeating of justice. (*Ramesam and Venkatasubba Rao, JJ.*) VENKATARAYUDU *v.* RAMA KRISHNAYYA. **123 I.C. 337 = 31 M. L. W. 30 = 1930 M. W. N. 50 = A. I. R. 1930 Mad. 268 = 58 M. L. J. 137.**

———Where the lower Court acts in a way which amounts to a denial of justice, High Court can interfere in revision. (*Das, J.*) MAUNG PO DIN *v.* MAUNG THA SAING. **A. I. R. 1930 Rang. 142.**

——— Where substantial justice is done the High Court will not interfere in the exercise of its revisional jurisdiction even if it is of opinion that the procedure adopted by the lower Courts is wrong. (*Greaves and Graham, JJ.*) BHAGABAN CHANDRA *v.* AMIN ALI. **86 I. C. 756 = A. I. R. 1926 Cal. 245.**

———A Court is not bound to interfere under S. 115 except in aid of justice.

Where the lower Court acceded to plaintiff's prayer under S. 151 to set aside a decree,

Held, that though the Court had no jurisdiction under the section to set aside its own decree, yet as plaintiff would have succeeded had he applied under O. 47, R. 1 instead of under S. 151, High Court should not interfere. (*Das and Ross, JJ.*) RAMESWAR MAHTON *v.* LALA DWARKA PRASAD. **84 I. C. 320 = 3 Pat. 778 = 6 P. L. T. 309 = A. I. R. 1925 Pat. 36.**

C. P. CODE, (1908), S. 115—High Court—Substantial justice.

———Where substantial justice has been done the fact that the lower Court misapprehended the appropriate rule does not necessitate the exercise of the High Court's revisional power. (*Jackson, J.*) KRISHNAMACHARULU *v.* VENKATASUBBIAH. **24 M. L. W. 443 = 1926 M. W. N. 713 = 97 I. C. 795 = A. I. R. 1926 Mad. 1059.**

———Where substantial justice has been done to the parties and the applicant for revision has not been prejudiced in any way, no revision will be allowed though the lower Court has not followed the correct procedure. (*Suhrawardy and Duval, JJ.*) AZAM KHAN *v.* UMEDALI MORAL. **85 I. C. 750 = A. I. R. 1925 Cal. 1223.**

———The High Court should not exercise its power of revision except in aid of justice. (*Das, J.*) SHEIKH HAMIDUR RAHMAN *v.* SHAHANAND DAS. **80 I. C. 575 = A. I. R. 1925 Pat. 153.**

———A just decision, though purporting to be under a wrong section, will not be revised, if a right section justifies the decision. (*Spencer and Devadoss, JJ.*) (JOHN JOSEPH) BRITO *v.* MRS. S. S. BRITO. **75 I. C. 888 = 19 M. L. W. 532 = A. I. R. 1924 Mad. 586.**

—S. 115—High Court—Suo Motu.

———Though, as a matter of practice, the High Court exercises revisional jurisdiction only on the application of the parties the jurisdiction itself is not confined to such cases. (*Wallace and Srinivasa Aiyangar, JJ.*) MUTHU CHETTIAR *v.* NARAYANAN. **51 Mad. 672 = 28 M. L. W. 297 = 110 I. C. 63 = A. I. R. 1928 Mad. 528 = 55 M. L. J. 274.**

———Under S. 115 of the C. P. Code, the High Court has power to act *suo motu*, and there is no limitation for exercise of its power to set aside orders without jurisdiction passed by lower Courts. (*Jwala Prasad and Ross, JJ.*) RAM PRASAD RAI *v.* MAHESH KANT CHAUDHARY. **65 I. C. 122 = 1 Pat. 232 = 3 Pat. L. T. 445 = A. I. R. 1922 Pat. 525.**

—S. 115—Illegality—Absence of evidence.

———Where a Court correctly states the law but applies it by assuming the existence of facts which it is necessary to prove and of which there is no proof and in so doing states that there is evidence on the record while in fact there is no evidence on the record the Court acts illegally. (*Saunders, J. C.*) MA KYAW *v.* MAUNG SHEIVGO. **63 I. C. 838 = 4 U. B. R. 16 = A. I. R. 1921 U. B. 27.**

—S. 115—Illegality—Absence of injustice.

———Revision under S. 115 should not be allowed in the absence of injustice or hardship though the order of the lower Court may be illegal. (*Halifax, A. J. C.*) RAMJI PATIL *v.* KARKAJI. **78 I. C. 746 = A. I. R. 1924 Nag. 293.**

—S. 115—Illegality—Admission of evidence.

———Where a document was admissible under S. 92 Prov. 4, Evidence Act but the lower Court held that it was inadmissible,

Held that it was wrong to say that in giving such decision the Judge acted "illegally" so as to justify interference in revision. 26 C. W. N. 50 (P.C.), Foll. (*Carr, J.*) MG. NYAN *v.* MG SHWE NI. **83 I. C. 334 = 2 Bur. L. J. 275 = A. I. R. 1924 Rang. 212.**

—S. 115—Illegality—Application of law.

———Where the lower Court distinctly stated that the Transfer of Property Act was not in force in the Punjab but it proceeded to apply the principles of Ss. 130 and 131, T. P. Act, to the case as other principles had been followed in the Punjab :

Held, that in doing so it did not act illegally or with material irregularity in the exercise of its jurisdiction. 11 Cal. 6 (P. C.); 25 Bom. 337 ; and A. I. R. 1915 P. C. 99, Rel. on. (*Addison and Coldstream, JJ.*) SANT SINGH *v.* MUBARAK SINGH. **106 I. C. 901 = 9 Lah. 308 = 10 L. L. J. 51 = 29 P. L. R. 42 = A. I. R. 1928 Lah. 140.**

———Lower Court considering question of law and following authority does not act with illegality or material irregularity. (*Jackson and Thiruvenkatachariar, JJ.*) MOHAMADALLI SAHEB *v.* ABDUL KHADIR SAIB. **32 M. L. W. 347 = 59 M. L. J. 351.**

—S. 115—Illegality—Commissioner's fee.

———A Court has jurisdiction to fix the fee of a Commissioner and even if it fixes it too high it cannot be said to act illegally or with material irregularity. (*Daniels and Wazir Hasan, A. J. Cs.*) GIRDHARI GOPAL *v.* PANDIT LACHMI NARAIN. **76 I. C. 503 = A. I. R. 1924 Oudh 348.**

—S. 115—Illegality—Contravention of law.

———The contravention of an express provision of law is not merely an erroneus decision but it is an illegality within the meaning of S. 115. (*Raza, J.*) DURGA PRASAD *v.* CHANDIKA PRASAD. **118 I. C. 805 = A. I. R. 1930 Oudh 9.**

—S. 115—Illegality—Decision on point not raised.

———The decision of the District Judge on a point of fact which was never raised in the pleadings or at all in the trial Court by either side amounts to an illegal and irregular method of arriving at a conclusion and can be set aside in revision. 2 L. B. R. 333, Rel. on. (*Brown, J.*) MAUNG PA *v.* ABDUL GANI. **98 I. C. 1029 = 4 Rang 202 = A. I. R. 1926 Rang. 214.**

—S. 115—Illegality—Dismissal of appeal.

———A pleader's unpreparedness to argue affords no ground for the Court to ignore his presence and proceed to dismiss the appeal as if there was no appearance ; he is bound to proceed to decide on merits but a revision can lie on the ground that, in dismissing an appeal, the Court clearly acts illegally and with material irregularity. 17 C. P. L. R. 1, Foll. (*Kinkhede, A. J. C.*) GANESH PRASAD *v.* BHANGILAL. **83 I. C. 257 = A. I. R. 1925 Nag. 236.**

—S. 115—Illegality—Dismissal on wrong ground.

———Dismissal of suit for damages for breach of contract on the preliminary ground that plaintiff being benamidar is not entitled to sue is revisable as the Court has acted illegally in the exercise of jurisdiction. (*Abdul Raoof, J.*) BALMUKAND *v.* SHANKAR DAS. **76 I. C. 125 = A. I. R. 1925 Lah. 68.**

—S. 115—Illegality—Evidence.

———*Omission to consider.*

Where the Court has not considered the evidence in the case but has based his decision on personal inspection, the proceedings are illegal and materially irregular, and are therefore revisable. (*Rutledge, C.J. and Maung Ba, J.*) SAKEENA BIBI *v.* C. STEPHENS. **97 I. C. 1025 = 4 Rang. 221 = A. I. R. 1926 Rang. 205.**

—S. 115—Illegality—Income-tax proceedings.

———*Income-tax Act (XI of 1922), S. 66.*

The Commissioner has no power under the law to refuse to pass any order on an application to state a case or to delegate his authority to any Subordinate Officer. The refusal by the Commissioner to state the case, whatever may be the grounds for his refusal, is tantamount to a refusal on the ground that there is no question of law involved and the High Court, if it is not satisfied of the correctness of the Commissioner's decision has power to require the Commissioner to state the case and to make a reference to the High Court. (*Moti Sagar, J.*) FIRM GOKAL CHAND *v.* THE COLLECTOR, INCOME-TAX. **76 I. C. 139 = A. I. R. 1924 Lah. 662.**

—S. 115—Illegality—Meaning of.

———Acting illegally does not merely imply the committing of an error of procedure such as acting with material irregularity does. The legislature has advisedly left that part of the clause in an indefinite language so as to empower the High Courts to interfere and correct gross and probable errors of Subordinate Courts. (*Walmsley and Mookerjee, JJ.*) JUGUNNESSA BIBI *v.* SATISH CHANDRA BHATTACHARYA. **78 I. C. 958 = 83 I. C. 438 = 51 Cal. 690 = 28 C. W. N. 559 = 39 C. L. J. 434 = A. I. R. 1924 Cal. 633.**

—S. 115—Illegality—Merits not gone into.

———*Merits of the case not gone into—Interference by the High Court in revision.*

Where a judge has decided a case without going into the merits but on a question which is not warranted by the law, he must be deemed to have acted illegally in the exercise of his jurisdiction and consequently the High Court can interfere in revision. (*B. B. Ghose, J.*) KEDAR HURA *v.* ASUTOSH ROY. **99 I. C. 946 = 44 C. L. J. 565.**

—S. 115—Illegality—Non-appearance of witness.

———An order under O. 16, R. 10 or R. 12 of the Code is not appealable but if it is illegal, it is open to revision by the High Court under S. 115 of the Code. (*Seshagiri Iyer, J.*) RENGASAMI REDDI *v.* KONDA REDDI. **61 I. C. 967 = 29 M. L. T. 95.**

—S. 115—Illegality—Order for Security.

———In making in order for pauper appellants to furnish security for costs, the District Court acts illegally as O. 41, R. 10, of the C. P. Code, does not apply to pauper appeals. (*Chevis and Campbell, JJ.*) NAZIM *v.* ABDUL HAMID. **67 I. C 256 = 3 Lah. 30 = 68 P. L. R. 1922 = A. I. R. 1922 Lah. 87.**

—S. 115—Illegality—Precedents.

———If following a decision of High Court the Court arrived at a result which is an illegal action or an action which may be described as material irregularity, High Court will certainly have jurisdiction to interfere under the express language of S. 115 (*c*) although the result may have been arrived at in a way entirely unexceptionable; 21 A. L. J. 315, Not Foll. (*Mukerji and Niamatullah, JJ.*) DIP CHAND *v.* SHED PRASAD. **119 I. C. 103 = 1929 A. L. J. 769 = 51 All. 910 = A. I. R. 1929 All. 593.**

———Merely because the view taken by the lower Court is based on one set of authorities rather than the view taken by the other it is impossible to say that it thereby acted illegally or irregularly and the High Court will not interfere with it in revision; 11 Cal. 6, (P.C.) and A.I.R. 1917 P.C. 71 (P. C.) Rel. on. (*Baker, J.*) KRISHNA PARSHERAM *v.* BHAU PIRAJI. **116 I. C. 249 = 31 Bom. L. R. 331 = A. I. R. 1929 Bom. 198.**

—S. 115—Illegality—Reversal.

———The reversing of decision of the Court of first instance by appellate Court, without assigning any reason whatsoever for such reversal amounts to acting illegally in the exercise of jurisdiction within S. 115. (*Cuming and Mukerji, JJ.*) JOGESHCHANDRA *v.* RAMANI KANTA. **91 I. C. 839 = A. I. R. 1926 Cal. 530.**

—S. 115—Illegality—Transfer without notice.

———Order of a District Judge transferring a pending

suit from one Court to another at the instance of one party without notice to the other is liable to be interfered with in revision, the learned Judge having acted illegally or with material irregularity in the exercise of his jurisdiction. 18 A. L. J. 351, Foll.; 6 All. 233, Diss.; 43 All. 564 (F. B.), Dist.; A.I.R. 1924 P. C. 198 (P.C.), Ref. (*Mukerji and Boys, JJ.*) DE MELLO *v.* NEW VICTORIA MILLS CO., LTD. **23 A. L. J. 948 = 6 L. R. A. Civ. 555 = 90 I. C. 287 = A. I. R. 1926 All. 17.**

—S. 115—Illegality—What amounts to.

———Where the lower Court has applied its mind to the case and duly considered the facts and the law applicable then although its decision may be erroneous, the error cannot be corrected on revision, but if the lower Court has failed to take into account some proposition of law or some material fact in evidence, it has acted illegally and its decision may be reversed; 2 L. B. R. 333, Foll. (*Otter, J.*) FRUT CHONG *v.* MAUNG PO CHO. **7 Rang. 339 = 120 I. C. 899 = A. I. R. 1929 Rang. 145.**

—S. 115—Illegality—What is.

What is illegal act or one which is materially irregular must be decided on the merits of each case. Where a Court correctly states the law but applies it by assuming the existence of facts which it is necessary to prove and of which there is no proof and in so doing states that there is evidence on the record while in fact there is no evidence on the record, the Court acts illegally. (*Saunders, J. C.*) MA KYAW *v.* MAUNG SHEIN GO. **63 I. C. 838 = 4 U. B. R. 16 = A. I. R. 1921 U. B. 27.**

—S. 115—Interlocutory order—Accounts.

———Where the parties have a right of appeal from the ultimate decision after the accounts are taken the High Court should not interfere in revision or superintendence, unless it were proved to its satisfaction that the Judge had given improper directions in his interlocutory order as to the mode of taking accounts to the commissioner which unless varied or set aside would result in irreparable loss to the parties. (*Dawson Miller, C. J. and Mullick, J.*) HARIHAR PRASAD SINGH *v.* KESHO PRASAD SINGH. **3 Pat. L. T. 638 = A.I. R. 1922 Pat. 598.**

—S. 115—Interlocutory order—Adjournment.

Where the only interlocutory order passed is to adjourn the matter to give the defendant time to reply, even if the order was inexpedient, the Court cannot interfere. (40 M. 793 and 44 B. 619, Foll.) *Obiter*: It appears to be a sound rule that such applications should not lie, because if the conduct of pending case is to be taken out of the hands of the trying Court at every step by applications for revision no original suit would ever come to an end and the trying Judge would be deprived of all discretion. The result would be disastrous to the administration of justice. (*Baker, J. C.*) RAJABAI *v.* JAGANNATH. **78 I. C. 969 = 7 N. L. J. 183 = A. I. R. 1924 Nag. 417.**

—S. 115—Interlocutory order—Amendment.

———Orders refusing amendment of plaint or refusing permission to withdraw suit on the ground that it is defective in form, being interlocutory orders, are not open to revision; A. I. R. 1924 Lah. 425, Rel. on. (*Bhide, J.*) GOT MAL *v.* M. R. RAMCHANDRA AND CO., LTD. **122 I.C. 105 = 31 P. L. R. 456 = A. I. R. 1930 Lah. 589.**

—S. 115—Interlocutory order—Award.

———Where an application was made to the Court to pass a decree in terms of the award and the Court decided not to pass a decree in terms of the award but to continue the hearing of the suit by the Court,

Held, that it was clearly an interlocutory order and an application to revise it was not competent. (*Macleod, C. J. and Crump, J.*) CHIMANBHAI KALYABHAI *v.* KESHAVLAL BULAKHIDAS. **73 I. C. 464= 25 Bom. L. R 443=47 Bom. 721= A. I. R. 1923 Bom. 402.**

—S. 115—Interlocutory order—Case.

———A mere interlocutory order does not amount to a case decided within the meaning of S. 115, C. P. Code. A finding on an issue or part of an issue not going to the root of the case cannot be revised by the High Court under S. 115, C.P. Code.; A. I. R. 1921 All. 1 (F. B.); and A. I. R. 1917 P.C. 71; Ref.; 7 Bom. 217; 32 Mad. 284; 21 Bom. 580, and A. I. R. 1924 Lah. 425 (F. B.). Foll. (*Mears, C. J. and Sen, J.*) EQUITABLE TRUST CO. *v.* HAFIZ MOHAMMAD HALIM & CO. **50 All. 276=108 I. C. 735=25 A. L. J 991= A. I. R. 1928 All. 97.**

———*Punjab Courts Act.*

An interlocutory order cannot constitute a "case" within the meaning of S. 44, Punjab Courts Act and C. P. Code, S. 115. The High Court has no jurisdiction to entertain an application for the revision of an interlocutory order. 60 P.R. 1897, Dissented from. (*Shadi Lal, C. J., Le Rossignol, Broadway, Abdul Raoof and Martineau, JJ.*) FIRM LAL CHAND *v.* FIRM BEHARI LAL. **84 I. C. 259=5 Lah. 288=6 L. L. J. 558= A. I. R. 1924 Lah. 425 (F.B.).**

—S. 115—Interlocutory order—Commission to examine witness.

———Ordinarily, in the case of a witness not under the control of the party asking for the commission, who resides beyond the limit fixed under Order 16, Rule 19 (*b*), C. P. Code, a commission should issue as a matter of right, unless the Court is satisfied that a party is merely abusing its authority to issue process. It is not for the Court to decide whether the party will be benefited thereby or not; that is a matter entirely for the party. It is clearly the duty of High Court to interfere, even in interlocutory proceedings, rather than permit a trial to go on an illegal course, which must entail unnecessary expenses to the parties and useless waste of time. (*Wallace, J.*) JAGANNATHA SASTRY *v.* SARATHAMBAL AMMAL. **71 I. C. 530= 46 Mad. 574=1923 M. W. N. 157= 17 M. L. W. 251=A. I. R. 1923 Mad. 321= 44 M. L. J. 202.**

—S. 115—Interlocutory order—Evidence.

———An interlocutory order of the lower Court rejecting certain evidence as inadmissible during the pendency of a suit is not revisable; A. I. R. 1917 P.C., 71 and 44 Bom. 619, Rel. on. (*Marten, C. J. and Percival, J.*) ISA ALAM *v.* BAI MARIAM. **29 Bom. L. R. 304= 101 I. C. 385=A. I. R. 1927 Bom. 664.**

———An interlocutory order which does not determine the case but which is made with the object of collecting materials upon which the case is to be determined thereafter is not revisable. (*Kendall, A. J. C.*) DHARAM NARAIN *v.* UNAO COMMERCIAL BANK, UNAO. **80 I. C. 612=11 O. L. J. 692=28 O. C. 78= A. I. R. 1925 Oudh 189.**

———*Provincial Small Cause Courts Act, S. 25—Failure to forthwith apply in revision on interlocutory order does not bar the right to apply when the case is over.*

Where a Small Cause Court Judge refuses to summon witnesses, the aggrieved party can forthwith apply in revision against that order, but his failure to do so does not bar his right to apply in revision when the case is over. (*Bucknill, J.*) RAMTAKHAN PANDE *v.*

DHARAMDEO MISSIR. **97 I. C. 335= A. I. R. 1926 Pat. 575.**

—S. 115—Interlocutory order—Injunction.

———No revision lies against an order refusing a temporary injunction unless non-interference causes an irremedial injury or leads to failure of justice; 15 N. L. R. 21, A. I. R. 1924 Nag. 44; A. I. R. 1921 All. 1. Foll.; 33 All. 79; 41 Cal. 436, Dist. (*Findlay, J. C.*) NARSINGHDAS *v.* DAMDOOLAL. **107 I. C. 908=A. I. R. 1928 Nag. 222.**

—S. 115—Interlocutory order—Interfere with.

———*Power to interfere with.*

Per *Full Bench.*—Sind Judicial Commissioner's Court has no jurisdiction to interfere in revision under S. 115, C. P. Code, with interlocutory orders even in exceptional circumstances. (*Rupchand, A. J. C.*, contra). A. I. R, 1924 Lah. 425 (F. B.), Foll.

Per *Wild, A. J. C.*—As regards S. 115, C. P. Code, and S. 25, Provincial Small Cause Courts' Act, the Sind Judicial Commissioner's Court has no jurisdiction to interfere in revision with an interlocutory order, but it can do so under S. 32, Karachi Small Cause Courts Act of 1929.

Per *Rupchand, A. J. C.*—Even if S. 115 is not wide enough to permit of interference in revision with an interlocutory order before the whole suit is decided, the powers vested in the Sind Judicial Commissioner's Court by S. 15-A. Sind Courts Act, are wide enough. These powers were introduced with the specific object of conferring upon this Court powers of control or superintendence over subordinate Courts similar to those vested in the Bombay High Court under S. 5, Reg. 2, of 1827, and on all Chartered High Courts under S. 15, Government of India Act, 1861, corresponding to S. 107 of the present Act. (*Percival, J. C. Rupchand and Wild, A. J. C's.*) KHUDABUX *v.* PANJO. **A. I. R. 1930 Sind 265.**

———It is not the practice of High Courts to allow revision of interlocutory orders which can be questioned in appeal and interference in revision is allowed in such cases only when great inconvenience or injustice would otherwise result. (*Munje, A. J. C.*) SAMBHA *v.* DESRA. **121 I. C. 672=A. I. R. 1930 Nag. 51.**

———High Court cannot interfere with interlocutory orders under S. 115, except in special circumstances. (*C. C. Ghose, J.*) MATI BALA DASI *v.* RAJ NARAIN. **A. I. R. 1929 Cal 83.**

———*Madras High Court.*

As far as the Madras High Court is concerned, it cannot be held that there can be no interference by way of revision in an interlocutory matter or proceedings on the ground that it is not a case decided: 9 Mad. 256; A. I. R. 1924 Lah. 425, and A. I. R. 1921 All. 1 (F.B.); Not Foll. A.I.R. 1922 Mad. 436; 14 Cal. 768; and 40 Bom. 86, Foll. (*Odgers and Curgenven, JJ.*) PARTHASARATHY APPA RAO *v.* VENKATADRI APPA RAO. **113 I. C. 646=A. I. R. 1929 Mad. 121.**

———It is extremely undesirable that, whenever any of the lower Courts gives a preliminary decision, which a party to the suit concerned considers as an erroneous decision in law, recourse should be had to High Court by way of revision except under very exceptional circumstances: A. I. R. 1922 P. C. 112 and 13 N. L. R. 116, Foll. (*Findlay, J. C.*) RAMCHANDRA JAIRAM PANDE *v.* PURSHOTTAM ANAND RAO JOSHI. **110 I. C. 78 (Nag.).**

———It would be inexpedient for the appellate Court to interfere with an order which is not appealable by having recourse to the exceptional powers under S. 115; A. I. R. 1926 Bom. 237, Rel. on. (*Marten, C. J. and*

Crump, J.) KUNVERJI RATANSI *v.* PITAMBERDAS RAMDAS. **29 Bom. L. R. 1355 = A. I. R. 1927 Bom. 599.**

———High Court will not interfere in revision with an interlocutory order unless the order is perverse or the petitioner will have suffered some irreparable injury if the order is carried out. (*Odgers, J.*) SREENIVASA AIYANGAR *v.* RANGA AIYANGAR. **1927 M. W. N. 218 = A. I. R. 1927 Mad. 524.**

———It is not ordinarily the practice of the High Court, to interfere with orders of an interlocutory nature unless there is some special reason for doing so. (*Phillips, Krishnan and Ramesam, JJ.*) ZAMINDAR OF KALLIKOTE AND ATAGADA ESTATE *v.* MONGOLOPUR. **24 M. L. W. 416 = 97 I. C. 921 = A.I.R. 1926 Mad. 1047 = 51 M.L.J. 500 (F.B.).**

———Per *Cuming, J.* To decide a case within the meaning of S. 115 is to decide the whole case and not to decide a part of the case and therefore S. 115 has no application to interlocutory orders: 18 Bom. 35; 4 All. 91 and 9 Mad. 256, Foll. 14 Cal. 768, Not Foll.

Per *Contra Page, J.*—High Court has jurisdiction under S. 115 to revise interlocutory orders passed by Subordinate Courts from which no appeal lies to the High Court: 14 Cal. 768; 15 C. W. N. 682 and 42 Cal. 920, Foll. It is of great importance that the powers of revision should not be restricted, but High Court will interfere in revision only when irreparable injury will be caused to the applicant if revision was refused. (*Cuming and Page, JJ.*) SALAM CHAND KANNYRAM *v.* BHAGWAN DAS CHILHANIA. **53 Cal. 767 = 30 C. W. N. 907 = 98 I. C. 615 = A. I. R. 1926 Cal. 1149.**

———Although the High Court will not exercise its revisional jurisdiction except on rare occasions where the refusal of such jurisdiction would be tantamount to a denial of justice, yet an interlocutory order fixing a certain place to which a witness to be examined on commission is to be brought is an order which can be revised by the High Court. There is nothing in law to prevent the High Court from interfering with interlocutory orders of this nature, if it thinks that the order complained of is one which is calculated to do irreparable injury to a party in a suit. (*Suhrawardy and Chotzner, JJ.*) ANANDA CHANDRA PRODHAN *v.* SUB CHAND PRODHAN. **85 I. C. 619 = A. I. R. 1925 Cal. 1118.**

———Although the High Court interferes as little as possible with interlocutory orders where an alternative remedy exists it is not a hard and fast rule and where the order may cause a failure of justice or irreparable injury, the High Court can and will interfere. When issues which were unnecessary and which were likely to entail an expenditure of time and money wholly out of proportion to the matter in dispute, were likely to cause irreparable injury, the issues were ordered to be struck off in revision. (*Pearson and Graham, JJ.*) SM. SARAJUBALA DEBI *v.* MOHINI MOHAN GHOSE. **82 I. C. 1008 = 40 C. L. J. 191 = 28 C. W. N. 991 = A. I. R. 1925 Cal. 204.**

———It is not usual to interfere in revision in the case of interlocutory orders against which though no appeal may lie their correctness can be challenged in an appeal against the final decree in the suit. (*Prideaux, A. J. C.*) BANOOBI *v.* YAKUBKHAN. **80 I. C. 375 = A. I. R. 1925 Nag. 108.**

———It is not usual to interfere in revision in the case of interlocutory orders because though there may be no immediate appeal against such an order a remedy is supplied by S. 105, C. P. Code, which provides

that such orders may be made a ground of objection in the appeal against the final decree. (*Prideaux, A. J. C.*) ANWAR KHAN *v.* YAKUB KHAN. **79 I.C. 911 = A.I.R. 1925 Nag. 62.**

———Ordinarily the High Court will not interfere in revision with interlocutory orders. But where the Judge against whose order there is an application for revision has so used his jurisdiction that the result of allowing his order to stand will be definitely to decide the case pending before him, so that all the proceedings thereafter taken would be merely infructuous and waste of time and where the interlocutory order could not be made the ground of an appeal against the final decree, then the High Court, can interfere in revision and set aside the order. The High Court has jurisdiction to interfere with an order refusing an amendment of plaint hy the addition of an alternative prayer for possession and set it aside if necessary. 14 S. L. R. 28, Dist. (*Kennedy, J. C. and De Souza, A. J. C.*) MUNICIPALITY OF TANDO ADAM *v.* KHAIR MAHOMED. **92 I. C. 1019 = A. I. R. 1925 Sind 260.**

———Where the lower Court decided, in a suit contesting the validity of the nomination of certain Municipal Councillors, that the Secretary of State was a proper, though not a necessary party and that his jurisdiction to try the suit was not on that account barred by S. 32 of the Bombay Civil Courts Act (XIV of 1869), an application to revise that order is maintainable as the High Court has the power to call for the record of a case in which the question of jurisdiction is involved, even if it be in an interlocutory stage. (*Shah and Coyajee, JJ.*) SECRETARY OF STATE *v.* PATEL NARSIBHAI. **48 B. 43 = 25 Bom L. R. 992 = 77 I. C. 241 = A. I. R. 1924 Bom. 65.**

———Interference by the High Court with the proceedings of a lower Court during the pendency of a suit is to be deprecated unless strong reasons are made good. In the present case revision was granted, partly on the ground that the lower Court had not properly understood the provisions of O. 11, R. 14 of the C. P. Code, and partly on the ground that the result of its orders might be wholly unnecessary and cause irremediable damage to first defendant's business interests. (*Wallace, J.*) RAMACHARI *v.* KRISHNAMACHARI. **80 I. C. 604 = 47 Mad. 934 = 20 M. L. W. 533 = 1924 M. W. N. 863 = A. I. R. 1924 Mad. 846 = 47 M. L. J. 460.**

———Ordinarily an interlocutory order is not capable of revision particularly when there is another remedy available to the injured party; but where the order complained against is such as is calculated to cause irreparable loss to the injured party and there is no right of appeal and no remedy available to the party, an interlocutory order may be revised under S. 115 read with S. 15 of the Charter Act. (Case-law discussed.) (*Jwala Prasad and Foster, JJ.*) MANI LAL *v.* DURGA PRASAD. **80 I. C. 667 = 5 P. L. T. 425 = 1924 P. H. C. C. 254 = 3 Pat. 930 = A. I. R. 1924 Pat. 673.**

———Interlocutory orders cannot be interfered with in revision. (*Zafar Ali, J.*) RAHAMAT ULLAH *v.* RAHIM BAKHSH. **75 I. C. 107 = A. I. R. 1923 Lah. 301.**

———Though the Court will interfere in revision with an interlocutory order, such interference should be exercised with extreme diligence, the general rule being against such interference; it will interfere only in such cases as for example where the Court below has acted perversely or in a manner as to cause irreparable loss to plaintiffs. (*Odgers, J.*) RATNACHALAM *v.* SIVACHIDAMBARAM.

C. P. CODE, (1908), S. 115—Interlocutory order—Interfere with.

76 I. C. 207 = 18 M. L. W. 198 = 1923 M. W. N. 403 = A. I. R. 1923 Mad. 690 = 45 M. L. J. 703.

———The High Court will not interfere in revision with interlocutory orders unless some irreparable injury is caused to any party thereby. (*Mullick and Kulwant Sahay, JJ.*) RAMJAS AGARWALA *v.* LINTON MOLESWORTH & CO. **73 I. C. 71 = A. I. R. 1923 Pat. 411.**

———The High Court has the power in revision to interfere with an interlocutory order but that interference must be exercised with extreme diligence, the general rule being against such interference. (*Odgers, J.*) RAMAKRISHNA *v.* KRISHNASWAMI. **68 I. C. 167 = 15 M. L. W. 667 = 1922 M. W. N. 521 = A. I. R. 1922 Mad. 321.**

———High Court will interfere in revision with an interlocutory order only in exceptional circumstances for example to avoid irreparable waste of time and money of the parties affected by the decision as well as waste of time of Court. (*Leslie Jones, J.*) DAMRI SHAH THAKURRAM *v.* RULIA MAL DONGAR MAL. **64 I. C. 387 = 17 P. L. R. 1922 = A. I. R. 1921 Lah. 213.**

———The High Court has power under S. 115 to deal with interlocutory applications and will do so by way of setting aside the order complained of when no appeal lies directly from the order and sufficient grounds exist peremptorily calling for its interference even though the substance of the order may be one that could be brought up on appeal from the final decree in the suit. (14 Cal. 768, Foll). The Court should not as an ordinary rule interfere with orders passed in the exercise of a discretion provided there has been some attempt at any rate to exercise that discretion judicially. It should not interfere unless irreparable damage would be caused by holding its hand. 8 L. B. R. 77, Foll. (*Robinson, C. J. and Heald, J.*) S. R. M. M. CHETTY FIRM *v.* P. L. N. N. NARAYANAN CHETTY. **64 I.C. 821 = 11 L.B.R. 65 = A. I. R. 1921 L. B. 6.**

—S. 115—Interlocutory order—Jurisdiction.

———Where the lower Court decided wrongly the question of jurisdiction and on such wrong decision gave itself jurisdiction, the High Court will interfere. (*C. C. Ghose, J.*) RAJ KUMAR *v.* JADU NATH. **116 I. C. 172 = A. I. R 1929 Cal. 159.**

———Although the High Court does not ordinarily interfere in revision against an interlocutory order still, where matters of principle or jurisdiction are involved it does not necessarily decline to entertain it. (*Kinkhede, A. J. C.*) RAMCHANDRARAO *v.* MAYARAM. **106 I. C. 57 = A. I. R. 1928 Nag. 131.**

———Revision is allowed from interlocutory order deciding a question as to place of trial. (*Campbell, J.*) NARAYANASWAMI IYER *v.* S. D. CHOWDHARI. **86 I. C. 395 = A. I. R. 1925 Lah. 72.**

———A case should not come to High Court until all the issues are determined and the case finally disposed of ; but this is upon the ground of convenience and does not bar the revisional jurisdiction of the High Court when the determination of one of the issues in the case goes to the root of the jurisdiction of the trial Court to determine the remaining issues. (*Jwala Prasad and Foster, JJ.*) MANI LAL *v.* DURGA PRASAD. **80 I. C. 667 = 5 P. L. T. 425 = 1924 P. H. C. C. 254 = 3 Pat. 930 = A. I. R 1924 Pat. 673.**

—S. 115—Interlocutory order—Legal representative.

———An order rejecting the claim of a person to be the legal representative of a deceased plaintiff which does not conclusively determine the right of the parties in the suit is not appealable and therefore is revisable. (*Jackson, J.*) RUKMANI AMMAL, *v.* VEERASWAMI AIYANGAR. **80 I. C. 942 = 35 M. L. T. 82 = 1924 M. W. N. 763 = A. I. R. 1924 Mad. 813 = 47 M. L. J. 370.**

—S. 115—Interlocutory order—Mesne profits.

———Where no direction as to mesne profits was given in the preliminary decree but the Lower Court directed the commissioner to ascertain mesne profits also before the final decree is passed, *Held* that as the final decree will be open to regular appeal, that will be the appropriate method of challenging the correctness of an interlocutory order made in the course of trial and not by way of revision. (*Spencer, J.*) HUSSAIN SAHIB *v.* HAMMAD SAHIB. **74 I. C. 812 = 16 M. L. W. 312 = 1922 M. W. N. 562 = 31 M. L. T. 180 = A. I. R. 1923 Mad. 43.**

—S. 115—Interlocutory order—Restoration.

———An order restoring a suit dismissed for default is not an interlocutory one and there fore is open to revision : A. I. R. 1926 Lah. 344 ; A. I. R. 1926 Lah. 642; and A. I. R. 1926 Lah. 379. Foll. (*Broadway, J.*) ABDUL AZIZ *v.* PUNJAB NATIONAL BANK. **107 I. C. 395 (Lah.)**

—S. 115—Interlocutory order—Stay of suit.

———Where there were orders under S. 10. ordering a stay in one case and a non-stay in another of a later suit,

Held, that from such orders no revision lies : A. I. R. 1929 Lah. 107 ; A. I. R. 1926 Lah. 379 ; A. I. R. 1926 Lah. 344, Dist.; 42 All. 409 ; A. I R. 1922 Lah. 54, Ref. A. I. R. 1924 Lah. 425, Rel on. (*Johnstone, J.*) SWAN LANE SPINNING CO. *v.* PARAS RAM HARNAND RAI. **A. I. R. 1929 Lah. 662.**

———High Court can set aside an order refusing to stay suit under Section 10 pending the final decision of a suit previously instituted for the same subject-matter and between the same parties. (*Zafar Ali, J.*) MEHTAH SHAH *v.* ALI HAIDAR SHAH. **82 I. C. 234 = A. I. R. 1925 Lah. 144.**

———Where the Lower Court wrongly passed an order staying a suit under S. 10 of the C. P. Code the High Court refused to revise the order, but pointed out to the Lower Court the desirability of revising its order on proper application. (*Abdul Raoof, J.*) MELA RAM *v.* RIKHI KESH. **69 I. C. 111 = 33 P. W. R. 1922 = A. I. R. 1923 Lah. 69.**

———High Court will revise an order refusing to stay a suit when the same question is in issue between the parties in two different suits. (*Phillips, J.*) RAMCHANDRAM PILLAI *v.* NEELAMBAL. **70 I. C. 5 = 16 M. L. W. 607 = A. I. R. 1923 Mad. 88**

S. 115—Jurisdiction.

- **Absence of.**
- **Assumption of.**
- **Decision as to.**
- **Declining of.**
- **Defect of.**
- **Excess of.**
- **Existence of.**
- **Failure to exercise.**
- **Final Decision.**
- **Improper exercise of.**
- **Meaning of.**
- **Proper exercise of.**
- **Submission to.**

—S. 115—Jurisdiction—Absence of.

———An appellate Court has no jurisdiction to order a subordinate Court which is legally not competent, to try a suit and dispose of it, and that if it does actually order the subordinate Court to dispose of the case it acts without jurisdiction and also acts illegally in the exercise of its jurisdiction. If therefore an order of this kind is passed it is open to be revised both under Cl. (*a*) and Cl. (*c*), S. 115, C. P. Code; A. I. R. 1926 P. C. 142; A. I. R. 1930 All. 434 ; 39 Mad. 195 ; *Davies* v. *Kennedy*. (1869) Ir. 3 Eq. R. 31 ; 8 All. 111 ; 15 Bom. 148 ; 32 Cal. 146 and A. I. R. 1930 All. 158, Ref to 25 All. 509, Doubted. (*Sulaiman, Mukerji and Niamatullah, JJ.*) RAM IQBAL RAI *v.* TELESSARI KUARI.

A.I.R. 1930 All. 713 (F.B.).

———Where no appeal was maintainable under the law but the lower Court on the same entertained the appeal, *held* that the High Court could interfere in revision and hold that the appeal was incompetent. (*Tapp, J.*) UTTAM *v.* KAKOO. **12 Lah. L. J. 89.**

———According to the compromise arrived at by the parties to a suit, the plaintiff was to be granted a decree realizable from the assests of a deceased person in the hands of *A*. But the Court in passing the decree made *A* personally liable if the decree could not be realized from the assets.

Held, that the decree was not according to the terms of the compromise ; and as the Court had no jurisdiction to pass such a decree, its order was revisable (*Bhide, J.*) TIRATH RAM *v.* DEOKI.

116 I. C. 706 = A. I. R. 1929 Lah. 254.

———Although posssession is the only question for decision of Court under O. 38, R. 8, if the particular circumstances necessitate the determination of question of title, the Court cannot be held to have exceeded its jurisdiction in going into question of title. (*Wort, J.*) MT SUNDER KOER *v.* JANKI DAS KANHAIYA LAL.

119 I.C. 555 = 11 P.L.T. 59 = A.I.R 1929 Pat. 747

———Where the execution is taken out one year after decree and arrest is ordered without complying with the provisions of O. 21, R 22, the whole of the proceedings are without jurisdiction and the High Court will interfere by way of revision even where the aggrieved party had only filed an appeal from the order from which no appeal was in fact maintainable. (*Pratt, J.*) RAMDAS *v.* KANNAMAL. **7 Rang. 110 = 117 I.C. 245 = A.I.R. 1929 Rang. 161.**

———Where an appeal which lay properly to the District Judge was accepted and disposed of by a Subordinate Judge who had no jurisdiction to hear it, there is ground for thinking that the parties were prejudiced and it is within the High Court's discretion to correct the error. (*Addison, J.*) MT. BANNI *v.* MANGU.

114 I.C. 440.

———*Bengal Tenancy Act, S.* 66 (*b*).

Where the Court varies the terms of a decree by extending time within which to pay the money in a case not governed by S. 66 (*b*) of the Bengal Tenancy Act, which he has no jurisdiction to do, there is no appeal from that order but it can only be set right by an application for revision. 26 Cal. 639, Dist. (*B.B. Ghose and Bose, JJ.*) DALILUDDI *v.* BAKSHI BEPARI.

112 I.C. 124 = A.I.R. 1929 Cal. 140.

———Unless it is shown to the High Court that an appellate court had no jurisdiction to pass an order of remand, it will not go into the merits of that order in revision. 17 Mad. 410 (F.B.), Foll. (*Curgenven, J.*) *In re* RANGAYYA. **39 M.L.T. 120 = A.I.R. 1927 Mad. 1111.**

———*Commission—Issue of.*

The Court cannot be said to have acted with jurisdiction in taking away from a litigant the rights which he undoubtedly has, under the law, of having a witness brought before the Court and examined before the Court in accordance with the normal procedure and ordering the issue of a commission when no sufficient ground has been shown for that course. Such an order can therefore be revised. (*Odgers, J.*) SREENIVASA AYANGAR *v.* RANGA AYANGAR.

1927 M.W.N. 218 = A.I.R. 1927 Mad. 524.

———*Issue of Commission is a question of jurisdiction and not one of mere discretion—Grounds alleged for issue of commission should be carefully examined.*

The question as to the propriety of allowing evidence to be taken on commission is not a question of discretion at all. That question ultimately resolves itself into a question as to whether a court can be said to have acted with jurisdiction in taking away from a litigant the rights which he undoubtedly has under the law of having his witness brought before the court and examined before the court in accordance with the normal procedure ; in other words whether the circumstances disclosed in the case gave the court jurisdiction to depart from the usual course prescribed by law. The court on the evidence before it has to arrive at a necessary conclusion whether it is or is not necessary for the purpose of justice that the ordinary mode in which evidence is to be taken should be departed from and unless the court dees arrive at the conclusion that it is necessary, it is the right of the person who opposes the examination in the way proposed to have the evidence taken in the usual way. The importance of having the witnesses present before the court, the advantages that would follow from their examination and cross-examination in the presence of the court and the emergency which might arise of having them confronted or identified should not be altogether lost sight of. If all these matters are duly considered and an order is passed, then and then only can it be said that the order has been passed in the exercise of a judicial direction (1882) 20 Ch. D. 764 Foll (*M. N. Mukerji, J.*) PUNCHKARI MITRA *v.* PUNCHANAN SAHA.

84 I.C. 9 = 39 C.L.J. 598 = A.I.R. 1924 Cal. 971.

———Where a scheme has been framed, no appeal lies from the order of Court in the matter of its execution A I.R. 1924 Mad. 569, Foll. But where the order of the Court is without jurisdiction, revision will lie. (*Venkatasubba Rao and Jackson, JJ.*) VYTHILINGA MUDALIAR *v.* MAHADEVA IYER.

91 I.C. 794 = A.I.R. 1926 Mad. 659.

———Judicial matters cannot be decided on the private opinions of the Judge nor can that opinion be substituted for a decision on evidence, even though the taking of that evidence may involve much time and trouble. A decision based on such private opinion is without jurisdiction. (*Wallace, J.*) SRIRANGA NARAYANA JEER *v.* AHOBILA JEER. **22 M.L.W. 837 = 91 I.C. 651 = A.I.R. 1926 Mad. 166.**

———Where the lower court after finding there was no sufficient cause for non-appearance of plaintiff, however, restored the suit as a matter of grace,

Held the court had no jurisdiction to set aside the dismissal for default in the absence of any of the grounds specified in O.9, R. 9, and that the High Court was bound to interfere and set aside the order of the lower court though the suit was subsequently tried and decreed. (*Wallace, J.*) MANICKAM PILLAI *v.* BATHU MAL.

20 M.L.W. 829 = 85 I.C. 499 = A.I.R. 1925 M. 209 = 48 M L.J. 152.

———In a suit for partition, a consent decree was passed in appeal by the High Court and the suit remitted to the sub-court for effecting partition. The sub-court fixed a day for hearing and on that day, the plaintiff did not appear and the sub-judge dismissed the suit for want of prosecution under O. 17, R. 2.

Held, by the Privy Council, that after a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal and in dismissing the suit, the Lower Court exercised a jurisdiction not vested in it by law. (*Lord Phillimore.*) LACHMI NARAYAN *v.* BALMUKUND MARWARI.

A.I.R. 1924 P.C 198 = 47 M.L.J. 441.

An order dismissing an execution application without notice to decree-holder is without jurisdiction. No order can be passed to the prejudice of a party without having given him an opportunity to be heard. (*Jwala Prasad and Bucknill, JJ.*) GOUR CHANDRA *v.* JANARDAN.

68 I.C. 337 = 4 P.L.T. 204 = A.I.R. 1923 Pat. 180.

———On the mere ground that the decision was wrong a High Court certainly will not interfere but where the lower Court had no jurisdiction to enquire into the question, High Court has power to interfere in revision. (*Carr, J.*) MAUNG TUN U *v.* MAUNG PO SHAK.

76 I.C. 504 = 1 Rang. 265 = A.I.R. 1923 Rang. 199.

———A suit against three defendants was decreed, as against two of them after contest, and as against the third, *ex parte*. An appeal was preferred by the first two defendants and was dismissed; subsequently, the third defendant applied in the Lower Court to have the *ex-parte* decree against him set aside but the Lower Court restored the suit as against all the three defendants and fixed a date of hearing. On that date the court dismissed the whole suit for default.

Held, that the order restoring the case as against all the defendants was passed without jurisdiction, that all the subsequent proceedings were illegal and must fall to the ground on that order being set aside. (*Daniels, A.J.C.*) MAHABALI PRASAD *v.* BALBADHAR SINGH.

64 I.C. 303 = 24 O.C. 282 = A.I.R. 1921 Oudh 141.

—S. 115—Jurisdiction—Assumption of—Appellate Court.

———Lower Court wrongly reversing decision of Court lower to it on the ground of wrong exercise of jurisdiction, confers jurisdiction on itself by an error of law and therefore acts without jurisdiction. 39 Mad. 195, Ref. (*Ramesam, J.*) K. RAMA RAO *v.* N. PITCHAYYA.

104 I.C. 415 = 1927 M.W.N. 420 = 39 M.L.T. 25 = A I.R. 1927 Mad. 786 = 53 M.L.J. 131.

———If the lower appellate Court has assumed jurisdiction and passed an order on appeal, a second appeal will lie. If no appeal lay to the lower appellate Court, and it has acted on an assumed jurisdiction, the High Court has power in revision to revise that order. (*Sulaiman, J.*) HIRALAL *v.* TIKAM SINGH.

94 I. C. 1 = A.I.R. 1926 All. 401.

———Where there is no appeal against an order and the appellate Court entertains an appeal, the High Court could and should interfere in revision. (*Cuming and B. B. Ghose, JJ.*) HEMANTA KUMARI DEBI *v.* RAJENDRA KISHORE NATH. **97 I. C. 306 = A I.R. 1926 Cal. 1236.**

———*See also* (*Sulaiman and Daniels, JJ.*) HAFIZ ZAHUR AHMAD *v.* TASLIM-UN-NISSA.

48 All. 27 = 23 A. L. J. 891 = 6 L. R. A. Civ. 575 = 89 I. C. 404 = A I. R. 1926 All. 55.

———*See also* (*Mullick and Ross, JJ.*) RAGHUNANDAN PANDEY *v.* GARJA MANDAL.

91 I. C. 217 = 4 Pat. 718 = 6 P. L. T 795 = 1925 P. H. C. C. 183 = A I. R. 1925 Pat. 525.

———Where the lower Appellate Court erroneously entertains an appeal against an order made under O. 21, R. 101 the High Court can set aside the appellate Court's decision under S. 115 of the Code. (*Macleod, C. J. and Crump, J.*) (BAI) MANI *v.* RANCHODLAL AMRATLAL. **72 I. C. 256 = 25 Bom. L. R. 147 = A. I. R. 1923 Bom. 214.**

———Where the appellate Court has decided correctly but has decided without jurisdiction by holding that appeal lay where appeal did not lie, High Court will not interfere in revision. (*Heald, J.*) M. T. T. K. M. M. N. CHETTIAR FIRM *v.* K. P. A. N. M. FIRM.

120 I. C. 693 = A. I. R. 1929 Rang. 198.

———Where although it was probable that the Court below had acted irregularly or illegally it was quite clear on the merits that the order of the Court below ought to be sustained, and where the only result of allowing an application for revision would have been to drive the parties to another suit,

Held, that the application in revision should be rejected, (*Lindsay, J. C.*) DEO NARAIN *v.* RAM KHELAWAN. **63 I. C. 545 = 8 O. L. J. 307 = A. I. R. 1921 Oudh 168 (2).**

—S. 115—Jurisdiction—Assumption of—Deposit by person not entitled.

———Reversioners have not within the meaning of the words of Bengal Tenancy Act (VIII of 1885), S. 170 (3) an "interest in the tenure or holding voidable on the sale," and hence, where the executing Court allows the reversioners to deposit the decretal amount (in satisfaction of a decree for rent obtained against a Hindu Widow): he exercises a jurisdiction not vested in him by law or he is acting in the exercise of his jurisdiction illegally or with material irregularity and C. P. Code, S. 115 applies to this case. (*Sanderson, C. J. and Chotzner, J.*) MOHENDRA NATH NANDA *v.* BAIDYANATH TRIPATHI. **70 I. C. 127 = 26 C. W. N. 167 = A. I. R. 1922 Cal. 95.**

—S. 115—Jurisdiction—Assumption of—Appellate Court.

———Where plaintiff dies during the pendency of the suit and there are two claimants to be substituted, and the Court disposes of the question of substitution in its judgment, and not by a separate order, in favour of one of the claimants, no appeal lies at the instance of the other. Any order passed by the Appellate Court in such appeal is without jurisdiction and must be vacated. 16 O. C. 350 and 15 Bom. 145, Foll. 9 All. 445 and 43 Mad. 812, Dist. (*Simpson, A J. C.*) LATTA SINGH *v.* LACHUMI KUAR. **91 I. C. 366 = 2 O. W. N. 857 = A. I. R. 1926 Oudh 158.**

—S.115—Jurisdiction—Assumption of—Erroneous construction of statute.

———Where upon an erroneous construction of statute, a Subordinate Court assumes a jurisdiction which does not belong to it, the High Court has the power to revise its decision. (*Macleod, C. J. and Coyajee, J.*) BHEEMJI *v.* B. B. AND C. I. RY. **50 Bom. 215 = 28 Bom. L. R. 443 = 94 I. C. 742 = A. I. R. 1926 Bom. 266.**

———To assume jurisdiction to do an act by taking an erroneous view of the law, when there is really no jurisdiction raises a case for interference under S. 115, C. P. Code, where, by an erroneous construction of R. 10 of Sch. X taken with S. 55 of the Madras Local Boards Act (XIV of 1920), the Dt. Judge assumed jurisdiction to declare the membership of R. as void and as a necessay consequence his presidentship also, it is a proper case for interference by the High Court. (*Krishnan and Venkatasubba Rao, JJ.*) RAMASWAMI GOUNDAN *v.* VELAPPA GOUNDAN.

C. P. CODE, (1908), S. 115—Jurisdiction—Assumption of—Inherent power.

71 I. C. 1039 = 16 M.L.W. 848 = 1923 M. W. N 133 = 46 Mad. 536 = A. I. R. 1923 Mad. 192 = 44 M. L. J. 1.

—S. 115.—Jurisdiction—Assumption of—Inherent power.

A suit was dismissed for default. The Court found that there was no sufficient cause for non-appearance of plaintiff. But Court restored the suit to file in exercise of the inherent power of the Court, under S. 151.

Held, that case was a proper one for revision as the question was whether the Court has jurisdiction to make the order. A. I. R. 1929 Bom. 198, Dist. (*Jackson, A. J. C.*) ATMARAMSAO *v.* RAMBHAROS.

121 I. C. 659 = 26 N. L. R. 30 = A. I.R. 1930 Nag. 48.

—S. 115—Jurisdiction—Assumption of—Erroneous view of Law.

———Where the Subordinate Judge assumed jurisdiction to enquire into a petition on a wrong view of the law that a certain maxim *Actus curiu aeeminem gravabit* applied, where in fact it did not, an application in revision is maintainable. (*Krishnan J.*) KRISHNAJI *v.* MUTHUVEERA. **72 I. C. 449 = 18 M. L. W. 299 = 1923 M. W. N. 199 = A. I. R. 1923 Mad. 490 = 44 M. L. J. 344.**

—S. 115—Jurisdiction—Assumption of—Execution Sale.

———Where, after an application to set aside a sale, the total amount was not deposited within the time prescribed, the decree connot be said to have been satisfied been and the Court is bound to confirm the sale. Where the lower Court supposing that it had no authority to do so accepted the deposit made by the judgment-debtor, exercised a jurisdiction which was not vested in it and it is the duty of the High Court to interfere. A. I. R. 1922 Nag. 248, not Foll. A. I. R. 1923 All. 392, Dist. A.I.R. 1928 Nag. 136, Foll. (*Findlay, J. C.*) SADASHEO KHARTAIKAR *v.* NARAYAN.

106 I. C. 568 = A. I. R. 1929 Nag. 10.

———The High Court has jurisdiction to interfere with the wrong exercise by the courts below of power vested in them under O. 21, Rr. 89 to 92 dealing with confirmation on setting aside auction sale. The court has no jurisdiction to confirm the sale when the judgment-debtors had complied with all the provisions of law and deposited the necessary amount within the time prescribed for that purpose. (*Suhrawardy and Ghose, JJ.*) SANTOSH BALA DEBI *v.* Ram CHANDRA GHATI.

67 I. C. 286 (Cal.)

—S. 115—Jurisdiction—Assumption of—Extension of time.

———The Court has no discretion to enlarge the thirty days allowed by Art. 164, within which the defendant can apply to set aside the *ex-parte* decree and in entertaining the application after the expiry of limitation, the Court assumed illegally a jurisdiction which it did not possess. A. I. R. 1926 Lah. 379, Foll. (*Addison, J.*) PAL SINGH *v.* HARNAM SINGH. **100 I. C. 936 = A. I. R. 1927 Lah.342.**

———It is a case of illegal assumption of jurisdiction within S. 115 where a Court grants in favour of the applicant a prayer contained in a time-barred application for which the law does not permit extension of time, A. I. R. 1924 Lah. 425, (F. B.) and A. I. R. 1925 Lah. 639, Ref. (*Campbell, J.*) PIROJ SHAH *v.* QARIB SHAH. **7 Lah. 161 = 8 L. L. J. 267 = 27 P. L. R. 321 = 95 I.C. 124 = A.I.R. 1926 Lah. 379.**

———When a Court in effect decides that an application is time-barred, and in spite of its decision refers to that application, which is one for which the law does not permit it to extend time, as within time, and proceeds to decide it in favour of the applicant the Court is guilty of much more than an erroneous decision of law. It illegally assumes jurisdiction which it does not possess. (*Campbell, J.*) WIRU RAM *v.* AMAR CHAND.

C. P. CODE (1908), S. 115—Jurisdiction—Assumption of—Res judicata.

8 L. L. J. 170 = 94 I. C. 117 = 27 P. L. R. 710 = A. I. R. 1926 Lah. 344.

—S. 115—Jurisdiction—Assumption of—Issue of notice.

———Issuing notice by the District Judge under Regn., (XVII of 1806), which was not in force, is exercise of jurisdiction not vested in him by law and the order is subject to revision. (*James, J. On difference between Das and Fazl Ali, JJ.*) BAIJNATH *v.* CHIRANJI LAL.

10 P. L. T. 787 = A. I. R. 1929 Pat. 537.

—S. 115—Jurisdiction—Assumption of—No enquiry to give jurisdiction.

———Order of a Court assuming jurisdiction in a matter without any judicial inquiry into the facts which alone will give it jurisdiction is liable to be set aside in revision. (*Jackson, J.*) GOGINANI GOPAYYA *v.* MANI KONDA SOBHANADRI. **24 M. L.W. 839 = 99 I. C. 383 = A. I. R. 1927 Mad. 188.**

—S. 115—Jurisdiction—Assumption of—Practice.

———No hard and fast rule as to revision can be laid down in case of decisions as to jurisdiction under S. 20, and each must be decided on its own merits. Ordinarily, interference in revision is inadvisable in such cases and should only be exercised in exceptional cases to remedy an injustice. Where the defendant is by law entitled to have the case tried at Patna, it will be a grave injustice to him to insist on its trial in Jagraon in the Punjab, which will put him to a very great expense merely because the trial Court has erroneously held that the Jagraon Court has jurisdiction. (*Moti Sagar, J.*) SITA RAM RAM DHAN *v.* BANARSI DAS PURAN CHAND. **77 I. C. 764 = A. I. R. 1923 Lah. 565.**

—S. 115—Jurisdiction— Assumption of—Question of.

———If the lower appellate Court is wrong in holding that it was permissible for the first Court to enquire into the allegations of fraud made in an application, and not by separate suit, a question of the Court exercising a jurisdiction which did not vest in it, does arise and his decision is revisable. (*Findlay, Offg. J. C.*) M. B. KHINKHEDE *v.* MOHANYA. **94 I. C. 56 = A. I. R. 1926 Nag. 388.**

—S. 115—Jurisdiction—Assumption of Reference to arbitration.

———Where misinterpretation of the evidence and the misconception as to the nature of the plaintiff's firm by the trial Court resulted in its assuming jurisdiction in referring the dispute to arbitrators, which was not vested in it and in conferring jurisdiction on the arbitrator to decide the dispute which it did not otherwise have,

Held, that the order of the Court in referring the dispute to arbitrators was open to revision. (*Jai Lal, J.*) HARBAJAN *v.* KALU MAL. **111 I. C. 145 = A. I. R. 1929 Lah. 369.**

—S. 115 — Jurisdiction — Assumption of—Res-judicata.

———A wrong decision on a question of *res judicata* is not an exercise by a Court of a jurisdiction not vested in it by law so as to entitle the person aggrieved by it to apply for revision, 11 Cal. 6, Foll. (*Daniels, J. C.*) KEDAR NATH *v.* SUKH NATH. **64 I. C. 209 = 24 O. C. 213 = A. I. R. 1921 Oudh 54.**

—S. 115—Jurisdiction—Decision as to.

———A decision upon a preliminary issue relating to jurisdiction is open to revision under S. 115. A. I. R. 1928 Mad. 416; A. I. R. 1925 Mad. 707 and 39 Mad. 195 (F. B.), Rel. on. (*Curgenven, J.*) RANGANAYAKI *v.* SHIVARAMA DUBEY. **122 I. C. 337 = 58 M. L. J. 104 = A. I. R. 1930 Mad. 216.**

———Where the lower Court has jurisdiction to decide a certain point and decides that point wrongly, the High Court will not interfere with the decision under the provisions of S. 115 whether it be on a question of law or fact. That depends upon the question whether or not the lower Court had jurisdiction to decide that point and any decision which the lower Court may have given as to its own jurisdiction is in no way binding on the higher Court and is open to revision. A. I. R. 1927 Sind 239, Rel. on. (*Rupchand and Barlee, A. J. Cs.*) DATTARAM MUNSHILAL *v.* HARJIMAL & SONS. **121 I. C. 161 = 24 S.L.R. 145 = A.I.R. 1930 Sind 170.**

———Appellate Court has the power to decide the question of jurisdiction if the evidence is already on the record. If, therefore, it holds that there is jurisdiction to hear the suit the High Court has no jurisdiction to entertain an application for revision against such an order. A. I. R. 1924 Lah. 425, Foll. (*Addison, J.*) COTTON TRADING SYNDICATE COMMISSION AGENCY *v.* MALAWAMAL SHIV RAM. **108 I. C. 597 = A. I. R. 1929 Lah. 83.**

———High Court, sitting in revision, has jurisdiction to interfere with the order of the lower appellate Court whereby it erroneously decides that the Court of the first instance has jurisdiction to entertain a suit. 24 Mad. 427, Dist. and 39 Mad. 195 (F.B.), Foll. (*Venkatasubba Rao and Reilly, JJ.*) KATTIYA PILLAI *v.* RAMASWAMIA PILLAI. **29 M.L.W. 584 = 1929 M.W.N. 286 = 119 I.C. 35 = A. I. R. 1929 Mad 396 = 56 M. L. J. 394.**

———The Court of first instance returned the plaint on the ground that that Court had no jurisdiction to entertain it. This order was affirmed on appeal by the District Judge.

Held, that the order could be revised. A. I. R. 1917 P.C. 71, Foll.; 16 A. L. J. 535, Dist. (*Wazir Hasan, Ag. C.J. and Pullan, J.*) MANOHAR LAL *v.* MOHRE LAL. **5 O. W. N. 1117 = 114 I. C. 507 = 4 Luck. 347 = A. I. R. 1929 Oudh 91.**

———Order of Court holding that a suit is not triable by itself but by the tribunal under the Sikh Gurdwara Act (VIII of 1925) goes to the root of the case and practically terminates the proceedings so far as that Court is concerned, and therefore the order is revisable. (*Zafar Ali and Jai Lal, JJ.*) KESAR SINGH *v.* SHRIMANI GURUDWARA PROBANDHAK COMMITTEE. **8 Lah. 362 = 101 I. C. 171 = 28 P. L. R. 698 = A. I. R. 1927 Lah. 394.**

———A distinction must be drawn between the decision of the Court on the preliminary point whether it has jurisdiction to entertain a particular dispute or to pass a particular order and the power to decide any matters within its admitted jurisdiction. It is an elementary principle that where the Court's jurisdiction in any particular matter is disputed it must adjudicate upon it, but that such adjudication is not final and is always open to revision under S. 115, C. P. Code. (*Rupchand Bilaram and Lobo, A. J. Cs.*) HASSOMAL HIRDOMAL *v.* KODANMAL MOTIOMAL. **104 I. C. 342 = A. I. R. 1927 Sind 239.**

———An appellate judgment deciding (even erroneously) that the Court of first instance had jurisdiction to hear a suit, is not open to revision by the High Court. (*Campbell, J.*) FIRM BHOGI LAL *v.* FIRM AMAR NATH. **26 P. L. R. 746 = 90 I. C. 1042 = A. I. R. 1926 Lah. 47.**

———Interference in revision is ordinarily inadvisable from an appellate order upholding an order of the trial Court returning plaint for want of jurisdiction and should only be exercised in exceptional cases to remedy an injustice. (77 P. R. 1909, Ref.) (*Scott-Smith, J.*) THE FIRM JAGAN NATH DIWAN CHAND OF GUJRANWALA *v.* THE FIRM JAGAL NATH MOTI LAL OF CALCUTTA. **71 I. C. 38 = A. I. R. 1924 Lah. 349.**

———The High Court has jurisdiction to interfere under Section 115 (c) when a lower Appellate Court erroneously decides in the exercise of its admitted jurisdiction as an appellate Court, that the Court of first instance has or has not jurisdiction to entertain a suit. In any case, High Court can take up under Section 115 (b) both the orders of the Courts below read together, on the question whether the first Court has failed to exercise a jurisdiction vested in it. 39 M. 195 (F.B.), Rel. on. (*Campbell, J.*) DALIPA *v.* BARKAT ALI. **76 I. C. 1010 = A. I. R. 1923 Bom. 412.**

———Where an appellate judgment erroneously decided that the Court of the first instance had jurisdiction to hear the suit, *Held*: The High Court could interfere and grant revision. (*Wilberforce, J.*) THE FIRM DURGA PRASHAD MUTSADDI LAL *v.* THE FIRM RULIA MAL DOOJAR MAL. **65 I. C. 282 = 4 Lah. L. J. 176 = 29 P. L. R. 1922 = A. I. R. 1922 Lah. 100.**

———Where an appellate Court reversed, on a consideration of the plaint and evidence in the case, the order of the trial Court returing the plaint,

Held, that no revision lay to the High Court. If the appellate Court had confirmed the trial Court's order the plaintiff would have been entitled to come up in revision to the High Court against the original order of the trial Court. (*Piggott and Walsh, JJ.*) CHANDU LAL *v.* KOKAMAL. **61 I. C. 36 = 43 All. 334 = 19 A. L. J. 110 = A. I. R. 1921 All. 226.**

———No revision lies from the decision on a preliminary issue in a suit regarding the jurisdiction of the trying Court to entertain the suit. 12 O. C. 205, Ref. (*Kanhaiyalal, J. C. and Lyle, A. J. C.*) SHYAM SUNDAR *v.* SHEOAMBAR. **64 I. C. 92 = 24 O. C. 231 = A. I. R. 1921 Oudh 176.**

—S. 115—Jurisdiction—Declining of.

———*Execution application.*

Where the Lower Appellate Court held that the Dt. Munsif had no jurisdiction to allow the execution and it dismissed the execution application on the ground that it was made to a Court not having jurisdiction,

Held, that in doing so, it declined jurisdiction within the meaning of S. 115. (*Oldfield and Venkatasubba Rao, JJ*). MUTHUKARUPPA CHETTY *v.* PARIYA KAVUNDAN. **73 I. C. 956 = 18 M. L. W. 17 = 1923 M. W. N. 406 = A. I. R. 1924 Mad. 32 = 45 M. L. J. 210.**

———*Pauper application.*

Court not inquiring into an application to sue as pauper on merits, but fixing a day under O. 33, R. 6, for receiving evidence as regards pauperism, but merely considering the case to be weak on merits, although time for production of evidence had not arrived can be said to have refused to exercise jurisdiction. (*Sulaiman and Niamatullah, JJ.*) SUMATRA DEVI MT. *v.* HAZARI LAL. **A. I. R. 1930 All. 758.**

—S. 115—Jurisdiction—Defect of.

———Where the defect in the lower Court's judgment is one of expression and of want of experience, it cannot be said that there is a defect of jurisdiction. (*Dalal, J. C.*) JAGMOHAN DAS *v.* AHMAD RAZA. **88 I.C. 577 = A. I. R. 1926 Oudh 183.**

———The High Court is not bound to interfere on the revision side even when there is a defect of jurisdiction unless, failure of justice has directly resulted from such a defect. (*Broadway, J.*) GANGA RAM *v.* SUNDAR LAL. **67 I. C. 278 = 82 P.L.R. 1922 = A.I.R. 1921 Lah. 265.**

—S. 115—Jurisdiction—Excess of.

———*Preliminary decree—Transfer of case.*

When after passing of a preliminary decree for accounts the case is transferred to another Court to deal with further proceedings of the case, the former Court having no jurisdiction to pass a decree for the amount found due, it is no doubt open to the latter Court to consider the question of a *de novo* trial, but that is merely a matter of discretion and the preliminary decree that has been passed must be taken into consideration as it cannot be set aside except in due course of law (i. e. by an appellate Court) and the latter Court to which the case has been transferred cannot ignore the preliminary decree and try the case from commencement. It can exercise its discretion to hold a *de novo* trial only from the stage after the passing of the preliminary decree, but cannot go behind it : A. I. R. 1924 P. C. 198 (P. C.), Ref. Order holding trial *de novo* from the commencement is revisable. (*Jai Lal, J.*) FIZAL KARIM CHISTI *v.* MUNICIPAL COMMITTEE, JULLUNDUR. **118 I. C. 537 = A. I. R. 1929 Lah. 107.**

———The jurisdiction as to the passing of the order of rejection only arises in the event of no security being filed within the time fixed by the Court. Where security has been filed but there is a clerical error as to the description of the property and the appellant has applied for its correction, the Court cannot by rejecting the application, reject the appeal. Such rejection of appeal is apt to be revised as being an excessive exercise of jurisdiction. (*Wazir Hasan, A. J. C.*) JAIDAT SINGH *v.* BALDEO SINGH. **86 I. C. 752 = 12 O. L. J. 83 = A. I. R. 1925 Oudh 402.**

———Where it was open to the Judge to decide the question of title incidentally in so far as it was necessary for the purposes of giving relief to the plaintiffs, namely, their prayer for declaration, of right to, and recovery of the price of fish, but it was not within his jurisdiction at all to declare the plaintiff's title to the tank in dispute. *Held*, in revision so much of the decree of the lower Appellate Court must be expunged as declares the plaintiff's title to the tank in suit which was not within the Judge's jurisdiction to declare. (*Woodroffe and Ghose, JJ.*) ARADHAN MONDAL *v.* ABHOYA CHARAN MONDAL. **68 I. C. 626 = A. I. R. 1923 Cal. 321.**

—S. 115 –Jurisdiction—Existence of.

———The fact that the Court below acts wrongly would not invoke the revisional powers of the High Court when the Court below acts within jurisdiction and there is no question of law to be considered. (*Mukerji and Boys, JJ.*) MOTI LAL *v.* NANDAN. **121 I. C. 545 = 1930 A. L. J. 454 = A. I. R 1930 All. 122.**

———Upon the transfer of territorial jurisdiction if a Court having jurisdiction over the place where the cause of action in a pending suit arose dealt with it without a formal order for transfer of the suit to its file, the irregularity is merely technical and does not form a fit subject for revision. (*Curgenven, J.*) RAMANATHAN CHETTY *v.* ALAGAPPA CHETTY. **53 Mad. 378 = A. I. R. 1930 Mad. 528.**

———The grant of succession certificate in respect of

sum of money for which probate has already been granted is invalid under Succession Act, S. 385, and the order of the District Judge setting aside the order of the Lower Court granting the certificate is one within his jurisdiction and so cannot be set aside in revision, even if erroneous. (*Tapp, J.*) HARI CHAND *v.* HARGOPAL. **A. I. R. 1930 Lah. 574.**

———Simply because the Court takes a wrong view on the facts or law, it cannot be said to have acted with any illegality in the exercise of its jurisdiction. Thus if the Court has jurisdiction to decide the matter before it the High Court will not interfere with its order however wrong it may be on facts or law. (*Subhedar, A. J. C.*) PACHANNA *v.* POCHANNA. **120 I. C. 332 = A. I. R. 1930 Nag. 136.**

———If the trial Court, whose order it is intended to revise, had jurisdiction to decide the matter and has acted properly in exercise of that jurisdiction, its orders should not be set aside merely on the ground that the High Court cannot agree with the conclusion arrived at by the trial Court whether the case is decided rightly or wrongly : 11 Cal. 6 (P. C.), 16 Cal. 749 (P. C.). and A.I.R. 1917 P.C. 71, Foll. (*Gokaran Nath Misra and Nanavutty, JJ.*) ADITYA PRASAD *v.* JAGDISH PRASAD. **115 I. C. 105 = 5 O. W. N. 873 = 4 Luck 93 = A. I. R. 1929 Oudh 2 .**

———No application for revision lies where the Lower Court had jurisdiction to decide whether or not it would exercise its inherent powers and such jurisdiction was exercised by declining to exercise such power. (*Mullick, J.*) MODE NARAIN LAL *v.* KRISHNA DAYAL. **108 I. C. 804 = 9 P. L. T. 659.**

———The Election Court has jurisdiction to go behind the decision of the Returning Officer relating to the validity of votes in an election and in such a case there is neither lack of jurisdiction nor irregular exercise of jurisdiction, which would give the High Court authority to interfere under S. 115. (*Wallace, J.*) MAMUNDI KONAR *v.* SHAMSHUDDIN SAHIB. **90 I. C. 771 = 22 M. L. W. 507 = A. I. R. 1925 Mad. 1207 = 49 M. L. J. 381.**

———Where a suit was dismissed by a Subordinate Judge and on appeal to the Dt. Judge he differed from the Sub-Judge as to the value of the properties and returned the appeal to be presented to the proper Court, *Held*, that the Dt. Judge had jurisdiction to pass the order that he passed and that no revision lay. (*Mullick and Ross, JJ.*) MT. LADLI BEGUM *v.* RAM DAS. **90 I. C. 321 = 1925 P. H. C. C. 167 = 6 P. L. T. 448 = A. I. R. 1925 Pat. 488.**

———If Court has jurisdiction to extend time upon an application for review there is no reason why his order should be disturbed because he made the order upon an application for extension and not upon an application for review. (*Kulwant Sahay, J.*) MT. RAM KUMARI *v.* DEONANDAN SINGH. **90 I.C. 79 = 1925 P.H.C.C. 151 = A.I.R. 1925 Pat. 452.**

———A Court has jurisdiction to construe its own order and the High Court would not interfere if there is no irregularity in the exercise of that jurisdiction. (*Dawson Miller, C. J. and Mullick, J.*) TULAMAN BAID *v.* PRAYAG SAHU. **86 I.C. 107 = 3 Pat. L. R. Civ. 100 = 6 P.L.T. 481 = 1925 P.H.C.C. 14 = A.I.R. 1925 Pat. 318.**

———A Court has jurisdiction to accept or reject any piece of evidence including a medical certificate, hence its order based upon such acceptance or rejection is not revisable. (*Mallick and Bucknill, JJ.*) BHAICHAND FUL CHAND *v.* SETH HAJI DAWOOD AYUB. **76 I. C. 60 = A.I.R. 1924 Pat. 816.**

C. P. CODE (1908), S. 115—Jurisdiction—Existence of.

——*Held*: The Court has jurisdiction to pass an order granting adjournment on terms as to costs and the High Court would not interfere in revision with such an order. (*Das and Macpherson, JJ.*) CHOTU MIAN *v.* PALTO GOPE. **84 I.C. 1013 = 1 Pat. L. R. Civ. 270 = A.I.R. 1924 Pat. 529.**

—S. 115—Jurisdiction—Failure to exercise—Concurrent orders.

——Per *Mukerji, J.*—Where there is a refusal to exercise a jurisdiction which was undoubtedly possessed and there is an appeal to the District Judge who comes to the same conclusion as the Court below, an application in revision would lie against the orders of both the Courts. It would be different if the District Judge came to a different conclusion from that of the first Court. (*Sulaiman and Mukerji, JJ.*) FIRM GANESHI LAL HARNARAIN *v.* DEBI DAS. **47 All. 140 = 6 L.R. A. Civ. 79 = 85 I.C. 470 = A.I.R. 1925 All. 267.**

—S. 115—Jurisdiction—Failure to exercise—Erroneous decision.

——Where the decision of the Courts below is so palpably erroneous as to amount almost to an improper refusal to exercise a jurisdiction to the prejudice of the party entitled, revision will be allowed. (*Kanhaiya Lal, J.*) SURAJMAN CHAUBE *v.* ANJORE SHUKUL. **79 I.C. 605 = 46 All. 73 = 21 A.L.J. 861 = 4 L.R.A. Civ. 591 = A.I.R. 1924 All. 263.**

—S. 115—Jurisdiction — Failure to exercise—Error of law.

——The Court cannot be permitted to deprive itself of the jurisdiction, which belongs to it, by fastening an erroneous construction upon the words of statute. Where therefore a Court having jurisdiction to entertain an application refuses to look upon it upon an erroneous assumption which is not warranted by facts, a revision lies. (*Sen and Niamatullah, JJ.*) TAHSIN KHAN *v.* BASANT RAI. **A.I.R. 1930 All. 477.**

——Where the Judge wrongly thinks an appeal is untenable the High Court should interfere in revision (*Macnair, A.J.C.*) RAMACHANDRA *v.* MOHAN LAL. **121 I.C. 668 = 13 N.L.J. 4 = A.I.R. 1930 Nag. 207.**

——Where the Subordinate Judge has failed to exercise jurisdiction vested in him by law by refusing to accept the plaint, and the District Judge on appeal has erred in law in confirming the decision of the first Court, the High Court has authority to interfere in exercise of its revisional jurisdiction. 32 Cal. 146, Foll. A. I. R. 1921 All. 226, Dist. (*Jailal, J.*) JAGANNATH AMAR NATH *v.* BURMA OIL CO., LTD. **119 I.C. 481 = 11 L.L.J. 282 = A.I.R. 1929 Lah. 605.**

——Refusal to entertain on erroneous grounds an appeal amounts to failure to exercise jurisdiction and is revisable. (*Jai Lal, J.*) CHAMPA LAL MODHO LAL *v.* BANARSI DAS. **99 I. C. 690 = A. I. R. 1927 Lah. 134.**

——Where the Courts below upon an erroneous interpretation of the provisions of the Court Fees Act and also Civil Court Jurisdiction Act, came to a wrong conclusion that the suit was not triable by the Subordinate Judge,

Held, that this is a case in which the High Court should interfere though the lower Court's order may be an interlocutory one. (*Greaves and Chakravarti, JJ.*) RAJANI KANTA BAG *v.* RAJA BALA DASI. **85 I.C. 870 = 29 C. W. N. 76 = 52 Cal. 128 = A.I.R. 1925 Cal. 320.**

——An erroneous order based on misconstruction of the provisions of the law holding that the applicant cannot apply under R. 100 of O. 21 is a refusal to exercise jurisdiction and is revisable. (*Das, J.*) RAM KISHUN SINGH *v.* DAMODHAR PROSAD. **75 I. C. 856 = 83 I. C. 599 = 5 P.L.T. 107 = A. I. R. 1924 Pat. 506.**

——If the erroneous decision of a Subordinate Court on the point of limitation involves a refusal to deal with a petition made to it, its action amounts to a failure to exercise a jurisdiction vested in it by law. 44 M. 554, Foll. 1 M.L. W. 855 and 3 L.W. 36 Dist. (*Spencer and Venkatasubba Rao, JJ.*) BRITISH INDIA S. N. CO. *v.* MAHOMED BHOY. **70 I. C. 888 = 17 M. L. W. 705 = 46 Mad. 938 = A. I. R. 1923 Mad. 435 = 44 M. L. J. 100.**

——Where a Court by an erroneous view of the law refuses to exercise a power which it has got or exercises a power which it assumes it has but it has not really got, the case would be one falling under S. 115 and is revisable, (*Krishnan and Venkatasubba Rao, JJ.*) GANGAYYA *v.* VENKATARAMAYYA. **72 I.C. 839 = 16 M.L.W. 988 = 1923 M. W. N. 51 = 31 M. L. T. 423 = A. I. R. 1923 Mad. 230 = 44 M. L. J. 80.**

—S. 115—Jurisdiction—Failure to exercise—Evidence.

——Where the lower appellate Court dismissed the suit brought on a hand note on the ground that the note was not admissible because of defective stamps and that no parol evidence was admissible in support of the transaction,

Held that the revision did not lie either under S. 115, C. P. Code, or S. 107, Government of India Act, for holding particular evidence as inadmissible was vastly different from failing to exercise a jurisdiction vested by law in the Court of the first appeal. 23 Bom. 177 and (1918) P. H. C. C. 347, Foll. (*Dhavle, J.*) SHEOPUJAN *v.* BIRNA PANDEY. **A.I.R 1929 Pat. 633.**

—S. 115—Jurisdiction—Failure to exercise—Execution sale.

——It is now the settled practice of the Patna High Court to treat a refusal to accept deposit tendered for the purpose of setting aside a sale under O. 21, R. 89, C. P. Code as a refusal to exercise jurisdiction. (*Mullick and Macpherson, JJ.*) AULAD ALI *v.* ABDUL HAMID. **74 I. C. 102 = 2 Pat. 715 = A. I. R. 1923 Pat. 490.**

——A Court which refuses to entertain an application under O. 21, R. 89, on the ground that the petitioner has no *locus standi* fails to exercise a jurisdiction vested in it by law. 40 Mad. 793 P.C., Rel. on. (*Wallis, C. J. Oldfield and Kumaraswami Sastri, JJ.*) SUNDARAM *v.* MAMEA MAVUTHAR. **63 I. C. 937 = 44 Mad. 554 = 13 M.L.W. 498 = 1921 M.W.N. 272 = A. I. R. 1921 Mad. 157 = 40 M. L. J. 497 (F.B.).**

—S. 115—Jurisdiction—Failure to exercise — Extension of time.

——An order restoring a case dismissed for default on condition of the payment of a reasonable amount of costs to the opposite party within a time fixed by the order is not an illegal order, but, on the contrary, is an order contemplated by O. 9, R. 13. Where an application of defendant to extend the time fixed for payment was refused,

Held that the refusal did not amount to a failure to exercise jurisdiction against which, a revision can lie. (*Sulaiman and Daniels JJ.*) AHMAD HUSAINKHAN *v.* HARDIAL. **48 All. 199 = 24 A. L. J. 120 = 6 L. R. A. (Civ.) 586 = 90 I. C. 243 = A. I. R. 1926 All. 142.**

—S. 115—Jurisdiction—Failure to exercise—Improper procedure.

——Where a Judge did not hold that on the facts alleged in the plaint he had no jurisdiction but held that the case set out in the plaint was untrue in fact.

Held; that on this finding he ought to dismiss the suit on the merits and not return the plaint under O. 7, R. 10, C. P. Code. If he returns the plaint he fails to exercise jurisdiction vested in him by law and the order is open to revision. (*Sulaiman and Daniels, JJ.*) BISHESHAR PRASAD PANDEY *v.* RAGHUBIR.
90 I. C. 353 = 48 All. 168 = 24 A. L. J. 83 = A. I. R. 1926 All. 58.

—S. 115—Jurisdiction—Failure to exercise—Inherent powers.

———An order dismissing an application under Ss. 151 and 152 on the ground that such application did not lie amounts to a refusal to exercise jurisdiction within S. 115. (*Suhrawardy and Chotzner, JJ.*) KABIR-UD-DIN MENDAL *v.* ENTAJ MONDAL. **79 I. C. 586 = A. I. R. 1925 Cal. 420.**

—S. 115—Jurisdiction—Failure to exercise—Omission to adjudicate.

———*Informal application for execution.*

Certain decree holder made an application to the execution Court for setting aside an order dismissing a previous application for execution without stating under what provisions of the law such application was being made. The execution Court dismissed the application holding the same to be an "informal" application. The decree-holder appealed under S. 47, C. P. Code.

Held that the order appealed against was not an appealable order and hence no appeal could lie.

Held further that in such cases Court should look to substance rather than to form and that the application ought to have been treated as one for review and that in not doing so, the Court failed to exercise jurisdiction which was vested in it by law within S. 115. (*Tek Chand, J.*) LAHORE ELECTRIC SUPPLY CO. LTD., LAHORE *v.* JAGAT RAM. **115 I. C. 862 = A. I. R. 1928 Lah. 811.**

———*Case not raised.*

Per *Kemp, A.J.C.*—Failure to adjudicate on plaintiff's claim is failure to exercise jurisdiction and revision lies.

Per *Fawcett, J. C. and Crump, A.J.C.*—Where the question is whether the plaintiff's claim is founded on breach of contract or fraud it is not sufficient to say that the words of the plaint can be construed as disclosing a case of a fraud and that therefore a case of fraud should be tried. Where the whole course of the case shows unmistakably that the plaintiffs relied not on fraud but on a breach of contract, it cannot be held that the Court failed to exercise jurisdiction merely because they omitted to consider *ex proprio motu* a case which was not properly raised before them and adjudicated only on the question of the breach of contract. (*Fawcett, J. C., Crump and Kemp, A. J. Cs.*) BANUMAL *v.* NEWANDMAL. **83 I. C. 360 = 16 S. L. R. 207 = A. I. R. 1921 Sind 159 (F.B.).**

—S. 115—Jurisdiction—Failure to exercise—Partition.

———The High Court will interfere in revision where the lower Court refuses to order partition at the instance of any of the defendants in a partition suit as such a refusal amounts to a failure to exercise jurisdiction. (*Suhrawardy and Duval, JJ.*) LOKE NATH SAHA *v.* RADHA GOBINDA. **86 I. C. 765 = A. I. R. 1926 Cal. 184.**

—S. 115—Jurisdiction—Failure to exercise—Probate.

———Revision lies against the order of a District Judge refusing to enter into the matter, when the applicant for probate alleges that certain properties have been erroneously included in the schedule and that they are

trust properties and not part of the estate of the deceased and should therefore be excluded from the valuation. It is the duty of the District Judge in such a case to go into the matter and his failures to do so is a refusal to exercise a jurisdiction vested in him by law and under S. 115 his order is revisable. (*Rankin and Mukerjee, JJ.*) CHINMATHA NATH PAL CHOUDHURI *v.* SECRETARY OF STATE. **78 I.C. 901 = A. I. R. 1925 Cal. 357.**

—S. 115—Jurisdiction—Failure to exercise—Rent Suit.

———Where in a suit by a co-sharer landlord for his share of the rent or in the alternative for the whole rent, the Court declined to consider whether the plaintiff was entitled to a decree for the whole rent, *held* that the Court refused to exercise a jurisdiction vested in it and that, that a revision lies. (*Dawson Miller, C. J. and Mullick, J.*) RAJGIRI SINGH *v.* JADUNATH ROY. **4 Pat. L. T. 39 = 1922 P.H. C. C. 355 = A. I. R. 1923 Pat. 41.**

—S. 115—Jurisdiction—Failure to exercise—Restoration of Suit.

———Refusal to receive evidence in support of application for restoration of a suit dismissed under O. 17, R. 2 on the understanding that it was dismissed under R. 3, is a refusal to exercise jurisdiction within S. 115. (*Mullick and Macpherson, JJ.*) MAHOMED MANDOOD *v.* RAMESHWAR SINGH. **74 I. C. 693 = 1 Pat. L. R. 281 = A. I. R. 1923 Pat. 530.**

—S. 115—Jurisdiction—Failure to exercise — Right to particular procedure denied.

———If the law gives a party the benefit of a particular procedure and there is failure on the part of the lower Court to exercise its jurisdiction so as to let him take advantage of it, the fact that it has held that another procedure is open to him is no reason for not setting it right in revision. (*Kotval, A. J. C.*) GAYARAMSAO *v.* BALKISHAN. **A. I. R. 1929 Nag. 179.**

—S. 115—Jurisdiction—Failure to exercise—Stay.

———Staying execution proceedings by wrongly applying C. P. Code, S. 10 is refusing to exercise jurisdiction and is revisable A I. R. 1924 Lah. 425; A. I. R. 1923 Lah, 615. Dist. (*Johnstone, J.*) MAHBOOB BEGUM *v.* GULAM MAHOMED. **119 I. C. 488 = A. I. R. 1929 Lah. 694.**

—S. 115—Jurisdiction — Failure to exercise—Stay of Suit.

———An order, the effect of which is to refuse to exercise a jurisdiction vested in the Court under S. 10, is open to revision. (*Stuart C. J., Wazir Hasan and Gokaran Nath Misra, JJ.*) SAHDEO SINGH *v.* MT. CHANUN KUER. **111 I. C. 161 = 5 O. W. N. 604 = 3 Luck. 650 = A. I. R. 1928 Oudh 355 (F. B.).**

—S. 115—Jurisdiction—Failure to exercise—Suit held not maintainable.

S. 115, C. P. Code, covers the case of an appellate Court rejecting a suit on the erroneous ground of its not being maintainable. The Court's act amounts to declining to give a decision on the merits. This means it refuses to exercise a jurisdiction vested in it by law, a refusal which can be rectified in revision. (*Martineau, J.*) IMAM DIN *v.* DITTU. **78 I. C. 445 = A. I. R. 1925 Lah. 174.**

—S. 115—Jurisdiction—Final decision.

———There is no better way of directing that there shall be no appeal than by the legislature stating that the decision of a particular Court shall be final. But even a decision which is final is open to revision. (*Schwabe, C. J., Ramesam and Waller, JJ.*) PARTHA-

C. P. CODE (1908), S. 115—Jurisdiction—Improper exercise of.

Saradhi Naidu *v.* Koteswara Rao.
78 I. C. 98 = 47 Mad. 369 = 19 M. L. W. 402 = 34 M. L. T. 50 = 1924 M. W. N. 272 = A. I. R. 1924 Mad. 561 = 46 M. L. J. 201 (F. B.).

—S. 115—Jurisdiction—Improper exercise of.

———*Trial of suit stayed.*

Where the appellate Court has not been informed that the suit was stayed under S. 10 and it orders it to be taken up forthwith, thinking it to be pending without adequate cause, the Court below if it proceeds with the suit acts improperly. The order of the appellate Court cannot override express provisions of law and it is open to a party aggrieved to ask Court below to reconsider its order, although no revision is maintainable. (*Mukerji and Niamatullah, JJ.*) L. Bal Krishna *v.* Ram Kishun. **121 I. C. 97 = 1930 A. L. J. 235 = A. I. R. 1929 All. 957.**

———When a Court having jurisdiction to try a suit passes a preliminary decree for rendition of accounts, but its jurisdiction is ousted to deal with further proceedings, *i.e.*, to pass a final decree for the amount found due, it being more than the Court has jurisdiction to pass a decree for, the proper order for the appellate Court is to transfer the case to the Court having jurisdiction to try the suit and not to return the plaint for presentation to proper Court. Order returning the plaint is revisable. (*Jai Lal, J.*) Fazal Karimchisti *v.* Municipal Committee, Jullundur.
118 I. C. 537 = A. I. R. 1929 Lah. 107.

———*Dismissal of execution application.*

On default by the judgment-debtor to furnish security, the Court directed the decree-holder to take steps for execution at once, and he deposited talbana for service of sale proclamation, but the processes not having been filed, the execution case was ordered to be dismissed for default.

Held, that the Court exercised jurisdiction illegally in not allowing the decree-holder reasonable time for filing the processes after he had put in the talbana under the direction of the Court, and that as the decree-holder could not have been expected to be ready with the processes in the expectation that the judgment-debtor would fail to furnish the required security, the order dismissing the case for default must be set aside. (*Greaves and B. B. Ghose, JJ.*) Ram Prosad Ram Kissen *v.* Haro Kumar Basak. **92 I. C. 298 = A. I. R. 1926 Cal. 1017.**

———*Dismissal of stay application.*

Where the petitioner applied for stay of execution of decree from which an appeal was pending and the application was dismissed by the District Judge as being made too late;

Held (*Graham, J. dissenting*): the District Judge though he had jurisdiction over the subject-matter, exercised the jurisdiction irregularly and the High Court had jurisdiction to interfere in revision with the order of the District Judge and set aside his order. (*Suhrawardy and Graham, JJ.*) Biresh Chandra Das *v.* Hari Dasi Bose. **82 I. C. 435 = A. I. R. 1925 Cal. 254.**

———Exercise of jurisdiction owing to a wrong interpretation of a rule is revisable. (*Devadoss and Wallace, JJ.*) Veerappa Chettiar *v.* Sundaresa Sastrigal. **92 I. C. 300 = 48 Mad. 676 = 22 M. L. W. 606 = A. I. R. 1925 Mad. 1201 = 49 M. L. J. 366.**

———Applying O. 25, R. 1 to a suit which is not for payment of money is an illegal exercise of jurisdiction and such an order is revisable. (*Carr, J.*) Amina Bibi *v.* Moideen Kaka. **89 I. C. 620 = 3 Rang. 211 = A. I. R. 1925 Rang. 300.**

C. P. CODE (1908), S. 115—Jurisdiction—Submission to.

———S. 115 of the Code applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it. A I. R. 1917 P.C. 71, Foll. Wrong exercise of jurisdiction is no ground for interference. 11 Cal. 6 P. C. = 52 I. C. 641 and 37 I. C. 348 Foll. The High Court is very slow to interfere in revision where there is a separate remedy open. 32 Mad. 334: 1 M. L. W. 905 and 1 M. L. W. 232, Ref. to. (*Odgers, J.*) Ventala Veeraraju *v.* Kuruvella Subbarayadu. **64 I. C. 493 = 15 M. L. W. 245 = 1921 M. W. N. 507 = A. I. R. 1922 Mad. 3 = 41 M. L. J. 378.**

—S. 115—Jurisdiction—Meaning of.

———Jurisdiction in its ordinary sense when applied to a Court means the power or authority of judging and a Court is said to be of competent jurisdiction with regard to a suit or other proceeding when it has power to hear or determine it or exercise any judicial power therein. Therefore when a Court entertains a petition and deals with it but holds wrongly that it is not maintainable under any provision of the law that does not amount to a refusal to exercise jurisdiction: 39 Cal. 473 and 20 All. 78 and 11 Bom. 488, Foll. (*Cuming and Mallick, JJ.*) Jyotindra Nath *v.* Sourindra Nath.
46 C. L. J. 182 = 31 C. W. N. 818 = 103 I. C. 468 = A. I. R. 1927 Cal. 928.

———The term " jurisdiction " is used in the ordinary sense, that is, a jurisdiction local, pecuniary, personal or with reference to the subject-matter of the suit. (*Curgenven, J.*) (Paitchaikala) Mangamma *v.* Nallanti Peda Ammanna. **26 M. L. W. 15 = 101 I. C. 514 = A. I. R. 1927 Mad. 660.**

—S. 115—Jurisdiction—Proper exercise of.

———*Rate of maintenance.*

Where a Hindu widow brought a suit questioning the will of her husband and therein applied for interim grant of maintenance, and the lower Court granted a maintenance on the basis of what the will gave to the widow as maintenance:

Held: that the lower Court exercised its jurisdiction properly in taking the wish of the testator as the basis of his decision and that the High Court cannot interfere. (*Coutts and Ross, JJ.*) Sabitri Thakurain *v.* Frederic Ammie Save. **A. I. R. 1922 Pat. 38.**

———*Reference to Collector.*

The lower Court found that the mortgagor was a member of an agricultural tribe and referred a mortgage suit to the Collector under sub-S. 3 of S. 9 of the Bundelkhand Land Alienation Act with a view to the Collector exercising powers under sub-Ss. 1 and 2 of the section.

Held: that a revision lay to the High Court on the question whether the lower Court had exercised its jurisdiction correctly in refusing to pass a decree in favour of the plaintiff and referring the case to the Collector. (*Mukerji and Dalal, JJ.*) Jaswant Rao *v.* Kashinath Rao. **6 L. R. A. (Civ.) 14 = 86 I. C. 208 = A. I. R. 1925 All. 253.**

———*Remand.*

Where a Court ordering remand has, in the view of the revisional Court, properly exercised its jurisdiction, the revisional Court has no power under S. 115 to interfere: A. I. R. 1927 Mad. 335 and A. I. R. 1927 Mad. 859, Foll. (*Kumaraswami Sastri and Wallace, JJ.*) Suppiah Nadar *v.* Muthia Pillai.
112 I. C. 710 = A. I. R. 1928 Mad. 984.

—S. 115—Jurisdiction—Submission to.

High Court will decline to interfere in revision on an objection as to jurisdiction where it has been shown that no objection was taken and that the parties submitted to the jurisdiction of the Court : 19 C. W. N. 900, Rel. on. (*Graham, J.*) DHANANJOY DAS *v.* RAMCHANDRA DAS. **45 C. L. J. 218 = 101 I. C. 688 = A. I. R. 1927 Cal. 388.**

———A suit cognizable by a Court of Small Causes was tried by a Munsif under his ordinary jurisdiction without objection to his jurisdiction though he had none and a decree was passed for plaintiff. The defendant appealed to Dt. Judge without any reference to the question of jurisdiction. The District Judge reversed the decree of the Munsif and the plaintiff applied to High Court under S. 115, C. P. Code for revision of the order by the District Judge.

Held, the High Court should not interfere. 33 Mad. 323 and 25 Bom. 417 Dist. (*Baker, J. C.*) KAMRUDDIN *v.* MT. INDRANI. **19 N. L. R. 179 = 75 I. C. 769 = A. I. R. 1924 Nag. 17.**

—S. 115—Leave to sue.

———Per *Walsh, J.* (Piggott, J. doubting).—An application for revision of the order refusing leave to sue *in forma pauperis* is not maintainable. (*Piggott and Walsh, JJ.*) MAHADEO SAHAI *v.* SECRETARY OF STATE. **65 I.C. 255 = 20 A.L.J. 55 = 44 All. 248 = A. I. R. 1922 All. 1.**

———No application in revision can be maintained against an order admitting an application for leave to sue *in forma pauperis.* (*Piggott and Walsh, JJ.*) KANDHAIA SINGH *v.* MT. KUNDAN. **67 I. C. 641 = 20 A. L. J. 471 = A. I. R. 1922 All. 208.**

———An application for permission to sue as a pauper is in itself a ' case ' within the meaning of that term as used in S. 115, 12 O. C. 381 Foll ; A. I. R. 1922 All. 1, Not Foll. (*Ashworth, J. C.*) SHEO NARAYAN LAL *v.* MT. MUNAQQA. **74 I. C. 344 = 9 O. L. J. 610 = A. I. R. 1923 Oudh 118.**

———No revision lies where Court finds on the materials before it, that the person seeking to sue as pauper is not unable to pay the Court fees due. (*Mullick and Macpherson, JJ.*) UMAR BAHADUR *v.* MD. KARIM NAWAB. **79 I.C. 56 = 5 P.L.T. 606 = 2 Pat.L.R. 276 = 1923 P. H. C. C. 287 = A. I. R. 1924 Pat. 667.**

———An order rejecting application to sue *in forma pauperis* not being an interlocutory order is revisable ; 134 P. R. 1919 ; A. I. R. 1926 All. 446 ; A. I. R. 1924 Lah. 659 ; 41 Mad. 620, Ref. (*Dalip Singh, J.*) ALLAH WASAI *v.* RAMZAN. **117 I. C. 95 = A. I. R. 1929 Lah. 498.**

———*C. P. Code—O.* 33, *R.* 1.

An order rejecting an application to sue as a pauper is a decision of a case for the purposes of S. 115 of the C. P. Code and is subject to revision by the High Court under that section. A.I.R. 1924 Nag. 44 Foll. But where the case is one of a pure finding on evidence and where there is not any material irregularity the HighCourt will not interfere in revision. It is settled law that where a Court has jurisdiction to determine a question, and it has determined that question it cannot be said to have acted illegally or with material irregularity merely because it has come to an erroneous decision. 11 Cal. 6 (P. C.) Foll. (*Baker, J. C. and Prideaux, A. J. C.*) RAMCHANDRA *v.* GAJRABAI. **88 I. C. 157 = A. I. R. 1925 Nag. 343.**

———*C. P. Code O.* 33, *R.* 1.

The refusal to allow plaintiff to sue as a pauper does not determine anything in the suit. It is merely the decision of a preliminary issue arising in or anterior to the suit. It determines nothing except that the plaintiff cannot sue as a pauper. He can sue in the ordinary way like anybody else and no revision lies from such an order ; 43 All. 564, (F. B.) ; 32 All. 623, not Appr.

(*Walsh and Dalal, JJ.*) SHANKAR BAN *v.* RAM DEO. **48 All. 493 = 24 A. L. J. 557 = 94 I. C. 484 = A. I. R. 1926 All. 446.**

———*Practice—C. P. Code, O.* 33, *R.* 1.

Revision lies from an order rejecting application to be allowed to sue as a pauper. A.I.R. 1924 Nag. 44 and A.I.R. 1925 Nag.343, Foll. A.I.R.1926 All. 446, not Foll. But High Court will not interfere in this class of cases unless there is some material irregularity or illegality in the lower Court's procedure even if on the evidence in question it were itself disposed to take a different view of questions of fact involved. (*Findlay, J. C.*) GENIABAI *v.* SANKER RAO. **104 I. C. 198 = A. I. R. 1927 Nag. 340.**

———Revision lies against an order refusing leave to sue as a pauper. (*Jai Lal, J.*) MT. KAKO *v.* SOHNA. **98 I. C. 879 = A. I. R. 1927 Lah. 56.**

———Where a minor plaintiff applied to sue as a pauper but the lower Court taking into consideration the means of his near relations, rejected the application,

Held, that the Court had acted with material irregularity in disposing of the application without having applied its mind to provisions of O. 33 and without having realized what the vital issue for determination in such application is and the High Court would interfere in revision. (*Tek Chand, J.*) SHARAN SINGH *v.* MT. MAN KAUR. **121 I. C. 381 = A. I. R. 1929 Lah. 746.**

———Order of dismissal of application to sue as pauper on the ground that the suit is barred by limitation is *ultra vires* and the order of dismissal is revisable. (*Jwala Prasad and Adami, JJ.*) SHEIKH MUHAMMAD NASRULLAH *v.* SHEIKH MUHAMMAD SHUKURULLAH. **83 I. C. 871 = 3 Pat. 275 = 1925 P. H. C. C. 134 = 6 Pat. L.T. 209 = A. I. R. 1925 Pat. 30.**

———In cases under O. 33, R. 5, it is the duty of the Court not merely to read through the plaint but to make a very extensive inquiry as to the facts on which the plaint is based. And if the Court after proper exercise of jurisdiction has come to a conclusion and rejected the application, no revision lies, although the conclusion may be wrong. (*Neave and Kendall, A. J. Cs.*) MD. ISMAIL *v.* KARAM ALI. **79 I. C. 922 = 11 O. L. J. 568 = A.I.R. 1925 Oudh. 74.**

———A revision petition does lie against an order of the Court rejecting an application for leave to sue *in forma pauperis.* A. I. R. 1922 All. 1, Diss. from ; 13 M.L.J. 292 (F. B.) ; 41 Mad. 620 and A. I. R. 1924 Mad. 80, Foll. (*Sundaram Chetty, J.*) RAMCHANDRA RAJU *v.* VENKIAH. **101 I. C. 18 = A. I. R. 1927 Mad. 441 = 52 M. L. J. 330.**

———The Court is not entitled to take evidence from the parties upon the question of the plaintiff's title before coming to the conclusion whether it would grant or refuse the application under Rules 5 and 6 of O. 33. If it takes evidence on the question of title it exercises a jurisdiction not vested in it by law within S. 115. (*Banerji and Gokul Prasad, JJ.*) MT. SHANRAN BIBI *v.* ABDUS SAMAD. **73 I. C. 538 = 45 All. 548 = 21 A. L. J. 441 = 4 L. R. A. Civ. 252 = A. I. R. 1923 All. 577.**

———Where the Lower Court disposed of an application for leave to sue as a pauper, without taking such evidence as the opposite party had offered before it and without notice to the opposite party and the Government,

Held, the Court acted without jurisdiction in dealing with the pauper application and a revision lay. (*Mukerji and Graham, JJ.*) NONI KRISHNA BOSAK *v.* NOBA MONJURI DASSI. **100 I. C. 726 =**

C. P. CODE (1908), S. 115—Leave to sue.

A. I. R. 1927 Cal. 464.

———Revision lies from an order granting leave to sue as a pauper. 32 All. 623, Diss. from. (*Waller, J.*) VENKAT KRISHNAYYA *v.* THUMMALAPALLI SAYAMMA. **96 I. C. 175 = A. I. R. 1926 Mad. 958.**

———Where a Court entertains a suit without its permission having been obtained as required by O. 1, R. 8, such permission having been afterwards obtained the Court does not act without jurisdiction, and therefore sub-S. (*a*) of S. 115 is not contravened. (*Otter, J.*) MAUNG WA *v.* MAUNG CHEIK. **101 I. C. 200 = 6 Bur. L. J. 16 = A. I. R. 1927 Rang. 134.**

—S. 115—Limitation.

———Article 181 has no application to an application made to High Court in revision of an order of a Criminal Court of inferior jurisdiction. It does not appear that the legislature ever intended that there should be a time limit placed upon the power of the High Court to interfere by way of revision in a criminal case. There is no reason also why the same principle should not be applied to civil revisions. These powers are exercised by High Court quite irrespective of any right on the part of the aggrieved party to move the Court. 43 Cal. 1029, Ref. (*Pullan, J.*) SHAH NAIM ATA *v.* EMPEROR. **7 O. W. N. 663 = 1930 Cr. C. 941 = A. I. R. 1930 Oudh 401.**

———*Time for filing revision is* 45 *days in C. P. and Berar.*

The period allowed by the Nagpur Judicial Commissioner's Court for applications for revision is only 45 days. (*Prideaux, A. J. C.*) UDAIRAM *v.* THAKUR PRASAD. **89 I. C. 933 = A. I. R. 1926 Nag. 65.**

S. 115—Material Irregularity.

Alteration in judgment.
Appointment of Guardian ad-litem.
Burden of proof.
Dismissal for default.
Election.
Evidence.
Failure to adjudicate.
Finding of fact.
Issues.
Meaning of.
Misreading findings.
Non-joinder of parties
Objection to attachment.
Omission to apply law.
Pleadings.
Practice.
Precedents.
Procedure.
Remand.
Sale certificate.
Security for mesne profits.
Setting aside sale.
Transfer of case.
What amounts to.
Wrong valuation.

—S. 115—Material Irregularity—Alteration in judgment.

———In a claim proceeding, the Dt. Munsif delivered his judgment orally, dictating it to the shorthand writer. When the short-hand transcription reached the Dt. Munsif he entirely changed the effect of what he had said in open Court.

Held it was a material irregularity.

Held further that though it is the practice of the Madras High Court not to interfere in revision when another remedy is available, it will interfere where the case is exceptional and it is doubtful whether another remedy is open. (Re-trial of the whole case directed.)

C. P. CODE, (1908), S. 115—Material irregularity—Election.

(*Oldfield, J.*) HARI KRISHNAN *v.* ARUR PANDITHAR. **72 I. C. 688 = 18 M. L. W. 105 = 1923 M. W. N. 354 = A. I. R. 1923 Mad. 663.**

—S. 115—Material irregularity—Appointment of guardian-ad-litem.

———Where the defendant was alleged to be of unsound mind which fact was denied by the plaintiff and the Court after an interview with defendant appointed a guardian *ad-litem* for him.

Held, that the procedure constituted a material irregularity and the order was revisable. (*Woodroffe and Ghose, JJ.*) RAM SUNDAR SAHA *v.* KALI NARAIN SEN CHOUDHRY. **70 I. C. 307 = A. I. R. 1922 Cal. 86.**

—S. 115—Material Irregularity—Burden of proof.

———Where on a plaintiff's petition for discovery the defendants produced the account books in their custody and after inspection the plaintiffs did not admit their genuineness or completeness and insisted on proof the lower Court held that they could be exhibited,

Held, the burden of proof was on the defendants and the Court committed a material irregularity, which should be set aside. (*Oldfield and Venkatasubba Rao, JJ.*) RAJAGOPALA *v.* RAMANUJA. **72 I. C. 459 = 1923 M.W.N. 292 = 18 M.L.W. 165 = A. I. R. 1923 Mad. 607.**

———The wrong allocation of the *onus* of proof is material irregularity justifying interference in revision. 102 P. R. 1912 Disappr. 41 P. R. 1898; 143 P.W.R. 1908 Foll. (*Shadi Lal, C. J.*) GANDA RAM *v.* REHANA. **64 I. C. 91 = 3 L. L. J. 417 = A. I. R. 1921 Lah. 166.**

—S. 115—Material irregularity — Dismissal for default.

———After decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed in appeal. And if a trial Court, having fixed a date for further proceedings under directions of appellate Court modifying the preliminary decree, dismisses the suit on that date, under O. 9, R. 9, such a dismissal is wrong and a revision lies over it. A. I. R. 1924 P. C. 198 and 32 All. 319, Rel. on. (*Venkatasubba Rao and Madhavan Nair, JJ.*) YAGAMMAL *v.* ARULAYEE AMMAL. **124 I. C. 605 = 30 M. L. W. 979 = 53 Mad. 395 = A. I. R. 1930 Mad. 158 = 57 M. L. J. 781.**

———The plaintiff closed his case and the hearing of the defendant's evidence was begun. The case was then adjourned till next day for the remainder of the evidence. Next day the plaintiff and her pleader were both absent and the Court dismissed the suit under O. 9, R. 8 read with O. 17, R. 2 C. P. Code.

Held, that it was within the competence of the Court to dismiss the suit for default, and it could not be said that in doing so the Court acted with material irregularity in the exercise of its jurisdiction. (*Daniels, J. C.*) MT. AISHA *v.* MT. CHATTA. **89 I. C. 418 = 2 O. W. N. 432 = A. I. R. 1925 Oudh 433.**

—S. 115—Material irregularity—Election.

———Where a Court held that the marking of the ballot papers by the polling officers secretly and without allowing the candidates or their agents to see how the marks were made was in contravention of R. 15 of the Rules under Madras Act V of 1920, S. 303 (2) (*b*) for the conduct of elections it did not act with material irregularity in the exercise of its jurisdiction, nor assumed jurisdiction which it did not possess, and so its order was not revisable. C. R. P. No. 541 of 1923, Foll.; A.I.R. 1927 Mad. 1000, not Foll.; A. I. R. 1924 Mad. 561 (F. B.),

C. P. CODE (1908), S. 115 —Material irregularity—Election.

Rel. on. (*Curgenven, J.*) UMAR UDUMAN THARAGANAR *v.* MOIDEEN PILLAI. **1927 M. W. N. 838 = 119 I. C. 145 = A.I.R. 1929 Mad. 257.**

———The High Court could revise an order of a Sub-Judge on an election petition, if he had acted with material irregularity or illegality. (*Spencer and Venkatasubba Rao, JJ.*) VENKATARAMA IYER *v.* HAMID SULTAN. **70 I. C. 987 = 17 M. L. W. 656 = 1923 M. W. N. 78 = 32 M. L. T. 114 = A. I. R. 1923 Mad. 360 = 44 M.L.J. 161.**

—S. 115—Material irregularity— Evidence—Absence of.

———A Court acts with material irregularity in the exercise of its jurisdiction in coming to a finding not based on the evidence on record. (*Addison, J.*) BHAGWAN SINGH *v.* MT. CHETAN BAI. **96 I. C. 247 = A.I.R. 1926 Lah. 566.**

———Reversing judgment of a lower Court on a new question not raised by the parties and for which there were not sufficient materials for the Court, is acting with material irregularity. (*Madhavan Nair, J.*) NARANO MAHAPATRO *v.* SRI RAMACHANDRA MARDARAJA. **80 I. C. 724 = A. I. R. 1925 Mad. 357.**

———Where a Court disposes of a suit on a case not raised by the parties and to which evidence has not been directed there is a substantial error or defect of procedure and revision lies. (*Ross, J.*) GAYANI SAHU *v.* BALCHAND SAHU. **73 I. C. 41 = A. I. R. 1924 Pat. 341.**

———If the decision is based not merely on a forced and impossible construction of the facts that were before the Court but on the importation of facts which are admitted by both parties not to exist, there is clearly a material irregularity in the exercise of jurisdiction of the sort contemplated by clause (*c*) of S. 115 of the Civil Procedure Code. (*Hallifax, A.J.C.*) PANDURANG *v.* KALLUDAS. **65 I. C. 881 = A. I. R. 1923 Nag. 108.**

———On a point of fact dealing with the sufficiency of cause for not making a deposit, a court cannot come to a finding without taking any evidence especially where there is no affidavit on the record and the parties are not agreed as to the facts. (*Panton, J.*) JABAN SAHA *v.* SEBAK MONDAL. **64 I. C. 85 (Cal.).**

—S. 115—Material irregularity—Evidence—Admissibility of.

———Ordinarily when a Court acts on evidence which has not been proved or which is inadmissible in evidence, it does not act without jurisdiction. Furthermore, if a Court considers the question of the admissibility of a document and decides either that it is admissible or not admissible then, even though the decision may be wrong, the Court does not act with material irregularity or illegality. It merely commits an error of law. But on the other hand if the Court does not apply its mind to the question of the admissibility at all and acts on a document which has not been proved or which is not admissible without considering whether or not it is admissible, it acts with material irregularity or illegality in exercising its jurisdiction. (*Suleman, J.*) HABIB BUX *v.* SAMUEL PITZ & CO. LTD. **23 A. L. J. 961 = 6 L. R. A. Civ. 553 = 89 I. C. 22 = A. I. R. 1926 All. 161.**

—S. 115—Material irregularity—Evidence—Commission—Examination on.

———Where the defendant had been a resident of Rangoon with his family for many years and he was served with summons there, and the plaintiff himself was a resident of Rangoon and was examined on commission himself there.

Held, in these circumstances the defendant should have been allowed to be examined on commission. The watching of his demeanour was not a sufficiently strong ground to justify the dragging of the defendant all the way from Rangoon to India. 40 M. 793, Expl.

Held, further, that the omission to examine defendant on commission amounted to material irregularity. (*Krishnan, J.*) A. R. P. R. VISWANATHAN CHETTY *v.* M. N. M. SOMASUNDARAM CHETTY. **78 I. C. 407 = 34 M. L. T. 314 = 1924 M. W. N. 191 = A. I. R. 1924 Mad. 541 = 46 M.L.J. 131.**

C. P. CODE (1908), S. 115—Material irregularity —Evidence—Refusal to take,

—S. 115—Material irregularity—Evidence—Estoppel.

———Per *Kemp, A.J.C.*—Ignoring the application of the rule of estoppel is material irregularity. (*Fawcett, J. C., and Crump and Kemp, A. J. Cs.*) BANUMAL *v.* NEWANDMAL. **83 I. C. 360 = 16 S. L. R. 207 = A. I. R. 1921 Sind 159.**

———Omission to consider the question of estoppel is a material irregularity which justifies interference in revision. (*Martineau, J.*) TEJ BHAN *v.* WALI DAD. **60 I. C. 716 = 3 Lah. L. J. 181 = A. I. R. 1921 Lah. 60.**

—S. 115—Material irregularity—Evidence—Further evidence—Order to take.

———Where in appeal against dismissal of suit under O. 17, R. 3 the appellate Court directs further evidence to be taken by the trial Court, without expressly setting aside the decree passed by the trial Court it acts with material irregularity within S. 115. (1917) 38 Mad. 414, Dist.; (1922) 46 Bom. 184 ; (1919) 46 Cal. 738, Foll ; (1922) 44 All. 176 ; (1922) 44 All. 492, Dist. (*Duckworth and Po Han, JJ.*) ASHROF ALI *v.* MAHOMED MORDEN. **1 Rang. 656 = 79 I. C. 482 = A. I. R. 1924 Rang 177.**

—S. 115—Material irregularity—Evidence—Ignoring of.

———Failure to consider material pieces of evidence amounts to a material irregularity resulting in a miscarriage of justice. (*Maung Ba, J.*) MUN NUN *v.* SAKU. **6 Bur. L. J. 147 = 104 I. C. 321 = A. I. R. 1927 Rang. 302.**

———The omission by a Judge to apply his mind to the most material evidence in the case amounts to a material irregularity, and it is a fit case to exercise revisional powers. (*Maung Ba, J.*) MAUNG TUN YIN *v.* MAUNG TUN *alias* TIN NYUN. **6 Bur. L.J. 152 = 104 I. C. 316 = A. I. R. 1927 Rang. 283.**

———Where a Court omits to take into consideration a material point which arises in the case, its decision is liable to be revised. (*Maung Kin, J.*) SHWE HLA GYI *v.* SAN DWE. **64 I. C. 361 = 10 L. B. R. 332.**

—S. 115—Material irregularity—Evidence—Misreading of.

———Where the lower Court held that a document *A* was part and parcel of another document *B* which in fact it was not, it committed material irregularity. (*Devadoss and Jackson, JJ.*) ADIKESAVALU NAIDU *v.* LAKSHMANA AYYAR. **113 I. C. 36 = A. I. R. 1929 Mad. 204.**

—S. 115—Material irregularity — Evidence—Refusal to take.

———An objection under O. 21, R. 90 was filed by the judgment-debtor that the decree-holder had dishonestly misled certain bidders by false representation, that fictitious bids were offered and that the property was sold for an inadequate consideration. The Court took down the evidence of the judgment-debtor and dismissed his

C. P. CODE (1908), S. 115—Material irregularity—Evidence—Refusal to take.

objection. He did not fix any date for its hearing and did not allow any opportunity to the judgment-debtor to produce any witnesses in corroboration of his testimony. An appeal was made to the District Judge who dismissed it. Revision was filed from the appellate order.

Held, that there was a material irregularity in the exercise of the jurisdiction and the fact that revision was described as one from the appellate order and that the District Judge declined to interfere in the matter could not preclude High Court from curing irregularity for S. 115 does not require that no appeal in the meantime should have been preferred to the District Judge or if preferred it is only the order of the District Judge that could be revised. (*Sulaiman and Niamatullah, JJ.*) MAHADEO PRASAD *v.* KHUBI RAM. **118 I.C. 189 = 51 All. 1023 = 1930 A. L. J. 97 = A.I.R. 1929 All. 793.**

———Where the lower Court refused to take evidence merely because it thought that certain facts were probable.

Held, that this was certainly a material irregularity in the exercise of its jurisdiction. (*Phillips and Madhavan Nair, JJ.*) SHARIBA BEEBY *v.* ABDUL SALAM. **51 Mad. 860 = 110 I. C. 490 = 1928 M. W. N. 49 = 28 M.L.W. 513 = A.I.R. 1928 Mad. 815 = 55 M. L.J. 565.**

———Where the lower Courts on an erroneous view of the law as to limitation, shut out evidence offered,

Held, that they had acted with material irregularity in the exercise of their jurisdiction. (*Teunon and Chaudhuri, JJ.*) BHUSAN MANI DASI *v.* PROFULLA KRISTO DEB. **48 Cal. 119 = 60 I. C. 801 = A. I. R. 1921 Cal. 251.**

—S. 115—Material irregularity—Failure to adjudicate.

———Where the lower appellate Court has failed to take notice of the real point in the case and has given no decision on it at all, it is clearly a material irregularity justifying interference of the High Court on the revision side. A. I. R. 1921 Lah. 60; 18 P. W. R. 1909; 13 I. C. 657 and 15 C. L. J. 114, Foll. (*Tek Chand, J.*) SECRETARY OF STATE *v.* HAJI BAKHA FAZAL DIN. **29 P. L. R. 633 = 106 I. C. 226 = A.I.R. 1928 Lah. 299.**

———Court's failure to decide the point raised before it is a material irregularity which can be impugned in revision. 78 P. R. 1916, Foll. (*Harrison, J.*) BABU *v.* MALUKA. **108 I. C. 604 (Lah.).**

———*Arbitrary dismissal.*

If a litigant believing that he has certain valid grounds to urge against certain proceedings going on in his case, puts forward his grievance in the form of a petition justice and equity require that the matter should be disposed of one way or the other by formal orders dealing with the points raised. It is not intended that the Courts should be so technical as to throw away the application practically without any orders. The Courts are bound to dispose of matters coming up for consideration by an adjudication in some form or the other, whether the same be an order, or a judgment, or a decree. A failure to so adjudicate is a material irregularity in the exercise of jurisdiction. (*Kinkhede, A. J. C.*) MADHAO RAO *v.* MANOHARLAL. **85 I. C. 779 = A.I.R. 1925 Nag. 289.**

———*Arbitration—Supersession of.*

There is an inherent jurisdiction in a Court to intervene and supersede the arbitration on grounds other than those mentioned in Sch. 2, Rr. 5, 8 and 15, if the case fell under S. 151 of the Code, *viz.*, where such an order is necessary for the ends of justice or to prevent the abuse of the procees of the Court. But it can intervene only if it is satisfied that the ends of justice urgently require its intervention or that without such intervention there would be an abuse of the process of the Court. That being so, if the Court has not applied its mind to the extent of its own jurisdiction and has not recorded any finding that the ends of justice require its intervention or that the process of the Court is likely to be abused, but has merely superseded the reference on the ground that one of the parties thereto has an apprehension that he would not be fairly treated, the Court, if it has not actually acted without jurisdiction, has certainly acted with material irregularity in the exercise of its jurisdiction, and the High Court will interfere in revision. (*Sulaiman and Niamatullah, JJ.*) BHOLA NATH *v.* RAGHUNATH DAS MITHAN LAL. **51 All. 1010 = 1929 A. L. J. 918 = A. I. R. 1929 All. 743.**

———*Claim.*

Where investigation has been refused or an order is passed without investigation or where the order passed after a proper investigation is not a proper order passed in accordance with O. 21, Rr. 59-63, the High Court should and can interfere, if it is in the interests of justice, under S. 115. Where on the objection that the property attached was not in possession of the judgment-debtor on his own behalf but on behalf of the objector, the Court failed to make investigation as to on whose behalf the property was held and inquired only into the actual possession.

Held, it acted with material irregularity and revision lay. 1 U. B. R. 75 and 1 L. B. R. 180, Foll. (*Duckworth, J.*) PHOMAN SINGH *v.* A. J. WELLS. **76 I. C. 677 = 1 Rang. 276 = 2 Bur. L. J. 134 = A. I. R. 1923 Rang. 195.**

———*Election.*

Madras District Municipalities Act, S. 303 (2) (*b*)—Rules for Decision of Disputes, R. 11 (*c*)—Court cannot set aside election on mere ground of non-compliance with provisions of Act or Rules—It must further find that its result would have been different, had that irregularity not occurred. Failure of the Court to come to this finding is material irregularity and therefore revisable. A. I. R. 1925 Mad. 877 and A. I. R. 1927 Mad. 546, Foll. (*Curgenven, J.*) UMAR UDUMAN THARAGANAR *v.* MOIDEEN PILLAI SAHIB. **119 I. C. 145 = 1927 M. W. N. 838 = A. I. R. 1929 Mad. 257.**

———*Restoration.*

Application under O. 9, R. 9 dismissed—Second application for restoration, summarily dismissed without hearing applicant—Revision was allowed. (*Bhide, J.*) NAND LAL *v.* JETHA RAM. **117 I. C. 908 = A. I. R. 1929 Lah. 878.**

———*Restoration.*

Where a Judge dismissed an application for restoration without hearing the plaintiff or taking any evidence and without carefully going into the matter as he was under an erroneous impression that the plaintiff could bring a fresh suit.

Held, that the Judge acted with material irregularity and a revision lay. (*Tek Chand, J.*) KURA RAM NEKI RAM *v.* JAIMAL. **100 I. C. 677 = A. I. R. 1927 Lah. 239.**

—S. 115—Material irregularity—Finding of facts.

Under S. 115, C. P. Code, the High Court has power to interfere with findings of facts when they are not properly arrived at; that is, when they are not arrived at on a scrutiny of all relevant evidence and after consideration of proper presumptions arising out of the particular incidents. The High Court can then interfere on the ground of material irregularity. (*Mitter, J.*) BHAIRAB CHANDRA *v.* KALIDHAN ROY. **120 I. C. 451= 33 C. W. N. 569=A. I. R. 1929 Cal. 736.**

—S. 115—Material irregularity—Issues.

———When the defendant objects to the valuation of the plaint and his valuation is out of all proportion to the valuation given in the plaint by the plaintiff, it is a material irregularity for the Court to refuse to frame an issue and decide it. The High Court can set aside the order in revision. (*Devadoss, J.*) VENKATACHALAM CHETTIAR *v.* KRISHNASWAMY THEWAN. **69 I. C. 542=1922 M. W. N. 692= A. I. R. 1923 Mad. 134.**

———Per *Kemp, A. J.C.*—Framing an issue on a point not raised in the pleadings is a material irregularity in the exercise of jurisdiction and a ground for revision.

Per *Crump, A. J. C.*—High Court can interfere where the lower Court has framed and tried an issue which did not properly arise. But before this principle can be applied it must he shown that an error of this nature has in fact been committed. (*Fawcett, J. C., Crump and Kemp, A. J. Cs.*) BANUMAL *v.* NEWANDMAL. **83 I. C. 360= 16 S. L. R. 207=A. I. R. 1921 Sind 159 (F. B.).**

—S. 115—Material irregularity—Meaning of.

———The Court can be regarded as having committed a material irregularity in the exercise of its jurisdiction if either (*a*) it appears that it did not apply its mind judicially to the question before it, or (*b*) if the materials before it were not such as could reasonably be held to be materials on which the Court might, rightly or wrongly, hold that there was a formal defect or other sufficient reason *ejusdem generis* with formal defects under O. 23, R. 2. A. I. R. 1921 All. 65; A. I.R. 1925 All. 466; A. I. R. 1926 All. 548; A.I.R. 1928 All. 98; 13 M. I. A. 160; 16 C. L. J. 103; 37 Bom. 682; 11 A. L. J. 733; 40 All. 612; A. I. R. 1927 All. 704; A.I.R. 1928 Oudh 482, Ref. (*Mukerji and Boys, JJ.*) JAG. MOHAN SINGH *v.* RAM KHILAWAN DUBE. **119 I. C. 859=1929 A. L. J. 961= A. I. R. 1929 All. 683.**

———What is material irregularity must be decided on the facts of each case so far as may be negatively defined it is not a mere mistake of fact or law unless the mistake has occasioned a wrong assumption or refusal of jurisdiction. Where there is jurisdiction and it has not been exercised or has been illegally or irregularly exercised S. 115 will apply. (*Wallace, J.*) AHMAD THAMBI *v.* BASAVA. **72 I. C. 902=16 M. L. W. 898= 1922 M. W. N. 813=44 Mad. 123= A. I. R. 1923 Mad. 254=44 M. L. J. 69.**

—S. 115—Material irregularity — Misreading findings.

———Where the lower appellate Court entirely misread the findings submitted to it on a remand, the Court acted with material irregularity in the exercise of its jurisdiction and its decree must be set aside. (*Daniels, J.*) GHISSU *v.* AMIR ALI KHAN. **92 I. C. 555= A. I. R. 1926 All. 604.**

—S. 115—Material irregularity—Non-joinder of parties.

———Where the plaintiffs claimed the land in dispute under a mortgage from *M* and the main question was whether *M* had included the particular land in his mortgage but the Court disposed of the suit without impleading *M*.

Held, that it was a material irregularity to decide the case in the absence of *M* and a revision lay. (*Viscount Haldane.*) SETH UMEDMAL *v.* CHAND MAL. **54 Cal. 338=53 I. A. 271=25 A. L. J. 61=**

25 M. L. W. 90=3 O. W. N. 989= 1927 M. W. N. 84=38 M. L. T. (P. C.) 43= 99 I. C. 749=29 Bom. L. R. 755=45 C. L. J. 274= 31 C. W. N. 413=28 P. L. R. 113=8 P. L. T. 251= A. I. R. 1926 P. C. 142=52 M. L. J. 368 (P. C.).

———Where contrary to the imperative provisions of S. 55, Court of Wards Act, the Collector who is an indispensable party in a suit for money against certain minors, is not brought on record the Court acts illegally in the exercise of its jurisdiction or at least there is material irregularity in the exercise of jurisdiction and as such it is a case in which the High Court can interfere under S. 115. A. I. R. 1926 P. C. 142, Ref. (*Sulaiman and Niamatullah, JJ.*) COLLECTOR OF BALLIA *v.* LILADHAR BHAGAT. **1930 A. L. J. 223=A. I. R. 1929 All. 761.**

———Non-joinder of Receiver in execution proceedings for sale was treated as a material irregularity so as to justify revision. (*Devadass, J.*) FRAZER *v.* KRISHNASWAMY AIYAR. **71 I. C. 293=1922 M. W. N. 745= 16 M. L. W. 322=31 M. L. T. 290=47 Mad. 47= A. I. R. 1923 Mad. 144=43 M. L. J. 211.**

—S. 115—Material irregularity—Omission to apply law.

———If it is merely a case of erroneous judgment on an isolated matter without further far reaching consequences, High Court should not interfere in revision, however erroneous the decision may be. 17 Mad. 410 (F. B.), Ref. The lower Court in deciding a case acted without the barest reference to the legal principles on which alone the case could have been decided, and gave an erroneous judgment the result of which was to perpetuate the error and to cause multiplicity of suits for all time.

Held, that the Court acted with material irregularity in not referring to the legal principles underlying the matter in controversy and as the result of the decision was to cause multiplicity of proceedings the case was a fit one for the High Court to interfere by way of revision. A. I. R. 1928 Mad. 484; A. I.R. 1923 Mad. 230; A. I. R. 1921 Mad. 157 (F.B.); A.I.R. 1927 Mad. 188; A. I. R. 1926 P. C. 142 and 1 Pat. L. T. 467, Foll. (*Ramesam, J.*) SURYANARAYANA *v.* VENKATA RAMAYYA APPA. **115 I. C. 351= 29 M. L. W. 600=56 M. L J. 273.**

———Where the lower Court acts with irregularity in the exercise of its jurisdiction in not paying heed to the provisions of S. 99, C. P. C. and that irregularity is material, in that it results in the appeal being accepted on a pure technicality its decision is liable to be set aside in revision. (*Campbell, J.*) DUNI CHAND *v.* RAMDHAN. **93 I. C. 938=A. I. R. 1926 Lah. 402.**

—S. 115—Material irregularity—Pleadings.

———*Plaint—Signature on.*

Where a suit has been filed with the knowledge of the plaintiff, but the plaint has either a defective signature or no signature at all, neither the District Munsif (under S. 73, Village Courts Act) nor High Court will interfere unless the irregularity has resulted in some specific prejudice; 20 All. 90, Expl. and 22 All. 55, Rel. on. (*Curgenven, J.*) MAHOMED KASSIM SAHIB, *In re.* **30 M. L. W. 499=A. I. R. 1929 Mad. 790.**

———*O. 8, Rr. 5 and 10 C. P. Code—Written statement—Order to file.*

An order requiring a written statement, for disobedience of which a decree can be passed under O. 8, R. 5, must be an unconditional order requiring a written statement to be filed. An order permitting the defendants to file written pleas, if any, cannot be regarded as an absolute order requiring the filing of the written

C. P. CODE, (1908), S. 115—Material irregularity —Practice.

statement, and the passing of a decree against the defendants under O. 8, R. 5, for failure to file written statement, is a material irregularity justifying interference in revision. (*Kumaraswami Sastri and Ramesam, JJ.*) MUTTIAH CHETTIAR *v.* LOKA SINGH. **105 I. C. 288 = 39 M. L. T. 273 = A. I. R. 1927 Mad. 1007 = 53 M. L. J. 504.**

—S. 115—Material Irregularity—Practice.

———Appellate Court setting up a new case for the defendant is acting with material irregularity and a revision lies from its decision. (*Addison, J.*) PAHLASINGH *v.* JAMAL DIN. **98 I. C. 867 = A. I. R. 1927 Lah. 73.**

———Where without a prayer for sale the Court ordered the sale without purporting to act under S. 151, C. P. Code.

Held, the order should be revised. (*Wallace, J.*) MINEEKANTI KOTAYYA *v.* TELAPROLU KRISHNAYYA. **20 M. L. W. 488 = 1924 M. W. N. 547 = A. I. R. 1924 Mad. 911.**

—S. 115—Material irregularity—Precedents.

———A Judge arriving at a decision by following rulings which have become obsolete, acts with material irregularity and his action forms valid ground for interference on the revisional side. (*Tekchand, J.*) DULLOMAL RAM LAL *v.* GANGA RAM. **117 I. C. 96 = 11 L. L. J. 491 = A. I. R. 1929 Lah. 824.**

———Where the lower appellate Court misreads a ruling of the Court and on its basis refuses to entertain an application of a party which is really maintainable, it acts with material irregularity within S. 115. (*Mukerji, J.*) RAM SARAN DAS *v.* GIRDHARI LAL. **48 All. 286 = 24 A. L. J. 286 = 92 I. C. 567 = A. I. R. 1926 All. 305.**

—S. 115—Material irregularity—Procedure.

———A serious error of procedure is material irregularity. (*Otter, J.*) MAUNG WA *v.* MAUNG CHEIK. **6 Bur. L. J. 16 = 101 I. C. 200 = A. I. R. 1927 Rang. 134.**

———Where Court has acted by inventing a rule of procedure not warranted by law the High Court is not only competent to interfere but should interfere; 20 Cal. 8; A. I. R. 1926 P. C. 142, Foll.; 15 All. 407; 9 A. L. J. 12; 63 I. C. 140, Ref. The auction purchasers need not be shown as opposite parties in the same way as defendants are described in a plaint. (*Mukerji and Niamatullah, JJ.*) DIP CHAND *v.* SHEO PRASAD. **119 I. C. 103 = 51 All. 910 = 1929 A. L. J. 769 = A. I. R. 1929 All. 593.**

———Under O, 22, R. 5, where a question arises, as to which whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court, and for that purpose, the Court must take evidence and then decide for itself, who has got the better claim. If the Court fails to follow this procedure the High Court will interfere. (*Krishnan ann Odgers, JJ.*) NAGAPPA NADAR *v.* KARUPPIAH NADAR. **86 I. C 178 = 21 M. L. W. 21 = A. I. R. 1925 Mad. 456.**

—S. 115—Material irregularity—Remand.

———Where the District Munsiff passed a decree on the assent of the defendant to abide by the oath of one of the Plaintiffs and later appealed to the District Judge who remanded case to take further evidence on facts,

Held: that the District Judge acted illegally and with material irregularity in entering into merits and in setting aside the decree of the Munsif. (*Daniels, J.*) MITHULAL *v.* SRILAL. **74 I. C. 918 =**

C. P. CODE, (1908), S. 115—Material irregularity —Setting aside sale.

45 All. 724 = 21 A. L. J. 637 = 4 L. R. A. Civ. 596 = A. I. R. 1924 All. 126.

———Appellate Court finding on one issue and remanding whole case amounts to material irregularity. (*Devadoss, J.*) SURYANARAYANA RAJU *v.* GANAPATY RAJU. **70 I. C. 655 = 16 M. L. W. 593 = 30 M. L. T. 314 = A. I. R. 1923 Mad. 113.**

—S. 115—Material irregularity—Sale certificate.

———Where a sale certificate was amended without notice to the judgment-debtor, *Held*, it was the duty of the Judge to have given notice of the auction-purchaser's application to the judgment-debtor, especially in a case where amendment is sought to be made of a sale certificate, which, as their Lordships of the Privy Council observe, is a solemn document and could not easily be impugned, and it is acting with material irregularity in not giving to the judgment-debtor notice of the auction-purchaser's application. But in this particular case no injustice has been caused by the material irregularity in the disposal of the respondent's petition for amendment. (*Devadoss, J.*) YAGNASAMI IYER *v.* K. CHIDAMBARANATH MUDALIAR. **65 I. C. 732 = 1922 M. W. N. 130 = 16 M. L. W. 760 = A. I. R. 1922 Mad. 63.**

—S. 115—Material irregularity—Security for mesne profits.

———No Court ought to allow itself to be prevented from doing substantial justice merely because that Court cannot find a section of the C. P. Code, under which its order will fall. 44 Cal. 929 (F. B.) Ref. An order to furnish security for mesne profits is not without jurisdiction but the Court acts, in passing such order with material irregularity, within S. 115. (*Dalal and Simpson, A. J, Cs.*) BHAGWAN BAKHSH SINGH *v.* SURENDRA BIKRAM SINGH. **10 O.L.J. 209 = 74 I. C. 335 = A. I. R. 1924 Oudh 11.**

—S. 115—Material irregularity—Setting aside sale.

———In a rent decree executed as money decree on account of the fact that a cosharer had not been added as a party to the suit, attachment and sale proclamation were issued simultaneously and the judgment-debtor did not get any notice under O. 21 R. 66, and so could not assist the Court in determining the proper valuation. Also an encumbrance was not mentioned in the proclamation and valuation was so glaringly low that it could not have been in good faith as a consequence of which the property fetched an inadequate price.

Held, that irregularities made this a fit case for High Court to interfere in order that justice may be done; 6 C. W. N. 836, Foll. (*Adami, J.*) PIRTAM MANDER *v.* NARESH MOHAN. **A. I. R. 1929 Pat. 588.**

———There is no appeal from the order of the Court refusing to confirm the sale but refusal to confirm a sale in the absence of an application under Rr. 89, 90 or 91 is a material irregularity and revision will lie (*Dalip Singh, J.*) PREM DAS *v.* GOKAL CHAND. **98 I. C. 866 = A. I. R. 1927 Lah. 71.**

———Allowing application to set aside sale as being illegal under R. 90 without substantial injury to applicant owing to irregularity is revisable. (*Sulaiman and Mukerji, JJ.*) SUPERIOR BANK LTD *v.* BUDH SINGH. **83 I. C. 1028 = 22 A. L. J. 413 = 5 L. R. A. Civ. 769 = A. I. R. 1924 All. 698.**

———A sale was impeached under O. 21, R. 90 on the ground of fraud, seven years after its confirmation. The lower Court did not grant the application but the Dt. Judge on appeal set it aside. The judgment of the Dt. Judge did not show that he had discussed all the points arising in the case.

Held, that his judgment was defective and should be set aside, especially because the decree-holder purchaser would have no remedy left to get the benefit of the decree if the sale were set aside so late as 7 years. 1 C. W. N. 67, Ref. (*Suhrawardy, J.*) GIRIBALA DASI *v.* TARAK NATH JATAN. **78 I. C. 149= A. I. R. 1925 Cal. 515.**

—S. 115—Material irregularity—Transfer of case.

———Transfer of a suit at the instance of one of the parties but without notice to the other party is not a material irregularity sufficient to justify interference in revision. 23 O. C. 216, Diss. (*Ashworth, J. C.*) KARIM BAKSH *v.* ABDUL HUQ. **74 I. C. 249=26 O. C. 62=A. I. R. 1923 Oudh 240.**

—S.115—Material irregularity—What amounts to.

———An error in arriving at the conclusion at which lower Court did arrive cannot be set right by taking up the matter in revision, for error is not an irregularity; 11 Cal. 6 (P. C.), Foll. (*Mukarji and Boys, JJ.*) HARBANS DEO RAI *v.* RAJ KUMAR RAI. **1930 A. L. J. 1043=A. I. R. 1930 All. 702.**

———The permission with liberty to bring a fresh suit should not ordinarily be granted so as to cause much harassment of the opposite party. Such permission should only be given when the Court is satisfied that the defect is not for any default of the plaintiff but discovery of certain facts which renders the suit in its present shape so defective. This duty of looking at the case from this stand point becomes more necessary if an application for withdrawal of a suit is presented in the lower appellate Court. After having lost, a party cannot ordinarily be permitted to withdraw with liberty to bring a fresh suit unless the Court is absolutely satisfied that the failure of the plaintiff was due to certain defects which were not known to him at the time of the institution or the trial of the suit. Where the application stated that there were certain formal defects in the case and that therefore the Court should give permission and the Court passed an order to the following effect. "Heard pleaders: The appellants are permitted to withdraw the suit with liberty to bring a fresh suit. The respondent will get his costs of the appeal."

Held, in revision that the order though not one made without jurisdiction was one which cannot be supported as the procedure adopted was vitiated by material irregularity and that it should consequently be set aside. (*Suhrawardy and Jack, JJ.*)MOTI LAL DUTT *v.* KALI DAS BHATTACHARJI. **34 C. W. N. 912.**

———Cl. (*c*) of S. 115 contemplates cases other than those referred to in cls. (*a*) and (*b*). The words in cl. (*c*) did not occur in the Code of 1877 and were introduced for the first time in the Amending Act of 1879. They are intended to refer to cases where the court has jurisdiction and has exercised it but has acted illegally or with material irregularity in the exercise of jurisdiction. The clause is intended to authorise the High Courts to interfere and correct gross and palpable errors of subordinate courts so as to prevent grave injustice in non-appealable cases. Where the lower Court disregarded a prior decree of a superior court and there was consequent miscarriage of justice. *held* that the High Court could interfere in revision. (*Lort Williams, J.*) GULABCHAND BANGUR *v.* KABIRUDDIN AHMED. **34 C. W. N. 515.**

———Where the lower Courts have thrown out the plaintiff's suit on a question which did not really arise in the case and have referred to certain provisions of law which had obviously no application to it, revision will lie. (*Tekchand, J.*) GURDAS MAL *v.* RAM BHOJAMAL. **117 I. C. 229=A. I. R. 1929 Lah. 294.**

———Where the mistakes committed by the lower

Court are so varied and so numerous as almost to amount to material irregularity in the exercise of jurisdiction, revision may lie though there may be no excess of jurisdiction. (*Srinivasa Aiyangar, J.*) T. C. XAVIER *v.* E. C JOSEPH. **87 I. C. 216= 21 M. L. W. 654=A. I. R. 1925 Mad. 614= 48 M. L. J. 268.**

———Where the lower Court came to its conclusion on no evidence and had omitted even to consider the one point which the law directed to be decided.

Held, there was material irregularity in the exercise of jurisdiction. (*Wallace, J.*) GOPALASWAMY *v.* RAMCHANDRA. **72 I. C. 137=32 M. L. T. 293= 1923 M. W. N. 159=A. I. R 1923 Mad. 503= 44 M. L. J. 409.**

—S. 115—Material irregularity—Wrong valuation.

———The High Court will interfere where the Courts below in a pre-emption suit committed a material irregularity in assuming, as the value for purposes of jurisdiction, the market value at the time of the suit instead of that at the time of the sale. (*Scott-Smith, J.*) SHER MUHAMMAD *v.* AHMAD. **69 I. C. 650= A.I.R. 1924 Lah. 380.**

—S. 115—Misconstruction—Document.

———Where the lower court erroneously decided that an award be filed, overruling the objection that the arbitrators made private inquiries on the ground that the agreement to refer authorised such enquiry, the High Court can interfere in revision where the agreement does not in fact so authorise. (*Jai Lal, J.*) NEBA RAM *v.* KHOTA RAM. **110 I. C. 833= A. I. R. 1928 Lah. 550.**

———Misconstruction of a document (even if established) is not sufficient ground for interference in revision. (*Tekchand, J.*) LAJPAT RAI *v.* DAULAT RAM BHANA MAL. **108 I. C. 373=A. I. R. 1928 Lah. 713.**

—S. 115—Misconstruction—Law.

———Wrong construction of a section is not a question of jurisdiction. (*Devadoss, J.*) DT. BOARD, GUNTUR *v.* SUBBA RAO. **112 I. C. 608=1928 M. W. N. 479= A. I. R. 1928 Mad. 983.**

———Where a lower appellate Court misconstrued the law on which the judgment of a trial Court was based, *i. e.*, where it wrongly held from the tenor of trial Court's judgment that the trial Court's order was under O. 21. R. 92. whereas its judgment was equally consistent with an order under S. 151 which was appropriate to the case; or where it also omitted to decide the question (which was material to the case), whether the word "interests" in. O. 21, R. 90, includes the interests also of an intending auction-purchaser.

Held, that a revision would lie. (*Dalip Singh, J.*) JHANDA *u.* MD ISMAIR. **101 I. C. 520= 28 P. L. R 130=A. I. R. 1927 Lah. 808.**

—S. 115—Misconstruction—Pleadings.

Where a Court proceeds on misunderstanding of the pleadings, revision lies. (*Martineau J.*) HARDWARI MAL *v.* MUNNA LAL. **95 I. C. 294= A. I. R. 1927 Lah. 44.**

—S. 115—Misconstruction—Rules.

A mere error committed by a Court in construing the election rules while disposing of an election petition is not a ground for the High Court's interference in revision. (*Odgers. J.*) DORAISWAMI NADAR *v.* JOSEPH L. MOTHER. **92 I. C. 119=1926 M. W. N. 572= 24 M.L.W. 208=A. I. R. 1926 Mad. 319.**

———Wrong order relating to pleader's fees arising on the misconstruction of the rules, is not revisable. (*Das and Adami, JJ.*) MOHANT RAMKISHUN DAS *v.* BENI PRASAD. **65 I. C. 355=3 P L. T. 314=**

A. I. R. 1923 Pat. 90.

—S. 115—Mistake.

———The High Court can interfere in revision under S. 115, Civil Procedure Code, 1908, where the lower Court's finding is obviously incorrect. (*Drake Brockman, J. C.*) MANGULAL *v.* NANHI. **67 I. C. 806= 5 N. L. J. 1=19 N. L. R. 131= A. I. R. 1922 Nag. 104.**

—S. 115—New plea.

———In revision the mere fact that the question raised is capable of being regarded as an after-thought is no objection to the maintainability of the petition, if otherwise the Court is satisfied that the order under revision was clearly wrong and unsustainable. (*Wallace and Srinivasa Aiyangar, JJ.*) MUTHU CHETTIAR *v.* NARAYANAN. **110 I. C. 63=51 Mad. 672= 28 M. L. W. 297=A. I. R. 1928 Mad. 528= 55 M. L. J. 274.**

———*Jurisdiction.*

The question of jurisdiction depends upon disputed facts and it cannot be allowed to be raised for the first time in revision. (*Mitter, J.*) BIBULI BHUSHAN *v.* CHINIBASH MAKHAL. **102 I. C. 125= 45 C. L. J. 229=A. I. R. 1927 Cal. 381.**

———*Limitation.*

New plea of limitation cannot be raised in revision. (*Zafar Ali, J.*) ABDUL KADIR *v.* NURDIN. **103 I. C. 68=A. I. R. 1927 Lah. 555.**

———The High Court in revision may consider any matter bearing on questions arising under S. 115 even though it was not taken or argued in either of the two lower Courts. (*Otter, J.*) MAUNG WA *v.* MAUNG CHEIK. **101 I. C. 200=6 Bur. L. J. 16= A. I. R. 1927 Rang. 134.**

———*Estoppel.*

A plea of estoppel being a mixed question of law or fact cannot be entertained for the first time in revision. (*Kinkhede, A. J C.*) HIRALAL *v.* TULSIRAM. **80 I. C. 946=22 N. L. R. 118= A. I. R. 1925 Nag. 77.**

———A new point raising questions both of law as well as of fact cannot be entertained for the first time in an application in revision. (*Kulwant Sahay, J.*) SURAJ NARAIN *v.* HARDWAR SINGH. **87 I. C. 381= 6 P. L. T. 295=A. I. R. 1925 Pat. 461.**

———A question involving a consideration of the terms of the contract between the parties was not allowed to be raised in revision though it involved consequently a question of jurisdiction. (*N. R. Chatterjee, J.*) RAHIMODDIN MOLAH *v.* NIROD BARANI DEBI. **84 I. C. 685=40 C. L. J. 197= A. I. R. 1924 Cal. 1036.**

———*Question of law.*

If a party does not choose to take a point of law in the Court below, then it cannot be said that the lower Court has acted illegally or with material irregularity in deciding the case without taking into consideration a point of law that was never raised before it. If the High Court entertains an application for revision on the ground that has not been taken in the Court below it should be exceeding the powers that are granted to the High Court to exercise a revisional jurisdiction over the decisions of the lower Courts. (*Macleod, C. J. and Crump, J.*) HARIDAS CHAKUBHAI *v.* RATANSEY RAGHAVJI. **62 I.C. 952=46 Bom. 56= 23 Bom. L. R. 802=A.I.R. 1922 Bom. 149.**

———*Question of law.*

Point as to *res judicata* not raised in the Court below cannot be raised in revision. (*Krishnan, J.*) RAMUDU CHETTI *v.* VARADARAJA CHARIAR. **62 I.C. 480= 13 M.L.W. 289=A. I. R. 1921 Mad. 532.**

—S. 115—Order—Adjournment.

———When the lower appellate Court has postponed the consideration of an application for review, there is no appeal as the order cannot be construed as a final order. Again such an order is not included in the list of appealable orders in O. 47, R. 1. Hence the only remedy of revision is under S. 115. (*Ashworth, J.*) RANG LAL *v.* LILAWATI. **119 I. C. 561=A. I. R. 1929 All. 375.**

—S. 115—Order—Interest--Award of.

Order granting mortgagee interest on mortgage money for the time during which sale proceeds of mortgage property are lying in Court, is not appealable but is revisable. (*Heald and Otter, JJ.*) S. A. S. CHETTIAR FIRM *v.* U. MIN DIN. **118 I. C. 416= A. I. R. 1929 Rang. 127.**

—S. 115—Order—Majority.

No revision lies from the order of the Judge in which defendant was held to be major there being before High Court no record of the suit or case decided in the court below. (*Piggott and Walsh, JJ.*) AMOLAK CHAND *v.* BHAGWAN DAS. **A.I.R. 1922 All. 334.**

———*Non-joinder and misjoinder.*

Powers of revision have been and can be exercised in cases where the lower Court passes orders as to (1) misjoinder of parties, (2) non-joinder of parties and (3) misjoinder of parties and cause of action. (*Venkatasubba Rao, J.*) M. A. VELAPPA NADAR *v.* MUNA CHINA PENA CHIDAMBARA NADAR. **70 I.C. 684= 1922 M.W. N. 316=16 M. L. W. 186= A.I.R. 1922 Mad. 174=43 M. L. J. 277.**

———**Order — Order under Burma Co-operative Societies Act (1927), S. 47.**

An order passed by a civil Court, enforcing on application the order made by a liquidator under S. 47 (2) (*b*) is not revisable. (*Ormiston, J.*) U PO NYAN *v.* MAUNG KYAN. **118 I. C. 403= A. I. R. 1929 Rang. 113.**

—S. 115—Order—Order under Guardians and Wards Act, Ss. 34 (d), 47 and 48.

———An order under S. 34 (*d*) which is final under S. 48 directing the guardian of a ward to pay a certain sum of money as balance due from him is not appealable, but it would be open to examination by the High Court on the revision side. (*Broadway J.*) RAM JAS *v.* CHANI. **79 I. C. 178=4 L. L. J. 272= A.I.R. 1923 Lah. 89.**

—S. 115—Order—Guardians and Wards Act, Ss. 48 and 47.

———When the Court orders a particular procedure to be followed to effect the sale of a minor's property that order is final although made without jurisdiction. (*Newbould and B. B. Ghose, JJ.*) TARINI KUMAR DUTTA *v.* SRISH CHANDRA DAS. **85 I. C. 667= A. I. R. 1925 Cal. 1160.**

—S. 115—Order—Remand.

———Where both parties declared that they had no evidence to offer on the questions at issue and asked the Court to deal with the case on the admissions made by them, it was highly irregular on the part of the appellate Court to allow appellant to raise new questions and to remand the case for fresh evidence on those points and appellate Court's order of remand could be set aside in revision. (*Madhavan Nair and Thiruvenkatachariar, JJ.*) T. KAKAMMA *v.* T. CHANDRASEKHARA SOMAYAJULU. **119 I. C. 705=A. I. R. 1929 Mad. 205.**

———Where a suit was dismissed by the trial Court holding that it had no jurisdiction and the lower appellate Court remanded the case to the trial Court for taking action under Order 7, rule 10.

Held: the remand order is open to revision by the

High Court. (*Broadway, J.*) DWARKA DAS *v.* RAHIM BAKSH. **73 I. C. 755 = A. I. R. 1923 Lah. 524.**

—Ss. 115—Order—Restoration.

———*Of suit.*

The order of the Court rejecting an application for restoration of suit dismissed under O. 9, Rr. 2 and 3 is not open to revision under S. 115. (*Tapp, J.*) NANAK CHAND RAM LAL *v.* AHMAD DIN. **A. I. R. 1930 Lah. 440.**

———Revision lies from an order refusing to restore a case dismissed for default. 1 Lah. 339, Rel. on. (*Prideaux, A. J. C.*) WASUDEO *v.* INAYAT HUSSAIN. **95 I. C. 260 = 9 N. L. J. 145 = A. I. R. 1926 Nag. 409.**

———High Court can revise an order refusing to restore an application for review dismissed in default. (*Pearson and Graham, JJ.*) HEM SHANKER ROY CHOWDHURY *v.* NISHI KANTA DAS GUPTA. **81 I. C. 1017 = A. I. R 1925 Cal. 430.**

———Where a suit was dismissed for default and the Court refused to restore it on the ground that it would fail on merits, without going into the reason for plaintiff's absence, *held*, the order was revisable under S. 115 (*Krishnan, J.*) SURYANAVANA GARU *v.* VENKAYYA. **70 I. C. 38 = 16 M. L. W. 837 = 1922 M.W.N. 822 = A. I. R. 1923 Mad. 177.**

———An order setting aside an abatement cannot be interfered with on the ground that the Court below had not before it sufficient cause to pass the order. The case does not fall within the purview of S. 115, C. P. Code as it cannot be said that the Court acted without jurisdiction, nor can it be said that it either failed to exercise a jurisdiction vested in it by law, or that it acted illegally or with material irregularity. (*Tudball, J.*) BHUPAL KURMI *v.* PEAREY LAL. **63 I. C. 230 (All.).**

———No appeal lies from an order setting aside an order rejecting an appeal for failure of the appellant to give security for costs nor is the order open to revision when it is made in the interests of the justice. (*Piggott and Kanhaiya Lal, JJ.*) SUNDER *v.* HABIBCHICK. **18 A. L. J. 838 = 2 U. P. L. R. (All.) 283 = 60 I. C. 81 = 42 All. 626.**

—S. 115—Order—Returning plaint.

———*P*, who was the owner of a motor lorry purchased on hire purchase system, instituted a suit at *S* against *D* for recovery of damages alleging that he had performed all the conditions under which the motor lorry was taken and that *D* had illegally taken possession thereof. On objection by *D* that the Courts at *S* had no jurisdiction to try the suit by virtue of Cl. 15 of the agreement which provided that only Lahore Courts would have jurisdiction to decide suits relating to the agreement, the plaint was returned for presentation to proper Court.

Held, that revision in High Court from the order was competent. (*Jai Lal, J.*) ABNASH CHANDAR *v.* AUTO SUPPLY CO. LTD., LAHORE. **122 I. C. 488 = A. I. R. 1930 Lah. 611.**

—S. 115—Order—Review.

———The order of the trial Judge who purports to act on the ground of " accidental slip " does not contravene the provisions of O. 47, R. 2, and therefore the order is not revisable on that ground. (*Ramesam, J.*) KATHYUMMA *v.* MD. KUTTY. **24 M. L. W. 447 = 97 I. C. 545 = A. I. R. 1926 Mad. 1083.**

—S. 115—Order—Setting aside decree.

———Where an order setting aside an *ex parte* decree has been passed and the plaintiff accepts costs and his pleader appears in Court thereafter, the plaintiff should be deemed to have accepted the order setting aside decree and the order will not be interfered with in revision. (*Addison, J.*) S. BURDEN AND CO. *v.* ARMY CANTEEN BOARD, INDIA. **96 I. C. 782 = A. I. R. 1926 Lah. 637.**

———An order setting aside an *ex parte* decree cannot be set aside by the High Court in revision, for the simple reason that the validity of such an order can be attacked under S. 105 of the Code in an appeal from the final decree passed in the suit. (*Walsh and Wallach, JJ.*) KALLU *v.* NADIR BAKSH. **64 I. C. 527 = 19 A. L. J. 907 = A. I. R. 1922 All. 441.**

———In the case, the defendant neither carried out the order of the Trial Court nor of the appellate Court to deposit the costs within the time fixed. The Court of revision reversed the order setting aside the *ex parte* decree observing that the Appellate Court ought to have dismissed the appeal on non-payment of costs for payment of which time should have been fixed before disposal of the appeal. (*Kanhaiya Lal, J. C.*) SUKHAI *v.* BINDA BAKSH SINGH. **A. I. R. 1922 Oudh 14.**

—S. 115—Order—Setting aside ex parte decree.

———Revision lies from order setting aside an *ex parte* decree. 14 O. C. 111 Foll. 34 All. 592 and 18 Bom. 35 Ref. (*Daniels, A. J. C.*) MAHABALI PARSHAD *v.* BALBHADDAR SINGH. **64 I. C. 303 = 24 O. C. 282 = A. I. R. 1921 Oudh 141.**

—S. 115—Order—Wrong Order.

——— Order of lower Court on a petition as, " the petition will be recorded, " is no order at all. Such an order is liable to be set aside. (*Devadoss, J.*) MUNISWAMI MUDALI *v.* MEENAKSHI AMMAL. **51 Mad. 244 = 27 M. L. W. 320 = 106 I.C. 660 = 1927 M. W. N. 884 = A. I. R. 1928 Mad. 215 = 54 M. L. J. 154.**

———Order, bringing non-contesting defendants on record at instance of contesting defendants on application to restore suit, being wrong can be revised. (*Rankin and M. N. Mukerji, JJ.*) KAILAS CHANDRA *v.* HRIDOY CHANDRA. **83 I. C. 958 = 39 C. L. J. 367 = A. I. R. 1924 Cal. 814.**

———Order granting adjournment without fixing time for payment of process-fee followed by an order of dismissal for want of prosecution is bad and would be set aside in revision. (*Kinkhede, A. J. C.*) AYODHYAPRASAD *v.* SECRETARY OF STATE. **79 I.C. 123 = A. I. R. 1924 Nag. 298.**

—S. 115—Other Remedy.

Appeal.
Application to trial Court.
Dismissal for default.
Doubtful.
Execution proceedings.
Ex parte decree.
General rule.
Interlocutory order.
More appropriate and complete.
No appeal to High Court.
No revision.
Principle.
Special case.
Suit.

—S. 115—Other remedy—Appeal.

———The order rejecting a plaint is a decree. An order passed in appeal from that order that no appeal lies amounts to dismissal of the appeal. Even such order is a decree and is open to a second appeal and not a revision to the High Court: 8 C.W.N. 64, Rel. on (*Suhrawardy and Jack, JJ.*) RAM GOPAL SANYAL *v.* NARENDRA NATH. **49 C.L.J. 81 = 115 I.C. 368 = A.I.R. 1929 Cal. 226.**

———*Defendant against whom suit is dismissed—Ob-*

jection to execution—S. 47 C.P. Code and not O. 21, R. 58 applies—Practice.

A suit was dismissed as against one of the defendants who in execution proceedings of the decree passed in the suit brought objection to an attachment apparently under O. 21, R. 58, which was recorded under that rule only. The Court proceeding under that rule made inquiries and rejected the claim.

Held, that the objection petition, though wrongly preferred under O. 21, R. 58, must be treated as one under S. 47, and the order passed by the Court would have the effect of a final order under S. 47 which would be appealable as a decree, and against which no revision would lie. A.I.R. 1921 Cal. 242; A.I.R. 1925 Pat. 482 Foll ; A.I.R. 1927 Pat. 404 and 1 Pat. L.T. 645, Dist.

Held further, that the High Court sitting in revision should not vacate the order of the execution Court, and direct the objector to bring fresh objection under S. 47 inasmuch as Court had jurisdiction to decide an objection under S. 47 as well as a claim under O. 21, R. 58. (*Fazl Ali, J.*) MADHO BIBI *v.* HAZARI MAL MARWARI. **115 I.C. 695 = 8 Pat. 717 = 10 P.L.T. 95 = A.I.R. 1929 Pat. 141.**

———The object of S. 115 is to confine the powers of revision to cases in which the question raised cannot be made the subject of an appeal to the High Court. (*Thiruvenkatachariar, J.*) PATTAMMAL *v.* KRISHNASWAMI IYER. **112 I.C. 231 = A.I.R. 1928 Mad. 794.**

———Any order which may be brought up in appeal to the High Court either directly or after an intermediate appeal to a lower Court should be held to be a case in which an appeal lies to the High Court. In other words, the section deals with cases in which an appeal as such, whether it is first appeal or a second appeal, can be preferred to the High Court. 20 Mad. 155, Foll (*Thiruvenkatachariar, J.*) PATTAMMAL *v.* KRISHNASWAMI IYER. **112 I.C. 231 = A.I.R. 1928 Mad. 794.**

—S. 115—Other remedy—Appeal—Practice.

———Where the Code provides an appeal to a lower Court against an order the party aggrieved thereby must pursue that remedy and should not be permitted to invoke the powers of revision exercisable by the High Court except in some extreme cases where but for such, interference irreparable injury might be done. (*Thiruvenkatachariar, J.*) PATTAMMAL *v* KRISHNASWAMI IYER. **112 I.C. 231 = A.I.R. 1928 Mad. 794.**

———The High Court will not do anything like going into the merits when an appeal is available to the party, but if the lower Court whose order is impugned has entirely misconceived the question before it or committed such obvious irregularity, there is no reason why the High Court should not interfere. A.I.R. 1926 Mad. 18, Appl. (*Jackson, J.*) MEENAKSHI AMMAL *v.* ISWARAM IYER. **39 M.L.T. 590 = 27 M.L.W. 238 = 1928 M.W.N. 50 = 107 I.C. 301 = A.I.R. 1928 Mad. 124 = 53 M.L.J. 903.**

———Where a decree was passed without jurisdiction and though an appeal was provided no appeal was filed,

Held, that a revision may be allowed in exceptional circumstances. (*Panton and Mullick, JJ.*) SOMOKANUT MOHANTA *v.* SARVESWAR DAS. **31 C.W.N. 739 = 103 I.C. 644 = A.I.R. 1927 Cal. 578.**

———*Aden Court.*

The Aden Court is a Court of final appeal, and an order granting Letters of Administration is a final judgment. There would, therefore, be an appeal to the Privy Council, and it is not competent to the High Court to deal in revision with such a judgment or order. (*Macleod, C.J. and Coyajee, J.*) LEOH MOSES *v.* SOLOMON JUDAH MEYER. **50 Bom. 32 = 27 Bom. L. R. 1460 = 92 I.C. 367 = A.I.R. 1926 Bom. 139.**

———Where an appeal is the proper course, revision should not be entertained against an order refusing a review. (*Ashworth, A.J.C.*) NARESH PRATAB SINGH *v.* SITTA PRASAD TEWARI. **91 I.C. 34 (Oudh).**

———Where a second appeal is dismissed on the ground that no appeal lies to the High Court, the decree of the lower appellate Court stands good as between the parties, and is the only decree which is capable of execution. It is also capable of revision by the High Court. (*Suhrawardy and Graham, JJ.*) SURENDRA KRISHNA ROY CHOWDHURY *v.* ABBAS ALI. **85 I.C. 760 = A.I.R. 1925 Cal. 1237.**

———S. 115 would be inapplicable where appeal lies to the High Court. (*Sulaiman and Mukerjee, JJ.*) FIRM GANESHI LAL HARNARAIN *v.* DEBI DAS. **47 All. 140 = 6 L.R.A. Civ. 79 = 85 I.C. 470 = A.I.R. 1925 All. 267.**

———Remedy by way of revision is an exceptional remedy and is to be resorted to only when there is no other remedy available to the aggrieved party. A suit was found to be under-valued and an order was passed for amendment of plaint and for making up the deficiency in Court-fees. Thereupon an application was made to continue the suit *in forma pauperis* which was disallowed and the plaint was rejected on the ground that the party did not comply with the first order. An application having been made on the order disallowing the suit to be continued *in forma pauperis.*

Held, that the order disallowing the application to continue the suit *in forma pauperis* had become merged in the order rejecting the plaint, and as the order rejecting the plaint amounted to a decree, an appeal ought to have been preferred against that order and a revision was not maintainable. (*Motisagar, J.*) MT. AZAM BIBI *v.* MT. IMTIAZ BEGUM. **78 I.C. 604 = A.I.R. 1925 Lah. 191.**

———The final decree in a partition suit omitted to give relief as to mesne profits though it had been allowed in the preliminary decree. An application for the amendment of the final decree either by way of amendment or by way of review was dismissed. Then an application was made under S. 151, C. P. Code to pass a further final decree for mesne profits. This application was also dismissed.

Held, that if the application was treated as an application for a final decree in the suit, the order on such application must be treated as a decree and an appeal would lie and therefore no revision lay. (*Phillips, J.*) VEERAPPA GOUNDAN *v.* VEERAPPA GOUNDAN. **88 I.C. 94 = A.I.R. 1925 Mad. 886 = 48 M.L.J. 512.**

———*Practice.*

Though S. 115 prohibits revision in cases in which an appeal lies, and though revisions should not be granted ordinarily where some other remedy has been provided, still as the exercise of the power of revision is discretionary, it must be adopted to the circumstances of each particular case and where necessary interference may be made. (*Kinkhede, A.J.C.*) VITHALSINGH *v.* AGARCHAND. **79 I.C. 903 = A.I.R. 1925 Nag. 17.**

———Order of an appellate Court returning a plaint being appealable, no revision lies from such an order. (*Neave, A.J.C.*) BADRI SING *v.* LALTA SINGH. **79 I.C. 1024 = A.I.R. 1925 Oudh 70.**

———*Practice.*

When the legislature has given a right of appeal and that right of appeal has not been taken advantage of, High Court should not interfere on the revision side. (*Broadway, J.*) TOLA RAM *v.* CHANDU MAL TOTA

Ram. **71 I.C. 160 = A.I.R. 1924 Lah. 400.**

———The High Court cannot interfere in revision if an appeal can lie but has not been preferred against the order complained of. (*Kulwant Sahay and Mullick, JJ.*) Syed Baker Hussain *v.* Mirza Hussain Mirza. **73 I.C. 373 = 4 P.L.T. 46 = A.I.R. 1923 Pat. 223.**

—S. 115—Other remedy -- Application to trial Court.

———Where a partition was to be a partition of the whole property and by oversight or for any other reason one of the properties was left unpartitioned,

Held, that it was open to the parties to draw the attention of the trial Court to the omission and to get a direction from it in the matter and no revision lies. (*Ross, J.*) Balaram Manjihi *v.* Jagannath Manjhi. **92 I.C. 684 = A.I.R. 1925 Pat. 760.**

—S. 115—Other remedy—Dismissal for default.

———Where the Court, on the day of the hearing when an application was made for adjournment as the plaintiff was ill, rejected the application and dismissed the suit,

Held, the proper course was to apply for a review of the order or apply for an order to set aside the order of dismissal and not to apply in revision. (*Macleod, C.J. and Crump, J.*) Pandurang Vedunam *v.* Mohan Chhatrabhuj. **80 I.C. 178 = A.I R. 1923 Bom. 395.**

—S. 115—Other remedy—Doubtful.

———In a claim proceeding, the Dt. Munsif delivered his judgment orally dictating it to the short-hand writer. When the short-hand transcription reached the Dt. Munsif he entirely changed the effect of what he had said in open court.

Held, that though it is the practice of the Madras High Court not to interfere in revision when another remedy is available, it will interfere where the case is exceptional and it is doubtful whether another remedy is open. (Retrial of the whole case directed.) (*Oldfield, J.*) Hari Krishna *v.* Arur Pandither. **72 I. C. 688 = 1 M.L.W. 105 = 1923 M.W.N. 354 = A.I.R. 1923 Mad. 663.**

———Where an order was passed requiring the plaintiffs in the case to elect between themselves as to who should proceed with the suit, and to amend the plaint accordingly,

Held, that the High Court could interfere in revision, as it was doubtful if the second plaintiff would have any remedy under S. 105, C. P. Code once the order of election had been complied with. (*Batten, A.J.C.*) Shanker *v.* Sonoo. **4 N.L.J. 58 = 63 I.C. 419 = A. I. R. 1921 Nag. 9.**

—S. 115—Other remedy—Execution proceedings.

———Where the appeal to the lower Court was under S. 47, C. P. Code, and where the auction purchaser and not the decree-holder or judgment-debtor petitions the High Court for revision, his petition is not barred, because a second appeal by him does not lie. (*Ramesam, J.*) Krishna Ayyar *v.* Muthuswami Thevar. **117 I. C. 789 = A. I. R. 1929 Mad. 84.**

—S. 115—Other remedy—Ex parte decree.

———The revisional powers of the High Court may be invoked only when there are no other sufficient remedies open for the aggrieved party.

A person was declared to be *ex parte*. He applied to set aside the order declaring him *ex parte*. His application was rejected and *ex parte* decree against him was passed. He did not apply under R. 13, O. 9, to set aside the *ex parte* decree nor did he appeal against it. It was argued that his petition for revision should be entertained as it would be too late then for him to apply under O. 9, R. 13, or to appeal against the *ex parte* decree.

Held, that the revision petition cannot be entertained. The applicant's neglect to avail himself of the remedies open to him does not give him a better right to apply to the High Court to exercise its powers of revision. (*Tiruvenkatachariar, J.*) Kandaswamy Koundan *v.* N. M. L. Subramanian Chettiar. **113 I. C. 409 (Mad.).**

—S. 115—Other remedy—General rule.

———There is no inflexible rule that the High Court will not interfere in revision when a remedy by suit is open. If the case comes within the scope of S. 115 and if there are sufficiently strong reasons for interference, the Court may and does interfere. 40 All. 216, Rel. on. (*Mirza and Broomfield, JJ.*) Hira Lal Mohan Lal *v.* Ramchandra Kundanmal. **32 Bom. L. R. 619 = A. I. R. 1930 Bom. 375.**

———When another remedy is open to the aggrieved party and where no great injustice or inconvenience would follow from High Court's refusal to act, High Court will not interfere in revision with a pure finding of fact when the finding is not opposed to the evidence on record or is not based on meagre or little evidence or on disregard of evidence. A. I. R. 1922 Nag. 115 and A. I. R. 1926 Nag. 290, Appl. (*Prideaux, A. J. C.*) (Sheikh) Mahammad *v.* Pandurang. **115 I. C. 167 = A. I. R. 1929 Nag. 66.**

———The ordinary rule is that the High Court will not interfere in revision in any case in which the petitioner has another remedy except in very exceptional circumstances. The High Court will, however, interfere where the right of the party is clear and where the result of non-interference will be only to multiply proceedings by driving the party to a suit, in which there can be no defence. 28 All. 72; 4 P. L. J. 94; 35 Cal. 120; 32 Mad. 334, and A. I. R. 1925 Cal. 907, Ref. (*Mya Bu, J.*) Administrator-General, Burma *v.* C. R. V. V. S. Chettiar Firm. **109 I. C. 444 = 5 Rang. 742 = A.I.R. 1928 Rang. 83.**

———While Courts would not generally interfere in revision where an equally efficacious remedy is open to the party, it can interfere where the remedy by way of appeal would entail unnecessary hardship on the party, involve multiplicity of proceedings, or would not give the party as complete and efficacious a relief as interference with an interlocutory order and the case satisfies the requirements of S. 115. If the case is one of declining to exercise jurisdiction and the requirements of S. 115 are otherwise satisfied, the High Court should not decline to interfere when by timely interference, it will save a great deal of unnecessary hardship. (*Kumaraswami Sastri and Wallace, JJ.*) Kulandai *v.* Indran Ramaswami. **108 I. C. 539 = 51 Mad. 664 = 27 M.L.W. 286 = A.I.R. 1928 Mad. 416 = 55 M.L.J. 345.**

———It is not an invariable rule of the High Court that it will not interfere in revision when a party has another remedy open to him although certainly in such cases it would require very strong grounds to induce the Court to interfere. (*Wallace, J.*) Arunachallam Chettiar *v.* Sivalingam Chettiar. **104 I.C. 371 = 26 M.L.W. 76 = A. I. R. 1927 Mad. 799.**

———*Scope of.*

It is a general rule that High Court will not interfere on the revision side when the petitioner has another remedy, but it will do so in exceptional circumstances. 65 P.W.R. 1908, Rel. on. (*Addison, J.*) Guranditta Ram Ram Kishen *v.* Sukhu Ram. **100 I. C. 595 = 9 L.L.J. 19 = 28 P.L.R. 136 =**

A. I. R. 1927 Lah. 911.

———High Court will not interfere as a general rule in revision where the aggrieved party has another and adequate remedy. (*Cuming and Page, JJ.*) SALAM CHAND KANNYRAM *v.* BHAGWAN DAS CHILHANIA **98 I. C. 615=53 Cal. 767=30 C.W.N. 907= A. I. R. 1926 Cal. 1149.**

———Where a remedy by way of suit is available the High Court will not ordinarily interfere by way of revision. [(1914) M.W.N. 95 Ref.] But if the remedy is clear and is sure to result in applicant's success the parties will not necessarily be driven to another suit. 32 Mad. 334, (F. B.) Foll. (*Jackson, J.*) VEERASAMI MUDALI *v.* VENKATACHALA MUDALI. **92 I.C. 20=22 M.L.W. 448=1925 M.W.N. 763= A. I. R. 1926 Mad. 18=50 M. L. J. 102.**

———*Sulaiman, J.*—The existence of another remedy cannot be an insuperable obstacle in the way of interference by the High Court in revision. 43 M. 94, Foll. (*Lindsay, Sulaiman and Daniels, JJ.*) RAM SARUP *v.* GAYA PRASAD. **90 I. C. 180=48 All. 175= 24 A.L.J. 56=6 L.R.A. Civ. 601= A. I. R. 1925 All. 610 (F.B.).**

———As a general rule the High Court does not interfere in revision when the applicant has another remedy open to him. (*Baker, J. C.*) SK. BALDAR *v.* SK. IMAM. **76 I. C. 46=A. I. R. 1925 Nag. 31.**

———Where another remedy is open, an application for revision is not maintainable. 12 O.C. 109, Foll. (*Simpson, A.J.C.*) MAKHDOOM BAKSH SINGH *v.* GANGA PRASAD. **91 I. C. 617=2 O.W.N. 658= A. I. R. 1925 Oudh 666.**

———Although a High Court generally does not entertain an application for revision when there is another remedy open to a petitioner, there is nothing in the law which prohibits such Court from interfering even in cases where grave injustice may have been done. 10 A. 112; 36 P. R. 1887; 71 P.R. 1884; 15 P.R. 1874, Ref. to. (*Abdul Raoof, J.*) RALLA RAM *v.* MT. RAJ. **67 I. C. 945=4 Lah. L. J. 71= A. I. R. 1922 Lah. 63.**

———The exercise of revisional powers is always discretionary, and where an aggrieved party has other remedy available the High Court will be unwilling to interfere. (*Das and Bucknill, JJ.*) S. A. ZAMIN *v.* S. M. A. ALI. **65 I.C. 135=1 Pat. 68= 3 Pat. L. T. 406=A. I. R. 1922 Pat. 315.**

———A High Court will be slow to exercise its powers of revision unless the party applying to the Court has no other remedy. Facts ousting jurisdiction must be patent on the face of the record before it can be predicated of a Court that it has exercised a jurisdiction not vested in it by law in terms of Cl. (*a*) to S. 115. Where an objection, as to the legality of the award on the ground of absence of Court's sanction for reference to arbitration on behalf of minors is taken, and the Court holds the reference and award to be valid its decision, even if it is erroneous, is on a point of law and as such is not open to revision, for S. 115 is not directed against conclusions of law or facts in which the question of jurisdiction is not involved. (*Kennedy, J. C. and Raymond, A.J.C.*) EMNOBAI WIDOW *v.* FAKIR MUHAMAD. **65 I.C. 50=15 S.L.R. 165= A.I.R. 1922 Sind 1.**

—S. 115—Other remedy—Interlocutory order.

———Where the lower Court decided that it has jurisdiction to proceed with a suit, revision should not be ordinarily allowed as the aggrieved party has ample opportunity to contest the order later on. (*Das and Scroope, JJ.*) DEVENDRA BHATTACHANDRYA *v.*

EMPEROR. **103 I.C. 459=6 Pat. 347= A. I. R. 1927 Pat. 251.**

———Revision will not lie where there is another remedy open by way of appeal at a later stage of the proceedings. (*Addison, J.*) MUHAMMAD AKABAR *v.* MT. HUSSEIN BIBI. **96 I.C. 173 (Lah.).**

—S. 115—Other remedy—More appropriate and complete.

———Powers under S. 115 are discretionary and the High Court should not exercise those powers of revision when a more appropriate and far more complete remedy is open. (*Cuming and Page, JJ.*) ALICE MAUD *v.* J. C. GALSTAUN. **98 I. C. 89=45 C.L.J. 213= 31 C.W.N. 615=A. I. R. 1927 Cal. 114.**

—S. 115—Other remedy—No appeal to High Court.

———In case where an appeal lies to this Court, a revision would not lie, but in other cases the High Court is competent to call for the record of a civil case and pass such orders as it thinks fit even though other remedy may be open. 28 All. 72, Rel. on. 19 I. C. 736, Dist. (*Dalal, J.*) EMPEROR *v.* BEHARI LAL. **114 I.C. 741=51 All. 338=12 A. I. Cr. R. 206= 10 L.R.A. Cr. 125=1929 A.L.J. 62= A. I. R. 1928 All. 588.**

———S. 115 confers revisional jurisdiction on the High Court in cases in which no appeal lies to that Court. Its jurisdiction is not excluded by the fact that an appeal might lie to a subordinate Court. If the order of the trial Court is set aside, the confirming order of the lower appellate Court must necessarily fall to the ground with it. 8 All. 111 (F. B.), Foll.; 11 All. 267 (F. B.); 39 All. 641 and 43 All. 405, Not Foll. (*Sulaiman and Daniels, JJ.*) BISHESHAR PRASAD *v.* RAGHUBIR. **90 I.C. 353=48 All. 168=24 A. L. J. 83= A. I. R. 1926 All. 58.**

———An order of an appellate Court reversing an order of the lower Court returning a plaint for presentation to the proper Court is open to revision, as no Second Appeal lies from such order. (*Abdul Raoof, J.*) RAM LAL ISHAR DAS *v.* SALIG RAM. **[59 I.C. 2=7 P. W. R. 1921.**

—S. 115—Other remedy—No revision.

———No application for revision lies where there is another remedy open to the applicant. (*Mullick, J.*) MODE NARAINLAL *v.* KRISHNA DAYAL. **108 I.C. 804=9 P.L.T. 659.**

—S. 115—Other remedy—Principle.

———It is wrong in principle that a petitioner should invoke the extraordinary powers of the High Court without exhausting the ordinary powers of the Court below which may give him all he wants. (*Skemp, J.*) GANDA SINGH KOCHAR *v.* EMPEROR. **117 I.C. 906=30 Cr. L.J. 862.**

—S. 115—Other remedy—Special case.

———Where the lower Court has refused to exercise jurisdiction by refusing to entertain an application for review based on the ground of fraud, the High Court will interfere in revision notwithstanding the existence of another remedy. (*B. B. Ghose, J.*) KHITISH CHANDRA CHATTERJI *v.* NAGENDRA NATH MANDAL. **119 I.C. 371=49 C.L.J. 425=33 C.W.N. 572= A.I.R. 1929 Cal. 513.**

———High Court can interfere in revision in special cases even when another remedy is open to the party. (*Jai Lal, J.*) GOKAL CHAND *v.* LILA RAM. **118 I. C. 393=A. I. R. 1929 Lah. 175.**

———High Court can interfere in revision though there may be another remedy by way of instituting suit, provided there are exceptional circumstances.

After arguments were over Court granted permission to defendants to bring their witness in the absence of plaintiff's counsel, and after hearing the witness, dismissed the plaintiff's suit in default.

Held, that the Court committed a material irregularity and High Court can interfere in revision. (*Addison, J.*) MT. IMAM BIBI *v.* FAZAL MD. SHAH.
96 I.C. 359 = 8 L.L.J. 423 = 27 P.L.R. 644 = A.I.R. 1926 Lah. 612.

———The special remedy by way of suit under S. 73 does not prevent a Court from interfering under S. 115 where there is a manifest error in the order under S. 73, and setting that error aright as otherwise the parties will be driven to unnecessary litigation. (*Krishnan, J.*) SUBRAMANIAN CHETTY *v.* RAMASWAMI CHETTY.
22 M. L. W. 744 = 1926 M. W. N. 27 = 91 I. C. 11 = A. I. R. 1926 Mad. 179 = 49 M.L.J. 753.

———It is not the practice of High Court to interfere in revision where another remedy is open to the aggrieved party and where no great injustice or inconvenience would follow from the refusal to act. (*Prideaux, J.*) SAMSHEKHAR *v.* ABDUL SATTAR KHAN.
94 I. C. 70 = 22 N. L. R. 30 = A. I. R. 1926 Nag. 290.

———There are cases in which justice requires interference in revision even where another remedy is open to the aggrieved party ; much more so would interference be necessary and justifiable where another remedy is barred. (*Kinkhede, A. J. C.*) AYODHYAPRASAD *v.* SECRETARY OF STATE. **79 I. C. 123 = A. I. R 1924 Nag. 298.**

———*Other remedy being open no revision lies.*

It is not the practice of the High Court to interfere in revision when another remedy is open to the aggrieved party and where no great injustice or inconvenience would follow from the refusal to act. 30 A. 331 and 33 A. 617, Ref. (*Prideaux, A. J. C.*) RAMJI *v.* BALKRISHNA. **69 I. C. 719 = A. I. R. 1924 Nag. 38.**

———Where there is a right of appeal, the High Court even if it thought that the order complained of was not right, would not interfere in revision unless its interference were necessary on the ground of avoiding irreparable loss. (*Dawson Miller, C. J. and Foster, J.*) HARIHAR PRASAD SINGH *v.* KESHO PRASAD SINGH.
71 I. C. 911 = A. I. R. 1924 Pat. 176.

———The High Court will not interfere in revision when the aggrieved party has a remedy by suit open to him except in cases where there would be a very serious miscarriage of justice if the High Court did not interfere. (*Suhrawardy and Cuming, JJ.*) GIRIBALA DASI *v.* PRIANATH PAL. **65 I. C. 476 (Cal.).**

———*Party suffering injustice even by resorting thereto—Revision lies.*

Revision should not ordinarily be granted, even in a case in which no appeal lies if some other remedy is provided which can be called reasonably efficacious in respect of the circumstances of the particular case. But in cases where some other remedy is open if the decree is wrong, the slower remedy by regular suit will still leave the applicant suffering injustice and undue hardship, and this is sufficient to call for the exercise of the revisional powers of High Court in his favour. (*Hallifax, A. J. C.*) RAMCHANDRA FETE *v.* SHRIDHAR. **65 I. C. 351 = 18 Nag. L. R. 71 = 5 Nag. L. J. 151 = A. I. R. 1922 Nag. 115.**

———*Practice.*

Though S. 115, C. P. Code, prohibits revision only in cases in which an appeal lies, revision should not be

granted ordinarily where some other remedy has been provided. But the exercise of the power of revision is discretionary and must be adopted to the circumstances of each particular case. There are cases in which justice requires interference in revision even though another remedy is open to the aggrieved party. (*Hallifax, A. J. C.*) NILKANTH *v.* KASUBAI.
63 I. C. 46 = 4 N. L. J. 55 = A. I. R. 1921 Nag. 17.

———The High Court will not interfere in revision where there is another remedy available, *e.g.*, by way of suit except in very exceptional circumstances. (*Coutts and Adami, JJ.*) HARMOOJI BEGUM *v.* MT. AYASHA. **1921 P. H. C. C. 204 = A. I. R. 1921 Pat. 401.**

———Order under O. 21, R. 101, should not be revised because another and better remedy by way of suit is open to the parties. 3 P. L. J. 579 Diss. from. (*Rankin, C. J.*) BHIM NAIK *v.* CHAKRADHAR MAITY.
34 C. W. N. 577 = A. I. R. 1930 Cal. 348.

—S. 115—Other remedy—Suit.

———The extent to which investigation required by R. 58 should go depends upon the circumstances of the case and, as the party aggrieved by order under that rule or R. 61 has a remedy under O. 21, R. 63, High Court should not interfere in revision with the decision under R. 61. A. I. R. 1924 Pat. 506 ; and A. I. R. 1929 Pat. 273, Ref. 15 Cal. 521 (P. C.), Rel. on. (*Macpherson, J.*) MANGU RAM MARWARI *v.* HOMESHWAR SINGH. **A. I. R. 1930 Pat. 394.**

———Suit against principal debtor dismissed for want of service—Claim decreed against surety—Surety in revision raising discharge—Substantial justice done—Other remedies open to him—Revision petition was disallowed. A. I. R. 1917 P. C. 71, Rel. on. (*Jai Lal and Agha Haider, JJ.*) JOT RAM *v.* JITA.
A. I. R. 1929 Lah. 777.

———The rule of allowing no revision where a suit lies is not an inflexible one and might be departed from in special cases. (*Jackson, A. J. C.*) MOROTIRAO *v.* GOVIND. **120 I. C. 735 = A. I. R. 1929 Nag. 356.**

———High Court does not ordinarily interfere in revision with orders passed under O. 21, R. 63. 3 U. B. R. 13 and A. I. R. 1917 P. C. 71, Ref. (*Heald and Otter, JJ.*) S. R. M. M. A. FIRM *v.* MAUNG PO SAUNG. **7 Rang. 466 = 120 I. C. 236 = A. I. R. 1929 Rang. 297.**

———Before the plaintiff can invoke the provisions of S. 115 he has to satisfy the High Court that he has no other remedy open to him to get redress and that irreparable injury would result to him unless High Court interferes. Thus if the plaintiff has a right to proceed against the defendant in a Court, the mere fact that he has been deprived of his right of proceedings with his suit in another Court is not sufficient to warrant High Court's interference in revision. (*Percival, J. C. and Rupchand Bilaram, A. J. C.*) GOPALOMAL PAMANMAL *v.* SUNDERDAS PARMANAND.
118 I. C. 193 (Sind).

———High Court will not interfere ordinarily in revision in a case where there is another remedy provided by statute ; but where it is quite clear that, although purporting to deal with the question of possession, the Court has really been considering questions of benami, joint family and transfer in fraud of creditors, or rather has been materially influenced by suspicions relating thereto, it is right that High Court should interfere. 29 Cal. 543 ; A. I. R. 1923 Rang. 195 and (1919) P. H. C. C. 81 (F. B.), Rel. on. (*Sen, J.*) ANAND

PRASAD *v.* GOPAL DAS. **8 P. L. T. 677 = 103 I. C. 32 = A. I. R. 1927 Pat. 316.**

———In revision High Court will not interfere if another remedy by way of regular suit is open to the aggrieved party. 72 P. R. 1918, Foll. (*Addison, J.*) BALLA MAL *v.* AGHA DIN GUL. **93 I. C. 868 (Lah.).**

———Where an aggrieved party has the remedy of a suit open to him, the High Court will not interfere in revision though the lower Court's order is in exercise of a jurisdiction wrongly assumed. (*Moti Sagar, J.*) NAND KISHORE *v.* NARAIN SINGH. **78 I. C. 350 = 6 Lah. L. J. 137 = A. I. R. 1924 Lah. 471.**

———Bengal Land Registration Act, S. 59—Order under—Revision is not competent—Another remedy open to the petitioner by way of suit—No revision lies. (*Mullick and Bucknill, JJ.*) KAPILESHWAR JHA *v.* RAGHUNANDAN PRASAD. **74 I. C. 474 = 4 P. L. T. 718 = 1 Pat. L. R. Civ. 370 = A. I. R. 1924 Pat. 134.**

———*Not maintainable.*

Where in a suit for money, certain property belonging to the judgment-debtor was attached (under O. 38, R. 5) before judgment, but released on two persons standing as sureties, and they paid the amount in Court just after a holder of the decree applied for execution.

Held, that the money so deposited is "assets held by a Court," within the meaning of S. 73 and are therefore liable to be rateably distributed. 41 Mad. 616, Approved; 36 Bom. 156, Dissented from. In cases like the present, where no suit lies, it is the practice of the High Court to interfere in revision. (*Richardson, J.*) GHISULAL AGARWALLA *v.* TODURMULL AGARWALLA. **70 I. C. 539 = 26 C. W. N. 169 = A. I. R. 1922 Cal. 19.**

———Where another remedy is open to a party, *e.g.*, a suit under O. 21, R. 63, C. P. Code, the Court will not entertain an application for revision. (*Banerji, J.*) BASDEO SAHAI *v.* SARASWATI. **64 I. C. 469 (All.).**

———*Order under S. 9 of the Specific Relief Act.*

A High Court will not interfere in revision when there is another remedy open to the applicant. Therefore, no application for revision of an order dismissing a suit under S. 9 of the Specific Relief Act will lie, the plaintiff having a remedy by a regular suit on the basis of title. (*Tudball, J.*) RAM ANAND *v.* SHEO BALA. **63 I. C. 809 (All.).**

—S. 115—"Record of case."

———*Meaning explained.*

The "record of the case" means the record of the legal proceeding which has been decided although it is only a legal proceeding in the suit. (*Percival, J. C. Rupchand and Wild, A. J. Cs.*) KHUDABUX *v.* PANJO. **A. I. R. 1930 Sind 265 (F.B.).**

—S. 115—Revision—Attachment.

———The High Court can interfere in a case of mistake by the lower Court upon the fact or law on its merits, occasioned by not directing proper attention to O. 21, R. 60, to find out whether the attached property was in the judgment-debtor's possession and whether objector was entitled to resist the claim of the decree-holder. 46 Cal. 962, Dist. (*Rankin, C. J.*) RAJ KISHORE GOPE *v.* BHABATOSH CHAKRAVARTI. **49 C. L. J. 51 = 115 I. C. 362 = A. I. R. 1929 Cal. 225.**

———*Order under C. P. Code, O. 21, R. 58 was not revised—C. P. Code, O. 21, R. 58.*

Certain house property was attached in execution of a decree. The objector claimed that the property had been purchased by him from the judgment-debtor before the passing of this decree. The Court below found that the *bona fides* of the sale-deed were doubtful and the judgment-debtor was really in possession of the said property in spite of the alleged sale.

Held, there was no reason for interfering in revision. (*Kanhaiya Lal, J. C.*) SHAM LAL *v.* RADHA SHYAM. **74 I. C. 546 = 10 O. L. J. 139 = A. I. R. 1923 Oudh 208.**

———Where property attached before judgment was in Court, and decree was passed in the suit but the decree-holder did not apply for execution of his decree, and the holder of another decree applied for attachment of the property,

Held, that the Court was entitled to order the attachment and although in equity it ought to have given notice to the other decree-holder at whose instance the property had been attached before judgment, there is nothing in the Code requiring such notice and the failure to give such notice does not merit revision under C. P. Code, S. 115. (*Macleod, C. J. and Fawcett, J.*) VISHNU DHONDDEV PALKAR *v.* RAMPRATAP DAULATRAM MARWADI. **59 I. C. 713 = 45 Bom. 360 = A. I. R. 1921 Bom. 219.**

—S. 115—Revision—Construction of document.

———On a mere question of the interpretation of particular words in a document, where the words were clearly susceptible of more than one interpretation, the High Court would decline to interfere in revision. (*Piggott, J.*) KRISHNA DATT DUBE *v.* BRIJ LAL. **80 I. C. 313 = A. I. R. 1923 All. 269.**

—S. 115—Revision—Discretionary.

———Interference in revision is discretionary and when the interference is likely to work, not in the interests of justice but rather against it, such a course should not be taken. 93 P. R. 1911, Rel. on. (*Bhide, J.*) HUZARA SINGH *v.* DITTA RAM HUTA RAM. **A. I. R. 1930 Lah. 417.**

———An application in revision is matter of discretion for the High Court and the Court will not interfere with an order though made without jurisdiction if to interfere with such order amounts to doing grave injustice. (*Wort, J.*) AMANATULLAH MIAN *v.* RAGHUNATH PRASAD. **A. I. R. 1930 Pat. 279.**

———Under S. 115 of the C. P. Code, the High Court is not bound to intervene but may refuse to exercise its discretion if the circumstances require that such discretion should not be exercised. (*Sulaiman and Mukerji, JJ.*) FATEH LAL *v.* SHER SINGH. **85 I. C. 660 = 6 L. R. A. Civ. 63 = A. I. R. 1925 All. 264.**

———There is no obligation on the High Court to interfere on an application made under S. 115, even if facts are proved which bring the application within the section. It is purely a matter of discretion, and no rules can be laid down how that discretion is to be exercised. Whether the Court will interfere or not is entirely for the Court, which hears the application, to decide on the particular circumstances of the case before it. (*Macleod, C. J. and Crump, J.*) BHIKALAL GIRDHARLAL *v.* ACHRATLAL LALLUBHAI. **87 I. C. 910 = 49 Bom. 535 = 27 Bom. L. R. 423 = A. I. R. 1925 Bom. 341.**

—S. 115—Revision—Dismissal for default.

———Where the High Court is satisfied that the Subordinate Court has failed to exercise its inherent power to restore a suit dismissed for default in a proper case, it might be a ground for interference in revision. (*Fazl Ali, J.*) BHUNESHWARI KUER *v.* JAGOO SINGH. **122 I. C. 585.**

C. P. CODE (1908), S. 115—Revision—Dismissal for default.

———Suit dismissed for default of counsel—Revision will not lie. (*Dalip Singh, J.*) Chunni Lal *v.* Gandu Mal. **101 I. C. 444 = 28 P. L. R. 204 = 9 Lah. L. J. 80 = A. I. R. 1927 Lah. 791.**

—S. 115—Revision—Election.

———Where the voter wrote his name against the name of the candidate instead of marking a cross and the lower Court held that the rule that voter should not write his name should not be strictly applied in the case of illiterate voters,

Held, the rule is mandatory and omission to apply it strictly is revisable. (*Devadoss, J.*) Venkataramiah Subbireddi. **90 I. C. 1055 = 22 M. L. W. 24 = A. I. R. 1925 Mad. 1173.**

———The lower Court decided, over-ruling objections that an election petition to set aside an election disclosed grounds on which an election enquiry could be held under the Election Rules.

Held, that the High Court could interfere because if the election petition did not disclose any ground for an inquiry, the lower Court would be exercising a jurisdiction not vested in it by holding such an enquiry and to hold it would simply lead to waste of time of the Court and of the parties. In such a case it was but right and proper that the High Court should decide whether the petition disclosed any grounds for holding an enquiry and, if it did not the High Court should say so at once and stop the enquiry at the very outset. (*Krishnan, J.*) Janardhanan *v.* N. N Verghese. **87 I. C. 113 = 1925 M. W. N. 305 = A. I. R. 1925 Mad. 707 = 48 M. L. J. 451.**

—S. 115—Revision—Error of law or fact.

———The fact that a Court is guilty of error of law or error of fact is no ground for interfering with his decision in revision. 30 Cal. 397, Rel. on. (*Cuming, J.*) Dwitiar Chand *v.* Dharanidhar Mandal. **A. I. R. 1929 Cal. 831.**

—S. 115—Revision—Erroneous decision.

———*Contingent right—Sale of.*

Where the right to receive lease money was attached and sold before the period for which the lease money was payable had expired and a decree was passed in suit for the recovery of the lease money, the decision of the Court is so obviously erroneous and directly opposed to settled principles as to necessitate the High Court to interfere in revision. A. I. R. 1926 Nag. 396; A. I. R. 1925 Pat. 310, Ref. (*Macnair, Offg. J. C.*) Pandurang *v.* Sitaram. **119 I. C. 673 = A. I. R. 1929 Nag. 228.**

———An erroneous decision on an issue is no ground for revision during the pendency of the suit. (*Mya Bu, J.*) Tun Hlaing *v.* Ma Kha Bu. **A. I. R. 1929 Rang. 270.**

—S. 115—Revision—Evidence.

———The High Court will be justified in interfering in revision where the lower Court refuses a party leave to adduce evidence in a guardianship proceeding. (*Suhrawardy and Costello, JJ.*) Rosulan Bibi *v.* Rahamatulla Khan. **34 C. W. N. 763.**

———If such Court finds the loss of a document not proved and refuses to admit secondary evidence it cannot be said that it has refused to exercise jurisdiction or has exercised jurisdiction with material irregularity, nor is there any gross or palpable error to justify interference in revision. A. I. R. 1926 Nag. 290 and 19 Cal. 438 (P. C.), Rel. on; A. I. R. 1926 Nag. 257; A. I. R. 1927 Nag. 286, Expl. and Dist.; A. I. R. 1924 Cal. 633, Dist. (*Jackson, A. J. C.*) Pandu *v.* Bapu Das. **121 I. C. 33 = A. I. R. 1929 Nag. 288.**

—S. 115—Revision—Examination of parties.

C. P. CODE (1908), S. 115—Revision—Finding of fact.

———*Failure to examine to ascertain real points in dispute justifies interference in revision.*

The powers which O. 10 of the C. P. Code vest in the Civil Courts to examine the parties are mainly intended to draw out by *viva voce* examination the real points in controversy between them and thus prevent the real matter in dispute remaining undecided or left out from consideration. There are other enabling provisions also in Os. 11 and 12 of the C. P. Code which the parties can avail themselves of and thus reduce the points of dispute between them and lessen the number of issues to be framed in the case. Where the Court fails to perform this duty, the High Court will interfere in revision. (*Kinkhede, A. J. C.*) Balaji Vinayak Buti *v.* Vithoba. **79 I. C. 614 = A. I. R. 1924 Nag. 191.**

—S. 115—Revision—Execution.

———A revision is competent where a decree-holder is deprived of his just remedy by an erroneous view of the Court.

Where under the provisions of the security bond, the surety is liable to pay the decretal amount, if the decree-holder fails to realize his decree for any reason whatsoever, the view of the Court refusing to execute the decree against surety when he is liable to be proceeded against under the terms of the bond is open to revision. (*Jai Lal, J.*) Fazal Qadir *v.* Muhammad Mahmud. **31 P. L. R. 105 = A. I. R. 1930 Lah. 512.**

———Where a suit is instituted in respect of a matter which can be agitated only in execution in the same Court, the suit should not be dismissed but the plaint should be treated as an application for execution. Failure to do so can be rectified in revision. (*Mittra, O. J. C.*) Sitaram *v.* Donger Singh. **59 I. C. 477 = A. I. R. 1921 Nag. 130.**

—S. 115—Revision—Extension of time for discharge.

———The High Court will not interfere in revision with a discretionary order under S. 43 of the Provincial Insolvency Act granting extension of time for applying for discharge. (*Ramesam, J.*) Selvam Chettiar *v.* Venkatachalam Chettiar. **(1930) M. W. N. 673.**

—S. 115—Revision—Finding of fact.

———If the conclusion on a question of fact is arrived at by overlooking a clear provision of law, then such a finding can be interfered with under S. 115, C. P. Code, on the ground that it is a perverse one. 16 M. L. T. 156, Foll. (*Madhavan Nair, J.*) M. & S. M. Ry. Co. *v.* Gangammal. **109 I. C. 696 = A. I. R. 1928 Mad. 484.**

———*Finding based on no evidence—Interference is justified.*

A finding based upon no evidence is not a good finding in law and can be interfered with on the revision side by the High Court. (*Moti Sagar, J.*) Firm Indraj Mal Jugal Kishore *v.* Lije Ram. **86 I. C. 383 = 6 L. L. J. 593 = A. I. R. 1925 Lah. 278.**

———Where lower appellate Court disregards the admissions in the pleadings and the decision of the case is against the pleadings themselves, High Court has power to interfere. 25 All. 509, Foll. (*Baker, Offg. J. C.*) Kashiram *v.* Barkya. **77 I. C. 46 = 7 N. L. J. 13 = 21 N. L. R. 6 = A. I. R. 1924 Nag. 101.**

———*Small Cause Courts.*

Small Cause Courts have doubtless been given very wide powers with regard to decisions on question of fact and in revision, the High Court is always reluctant in questioning a decision on the facts. But there is no doubt that it has, for good reasons, power to do so. In cases where the findings of fact are based on or involve assumptions or inferences which there is nothing in fact or probability to support, or are not justified by sufficient evidence or where the finding or fact is opposed to the evidence or on flagrant misinterpretation or disregard of evidence, or if injustice would otherwise be done the High Court has power to interfere in revision. (*Prideaux, A. J. C.*) PADAMSI *v.* SESHRAO. **73 I. C. 1055 = 19 N. L. R. 72 = A. I. R. 1923 Nag. 292.**

—S. 115—Revision—Fresh petition.

———A fresh petition for revision can lie where the previous petition is dismissed for default A. I. R. 1923 Pat. 514, Dist. (*Jai Lal, J.*)) NEBA RAM *v.* KHOTA RAM. **110 I. C. 833 = A. I. R. 1928 Lah. 550.**

—S. 115—Revision—In forma pauperis.

———An order rejecting an application for leave to sue *in forma pauperis* cannot be impeached in revision. Where a Court having jurisdiction to entertain an application, upon a review of the evidence rejects that application on the merits, the Court cannot be said to have acted with material irregularity or illegality in the exercise of the jurisdiction which it was possessed of, merely because the Court has not given detailed reasons for its view. (*Niamatullah and Sen, JJ.*) MAJID HUSAIN KHAN *v.* AINUL AZIZ KHAN. **125 I. C. 578.**

—S. 115—Revision—Interest.

———Where a Court arbitrarily reduced the amount of interest payable by virtue of a contract without giving any reason therefor in the judgment, *held*, that a revision lay. (*Shadi Lal, C.J.*) AMAR SINGH DHUNI MAL *v.* SAT DHARAM PARCHARK PRESS, DELHI. **100 I. C. 75 = A. I. R. 1927 Lah. 798.**

—S. 115—Revision—Interference unnecessary.

———Where an order, against which the revision was filed, had been taken benefit of by the respondent and the decision of the question raised was really important for further proceedings rather than the order itself.

Held, that it was unnecessary to set aside the order in revision. (*Ramesam, J.*) MUTHIA CHETTIAR *v.* EKAPPA CHETTIAR. **101 I. C. 646 = A. I. R. 1927 Mad. 598 = 52 M. L. J. 597.**

—S. 115—Revision—Interrogatories.

———A refusal to issue interrogatories for the examination of witnesses is not a ground for revision. (*Scott-Smith, J.*) ROOP CHAND *v.* CHURCH MISSIONARY. **69 I. C. 417 = A. I. R. 1923 Lah. 282.**

—S. 115—Revision—Irrelevant decision.

———Where a lower Court decides a case, on a question not arising in the case, on that ground alone a revision lies. (*Johnstone, J.*) LAL SINGH *v.* MUHAMMAD AFZUR. **A. I. R. 1930 Lah. 80.**

—S. 115—Revision—Issues.

———Where upon the pleadings clearly an issue arises whether the rent payable by the defendant is below the prevailing rate and the trial Court, on being so requested refuses to frame the same,

Held, that the case is perhaps near the border line so far as S. 115 of the C. P. Code is concerned, but it is clear that under S. 107 of the Government of India Act it is a fit case for interference in revision. 15 C. W. N. 682, Dist. (*Mullick and Ross, JJ.*) SHEO PRASAD SINGH *v.* SUKHU MAHTO. **72 I. C. 148 = 4 P. L. T. 401 = 1 Pat. L. R. 89 = A. I. R. 1923 Pat. 518.**

———Where the Court under a mistake frames issues which do not arise from the plaint as drafted and rejects application to confine issues to the matters set up in the plaint, revision of the order is possible. 12 Bom. 617

and 42 Cal. 926, Rel. on. (*Jackson, A. J. C.*) PREMSHEK DAS *v.* SHANKER DAS. **120 I. C. 404 = A. I. R. 1929 Nag. 347.**

—S. 115—Revision—Issue ignored.

———The suit was for damages for use and occupation against the legal representative of a tenant holding over. The defendant in her written statement challenged the plaintiff's title. The defendant did not abandon the issue. The Court ignored the issue of title.

Held, that the plaintiff was not absolved from the duty of proving his title and that as the defendant was prejudiced by the Court having so absolved the plaintiff, the High Court should interfere in revision. (*Devadoss and Wallace, JJ.*) KOPPA ANKI *v.* VENKADA SUBBAYYA. **87 I. C. 695 = A. I. R. 1925 Mad. 884 = 48 M. L. J. 685.**

—S. 115—Revision—Jurisdiction.

———Where an inferior Court disposes of a case which should have been heard by a superior Court, there is ground for thinking that the parties were prejudiced and the High Court can interfere under S. 115, C. P. Code. 21 P. R. 1918, Foll. (*Addison, J.*) BANNI *v.* MANGU. **114 I. C. 440 (Lah.).**

———On the question of jurisdiction whether under S. 115 or S. 100 of the Code, a discretion rests with the High Court whether it is in the interests of justice to interfere. (*Findlay, J. C.*) RAJARAM *v.* MUKUND RAO. **100 I. C. 37 = A. I. R. 1927 Nag. 164.**

———Provincial Small Cause Courts Act, Sch. II, Art. 35 (*g*)—Suit for recovering jewels etc. given for marriage arranged, which had fallen through, is not cognizable by Small Cause Court. But when it has been fully tried on merits, High Court cannot interfere in Revision. (*Boys, J.*) RAGHURAJ SINGH *v.* SHAM DEI. **81 I. C. 870 = 5 L. R. A. Civ. 685 = A. I. R. 1925 All. 51.**

———Where a suit for less than Rs. 500 was of a small cause nature and was tried by the Munsif on the Original Side and the decision was confirmed in appeal, the High Court refused to interfere in revision and to remand the suit for retrial on the Small Cause side,

Held, also that no second appeal lies 33 Mad. 323 and 34 Bom. 171, Dist. (*Spencer and Ramesam, JJ.*) BHUVANAPALLI SUBBAYYA *v.* RAJAH VELUGOTI GOVINDA KRISHNA YACH. **66 I. C. 207 = 14 M. L. W. 349 = A. I. R. 1922 Mad. 352 = 42 M. L. J. 118.**

———Proceedings under O. 41, R. 23 instead of under O. 41, R. 25 does not create a point of jurisdiction as to justify interference. (*Newbould, J.*) ATUL CHANDRA *v.* KOBAD ALI. **64 I. C. 436 (Cal.)**

—S. 115—Revision—Just order.

———*Wrong provision of law followed.*

Where the order passed by the Assistant Collector under the Oudh Rent Act was passed under O. 9, R. 16 instead of under the correct provision contained in O. 17, R. 3, yet as the order was manifestly a just and sensible order, it was not interfered with in revision. (*Simpson and Syed Wazir Hasan, A. J. Cs.*) CHAUKARJA *v.* KALKAPANDE. **72 I. C. 394 = 9 O. L. J. 543 = A. I. R. 1923 Oudh 18.**

—S. 115—Revision.

———*No appeal—O. 22, R. 3.*

Wallace, J.—Order granting an application praying that the abatement of a suit be set aside on the ground that O. 22, R. 3 did not apply, but O. 22, R. 10 applied is merely an order that there has been no abatement and does not purport to give or refuue to give leave to continue the suit under O. 43, R. 1, cl. (*e*) and therefore is revisable. (*Coutts Trotter, C.J., Beasley and Madhavan Nair, JJ.*) PERUMAL PILLAI *v.* PERUMAL CHETTY. **51 Mad. 701 = 112 I.C. 116 = 28 M.L.W. 164 = 1928 M.W.N. 434 = A. I. R. 1928 Mad. 914 = 55 M.L J. 253 (F.B.)**

———Order refusing to substitute a certain person as legal representative is revisable. 15 N.L. R. 21, Rel. on; 46 Cal. 962, Ref. (*Subhedar, A. J. C.*) KASHIBAI *v.* SHRI KUMAR. **A. I. R. 1930 Nag. 10.**

—S. 115—Revision—Local investigation.

———The High Court should not interfere in revision or under powers of superintendence to prevent what would be a calamitous waste of time and money if local investigation were to take place. If it would be not only fruitless but would be determining the rights of the parties upon an improper basis and would inevitably and unnecessarily prolong a litigation, High Court ought to interfere to prevent such a calamity. (*Dawson Miller, C. J. and Foster, J.*) RAMAJI RAM *v.* RAMASRE RAUT. **83 I. C. 124 = 1924 P. H. C. C. 217 = A. I. R. 1924 Pat. 761.**

—S. 115—Revision—Madras Agency Rules.

———Where after expiry of the period for preferring an appeal to the Agent to the Governor, under the Agency Rules, a petition was presented to the Agent to be disposed of as an appeal or a petition under S. 55 of the Rules, but was dismissed as not giving satisfactory reasons, High Court would not interfere in revision. A. I. R. 1926 Mad. 218, Ref. (*Mackay, J.*) JAGANNADHAN *v.* CHENDRAMMA. **119 I. C. 320 = A. I. R. 1929 Mad. 489.**

—S. 115—Revision—Maintainability of suit.

———*Pending suits—Maintainability of suit questioned—Interference is justified.*

Obiter.—If a suit is not maintainable at all, it might in some cases be advisable for the High Court in revision to inferfere and thus to prevent further waste of time and money, the ground of interference being that a Court has no jurisdiction to proceed with a suit which is not maintainable in law. (*Wallace and Madhavan Nair, JJ.*) BALAKRISHNA ODAYAR *v.* V. JAGANNADA CHARIAR. **87 I. C. 194 = A. I. R. 1925 Mad. 820 = 48 M. L. J. 534.**

—S. 115—Revision—Misconception.

———If the lower Court's method of arriving at the conclusion is irregular and if it entirely misconceives the point at issue, there is sufficient ground for High Court's interference in revision. (*Brown, J.*) MAUNG PO HTAIK *v.* BRAMA DIN. **119 I. C. 740 = 7 Rang. 300 = A. I. R. 1929 Rang. 244.**

—S. 115—Revision—Mistake.

———A mistake committed by a Court on the point of costs is hardly a ground for revision. (*Jai Lal, J.*) GANGA BISHEN *v.* MURREE BREWERY CO. OF RAWALPINDI. **109 I. C. 476 = 10 L. L. J. 401 = A. I. R. 1928 Lah. 800.**

—S. 115—Revision—No prejudice.

———The High Court will not interfere in revision when the applicant has suffered no prejudice and the order complained against does not affect his interests. (*Suhrawardy and Ghose, JJ.*) SURAJ NARAIN DAS *v.* AMIRUDDIN MAHOMED. **66 I. C. 127 (Cal.).**

—S. 115—Revision—Question of fact.

———Whether a particular grant was made to a person not holding the kudivaram is a pure question of fact to

be decided as such and the High Court would not go into it either in revision or even in second appeal although the decision of this question is necessary to see whether the suit lies to a Civil Court. 20 C. L. J. 213, Rel. on.; 40 All. 674; 41 All. 602 and A. I. R. 1926 P. C. 142, Dist. (*Wallace, J.*) KISHEN PRASAD *v.* K. DALAYYA. **116 I. C. 133 = A.I.R. 1929 Mad. 259.**

—S. 115—Revision—Rangoon Municipal Act.

———*Decision under.*

The decisions of the Rangoon Small Cause Court in dealing with references under the Rangoon Municipal Act, 1922, are subject to revision under S. 115, C. P. Code. (*Doyle, J.*) M. A. SHAKUR *v.* MUNICIPAL CORPORATION. **92 I. C. 780 = 4 Bur. L. J. 161 = A. I. R. 1925 Rang. 367.**

—S. 115—Revision—Remand.

———No revision lies from an order of remand. (*Rafique, J.*) BISHNATH SINGH *v.* MT. RAM SRI. **76 I.C. 525 = A. I. R. 1923 All. 464.**

———An order of remand is not an interlocutory order as it entirely disposes of the case so far as the Court passes it for the time being. (*Ashworth, J. C.*) FARZAND ALI *v.* EKADASHI. **73 I. C. 591 = 26 O. C. 10 = 10 O. L. J. 36 = A. I. R. 1923 Oudh 177.**

—S. 115—Revision—Restoration.

———A suit for pre-emption was dismissed for default owing to absence of plaintiff on the day of hearing. The plaintiff put in an application for the restoration of the case on the ground that his absence was unavoidable by reason of an attack of colic. The lower Court disbelieved his evidence and dismissed his application. *Held*, there was no scope for interference as the Court could not be said to have acted illegally or with material irregularity. (*Le Rossignol, JJ.*) FARIDA *v.* KHAIRA. **77 I. C. 336 = 3 Lah. 79 = A. I. R. 1922 Lah. 290.**

—S. 115—Revision—Return of plaint.

———Where a plaint presented to the Subordinate Judge, First Class, was returned for presentation to the proper Court and on appeal the District Judge affirmed the order, *held* that a revision was not maintainable against the appellate order. (*Addison, J.*) RALLA SINGH *v.* AROORA MAL. **31 P. L. R. 178.**

———A High Court could not interfere in revision with an order of a lower Court returning the plaint for presentation to proper Court, as the plaintiff has got the remedy of proceeding with the suit in the proper Court. The provision of S. 115, C. P. Code can be invoked only if the petitioner has no other remedy open to him to get redress and irreparable injury would result to him unless interference was made. (*Percival, J. C. and Rupchand Bilaram, A. J. C.*) GOPALAMAL PAMANMAL *v.* SUNDERDAS PARMANAND. **118 I. C. 193.**

—S. 115—Revision—Review.

———A suit by several plaintiffs was decreed and appeal was filed therefrom. Appellants finding one plaintiff-respondent dead, applied for substitution of his representatives. The appellate Court held the application out of time and declared appeal as abated. It was however discovered that the plaintiff had died during suit. The appellants therefore applied for review and the order on review was that the decree of the lower Court being in favour of dead person was nullity and therefore no appeal lay.

Held, that the order on review created an anomalous position and therefore should be set aside in revision. (*Tekchand, J.*) SIKANDAR KHAN *v.* BALAND KHAN. **8 Lah. 617 = 29 P. L. R. 81 = A. I. R. 1927 Lah. 435.**

——A Judge is not likely to entertain a review of his own judgment unless he is *prima facie* satisfied that the new matter is important, and simply because the Court has not said in so many words that the matter is important, interference in revision is not competent. (*Odgers and Curgenven, JJ.*) SRINIVASA AIYANGAR *v.* OFFICIAL ASSIGNEE MADRAS. **50 Mad. 891= 39 M. L. T. 11=103 I. C. 377= 26 M. L. W. 277=1927 M. W. N. 806= A. I. R. 1927 Mad. 641=52 M. L. J. 682.**

——No revision lies from an order rejecting an application for review. (*Wazir Hasan, A. J. C.*) BABU SHEOCHARAN DAS *v.* MT. JAGWANT KUAR. **88 I. C. 582=12 O. L. J. 443= 2 O. W. N. 419=A. I. R. 1925 Oudh 594.**

——An order rejecting an application for review is not open to revision. (*Broadway, J.*) TOLA RAM *v.* CHANDU MAL TOTA RAM. **71 I. C. 160= A. I. R. 1924 Lah. 400.**

—S. 115—Revision—Right to sue.

——Denial of right to sue where such right to sue is available to the plaintiff is a matter which comes under S. 115 (*b*), and revision lies against a finding to that effect. (*Kemp, Ag. C. J. and Murphy, J.*) RATANLAL GHELABHAI *v.* AMARSING RUPSING. **53 Bom. 773= 31 Bom. L. R. 1042=A. I. R. 1929 Bom. 467.**

—S. 115—Revision—Scope of.

——High Court will not extend its interference in revision to matter in which it would not interfere even in second appeal; 20 C. L. J. 213, Foll. (*Wallace, J.*) KISHEN PRASAD *v.* K. DALAYYA. **116 I. C. 133= A. I. R. 1929 Mad. 259.**

—S. 115—Revision—Security.

——A finding that security offered by applicant is insufficient is not revisable. (*Simpson, A. J. C.*) JAIDAT SINGH *v.* BALDEO SINGH. **90 I. C. 1051= A. I. R. 1926 Oudh 160.**

—S. 115—Revision—Technical ground.

——High Court will not interfere in revision only on technical grounds. (*Banerjee, J.*) RAMARAJ SINGH *v.* RABI PROSAD **63 I. C. 140 (All.).**

—S. 115—Revision—Transfer.

——Section 24 of the C. P. Code requires the Court to issue notice to the parties before it makes an order for transfer otherwise than of its own motion and an order for transfer made without notice to the other party can be set aside in revision and on the application of the party. (*Martineau, J.*) LABHU RAM *v.* KARTA RAM. **78 I. C. 614=A. I. R. 1925 Lah. 189.**

—S. 115—Revision—Withdrawal of suit.

——Where a Court having jurisdiction to entertain an application under O. 23. R. 1, C. P. Code, comes to the conclusion that there is some ground for allowing the suit to be withdrawn and directs the suit to be withdrawn by safeguarding the interests of the defendants as to costs, the order cannot be challenged under S. 115, even if the Court exercised its discretion wrongly in favour of the plaintiff. 40 All. 612, Foll. (*Sen and Niamatullah, JJ.*) JAGADAMBA PRASAD *v.* HORI LAL. **1930 A. L. J. 1209=125 I. C. 580.**

—S. 115—Revision—Written statement.

——*Order refusing permission to file.*

In a suit against a firm an order refusing permission to a partner to file a written statement to resist the claim was passed.

Held: that as the order passed was not appealable and the partner would have no right of appeal from decree which would be passed against the firm in his absence, the case is "case decided" within S. 115. (*Sulaiman, J.*) SITAL PRASAD *v.* PEAREY LAL. **1930 A. L. J. 1212=A. I. R. 1930 All 701.**

—S. 115—Right to apply.

——*Order refusing pleader to appear.*

Where the Court on an application of a party refuses to allow a particular pleader to appear and conduct his case, that party is entitled to file a revision petition against the lower Court's decision. He is as much interested in getting his vakil to appear for him as the other side is to prevent his appearance and it cannot be said that if the vakil does not choose to file a revision petition, the party will have no remedy. (*Kumaraswami Sastri and Wallace, JJ.*) GNANASAMBANDA *v.* RATHNASABAPATHY. **110 I. C. 544= A. I. R. 1928 Mad. 592.**

——*Setting aside* ex parte *decree—Plaintiff accepting costs.*

Where an order setting aside an *ex parte* decree has been passed and the plaintiff accepts costs and his pleader appears in Court thereafter, the plaintiff should be deemed to have accepted the order setting aside the decree and the order will not be interfered with in revision. (*Addison, J.*) BURDEN AND CO., *v.* ARMY CANTEEN BOARD, INDIA. **96 I. C. 782= A. I. R. 1926 Lah. 637.**

—S. 115—Scope of.

——Scope of words "in which no appeal lies thereto" is not restricted to cases where no appeal lies from order sought to be revised. (*Sulaiman and Niamatullah, JJ.*) BANI MADHO RAM *v.* MAHADEO PANDEY. **1930 A. L. J. 924=A. I. R. 1930 All. 604.**

——High Court's revisional power is not meant to correct a mere error of a question of fact or law but is confined to the question of jurisdiction. (*Young and Mukerji, JJ.*) ABDUL HAKIM *v.* MUKARRAM ALI. **124 I. C. 478=1929 A. L. J. 1157= A. I. R. 1930 All. 158.**

——Section 115 applies to jurisdiction alone, the irregular exercise of it or the irregular assumption of it and is not directed against the conclusions of law or fact in which the question of jurisdiction is not involved. Where, therefore, the Judge makes restitution of property sold in execution to judgment-debtors under S. 151 having jurisdiction to do so the mere fact that his order granting restitution is erroneous does not necessarily imply that he has acted illegally or with material irregularity and no revision lies from such order The Court may have committed mistake but it has jurisdiction to decide wrong as well as right. A. I. R. 1928 Lah. 140, Foll. (*Tapp, J.*) RAMZAN *v.* SATISH CHANDRA. **A. I. R. 1930 Lah. 468.**

——Revisional Court is not a Court of appeal and it is not every decision on a point of law or fact that can be corrected by the High Court in its revisional jurisdiction. A. I. R. 1917 P. C. 71, Expl. (*Mukerji and Niamatullah, JJ.*) DIPCHAND *v.* SHEO PRASAD. **119 I. C. 103=1929 A. L. J. 769= 51 All. 910=A. I. R. 1929 All. 593.**

——High Court will not extend its interference in revision to matter in which it would not interfere even in second appeal. 20 C. L. J. 213, Foll. (*Wallace, J.*) KISHEN PRASAD BAHADUR *v.* KOTTKOTA DALAYYA. **116 I. C. 133=A. I. R. 1929 Mad. 259.**

——Section 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it and is not directed against conclusion of law or fact, in which the question of jurisdiction is not involved. 11 Cal, 6 (P. C.) and A. I. R. 1917 P. C. 71, Foll.; 15 N. L. R. 21 and 7 N. L. R. 130, Dist. (*Ghulam Mohiuddin, A.J.C.*) FUNDILAL *v.* DAMRULAL. **115 I. C. 176 (Nag.).**

——Section 115 is not directed against conclusions of law or fact in which the question of jurisdiction is not

involved. A. I. R. 1917 P. C. 71, Foll. (*Jackson, A. J C.*) GAURISHANKER *v.* DEVIPRASAD.
120 I. C. 401 = A. I. R. 1929 Nag. 317.

———*Powers of High Court.*

———Per *Wazir Hasan, J.*—Where there is no right of appeal the High Court's power of interposition is provided by the creation of its revisional jurisdiction and that jurisdiction is extremely narrow and limited. It only arises in cases of an error of a Court below when such error affects its jurisdiction. Such revisional jurisdiction can be destroyed only by an express legislative enactmunt. (*Stuart, C. J. Wazir Hasan, Misra, Raza and Nanavutty, JJ.*) GAYA PRASAD *v.* KALAP NATH. **6 O. W. N. 661 = 4 Luck 539 = 119 I. C. 357 = A. I. R. 1929 Oudh 389 (F. B.).**

———The High Court has no power of revision in a case which decides a question of law and not a question of jurisdiction. 11 Cal. 6 (P.C.), Foll.; 30 All. 331, Ref. (*Doyle, J.*) U KYAWAHU *v.* U SHWE SO.
6 Rang. 667 = 114 I. C. 543 = A. I. R. 1929 Rang. 21.

———Section 115 applies to jurisdiction alone the irregular exercise or non-exercise of it and the section is not directed against conclusions of law or facts in which the question of jurisdiction is not involved. The refusal to issue a commission for the examination of a witness does not constitute a question in which jurisdiction was involved. A. I. R. 1924 Mad. 541, Not Foll.; A. I. R. 1917 P. C. 71, Foll. (*Percival, J.C. and Aston, A.J.C.*) SPENCER & CO. *v.* EDULJI, **23 S. L. R. 403 = 116 I. C. 97 = A. I. R. 1929 Sind 92.**

———In case where an appeal lies to this Court, a decision would not lie, but in other cases, the High Court is competent to call for the record of a civil case and pass such orders as it thinks fit even though other remedy may be open. 28 All. 72, Rel. on; 19 I. C. 736, Dist. (*Dalal, J.*) EMPEROR *v.* BEHARI LAL.
51 All. 338 = 12 A. I. Cr. R. 206 = 10 L. R. A.C.R. 125 = 114 I. C. 741 = 1929 A. L. J. 62 = A. I. R. 1928 All. 588.

———*Powers of High Court.*

The powers of revision vested in the High Court under S. 25 of Provincial Small Cause Courts Act are wider than those under C. P. Code, S. 115. (*Jai Lal, J.*) MD. SHAFI *v.* DELHI HOUSE OF MULTAN.
115 I. C. 757 = A.I. R. 1928 Lah. 274.

———What cannot be obtained by an appeal, a party ought not to be able to obtain by a Civil Revision Petition. A.I.R. 1927 Mad. 335, Ref. (*Odgers and Curgenven, JJ.*) KARUPPANNA PILLAI *v.* ETHUMALAI PILLAI. **103 I.C. 670 = A.I.R. 1927 Mad. 859.**

———*Practice.*

———An application for revision of the lower appellate Court's order dismissing the appeal from an order granting temporary injunction restraining execution of a decree was treated as an application to revise the order of the trial Court. (*Curgenven, J.*) AYYAMPERUMAL NADAR *v.* MUTHUSWAMI PILLAI. **38 M.L.T. 358 = 102 I.C. 700 = 26 M.L.W. 899 = A.I.R.'1927 Mad. 687.**

———The word "conclusive" in R. 63 is equivalent to "unappealable" and does not preclude revision in the case of an order under R. 60 or R. 61 in proper cases. A.I.R. 1923 Rang. 195, Expl. (*Findlay, J.C.*) HAJI DIWAN *v.* BHAO SINGH. **103 I.C. 12 = 10 N. L.J. 155 = A. I. R. 1927 Nag. 286.**

———S. 115 confers revisional jurisdiction on the High Court in cases in which no appeal lies to that Court. Its jurisdiction is not excluded by the fact that an appeal might lie to a subordinate Court. (*Sulaiman and Daniels, JJ.*) BISHESHAR PRASAD *v.* RAGHUBIR.
48 All. 168 = 24 A. L. J 83 = 90 I. C. 353 = A.I. R. 1926 All. 58.

———*Pleas under.*

A Court cannot at the same moment refuse to exercise his jurisdiction and act in the exercise of it with material irregularity. The one ground excludes the other. (*Cuming and Page, JJ.*) BASARATULLA MEAN *v.* RIAZUDDIN MEAN. **53 Cal. 679 = 30 C.W.N. 570 = 96 I.C. 705 = A. I. R. 1926 Cal. 773.**

———Cl. (*c*) of S. 115 has been advisedly framed in indefinite language in order to empower the High Court to interfere and correct gross and palpable errors of subordinate Courts. A.I.R. 1924 Cal. 633, Foll. (*Cuming and Mukerji, JJ.*) JOGESH CHANDRA *v.* RAMANI KANTA. **91 I. C. 839 = A.I.R. 1926 Cal. 530.**

———*Interlocutory orders.*

Revision lies when the order sought to be revised is not passed in the course of proceedings in the suit or when it terminates one way or the other any separate proceedings which may arise either before the suit is deemed to be instituted or after the suit has been disposed of; an instance of the former being proceedings in an application for leave to sue as a pauper and an instance of the latter being proceedings to set aside an *ex parte* decree or a dismissal for a default. 32 All. 623; A.I.R. 1922 All. 1; A.I.R. 1925 All. 610; A. I. R. 1926 Lah. 379 and A.I.R. 1925 Lah. 191, Ref. (*Jai Lal, J.*) FIRM BHAJAN RAM *v.* MT. NARAIN DEVI.
96 I. C. 830 = A.I.R. 1926 Lah. 642.

———*Technicality.*

The powers of revision should not be exercised in cases where by so doing the Court would be giving effect to mere technicalities of procedure at the expense of manifest justice. (*Dawson Miller, C. J., Mullick, Jwala Prasad, Das and Foster, JJ.*) RAM GOLAM SAHU *v.* CHINTAMAN SINGH. **5 Pat. 361 = 7 P.L. T. 313 = 93 I. C. 939 = 1926 P. H.C.C. 49 = A. I. R. 1926 Pat. 218 (F.B.).**

———*Powers of High Court.*

Per *Heald, J.*—Where the jurisdiction of the High Court has been questioned as to the High Court's revisional powers reference must be made to the provisions of S. 107 of the Government of India Act, rather than to S. 115 of the C. P. Code. (*Robinson, C. J., Heald and Rutledge, JJ.*) K.A.M. MOHIDEEN *v.* BUKSHI RAM. **91 I. C. 627 = 3 Rang. 410 = A. I. R. 1926 Rang. 33 (F. B.).**

———S. 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it, or illegal assumption of it. An application under that section may, therefore, fall to be considered on the grounds: (1) absence of jurisdiction; (2) refusal to exercise jurisdiction; and (3) where the Subordinate Court has not only had jurisdiction but has also exercised it but exercised it illegally or with material irregularity. The third ground would clearly include erroneous conclusions of fact or law reached in the exercise of jurisdiction, but it would certainly include such rules of procedure as lay down certain preliminary conditions on the fulfilment of which the exercise of jurisdiction one way or the other will depend. An order purporting to be passed under O. 23, R. 1, but made in disregard of the procedure presented therein is irregular exercise of jurisdiction and deserves revision. (*Wazir Hasan A.J.C.*) MD. EJAZ RASUL KHAN *v.* MUBARAC HUSAIN. **79 I. C. 1033 = 27 O.C. 231 = 11 O.L.J. 613 = A. I. R. 1925 Oudh 291.**

———Where the decision of the Court is the very basis and foundation of the jurisdiction in its limited sense as distinguished from the powers it has got, *held*, that the case comes within the scope of S. 115. (*Das, J.*) RAM KISHUN SINGH *v.* DAMODHAR PRASAD.
83 I. C. 599 = 5 P.L. T. 107 = 75 I. C. 836 = A.I.R. 1924 Pat. 506.

——*Powers of High Court.*

S. 25 of the Small Cause Court Act is of the widest scope in conferring discretion upon the High Court in contradistinction to the narrow terms of S. 115, C. P. Code. (*Duckworth, J.*) VALAB DAS *v.* MAUNG BA THAN. **1 Rang. 372=2 Bur.L.J. 154=26 Cr.L.J. 523=85 I.C. 362=A.I.R. 1924 Rang. 54.**

——S. 115 applies to jurisdiction alone, the irregular or non-exercise of it or the illegal assumption of it ; the section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. 40 Mad. 793. P.C. Foll. (*Raymond and Rupchand Bilaram, A.J.Cs.*) MESSRS. FORBES, FORBES CAMPBELL & CO., LTD. *v.* VERSIMAL DEWANMAL. **75 I.C. 1041=A.I.R. 1924 Sind 49.**

——*Interpretation.*

In absence of any other remedy S. 115 should receive a liberal rather than narrow interpretation. 65 I.C. 37,Foll. (*Raymond and Rupchand Bilaram, A.J.Cs.*) MESSRS. FORBES. FORBES CAMPBELL & CO., LTD. *v.* VERSIMAL DEWANMAL. **75 I.C. 1041=A.I.R. 1924 Sind 49.**

——It is only if the Court had acted illegally or with material irregularity in relation to the question of jurisdiction, that an application for revision can be maintained. 40 Mad. 793 (P.C.) and 40 All. 512, Foll. ; 44 Mad. 554 and 4 Pat. L. J. 340, not Foll. (*Banerjee, Piggott and Walsh, JJ.*) YAD RAM *v.* SUNDER SINGH. **74 I.C. 778=21 A.L.J. 313=45 All. 425=4 L. R. A. Civ. 402=A.I.R. 1923 All. 392 (F.B.).**

——S. 115, C. P. Code, which corresponds in its wordings to S. 44 of the Punjab Courts Act, applies to jurisdiction alone the irregular exercise, or non-exercise of it, or the illegal assumption of it and it is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. (*Moti Sagar, J.*) PUNJAB BANKING CO. *v.* DIWAN DHANPAT. **75 I.C. 487=A.I.R. 1923 Lah. 506.**

——*Powers of High Court.*

The powers of the High Court under S. 25 of the Small Cause Courts Act are wider than the powers under S. 115 of the Code. (*Walsh and Ryves, JJ.*) ABDUL AZIZ *v.* MUNNA LAL. **63 I.C. 435=19 A.L.J. 555=A.I.R. 1921 All. 325.**

——*Interpretation.*

The powers under S. 115 must receive a liberal rather than a narrow interpretation, particularly when the applicant has no other remedy. 40 Bom. 86, Foll. (*Kennedy, J. C. and Madgaonkar, A. J. C.*) NARAINDAS *v.* JASSOMAL. **65 I.C. 37=15 S.L.R. 135=A.I.R. 1921 Sind 80.**

——*Interpretation.*

S. 115 must be read as a whole. (*Saunders, J. C.*) MA KYAW *v.* MAUNG SHEIN GO. **63 I.C. 838=4 U.B.R.16=A.I.R. 1921 U.B. 27.**

—S. 115—Subordinate Court—Assistant Collector.

——The Court of the Assistant Collector when exercising jurisdiction over a class of cases in which the course of appeal lies to the Judicial Commissioner's Court is a Court 'Subordinate' to that Court and its orders are revisable. (*Simpson and Wazir Hasan, A. J.Cs.*) CHOUDHARAJA BAKSHA *v.* KALKA PANDE. **72 I.C. 394=9 O.L.J. 543=A.I.R. 1923 Oudh 18.**

—S. 115—Subordinate Court—Board of Revenue.

——*Madras Estates Land Act, S.* 192—(Per Phillips and Odgers, JJ.)—*Power under C. P. Code, S.* 115 *is inconsistent with that under S.* 205, *Madras Estates Land Act—High Court cannot revise orders of the Board of Revenue passed under Ch.* 11 *or S.* 205, *Madras Estates Land Act* (Venkatasubba Rao, J. contra).

The mere fact that the C. P. Code is made applicable to proceedings under the Act including presumably the proceedings of the Board of Revenue cannot by itself convert the Board of Revenue into a Civil Court subordinate to the High Court unless for some other reason it is a Civil Court subordinate to the High Court, such as is referred to in S. 3, C. P. Code, which it is not. Unless it can be said that the Board of Revenue is subject to the superintendence of the High Court when acting under S. 205 it is impossible to hold that it is a Court subordinate to the High Court. The circumstances that under O. 46, R. 1, C. P. Code, which is made applicable under the Act, the Board of Revenue can make a reference to the High Court on a question of law, and that under S. 202 "the High Court may, with the approval of the Local Government, make rules consistent with this Act, declaring that any portions of the C. P. Code cannot apply, etc.," can hardly be deemed to give power of superintendence to the High Court. 27 Bom. 575 and 30 Bom. 246 (P.C.), Dist. ; A. I. R. 1923 Cal. 169, Foll. ; A.I.R. 1921 Cal. 262, Appr. ; 49 Mad. 499 =A.I.R. 1926 Mad. 480=94 I. C. 164, Overruled. The Board of Revenue exercises judicial powers and is in that sense a Court as pointed out in 9 Cal. 295 but that does not make it necessarily an inferior Court subject to the High Court as the superior Court. In the absence of any provisions declaring the Board of Revenue to be subject to the appellate jurisdiction of the High Court it must be held that it is not so subject. 49 Mad. 499 ; A. I. R. 1926 Mad. 480, Overruled. Case law discussed. (*Phillips, Odgers and Venkatasubba Rao, JJ.*) RAGHUNADHA PATRO *v.* GOVINDA PATRO. **114 I. C. 161=A.I.R 1928 Mad. 1032=55 M.L.J. 798 (F.B.).**

——*Quaere.*—Whether the High Court has jurisdiction to interfere in revision with the orders of the Board of Revenue under Ss. 171 and 172 of the Mad. E.L. Act. (*Phillips, Krishnan and Ramesam, JJ.*) ZAMINDAR OF KALLIKOTE *v.* MONGOLOPUR. **24 M.L.W. 416=97 I.C. 921=A.I.R. 1926 Mad. 1047=51 M.L.J. 500.**

——Madras Estates Land Act, Ss. 171, 172, 173 and 192—Board of Revenue is not a Court subordinate to High Court under S. 115, C.P. Code. (Per *Spencer, J.* (*contra*; *Devadoss, J.*) BURLA APPANNA *v.* ANALA LATCHAYYA. **79 I.C. 372=33 M.L.T. 92=18 M.L.W. 849=47 Mad. 250=A.I.R. 1924 Mad. 119=45 M.L.J. 735.**

—S. 115—Subordinate Court—Collector.

——It is doubtful whether the High Court cannot interfere with the decision of the Collector made in the exercise of his discretion, refusing to issue a certificate under S. 10 of the Bombay Hereditary Offices Act. 8 Bom. 264, Doubted. (*Macleod, C. J. and Coyajee, J.*) GOVIND *v.* BALKRISHNA. **28 Bom. L. R. 456=94 I.C. 760=A. I. R. 1926 Bom. 308.**

——*Land Acquisition Act, S.* 18.

A revision over an order by a Collector dismissing an application made by a person under Land Acquisition Act, S. 18, to refer the matter of his right to receive the compensation instead of another, does not lie as the High Court is not competent to revise the order of the Collector. 65 P.R. 1915 and A.I.R. 1924 Mad. 442 (F.B.), Foll.; 67 P.R. 1916, not Appr. (*Jai Lal, J.*) MUSHTAQ ALI *v.* SECRETARY OF STATE. **31 P.L.R. 158=A.I.R. 1930 Lah. 242.**

——The Collector, though he may be acting judicially when exercising his functions under S. 18 and though he may even be called a Court, is certainly not a Court which is subordinate to the High Court for the purposes of S. 115, C. P. Code and therefore no revision lies

against his decision. Case-law referred. C. R. 230 of 1927, Dist. (*Mohiuddin, A.J.C.*) R. S. SETH GOVERDHAN DAS *v.* COLLECTOR OF BHANDARA.
123 I.C. 911 = A.I.R. 1930 Nag. 271.

—S. 115—Subordinate Court—Controller of Rents
———*Powers of High Court.*

———The jurisdiction of the High Court in revision is not conferred by the Rent Act. The High Court exercises its jurisdiction under S. 115 of C. P. Code and S. 107 of the Government of India Act and there cannot be any doubt that it has the power to revise an order passed by the Rent Controller without jurisdiction, although the order did not admit of revision by the President of the Tribunal. (*Greaves and B. B Ghose, JJ.*) SATYA NIRANJUN *v.* KARNANI INDUSTRIAL BANK, LTD.
30 C.W.N. 236 = 93 I.C. 56 = A.I.R. 1926 Cal. 708.

———*Rangoon Rent Act, S.* 15.

Per *Heald and Rutledge, JJ., Robinson, C.J., dissenting.*—The controller of Rents is not a Court nor a Civil Court. The High Court is not a Court of appeal from him as a Court nor has appellate jurisdiction over him nor is he a Court subject to the appellate jurisdiction of the High Court within the meaning of S.107 of the Government of India Act nor subordinate to the High Court within the meaning of S. 115 of the C. P. Code so as to make his decisions subject to revision by the High Court. A.I.R. 1923 Cal. 169 ; 26 C.W.N. 30 ; A.I.R, 1922 Cal. 427 ; 26 C.W.N. 102 ; 26 C.W.N. 53 and 9 Cal. 295 (P.C.), Dist. ; A. I. R. 1923 Rang. 94 (F. B.), Expl. (*Robinson, C.J., Heald and Rutledge, JJ.*) K. A. M. MOHIDEEN *v.* BUKSHI RAM. **3 Rang. 410 = 91 I. C. 627 = A.I.R. 1926 Rang. 33 (F.B.).**

—S. 115—Subordinate Court—District Munsiff—Madras Village Courts Act, S. 73.

———High Court can under S. 115, C. P. Code, revise the order of the District Munsiff under S. 73 of the Village Courts Act, as the District Munsiff acts as a Court subordinate to the High Court. 21 Mad. 363 and 24 Mad. 335, Ref. (*Ramesam, J.*) KONAKALLA RAMA RAO *v.* N. PITCHAYYA. **1927 M. W. N. 420 = 39 M.L.T. 25 = 104 I.C. 415 = A.I.R. 1927 Mad. 786 = 53 M. L. J. 131.**

—S. 115—Subordinate Court—Election Court.
———*Madras District Municipalities Act, S.* 52.

Order of Election Court under the Act is revisable by High Court ; the Judge is not a *persona designata*. A.I.R. 1923 Mad. 254 ; A.I.R. 1923 Mad. 192, Foll. ; A.I.R 1924 Mad. 561 (F.B.), Rel. on. (*Jackson, J.*) ATHIMOOLAM SERVAI *v.* GOPALA KRISHNA KONE.
105 I.C. 216 = 26 M.L.W 323 = 1927 M.W.N 646 = A.I.R. 1927 Mad. 921 = 54 M.L.J. 269.

———A Court dealing with an election enquiry is a Court subordinate to the High Court within S. 115, C.P.C. (*Wallace, J.*) AHMAD THAMBI *v* BASAVA.
72 I.C. 902 = 16 M.L.W. 898 = 1922 M.W.N. 813 = 46 Mad. 123 = A.I.R. 1923 Mad. 254 = 44 M.L.J. 69.

———The High Court has no jurisdiction to interfere with orders passed by Sub-Judge or District Judge on petitions presented under the rules for the decision of disputes as to the validity of an election held under Madras District Municipalities Act, as they are not Courts as defined by C. P. Code. 21 Bom. 279, Foll. (*Devadoss, J.*) DEIVANAYAGAM PILLAI *v.* MOHIDEEN ROWTHER. **70 I.C. 780 = 16 M.L.W. 827 = 1922 M.W.N. 818 = A.I.R. 1923 Mad. 169 = 44 M.L.J. 39.**

—S. 115 — Subordinate Court — First Judge of Small Causes, Rangoon.
———*Rangoon Rent Act* (1920), *S.* 18.

The first Judge of the Court of Small Causes acting under the provisions of the Rangoon Rent Act is a Court subordinate to the High Court within the meaning of S. 115 of C. P. Code. He decides questions of civil rights in the same manner as a Court exercising civil jurisdiction would do, and he must be regarded as a Civil Court and as a Court subordinate to High Court. S. 18 provides that his decision shall be final, but there is nothing to show that this expression is used in any other meaning than its ordinary legal meaning, *viz.* that his order shall not be appealable. (*Robinson, C.J., Pratt and MacGregor, JJ.*) MAHOMED EBRAHIM MOOLLA *v.* S. R. JANDASS. **70 I.C. 135 = 1 Bur. L. J. 138 = 11 L.B.R. 387 = A.I.R. 1923 Rang. 94 (F.B.).**

—S, 115 — Subordinate Court—Kumaun High Court.

———The High Court of Kumaun is not a Court subordinate to Allahabad High Court for purposes of revisional jurisdiction. (*Piggott, J.*) SADAR SINGH KONDARI *v.* AMAR SINGH KONDARI.
71 I.C. 991 = 45 All. 383 = A.I.R. 1923 All. 291.

—S. 115—Subordinate Court—Persona Designata.
———*Bombay City Municipal Act* (*III of* 1918), *S.* 33.

A judge acting under S. 33 is not a Court within the meaning of the C. P. Code and hence no revision lies from the decision under S. 115, C. P. Code. (*Macleod, C.J. and Crump, J.*) R. S. NAVALKAR *v.* MRS. SAROJINI NAIDU. **73 I.C. 133 = 25 Bom.L R. 463 = A.I.R. 1923 Bom. 421.**

———*Bombay District Municipal Act, S.* 22.

District Judge acting under Bombay District Municipal Act, S. 12, is not a Court within S. 115. 21 Bom. 279, Appr. (*Macleod, C. J. and Coyajee, J.*) GANGADHAR *v.* HUBLI MUNICIPALITY.
50 Bom. 357 = 28 Bom. L.R. 519 = 94 I.C. 660 = A.I.R. 1926 Bom. 344.

———*Madras City Municipal Act.*

Under the Municipal Act and the Rules framed under it the Chief Judge of the Small Cause Court for this purpose is *persona designata* and not merely a selected member of the Court chosen to represent it and therefore the High Court has no jurisdiction to entertain a revision against his order. A.I.R. 1924 Mad. 561, Dist. ; A.I.R. 1926 Rang. 25 (F.B.), Foll. (*Coutts-Trotter, C.J. Jackson and Sundaram Chetty, JJ.*) O.A.O.K. LAKSHMANAN CHETTIAR *v.* J. S. KANNAPPAR.
50 Mad. 121 = 24 M.L.W 773 = 1926 M.W.N. 986 = 99 I.C. 148 = A.I.R. 1927 Mad. 93 = 51 M.L.J. 738 (F.B.).

———*Rangoon Rent Act.*

The first (now Chief) Judge of the Rangoon Small Causes Court, when exercising the powers vested in him by S. 18 of the Rangoon Rent Act 1920 (S. 20 of Act IX of 1925) exercises those powers not as a Court but as a *persona designata* and therefore his decision thereunder is not subject to the revisional jurisdiction of the High Court. A.I.R. 1926 Rang. 25, Foll. ; A.I.R. 1923 Rang. 94 (F.B.), Overruled. (*Rutledge, C.J., Heald, Chari and Maung Ba, JJ.*) H.A. AZIZ *v.* KILYBOY.
4 Rang. 304 = 5 Bur. L. J. 117 = 98 I.C. 902 = A.I.R. 1927 Rang. 1 (F.B.).

—S. 115—Subordinate Court—Registrar.
———*Registration Act, S.* 75 (4).

Registrar acting under S. 75 (4) merely acts as if he were a Civil Court. He is not a Court subordinate to the High Court within S.115. (*Waller, J.*) NAGANNA NAIDU *v.* PATTABHIRAMAYYA. **109 I.C. 180 = 51 Mad. 245 = 27 M.L.W. 346 = 1928 M.W.N. 181 = A.I.R. 1928 Mad. 475 =**

54 M.L.J. 595.

—S. 115—Subordinate Court—Rent Court.

——Even where the District Judge has acted as a Rent Court, the High Court can interfere in revision under S. 115. (*Dalal, J.C.*) JAGANNATH PERSHAD *v.* BECHU.

27 O.C. 89 = 11 O.L.J. 77 = 5 L.R. Oudh 78 = 80 I.C. 327 = A.I.R. 1924 Oudh 349.

—S. 115—Subordinate Court—Resident, Aden.

——With regard to the questions arising in reference to cases to be stated by the Resident for the decision of the High Court under S.8, Aden Courts Act (II of 1864) the Resident's Court is subordinate to the High Court, and the application for revision under S. 115 would lie against the order of the Resident declining to make a reference under that section. 34 Bom. 267, Foll.; A.I.R. 1926 Bom. 139, Expl. and Dist.; 30 Bom. 246 (P.C.) and 27 Bom. 575, Rel. on. (*Patkar and Murphy, JJ.*) SEDECK ABDULLA *v.* MAHOMAD ABDULLA.

115 I.C. 407 = 31 Bom. L.R. 225 = A.I.R. 1929 Bom. 190.

—S. 115—Subordinate Court—Revenue Court.

——*Madras Act III of* 1895, S. 7.

No revision lies under S. 115, C.P. Code or S. 107 of the Government of India Act or S. 16 of the Madras Letters Patent against an order of the Revenue Divisional Officer acting under Act III of 1895 as such officer is not a Court subject to the superintendence of the High Court. Meaning of 'appellate jurisdiction' discussed. Case-law discussed. (*Ayling, Offg. C. J. and Odgers, J.*) *In re* PALANIKUMARA CHINNAYYA.

66 I.C. 566 = 14 M.L.W. 548 = 1921 M.W.N. 757 = A.I.R. 1922 Mad. 337 = 41 M.L.J. 577.

——The High Court has no jurisdiction to interfere in revision in a case cognizable by the Revenue Courts. (*Gokul Prasad, J.*) GANESH RAI *v.* FAIZAN.

61 I.C. 890 (All.).

—S. 115—Subordinate Court—Single Judge of High Court.

——A single Judge of the Chief Court sitting to hear and determine a suit in the exercise of the powers conferred by S. 10 of the Oudh Courts Act (1925) is not a court subordinate to the Chief Court within the meaning of S. 115, C.P. Code and therefore no revision lies against his decision. (*Stuart, C.J. and Wazir Hasan, J.*) BISENI BHUWAN RAJ KUER *v.* MINOR SON OF MADHO SINGH. **2 Luck. 1 = 3 O.W.N. 952 = 99 I.C. 547 = A.I.R. 1927 Oudh 59.**

—S. 115—Subordinate Court — Small Cause Judge.

——*Rangoon Municipal Act* (*VI of* 1922), *S*, 14.

The High Court has no jurisdiction to interfere in revision with the orders passed by the Chief Judge of the Small Cause Court, Rangoon, in the exercise of the powers conferred on him by S. 14 of the Rangoon Municipal Act. (*Rutledge, C.J., Heald and Chari, JJ.*) MUNICIPAL CORPORATION, RANGOON *v.* M. A. SHAKUR. **91 I.C. 550 = 3 Rang. 560 = 4 Bur. L.J. 202 = A.I.R 1926 Rang. 25 (F.B.).**

—S. 115—Withdrawal of suit.

——Where an appellate Court sets aside its judgment on review and then permits withdrawal of the appeal as well as the suit without granting permission to bring a fresh suit on the same cause of action, then although the effect of this order may be to deprive the defendant of the advantage of using the judgment in his favour as *res judicata* in subsequent cases and although the High Court may not approve of the order still it would be no ground for interference under S. 115. 29 Bom. 13 and A.I.R. 1929 Bom. 425, Dist. (*B.B. Ghose and Bose, JJ.*) SAHERJAN BIBI *v.* GOPAL CHANDRA.

34 C. W. N. 265 = A.I.R. 1930 Cal. 424.

——Where a court passes an order granting the plaintiff permission to withdraw the suit with liberty to sue again, but gives no reasons whatsoever for its order, High Court has reasons to interfere on the ground that the Court below has not applied its mind to the application and has therefore passed an order which could be revised under S. 115. (*Mukerji and Boys, JJ.*) JAGMOHAN SINGH *v.* RAM KHILAWAN DUBE.

119 I.C. 859 = 1929 A.L.J. 961 = A.I.R. 1929 All. 683.

——(*Suhrawardy and Chotzner, JJ.*) SUBASINI DEVI *v.* ASHUTOSH LAHIRI. **84 I. C. 372 = 39 C.L.J. 371 = A.I.R. 1924 Cal. 751.**

——(*Ashworth and Iqbal Ahmed, JJ.*) KAMTA SINGH *v.* BHAGAVANDAS. **106 I. C. 435 = 50 All. 199 = 25 A.L.J. 943 = A.I.R. 1928 All. 98.**

——*Discretion.*

Where a court has jurisdiction to grant leave to the plaintiffs to bring a fresh suit, the fact that the Court may have exercised, and probably did exercise, a wrong discretion in granting the plaintiffs' application, is not sufficient to bring the case within the purview of S. 115. 40 All. 612, Foll. (*Dalal, J.*) HASAN ALI *v.* LACHMAN PRASAD. **103 I.C. 372 = 25 A.L.J. 838 = A.I.R. 1927 All. 750.**

——(*Daniels, J.*) NANNHU *v.* ROSHAN SINGH.

74 I.C. 112 = A.I.R. 1924 All. 121.

——Where there was no material before the Court on which it was entitled to exercise the discretion allowed under O. 23, R. 1, but it did exercise its discretion,

Held, that it acted without jurisdiction. (*Ashworth, J.*) MAHABIR PRASAD *v.* MOHAMMAD ALI KHAN.

103 I.C. 229 = 25 A.L.J. 870 = A.I.R. 1927 All. 704.

——High Court will not interfere in revision with an order allowing withdrawal of a suit which was to be dismissed by the trial Court on a question of technicality. (*Mukerji, J.*) PANCHAMLAL *v.* MD. YAQUB KHAN.

24 A.L.J. 313 = 92 I.C. 558 = A.I.R. 1926 All. 294.

——In allowing plaintiff to withdraw his plaint by reason of a defect, not in form but in substance, the Judge exercises a jurisdiction not vested in him by law. The fact that injustice is about to fructify inasmuch as the second suit has progressed is no argument in its favour. (*Jackson, J.*) PALIKANJI CHETTIAR *v.* KRISHNA AIYAR. **23 M.L.W. 525 = 94 I.C. 983 = A.I.R. 1926 Mad. 863.**

——(*Mitter, J.*) HARSHAMUKHI DASI *v.* SARAT CHANDRA ATA. **117 I. C. 364 = 32 C. W. N. 1244.**

——Where a Court below has failed to exercise a judicial discretion an order under O. 23, R. 1, can be made the subject of revision. 21 O. C. 66, Foll. (*Daniels, J.C.*) RAJINDRA PURI *v.* BENI MADHO. **79 I.C. 1031 = 11 O.L.J. 351 = A.I.R. 1925 Oudh 140.**

——Where the real ground on which withdrawal was sought for in a suit for possession was that the evidence was not sufficient to identify the land in dispute with the plots belonging to the plaintiffs.

Held, that the order allowing withdrawal was without jurisdiction. (*Daniels, J. C.*) DAULA *v.* DWARKA PAL. **78 I.C. 121 = A.I.R. 1925 Oudh 61.**

——Order under O. 23, R. 1 passed by an Assistant Collector in an arrears of rent case, is revisable by High Court. (*Daniels, A.J.C.*) PULAI *v.* RANA UMANATH SINGH. **72 I.C. 1034 = A.I.R. 1924 Oudh 107.**

——Where the plaintiff put in an application for permission to withdraw it with liberty to bring a fresh suit, "for some reasons and defects" which were not specified and the Court simply passed an order thereon by writing the one word 'allowed' without anything further;

Held, the court had not exercised its jurisdiction as required by law. (*Banerji, J.*) RAHAMAT ULLAH *v.* DHARAM SINGH. **64 I. C. 948 = 20 A.L.J. 90 = A.I.R. 1922 All. 185.**

———An order under O. 23, R. 1 allowing withdrawal of a suit by a plaintiff is open to revision. (*Greaves, J.*) UDOY CHAND MANDAL *v.* MOLLA SYED REASAT HOSSAIN.

70 I.C. 484 = A.I.R. 1922 Cal. 58.

———(*Batten, Offg. J.C.*) SINGHAI RAJILAL *v.* KANHAI. **61 I.C. 584 = 18 N.L.R. 30 = A.I.R. 1922 Nag. 84.**

———Per *Mullick, J.*—The practice of the court has been to interfere either under the powers conferred, by S. 115, C. P. Code, or by the Government of India Act. (*Dawson Miller, C. J., Mullick and Jwala Prasad, JJ.*) RAJ KUMAR MAHTON *v.* RAM KHELAWAN SINGH.

64 I. C. 337 = 1922 P. H. C. C. 17 = 3 P.L.T. 80 = 1 Pat. 90 = A.I.R. 1922 Pat. 44 (F.B.).

———When the grant of leave to withdraw suit is improper it will be interfered with in revision. (*Richardson, J.*) KIRANMOYI *v.* RAMA NATH.

64 I.C. 556 (Cal.).

———Allowing on the ground of plaintiff's inability to produce important evidence, a suit to be withdrawn is illegal and materially irregular in exercise of jurisdiction and justifies revision. (*Das and Ross, JJ.*) UCHANT AHIR *v.* BASAWAN AHIR.

61 I. C. 639 = 6 P. L. J. 112 = 2 P.L.T. 634 = A.I.R. 1921 Pat. 42.

—S. 117—Original jurisdiction.

———*Code generally applicable.*

The C. P. Code is generally applicable to the High Court in the exercise of its ordinary original civil jurisdiction except where it is specifically excluded, or unless the High Court itself had made rules superseding any particular provisions of the Code. (*Venkatasubba Rao, J.*) YELUMALAI *v.* KUPPAMMAL.

27 M.L.W. 760 = 109 I.C. 173 = A.I.R. 1928 Mad. 385 = 54 M.L.J. 263.

—S. 119—Scope.

———Section 119 is not restricted to the admission of advocates, vakils and attorneys and to their professional conduct. (*Devadoss, J.*) *In the matter of a* VAKALATH. **109 I.C. 206 = A. I. R. 1928 Mad. 472.**

—S. 120—Original jurisdiction.

———The application of S. 20 to High Court in the exercise of its original jurisdiction is expressly excluded by S. 120, C. P. Code. (*Schwabe, C.J. and Wallace, J.*) PARAMESWARA *v.* V. MAHADEVI.

72 I.C. 982 = 1922 M.W.N. 841 = A.I.R. 1923 Mad. 272.

—S. 122—Applicability.

———*Rules for High Court ordinarily applies to both sides.*

Merely labelling a notification "Appellate Side" in he Gazette does not necessarily prevent a new rule applying to both branches of the High Court, unless the rule itself expressly says that it does not apply. Technically, R. 72-A, O. 21 would in terms apply to the original side as well as to the appellate side. (*Marten, C.J. and Blackwell, J.*) VRAJ LAL *v.* VENKATASWAMI. **52 Bom. 459 = 108 I.C. 794 = 30 Bom. L.R. 402 = A.I.R. 1928 Bom. 123.**

———*Sections do not apply to Patna High Court.*

The rules under S. 122 in order to have the effect of varying the rules in the first Schedule to the Code must first have been considered and submitted by a Rule Committee appointed under S. 123. R. 6 of Chap. 7 of the Rules of the Patna High Court is not a rule made under S. 122 of the C. P. Code. Hence R. 6, Chap 7, does not, therefore, add anything to O. 41. R. 1, and a second appeal is not barred by limitation notwithstanding that a copy of the judgment of the trial Court is not filed in time. 40 All. 1 (F. B.) Dist. 32 Bom. 14 Foll. (*Jwala Prasad and Ross, JJ.*) RAMDEO SINGH *v.* MUKHAM SINGH. **74 I. C. 330 = 1923 P. H. C. C. 19 = A. I. R. 1921 Pat. 509.**

———*Ss.* 122 *and* 123 *do not apply to Patna High Court.*

The High Court Rules of Patna were framed under Cl. 29 of the Letters Patent. Although the rules were not submitted to any Rule Committee, they are quite legal. Ss. 122 and 123, C. P. Code do not include the High Court at Patna as it was not established when the C. P. Code of 1908 was enacted. Where an appeal was dismissed for default in furnishing the list of papers to be printed in the paper-book,

Held, that it was not a proper case presented for granting leave to appeal to the Privy Council. (*Dawson Miller, C. J. and Mullick, J.*) RAJENDRA KISHORE *v.* RAJKUMAR KAMAKHYA NARAIN SINGH.

60 I. C. 285 = 2 P. L. T. 112 = 1921 P. H. C. C. 97 = A. I. R. 1921 Pat. 83.

—S. 122—Applicability to Chief Court.

———The Chief Court of Oudh is a High Court within the meaning of C. P. Code. (*Stuart, C. J. and Raza, J.*) PUNJAB NATIONAL BANK, LTD. *v.* JAI RAM DAS. **4 O. W. N. 1114 = A.I.R. 1928 Oudh 89.**

———*Appeal—Rules as to S. 72.*

Under Ch. 3, R. 2 of the Rules made by the Allahabad High Court and O. 42, R. 1, as amended by the Allahabad High Court, a memorandum of second appeal must be accompanied by a copy of the judgment of the Court of first instance. Otherwise the Court must refuse to accept the memorandum under S. 122 of the C. P. Code. Both Ch. 3, R. 22 of the Rules of the Allahabad High Court and the amendment made by that Court in O. 42, R. 1, are *intra vires*. The terms of the amended O. 42, R. 1, do not allow the construction that the Court can dispense with the copy of judgment of the trial Court. But when a properly constituted appeal is presented out of time, nothing prevents the application of Limitation Act, S. 5 in a proper case. (*Walsh, Lindsay and Sulaiman, JJ.*) BHAIRON GULAM *v.* RAM AUTAR SINGH.

63 I. C. 338 = 43 All. 660 = 19 A. L. J. 598 = A. I. R. 1921 All. 23 (F.B.).

—S. 122—Scope of.

———*Rules cannot override C. P. Code.*

The basis of the power of High Court to frame rules is the power of High Court to do all things that may be necessary to do in order to carry out the provisions of the Letters Patent and the C. P. Code. That being the case and it being only a subordinate body in the matter of framing of rules it has no power to so frame rules as to override either the provisions of the C. P. Code, or the Letters Patent. (*Mukerji and Bennet, JJ.*) PAHUNCHI LAL *v.* BHUP SINGH. **A. I. R. 1930 All. 558.**

———A rule made by the High Court, if it is in conflict with the provisions of a section of the C. P. Code would be *ultra vires*. (*Dalal, J. C.*) SYED MOHAMMAD SHAKIR *v.* JUGAL KISHORE. **85 I.C. 455 =**

28 O. C. 169=A. I. R. 1925 Oudh 492.

———*Section allows only rules of procedure.*

Section 35 of the Letters Patent as well as S. 122 of the C. P. Code, and S. 108 of the Government of India Act (1915) merely give the High Court power to make rules and orders for the purpose of regulating proceedings in civil cases. (*Rutledge, C. J., Brown and Maung Ba, JJ.*) MA THAN *v.* MG. BA GYAW. **93 I. C. 124= 3 Rang. 546=4 Bur. L. J. 185= A. I. R. 1926 Rang. 1 (F. B.).**

———*Limitation cannot be affected.*

The High Courts are not entitled by rules to abrogate or vary the period of limitation set out in the Limitation Act, in respect of proceedings to which the provisions of Limitation Act, apply. (*Page, C. J., Carr and Cunliffe, JJ.*) (SHAKOOR) ABDUL GANNY *v.* MRS. J. M. RUSSELL. **A. I. R. 1930 Rang. 228 (F. B).**

———*Limitation.*

The High Court rule under the C. P. Code under S. 122 extending S. 5 of the Limitation Act to applications under O. 9. R. 13 is *intra vires* (*Coutts Trotter, C. J. Ramesam and Wallace, JJ.*) KRISHNAMACHARIAR *v.* SRI RENGAMMAL. **80 I. C. 877= 47 Mad. 824=20 M. L. W. 332=35 M. L. T. 43= 1924 M. W. N. 682=A. I. R. 1925 Mad. 14= 47 M.L.J. 409 (F.B.).**

———*Limitation cannot be affected.*

The High Court has power to alter, amend, and add to rules of procedure laid down in Code but it has no power to alter the period of limitation provided by the Limitation Act. (*Abdul Raoof, J.*) MADAN GOPAL *v.* MALAWA RAM. **68 I. C. 777= A. I. R. 1923 Lah. 96.**

—S. 125—Patna rules.

———*Publication need not be in entirety,*

The Patna High Court has adopted the General Rules and Circular Orders of the Calcutta High Court and though these rules have not been published by the Patna High Court, the rule by which the Rules of the Calcutta High Court were extended was properly published and this is sufficient publication, as there was no necessity to publish the rules in their entirety. (*Coutts and Sultan Ahmad, JJ.*) RAM CHANDRICA PRASAD SINGH *v.* RAM NIWAJI. **61 I. C. 666=2 P. L. T. 45= A. I. R. 1921 Pat. 428.**

—S. 125—Process papers.

———The rule which requires parties to file with their application for rehearing printed forms of processes duly filled up, is not inconsistent with the provisions of the C. P. Code. (*Coutts and Sultan Ahmad, JJ.*) RAM CHANDRIKA PRASAD SINGH *v.* RAM NIWAJI. **61 I. C. 666=2 P. L. T. 45= A. I. R. 1921. Pat. 428.**

—S. 126—Applicability.

———There is nothing in the Government of India Act or in the C. P. Code, which requires that the rules which the High Court may make for the conduct of its own business or for the regulation of the pleaders appearing before it should have the sanction of the Local Government. (*Devadoss, J.*) *In re* THE MATTER OF VAKALATH. **109 I. C. 206=A. I. R. 1928 Mad. 472.**

—S. 128—Negotiable instrument.

———A suit on a negotiable instrument provided for under O. 37 falls under the category of suits of the nature referred to in S. 128 (2) (*f*). and Act 5 of the Limitation Act of 1908 applies to such suits. 52 Cal. 954=A. I. R. 1925 Cal. 781. Diss. from. (*Lobo, A. J. C.*) FIRM OF JETHA DERJI AND CO. *v.* FIRM OF SHRIRAM MOOLCHAND. **98 I. C. 78=21 S.L.R. 257= A. I. R. 1927 Sind 90.**

—S. 128—Scope

———*Refers to rules under the present code.*

Per *Thiruvenkatachariar, J.*—S. 128 relates only to rules to be made under the present Code by the High Courts with the advice of the Rule Committee constituted under S. 123, (*Kumaraswami Sastri, Ramesam and Reilly, JJ.*) DHANARAJU *v.* MOTI LAL DAGA. **52 Mad. 563=29 M.L. W. 823=116 I. C. 343= A. I. R.1929 Mad. 641=57 M. L. J. 264 (F.B.).**

—S. 129—Scope of—Rules framed under—Conflict with the Code.

———*Obiter.*—The object of S. 129 is to provide for elasticity in procedure and to enable defects in the Code to be remedied without the dilatory process of legislation. There is nothing in the Code to say that those rules should not be inconsistent with the Code. (*Lord Williams, J.*) UMESHCHANDRA BANERJI *v.* KUNJALAL BISWAS. **57 Cal. 676.**

—S. 129—'Letters patent'

———S. 129 of the C. P. Code, 1908, may legitimately be read as referring to the Letters Patent of 1865 which were in force at the time of the passing of that Code and not the Letters Patent of 1862. (*Sanderson C. J. and Walmsley, J.*) UDOY CHAND PANNA LAL *v.* KHETSIDAS TILOKCHAND. **81 I. C. 1048=51 Cal. 905= 28 C. W. N. 916=A. I. R. 1924 Cal. 1025.**

—S. 132—Commission.

———An order for the examination of a witness on commission can only be made on the grounds in the C. P. Code and when such orders are issued otherwise than on these grounds it is a proceeding without jurisdiction. One should be very careful before permitting the issue of a commission which will deprive the other side of the great advantage of having a witness cross-examined before the face of the Court itself. The Court cannot be said to have acted with jurisdiction in taking away from a litigant the rights which he undoubtedly has, under the law, of having a witness brought before the Court and examined before the Court in accordance with the normal procedure and revision will lie. (*Odgers, J.*) SREENIVASA AIYANGAR *v.* RANGA AIYANGAR. **1927 M. W. N. 218= A. I. R. 1927 Mad. 524.**

—S. 132—Meaning.

———*"Appearance" is exempted, not attendance.*

The correct meaning of S. 132 (1), is that a lady who according to the customs and manners of this country ought not to be compelled to appear in public shall be exempt from personal appearance in Court, that is, from being exposed to the public gaze—such a person is exempt not from attendance in Court but from appearance in Court. "Appearance" means that she shall not be compelled to come forth into view or become visible to the public gaze. (*Lort Williams, J.*) RE BILASARY SEROWGEE. **33 C. W. N. 681= 56 Cal. 865=A. I. R. 1929 Cal. 528.**

—S. 132—Parda Ladies.

———*Right of parda ladies is absolute.*

Section 132 recognizes the right of ladies who are behind the parda according to the custom of the country to require that their evidence, if necessary, should be taken on commission. This is a right which the Court has no power to deny. (*Cammiade and S. K. Ghose, JJ.*) RAHIMANNESSA BIBI *v.* HALIM. **114 I. C. 95=A. I. R. 1928 Cal. 814.**

———*Exemption has reference to Court only.*

Pardanashin lady is not entitled to decline to be examined at any place other than that of her choice—C. P. Code, O. 26, R. 1. (*Ghose, J.*) KHITIPATI ROY *v.* DHARANI MOHAN. **48 Cal. 448=64 I. C. 228= A. I. R. 1921 Cal. 229.**

—S. 135—Accused.

———*Accused going to Court—Exemption applies.*

Where a person is ordered to appear as an accused in a criminal case and comes from another place to attend the Court, he is exempted from arrest under S. 135 (2) and such an arrest is illegal. The immunity from arrest is not for the benefit of the Court but for the furtherance of public interest and the better administration of justice. The person arrested is entitled to a refund of money which he paid in order to secure his release from arrest : 4 Mad. 317, Ref. (*Stuart, C.J. Wazir Hasan and Raza, JJ.*) C. CURSATJI *v.* HAR GOVIND DAYAL. **6 O. W. N. 809 = 119 I. C. 367 = A. I. R. 1929 Oudh 426 (F.B.).**

—S. 135—Exception.

———*Principle underlying.*

A judgment-debtor who is arrested in execution of a first decree and is present before the Court at the time of his arrest is not exempt under S. 135 from being arrested in execution of a second decree, as there is no obligation on the judgment-debtor to be present before the Court for the purpose of the execution of the first decree. (*Wallace and Jackson, JJ.*) GOVINDSWAMY ODAYAR *v.* THE UNION BANK LTD. **84 I.C. 513 = 35 M. L. T. 102 = 1924 M. W. N. 781 = A. I. R. 1924 Mad. 900 = 47 M. L. J. 678.**

—S. 135—No case pending.

———*Section does not apply.*

Where there is no case pending before the Court or set down for hearing, S. 135 cannot be invoked to claim immunity from arrest. (*Tapp, J.*) HAQ DAD KHAN *v.* MUL RAJ. **31 P.L.R. 188 = A.I.R. 1930 Lah. 736.**

—S. 135—Scope.

———*Protection is only in civil litigation.*

S. 135 only gives a person engaged in civil litigation sanctuary from arrest under civil process. And a warrant issued under S. 488, Cr. P. Code, though entrusted to a civil bailiff does not come within S. 135. (*Tek Chand, J.*) MT. DANI *v.* EMPEROR. **117 I.C. 238 = 30 Cr. L. J. 788 = 1929 Cr.C. 417 = A. I. R. 1929 Lah. 785.**

———*Protection is confined to route from and to Court.*

The protection given by S. 135 cannot be claimed by a witness who is claiming privilege to return by any route he pleases. His return must be straight from the court to the place whence he came in obedience to the summons. It cannot possibly be open to a witness claiming privilege to dictate as to how far out of the straight route he may or may not go. This, of course, does not mean that if a witness goes to his destination by a road a few yards out of the way he therefore necessarily loses his protection. (*Boys, J.*) BEHARI SINGH *v.* EMPEROR. **84 I.C. 64 = 46 All. 663 = 22 A. L. J. 638 = 5 L. R. A. Cr. 94 = 26 Cr. L. J. 240 = A. I. R. 1924 All. 676.**

—S. 136—Arrrest for contempt.

———*Arrest must be under the provisions of the Code.*

Disobedience of High Court's orders—High Court on its original side committing the person to the Presidency jail for contempt of Court—The person living outside the limits of High Court's ordinary original civil jurisdiction—High Court asked to direct the District Court to arrest the person in contempt—It is doubtful if the High Court on its original side can make such order under S. 136—The proper course would be for the High Court to pass an express injunction—Arrest might be ordered for breach of the injunction—S. 136 then directly applies. 26 Mad. 120, Ref. (*Rankin, C. J. and Mitter, J.*) SALAM CHAND *v.* JOOGUT KISHORE. **107 I. C. 65 = 55 Cal. 777 = 32 C. W. N. 114 = A. I. R. 1928 Cal. 462.**

—S. 136—Arrest by High Court in its appellate jurisdiction.

———*Sec. 136 applies.*

Where an order made by the High Court in its appellate jurisdiction is disobeyed and there is some difficulty as to the application of S. 136 due to the fact that though the person against whom the order is made is outside the limits of the ordinary civil jurisdiction of the High Court he is within the limits of its appellate jurisdiction there is nothing to prevent the High Court from adopting the procedure laid down in S. 136 and sending to the appropriate District Court the warrant of arrest and the order of attachment for necessary action being taken. The District Court, their officers and staff are undoubtedly subject to the jurisdiction of and are under the supervision of the High Court and there is no difficulty in directing this mode of execution. (*Venkatasubba Rao and Madhavan Nair, JJ.*) ADAIKKALA THEVAN *v.* IMPERIAL BANK, MADURA. **95 I.C. 196 = A.I.R. 1926 Mad. 574 = 50 M.L.J. 401.**

—S. 141—Appeal memorandum returned.

———An order returning a memorandum of appeal for presentation in proper Court is not an appealable order. 31 Cal. 344, Foll. (*Suhrawardy and Graham, JJ.*) GAIZADDY *v.* SUROJ KUMAR. **117 I.C. 849 = 32 C. W. N. 693.**

—S. 141—Applicability.

———*Specific provisions in the Code exclude the section.*

It is doubtful whether S. 141 which says that "the procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction" should be applied where procedure clearly laid down as in a matter under O. 34, R. 5. (*Wallace and Walsh, JJ.*) RASAN CHETTIAR *v.* RANGAYAN CHETTIAR. **30 M.L.W. 551 = 1929 M.W.N. 867 = 120 I.C. 72 = A. I. R. 1930 Mad. 105.**

———*O. 9, R. 9 applies to an application for second decree.*

If a decree is passed in the form prescribed as No. 4 in Appendix D to Sch. 1 with liberty to decree-holder to apply for personal decree for the amount of the balance such reservation of liberty does not amount to personal decree for the balance and a separate personal decree has to be subsequently passed. An application for such second decree is a continuation of the original suit and if it is dismissed for default, a second application is barred by O. 9. R. 9; 1 N.L.R. 143, Foll 29 All. 12 and A.I.R. 1924 P.C. 198 Dist. A.I.R. 1918 P.C. 159, Expl. (*Jackson A.J.C.*) DHARAMCHAND *v.* SHEORANLAL. **26 N.L.R. 154 = A.I.R. 1930 Nag. 188.**

———*O. 9, R. 9 applies to an application for personal decree.*

An application for a personal decree against a mortgagor where the sale proceeds of the mortgaged properties are insufficient to satisfy the decree is not an application in execution proceedings but is an application for a decree. Where such application is dismissed for default a fresh application is barred under O. 9, R. 9. Proper remedy of decree-holder is to set aside the order dismissing the application for default: 17 All. 106 (P.C.) and A. I. R. 1925 Cal. 834, Rel. on. (*Brown, J.*) A. K. R. P. L. A. CHETTYAR FIRM *v.* S. MEHER SINGH. **A.I.R. 1930 Rang. 257.**

———*S. 145 does not apply to sureties under Ss. 45 and 43 of Guardian and Wards Act.*

The proper remedy for the Court to proceed against the sureties on the surety bond executed by the guardian and the sureties is to assign the bond to enable the assignee to sue on the bond and not by issuing execution

on the strength of S. 141, C. P. Code A.I.R. 1926 Sind 35, Foll. (*Rupchand Bilaram and Lobo, A. J. Cs.*) NARAINDAS AILDAS *v.* MT. JHALIBAI.
103 I.C. 493 = A. I. R. 1927 Sind 262.

——*Civil Procedure Code applies to Succession Certificate Act.*

S. 141 refers only to the procedure in suits being applicable to other civil proceedings and does not confer any substantive rights not expressly given elsewhere by the Code, *e.g.*, the rights of appeal, revision or review; and any express provision in the Succession Certificate Act conferring these rights does not render the provisions of C. P. Code regarding procedure inapplicable to the Succession Certificate Act. (*Rupchand Bilaram and Tyabji, A.J.Cs.*) *In re* SUNDERDAS.
101 I. C. 166 = A.I.R. 1927 Sind 187.

——Order 9 applies by reason of S. 141 to applications made under O. 9, itself. 17 All. 106 (P. C.), Rel. on; 4 P. L. J. 287, Expl; 44 Cal. 950, 1 Lah. 339 and 18 Bom. 59, Ref. (*Phillips, J.*) VENKATANARASIMHA RAO *v.* HEWADRI SURAYANARAYANA.
92 I. C. 802 = 23 M. L. W. 409 = A. I. R. 1926 Mad. 325 = 50 M. L. J. 75.

——S. 141 of the C. P. Code has no application to the applications under S. 105 of the Bengal Tenancy Act. (*Dawson Miller, C. J. and Kulwant Sahay, J.*) HAZARI LAL SAHU *v.* AMBICA GIR. **79 I. C. 5 = 3 Pat. 67 = 1923 P.H. C. C. 273 = 2 Pat. L. R. 169 = 5 Pat. L. T. 591 = A. I. R. 1924 Pat. 104.**

——Clause (*c*) of rule 1 of Order 43 allows an appeal from an order under Rule 9 of Order 9 rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit. The clause applies therefore only in cases when a "suit" has been dismissed. It is clear that while the order dismissing the petitioner's first application remains in force, no fresh application can be made to set aside the dismissal of the suit. The order dismissing the second application is not an order refusing to set aside the dismissal of a suit within the meaning of clause (*c*) of Rule 1 of Order 43. Section 141 cannot operate to give an appeal from an order not otherwise appealable under order. (*Sanderson, C. J. and Richardson, J.*) HAR KUMAR MITTER *v.* MURARI MOHAN BOSE. **69 I. C. 1003 = 36 C. L. J. 184 = A. I. R. 1922 Cal. 572.**

——The provision contained in S. 141 of the C. P. C. 1908 (corresponding to S. 647 of the Code of 1882) was not intended by the Legislature to make "the procedure provided in this Code in regard to suits" applicable to proceedings in the course of execution for which a special procedure is provided by O. 21. (*Sanderson, C. J. and Richardson, J.*) HANSESWARI DASI *v.* RADHIKA PROSAD AICH BACHAR.
63 I.C. 855 Cal

—S. 141—Application for restitution.

——The provisions of S. 141 do not apply to proceedings in execution of a decree and as an application for restitution is not an application in execution but a matter in the nature of a suit it is covered by S. 141. 12 All. 179 (P. C.), Ref. (*Walker, J.*) UJAGAR SINGH *v.* PURAN SINGH. **A. I. R. 1930 Lah. 961.**

—S. 141—Application to Succession Certificate Act.

——C. P Code does not apply to proceedings under Succession Certificate Act which is not analogous to Guardians and Wards Act or Bengal Tenancy Act to which the C. P. Code has been held to apply. Therefore S. 141 does not apply except in so far as it is expressly introduced by S. 19 (3) and as a corollary by S. 26 (3) of the Succession Certificate Act. A Succession Certificate Court has no jurisdiction to appoint a Receiver. (*Walsh and Ryves, JJ.*) KANHAIYA *v.* KANHAIYA LAL. **79 I. C. 363 = 46 All. 372 = 22 A. L. J. 345 = 5 L. R. A. Civ. 238 = A. I. R. 1924 All. 376.**

—S. 141—Arbitration.

——*Section deals with procedure only.*

Section 141 deals with procedure and procedure alone, and does not touch the substantive law of arbitration. 30 All. 137, Foll. (*Darwood and Mya Bu, JJ.*) MA NGWE NYUN *v.* MA THWE. **6 Rang. 563 = 112 I. C. 451 = A. I. R. 1928 Rang. 137.**

——*S. 141 makes Sections 10 and 11 applicable to Civil Miscellaneous proceedings.*

Ss. 10 and 11, C. P. C. are concerned with the law of procedure and the mere use of the word "suit" in S. 10 does not restrict its applicability to suits alone but the sections can be extended to Civil Miscellaneous proceedings by virtue of S. 141, if it is otherwise applicable.

Where in a dispute between *A* and *B* an award is passed and the arbitrator applies to the Sind Court to file the award, and it appears that *B* has filed a suit against *A* in Delhi to set aside the award.

Held, that the arbitrators who are applicants in Sind, not being parties to the Delhi suits, S. 10 does not apply.

Once an award is filed there is no equitable reason for checking its legitimate consequences because a suit has been filed to set it aside. (*Raymond, A. J. C.*) *In the matter of Arbitration between* THE FIRM OF JAI NARAIN BABULAL *v.* FIRM OF NARAINDAS JANIMAL. **66 I. C. 796 = 16 S. L. R. 79 = A. I. R. 1922 Sind 6.**

—S. 141—Disposal ex parte.

——Section 141 and O. 9 are not primarily intended to apply to application under O. 21, R. 90, disposed of *ex parte* but a Court in the exercise of its inherent jurisdiction would still have power in such cases to restore the application to the file and decide it on the merits. (*Kennedy, J. C., and Madgavkar, A. J. C.*) ISSARSING *v.* UDHAVDAS. **83 I. C. 749 = 17 S. L. R. 105 = A. I. R. 1921 Sind 55.**

—S. 141—Execution.

——*Court has inherent power to restore an Execution Petition dismissed for default.*

Application for setting aside *ex parte* order in execution proceedings is not maintainable and S. 141 does not operate to make O. 9, R. 13 applicable to execution proceedings. An application, however, to have the *ex parte* order passed in execution proceedings set aside, if not possible under O. 9, R. 13, must at least be held to be an application entertainable in the discretion of the Court under its inherent powers for a litigant could not be left without remedy if an execution Court passed an order under a complete misapprehension as to what the matter before it for consideration was. If an execution Court had no power to set aside an order passed by it *ex parte* merely because the sections and rules of O. 9, R. 13, were inapplicable to execution proceedings, it would also have no power, an impossible situation, to dismiss in default of appearance: 17 All. 106 (P. C.), Expl- and Foll. (*Boys and Young, JJ.*) BALDEO PRASAD SHUKUL *v.* SUKHDEO PRASAD SHUKUL.
121 I. C. 552 = A. I. R. 1929 All. 485.

——Proceedings under, are part of execution—So O.9 does not apply to them unless they also fall within S. 47. A. I. R. 1926 Cal. 798, 4 P. L. J. 135, Rel. on; 17 All. 106 (P. C.), Dist. (*Wallace, Beasley and Madhavan Nair, JJ.*) ALAGASUNDARAM PILLAI *v.* PICHUVIER. **120 I. C. 567 = 30 M. L. W. 424 = 52 Mad. 899 = A. I. R. 1929 Mad. 757 = 57 M. L. J. 381**

———None of the provisions of the Code are made applicable to execution proceedings by reason of the provisions of S. 141. 17 All 106 (P.C.) Foll.; 3 C. L. J. 276; 12 C. L. J. 6; 20 C. W. N. 1203; 44 Cal. 950 held as wrongly decided. (*Cuming and Page, JJ.*) BASARATULLA MEAN *v.* REASUDDIN MEAN. **96 I. C. 705 = 53 Cal. 679 = 30 C. W. N. 570 = A. I. R. 1926 Cal. 773.**

———S. 141 does not apply to proceedings in execution. 19 C. W. N, 758, Not Foll. (*Le Rossignol, J.*) KOURA LAL *v.* NATIONAL BANK. **89 I. C. 360 = A. I. R. 1926 Lah. 109.**

———Section does not apply to execution proceedings. (*Suhrawardy and Cuming, JJ.*) T. WANG *v.* SONA WANGDI. **87 I. C. 633 = 29 C. W. N. 886 = 42 C. L. J. 26 = A. I. R. 1925 Cal. 812.**

———The provisions of O. 9, R. 9 do not apply to execution proceedings. (*Jackson, J.*) KAJULURISAMI *v.* SOORYANARAYAN RAJU. **81 I. C. 841 = 20 M. L. W. 192 = 1924 M. W. N. 672 = A. I. R. 1925 Mad. 126 = 47 M. L. J. 269.**

———Section 141 does not apply to execution proceedings, and a Court is not empowered thereby to restore to the file under Order 9 an application in execution which has been dismissed in default. (*Hallifax, A.J.C.*) SHANKAR RAO *v.* MANIK RAO. **68 I. C. 643 = A. I. R. 1923 Nag. 18.**

———S. 141 of the Code does not operate so as to make the provisions of O. 9, R. 4 and all cognate provisions applicable to execution proceedings. (Case-law discussed.) (*Das and Adami, JJ.*) SHEONANDAN CHOWDHURY *v.* DEBI LAL CHOWDHARY. **71 I. C. 484 = 2 Pat. 372 = 4 P. L. T. 93 = 1923 P.H C C, 78 = 1 Pat. L. R. 134 = A. I. R. 1923 Pat 239.**

———Execution proceedings—Dismissal for default—No appeal lies against the order of dismissal. (*Jwala Prasad and Bucknill, JJ.*) GOUR CHANDRA *v.* JANARDAN. **68 I. C. 337 = 4 P. L. T. 204 = A. I. R. 1923 Pat. 180.**

———The section cannot be applied to proceedings in execution. (*Hallifax, A. J. C.*) HAR LAL *v.* NARAYAN. **64 I. C. 420 = 18 N. L. R. 152 = 4 N. L. J. 118 = A. I. R. 1922 Nag. 267.**

———S. 141 does not apply to a proceeding in execution. 17 All. 106 (P. C.), Foll.; 41 Cal. 1 and 38 Mad. 199, Ref. (*Shadi Lal, C. J. and Wilberforce, J.*) BHOLU *v.* RAM LAL. **2 Lah. 66 = 60 I. C. 720 = 64 P. L. R. 1921 = A. I. R. 1921 Lah. 67.**

—S. 141—Objections to execution.

———Objections made under O. 21 to the execution of a decree although numbered separately are virtually proceedings in execution and therefore S. 141 is inapplicable to them. (*Suhrawardy and Chotzner, JJ.*) NARENDRA NATH CHATTERJI *v.* RAKHAL DAS TARAFDAR. **41 C. L. J. 286 = 79 I. C. 351 = A.I R. 1925 Cal. 510.**

—S. 141—Probate proceedings.

———*Principle of O. 32 is applicable.*

Where a will of which probate is sought affects the interests of a minor, it is expedient to appoint a guardian *ad litem* of the minor following O. 32, C. P. Code. But it does not follow that every rule in O. 32, C. P. Code, is made strictly and legally applicable. (*Richardson and Huda, JJ.*) RADHASHYAM DASYA *v.* RANGA SUNDARI DASYA. **59 I. C. 664 = 24 C. W. N. 541.**

—S. 141—Proceedings.

———"*Proceedings*" *meaning of.*

The word "proceedings" in S. 141 includes only original matters in the nature of suits such as proceedings in probate, guardianship and so forth and that section does not apply to proceedings in execution. 17 All. 106 (P. C.) Foll. (*Macleod, C. J. Pratt and Fawcett, JJ.*) JAGANNATH VASUDEV *v.* MAHARAJA OF KOLHAPUR. **A. I. R. 1921 Bom. 463.**

—S. 141—Redemption suit.

———*Increase of compensation for improvements —S. 144 is made applicable.*

Interest at a sufficient rate may be substituted for the profits, which the person in possession under a mortgage decree which was subsequently varied, enjoyeo during the period between his execution of the first Court's decree and his giving notice that he had deposited the additional amount. The defendants in a redemption suit are not entitled to recover possession, merely because the amount of compensation for improvements is increased in appeal. But under S. 144 of the Code of Civil Procedure, they are entitled to interest or other compensation consequential on the variation of the First Court's decree. (*Spencer and Krishnan, JJ.*) NEDAKANDHAN NAMBUDRI *v.* VASUDEVAN NAMBUDRI. **73 I. C. 1041 = 18 M. L. W. 30 = 33 M. L. T. 45 = 1923 M. W. N. 508 = A.I.R. 1924 Mad. 87 = 45 M. L. J. 323.**

—S. 141—Restitution.

———*S.* 141 *makes O.* 9, *R.* 9, *applicable to S.* 144.

It appears that proceedings under S 144 of the Code cannot properly be described as proceedings in execution of a decree. In view of the difference of the language used in the present S. 144 and the S. 586 of the old Code, the conclusion that proceedings under S. 144 are not proceedings in execution of decrees is justified. In this view the terms of S. 141 do apply to such proceedings and that it is competent to the Judge to set aside the order of dismissal for default and to restore the application. (40 Mad. 780, differed from.) (*Rafique and Lindsay, JJ.*) JIWA RAM *v.* NAND RAM. **20 A. L. J. 226 = 66 I. C. 144 = 44 All. 407 = A. I. R. 1922 All. 223.**

—S. 141—Restoration.

———Where an application to restore a suit dismissed under O. 9, R. 3, is itself dismissed for default, a second application to restore the suit is competent. 1 Lah. 339, Foll. (*Addison, J.*) FIRM PIARE LAL MOHAN LAL *v.* HAIDER. **27 P. L. R. 564 = 99 I. C. 1055 = A. I. R. 1927 Lah. 71.**

———*Application.*

Where an application for setting aside dismissal of a suit for default was itself dismissed for default, and a subsequent application was made to restore it,

Held; Per *Daniels, J.*—That O. 9 read with S. 141, applied to the case, and that if there was no other remedy left to the applicant, S. 151 applied.

Per *Sulaiman, J.*—That though it could not be said that the case came under O. 9 read with S. 141, S. 151 applied and the Court could entertain the application under its inherent jurisdiction. (*Sulaiman and Daniels, JJ.*) GANESH PRASAD *v.* BHAGELU RAM. **47 All. 878 = 89 I. C. 350 = 23 A. L. J. 817 = 6 L. R. A. Civ. 412 = A. I. R. 1925 All. 773.**

———*Application to set aside* ex parte *decree.*

No appeal lies against order dismissing application for restoration of application to set aside *ex parte* decree. Nor can a right of appeal be claimed by virtue of S. 141 of the Code of Civil Procedure, when O. 43 of the Code makes no provision for such an appeal. (*Sulaiman, J.*) CHANDAR SAHAI *v.* DURGA PRASAD. **46 All. 538 = 79 I. C. 323 = 22 A. L. J. 427 = 5 L. R. A. Civ. 331 = A.I.R. 1924 All. 682.**

———Appeal lies against an order of dismissal of an application for restoration of the application, dismissed in default, for restoration of the suit dismissed in default. 7 N. L. R. 82, Foll. (*Hallifax, A. J. C.*) KALICHARAN *v.* RATANSINGH.

19 N.L.R. 119 = 75 I.C. 589 = A.I.R. 1923 Nag. 293.

——*Petition to set aside dismissal of a suit for default, was dismissed for default—No appeal lies.*

S filed a suit against the applicants in the court of the Subordinate Judge of Bilaspur. Certain preliminary issues were framed and the parties were told to appear on the 12th of July 1921, to argue them. The defendants were present but the plaintiff was not and the suit was accordingly dismissed. On the 23rd of July 1921, the plaintiff made an application for setting aside the order of dismissal. *S.* appeared on the 3rd of September 1921, but notices on the opposite party had not then been served. The case was adjourned to 8th October 1921, and the order passed on that date was as follows ;—*S.* in person non-applicants absent. The previous notices were returned unserved. Notice for this hearing could not be served for want of time as process-fee was paid on 3rd September 1921. I do not find any justification for paying process fee so late. I therefore dismiss the application for default of the applicant.

Held that the application was dismissed under O. 9, R. 2 and that no appeal lay against the order. (*Hallifax, A. J. C.*) HIRASA *v.* SHEOKUWAR.

72 I. C. 547 (Nag.).

—S. 141—Substituting representative.

——*Application for—Delay by pauper—Application can be dismissed.*

Pauper purposely delaying to bring legal representative of deceased opponent on record within reasonable time—Application can be rejected under O. 33, R. 9 (*a*) read with S. 141 or under S. 151. (*Rupchand, A.J.C.*) KHATIJANBAI *v.* NUR MOHAMMAD. **116 I. C. 111 = A. I. R. 1929 Sind 136.**

——No appeal lies from an order bringing a certain person on the record as the legal representative of a deceased party, which was passed on an application to set aside an *ex parte* decree. (*Sulaiman and Daniels, JJ.*) MOTILAL *v.* BISHAMBHAR NATH.

23 A. L. J. 442 = 88 I. C. 95 = 6 L. R. A. Civ. 361 = 47 All. 741 = A.I.R. 1925 All. 431.

—S. 141—Suit.

——*Meaning of.*

The word " suit " in S. 141, C. P. Code, is used in a comprehensive sense, so as to include appeals, which are only continuations of suit. 39 Mad. 195, Ref. to. (*Bhide, J.*) MT. PANA BIBI *v.* MAHLA.

110 I. C. 374 = A. I. R. 1928 Lah. 488.

—S. 141—Wakf.

——*District Judge authorising lease by Mutwallis.*

It is well settled in Calcutta High Court that mutwallis may be authorised to execute leases by the District Judge who for this purpose, is competent to discharge the functions of Kazi under the Mahommedan law. (3 C. W. N. 158 ; 37 Cal. 870 ; and 24 C. W. N. 339, Foll.) The proceeding followed in this connection is not a suit but merely a proceeding governed by S.141, C. P. Code. The fact that the provisions of C. P. Code regulate the proceedings does not make the order which may be passed therein appealable. (36 Mad. 16; 27 Mad. 504, Foll.) (*Mookerjee and Panton, JJ.*) HABIBAR RAHAMAN *v.* SAIDANNESSA BIBI.

38 C. L. J. 358 = 77 I. C. 907 = A.I.R. 1924 Cal. 327

S. 144.

Bar to suit.
Compensation.
Construction.
Court-fee.

Decree varied or reversed.
Interest.
Limitation.
Mesne profits.
Power of Court.
Procedure.
Refund of money or costs.
Restitution.
Scope of.
Miscellaneous.

—S. 144—Bar to suit.

——*Waste by mortgagee must be provided for in decree for redemption.*

The liability of a mortgagee in a redemption suit for alleged waste committed by him while he was in possession of the mortgaged property must be settled only at the time of the preparation of the decree for redemption. After the final decree in the suit has been passed, the question cannot be gone into in an application for restitution under S. 144, nor can it be the subject matter of a separate suit. (*Daniels, J. C. and Dalal, A. J. C.*) MOHAMMAD SHER KHAN *v.* SETH BISHESHWAR DAYAL. **88 I. C. 529 = A. I. R. 1925 Oudh 654.**

——*Suit for damages for wrongful civil suit is not barred by section.*

Where the bringing of an action does, as a necessary consequence, involve an injury to property which cannot be compensated by the grant of costs in the action, a subsequent action for damages by defendant is not barred. Defendant, after agreeing to have the dispute as to the property with plaintiff decided by the award of a competent arbitrator, resiled after the award had been made, and instituted a suit against plaintiff in consequence of which she was deprived for a certain period of all rights to enforce the payment of certain debts due to her deceased husband with the result that their payment in certain instances became impossible owing to the action of the law of limitation ;

Held she could not recover compensation by way of costs or under S. 144. The suit was therefore not barred, 42 C. 550, Diss. (*Stuart and Kanhaiya Lal, JJ.*) ARJUN SINGH *v.* PARBATI. **69 I. C. 173 = 44 All. 687 = 20 A. L. J. 636 = A.I.R. 1922 All. 465.**

—S. 144—Compensation.

——*Refers only to loss caused by execution of the reversed decree.*

The object of Section 144 is that anything done in execution of a decree reversed on appeal should so far as possible, be undone : and that the party, who has been finally victorious, should be placed in the position which he would have occupied, if the erroneous decree had not been carried out. Therefore the provisions of Section 144 would help the ultimate decree-holder in getting compensation for any loss caused to him by reason of the execution of the decree of the lower Court, but they do not entitle him to recover mesne profits for a period prior to the execution of such decree. (*Shadi Lal, C. J.*) CHHABER SINGH *v.* RADHA RAM. **68 I. C. 807 = 4 L. L. J. 333 = A. I. R. 1921 Lah. 234.**

—S. 144—Construction—Interpretation.

——*Section provides a simple and speedy remedy.*

The object of S. 144 is to provide a speedy and simple remedy for any party who has suffered by reason of an erroneous decree made by a Court of first instance and it does not apply to a case where the Court has to decide questions of conflicting rights under different decrees which may be very complicated. (*B. B. Ghose and Panton, JJ.*) ASHUTOSH NANDI *v.* KUNDAL

Kamini. 33 **C. W. N. 908 = A. I. R. 1929 Cal. 814.**

——*S.* 144 *merely lays down a procedure.*

Section 144 is not a rule of substantive law. The right to refund or restitution would exist in spite of the said section. It lays down merely the procedure. (*Mukerji and Sen, JJ.*) Sohan Bibi *v.* Baijnath Das. **50 All. 767 = 26 A. L. J. 587 = 112 I. C. 876 = A. I.R. 1928 All. 293.**

———*Section is mandatory.*

Section 144 gives no discretion to Court. Restitution should be ordered as a matter of course in order to bring about *status quo ante.* (*Carr and Mg. Ba, JJ*). W. Maung Gyee *v.* Ba Lin. **117 I. C. 57 = A. I. R. 1928 Rang. 293.**

———Section is mandatory—Refusal to order restitution on equitable considerations arising from events subsequent to decree is not warranted. (*Coldstream, J.*) Gujar Mal *v.* Narain Singh.

96 I. C. 804 = A. I. R. 1926 Lah. 685.

———"*Court of first instance*"—*Interpretation of.*

The Code has not defined for the purpose of S. 144 what is the "Court of first instance" when the "Court of first instance" has lost territorial jurisdiction. In a case like this the Court must proceed upon some general principle as laid down in S. 37 (*b*) in interpreting the phrase "the Court of first instance" which would apply even to cases where the Court of first instance has been abolished and also to cases where the Court of first instance has ceased to have jurisdiction. 13 L. W. 67, Ref. (*Wallace, J.*) Panchapakesa *v.* Natesa Pattar. **1926 M. W. N. 395 = 95 I. C. 587 = A. I. R. 1926 Mad. 813 = 51 M. L. J. 161.**

———An application for restitution is an application in execution : 20 Mad. 448 ; (1917) M. W. N. 643 ; A. I. R. 1923 Mad. 270 ; 40 Mad. 780 and 31 All. 551, Foll. : A. I. R. 1925 Pat. 1 ; 41 Bom. 625 and 45 Bom. 1137, not Foll. (*Wallace, J.*) Panchapakesa *v.* Natesa Pattar.

1926 M. W. N. 395 = 95 I. C. 587 = A. I. R. 1926 Mad. 813 = 51 M. L. J. 161.

———An application made for restitution under S. 144 is an application for the execution of a decree. 45 Bom. 1137, Foll. (*Wazir Hasan and Raza, JJ.*) Sant Sahai *v.* Chhutai Kurmi. **1 Luck. 40 = 3 O. W. N. 65 = 13 O. L. J. 731 = 92 I. C. 23 = A. I. R. 1926 Oudh 199.**

———'*Party*' *meaning of*—*Nature of procedure under the section.*

Per *Walsh, J.*—Proceedings under S. 144 of the Code are not execution proceedings although they are of course in the nature of proceedings in execution to enforce either directly or indirectly the final decree. It is not necessary that a party to an application under S. 144 should have been a party to the decree. S. 144 is very wide in its terms. It includes matters which an execution Court or an appellate Court could not ordinarily deal with and the word "party" is not used in that section in the sense "party to the suit." but as meaning "party to the application." (*Walsh and Ryves, JJ.*) Birj Lal *v.* Damodara Das. **66 I. C. 545 = 44 All. 555 = 20 A. L. J. 456 = A. I. R. 1922 All. 238.**

———*Proceedings for restitution are not in execution*—*O.* 9, *R.* 7, *applies.*

It appears that proceedings under S. 144 of the Code cannot properly be described as proceedings in execution of a decree. In view of the difference of the language used in the present S. 144 and the S. 586 of the old Code the conclusion that proceedings under S.144 are not proceedings in execution of decrees is justified. In this view the terms of S. 141 do apply to such proceedings and that it is competent to the Judge to set aside the order of dismissal for default and to restore the application (40 Mad, 780 differed from), (*Rafique and Lindsay, JJ.*) Jiwa Ram *a.* Nand Ram. **66 I. C. 144 = 44 All. 407 = 20 A. L. J. 226 = A. I. R. 1922 All. 223.**

———The word "decree" in S. 144 covers an "order" and the word "Court" in the said section includes Courts of every grade. (40 Mad. 299; 43 Mad. 235; A. I. R. 1922 P. C. 269; Foll.) (*Prideaux and Kinkhede, A. J. Cs.*) Ramji *v.* Zillaji. **80 I. C. 49 = 20 N. L. R. 93 = 7 N. L. J. 130 = A. I. R. 1924 Nag. 258.**

———The application for restitution is not an application for execution of a decree and therefore limitation cannot be governed by Art. 181, Limitation Act. (*Hallifax, A. J. C.*) Laxman *v.* Bishram Birju. **71 I. C. 42 = A. I. R. 1923 Nag. 94.**

—S. 144—Construction—Scope.

———*M* obtained possession of certain property in execution of his decree against *L*—Decree set aside in appeal—*L* applying for possession of property and *K* resisting his claim—Proceedings should be treated under O. 21, R. 97, and not under S. 144. (*Mukerji and Bennet, JJ.*) Khub Chand *v.* Lachman Das. **122 I.C. 758 = 1930 A.L.J. 834 = A.I.R. 1930 All. 415.**

———*Subsequent events may be taken into consideration before granting restitution.*

H brought a suit against *S* for possession of houses Nos. 1, 2, 3 and 4 and a nibhera, a decree for possession of houses Nos. 3 and 4 and nibhera was granted to *H*. In second appeal it was decided that *H* was entitled only to house No. 4 and nibhera. In another suit, brought by *S* against *H* for partition, houses Nos. 1, 2 and 3 were given to *H*. Ignoring this decree, *S* applied for restitution of possession of houses Nos. 1, 2, 3 under S. 144 on the strength of the decree in the second appeal and urged that as both decrees became final and operated as *res judicata*, the latter decree must prevail over the former.

Held : that no question of *res judicata* arose and that the matter was governed by S. 144 under which the applicant is to be placed in a position which he would have occupied but for such decree or such part thereof as has been varied or reversed. It does not lay down that where a decree has been varied or reversed the parties are to be placed in the same position in which they were before the suit was brought, nor does it direct that other proceedings such as suits are to be ignored. As under the decree in the partition suit, possession of houses Nos. 1, 2 and 3 was awarded to *H*, *S* could not claim restitution in respect of the said houses merely on the ground that the decree in the suit had been varied in the second appeal. A. I. R. 1927 All. 717, Dist. (*Bennet, J.*) Sita Ram *v.* Har Sahai. **118 I. C. 519 = A. I. R. 1929 All. 527.**

———There is no distinction between a decree in suit and a decree in a proceeding under S. 144. (*Chatterjea and Panton, JJ.*) Adwaita Chandra *v.* Chittagong Co. **84 I. C. 747 = 28 C. W. N. 988 = A. I. R. 1925 Cal. 102.**

—S. 144—Court-fee.

———*Order has the force of a decree.*

An appeal from an order of restitution under S. 144, if such order is not contained in the decree of the appellate Court, is an order which has the force of a decree and, therefore, the court-fee payable on the memorandum of appeal against such an order must be calculated in accordance with Art. 1, Sch. 1, Court-fees Act. A. I. R. 1925 All. 137 ; A. I. R. 1925 Pat. 1 and A. I. R. 1926

Lah. 685, Rel. on. (*Jai Lal, J.*) GUL MUHAMMAD *v.* SABZ ALI KHAN. **113 I. C. 270= A. I. R. 1930 Lah. 24.**

——*Court-fees Act, Sch. 2, Art. 11—Appeal—*Ad valorem *fee is payable.*

An application for restitution consequent on a decree of an appellate Court is not an application to execute that decree. Hence appeal from an order passed under S. 144, C. P. Code, is not an appeal from an order passed under S. 47 of that Code. Consequently Local Government, Financial Department Notification No. 41, limiting the court-fee chargeable in appeals under S. 47 to amount chargeable under Court-fees Act, Sch. 2 and Art. 11, does not apply to such an appeal and *ad-valorem* court-fee is payable in the case of an appeal from order under S. 144. 30 I.C. 680 : A.I.R. 1922 All. 223 ; A.I.R. 1925 Pat. 1 ; A. I. R. 1925 All. 137 and 39 I. C. 640, Ref. (*Ormiston, J.*) MAUNG HLA MAUNG *v.* MA HNIN DAUK. **8 Rang 271= A. I. R. 1930 Rang. 241.**

——Ad valorem *fee need not be paid in appeal.*

Applications under Ss. 47 and 144 are classed together when referred to in S. 2 of the Code and are obviously kindred and similar applications though there is a real distinction that when a decree has been actually executed and the property has passed, the application is of the nature of an application to recover possession. It is in consequence of the decree passed by the appellate Court that the application is made under S. 144 and it is in a sense a mere accident that because the decree has been fully executed, the petitioner is prevented from coming to the Court under S. 47 and is compelled to take action under S. 144, C. P. Code. It would be most inequitable that he should be penalised by being forced to stamp his application *ad valorem*. 40 Mad. 780 and 41 Bom. 625, Ref; A. I. R. 1921 Bom. 67, Foll.; A. I. R. 1922 All. 223. Ref.; A. I. R. 1925 All. 137 and A.I.R. 1925 Pat. 1, Ref. (*Harrison, J.*) RAHMAT ALI SHAH *v.* RIKHI KESH. **107 I. C. 491= A. I. R. 1928 Lah. 143.**

——Court-fees Act, Sch. 1, Art. 1—Appeal from order under S. 144, does not require *ad valorem* fee but a fee of Rs. 4. A. I. R. 1925 All. 137, Ref. (*Dalip Singh, J.*) MOTI SING *v.* HARBHAJAN SING. **103 I. C. 657=A. I. R. 1927 Lah. 635.**

——Appeal from order under S. 144 must be stamped *ad valorem*. (19 A.L.J. 771, *Overruled* ; A.I.R. 1922 All. 223 ; A. I. R. 1922 All. 238 and A. I. R. 1925 Pat. 1 (F. B.), Foll.) (*Daniels, J.*) BAIJNATH DAS *v.* BALMAKUND. **47 All. 98=22 A. L. J. 881= 5 L.R. Civ. 773=82 I.C. 321=A.I.R. 1925 All. 137.**

——Ad valorem *fee need not be paid on appeal.*

Determination of a question arising under S. 144 will naturally relate to the execution, discharge or satisfaction of the decree either of the First Court or of the Appellate Court. If the First Court's decree has been discharged by the Appellate Court, the question arising under S. 144 will naturally be a question as to the discharge of the decree coming under S. 47 of the C. P. Code. In an appeal under S. 47, of the C. P. Code "A" was declared (reversing the lower Court's order) entitled to a certain share in the sale proceeds realised by the decree-holder, which were lying in Court. Subsequently the lower Court allowed also the claim of "A" for interest and damages from the date on which the decree-holder removed from the Court the entire sale proceeds realised by him.

Held, that the order came under S. 47, that therefore the B. and O. Government Notification No. 2576 L-A-25 of 1921 directing under S. 35 of the Court Fees Act that the fee chargeable on appeals from orders under

C. P. Code S. 47, shall be limited to the amounts chargeable under Sch. 2, Art. 11 of the Court Fees Act applied and therefore that an appeal from the Court's order in the present instance need not be stamped *ad valorem* but that a stamp of Rs. 4 was enough. (*Jwala Prasad, J.*) SITAL PRASAD SINGH *v.* JAGDEO SINGH. **92 I. C. 474=4 Pat. 294=7 P. L. T. 415= A. I. R. 1925 Pat. 577.**

—S. 144—Decree—Varied or reversed.

——*Creditor of the decree-holder attaching the decree is a representative of the decree-holder and restitution can be had against him.*

Courts in exercising jurisdiction under S. 144 do so by virtue of the equitable jurisdiction to set right the injustice caused by the lower Courts passing erroneous decrees and by allowing proceedings to be taken thereunder. It is the duty of the Court as far as possible to restore parties to the position in which they would have been had not the erroneous orders been passed. The attaching decree-holder is a representative of the original decree-holder even for the purposes of restitution proceedings which are only execution proceedings. Where therefore the decree attached by the attaching decree-holder has been reversed in appeal, execution by way of restitution can be allowed to proceed against him and he can be ordered to restore the benefit received by him executing the decree. 37 I. C. 863 ; A. I. R. 1922 P. C. 269 ; 51 I. C. 375 and A. I. R. 1922 Mad. 228, Dist. ; 38 Mad 36, Ref. (*Anantakrishna Ayyar and Cornish, JJ.*) ANGANNA REDDI *v.* SUBBARAYA CHETTIAR. **32 M. L. W. 148= A. I. R. 1930 Mad. 787=59 M. L. J. 225.**

——Section 144 does not apply by way of entitling the party to claim restitution unless the decree on which the restitution is claimed is a reversal decree. (*B. B. Ghose and Bose, JJ.*) SARAT CHANDRA RAKSHIT *v.* SUBASHINI DEBI. **120 I.C. 807= 56 Cal. 550=A.I.R. 1930 Cal. 89.**

——Section 144 only applies where the decree is varied or reversed and it does not apply to a case where as the result of a different suit, the title of a person derived by purchase under quite a different proceeding in execution of a decree which stands unreversed is questioned. (*B.B. Ghose ond Panton, JJ.*) ASHUTOSH NANDI *v.* KUNDAL KAMINI. **33 C.W.N. 908=A.I.R. 1929 Cal. 814.**

——*Restitution to be ordered only when applicant discharges his obligation under the reversed decree.*

Where the decree-holder himself is the auction-purchaser, the sale cannot stand, if the decree be subsequently set aside or modified because the purchase is subject to the final result of litigation between the parties. The judgment-debtor seeking to get rid of the sale should have relief only on condition that he paid up what was due under the ultimate decree and the decree-holder would have a charge on the property for the amount ultimately found due by the appellate Court on payment of which the judgment-debtor would be entitled under S. 144 to have the property restored to him on his depositing the decretal amount in Court. 27 Mad. 98, Rel. on. 27 Cal. 810 ; 10 All. 166 (P.C.), Ref. (*Pratt, J.*) BAN GYI MAUNG *v.* MA NGWE BON. **7 Rang. 107=117 I.C. 252= A.I.R. 1929 Rang. 157.**

——*Decree need not be put in execution for section to apply.*

It is not necessary to confine the language of S. 144 to cases where something has been taken from a party in execution of a decree which has been varied or reversed. Thus a person against whom a decree has been made for possession or to give up possession may give up possession of the property without insisting on any process of execution. Where the application for restitution was erroneously rejected, *held*, that the later suit for declaration and possession was barred by sub-sec. (2) of S. 144.

Per *Rankin, C.J.*—S. 144 applies only to cases where the decree is modified or reversed on appeal or revision, or it may be on reference. (*Rankin, C. J. and C. C. Ghose, J.*) GOPAL PAROI *v.* SWARNA BEWA. **34 C.W.N. 707.**

———*Applicability.*

Where a decree-holder under a decree gets possession of the property decreed to him otherwise than by executing the decree but under colour thereof, and that decree is set aside on appeal, the opposite party is clearly entitled to be replaced in possession; 42 All. 568, Foll.; A.I.R. 1924 Cal. 769, Dist. (*Broadway and Zafar Ali, JJ.*) NARAIN SINGH *v.* BOCHAN SINGH. **8 Lah. 41 = 8 L.L.J. 551 = 28 P.L.R. 62 = 99 I.C. 952 = A.I.R. 1927 Lah. 37.**

———*No restitution against* bona fide *purchasers.*

A *bona fide* purchaser who is not a party to the suit or proceeding in which the auction sale is held, is entitled to hold the property even though the decree or order in execution of which the auction sale is held is subsequently reversed or set aside. But the protection which is given to a *bona fide* purchaser should not be extended to a defendant or a party to the suit even though he gets no benefit directly under the decree; in other words, it is only a *bona fide* purchaser who is not a party to the suit or proceeding that is entitled to keep the property purchased by him. In all other cases the purchase is liable to be defeated on the reversal of the decree in execution of which the sale is effected. 10 All. 166 P. C., Rel. on.

Per *Wallace, J.*—This salutary principle of restitution should be enforced as the rule, and exceptions to that rule should be allowed only so far as authority by which we are bound, has allowed them. (*Devadoss and Wallace, JJ.*) CHINNA VAVANAN *v.* CHETTIAPPA CHETTY. **91 I. C. 16 = 48 Mad. 767 = 22 M. L. W. 439 = A. I. R. 1926 Mad. 78 = 49 M. L. J. 452.**

—S. 144—Interest.

———Decree varied—Restitution of money paid under original decree—Interest not provided in security bond—Interest can still be awarded. 2 Pat. L. J. 149, Foll.; 41 Mad. 316 and 35 Bom. 255, Appr. (*Madhavan Nair and Cornish J.*) ASURAM *v.* SUB-COLLECTOR, RAJAHMUNDRY. **123 I. C. 47 = 1930 M. W. N. 153 = A. I. R. 1930 Mad. 577 = 58 M. L. J. 318.**

———*Interest can be awarded as consequential relief.*

The doctrine of restitution contemplates that on the reversal of a decree, the party who received any benefit under the erroneous decree should make proper restitution to the other party for what that other has lost and so where the decretal amount has been deposited in Court in execution of the decree and the decree is reversed on appeal by the judgment-debtor, unless it can be shown to be clearly contrary to real justice of the case, whether the decree-holder withdrew the amount or not, payment of interest is consequential upon such reversal not only from date of withdrawal but from the date of deposit to the date of refund. 23 Mad. 306, Ref. 21 C. W. N. 564, Dist.; A. I. R. 1925 Bom. 313, Rel. on. (*Fazl Ali and Chatterji, JJ.*) DALU RAM *v.* RAMANAND. **A. I. R. 1929 Pat. 593.**

———Deposit of decretal amount in Court—Objection petition restraining decree-holder from withdrawal dismissed on later date—Decree reversed in appeal—Interest is to be granted from date of reversal. (*Fazl Ali and Chatterji, JJ.*) DALU RAM *v.* RAMANAND. **A. I. R. 1929 Pat. 593.**

———Reversal of decree in Privy Council—Interest should be allowed on money to be paid back on reversal. *Rodger* v. *Comptoir* (1871) 3 P. C. 465, Foll. (*Le Rossignol and Martineau, JJ.*) HANUMAN PARSHAD *v.* NATIONAL BANK, DELHI. **93 I. C. 954 = 7 Lah. 232 = 8 L. L. J. 338 = 27 P. L. R. 400 = A. I. R. 1926 Lah. 488.**

———*Can be awarded though other party derived no benefit from the money.*

Plaintiff having got a decree against the 1st and 2nd defendants in the suit for the return of the earnest money and damages for breach of contract proceeded to appeal on the ground that he was entitled to specific performance of the contract against the defendant No. 3. Pending the appeal the 1st defendant paid into Court, the amount which had been awarded against defendants Nos. 1 and 2. The plaintiff continued the appeal and was successful. On an application by defendants 1 and 2, for restitution and claiming interest on the money which remained in Court.

Held, that plaintiff could not resist the claim on the ground that he acquired no benefit from the money. (*Macleod, C.J. and Coyajee, J.*) HIRABHAI DAHYABHAI *v.* MANEK LAL RANCHHOD. **87 I. C. 713 = 27 Bom. L. R. 485 = A. I. R. 1925 Bom. 313.**

———*Money lying in Court and none deriving benefit from it—No interest is payable.*

Where an auction-purchaser chose to leave the purchase money in Court on the chance that if the decree which was appealed against was confirmed, he would be able to get the property purchased by him and the money was lying in Court all the time and no one had the benefit of it.

Held, that when the decree had been reversed and the sale cancelled, the auction purchaser could not claim interest. (*Heald and Chari, JJ.*) MA TOK *v.* MAUNG MO HNAUNG. **89 I. C. 603 = 4 Bur. L. J. 58 = 3 Rang. 251 = A. I. R. 1925 Rang. 215.**

———Court cannot allow damages or interest as damages by way of restitution where interest is not awarded by the decree. (*Lentaigne and Carr, JJ.*) MAUNG PE *v.* MA HNIT. **82 I. C. 427 = 3 Bur. L. J. 58 = A. I. R. 1924 Rang. 275.**

———*Costs.*

Interest must be allowed on costs, which are allowed in the original decree but disallowed in appeal at the time of restitution. (*Tudball and Sulaiman, JJ.*) GOKUL PRASAD *v.* RAM DEVI. **63 I. C. 513 = 19 A. L. J. 771 = A. I. R. 1921 All. 241.**

—S. 144—Limitation.

———*Order of Privy Council—Art.* 183 *applies.*

Mukerji, J.—Where an application is made to obtain restitution as the necessary result of the order of His Majesty in Council, that application is to be taken as one to "enforce" an order in Council and must be governed by Art. 183 and not by the general and omnibus Art. 181. A. I. R. 1922 All. 238, Foll. (*Mukerji and Sen, JJ.*) SOHAN BIBI *v.* BAIJNATH DAS. **5 All. 767 = 26 A. L. J. 587 = 112 I. C. 876 = A. I. R. 1928 All. 293.**

———Limitation Act, Art. 181—Decree of trial Court reversed in first appeal—Decree executed in the meantime—First appellate decree affirmed in second appeal—Limitation for applicaion for restitution begins from date of first appellate decree. 7 B. L. R. 704; 27 C. L. J. 451; and A. I. R. 1926 Cal. 981 Diss. from.

(*Rankin, C. J., C. C. Ghose and Buckland, JJ.*) HARI MOHAN DALAL *v.* PARAMESHWAR SHAU.

117 I. C. 543 = 32 C. W. N. 971 = 56 Cal. 61 = A. I. R. 1928 Cal. 646.

———*Time should be computed from the final decree.*

A suit by a tenant for possession of the holding was decreed on 11th Feb. 1921 and possession was subsequently delivered to him. Defendants' appeal to the first appellate Court was decreed on 20th April 1922. Second appeal to the High Court was dismissed on 21st April 1925. Defendants made an application for restitution and possession was re-delivered in September or October 1925. They then made an application for ascertainment of mesne profits by way of restitution and for recovery thereof.

Held, that the article applicable to an application for restitution was Art. 181, Lim. Act. A.I.R. 1925 Pat. 1 (F.B.), Foll.; and that the time was to be computed from the date of the final decree which was the decree of the High Court and not that of the first appellate Court. 39 All. 641 and A. I. R. 1926 P. C. 93, Foll.

Held, further, that the right to apply for ascertainment of mesne profits did not accrue until after delivery of possession. (*Kulwant Sahay and Macpherson, JJ.*) RAMBU JHAWAN *v.* BANKEY THAKUR.

7 Pat. 794 = 10 P. L. T. 49 = 114 I. C. 476 = A. I. R. 1928 Pat. 598.

———The period of limitation is three years for an application for restitution. 24 C. L. J. 469, Foll. (*Newbould and B. B. Ghose, JJ.*) FAZLAR RAHAMAN *v.* ABDUL SAMAD. **92 I. C. 960 = A. I. R. 1926 Cal. 981.**

———Time for restitution begins from the date of High Court's order in second appeal, affirming the first appellate Court's order reversing trial Court's decree. A. I. R. 1923 Cal. 389 and 16 W. R. 1, Foll. (*Newbould and B. B. Ghose, JJ.*) FAZAHAR RAHAMAN *v.* ABDUL SAMAD. **92 I. C. 960 = A. I. R. 1926 Cal. 981.**

———An application for restitution under S. 144 is not an application for execution but a miscellaneous application, and Art. 181 governs it. 67 P. R. 1918, Foll. (*Coldstream, J.*) GUJARMAL *v.* NARAIN SINGH.

96 I. C. 804 = A. I. R. 1926 Lah 685.

———Limitation Act, S. 6—S. 6, Limitation Act applies to proceedings under S. 144. (*Wazir Hasan and Raza, JJ.*) SANT SAHAI *v.* CHHUTAI KURMI. **1 Luck. 40 = 3 O. W. N. 65 = 92 I. C. 23 = 13 O. L. J. 731 = A. I. R 1926 Oudh 199.**

———*Das and K. Sahay, JJ.*—An application for restitution is governed by Art. 181 and not Art. 182.

Per *Ross, J.*—There is no reason in principle why an application for restitution should not be treated as an application for execution, and therefore such an application is governed by Art. 182; 24 C. L. J. 467 (1916); 28 Cal. 113 (1900); 16 I. C. 238 (1912); 11 C. L. J. 541 (1910); Foll. (*Das, Ross and Kulwant Sahay, JJ.*) BALMUKUND MARWARI *v.* BASANTA KUMARI.

78 I. C. 200 = 3 Pat. 371 = 5 P. L. T. 145 = 1924 P. H. C. C. 33 = A. I. R. 1925 Pat. 1 (F.B)

———An application under S. 144, C. P. Code, for mesne profits is not one for execution, and as soon as the decree is reversed a right to apply for mesne profits accrues. (*Martineau, J.*) CHANDA SINGH *v.* BISHEN SINGH. **76 I. C. 501 = 5 L. L. J. 389 = A. I. R. 1924 Lah. 166.**

———Limitation Act, Art. 182—Plaintiff successful in first Court—Remand by appellate Court—Defendants successful in decision on remand—Application for restitution—Starting point is date of latter decision and not of the order of remand. (*Macnair, A. J. C.*) SONBA *v.* PARASHARAM. **76 I. C. 255 = 18 N. L. R. 200 = A. I. R. 1923 Nag. 101.**

———An application for restitution is an application for execution under the present C. P. Code, just as it was under the old Procedure Code, and Art. 182 of the Limitation Act applies to such applications. (*Dawson Miller, C. J and Jwala Prasad, J.*) BASANTA KUMARI DASI *v.* BALMAKUND MARWARI.

72 I. C. 912 = 1923 P. H. C. C. 1 = 2 Pat. 277 = 1 Pat. L. R. 338 = A. I. R. 1923 Pat. 371.

———An application for restitution cannot be treated as anything else than an application for execution of the decree of the appellate Court. Therefore, Art. 182 applies to applications under S. 144, C. P. Code. (*Macleod, C. J. and Shah, J.*) HAMIDALLI KADAMALLI *v.* AHMADALLI MHIBUBALLI. **62 I. C. 233 = 45 Bom. 1137 = 23 Bom. L. R. 480 = A. I. R. 1921 Bom. 67.**

—S. 144—Mesne profits.

———*Compromise in appeal—No mesne profits by way of restitution from the date of delivery under the decree.*

Decree-holder purchasing property in suit at sale—Sale confirmed during pendency of appeal by judgment-debtor—Possession granted to decree-holder—Appeal compromised—Decree-holder agreeing to give possession on receipt of first instalment from judgment-debtor—Instalment paid but possession not transferred—Application by judgment-debtor for mesne profits from date of delivery of possession by way of restitution.

Held, (1) that up to the date of the payment of the first instalment the possession of the decree holder was not that of a trespasser, (2) that the order confirming the sale was not reversed and that the judgment-debtor was not entitled to any mesne profits from date of possession by decree-holder. 15 C. L. J. 187, Dist. (*B. B. Ghose and Bose, JJ.*) SARAT CHANDRA RAKSHIT *v.* SUBASHINI DEBI. **120 I. C. 807 = 56 Cal. 550 = A. I. R. 1930 Cal. 89.**

———*Possession—Restitution against strangers—When available.*

Suit for ejectment—Suit decreed and possession obtained in execution—Decree finally reversed—Property leased in meantime to third persons—Application under S. 144—Possession can be recovered from the third persons and mesne profits from ejector only. (*B. B. Ghose and Bose, JJ.*) PHANI BHUSAN *v.* ANUKUL MUKHERJEE. **A. I. R. 1929 Cal. 590.**

———*Section applied to mesne profits after decree also.*

An order for mesne profits, accruing after decree, is not one for restitution under S. 144; but in the exercise of their inherent powers, Courts have often applied the principles of that section to cases which were not strictly within the terms of that section. An executing Court has therefore ample power to make an order to prevent what would be essentially a miscarriage of justice and a separate suit is not necessary. 41 Mad. 316; 61 P. R. 1917 and A. I. R. 1922 Cal. 28, Rel. on. (*Addison, J.*) JAWALA SINGH *v.* SUNDAR SINGH.

103 I. C. 328 = 28 P. L. R. 178 = A. I. R. 1927 Lah. 346.

———*Suit under O. 21, R. 103, for declaration and possession decreed—Application for mesne profits does not lie under S. 144—Section does not apply if can be claimed in separate suit.*

In revision it was held that the remedy of independent suit for mesne profits being open to him his application was not maintainable, 38 Mad. 829 (F. B.) and 41 Mad. 188 (F. B.), Foll.: 29 All. 143, not Approved. (*Odgers and Curgenven, JJ.*) BHIMANA GOWD *v.*

SIDDALINGANA GOWD. **104 I. C. 768 = 39 M. L. T. 94 = 27 M. L. W. 188 = A. I. R. 1927 Mad. 898.**

——On reversal of a money decree the judgment-debtor is entitled to mesne profits for the period during which the decree-holder auction purchaser remained in possession as also interest thereon, so also the commission paid to the auctioneer. (*Moti Sagar, J.*) RALYA SINGH *v.* TURIA MAL. **80 I. C. 316 = 6 L. L. J. 142 = A. I. R. 1924 Lah. 486.**

——Claim for mesne profits need not be made in application for reinstatement of possession whether S. 144 applies or not. (*Drake-Brockman, J. C.*) MST. RADHA *v.* MST. SAKHU. **17 N. L. R. 62 = A. I. R. 1921 Nag. 112.**

—S. 144—Power of Court.

——In proceedings under S. 144 the Court has inherent power to make such orders as may be necessary for ends of justice or to prevent abuse of processes of the Court. (*Wort ond Kulwant Sahay, JJ.*) MT. PHUL KUER *v.* MT. NAJMUNNISA. **11 P. L. T. 361 = A. I. R. 1930 Pat. 473.**

——S. 144 is not confined to restitution only but covers case of party who is entitled to any benefit by way of restitution or otherwise and empowers Court to do justice between parties. (*Jai Lal, J.*) SOHNUN *v.* MAST RAM. **118 I. C. 389 = A. I. R. 1929 Lah. 657.**

——*Power to order restoration or restitution is not limited to S. 144.*

The power of the Court to do all things necessary to do substantial justice between the parties in the matter of restitution is not limited to S. 144 and in all cases where the parties have invoked the aid of the Court and the Court has recognized a certain transaction on the basis of an existing decree, then, if that existing decree is set aside on appeal, the Court may order the parties to be restored to the position they would have been in, if they had not taken action under the existing decree. A.I.R. 1922 Cal. 28, Foll. (*Dalip Singh, J.*) MOTI SINGH *v.* HARBHAJAN SINGH. **103 I. C. 657 = A. I. R. 1927 Lah. 635.**

——Restitution can be ordered under S. 151 apart from S. 144. 43 Bom. 235, Dist. There is no legal warrant for the view that if complete restitution all round of the positions occupied by all parties cannot be effected, then no order should be passed under S. 151 ordering restitution "so far as may be" such as would have of necessity to be passed were the case governed by S. 144. (*Coldstream, J.*) GUJAR MAL *v.* NARAIN SINGH. **96 I. C. 804 = A. I. R. 1926 Lah. 685.**

——There is inherent power in Courts under S. 151 to apply the principle of S. 144 even in cases which do not strictly come within the terms of that section and to order such restitution as may become necessary as the result of their orders. (*Jackson, J.*) SUDALAIMUTHU PILLAI *v.* SUDALAIMUTHU PILLAI. **83 I. C. 138 = A. I. R. 1925 Mad. 365.**

——*Difference between Execution and Restitution.*

Das, J.—Execution presupposes a decree or order capable of being carried into effect; restitution presupposes an act of the Court, which has done an injury to the suitors. Execution will issue as of course: but in cases not comprehended strictly within the letter of S. 144 of the Code, restitution is not a matter of course but depends upon the discretion of the Court and will be ordered only when the justice of the case calls for it. The Jurisdiction as to restitution bears only a superficial resemblance to the jurisdiction as to execution. The jurisdiction to order restitution is inherent in the Court and that it flows, not from any power which it may have to carry into effect the decree or order of the Court, but from the recognitition of the duty which it owes to the suitors to take care that no injury is done to them by its acts. (*Das, Ross and Kulwant Sahay, JJ.*) BALMUKUND MARWARI *v.* BASANTA KUMARI. **78 I. C. 200 = 3 Pat. 371 = 5 P. L. T. 145 = 1924 P. H. C. C. 33 = A. I. R. 1925 Pat. 1 (F. B.).**

——Jurisdiction as to restitution does not arise merely under S. 144. It is inherent in the general jurisdiction of the court to act rightly and fairly, according to the circumstances, towards all parties concerned. A.I.R. 1922 P. C. 269; A.I.R. 1923 All. 394 (F.B.), Foll. (*Mukerji and Dalal, JJ.*) TARA CHAND *v.* MT. CHANPA. **84 I.C. 75 = 46 All. 767 = 22 A. L. J. 673 = 5 L. R. A. Civ. 659 = A. I. R. 1924 All. 718.**

——The power of a Court to grant restitution is not confined to cases covered by the provisions of S. 144 but under that section, read with S. 151 may be extended to other cases. (*Campbell, J.*) GANGA RAM *v.* NATHU RAM. **75 I. C. 858 = A. I. R. 1924 Lah. 583.**

——The power of a Court to order restitution is by no means confined to the terms of S. 144 of the Code. It is the inherent power of a Court to do what is right and proper under the circrcumstances which had happened. Where by a wrong interpretation of a decree the Court executing the decree delivered possession of the disputed land to certain persons and the High Court decided that the interpretation put on the decree by the executing Court was erroneous.

Held, that that being so, the Court had complete jurisdiction to restore the properties to the persons who had been originally in possession. (*Das and Ross, JJ.*) KAMALNATH JHA *v.* MOBIT NARAIN JHA. **78 I. C. 310 = 5 P. L. T. 553 = A. I. R. 1924 Pat. 800.**

——*Case not covered by express terms of section—Court has inherent powers to cause restitution.*

A decree-holder purchased property in execution sale. Subsequently, by a private settlement which received the sanction of the Court, it was agreed that the sale should not be confirmed, if by a certain fixed date the judgment debtors paid Rs. 1, 313 to the decree-holder. One of the judgment-debtors paid two instalments of Rs 317 and 230 respectively within the time allowed and the rest was not paid. Hence the sale was confirmed in full satisfaction of the judgment debt. But the fact that the decree-holder still held in hands the two sums of Rs. 317 and 230 paid to him by the judgment-debtors was overlooked by that Court when the order for confirmation of the sale was made. Therefore the judgment-debtors made the present application for restitution of the two sums mentioned.

Held, that the judgment-debtors were entitled to refund of the amount claimed, that their remedy does not lie by way of a regular Civil Suit, that this case was not covered by the express terms of S. 144 of the Code but that it was competent to the execution Court, in the exercise of its inherent powers under S. 151, to make an order for restitution with a view to secure complete justice between the parties concerned. 31 All. 551; 35 Mad. 607; A. I. R. 1915 P.C. 92, Foll. (*Mukerjee and Panton, JJ.*) RAI CHARAN BHUIYA *v.* DEBI PROSAD BHAKAT. **64 I. C. 864 = 26 C. W. N. 408 = 35 C. L. J. 53 = A. I. R. 1922 Cal. 28.**

——*Inherent power to order restitution.*

The difficulty of invoking the inherent power of the Court under S. 151 when there is an express provision to the contrary in a statute, does not arise where S. 144 does not define the full measure of the power of the Court to make an order for restitution; consequently the provisions of that section may be taken as a guide to determine in what class of cases an order for restitution may be made so that complete justice may be made between the parties and they may be restored to the *status quo ante*. (*Mookerji and Panton, JJ.*) RAI CHARAN BHUIA *v.* DEBI PRASAD BHAKAT.

64 I. C. 864 = 26 C. W. N 408 = 35 C. L. J. 53 = A. I. R. 1922 Cal. 28.

———Case not covered by S. 144—Court has inherent power to order restitution. Where a Court has by its temporary injunction deprived a party of what he was legally entitled to it should *ex debito justitiæ* restore him to the possession which he had thus lost and also compensate him for the profits which he had been precluded from earning. (*Drake Brockman J.C.*) MT. RADHA *v.* MT. SAKHU. **17 N.L.R. 62 = A. I. R. 1921 Nag. 112.**

—S. 144—Procedure.

———*Preliminary order if not appealed against cannot be attacked.*

Order passed under S. 144 that party entitled to mesne profits—Another order determining amount—Second order appealed against when appeal against first order time barred—First order being appealable could not be attacked in appeal against second order—Lah. Case No. 917 of 1919, Foll. (*Jai Lal, J.*) GUL MUHAMMAD *v.* SALIZ ALI KHAN.

113 I. C. 270 = A. I. R. 1930 Lah. 24.

———*Parties—Objector is a party.*

In the objection proceedings and proceedings which arise therefrom (such as proceedings under S. 144) the objector under R. 58 is to be deemed to be a party to the suit, the decree-holder and the judgment-debtor being other parties. (*Jai Lal, J.*) SOHNUN *v.* MAST RAM. **118 I. C. 389 = A. I. R. 1929 Lah. 657.**

———*Only the executing Court can order restitution.*

The question of restoration cannot be dealt with by the Court who did not sell or deliver possession of the property. Only the Court which executes the decrees has jurisdiction to restore the property to the judgment-debtor and no other Court has such jurisdiction because the sale and the delivery of possession take place in the Court executing the decrees and it is that Court alone which can set aside the sale and cancel the delivery of possession and restore the parties to *status quo ante*; 16 M. 287 and 22 All. 108, Rel. on. (*Jwala Prasad, J.*) RAGHUNANDAN PRASAD. *v.* KUMAR GHANAND SINGH. **113 I. C. 717 = A. I. R. 1928 Pat. 502.**

———Order under S. 151 in exercise, by analogy, of jurisdiction under S. 144 is appealable. 2 P. L. J. 361. and 2 P. L. J. 206; A. I. R. 1922 P. C. 269, Ref. (*Greaves and Mukerji, JJ.*) GUANADA SUNDARI MOJUMDAR *v.* CHANDRA KUMAR DE.

100 I. C. 735 = 31 C. W. N. 290 = A. I. R. 1927 Cal. 285.

———Proceedings for restitution are not proceedings in execution and therefore O. 45, R. 15 does not apply to an application for restitution; A. I. R. 1925 Pat. 1 (F.B.), Foll. Where though the applicants for restitution were unable to put before the trial Court a copy of the decree of the Privy Council, yet before the order was passed, the trial Court had been furnished with a copy of that order.

Held, there was no irregularity. (*Das and Adami, JJ.*) JUGAL KISHORE MARAWARI *v.* HOMESHWAR SINGH. **6 Pat. 252 = 102 I. C. 614 = A. I. R. 1927 Pat. 208.**

———*Party—*Bona fide *auction purchaser is not.*

A *bona-fide* auction-purchaser for value is not a party to the suit within the meaning of S. 2 or S. 47 of the C. P. Code and an order refusing restitution against him is not a decree and therefore not appealable. (*Moti Sagar, J.*) MT. ASGHARI BEGUM *v.* IRSHAD-UD-DIN.

79 I. C. 57 = A. I. R. 1925 Lah. 176.

———*Execution sale cancelled—Purchaser cannot apply under—S. 144.*

Where a decree was reversed on appeal and an auction sale which had taken place in execution of the decree was cancelled and the order cancelling the sale was allowed by the auction purchaser to become final,

Held, that the remedy of the auction purchaser was not by proceedings under S. 144 (*Heald and Chari, JJ.*) MA TOK *v.* MAUNG MO HNAUNG.

89 I. C. 603 = 3 Rang. 251 = 4 Bur. L. J. 58 = A. I. R. 1925 Rang. 215.

———An order for rateable distribution in a contest between rival decree-holders is not an order under S. 47 and is not a decree within the provisions of S. 144. Powers under S. 151, C. P. Code should be exercised when necessary for the ends of justice, *i.e.*, when this is the only legal method by which dues will be obtained. (*Ayling and Venkatasubba Rao, JJ.*) VARADA RAMASWAMI *v.* VUMMA VENKATARATNAM.

67 I. C. 546 = 1922 M. W. N. 184 = 15 M. L. W. 421 = 30 M. L. T. 178 = A. I. R. 1922 Mad. 99 = 42 M. L. J. 473.

—S. 144—Refund of money.

———*Money paid to secure release from illegal arrest is to be refunded.*

Where a person is ordered to appear as an accused in a criminal case and comes from another place to attend the Court he is exempted from arrest under S. 135 (2) and such an arrest is illegal. The immunity from arrest is not for the benefit of the Court but for the furtherance of public interest and the better administration of justice. The person arrested is entitled to a refund of money which he paid in order to secure his release from arrest. 4 Mad. 317, Ref. (*Stuart, C. J., Wazir Hasan and Raza, JJ.*) C. CURSATJI *v.* HAR GOVIND DAYAL. **119 I. C. 367 = 6 O. W. N. 809 = A. I. R. 1929 Oudh 426 (F.B.).**

———*Sale set aside—Auction purchaser entitled to refund of price paid.*

Mortgaged property sold in execution of prior mortgage decree—It is again sold in execution of subsequent mortgage decree—Subsequent sale set aside—Court can order refund to auction-purchaser under S. 151. (*Mukerji, J.*) ATMA RAM *v.* NANAK CHAND.

92 I. C. 571 = A. I. R. 1926 All. 274.

———*Pre-emption.*

Pre-emption decree—Pre-emption money increased in appeal—Decree-holder's failure to deposit enhanced amount—He can withdraw original deposit. 76 P. R. 1902, Dist. (*Martineau, J.*) DIWAN CHAND *v.* HIRA NAND. **78 I. C. 971 = A. I. R. 1925 Lah. 177.**

———Decree set aside after confirmation of sale—Auction-purchaser can claim refund of money paid by application under S. 47. 40 Mad. 299, 43 Mad. 107, 19 Cal. 683 P. C., Foll; 42 Bom. 411, Not Foll. 44 All. 266, Cons. 43 All. 60, Dist. (*Lindsay, Ryves and Daniels, JJ.*) BINDESHARI PERSHAD TEWARI *v.* BADAL SINGH. **74 I. C. 873 = 45 All. 369 = 21 A. L. J. 228 = 4 L. R. A. Civ. 161 = A. I. R. 1923 All. 394 (F.B.).**

———Auction sale—Deposit of price by purchaser and subsequent discharge of incumbrance—Sale set aside—Judgment-debtor must refund deposit before claiming restoration of possession, but not money paid for incumbrance as discharging encumbrance gives the purchaser the rights of the encumbrances and consequently no hardship is caused to him. (*Lord Carson.*) JAI BERHAM *v.* KEDAR NATH MARWARI.

69 I. C. 278 = 27 C. W. N. 582 = 37 C. L. J. 351 =

C. P. CODE, (1908), S. 144—Refund of money.

21 A. L. J. 490 = 25 Bom. L. R. 643 = 1923 M. W. N. 368 = 4 L. R. P. C. 117 = 18 M. L. W. 802 = 49 I. A. 351 = 2 Pat. 10 = 32 M. L. T. 10 = 4 P. L. T. 61 = A. I. R. 1922 P. C 269 = 44 M. L. J. 735.

———Abatement set aside—Restitution can be had of the costs paid as per 1st Court's order of abatement. (*Ayling and Venkatasubba Rao, JJ.*) PARAVATHI AMMAL *v.* ELAYAPERUMAL KONAR **66 I. C. 216 = 1922 M. W. N. 167 = 16 M. L. W. 445 = A. I. R. 1922 Mad. 70.**

—S. 144—Restitution.

———An application for restitution is not an application for execution. 41 Bom. 625; A. I. R. 1921 Bom. 67; 40 Mad. 780; A. I. R. 1926 Mad. 813, Diss. from: A. I. R. 1922 All. 223; A. I. R. 1922 All. 238; A. I. R. 1925 All. 137; 3 Pat. 371 ; A.I.R. 1928 Pat. 598; A. I. R. 1928 Pat. 1 (F. B.), Rel. on. (*Walker, J.*) UJAGAR SINGH *v.* PURAN SINGH.

A.I.R. 1930 Lah. 961.

———Since S. 144 cannot be invoked unless the decree has been reversed or varied, where a sale in execution of a decree is set aside under O.21, R.90 and the judgment-debtor applies for restitution and mesne profits decree remains intact and therefore the provisions of S. 144 cannot apply. An order for restitution in such a case comes under S. 151 in the exercise of the inherent jurisdiction of the Court. 2 P. L. R. 361 ; 41 Mad. 467 ; 18 C. W. N. 1299, Rel. on ; A.I.R. 1924 Pat. 800 and A. I. R. 1922 P. C. 269, Ref. (*Fazl Ali and Dhavle, JJ.*) RAM RATAN PRASAD *v.* BANARSI LAL.

122 I. C. 589 = 11 P. L. T. 156 = A. I. R. 1930 Pat. 280.

———Certain members of the joint family filed a suit against *S*, another member of the family, for avoiding transfers of joint family property made by *S*. and impleaded the transferees from *S*, also parties to the suit. Plaintiffs got a decree and the transferees submitting to it delivered possession of the property to the plaintiffs. *S*, however, appealed against the decree and the plaintiffs filed an objection under O. 41, R. 22, claiming mesne profits from the transferees of *S*. On appeal the suit was dismissed and the transferees applied for restitution of the properties.

Held, that the transferees were entitled to apply under S. 144 although they themselves had not appealed against the decree. (*Lindsay and Sulaiman, JJ.*) DHANI RAM *v.* SUMER CHAND.

98 I. C. 1042 = A. I. R. 1927 All. 182.

———A claimant for restitution under S. 144 need not be a party to the suit. The section is wide enough to cover the case of a person who has been deprived of any property or any interest in property to be compensated by way of restitution or otherwise for anything done under a decree that has been varied or reversed. (*Jai Lal, J.*) SOHNUN *v.* MAST RAM. **118 I. C. 389 = A. I. R. 1929 Lah. 657.**

———The doctrine of restitution is based on the principle that the Court will not permit an injustice to be done by reason of an erroneous order made by it when that erroneous order has been reversed and the Court will restore the parties to the position which they would otherwise have occupied. (*Mohiuddin, A. J. C.*) MULCHAND *v.* TARACHAND. **117 I. C. 288 = A. I. R. 1929 Nag. 138.**

———Disputed property in the hands of a Receiver. Such custody is for the benefit of the true owner—Restitution can be ordered in favour of the true owner. A. I. R. 1924 Cal. 600 Foll. Other cases Ref. (*Dawson Miller, C.J. and Mullick, J.*) BISHESHWAR PRATAP NARAYAN SAHI *v.* CHANDRESHWAR PRASAD.

108 I.C. 89 = 7 Pat. 319 = A. I. R 1928 Pat. 260.

C. P. CODE, (1908), S. 144—Restitution.

———*Meaning of.*

The word "restitution" implies restoration to a party of what has been lost to him in execution of a decree or directly in consequence of that decree. A. I. R. 1924 Cal. 769, Rel. on. (*Shadi Lal, C. J. and Broadway, J.*) NEADAR MAL *v.* RATTAN LAL. **104 I. C. 817 = 8 Lah. 356 = 9 L. L. J. 359 = 28 P. L. R. 695 = A I. R. 1927 Lah. 625.**

———*Remote damages cannot be awarded.*

Wrongful attachment of judgment-debtor's properties —Objection dismissed—Judgment-debtor privately selling the properties and depositing money in Court to set aside auction sale pending his appeal against the order dismissing his objections—Sale set aside on appeal—Loss caused by private sale cannot be claimed in restitution by judgment-debtor, as being very remote. (*Venkatasubba Rao and Madhavan Nair, JJ.*) MD. ANWARUL HUQ SAHIB *v.* M. A. SRINIVASA AYENGAR.

95 I. C. 630 = A. I. R. 1927 Mad. 353.

———Where in execution of a decree, immovable property of the judgment-debtor was sold, but on appeal the decree was set aside, only in part, and a substantial part of the decree was left still standing ;

Held, that the judgment-debtor was not entitled to have the sale set aside, but was entitled to restitution and may claim the balance of the sale proceeds. (*Carr, J.*) MA THU ZA *v.* MG PO SHEIN. **95 I. C. 877 = 5 Bur. L. J. 66 = A. I. R. 1926 Rang. 126.**

———*Innocent purchasers are not affected by the reversal of decree in appeal.*

Where a decree-holder is himself the purchaser in execution of his *ex parte* decree and the *ex parte* decree is subsequently set aside, the sale stands cancelled and any interest which has accrued to the decree-holder or any one claiming through him must also fail. But where the right of an innocent third party is injuriously affected by the conduct of the parties to the suit the sale need not fall along with the decree. For instance, where the decree-holder has parted with his interest in the property or in the greater portion of it, and thereafter he enters into a compromise with the judgment-debtor, behind the back of the transferee who has come on the property in good faith, and gets the decree set aside, the right of the transferee will not be affected. (*Suhrawardy and Duval, JJ.*) BEHARI LAL AGWAN *v.* SUBALA DASI.

86 I. C. 376 = A. I. R 1925 Cal. 1074.

———Restitution against *bona fide* auction-purchaser cannot be obtained. (14 Cal. 18 ; 10 All. 166 ; 38 All. 240, Ref.) (*Moti Sagar, J.*) MT. ASGHARI BEGUM *v.* IRSHAD UD-DIN. **79 I.C. 57 = A.I.R. 1925 Lah. 176.**

———*Is allowed against purchasers with knowledge.*

While as against a decree-holder who is himself the auction-purchaser a sale can be set aside and restitution made, an innocent purchaser through Court cannot ordinarily be so disturbed. But where a stranger purchaser declined to join as defendant in a suit against decree-holder to set aside the sale though expressly invited and was therefore absent in the suit by the appellant.

Held, that he was a representative of decree-holder to that extent, that he had notice of the claim and therefore restitution should be granted even as against him. 29 Bom. 435 (F. B.), Dist. (*Kennedy, J. C. and Madgavkar, A. J. C.*) JAMNOMAL GURDINOMAL *v.* GOPAL DAS. **80 I. C. 1002 = 17 S. L. R. 73 = A. I. R. 1924 Sind 101.**

———*Restitution can be granted only on application of party—Two innocent parties—S. 151 cannot be invoked in favour of one.*

Where the appellants, purchasers in Court auction, were deprived of their properties owing to the cancellation of the sale, the properties sold being in possession of the judgment-debtor as a mere trustee, and they thereupon applied for restitution of the sums paid by them which have been rateably distributed among certain persons holding decrees against the judgment-debtors, *held*, that restitution can only be granted under S. 144 on the application of a party to the "decree varied or reversed". The appellants were not the representatives of the judgment-debtor and there was no decree or order varying or reversing any order in their favour. They cannot be compensated for the loss of their money at the expense of equally innocent parties and the extraordinary powers conferred by S. 151 for the ends of justice and to prevent abuse of the process of the Court, cannot be invoked, where the equities are so evenly balanced, in favour of the appellants. (*Ayling, O. C. J. and Venkatasubba Rao, J.*) RAJA RAO *v.* ANANTHANARAYANAN CHETTY. **67 I. C. 369 = 15 M. L. W. 303 = 1922 M. W. N. 255 = A. I. R. 1922 Mad. 228 = 42 M. L. J. 308.**

——S. 144, C. P. Code, is not confined to cases where restitution is claimed on the reversal of the decree in first or second appeal; provided the decree is varied or reversed, the section applies, however the reversal or variance has been effected. 40 Mad. 299, followed. Order of the High Court, setting aside abatement necessarily affects the order of the Lower Court awarding costs to defendants. 6 All. 21, Dist. (*Ayling, O. C. J. and Venkatasubba Rao, J.*) SITALAKSHMI AMMAL *v.* KRISHNASWAMI IYER. **65 I. C. 797 = 1922 M. W. N. 186 = 16 M. L. W. 587 = A. I. R. 1922 Mad. 70.**

——After the auction-purchaser was put into possession of the property sold in the execution, the sale was set aside in appeal. The High Court confirmed the order of restitution of the Appellate Court wherefor the judgment-debtor applied for restitution of possession under S. 151, C. P. Code. (*Kotwal, A. J. C.*) SHRIKISAN *v.* SUNDARBAI. **64 I C. 732 = 18 N. L. R. 24 = A. I. R. 1922 Nag. 82.**

——*Procedure—Suit can be converted into application under S. 47.*

Though applications for restitution may have to be brought under S. 144 yet they are in substance execution proceedings and as such cognizable by the executing Court. They also come under S. 47, C. P. Code and under that section suits can be treated as execution proceedings and proceedings as a suit. (*Prideaux, A. J. C.*) JAMANLAL *v.* RAGBA. **67 I. C. 319 = A. I. R. 1922 Nag. 198.**

——*"Court of first instance" meaning of.*

Per *Mukerji, J.*—The words "Court of first instance" in S. 144 sufficiently point to the intention on the part of the legislature to confine the applicability of the section to cases where the variation or reversal has been made, or is a consequence of an order passed by a superior Court.

Per *Guha, J.*—S. 144 which embodies the rule to be followed in cases where restitution is sought, after reversal or variation of decrees, contemplates all cases of reversal or variation and is not confined to reversal or variation on appeal or revision only. The reference to the Court of first instance in the section does not initiate against this view. (*Mukerji and Guha, JJ.*) RAMANATH KARMAKAR *v.* SHEIKH ASANULLA. **34 C. W. N. 746.**

——*"Court of first instance" meaning of.*

Where the High Court reversed the decree of a Temporary Subordinate Court and that Court ceased to exist and a new Temporary Subordinate Court was established, to which an application for restitution was made.

Held, that the latter subordinate Court was the Court of first instance within the meaning of S. 144 and that it could order restitution.

Per *Abdur Rahim, J.*—The Court of first instance in S. 144 is used in contradiction to a Court of appeal.

Per *Oldfield, J.*—The Court of first instance in the ordinary meaning of the expression can only be the Court where the trial is at present pending. (*Abdur Rahim and Oldfield, JJ.*) LAKSHMA GOUNDAN *v.* SUBRAMANIA AIYAR. **61 I. C. 962 = 13 M. L. W. 67 = A. I. R. 1921 Mad. 103.**

—S. 144—Scope of—Applicability.

——The principle of S. 144 is not confined exclusively to matters in execution. It can be applied to interim orders passed pending the final disposal of a partition suit. (*Wallace and Jackson, JJ.*) ARUNACHALAM CHETTIAR *v.* PRATAPA SIMHA RAJAH SAHIB. **(1930) M. W. N. 644.**

——S. 144 is very comprehensive and is not inapplicable to a case in which a decree has been reversed by the Privy Council. 40 Mad. 299, Foll. (*Le Rossignol and Martineau, JJ.*) HANUMAN PRASHAD *v.* NATIONAL BANK, DELHI. **93 I. C. 954 = 7 Lah. 232 = 8 Lah. L. J. 338 = 27 P. L. R. 400 = A. I. R. 1926 Lah. 488.**

——One *P* held a decree for money against *A*, in execution of which he attached certain property. Before that attachment *A* had died and his daughter-in-law, the plaintiff had been impleaded as his legal representative. The plaintiff objected to the attachment contending that it did not belong to *A*. Her objection was finally allowed in appeal. Meanwhile the property attached had been sold by auction in execution of that decree and purchased by the defendant. Plaintiff then sued for the recovery of possession of that property or in the alternative for the recovery of Rs. 500, the value of the said property.

Held, that S. 144, C. P. Code, had no application to the case but the plaintiff should be allowed to obtain possession of the disputed property after refunding to the defendant the amount obtained by her out of the sale proceeds. (*Kanhaiya Lal, J.*) BALWANT SING *v.* MT. LAIQA BEGAM. **75 I. C. 238 = 4 L. R. A. Civ. 526 = A. I. R. 1924 All. 273.**

——S. 144 only applies where a decree has been set aside in appeal or otherwise. (*Daniels, J.*) CHUTTAN *v.* JWALA PRASAD. **73 I. C 602 = A. I. R. 1924 All. 64.**

——The appellant applied for letters of administration to the estate of one *M* and the respondent set up a will of the deceased. The moveable properties in dispute were at that time in the possession of the respondent. An inventory was made by the commissioner appointed by Court and the properties were locked up in a room under seal. Letters were granted to the appellant and probate was refused to the respondent. This decision being reversed on appeal to the High Court the respondent applied for removal of the seals and for delivery of the properties to her, and the District Judge made an order accordingly. The order of the High Court granting probate was, however, reversed by His Majesty in Council. The letters of administration to the appellant were thereupon restored, and the appellant applied for restitution of the properties to him.

Held, that the properties were never in the possession of the appellant, they were not taken out of his possession and made over to the respondent under any decree or order of Court, and therefore S. 144 had no application. (*Chatterjea and Panton, JJ.*) BAIKUNTHA NATH CHATTORAJ *v.* PROSANNAMOYI DEBI.

81 I. C. 571 = 51 Cal. 324 = A. I. R. 1924 Cal. 769.

———Where a decree is not varied or reversed but execution thereof has taken place under a mistake and the judgment-debtor seeks restitution, S. 144 has no application. (*Daniels, A. J. C.*) DORI LAL *v.* MT. JAMAGA. **72 I. C. 879 = A. I. R. 1923 Oudh 16.**

———The prejudice to be removed by way of restitution must be the result of erroneous terms of the original decree. But where prejudice suffered is due not to the variation in decree but to the terms of the sale order to which no objection was taken either at the time of proclamation or sale S. 144 does not apply. The terms of S. 144 are much more restricted than those of corresponding S. 583 of the previous Code. (*Ayling and Venkatasubba Rao, JJ.*) SUNDARAM REDDI *v.* RAGHAVA REDDI. **68 I. C. 516 = 1922 M.W.N. 141 = 16 M.L.W. 355 = A. I. R. 1922 Mad. 96 = 42 M. L. J. 315.**

—S. 144—Miscellaneous.

———The provisions of S. 144 are not exhaustive, but the Court has inherent power to restore any party which has suffered any injury by virtue of an order. 61 P.R. 1917; 31 All. 551; A.I.R. 1922 Nag. 82; A.I.R. 1927 Lah. 635, Foll. (*Jai Lal, J.*) SOHNUN *v.* MAST RAM. **118 I. C. 389 = A. I. R. 1929 Lah. 657.**

———*Moneys received in ignorance of pending Insolvency Petition.*

Provincial Insolvency Act, S. 52—Execution proceedings pending prior to application for insolvency—No notice under S. 52 to Executing Court by Receiver—Attached property sold—Decree-holder obtaining payment—No refund possible—Proper course is application under S. 52 and not under S. 144. (*Tek Chand, J.*) DIN MUHAMMAD *v.* TARA CHAND. **116 I.C. 192 = A. I. R. 1930 Lah. 39.**

———*Decree providing for profits to be determined in application under S. 144—Decree-holder cannot object to restitution.*

The appellant as plaintiff sued the respondent as defendant on a mortgage and having obtained an *ex parte* decree purchased the mortgaged property in execution thereof and upon confirmation of the sale obtained delivery of possession in October 1918. The respondent then instituted a suit for declaration of title to the property so purchased, assailing the *ex parte* mortgage decree as vitiated by fraud. He obtained an *ex parte* decree and recovered possession of the property in May 1926. The *ex parte* mortgage decree having been set aside the original mortgage suit was restored and re-tried and was again decreed in March 1928. In the course of the re-trial the respondent prayed for an account being taken of the profits enjoyed by the appellant during his possession of the property. The Court left the question of profits open with the remark that the question might be determined on an application under S. 144, C. P. Code. The respondent made the application before the final decree was passed. *Held*, that the appellant having taken the decree in the mortgage suit with the reservation that the question of profits for the period of possession would be determined on an application under S. 144, C. P. Code, and having reaped the benefit of that decree by execution cannot be permitted to turn round and challenge the maintainability of that very application when it has been made. Restitution can be ordered in such a case either under S. 144 or under S. 151, C. P. Code. (*Mukerji and Guha, JJ.*) RAMANATH KARMAKAR *v.* SHEIKH ASANULLA. **34 C.W.N. 746.**

———Forms under O. 21, should not be used. (*Walsh and Ryves, JJ.*) HANIFUNNISSA *v.* CHUNNI LAL. **63 I. C. 184 = 19 A. L. J. 549 = A. I. R. 1921 All. 321.**

S. 145.

Construction.
Fulfilment of condition.
Liability discharged.
Liability of surety.
Notice.
Personal liability.
Surety, rights of.
Miscellaneous.

—S. 145—Construction.

———*Applies only to personal liability.*

S. 145, C. P. Code, only applies if the sureties are personally liable, but not where the instrument only gives a charge on the property. A.I.R. 1926 Bom. 279 and A.I.R. 1919 P.C. 79, Foll. (*Marten, C. J. and Crump, J.*) JAYAPPA *v.* SHIVANGOUDA. **107 I. C. 710 = 52 Bom. 72 = 30 Bom. L. R. 19 = A.I.R. 1928 Bom. 42.**

———*Section applies where liability is incurred independently of the decree.*

S. 145 applies to cases where the liability of the surety is incurred independently of the decree and is not contained in or declared by the decree itself which is sought to be executed. In the latter case such a person becomes really a judgment-debtor and therefore becomes liable as such.

Where in a suit for money a compromise was arrived at whereby one of the defendants was exonerated as defendant but he undertook as surety the liability of the decretal amount by charging certain property of his and a decree was passed accordingly,

Held, that the decree-holder was entitled in execution to proceed against the surety's property. A. I. R. 1926 Cal. 889; A.I.R. 1924 Cal. 645; A. I. R. 1922 Cal. 35, Rel. on. (*Jai Lal, J.*) AYA RAM TOLA RAM *v.* HIT RAM BHOJ RAJ. **103 I. C. 449 = A. I. R. 1928 Lah. 209.**

———Sureties for successor-in-interest of party to suit who remained to be brought on record comes under S. 145. (*Gulam Mohiuddin, A. J. C.*) ABDUL ALI *v.* MT. MANBI. **109 I. C. 636 = A. I. R. 1928 Nag. 294.**

———*S. 145 does not apply but case is governed by Succession Act.*

B obtained letters of administration to the estate of one *M* and the appellants were his sureties on a bond executed under Succession Act (1925), S. 291. The respondent obtained a mortgage decree against *B* as administrator, and subsequently a money decree for the balance due after realization of the security. The respondent, thereupon, applied for execution of the decree against the sureties to the administration bond. They objected to the attachment on the ground that S. 145 was not applicable to the bond executed by them.

Held (*Das and Carr, JJ.*), that S. 145 does not apply to sureties of an administration bond (10 L.B.R. 236 and A.I.R. 1919 P.C. 55, Dist.); that the appellants only rendered themselves liable under the terms of the administration bond and the only way to proceed against them would be to obtain an assignment of the administration bond as provided by S. 292, Succession Act. (*Cunliffe, J.*, contra *Carr and Cunliffe, JJ.* On difference *Das, J.*) KO MAUNG GYI *v.* DAW TOK. **112 I. C. 427 = 6 Rang. 474 = A. I. R. 1928 Rang. 249.**

———*Das and Carr, JJ.*—The word "decrees" in the operative part of S. 145 refers only to cls. (*a*) and (*b*) and not to clause (*c*) to which the word "order"

C. P. CODE, (1908), S. 145—Construction.

only applies. (*Carr and Cunliffe, JJ.* On difference *Das, J.*) KO MAUNG GYI *v.* DAW TOP.
112 I.C. 427 = 6 Rang. 474 = A. I. R. 1928 Rang. 249.

——*Loss by the negligence or default of receiver—Sureties can be proceeded against.*

Accounts filed being unchallenged—Subsequent enquiry showing difference in money received—Proper course is to make an order under R. 4 or to proceed against sureties under S. 145. 10 L. B. R. 236, Foll. (*Maung Ba, J.*) CHETTIYAR FIRM *v.* MAUNG THA LU. **100 I. C. 996 = 6 Bur. L. J. 15 = A. I. R. 1927 Rang. 334.**

——S. 145 does not profess to define in any way the liability of a surety. It merely describes a procedure when the surety is liable for enforcing his liability. (*Brown, J.*) MAUNG PO AUNG *v.* MU THET PON.
5 Rang. 494 = A. I. R. 1927 Rang. 316.

——There is no warrant for the proposition that it is only a security bond in favour of the Court, which can be executed against the surety under S. 145. (*Cuming and Page, JJ.*) JOYMAN BEWA *v.* EASIN SARKAR.
95 I. C. 483 = 53 Cal. 515 = 43 C.L.J. 493 = 30 C.W.N. 609 = A.I.R. 1926 Cal. 877.

——S. 145 deals only with the execution of a decree or order against a surety and not with the question of a refund of money deposited by a surety. (*Martineau, J.*) FAQIR SINGH *v.* GANDA MAL. **95 I.C. 139 = A.I.R. 1926 Lah. 544.**

——*S. 145 does not apply to surety under Guardians and Wards Act.*

The procedure laid down in S. 145, C. P. Code, is not applicable to the case of a surety under the Guardians and Wards Act. S. 145 deals with something more than a mere mode of trial in a pending proceeding, and confers a substantive right of making a person, who is not a party to a pending suit to be made party to it and to be amenable to the jurisdiction to the Court in execution proceedings. It cannot be therefore extended to apply to enforcement of surety bonds given in favour of the Court in proceedings other than suits. (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*) KHUSHIRAM TEJBHANDAS *v.* JHALIBAI. **89 I.C. 342 = 19 S.L.R. 390 = A.I.R. 1926 Sind 35.**

——A Court cannot call on supurtdar to produce property in a suit in which he was not appointed supurtdar. (*Daniels, J.*) CHHUTTAN *v.* JWALA PRASAD.
73 I.C. 602 = A.I.R. 1924 All. 64.

——"*Under an order of Court*" *meaning of.*

The words "under an order of the Court" in cl. (*c*) of S. 145, which apply equally to the payment of money and the fulfilment of a condition, must in each case refer to the original order of the Court. It cannot be that they refer in respect of the condition to the original order imposing it and in respect of the payment to a second order to be passed in the subsequent proceedings. (*Hallifax, A. J. C.*) AMOLAK SAO *v.* KASHINATH. **64 I.C. 430 = A.I.R. 1921 Nag. 99.**

——The condition was that if the judgment-debtor failed to apply in the Insolvency Court for his discharge the surety would render himself liable for a certain sum.

Held, that no question, whether the surety has failed to produce the judgment-debtor, being called upon to do so, would arise. The surety's liability did not terminate on the striking off or dismissal of the execution case in which the bond was given. 22 C. W. N. 919, Foll.; 14 Cal. 757, Dist. (*Mullick and Jwala Prasad, JJ.*) DEOHRAJ *v.* MAHABIR PRASAD.
1921 P.H.C.C. 19 = A.I.R. 1921 Pat. 72.

—S. 145—Fulfilment of Condition.

——*Security for—Summary remedy is available.*

C. P. CODE (1908), S. 145—Fulfilment of Condition.

Transfer of Property Act, S. 67—Surety hypothecating immovable property for due performance of his bond—Creditor is entitled to enforce surety's liability by sale of hypothecated property in summary proceedings A. I. R. 1925 Cal. 485 Foll; 39 All. 225 Ref. (*Jai Lal, J.*) DEPAK DATT CHAUDHARI *v.* SECRETARY OF STATE. **118 I.C. 443 = A.I.R. 1929 Lah. 393.**

——Judgment-debtor's property attached—Prize of property entered in supurdnama—No condition in supurd-nama that such price only would be recoverable if article lost from supurdar's custody—Judgment-debtor is not bound by price as entered in supurdnama. (*Dalip Singh, J.*) FAZAL *v.* SALAMAT RAI.
120 I.C. 421 = A.I.R. 1929 Lah. 386.

——*Summary remedy available.*

In a case where a surety has offered certain specified properties as security for his obligations under the bond and where because these properties are immoveable properties it has been necessary to have the bond registered to make the security effective the bond can be enforced against the properties without bringing a regular suit. A.I.R. 1924 All. 105; 41 Mad. 327, Foll. (*Mya Bu and Heald, JJ.*) DAW OHU BWIN *v.* U BAH. **118 I.C. 632 = 7 Rang. 352 = A.I.R. 1929 Rang. 126.**

——*Bond to Court is not void.*

Though a security is given to the Court and not to a named individual still it cannot be void and can be enforced by the Court against the property in appropriate proceedings. A. I. R. 1919 P. C. 79, Foll. (*Marten, C. J. and Crump, J.*) JAYAPPA *v.* SHIVANGOUDA.
107 I. C. 710 = 52 Bom. 72 = 30 Bom. L. R. 19 = A. I. R. 1928 Bom. 42.

——*Bond for producing judgment-debtor.*

Where a judgment debtor is arrested in execution of a decree and he furnishes a security bond whereby the surety accepts his liability to pay the decretal amount on his failure to produce the judgment-debtor in the Court on the day fixed by the Court, the liability undertaken by the surety is not contingent upon the decree-holder's appearance in Court. It is the duty of the surety to produce the judgment-debtor on the date fixed even though the decree-holder remains absent, and if he does not do so, he is liable under the surety bond. (*Jai Lal, J.*) BIR SINGH *v.* MOHINDAR SINGH. **116 I. C. 554 = A. I. R. 1928 Lah. 974.**

——*Security bond is a contract.*

A security bond in essence is no more than a contract for the due performance of a certain thing and a party is entitled to have that contract enforced by the Courts unless there is some reason why it should not be so enforced. (*Dalip Singh, J.*) THAKAR DATT *v.* RAM SINGH. **108 I. C. 376 = A. I. R. 1928 Lah. 61.**

——*Security bond given to the trial Court is subject to appellate Court also.*

Where the agreement of suretyship ran as follows: "The said defendant would obey the order of the Court and will produce the things mentioned in the inventory in Court or will pay the price thereof. If she failed to do so, I or my lawful heirs or executors will produce Rs. 5,000," and the trial Court dismissed the suit but on appeal it was decreed and the plaintiff appealed to enforce the surety bond.

Held, that the surety undertook on behalf of the defendant that moveables would be produced by her which were mentioned in the inventory, whether the Court requiring her to produce the ornaments ultimately was that very Court or was acting in pursuance of the order made by a superior Court. That circumstance would not and should not make any difference to the liability

C. P. CODE. (1908), S. 145—Fulfilment of Condition.

of the surety. 42 All. 158, Rel. on ; A.I.R. 1925 Mad. 114, Dist.; 12 Bom. 71, Dist. and Diss. from. (*Shah and Fawcett, JJ.*) IRANGAUDA SHIDRAMGAUDA *v.* IRBASAPPA. **99 I. C. 820 = 28 Bom. L. R. 1516 = 51 Bom. 31 = A. I. R. 1927 Bom. 84.**

———*Mortgage by surety—Summary remedy available.*

Where under a bond of suretyship the surety of a judgment-debtor mortgages his property as security for his liability, on default by the judgment-debtor to pay, the decree-holder can enforce the security against the property under S. 145, without following the procedure provided for by O. 34, R. 14. (*Macleod, C. J. and Coyajee, J.*) GURUSHANTAPPA *v.* GURAVA. **95 I. C. 696 = 50 Bom. 339 = 28 Bom. L. R. 603 = A. I. R. 1926 Bom. 279.**

———*Inherent power of Court.*

S. 145 applies only in the case of surety for payment of money under Court's order—Surety to produce property attached—Default in producing property—Surety bond can be enforced apart from S. 145 by way of execution. [42 All. 158 (P. C.), Foll.] Although the case does not come within the terms of S. 145, the Court has the inherent power to enforce its bond without recourse to a suit. (*Phillips and Madhavan Nair, JJ.*) SANKUNNI *v.* VASUDEVAN. **97 I. C. 787 = 24 M. L. W. 300 = 1926 M. W. N. 681 = A. I. R. 1926 Mad. 1005 = 51 M. L. J. 239.**

———*Equitable mortgage by surety—Can be enforced in execution.*

Where the surety deposited title-deeds of his property as security and agreed to a consent decree being passed between parties to suit whereby, on failure to pay decretal amount by instalments, the whole amount was to become payable.

Held, that the surety was liable.

Per *Sanderson, C. J.*—Surety's property is liable to be sold not by reason of S. 145, but is liable for having consented to the consent decree.

Per *Rankin, J*—Separate suit is not necessary as the security was given to the Court and not to decree-holder. 32 Cal. 494, Expl.; A. I. R. 1924 All. 105, not Foll. ; 42 All. 158 (P. C.), Ref. to. (*Sanderson, C. J. and Rankin, J.*) SUKUMARI DEVI *v.* MUNGNEERAM BHANGAR & CO. **95 I. C. 908 = 54 Cal. 1 = 30 C. W. N. 683 = A. I. R. 1926 Cal. 889.**

—S. 145—Liability discharged.

———*Surety is discharged if decree-holder executes decree contrary to his agreement.*

Where the promise to abstain from continuing to take legal proceedings against the judgment-debtor is a consideration for the security bond executed by the surety making himself liable in the event of the judgment-debtor's failure to discharge his liability under the decree, total failure of the consideration for the surety's promise has the effect of discharging him. A. I. R. 1925 Lah. 552, Affirmed. (*Shadi Lal, C. J. and Broadway, J.*) GURUDAS MAL RAMCHAND *v.* GURANDITTA MAL. **119 I. C. 485 = 11 Lah. 77 = A. I. R. 1929 Lah. 770.**

———A surety in case of arrest before judgment can apply for discharge under O. 38, R. 3, but a surety for due performance of a decree cannot be discharged. 43 Mad. 325, Foll.; 41 Bom. 402, Ref. (*Dalip Singh, J.*) ARURA *v.* HAVELI RAM. **119 I. C. 419 = 11 Lah. L. J. 141 = 30 P. L. R. 130 = A. I. R. 1929 Lah. 435.**

———*Surety cannot be released for misconduct of principal.*

A stood surety in a certain sum for *B* who undertook to repay to a minor his share of an estate in case the Court declared that the minor had been validly adopted.

C. P. CODE (1908), S. 145—Liability of surety—Execution.

A subsequently applied to be released from his obligation under the bonds.

Held, that *A* contracted both with *B* and with the Court that he will carry out a certain promise if default is committed by *B*. It is not for him to say that he will or will not discharge this obligation and so he cannot be discharged. If there is any misconduct on the part of *B* he may have his remedies against him. 19 Bom. 245, Rel. on. (*Phillips, J.*) SHRINIWASA CHETTY *v.* CHENNA CHETTI. **92 I. C. 251 = 23 M. L. W. 705 = A. I. R. 1927 Mad. 294.**

———Attachment before judgment—Suit dismissed in trial Court but decreed in appeal—Sureties' liability ceases on dismissal of suit in trial Court. 5 L. B. R. 156, Appr. (*Maung Ba and Brown, JJ.*) MANECKJEE *v.* CHETTYAR FIRM. **105 I. C. 540 = 5 Rang. 492 = A. I. R. 1927 Rang. 310.**

———If a consent decree is passed without the knowledge and consent of the surety for judgment-debtor, the surety is discharged. *Tatum* v. *Evans*, 54 L. T. 336, Foll. (*Buckland, J.*) NATIONAL COAL CO., LTD. *v.* KSHITISH BOSE. **95 I. C. 409 = 30 C. W. N. 540 = A. I. R. 1926 Cal. 818.**

———*Surety is discharged if decree-holder executes decree contrary to his agreement.*

Where the consideration for the surety's promise it the forbearance to sue or to continue legal proceedings against the principal debtor all stipulations on the subject which constitute part of such consideration must be strictly complied with or the surety will not be bound, and total failure of the consideration for the surety's promise of guarantee will discharge him. (*Martineau, J.*) GURANDITTA MAL *v.* FIRM GURDASMAL RAMCHAND **91 I. C. 772 = 7 Lah. L. J. 343 = 26 P. L. R. 634 = A. I.R. 1925 Lah. 552.**

———Where a surety alleges that the judgment-debtor is laid up with fever and asks for time to bring the judgment-debtor next time, and the Court allows the time and the judgment-debtor is brought on the adjourned date surety's obligation is discharged. If the affidavit is false that may be a ground for proceeding against the surety, criminally. (*Young, J.*) MA TA DIN *v.* V. K. SHIVALKAR. **3 Bur. L.J. 99 = A.I.R. 1924 Rang. 347.**

—S. 145 —Liability of surety.—Discharge.

———*Discharge of surety for performance of a decree.*

Where by an arrangement between judgment-debtor and the decree-holder, time is extended to the former, whether this extension has the effect of discharging or exonerating the surety is a matter entirely within the discretion of the Court. The obligation of the surety is to the Court rather than to the decree-holder and in such cases Court would be right in exercising its discretion by refusing to make an order in favour of the decree holder 43 Mad. 273, Ref. (*Hilton, J.*) RAM CHAND DIWAN CHAND *v.* SANT SINGH. **A. I. R. 1930 Lah. 896.**

—S. 145—Liability of surety—Execution.

———*Surety is judgment-debtor under S.* 145.

A surety is not a party to the suit within S. 47, though for purposes of appeal he is to be deemed to be a party and, by virtue of S. 145, when an order for execution is made against him, he becomes a judgment-debtor and the proceedings taken against him are in the nature of execution proceedings. (*Sulaiman, Ag. C. J. and King, J.*) RAM KISHUN *v.* LALTA SINGH. **112 I. C. 534 = 51 All. 346 = 26 A. L. J. 1160 = A. I. R. 1928 All. 527.**

———A sapurdar being a person to whom goods attached in execution of a decree are entrusted is a surety and his liability can be enforced in execution proceedings in virtue of S. 145 read with S. 47, C.P. Code. (*Harrison* *and Tek Chand, JJ.*) DODA SHAH *v.* BISHAN DAS. **111 I. C. 592=A. I. R. 1928 Lah. 181.**

——*Inherent jurisdiction of Punjab Courts.*

In the Punjab there is inherent jurisdiction in the Court to proceed against the property of a surety whether an obligee is or is not named in the surety bond. A. I. R. 1919 P. C. 55, Rel. on. (*Dalip Singh, J.*) RAM SINGH *v.* IMPERIAL BANK OF INDIA, LTD., RAWALPINDI. **A. I. R. 1928 Lah. 802.**

——Surety becomes party only on application against him. (*Martineau, J.*) GURANDITTA MAL *v.* FIRM GURDASMAL RAMCHAND. **91 I. C. 772= 7 Lah. L. J. 343=26 P. L. R. 634= A. I. R. 1925 Lah. 552.**

——*Bond may be enforced in any execution proceeding.*

The liability of a surety under the section enures for the benefit of the Court as well as for the decree-holder. The Court accepting security may enforce it, failing which the decree-holder is equally entitled to enforce the same in any way that may be open to him for he is the ultimate beneficiary under the security bond. The present Code under S. 145 gives decree-holder a right and opportunity to enforce the bond in execution proceedings. The execution proceedings referred to therein are not in any way connected with the execution proceedings in which the security bond was filed but it may be any execution proceedings. The contention that the liability of the appellant ceased with the dismissal of the execution case in which the bond was filed must therefore fail. (*Jwala Prasad and Kulwant Sahay, JJ.*) SHYAM PROSONNO KATRAJ *v.* KESHAB CHANDRA RANA. **81 I. C. 702=5 P. L. T. 336= 1924 P. H. C. C. 63=A. I. R. 1924 Pat. 487.**

—S. 145—Liability of Surety— Extent of.

——*Acceptance of liability at one stage makes it* res judicata.

The judgment-creditor got a money decree against the judgment-debtor who was arrested in execution. *A* stood surety and executed a bond to pay the entire amount if during execution proceedings judgment-debtor absented himself. On judgment-debtor absenting himself, the decree-holder asked the Court to issue a warrant for the attachment of the surety's property. On 10th February, the surety asked for time to settle with the decree-holder, but the surety failed to make a settlement and on notice having been issued, stated that he was not a surety at all.

Held, that when the surety asked for time on 10th February to settle with the decree-holder he did not deny liability and the liability became *res judicata* and the surety was, therefore, still liable to the decree-holder (*Johnstone, J.*) LAL SINGH *v.* MUHAMMED AFZAL. **A. I. R. 1930 Lah. 80.**

——*Liability is for the entire amount of the decree.*

S obtained a decree againt *B* who appealed and applied for stay of execution. Stay was granted on the furnishing of security bonds to the amount of Rs. 10,000 and *R* (not a party to the suit) furnished security in the form of two fixed deposit receipts of Rs. 10,000 each. *S* applied for attachment of the receipts and asked for payment of eight separate items out of the proceeds, six of which were included in the decree and accepted by the sub-Judge, *R*, however, urged that the Sub-Judge was wrong in holding that the fixed deposit receipts were liable to meet the six items. *R* contended that the security related to certain property in her possession under a lease and to the profits accruing subsequent to a particular date from the property and to the other two items only. She had delivered up possession of property and contended that as, the decree did not grant

future mesne profits, her security was not liable for sale at the instance of the decree-holder.

Held that the Sub-Judge was right in rejecting this objection. Taking isolated sentences here and there, it was possible to find some support for the contentions of either party, but after very full consideration of the whole history of the matter there could be no possible doubt but that, in furnishing the security and thus remaining in possession of the propety and profits for a considerable further period *R* was well aware that he was giving security and did give such security for all claims that the decree holder might have, to the extent of that security, for any amounts payable to him under the decree. (*Boys and Pullan, JJ.*) SURJAN KUNWARI *v.* SHANTANAND GIR. **118 I. C. 191= A.I.R. 1929 All. 905.**

——Liability of a surety is co-extensive with that of the judgment-debtor and therefore when an appeal is preferred against a decree and execution proceedings stayed on furnishing a security bond the decree-holder can proceed directly against the surety in case of adverse decision of the appeal. (*Jai Lal, J.*) HAR NARAIN DAS. *v.* DHANA MAL. **117 I. C. 65.**

——*Surety bonds must be construed strictly.*

Suretyships must be construed strictly. A surety cannot be held liable beyond the extent to which he has contracted. A judgment-debtor was arrested. A bond was executed by a surety to produce him on a fixed date and in default to pay the decretal amount. Court was closed on the fixed date, when the surety was present with judgment-debtor. No notice was served on the surety to produce the judgment-debtor on any or other date and the judgment-debtor and the surety were absent on the next hearing fixed. Proceedings were taken out against surety.

Held that the surety was not liable. A. I. R. 1925 All. 5; A. I. R. 1928 Lah. 20; and 15 P. W. R. 1919; Rel. on. (*Addissn, J.*) DAVID JOHNSTON SURETY *v.* DWARKA PERSHAD LACHMI DAS. **109 I.C. 546= 10 L. L. J. 404=A. I. R. 1928 Lah. 696.**

——Surety undertaking to be liable in case a decree was passed against the debtor and the debtor failed to pay—Compromise decree passed granting certain period to debtor for payment—Surety is not liable. (*Greaves and Panton, JJ.*) ABDUL GAFUR *v.* MANNALAH AGARWALA. **98 I. C. 988=A. I. R. 1927 Cal. 239.**

——*Bond extends to appellate court also.*

Liability of surety for satisfaction of a decree does not cease on a suit by judgment-debtor to set aside the decree being decreed, and the surety can be held liable if the suit is dismissed in appeal unless there is a limitation as to the liability in the surety bond. A. I. R. 1927 Rang. 310, Dist. (*Maung Ba and Brown, JJ.*) MANACKJEE *v.* CHETTYAR FIRM. **105 I. C. 602= 5 Rang. 496=A. I. R. 1927 Rang. 321.**

——Stay of execution pending appeal—Surety for payment of interest—Order changed as to amount of security—Surety is discharged and is liable to pay interest only till the date of changing the order. (*Macleod, C.J. and Coyajee, J.*) HIRALAL *v.* MANILAL. **28 Bom. L. R. 517=94 I. C. 645= A. I. R. 1926 Bom. 565.**

——In a case where a person has contracted expressly that he will guarantee the performance of any of the obligations set out in S. 145, whether such a contract be oral or in writing, he renders himself liable to be proceeded against in execution of the decree as provided in S. 145. (*Cuming and Page, JJ.*) JOYMAN BEWA *v.* EASIN SARKAR. **53 Cal. 515=43 C. L. J. 493= 30 C. W. N. 609=95 I. C. 483=**

C. P. CODE, (1908), S. 145—Liability of surety—Extent of.

A. I. R. 1926 Cal. 877.

———Where a surety for production of a judgment-debtor failed to produce him owing to the imprisonment of the latter in a criminal case and the surety knew of the said criminal case, *held* that the surety could not be discharged from the obligations under the surety bond. (*Ryves and Gokul Prasad, JJ.*) RAMESHWAR DAS *v.* SRI LAL. **65 I.C. 374 = 44 All. 174 = 19 A.L.J. 968 = A. I. R. 1922 All. 390.**

———*Surety for Receiver.*

Under S. 145 of the Code, a surety for a Receiver can be asked to pay the sum which he has bound himself to pay. (*Twomey, C. J. and Robinson, J.*) MAUNG PO THEIN *v.* MA WAING. **10 L.B.R. 236 = 59 I. C. 844 = 13 Bur. L. T. 91.**

—S. 145 – Liability of surety—Insolvency.

———Surety becomes liable where judgment-debtor fails to apply for insolvency within time fixed. (*Jai Lal, J.*) BIR SINGH *v.* MOHINDAR SINGH. **116 I. C. 554 = A. I. R. 1928 Lah. 974.**

———The fact that in the meantime the judgment-debtor had got a protection order does not absolve the surety of his duty to produce the judgment-debtor on the adjourned date. (*Wallace, J.*) NACHIAPPA *v.* KANDAPPAN. **1926 M.W.N. 612 = 24 M.L.W. 480 = 97 I.C. 413 = A. I. R. 1926 Mad. 958.**

—S. 145—Liability of surety—Method.

———*Surety can be proceeded against in first instance.*

It is not incumbent upon the decree-holder to proceed against the judgment-debtor, before proceeding against the surety; he can proceed against the surety in first instance. A. I. R. 1928 Cal. 177, held too widely stated. (*Addison, J.*) MAHOMED EWAZ *v.* NANEH MEAN. **117 I. C. 226 = 30 P. L. R. 131 = 11 L. L. J. 40 = A. I. R. 1929 Lah. 205.**

———*Regular suit against surety is not barred.*

Cunliffe, J.—S. 145 does not bar a regular suit against a surety. It is not an exclusive remedy, but an additional and direct means of enforcing the surety's liability. (*Carr and Cunliffe, on difference Das, JJ.*) KO MAUNG GYI *v.* DAW TAK. **112 I. C. 427 = 6 Rang. 474 = A. I. R. 1928 Rang. 249.**

———*Surety undertaking to pay if principal judgment debtors failed—Decree should be first executed against the latter*

Where the surety bond provided that the decretal amount will be payable by the surety if it were not realized from the principal debtors, and a precept as against the principal debtors having proved infructuous, the decree-holder applied for a notice of arrest against the surety and the surety objected on the ground that decree be first executed against the properties of the principal debtor which he pointed out, but the Court ordered. "The execution cannot be stayed. The zaman can take out the warrant for the original judgment-debtor."

Held that it is not the function of the zaman to take out a warrant. Moreover, before proceeding against the person or property of the party the executing Court should satisfy itself that the decretal debt cannot be realized from the principal debtors. (*Zafar Ali, J.*) DIALOOMAL *v.* NANDU SHAH JAI LAL. **102 I. C 710 = A. I. R. 1927 Lah. 846.**

———The decree that is executed against the surety of judgment-debtor is the decree passed in the suit and therefore it cannot be said that a second decree is passed against him. (*Devadoss and Wallace, JJ.*) TAMBI REDDI *v.* DEVI REDDY. **49 Mad. 325 = 24 M. L. W. 361 = 94 I. C. 522 = A. I. R. 1926 Mad. 674 = 50 M. L. J. 584.**

C. P. CODE, (1908), S. 145—Personal liability.

———*Liability can be enforced against legal representatives.*

S. 145 makes a person who is liable as surety for the payment of any money, exposed to the procedure taken against judgment-debtors when the decree is being executed against them. Therefore the whole law setting up the machinery for execution of decrees is applicable to a case where surety dies before enforcement of payment which therefore can be recovered from his legal representatives. (*Kennedy, J. C. and Raymond, A. J. C.*) MOHAN *v.* MT. BHAGBAI. **19 S. L. R. 165 = 98 I. C. 136 = A. I. R. 1926 Sind. 294.**

———*Deposit in Court—Court may refuse execution against.*

If the security has been realised under an order of the Court under section 55 (4) or in the first instance consists of a cash deposit, the judgment-creditor may ask the Court to execute the decree under section 145 against the money lying in Court. But the Court may, in exercise of its discretion, refuse to make an order in favour of the judgment-creditor. (*Macleod, C. J.*) ABDUL HUSSEIN ESSUFALLI *v.* D. J. MISTRI & CO. **64 I. C. 648 = 46 Bom. 702 = 23 Bom. L. R. 1263 = A. I. R. 1922 Bom. 340.**

———*Court Amin—Can be proceeded against on his express bond.*

A person, who is put by the Court Amin in charge of execution proceedings, in custody of moveable property attached in the execution and who executes a security bond in respect thereof and undertakes to produce the property whenever required or to pay its price, can be proceeded against by an application in execution if he fails to produce the property as per his undertaking. The case falls within S. 145 of the C. P. Code, Order 21, Rule 43, only makes distinct the liability of the Amin so far as the Court is concerned. It does not affect in any way the liability of a person who expressly takes charge of property taken in execution, to either the Court or to the decree-holder. (*Gokul Prasad, J.*) MADHO PRASAD *v.* PEARY LAL. **62 I. C. 719 = 19 A. L. J. 247 = A. I. R. 1921 All. 220.**

—S. 145—Notice.

———*Cunliffe, J.*—It is imperative in any action taken by a Court under S. 145 that notice should be given to the surety before attachment of his property. (*Carr and Cunliffe, JJ., On Difference Das, J.*) KO MAUNG GYI *v.* DAW TOK. **112 I.C. 427 = 6 Rang. 474 = A.I.R. 1928 Rang. 249.**

———*Notice with warrant for arrest is not invalid.*

Mere arrest of a surety does not, but detaining him in civil prison does constitute the execution of a money decree passed against his principal, and hence no objection can be taken where a Court issues against a surety a warrant of arrest at the same time that it issues a notice to him, under the proviso to S. 145, C. P. Code, to show cause why his bond should not be forfeited. (*Martineau, J.*) SAJAWAL *v.* GOBIND RAM SHANKAR DAS. **99 I. C. 518 = A. I. R. 1927 Lah. 131.**

———Previous notice to surety is essential before attachment of his property. (*Duckworth and Godfrey, JJ.*) TAN KIN SHAN *v.* U. CHE SI. **84 I. C. 998 = 2 Rang. 567 = A. I. R. 1925 Rang. 135.**

———Proviso—Order against surety without notice is wrong. (*MacColl, A. J. C.*) MAUNG KYNE *v.* MAUNG SON TIN. **70 I. C. 870 = 4 U. B. R. 99 = 1 Bur. L. J. 236 = A. I. R. 1923 Rang. 26.**

—S. 145—Personal liability.

———*Surety agreeing to pay instalment in case of default is personally liable.*

R obtained a decree against a namesake of his. *A* settlement was reached between the two and a deed of compromise was drawn up and signed by the parties and by the surety *A*, all appearing before the Magistrate. The money was to be paid in instalments. The judgment-debtor defaulted and the decree-holder applied to the Court to be allowed to proceed against the surety *A* for the balance as the terms of the bond were that in case of default of any one instalment, the surety would be bound to pay the instalment money himself.

Held, that the decree-holder was entitled to prove his remedy against the surety in the executing Court. The surety took liability to perform the decree in event of default. It was not necessary that surety should have specifically said that the decree could be executed against him. That was clearly the intention of the parties including the surety and *A* rendered himself personally liable. A. I. R. 1926 Cal. 877, Foll. 8 M. L. W. 507, Dist. (*Johnstone, J.*) RAM NATH *v.* RAM NATH.

124 I. C. 677 = A. I. R. 1930 Lah. 185.

——*Interpretation of the bond.*

Where the surety bond provided: "I have agreed to pay on behalf of the 1st defendant a sum to the extent of Rs. 2,800 with interest at 6 per cent. per annum for and towards the amount to be so decreed and have furnished the under-mentioned property as security. Myself and my representatives are hereby bound to pay the aforesaid amount on the liability of the said property."

Held, the contents of the bond comprised a personal covenant to pay as well an agreement to hold liable the property given as security and the decree-holder could proceed in execution against the surety under S. 145, to the extent of his liability, as if he were a judgment-debtor. A. I. R. 1924 All. 105, Foll.

Held, further, that the hypothecated property could be sold in execution of the decree to satisfy the charge created on it. (*Odgers and Curgenven, JJ.*) THUSHTU BALKRISHNA CHETTIAR *v.* V. KRISHNAMURTHI AIYAR.

38 M. L. T. 143 = 1927 M. W. N. 202 = 100 I. C. 841 = A. I. R. 1927 Mad. 416 = 52 M. L. J. 182.

——*Liability extends to additional interest also.*

If a surety offers security which is accepted and undertakes to pay additional interest on condition that execution is stayed, the decree-holder is entitled to insist that that contract shall be carried out even as regards the additional interest. 2 I. A. 219, Rel. on. (*Odgers and Curgenven, JJ.*) THUSHTU BALKRISHNA CHETTIAR *v.* V. KRISHNAMUTHI AIYAR. **1927 M. W. N. 202 = 38 M. L. T. 143 = 100 I. C. 841 = A. I. R. 1927 Mad. 416 = 52 M. L. J. 182.**

——*Sapurdar's liability might be enforced by attaching his property.*

Certain articles belonging to a judgment-debtor were attached and made over to the *Sapurdar* on his giving the undertaking in writing that he would produce the articles when required to do so by the Executing Court or would pay the value thereof. He failed to produce some of those articles.

Held, that the Executing Court could order the attachment of his property to recover the value thereof. 16 N.L.R. 178, Diss ; 39 M.L J. 472, Dist. (*Zafar Ali, J.*) NAZIR AHMAD *v.* BAKHSHI RAM. **86 I. C. 173 = 26 P. L. R. 26 = A. I. R. 1925 Lah. 412.**

——*Surety for debtor filing insolvency or for producing him—Filing insolvency alone does not discharge the surety.*

Surety undertaking to pay decree amount if judgment-debtor fails to apply for insolvency within certain time or if surety fails to produce judgment-debtor in Court when ordered to do so—Judgment-debter applying for insolvency within time, alone will not release surety who must also produce judgment-debtor in Court, but decree cannot be executed against him unless he was first ordered to produce judgment-debtor in Court and made default. (*Moti Sagar, J.*) DHARAM SINGH *v.* NAND SINGH. **78 I. C. 447 = A. I. R. 1925 Lah. 170.**

——*Liability substantially discharged—Execution should not issue.*

Where sureties have substantially complied with their liabilities and have though somewhat late, produced the judgment-debtor, the extreme step of executing the decree against their property must not be taken. (*Duckworth and Godfrey, JJ.*) TAN KIN SHAN *v.* U. CHE SI.

84 I. C. 998 = 2 Rang. 567 = A. I. R. 1925 Rang. 135.

——A surety under an adjustment of an application for execution of award filed previously in court can be proceeded against in execution under S. 145. (*Kennedy, J. C. and Madgavkar, A. J. C.*) RAMSINGH JETHSING *v.* REWACHAND KEWAL RAM. **83 I. C. 870 = 17 S. L. R. 257 = A. I. R. 1925 Sind 25.**

——*Enforcement of security is not limited to personal liability.*

The object of this section is to provide that where a person has become liable as a surety for the performance of a decree or order under the section for a party for whose benefit a security has been given may enforce the security by executing the decree or order against the surety in the same manner as if the surety had been a party to the decree or order and was directed by the decree or order to perform the obligation undertaken by him. In the clause "to the extent to which he has rendered himself liable" the word "personally" was added by the present Code of Civil Procedure, but by the addition of that it could hardly have been intended to limit the enforcement of the security to a personal liability, for forms 2 3 and 4 of the appendix G appended to the Code of Civil Procedure, provide for the hypothecation of property to secure the performance of the obligation undertaken by the surety. The personal or individual liability of the surety under the security bond may not always be as extensive as that of the judgment-debtor, and the object of the above provision clearly is to limit the enforcement to the extent provided for by the security bond. Where the security bond did not purport to have been executed in favour of the decree-holder and contained an undertaking given to an appellate Court which granted the stay of execution subject to the production of such security.

Held, such a bond can be enforced by the Court in the same way as a decree. 38 All. 327 and 42 All. 158, Foll. 39 All. 225, Dist. (*Walsh and Kanhaiya Lal, JJ.*) BETI MAHALAKSHMI BAI *v.* CHAUDHARI BADAN SINGH.

74 I. C. 927 = 45 All. 649 = 21 A. L. J. 604 = 4 L. R. A. Civ. 356 = A. I. R. 1924 All. 105.

——Surety for appearance is liable personally for decree debt, if he undertakes and fails to produce judgment-debtor in Court on any day of hearing. (*Moti Sagar, J.*) FIRM SHIV DAYAL RAM DITTA MAL *v.* MUHAMMED KHAN. **80 I. C. 700 = 6 L. L. J. 200 = A. I. R. 1924 Lah. 490.**

——Where sureties agreed to produce judgment-debtor on the fixed date but failed, closing the execution petition without dismissing it does not put an end to their liability. The surety bond executed by the appellants provided that the defendant should be brought before the Court on the 4th July 1922, and that the sureties would be responsible for bringing him before the Court on that date and that in case of failure to produce on the said date they agreed that they themselves, their heirs and properties should be liable for Rs. 72,000 balance due under the decree. It did not appear whether any proceedings took place in Court on the 4th of July 1922 but on the 20th of July 1922 the decree-holder presented a petition asking for warrants against the defendant and sureties for the balance. Although the execution petition was noted as closed, there was no order dismissing the petition. Moreover security was given in connection with E. A. No. 178 which was not shown as disposed of at any time previous to the order directing warrants to issue against the sureties.

Held, that sureties were liable since they did not plead that they produced Judgment-debtor on 4-7-1922.

Held, further, that previous notice was not necessary. (*Spencer and Devadoss, JJ.*) NAGIR *v.* KRISHNAN. **75 I. C. 830 = 1923 M. W. N. 770 = A. I. R. 1924 Mad. 241.**

—S. 145—Surety, rights of.

———Surety's property cannot be attached without notice to him. Attachment of surety's property without notice is *ultra vires*. A. I. R. 1925 Rang. 135, Foll. 29 Bom. 29, Expl. (*Addison, J.*) MAHOMED EWAZ *v.* NANEH MIAN. **117 I. C. 226 = 30 P. L. R. 131 = 11 L.L.J. 40 = A. I. R. 1929 Lah. 205.**

———Surety hypothecating his house by unregistered bond—Attachment of the house proved ineffective owing to misdescription and claim by the occupant that the house belonged to him—Attempts at execution against the surety personally also failed—Another house of the surety attached and notice sent to the surety under O. 21, R. 66 for drawing sale proclamation—Surety failed to appear and the house was sold—Subsequent applications by the surety under O. 21, R. 90 and S. 47 for setting aside the sale on the ground that no attempts were made to sell the hypothecated property—During the pendency of these applications, suit was filed for declaration that the house could not be attached and sold. *Held*, that the suit was not barred by S. 47, but that the sale of the house was at the worst an irregularity which did not render it null and void was to be set aside by another court and that the suit was barred by principles of *res judicata*.

King, J.—In view of the fact that the house had been not merely attached, but even sold, long before the institution of the suit, it would have been futile to grant the injunction. The plaintiff was not entitled to claim a mere declaration in the terms prayed without asking for the consequential relief that the sale be set aside. The Court would have been justified in refusing relief on these grounds alone. A. I. R. 1919 P. C. 55, Cons. 38 Cal. 754 and 43 Mad. 325, Ref. (*Sulaiman, A. C. J. and King, J.*) RAM KISHUN *v.* LALTA SINGH. **51 All. 346 = 26 A. L. J. 1160 = 112 I. C. 534 = A. I. R. 1928 All. 527.**

———*Decree against wrong legal representative cannot bind the surety.*

A decree obtained against a person, who is not the legal representative of the deceased, is not binding on the estate and on the persons rightly entitled to that estate and the decree cannot be enforced against a surety who has passed a surety bond under S. 145. C. P. Code. 15 Bom. L. R. 41 and 9 Bom. 86, Rel. on ; 26 Mad. 230, Expl. (*Marten, C. J. and Percival, J.*) PUKHRAJ JESHRAJ *v.* JAMSHETJI RUSHIM. **100 I. C. 185 = 50 Bom. 802 = 28 Bom. L. R. 1382 = A. I. R. 1927 Bom. 63.**

———*Surety is party only for purposes of appeal.*

S. 145 in express terms provides that the surety shall be deemed a party to the suit within the meaning of S. 47 only for the purposes of appeal, and excludes by implication the inference that he is a party to the suit in proceedings before the original Court. 38 Cal. 754, Rel. on. (*Rupchand Bilaram, A. J. C.*) NOOR MAHOMED LALLAN *v.* DHANIRAM **20 S. L. R. 362 =**

96 I. C. 234 = A. I. R. 1926 Sind 105.

———Order discharging surety from suretyship is decree—Surety is a party within S. 47. (*Sulaiman and Mukerji, JJ.*) RATNI BAI *v.* GHASI RAM NATHU RAM. **86 I. C. 105 = 23 A. L. J. 59 = 6 L. R. A. Civ. 171 = A. I. R. 1925 All. 344.**

———*Obiter*—Surety is party within S. 47 and can raise a plea of fraud in executing Court—C. P. Code, S. 47. (*Zafar Ali, J.*) KANSHI RAM *v.* FIRM PRABH DIAL ARJAN DASS & CO. **92 I. C. 259 = 7 L. L. J. 457 = 26 P. L. R. 561 = A. I. R. 1925 Lah. 618.**

———S. 145 has been enacted for the purpose of expeditious enforcement of liabilities against sureties, in order to avoid the cumbrous procedure of assigning the bond to a decree-holder and his instituting a separate suit upon it. The surety can put forward in those proceedings any defence that is open to him. Though the security bond may be executed in favour of the Court, the Court holds it for the benefit of the decree-holder. (*Spencer and Venkatasubba Rao, JJ.*) SAMI IYER *v.* RAMASWAMI CHETTIAR. **72 I. C. 194 = 1923 M. W. N. 253 = 17 M. L. W. 473 = A. I. R. 1923 Mad. 340 = 44 M. L. J. 171.**

———*Limitation Act, Art. 182 (5) (1)—Application against Judgment-debtor alone, saves limitation against sureties also.*

An application for execution against the judgment-debtor and the surety is not barred, if made within three years of the application against the judgment-debtor alone where the surety binds himself to pay the amount of the decree, if the judgment-debtor does not pay. The question depends on the application of the provisions of S. 145, C. P. Code to Art. 182. If the effect of S. 145, C. P. Code is to make the decree equivalent to a decree passed jointly against the surety and the judgment-debtor, then the case is covered by explanation (1) to Art. 182, if not cl. 5 of Art. 182 applies. (*Piggott and Sulaiman, JJ.*) BADRUDDIN *v.* MOHAMMAD HAFIZ. **77 I. C. 129 = 20 A. L. J. 726 = 44 All. 743 = A. I. R. 1922 All. 481.**

—S. 145—Miscellaneous.

———Suit against a supratdar on ground of damages due to his misappropriating the property is barred. (*Dalal, J.*) PEAREY LAL *v.* SITA RAM. **113 I. C. 751 = 1929 A. L. J. 80 = A. I. R. 1929 All. 266.**

———*Carr, J.*—A proceeding for the grant of Letters of Adminisitration may take the form of a suit, but it is not in fact a suit, nor is it a proceeding consequent on a suit. (*Carr and Cunliffe, JJ. On difference Das, J.*) KO MAUNG GYA *v.* DAW TOK. **6 Rang. 474 = 112 I. C. 427 = A. I. R. 1928 Rang. 249.**

—S. 146—Assignee-decree-holder.

———*Section does not apply.*

O. 21, R. 16 lays down definitely that when a person other than the decree-holder wishes to execute a decree, that person must prove an assignment in writing or by operation of the law, and must adopt the procedure laid down in O. 21, R. 16. S. 146 does not apply as O. 21, R. 16 is the saving provision. (*Stuart, J.*) SHIB CHARAN DAS *v.* RAM CHANDER. **66 I. C. 878 = A. I. R. 1922 All. 98.**

—S. 146—Assignee from heir.

———*Heir not brought on record in the place of the deceased plaintiff—S. 146 does not apply to the heirs assignee.*

The words 'assignment' and 'creation' indicate that it is the person suing that assigns and creates the interest which enables the assignee to continue the suit. 39 Mad. 488 and A.I.R. 1922 P.C. 304, Foll. R. 10 only applies to cases not covered by R. 3. An assignee from the heir of a deceased plaintiff, who (the heir) was not himself brought on the record cannot apply under O. 22, R. 10. S. 146 cannot apply to such a case as the deceased heir himself could not apply under O. 22, R. 10, but could only apply under R. 3. A.I.R. 1922 Mad. 402, Dist. (*Wallace, J.*) CHUNAUGHAT KALLIAM KUTTI AMMA *v.* KALLINGAL TARVAD KARUNAWAN. **87 I. C. 402= A. I. R. 1925 Mad. 1166.**

—S. 146—Auction purchaser of under-proprietary tenure.

———*Decree for rent against original under-proprietor alone can be executed against his auction purchaser by virtue of S. 146, C. P. Code, and S. 154, Oudh Rent Act.*

The combined effect of S. 154, Oudh Rent Act and S. 146, C. P. Code, is to render an auction-purchaser of an under-proprietary tenure in execution of a mortgage decree liable to satisfy a decree for arrears of rent obtained against the original under-proprietor. Because the provisions of S. 154, Rent Act, not only make the transferee purchaser liable for the rent subsequently accruing but they make him so liable in consequence of the act of omission to pay the rent on the part of the original under-proprietor. That being so, he must be held to be a person claiming under his transferrer, and, as such, the decree against the original under-proprietor can be rightly executed against him under S. 146, C.P. Code, although he is not a judgment-debtor on the record of that decree. 9 O. C. 185, not Appr. (*Wazir Hasan and Raza, JJ.*) BISHESHAR DAYAL *v.* BAJRANG BAHADUR SINGH. **117 I. C. 452= 6 O. W. N. 469=A. I. R. 1929 Oudh 353.**

—S. 146—Ex-parte decree.

———Legal representative not actually brought on record can apply under O. 9, R. 13 for setting aside an *ex parte* decree. (*Dalal, J. C.*) MT. DEO KI *v.* JUGAL KISHORE. **85 I. C. 529=27 O. C. 299= A. I. R. 1925 Oudh 370.**

———Heirs of a defendant against whom an *ex parte* decree is passed before his death have a right to apply to set aside the *ex parte* decree. 21 All. 274, Doubted. (*Walsh and Ryves, JJ.*) MT. BANOO *v.* HARDWARI LAL. **83 I. C. 601=A. I. R. 1923 All. 30.**

—S. 146—Interpretation.

———S. 146 should have a beneficial interpretation and be read as supplementing the rules. (*Wallis, C. J., Spencer and Kumaraswami Sastri, JJ.*) MUTHIAH CHETTIAR *v.* GOVINDADOSS KRISHNADOSS. **69 I. C. 337=44 Mad. 919=14 M. L. W. 287= 1921 M. W. N. 649=A. I. R. 1921 Mad. 599= 41 M. L. J. 316 (F. B.).**

—S. 146—Part transfer are legal.

———The terms of S. 146 are wide enough to enable the Court to recognise part transfers of a decree. (*Wallis, C. J., Spencer and Kumaraswami Sastri, JJ.*) MUTHIAH CHETTIAR *v.* GOVINDADOSS KRISHNADOSS. **69 I. C. 337=44 Mad. 919= 14 M. L. W. 287=1921 M. W. N. 649= A. I. R. 1921 Mad. 599=41 M. L. J. 316 (F. B.).**

—S. 146—Puisne Mortgagee.

———Puisne mortgagee not a party to a suit on a charge cannot apply for setting aside *ex parte* decree either under S. 146 or O. 9, R. 13. 41 Mad. 510, Dist. (*Cuming and Chakravarti, JJ.*) SUSIL CHANDRA GUHA *v.* GOURI SUNDARI DEVI. **92 I. C. 946= A. I. R. 1926 Cal. 1015.**

—S. 146—Purchaser pendente lite.

———Per *Seshagiri Aiyar, J.*—A purchaser *pendente lite* is affected by the proceedings commenced against the party on record and such proceedings can be continued against the purchaser. (*Oldfield and Seshagiri*

Aiyar, JJ.) VISWANATHA SASTRI *v.* SITALAKSHMI AMMAL. **61 I. C. 979=13 M. L. W. 37= 1921 M. W. N. 181=A. I. R. 1921 Mad. 126.**

—S. 146—Representatives—Who are.

———The words "claiming under" in S. 146 include a case where the interest of a person has been assigned to or devolved upon another under O. 22, R. 10. (*Oldfield and Devadoss, JJ.*) SESHADRI REDDI *v.* VENKATA REDDY. **76 I. C. 809= 19 M. L. W. 660=A. I. R. 1924 Mad. 709.**

—S. 146—Scope of.

———*Representative can continue.*

On the death of the decree-holder. his legal representatives can continue an execution petition filed by him when he was alive. No fresh execution petition by them is necessary. (*Percival, J. C. and Barlee, A. J. C.*) SHOWKOMAL *v.* NICHUMAL. **24 S. L. R. 195= 123 I. C. 303.**

———*Representative cannot continue.*

S. 146 refers only to taking proceedings or making an application and not to continuing a proceeding or an application already started. (*Wallace, J.*) DORAISWAMI AYYAR *v.* BALASUNDARAM AYYAR. **38 M. L. T. 275=102 I. C. 243= A. I. R. 1927 Mad. 507=52 M. L. J. 477.**

———*Representative cannot continue.*

On the death of a decree-holder who is in course of executing his decree, his legal representative cannot be substituted in the execution petition to continue it. (*Coutts-Trotter, C. J. and Curgenven, J.*) PALANIAPPA CHETTIAR *v.* VALLIAMMAI ACHI. **99 I. C. 627= 1926 M. W. N. 981=50 Mad. 1=25 M. L. W. 354= A. I. R. 1927 Mad. 184=51 M. L. J. 745.**

———*Representatives can both institute and continue.*

The proper interpretation of S. 146 is that a person who is entitled to make an application or file an appeal which could have been made or filed by another under whom he claims but which has not been made or filed is also entitled to continue the application or appeal which has been made or filed by such person when that application or appeal is not properly prosecuted or when such person dies before the application or appeal is disposed of. (*Devadoss and Waller, JJ.*) RADHA KRISHNA AYYAR *v.* SRINIVASA AIYAR. **23 M. L. W. 379= 1926 M. W. N. 287=93 I. C. 831= A. I. R. 1926 Mad. 573=51 M. L. J. 10.**

———Private purchaser can't continue appeal withdrawn by judgment-debtor against order under O. 21, R. 89. (44 Mad. 554 (F. B.) and 41 Mad. 510, Expl.) (*Phillips, J.*) VENKATESA AIYAR *v.* VENKATARAMA AIYAR. **84 I. C. 665=1924 M. W. N. 62= A. I. R. 1924 Mad. 470.**

—S. 146—Surviving Co-parceners.

———*Execution by one of them alone to the Collector is not bad.*

The presentation of a Darkhast for execution by one of the surviving co-parceners of the deceased decree-holder cannot be said to be invalid so as to render the proceedings before the Collector invalid and so as to prevent the deduction of the time mentioned in sub-para. (3) of para. 11 of the 3rd Sch. of the Code. (*Shah and Fawcett, JJ.*) MADHAV PRABHAKAR *v.* BALOJI GOVIND. **51 Bom. 143=29 Bom. L. R. 75= 100 I. C. 619=A. I. R. 1927 Bom. 123.**

—S. 146—Transfer pending suit.

———Transfer by plaintiff pending suit—Transferee cannot execute decree in that suit unless he has got substituted in the suit for the plaintiff. S. 146 is subject to any special provision there may be and R. 16 of O. 21 is clearly a provision to which S. 146 will be subject

C. P. CODE, (1908), S. 146—Transferee of preliminary decree.

(*Adami and Bucknill, JJ.*) THAKURI GOPE *v.* MOKHTAR AHMAD. **69 I. C. 959 = 1922 P. H. C. C. 256 = 3 Pat. L. T. 625 = A. I. R. 1922 Pat. 563.**

—S. 146—Transferee of preliminary decree.

——Where the preliminary decree in a partition suit is transferred, the assignee of the decree is not a person claiming under the decree-holder within S. 146. (*Phillips and Madhavan Nair, JJ.*) RAMANADHAN *v.* RAMACHANDRA. **24 M.L.W. 392. = 97 I.C. 754 = A.I.R. 1926 Mad. 1129.**

—S. 148—Appeal.

——An order made under S. 148 is not a decree and is not appealable as an order under S. 104. (*Scott-Smith, J.*) LABH SINGH *v.* GANPAT. **71 I.C. 35 = A.I.R. 1923 Lah. 162.**

—S. 148—Alteration of decree.

——*Section does not apply.*

Per *Chevis, J.*—A decree can be altered by review, on appeal or on revision, but neither S. 148 nor S. 151 can be utilized for the purpose of altering a decree. 35 All. 582 Foll. (*Chevis, Broadway and Wilberforce, JJ.*) HIMMUN *v.* FAUJA. **67 I.C. 772 = 3 L.L.J. 310 = A.I.R. 1921 Lah. 6 (F. B.).**

—S. 148—Application for extension of time for applying for discharge.

——*Time for applying for discharge can be extended.*

The extension for good reasons of the period fixed by the adjudication order for an application for discharge is contemplated by S. 27 (2) of the Act. It is not a fatal defect that the application for extension is made after expiry of the fixed date. S. 148 of the C. P. Code establishes this principle and there is nothing repugnant to it in the provisions of the Insolvency Act. (*Le Rossignol, J.*) LAKHI *v.* MOLAR. **86 I.C. 115 = 26 P.L.R. 126 = A.I.R. 1925 Lah. 416.**

—S. 148—Costs.

——*Time for payment of costs—When cannot be extended.*

Where the appellant failed to pay the costs on payment of which only appeal was to be accepted, the Court has no power to extend the time limited in the order for payment of the money either under S. 148 or 115. (*Das, J.*) SHEIKH HAMIDUR RAHMAN *v.* SHAHANAND DAS. **80 I.C. 575 = A.I.R. 1925 Pat. 153.**

—S. 148—Decree fixing time.

——Where a definite time is fixed by the decree for making a deposit of money, the Court has no power to extend it subsequently. (*Daniels, J.C.*) DORI LAL *v.* MT. JAMAGA. **72 I.C. 879 = A.I.R. 1923 Oudh 16.**

—S. 148—Deficit Court-fee.

——*Extension of time cannot be granted.*

After the Court has ordered a return of plaint for presentation to proper Court on payment of additional Court fee, it cannot review its order and extend time previously fixed for payment of Court-fee. (*Odgers, J.*) RAMACHANDRAYYA *v.* VENKATARATNAM. **22 M.L.W. 582 = 1925 M.W.N. 804 = 92 I.C. 800 = A.I.R. 1926 Mad. 133.**

——*Accepting deficit Court-fee after time fixed is equal to extending time.*

When a Court accepts deficit Court-fee after the time fixed for its payment and the plaint is registered, it may be inferred that the Court condones the delay, and grants extension, as it has discretion to do under S. 148 or S. 149 for, if it wanted, the Court might have rejected the plaint under O. 7, R. 11. (*Dawson Miller, C.J. and Mullick, J.*) RAGHUNANDAN SAHAY *v.* RAM SUNDAR PROSAD. **85 I.C. 172 = 4 Pat. 190 = 3 Pat.L.R. (Civ.) 22 = 6 P.L.T. 4 = 1924 P.H.C.C. 355 = A.I.R. 1925 Pat. 299.**

C. P. CODE, (1908), S. 148—Depositing amount.

——*Time can be extended for sufficient cause.*

Appellant was ordered by the Court to deposit court-fee payable on his memo of appeal within a month. The order further provided that if the Court-fee was not paid within a month, the appeal would stand dismissed. The month expired during the vacation and on the re-opening day the appellant could not procure the stamp paper because the stamp vendor had none. He however got it the next day and the same day filed it in Court.

Held, that there having been no negligence or laches on the part of the appellant there was sufficient cause for re-instating the appeal and for extending the date fixed for payment of the court-fee up to the date when the stamp was tendered in Court. (*Dawson Miller, C.J. and Bucknill, J.*) AMIR MANDAL *v.* MOHAN CHANDRA MANDAL. **80 I.C. 1030 = 3 Pat. 337 = 6 P.L.T. 151 = A.I.R. 1924 Pat. 663.**

——*No jurisdiction to extend time.*

Court has no inherent power to amend its own decree so as to extend time fixed by itself to make up the deficit Court fee. Where it does so amend, it exercises jurisdiction not vested in it by law, and the High Court will interfere in revision. (*C. C. Ghose and Panton, JJ.*) (NAWAB) KHAJEH HABIBULLA *v.* GOLA ASMOTAR KHATUM. **74 I.C. 575 = 27 C.W.N. 720 = 37 C.L.J. 395 = A.I.R. 1923 Cal. 612.**

——*Decree conditional on payment of extra Court-fee—Time cannot be extended except by review.*

When the Court had made a decree in plaintiff's favour conditional on his paying an extra Court-fee within a specific period and had decreed that if this extra Court-fee was not paid, the suit was to stand dismissed.

Held, that once the term of deposit has been embodied in the decree the Court itself, even if it desired, had no jurisdiction to alter its own direction save on an application for review of judgment. 40 A 579, Rel. on. (*Scott-Smith, J.*) DIWAN CHAND *v.* RAM LABBAYA. **73 I.C. 922 = A.I.R 1923 Lah. 372.**

——*Courts can extend time for payment of deficit Court-fee.*

Courts have power under Ss. 148 and 149 to extend time for filing deficit Court-fee after setting aside in review an order rejecting the plaint insufficiently stamped and if the plaint originally filed is within the time the suit does not become time-barred. (*Newbould, J.*) SURENDRA PRASAD LAHIRI CHOWDHURY *v.* AFTABUDIN AHMED. **70 I.C. 43 = 26 C.W N. 391 = A.I.R. 1922 Cal. 234.**

—S. 148—Depositing amount.

——*Deposit under consent decree was made beyond time fixed in the decree—Deposit cannot be given retrospective effect.*

Court first passed an incomplete decree by consent of parties that in case defendant deposited certain amount within certain time the suit shall stand dismissed, or else if no deposit was made within that time the suit shall stand decreed. Defendant deposited the amount but after the period fixed was over and the Court declared that the deposit should have retrospective effect and the suit consequently was dismissed.

Held, that the order of the Court, not being in satisfaction or discharge of a decree, was not appealable.

Held further, that the Court had no power to extend the period of time fixed for making the deposit because, although, where in the progress of the suit something has to be done, Court granting time can extend it under S. 148, still where the decree finally settles the rights of the parties, the Court cannot extend time so as to interfere with the rights of the parties 40 All. 579 and 42

All. 639, Appr. (*Mukerji and Niamatullah, JJ.*) SHIAM LAL *v.* MOTI RAM. **118 I.C. 591= 1929 A.L.J. 968=A.I.R. 1929 All. 666.**

—S. 148—Depositing decree money.

——*When time can be extended.*

Time is of the essence of the agreement when, in the course of proceedings by the judgment-debtor to set aside an execution sale, a compromise is made between the decree-holder and judgment-debtor that on payment of the judgment-debt within a prescribed period, the sale shall stand cancelled, while upon failure to make such payment the sale shall stand confirmed. In such a case the Court has no power to extend the time fixed for payment. 33 C.L.J. 244, Foll. (*Adami and Kulwant Sahay, JJ.*) HANSRAJ SANGECHI *v.* JOGESHAR PRASAD. **88 I.C. 1020=6 P.L.T. 511=1926 P.H.C.C. 40= A.I.R. 1925 Pat. 691.**

——*When time can be extended.*

Where under a compromise decree time is fixed for payment of the decretal amount, the Court can extend the time for payment if in its discretion it thinks that time is not of the essence of the contract, and such an order extending the time is not subject to revision. (*Mullick and Bucknill, JJ.*) MT. NAND RANI KUER *v.* DURGA DASS NARAIN. **82 I.C. 505=2 Pat. 906= 1924 P.H.C.C. 122=5 Pat. L.T. 401= A.I.R. 1924 Pat. 387.**

——*For specific performance—Time cannot be extended.*

Where in a suit for specific performance, a decree is granted to the plaintiff and the plaintiff asked to deposit the money consideration for the sale before a fixed date, the Judge has no jurisdiction to extend the time under S. 148. 2 P.L.W. 400, Dist.; 35 All. 582, Ref.; 14 All. 529 and 18 All. 223. Doubted. (*Wort, J.*) AMANAT-ULLAH MIAN *v.* RAGHUNATH PRASAD. **A.I.R. 1930 Pat. 279.**

—S. 148—Depositing money to set aside Ex parte decree.

——*Time can be extended.*

S. 148 applies to proceedings antecedent to the passing of a decree. Where the Appellate Court passed an order, for restoration of a suit which was dismissed for default by the Trial Court, on the plaintiffs paying a sum of money within a time fixed by it and where the Trial Court refused to accept the sum a day later on the ground that the money was paid after the time fixed for payment.

Held, that the Court has jurisdiction under S. 148 to extend time for payment in such cases. (Case Law Discussed). (*Kinkhede, A.J.C.*) BULAKHICHAND *v.* AMEER ALLI. **87 I.C. 12=21 N.L.R. 111= A.I.R. 1926 Nag. 44.**

—S. 148—Ex parte decree.

——Order setting aside *ex parte* decree on condition of paying damages by certain time—Court can extend time. (36 All. 77, Foll.) (*Campbell, J.*) FIRM GOBIND SAHAI RUP LAL *v.* GURDAS MAL. **73 I.C. 648= A.I.R. 1924 Lah. 222.**

—S. 148—Final decree.

——Neither S. 148 nor S. 151 authorizes a Court to meddle with its final decrees. (*Jackson, J.*) KRISHNAMACHARULU *v.* VENKATA SUBBIAH. **24 M.L.W. 443=1926 M.W.N. 713=97 I. C. 795= A.I.R. 1926 Mad. 1059.**

——*Time fixed for decree which has become final cannot be extended.*

A Court has no jurisdiction to extend time fixed by a decree where the effect of such an extension will be to alter the terms of the decree which has become final between the parties. (*Wazir Hasan, A.J.C.*) TRIBHUWAN DAT SINGH *v.* SURAJ BALI. **11 O.L.J. 119= 78 I. C. 387=A.I.R. 1924 Oudh 330.**

——*Does not apply after final decree is passed.*

The general provisions of S. 148 relate only to proceedings antecedent to the passing of a decree. Any order passed for extension of time after a final decree is passed must be deemed to have been passed under the authority given to the Execution Court under S. 47 of the Court and is therefore appealable. (*Dalal, A.J.C.*) GANGA RATAN *v.* CHANDIKA PRASAD. **74 I.C. 573= A.I.R. 1924 Oudh 179.**

——*When time should be extended.*

Where after an *ex parte* preliminary decree for foreclosure was passed and the mortgagor in pursuance thereof attempted to raise money to pay off the sum but mortgagee applied for final decree immediately he was so entitled.

Held, that extension should be granted to mortgagor to make the payment. (*Hallifax and Kotval, A.J.Cs.*) AMAN SINGH *v.* PANDIT KUNJ BIHARI LAL. **86 I.C. 397=8 N.L.J 6=A.I.R. 1925 Nag. 258.**

——*Consent decree — Time for payment can be extended.*

Where a decree was passed in terms of a compromise by which defendant were to pay plaintiff Rs. 3300 within a certain time and in default, the mortgaged property was to be foreclosed, *held*, whether the decree is a foreclosure decree or is treated as a contract, the Court can extend the time for making payment. (*Kotval, A.J.C.*) KISAN LAL *v.* ABDULLA. **71 I.C. 421=A.I.R. 1923 Nag. 88.**

—S. 148—Fresh notice to respondent.

——*Time can be extended.*

Notice to respondent returned unserved—Application for issue of fresh notice not made within time—Time may be extended excusing delay under S. 148. (*Fawcett and Madgavkar, JJ.*) BABANNA SANGAPPA *v.* PARAVA NINGBASAPPA. **100 I.C. 147= 28 Bom. L. R. 1446=50 Bom. 815= A. I. R. 1927 Bom. 68.**

—S. 148—Insolvency.

——*Time for applying for discharge cannot be extended.*

Extension of time under S. 148, C. P. Code cannot be granted in cases where the insolvent fails to apply for discharge within the time fixed by Court, since the provisions of S. 43 (1) are mandatory and the powers given by S. 5 are to that extent limited. A.I.R. 1926 Mad. 942, Foll. and 17 Cal. 512, Dist. (But see A.I.R. 1928 Pat. 338 (F.B.); A.I.R. 1930 Mad. 389 (F.B.) and A.I.R. 1927 All. 418.) (*Otter and Baguley, JJ.*) BINDRABAN DINANATH *v.* OFFICIAL RECEIVER. **8 Rang. 187=A.I.R. 1930 Rang. 166.**

——*Period is fixed by code—Extension cannot be granted.*

In an order under S. 55 (4), there is no question of the period being fixed or granted by the Court, for, the period is fixed by the Code itself and consequently S. 148 is not applicable, and the Court has no power to extend the period of one month allowed under S. 55 (4). (1916) M. W. N. 179 Foll, and 10 Cal. 55 (P.C.), Dist. (*Phillips, J.*) NARASIMHA AIYAR *v.* RANGACHARI. **1926 M. W. N. 390=95 I. C. 444= A. I. R. 1926 Mad. 689=50 M. L. J. 477.**

—S. 148—Order providing for dismissal if conditions are not fulfilled.

——*Condition not fulfilled—No further order is necessary to effect dismissal.*

Where an order is passed allowing an application upon certain terms and providing that if within the time allowed those terms are not complied with, the application shall automatically, and without further interposition by the Court, stand dismissed, no further order of Court is necessary to effect dismissal of the application.

Curgenven, J.—The test to determine, in cases of this nature, whether power still exists to extend time is whether the proceeding in which time was originally granted is still pending or has been disposed of. (*Odgers and Curgenven, JJ.*) BALAKRISHNA AYYAR *v.* PARVATHAMMAL. **26 M. L. W. 333 = 39 M. L. T. 146 = 1927 M. W. N. 809 = 105 I. C. 124 = A. I. R. 1928 Mad. 154 = 53 M. L. J. 494.**

—S. 148—Pre-emption.

———S. 148 does not apply to decrees in pre-emption suits. (*Broadway, J.*) KHAN MUHAMMAD *v.* AHMAN. **73 I. C. 891 = A.I. R. 1924 Lah. 359.**

———*Time cannot be extended.*

S. 148 does not entitle the Court to extend the time fixed by the decree for payment of the purchase money in pre-emption cases. 99 P.R. 1912, Foll. (*Scott-Smith, J.*) LABH SINGH *v.* GANPAT. **71 I. C. 35 = A. I. R. 1923 Lah. 162.**

———Time fixed by pre-emption decree for payment cannot be extended by executing Court. S. 148 does not empower an executing Court to extend the time fixed for payment of the decretal amount. It empowers the Court to extend time only when a period is fixed for the doing of any act prescribed or allowed by the Code itself. It does not apply to a case where time is fixed by a decree. And the time fixed by a decree cannot be extended under section 151 as that section is not meant to empower the executing Court to alter the decree or in any way effect its finality. (*Prideaux, A. J. C.*) AMBADAS *v.* LAXMAN. **71 I. C. 401 = 19 N. L. R. 8 = A. I. R. 1923 Nag. 210.**

———*Time cannot be extended.*

If no payment of the purchase money has been made within the time fixed by a pre-emption decree, it is not competent to the court to extend the time either under S. 148 or S. 151, C.P. Code. 60 P. R. 1913; 35 All. 582, Foll. (*Wilberforce, J.*) NATHU KHAN *v.* GULAB KHAN. **64 I. C. 242 (Lah.).**

—S. 148—Pre-emption decree.

———*Court not bound to extend time.*

A person obtained a decree for pre-emption under which he had to pay a certain sum within a certain prescribed period, otherwise the suit was to be dismissed. He appealed against this decision but was unsuccessful. The appellate Court was not asked to grant an extension of time. He tried to deposit the money after the period had expired but the money was not accepted by the Court.

Held, that the Court was not bound to extend time under S. 148 which relates only to proceedings antecedent to the passing of the final decree; 17 O. C. 377, Foll. (*Shrivastava, J.*) RAJ BAHADUR *v.* MT. BISHUNATHA. **5 O. W. N. 890 = 114 I. C. 500 = A. I. R. 1928 Oudh 492.**

———*Appellate court can extend time by varying the decree under O. 41, R. 32.*

The jurisdiction with which a Court is invested by the provisions of S.148 in the matter of enlargement of time is restricted to cases where time for doing an act is fixed by the Court, otherwise than by its decree in a suit. But once an appeal is preferred from a decree, the appellate Court becomes seised of the entire proceedings and becomes vested with the jurisdiction of confirming, varying or reversing the decree from which the appeal is preferred, and it follows that the appellate Court has jurisdiction to extend the time though not under S. 148 but under the provisions of R. 32, O. 41, by varying the decree of the Court of first instance in that behalf. Where the Court of first instance passed a decree in favour of the plaintiff in a suit for pre-emption, conditional on payment into Court of a certain sum directing further that in default of such payment the suit would stand dismissed with costs and the plaintiff preferred an appeal before the expiry of the period fixed for the deposit of the sale consideration.

Held, that the appellate Court can extend time for deposit under O. 41, R. 32, 7 O. C. 359 and 11 O. C. 144, Rel. on. (*Stuart, C. J. and Wazir Hasan, J.*) MASLAHUDDIN *v.* RAM KISHEN. **2 Luck 425 = 101 I. C. 258 = 4 O. W. N. 252 = A. I. R. 1928 Oudh 32.**

—S. 148—Revision lies.

———An application for revision against an order dismissing the application under S. 148 for extension of time fixed for payment under the terms of a decree is tenable. 1 O. L. J. 191 Dist. (*Wazir Hasan, A. J. C.*) TRIBHUWAN DAT SINGH *v.* SURAJ BALI. **11 O. L. J. 119 = 78 I. C. 387 = A. I. R. 1924 Oudh 330.**

—S. 148—Scope of—Applicability.

———*Consent decree—Time fixed for performing obligations on either side—No alternative clause that failure to perform within the time fixed will entail forfeiture—Time can be extended.*

The decrees contain no alternative directions that if by the particular date, dates mentioned therein any party failed to carry out his part of the obligations imposed on him by the decrees and the other party would be precluded from enforcing them against the party in default. Both the decree-holders and the judgment-debtors are guilty of failure to perform their respective obligations. This cannot disentitle one party from compelling the other to perform his obligations in execution. A. I. R. 1923 Nag. 210; A.I.R. 1926 Nag. 286, Dist. (*Subhedar, A. J. C.*) RAMAKRISHNA *v.* LAXIMINARAIN. **116 I. C. 651 = 25 N. L. R. 110 = A. I. R. 1929 Nag. 164.**

———S. 148 only applies to cases of Acts done by a party under the provisions of the Code itself. (*Das, J.*) SHEIKH HAMIDUR RAHMAN *v.* SHAHANAND DAS. **80 I. C. 575 = A. I. R. 1925 Pat. 153.**

———Court can extend time fixed by the Court for doing any act. (*Walsh, A. C. J. and Ryves, J.*) PANDIT BAL GOBIND *v.* SHEO KUMAR. **82 I. C. 184 = 22 A. L. J. 791 = 5 L. R. A. Civ. 545 = 46 All. 864 = A. I. R. 1924 All. 818.**

—S. 148—Use of discretion.

———*When appellate Court can question.*

Questions like the exercise of discretion under S. 148 or 149, C.P. Code, should be left to the discretion of the Trial Court and in the absence of a very strong case, the Appellate Court must not interfere with the trial Court's discretion. (*Dawson Miller, C. J. and Mullick, J.*) RAGHUNANDHN SAHAY *v.* RAM SUNDER PRASAD. **85 I. C. 172 = 1924 P. H. C. C. 355 = 6 P. L. T. 4 = 3 Pat. L. R. Civ. 22 = 4 Pat. 190 = A. I. R. 1925 Pat. 299.**

—S. 149—Absence of doubt.

———The Court may not exercise its discretion in favour of an appellant when the question of the amount of court-fee is not in doubt or when no honest attempt appears to have been made to comply with the law. 3 P. L. J. 74, Foll. (*Macpherson and Dhavle, JJ.*) DEO NANDAN MISRA *v.* GANGA PRASAD. **8 Pat. 906 = 10 P. L. T. 622 = 120 I. C. 313 = A. I. R. 1929 Pat. 731.**

—S. 149—Acceptance after time fixed—Remedy.

———Where under S. 149 Court has accepted deficient Court fees after the time fixed for its payment, although without specifically excusing the delay, review lies on proper and legal grounds. (*Wallace, J.*) BASAVAYYA *v.* VENKATAPAYYA. **1926 M. W. N. 341 = A. I. R. 1926 Mad. 676 = 95 I. C. 439 = 51 M. L. J. 90.**

—S. 149—Additional Court-fee—Revision.

———Revision will lie against an order demanding additional Court-fees. *See also* C. P. Code, S. 115. (*Hallifax, A. J. C.*) HARIHAR RAO *v.* SALA BAI. **103 I. C. 268 = 10 N.L.J. 106 = A. I. R. 1927 Nag. 256.**

—S. 149—Appeal—Interference.

Questions like the exercise of discretion under S. 149, C.P. Code, should be left to the discretion of the Trial Court and in the absence of a very strong case, Appellate Court must not interfere with the trial Court's discretion. (*Dawson Miller, C.J. and Mullick, J.*) RAGHUNANDAN SAHAY *v.* RAM SUNDAR PRASAD. **85 I. C. 172 = 1924 P. H. C. C. 355 = 6 P. L. T. 4 = 3 Pat. L. R. (Civ.) 22 = 4 Pat. 190 = A. I. R. 1925 Pat. 299.**

———When the appellate Court had not exercised its discretion as regards granting time to make up the deficiency in Court-fees and rejected the memorandum of appeal, High Court set aside the order of rejection in appeal. (*Rafique and Lindsay, JJ.*) JAI SINGH GIR *v.* SITA RAM SINGH. **74 I. C. 757 = 21 A. L. J. 333 = 4 L.R.A. Civ. 188 = A.I.R. 1923 All. 349.**

—S. 149—Applicability.

———Where no suit is instituted but only an application under O. 33 for leave to sue as a pauper is made, S. 149 has no application to validate subsequent payment of court-fees. 38 Bom. 41, Ref. (*Findlay, J. C.*) JAGANNATHPURI *v.* NATHOO. **12 N. L. J 69 = 118 I. C. 687 = A. I. R. 1929 Nag. 268.**

—S. 149—Change of practice.

———A preliminary objection was raised that the appeal was not properly instituted as the memorandum of appeal bore originally a court-fee stamp of Rs. 10 and the *ad valorem* court-fee required by law was not made up till long after the expiry of the period of limitation. The explanation offered was that the appeal was filed on a court-fee stamp of Rs. 10 according to old practice and that the *ad valorem* court-fee was paid later.

Held, that in view of the explanation necessary extension of time be allowed and that the appeal was within time. (*Fforde and Bhide, JJ.*) SECRETARY OF STATE *v.* MT. VIDYA VOLI. **A. I. R. 1929 Lah. 748.**

—S. 149—Conflict with Schedule.

———S. 149 is one of the general provisions of the Code not liable to annulment or alteration by any proceedings under Part X, and if there is any conflict between such a general provision and a rule under the first schedule, the general provision must prevail. (*Wallace, J.*) BASAVAYYA *v.* VENKATAPAYYA. **1926 M. W. N. 341 = 95 I. C. 439 = A. I. R. 1926 Mad. 676 = 51 M.L.J. 90.**

—S. 149—Controversy as to court-fee.

———Where the matter regarding the court-fee payable is a controversial one, and the appellant satisfies the Court that he had a reasonable cause for not paying the requisite court-fee stamp when the appeal was filed, the case is a fit one for extending time to make good the deficiency in the court-fee. (*Jai Lal, J.*) GUL MUHAMMAD *v.* SABZ ALI KHAN. **113 I. C. 270 = A. I. R. 1930 Lah. 24.**

—S. 149—Day's delay.

———Refusal to take the deficit Court-fee for delay by one day was held to be an abuse of the powers of the Court. (*Gokaran Nath Misra and Wazir Hasan, JJ.*) KAMAKHYA DAT RAM *v.* SHYAM LAL. **1 L. C. 574 = 104 I.C. 527 = A.I.R. 1927 Oudh 507.**

—S. 149—Deliberate deficiency.

———Where the insufficiency of Court-fee was brought to the notice of appellant's pleader, while filing the appeal but he deliberately refused to pay, no extension could be allowed. 1 Lah. 234, Foll. (*Broadway and Martineau, JJ.*) MD. MAJID ULLAH KHAN *v.* MD. HAMID ULLAH KHAN. **69 I. C. 196 = A. I. R. 1924 Lah. 325.**

———Where there is no *bona fide* mistake about the Court-fee and the omission to pay the full amount is deliberate, time should not be allowed to make up the deficiency. (*Campbell, J.*) RAMJI LAL *v.* SHIBBA. **75 I. C. 667 = A. I. R. 1923 Lah. 309.**

—S. 149—Discretion—Revision.

———Under S. 149 the Court has discretion to grant time for payment of deficient Court-fee and the propriety of the exercise of that discretion cannot be challenged in revision. *See also* C. P. Code, S. 115. (*Wadegaonkar, A. J. C.*) MAHOMED GALIF *v.* ABDUL RAHIM. **89 I. C. 419 = A. I. R. 1926 Nag. 156.**

—S. 149—Discretion—Rule as to.

———To avail of the terms of S. 149, the permission to deposit deficit Court-fee must be given after considering the circumstances and reasons for not filing the entire Court-fee in the first instance. (*Jwala Prasad, J.*) FORZAND ALI *v.* ABDUL HAMID. **60 I. C. 493 (Pat.).**

—S. 149—Discretion—Scope of.

———Discretion under S. 149 extends to the whole or any part of any fee prescribed and can be exercised at any stage in the case. (*Lord Shaw.*) FAIZULLAH KHAN *v.* MAULADAD KHAN. **117 I. C. 493 = 31 Bom. L. R. 841 = 33 C. W. N. 781 = 56 I. A. 232 = 50 C. L. J. 39 = 30 M. L. W. 104 = 10 Lah. 737 = 1929 M. W. N. 818 = 31 P. L. R. 7 = A. I. R. 1929 P. C. 147 = 57 M. L. J. 281 (Pat.).**

—S. 149—Dispute as to deficiency.

———Where an insufficiently stamped appeal is filed in time and on the deficiency being pointed out to the appellant by the office, he disputes the order and does not make up the deficiency till long after the appeal is barred by time, he is not entitled to the benefit of S. 149 of the C. P. Code. (*Scott-Smith, J.*) WADHANA SINGH *v.* SUNDER SINGH. **59 I. C. 667 = 26 P. L. R. 1921 = A. I. R. 1921 Lah. 371.**

—S. 149—Effect of order under.

———*Relates back to date of plaint.*

Where a Court dismisses a suit and at the same time orders plaintiff to make up the deficiency in Court-fees, the Court must be presumed to have acted under S. 149, and if the plaintiff makes up the deficiency, the plaint becomes of the same force and effect as if the Court-fee demanded had been paid in the first instance. (*Campbell and Zafar Ali, JJ.*) ARSHAD ALI *v.* ZORAWAR SINGH. **8 Lah. L. J. 60 = 27 P. L. R. 172 = 92 I. C. 986 = A. I. R. 1926 Lah. 346.**

—S. 149—Error of Court.

———Where an appellant is misled by an error of the Court and the insufficiency in the Court-fee originally paid is due to a *bona fide* mistake on his part he is entitled to the benefit of S. 149 of the C.P.C. (*Jai Lal and Abdul Raoof, JJ.*) RANZOR SINGH *v.* SECRETARY OF STATE. **92 I. C. 319 = A. I. R. 1926 Lah. 509.**

——*Acceptance of deficit court-fees.*

Where a Court accepts deficit Court-fee after the time fixed for its payment and the plaint is registered, it may be inferred that the Court condones the delay and grants extension, as it has discretion to do under S. 148 or S. 149 of the C. P. Code for, if it wanted, the Court might have rejected the plaint under O. 7, R. 11. (*Dawson Miller, C. J. and Mullick, J.*) RAGHUNANDAN SAHAY *v.* RAM SUNDER PRASAD.
85 I. C. 172 = 4 Pat. 190 =
3 Pat. L. R. 22 (Civ). = 6 P.L.T. 4 =
1924 P. H. C. C. 355 = A. I. R. 1925 Pat. 299.

S. 149—Limitation—Extension.

——Court has power to extend the time allowed under Art. 158, Limitation Act, for supplying Court-fee stamp on an application to set aside an award. (*Percival, J. C. and Rupchand Bilaram, A. J. C.*) ADAMALI *v.* ABDULALI. **107 I. C. 223 =**
23 S. L. R. 91 = A. I. R. 1928 Sind 87.

—S. 149—Mistake—Bona fides.

——Discretion given to the Court by S. 149 to allow a party to make up the deficiency of court-fees payable on a memorandum of appeal even after the expiration of the period of limitation, prescribed for filing of the appeal, can be exercised in cases where the insufficiency of the stamp was caused by a *bona fide* mistake or a *bona fide* misunderstanding of the law as to valuation but not where the appellant never cared to find out the proper court-fee which he had to pay on the memorandum of appeal. (*Mohiuddin, A. J. C.*) PATIC SHYAMALAL *v.* GAURISHANKAR. **119 I. C. 700 =**
A. I. R. 1929 Nag. 294.

——Where full Court-fee is not paid in the first instance through *bona fide* mistake, but the deficiency is made good afterwards, the appellant is entitled to the benefit of S. 149 and accordingly, the Court can extend the time. (*Martineau and Zafar Ali, JJ.*) MOTI RAM *v.* BHANU RAM. **80 I. C. 251 =**
A. I. R. 1923 Lah. 629.

——Where the question involved was a debatable one and the deficiency in Court-fee as originally paid was due to a *bona fide* mistake.

Held, the case is a fit one for extension of time and for allowing the appeal to be heard on the merits. 86 P. R. 1912, Foll. (*Shadi Lal, C. J. and Abdul Qadir, J.*) RAM KISHEN *v.* HIRDE RAM. **71 I. C. 737 =**
A. I. R. 1923 Lah. 135.

—S. 149—Mistake—No bona fides.

——Time cannot be extended where there was no *bona fide* mistake. (*Abdul Raoof and Harrison, JJ.*) TIKKAN RAM *v.* BASU RAM. **67 I. C. 106 =**
A. I. R. 1922 Lah. 440.

—S. 149—Mistaken order.

——Where by the order of the Judge the petition for revision was allowed to be treated as a second appeal subject to the payment of the necessary Court-fee within one week and when the appeal came on for hearing before a Division Bench it was contended that it was time-barred.

Held, the appeal was one which under the rules of the Court had to be heard by a Division Bench and that a single Judge could not admit the appeal at all until it was properly stamped and his order of admission was of course subject to all just exceptions and to anything which might be urged at the hearing. (*Scott-Smith and Leslie Jones, JJ.*) UMED ALI *v.* JHANGMAGHIANA MUNICIPALITY. **2 Lah. 1 = A. I. R. 1922 Lah. 233.**

—S. 149—Mistaken—Valuation.

——A case of mistake in valuation was pre-eminently a case for the exercise by the judicial authority of the

discretion under S. 149, C. P. Code. (*Lord Shaw.*) FAIZULLAH KHAN *v.* MAULADAD KHAN.
117 I. C. 493 = 31 Bom. L. R. 841 =
33 C. W. N. 781 = 56 I. A. 232 =
50 C. L. J. 39 = 30 M. L. W. 104 =
10 Lah. 737 = 1929 M. W.N. 818 =
31 P. L. R. 7 = A. I. R. 1929 P. C. 147 =
57 M. L. J. 281 (P.C.).

—S. 149—Pauper application—Failure.

——*Limits of discretion.*

Discretion given to the Court of first instance by S. 149 to accept the plaint on a court-fee and treat the suit as having been instituted on the date when application to sue as pauper was filed, should not be too widely used by Court in favour of a plaintiff who has failed to establish his right to sue as a pauper. (*Jwala Prasad and Rowland, JJ.*) BANK OF BEHAR *v.* RAMCHANDERJI. **118 I. C. 329 =**
11 P. L. T. 55 = A. I. R. 1929 Pat. 637.

—S. 149—Pauper application—Withdrawal.

——Where the plaintiff applied for permission to sue *in forma pauperis*, but withdrew his application on the ground that in another Court his application to sue *in forma pauperis* with respect to a previous suit had been rejected, and paid the requisite Court fees beyond the period of limitation.

Held, that both the applications to sue *in forma pauperis* were fraudulent, that it was not a fit case for the Court to exercise discretion under S. 149, and the suit was barred. (*Young, J.*) SOOK LAL *v.* DAL CHAND. **74 I. C. 835 = 1 Rang. 196 =**
A. I. R. 1923 Rang. 256

—S. 149—Payment after limitation.

——Where a plaint is presented on a paper insufficiently stamped within the prescribed period of limitation and time is given by the Court to the plaintiff to make good the deficiency and the deficiency is supplied within the time allowed by the Court, but after the expiry of the period of limitation, the suit is not barred. 32 Mad. 305 (F. B.), Foll. *See also* C. P. CODE, O. 7, R. 11. (*Wadegaonkar, A. J. C.*) MAHOMED GALIF *v.* ABDUL RAHIM. **89 I.C. 419 = A.I.R. 1926 Nag. 156.**

——Where an appeal when filed was insufficiently stamped and the deficiency was made good after the expiry of the period of limitation but the omission to pay the proper Court-fee in the first instance was unintentional and a *bona fide* mistake.

Held, that the appeal should not be dismissed merely for such an omission. (*Martineau, J.*) MIHAN MAL *v.* INDAR SINGH. **6 L. L. J. 506 = 84 I. C. 946 =**
A. I. R. 1925 Lah. 246.

——Under O. 7, R. 11, cl. (*c*) read with S. 149 the Court has power to allow the plaintiff further time in which to make good the deficiency of Court-fee and that, if such deficiency were made good within the time prescribed the fact that in the meantime limitation had expired would not affect the suit. (1 Pat. L. J. 420, Ref.) The decision in 15 All. 65 is no longer law. *See also* C. P. CODE O. 7, R. 11. (*Ryves, J.*) RAM DIAL *v.* SHER SINGH.
74 I. C. 358 = 21 A. L. J. 387 =
45 All. 518 = 4 L. R. All. Civ. 251 =
A. I. R. 1923 All. 538.

——*Dismissal of application to appeal as pauper.*

An order dismissing the application to appeal as a pauper does not affect the fact that the appeal has been preferred within the prescribed period of 30 days if the appellant has paid the Court-fee in obedience to the Court's order and the presentation of the appeal cannot be held to be after the expiry of limitation and the appellant is entitled to have the appeal heard. There is a distinction between applications to sue as a pauper and applications to appeal as such. In the former the plaint is an integral portion of the application and in the latter the memorandum of appeal is a separate document. A person who wishes to sue as a pauper is expected to put in his application in sufficient time to allow of a suit being filed within limitation, if and after his application to sue has been rejected. In most cases a would-be appellant who must file his appeal within 30 days, cannot secure a decision on his application within that period. (*Le Rossignol and Campbell, JJ.*) DIYAL DAS *v.* SUNDER DAS. **65 I. C. 741 = 3 Lah. 35 = 26 P. W. R. 1922 = A. I. R. 1922 Lah. 225.**

———Under S. 149, on the payment of Court-fee within time allowed, the memorandum of appeal has the same force and effect as if the Court-fee had been paid in the first instance. The respondent is not entitled to challenge its validity on the ground of limitation. (*Le Rossignol and Campbell, JJ.*) DIYAL DAS *v.* SUNDAR DAS. **65 I. C. 741 = 3 Lah. 35 = 26 P. W. R. 1922 = A. I. R. 1922 Lah. 225.**

—S. 149—Scope of.

———The Court must fix a time within which the deficient Court-fee shall be paid and has no discretion to refuse to fix it. The Court also has discretion to extend the time already fixed. S. 149 implies that Court may, in its discretion, at any stage, allow a party to pay the deficient Court-fee. But this will not override, O. 7, R. 11, in the sense that S. 149 gives the Court any discretion to refuse to grant the time which O. 7, R. 11, says it shall grant. When the party pays beyond the time fixed and has not asked the Court to extend the time for payment, but the Court nevertheless excuses the delay and receives the fee, the only reasonable interpretation is that the court has implicitly, although not explicitly, extended the time. 20 C.W.N. 615, Ref. Under S. 149 Court has discretion to accept payment after the time fixed. *See also* C. P. CODE, O. 7, R. 11. (*Wallace, J.*) BASAVAYYA *v.* VENKATAPPAYYA. **1926 M. W. N. 341 = 51 M. L. J. 90 = 95 I. C. 439 = A. I. R. 1926 Mad. 676.**

—S. 149—Stage.

———The Court has power to grant time 'at any stage' for payment of deficient Court-fee. The use of the words "at any stage" leaves no room for doubt that the Court may grant time before or after registration of the plaint and even after the expiry of the prescribed period of limitation. (*Wadgaonkar, A. J. C.*) MAHOMED GALIF *v.* ABDUL RAHIM. **89 I. C. 419 = A. I. R. 1926 Nag. 156.**

—S. 150—Abolition.

———When the Court which has passed a decree is abolished, it is the Court to which its business is transferred which is competent to execute the decree. (*Sulaiman and Pullan, JJ.*) MAQBUL AHMAD *v.* PATESHRI PARTAP NARAIN SINGH. **118 I. C 670 = 1929 A. L. J. 976 = A. I R. 1929 All. 677.**

—S. 150—Ex parte decree of another Court.

———The Court to which the whole business of the Court which passed the decree is transferred, is entitled, on an application to it, to set aside an *ex parte* decree passed by other Court. (*Spencer and Krishnan, JJ.*) J. V. SRINIVASA RAO *v.* HANUMANTHA RAO. **65 I. C. 727 = 46 Mad. 1 = 15 M. L. W. 458 = 1922 M. W. N. 349 = 31 M L. T. 79 = A. I. R. 1922 Mad. 10 = 42 M. L. J. 344.**

—S. 150—Scope and applicability.

———*Ramesam, J.*—The words of S. 150 refer to cases where a certain specified business has been actually transferred by the order of a competent Court and do not apply to any other cases. 37 Mad. 462 held overruled by 42 Mad. 481 (F. B.) (*Ramesam and Devadoss, J.*) SUBRAMANIA AYYAR *v.* SWAMINATHA CHETTIAR. **28 M. L. W. 885 = 114 I. C. 545 = A. I. R. 1928 Mad. 746.**

———Section 150 in terms only applies to cases of transfer from a Court and not to cases of a Court ceasing to exist. (*Wallace and Jackson, JJ.*) SRI RAJAH SATRUCHERLA SIVAKANDA RAJU BAHADUR GARU *v.* RAJAH OF JEYPORE. **50 Mad. 882 = 38 M. L. T. 351 = 25 M. L. W. 671 = 1927 M. W. N. 282 = 103 I. C. 245 = A. I. R. 1927 Mad. 627 = 52 M. L. J. 605.**

———The cumbrous procedure of filing of an execution petition in the Court which passed the decree and then to obtain a transfer of the execution to another Court which would execute the decree has been dispensed with by S. 150. It enables the decree-holder to file the petition in the Court which ultimately has to execute the decree, but in order to apply Section 150 it must be shown that the business in question was transferred from the Court which passed the decree to another Court. (*Jwala Prasad and Adami, JJ.*) JAGANNATH PRASAD SINGH *v.* SHEONANDAN SAHAY. **62 I. C. 487 = 2 P. L. T. 374 = 6 P. L. J. 304 = 1921 P. H. C. C. 186 = A. I. R. 1921 Pat. 152.**

—S. 150—'Transfer'—Applicability.

———*'Transfer'—Includes transfer of business under Civil Court's Act.*

The word 'transfer' in S. 150 is not inapplicable to a case where the District Judge fixed the jurisdiction of the Court under the Civil Courts Act and transferred the whole of the business within a certain area to it. (*Krishnan and Venkata Subba Rao, JJ.*) MOUNA GURUSWAMY *v.* SHEIKH MUHAMMADHU. **86 I. C. 650 = 1922 M. W. N. 743 = 16 M. L. W. 748 = 46 Mad. 83 = A. I. R. 1923 Mad. 92 = 43 M. L. J. 713.**

—S. 150—Transfer of business.

———*Assignment of work.*

Where under S. 13 (2) of Act XII of 1887 the District Judge assigned certain business from one Subordinate Judge to another, the latter Subordinate Judge could not entertain an application to execute the decree passed by a former Judge. An assignment of business under S. 13 (2) is not the same thing as transfer of business within the meaning of S. 150, C. P. Code. (*Chatterji and Chotzner, JJ.*) MOHAMMAD KAZE MALI *v.* NIAMUDDIN AHAMED. **70 I. C. 210 = 26 C. W. N. 216 = A. I. R. 1922 Cal. 41.**

—S. 150—Transfer—Pending suit.

———In the case of a pending suit a transfer of territorial jurisdiction will not *per se* result in a transfer of the suit and technically a transfer order is necessary. A. I. R. 1928 Mad. 746 ; A. I. R. 1925 Mad. 117, Rel. on. (*Curgenven, J.*) RAMANATHAN CHETTY *v.* ALAGAPPA CHETTY. **53 Mad. 378 = A. I. R. 1930 Mad. 528.**

—S. 150—Transfer—Prior attachment.

———Where after attachment of property in execution of a decree for money and an order for sale made by the Court which passed the decree, the property is transferred to the local limits of the jurisdiction of another Court, the new Court having territorial jurisdiction over the property attached can entertain an application for execution by sale of property and pass orders thereon. 37 Mad. 462 and 42 Mad. 82, Rel. on. : A. I. R. 1927 Mad. 627, Ref. (*Venkatasubba Rao and Madhavan*

Nair, JJ.) MANIKKA GOUNDEN *v.* LOGANATHA MUDALIAR, **30 M. L. W. 649 = A. I. R. 1929 Mad. 852.**

S. 151.

Abuse of Process.
Amendment.
A peal.
Applicability.
Compromise decree.
Consolidation.
Contempt of Court.
Costs.
Dismissal for default.
Ends of Justice.
Enforcement of order.
Execution.
Ex-parte decree or order.
Extension of time.
Fraud.
Guardian and Ward.
Inherent Powers.
Injunction.
Invention of Procedure.
Issues.
Jurisdiction.
Letters of Administration.
Limits of.
Mistake—*See also* C. P. CODE, S. 151—AMENDMENT.
Parties, addition of.
Receiver.
Reconstruction of records.
Refund.
Reliefs.
Remand—*See also* C. P. CODE, S. 151—APPEAL.
Restitution.
Restoration.
Retrial.
Review.
Scope of—*See also* C. P. CODE, S. 151—LIMITS OF.
Stay of execution or suit.
Striking out pleadings.
Who can invoke.

—S. 151—Abuse of Process.

———*Lunacy—No inquiry as to.*

Section 151 itself assumes that the Court has some inherent powers to make such orders as may be necessary for the ends of justice or to prevent an abuse of the process of the Court and nothing in the Civil Procedure Code is to be deemed to limit or otherwise affect those powers, though they should be exercised with restraint and caution. Where the lower Court dismissed the application asking for an inquiry under O. 32, R. 15, without holding any independent inquiry whatsoever but relying solely on the judgment of the District Judge in the lunacy proceedings as being a judgment between the parties to the application which he was deciding,

Held, that the Court committed "an abuse of the process of the Court" and therefore the High Court could interfere under S. 151, C. P. Code. A. I. R. 1926 All. 212, Ref. (*Boys and Kendall, JJ.*) CHATARBHUJ *v.* HARNANDAN LAL.
50 All. 335 = 108 I. C. 141 = 25 A. L. J. 1082 = A. I. R. 1928 All. 108.

———Mere failure to comply with R. 24 of the Civil Rules of Practice is hardly in every case an abuse of process. (*Srinivasa Aiyangar and Jackson, JJ.*) TIMMARAJU *v.* NARASIMHA RAJU.
1928 M. W. N. 222 = 28 M. L. W. 152 = 109 I. C. 528 = A. I. R. 1928 Mad. 522 = 54 M. L. J. 665.

———*Multiplicity.*

The phrase "an abuse of the process of the Court" in S. 151 includes "the idle multiplicity of proceedings." A.I.R. 1924 All. 818, Rel. on. (*Dalal and Boys, JJ.*) HARNAND LAL *v.* CHATURBHUJ. **48 All. 356 = 24 A.L.J. 375 = 93 I. C. 285 = A. I. R. 1926 All. 212.**

———During the progress of Court sale, sons of the judgment-debtor filed a suit for partition of the property and obtained an *interim* injunction staying the sale. The judgment-debtor applied for the adjournment of the sale on the ground that "the bidders had come and gone away thinking that the auction would not take place." He did not rely on the injunction directly in the first instance, but simply preferred the application for adjournment. The said injunction had been passed only half an hour ago by the same Court, who, however, refused to grant adjournment.

Held, that the District Munsif's conduct in the present case was not in contravention of any definite provision of law. But his action resulted in the words of S. 151, as an abuse of the process of his Court, and therefore under the inherent power recognised in that section, his order must be set aside. (*Oldfield and Devadoss, JJ.*) MAMILLAYYA *v.* VENKAT RATNAM.
77 I. C. 12 = 1923 M. W. N. 672 = A. I. R. 1924 Mad. 100 = 45 M. L. J. 312.

———*Multiplicity—Bringing an improper suit is an abuse.*

Where a plaintiff brings a suit which he knows is bound to fail and asks the Court to find on an immaterial issue and after having got the dictum, brings another suit and tries to force the Court to follow the dictum previously given,

Held, that this would amount to an abuse of the process of Court. (*Walsh and Ryves, JJ.*) REKHAB DAS *v.* MT. SHEOBAI. **74 I. C. 656 = 45 All. 466 = 21 A. L. J. 393 = 4 L. R. A. Civ. 532 = A. I. R. 1923 All. 495.**

———Section 151 of the C. P. Code, read with S. 47 (2) of Act III of 1907, enabled Courts to make some trial of the question whether certain property should vest in the Court. As to the extent to which such trial should proceed under Act III of 1907, the Court has only to satisfy itself that the process of the Court was not abused. The existence of a sale-deed which is suspected to be a paper transaction does not necessarily show that the insolvent's title to the property is really doubtful. The existence of such a sale-deed does not bar the Court from enquiry whether such deed is a bogus one so that the Court is not absolutely precluded from deciding the claims of third parties. (*Macnair, A.J.C.*) GANGADHAR *v.* SHRIDHAR.
61 I.C. 589 = A. I. R. 1921 Nag. 159.

—S. 151—Amendment. *See also* **C. P. Code, Ss. 152 and 148.**

———*Decree.*

Plaintiff sued defendants 1, 2 and *A*. *A* died during the pendency of the suit and defendants 3, 4 and 5 were brought on record as his legal representatives. Suit was dismissed and decree was passed in favour of defendants 1, 2 and *A*, instead of 1, 2, 3, 4 and 5. Appeal by plaintiff was accepted and decree was given against defendants 1 and 2 only. Defendants 1 to 5 then appealed to the High Court. Appeal was, however, dismissed against defendant 1 and 2 only. Plaintiff then applied for the amendment of decree to the High Court to the effect that the decree should be against defendants 1, 2, 3, 4 and 5 instead of 1 and 2.

Held, that as in substance the first appeal had been disposed of against defendants 1, 2, 3 4 and 5 and

matter in second appeal fully decided against them all, amendment should be granted, (*Dalip Singh and Harrison, JJ.*) RAM CHAND *v.* CHHAJJU RAM.
120 I. C. 176 = 11 L. L. J. 37 = A. I. R. 1929 Lah. 317.

———A decree of the District Judge, by an accidental mistake, made those defendants also against whom no relief was claimed, liable for the decretal amount. On plaintiff's appeal to the High Court, the decretal amount was increased but the question as to who were bound by the decree, was not referred to in the judgment. Thereafter the defendants whose names were wrongly included in the decree applied to the High Court for the amendment of the decree.

Held, that the High Court had power to interfere either under S. 151 or 152, and that it was necessary to meet the ends of justice to order the amendment of the decree. (*Rutledge, C.J. and Brown, J.*) C. T. A. M. CHETTIAR FIRM *v.* KOYIN GYI.
7 Rang. 88 = 117 I. C. 585 = A. I. R. 1929 Rang. 158.

———*Form.*

Held, that as the High Court even in plaintiff's appeal could have under O. 41, R. 33 altered the decree and omitted the names of the applicants, the decree of the District Judge must be held to have merged in the decree of the High Court, and so the High Court was the only Court to grant the relief claimed. (*Rutledge, C. J. and Brown, J.*) C. T. A. M. CHETTIAR FIRM *v.* KO YIN GYI. **7 Rang. 88 = 117 I.C. 585 = A. I. R. 1929 Rang. 158.**

———*Mistake as to costs.*

When a decree is framed by the Court in pursuance of a judgment and certain costs are included in that decree as payable by one party to the other, if any item is wrongly included in the costs so payable it is open to the party aggrieved to point out the mistake to the Court and to claim that the decree should be amended by making the necessary correction. (*Jai Lal, J.*) GANGA BISHEN *v.* MURREE BREWERRY CO. OF RAWALPINDI. **109 I. C. 476 = 10 L. L. J. 401 = A. I. R. 1928 Lah. 800.**

———*Dismissal of prior application.*

A Court is competent to entertain successive applications for amendment of clerical or arithmetical mistakes in judgments or decrees and a decision on a prior application of this kind does not operate as *res judicata* in subsequent applications, but if an application for amendment has been heard and disposed of on the merits, the Court will, not except in exceptional circumstances, entertain a subsequent application for substantially the same relief. 39 Cal. 265, Foll. (*Tek Chand, J.*) MT. AHUA DEVI *v.* MT. SHEB DEVI.
107 I. C. 390 = A. I. R. 1928 Lah. 244.

———*Laches disentitles right to relief.*

Although there is no limitation for a case under S. 152, no amendment should be allowed by the Court either under S. 152 or S. 151, where laches may, in the particular circumstances of the case, disentitle a party to relief under S. 152. (*Prideaux, A. J. C.*) RAJE UDAJIRAM *v.* RAJESHWAR TRIMBAKRAO.
109 I. C. 727 = A. I. R. 1928 Nag. 149.

———*Mistake in Judgment.*

Where a decree as originally drawn up is quite in accordance with judgment and there is nothing wrong in it, without the Judgment being amended or set aside that decree cannot be amended or set aside by an indirect attack, and any mistake in the judgment can only be amended by appeal or review. (*B. B. Ghose and Cammiade, JJ.*) SYED MAHOMED MAHILA *v.* MAHOMED ISMAIL KHAN. **100 I. C. 309 = 44 C. L. J. 441 = A. I. R. 1927 Cal. 203.**

———*Decree in conformity with judgment.*

There is no power in the Court to amend the decree which is in conformity with the judgment and to amend the judgment on an application under S. 151. (*Dalip Singh, J.*) RAM PARSHAD *v.* JAUHARI MAL.
101 I. C. 142 = A. I. R. 1927 Lah. 403.

———*Forum.*

Where a decree is appealed from and the appeal is dismissed under O. 41, R. 11, the decree can be amended only by the appellate Court: 11 All. 267 (F. B.) and 30 All. 290, Foll. (*Daniels, J.*) MT. BHAGWATI DEVI *v.* SHANKAR LAL. **95 I. C 649 (All.).**

———*Mistake in final decree.*

A preliminary decree was passed against some minors represented by *A* as guardian. In appeal from that decree *B* was appointed guardian of the minors. *A* having died, *B's* name appeared as guardian of the minors in the appellate decree. In the final decree passed by the trial Court *A's* name appeared as guardian by mistake. In execution the mistake having been discovered an application for amendment of the guardian's name was made.

Held, that the decree passed on appeal from the preliminary decree became the preliminary decree in the suit and *B* continued to be the guardian till the final disposal of the suit. It was not necessary either for defendants or plaintiffs to apply for appointment of *B* as guardian and therefore amendment should be allowed. (*Kulwant Sahay, J.*) MINA MAHTO *v.* DOMAN MAHTO. **97 I. C. 152 = 8 P. L. T. 143 = 1926 P. H. C. C. 303 = A. I. R. 1926 Pat. 564.**

———*Satisfaction of decree.*

Per *Daniels, J.*—When a decree for money has been finally satisfied and discharged, the Court is *functus officio* and can no longer entertain an application for amend ment under S. 152 of the C. P. Code. (*Sulaiman and Daniels, JJ.*) PITAM LAL *v.* BALWANT SINGH.
88 I. C. 396 = 23 A. L. J. 518 = 6 L. R. A. Civ. 423 = A.I. R. 1925 All. 556.

———*Final Decree.*

A separate suit is not necessary for recovering land obtained possssion of by a party under a final decree for partition in excess of that which was awarded by the preliminary decree. The Court has jurisdiction in execution under Ss. 47 and 151 of the Civil Procedure Code to amend its final decree and to order the restoration of the land recovered by a party in excess of that awarded by that decree. (*Raymond and Madgavkar, A J.Cs.*) DANDUMAL *v.* DWARKAMAL. **78 I.C. 1039 = 19 S. L. R. 302 = A. I. R. 1925 Sind 126.**

———An application in substance for substitution of the heirs of the deceased party can be allowed to be amended into one under O. 22, R. 10, if owing to misunderstanding of law, the applicant has applied for substitution instead of under O. 22, R. 10. (*Chatterjee and Pearson, JJ.*) RAJANI KANTA ROY *v.* JYOTI PRASAD SINGH DEO. **75 I. C. 255 = 27 C. W. N. 710 = A. I. R. 1924 Cal. 90.**

———Accidentel omission of one item of mortgaged property in the plaint and decree—Subsequent amendment of decree including the same—Amendment if disallowed would cause great hardship. 4 L. W. 445 and 15 M. L. T. 102 Rel. on. 17 Bom. 657, 20 All. 337 Dist. (*Duckworth, J.*) MAUNG CHIT HLAING *v.* N. A. R. M. CHETTY.
74 I. C. 1020 = A. I. R. 1924 Rang. 104.

———*Limits.*

Court has no inherent power to amend its own decree, so as to extend time fixed by itself to make up the deficit Court-fee. (*C. C. Ghose and Panton, JJ.*) (NAWAB) KHAJEH HABIBULLA *v.* GOLA ASMOTAR KHATUN. **74 I. C. 575 = 37 C. L. J. 395 = 27 C. W. N. 720 = A. I. R. 1923 Cal. 612.**

———S. 151 would enable a Court to amend a decree when it does not correctly express what the Court actually decided or intended to decide. (*Campbell, J.*) ASU SINGH *v.* GAGJIT SINGH. **73 I. C. 679 = A. I. R. 1923 Lah. 147.**

———*Decree acted upon.*

Where the parties allowed a decree to be enforced for 6 years before any of them really attempted to get it changed, the inherent power of Court should not be exercised in favour of amending the decree. (*Predeaux, A. J. C.*) RAJE UDAJIRAM *v.* RAJESHWAR. **67 I. C. 310 = A. I. R. 1923 Nag. 109.**

———*Amendment in execution no power,*

An execution petition was presented nearly five years after the date of decree. When the case was transferred from the District Court to the Subordinate Judge he amended the final decree of the District Court.

Held, supposing the decree of the District Court was erroneous, it had become final, no appeal having been preferred and no application for review filed in time. The Subordinate Judge's order amending in execution the decree of another Court was wholly *ultra vires* and Ss. 151 and 152 which were invoked gave him no power to make such an order. (*Spencer and Ramesam, JJ.*) K. BUCHILINGAM *v.* K. SATYANARAYANA MURTI. **65 I. C. 710 = 15 L. W. 301 = A. I. R. 1922 Mad. 186.**

———*Execution application—Wrong amount.*

Where in an application for execution, a decree-holder has overstated the amount due on account of interest, the Court is competent under S. 151 to direct that the application be so amended as to show the correct amount due. (*Das and Adami, JJ.*) CHINTAMONI MAHAPATRA *v.* MONMOHINI DEBI. **69 I. C 200 = 1 Pat. 149 = A.I.R. 1922 Pat. 409.**

———*Alteration of decree.*

Per *Chevis, J.*—A decree can be altered by review on appeal or on revision, but S. 151 cannot be utilized for the purpose of altering a decree. 35 All. 582, Foll. (*Chevis, Broadway and Wilberforce, JJ.*) HUNMUN *v.* FAIJA. **67 I. C. 772 = 3 L. L. J. 310 = A.I.R. 1921 Lah. 6 (F. B.).**

———*Mortgage decree—No provision for interest—Amendment* exparte—*Not proper.*

The judgment and the preliminary decree made no provision for the payment of interest from the date of suit to the date fixed for payment nor was it provided for in the final decree as originally drawn, but it was provided in the amended final decree that the contract rate of interest should be allowed for this period. The amendment of the final decree was made *ex parte* by summary order.

Held, that to suggest that it was necessary for the ends of justice by a summary order and without notice to the judgment-debtor to increase the amount payable under the decree and that without any warrant in the terms of the Court's judgment but merely because a mortgagee is, on general principles, entitled to interest to the date fixed for payment is on the face of it, absurd. As the preliminary decree was in fact in accordance with the judgment, the only method by which it was open to the parties to obtain an alteration of the decree in the required direction was by an application for review of judgment or by appeal. Moreover such an amendment should not have been made without notice to the opposite party. Apart from any question of justice or injustice, it is probable that, if notice had issued the Court would be saved from gross errors. (*Saunders, J. C.*) MAUNG YAN GIN *v.* KHATARASAN CHETTY. **63 I. C. 799 = 4 U. B. R. 1 = A. I. R. 1921 U. B. 5.**

—S. 151—Appeal—Competency of.

———There is no specific provision in the Code for an appeal from an order passed under S. 151, and an appeal from such an order does not lie, for a right of appeal cannot be assumed unless expressly conferred by law. (*Bhide, J.*) MAHOMED AKBAR KHAN *v.* AMAR NATH. **122 I. C. 102 = 31 P. L. R. 477 = 12 L. L. J. 71 = A. I. R. 1930 Lah. 789.**

———Where a trial Court cites S. 151 as the authority empowering it to pass the order under O. 32, R. 6 directing the next friend to refund the money to the bank, wherein it was deposited under a decree in favour of the minors and wherefrom the next friend had withdrawn it without the permission of the Court, the order having been passed under S. 151 is not appealable. (*Shadilal, C. J. and Broadway, J.*) HARBHAJAM SINGH *v.* SANTOSH SINGH. **31 P. L. R. 171 = A. I. R. 1930 Lah. 496.**

———It is well settled that an appeal does not lie from an order under S. 151 unless it is clear that the order purporting to be under S. 151 is in substance really one under some other provision of the Code and from which an appeal is allowed. (*Tapp, J.*) RAMJAN *v.* SATISH CHANDRA. **A. I. R. 1930 Lah. 468.**

———An order for restoration of an application for execution dismissed for default being one under S. 151 is not appealable. (*Zafar Ali, J.*) HARI SINGH *v.* BULAGI MAL. **119 I. C. 494 = 11 Lah. 93 = 31 P. L. R. 375 = A. I. R. 1930 Lah. 20.**

———An appeal does not lie from an order passed under S. 151, C. P. C. (*Addison, J.*) CO-OPERATIVE SOCIETY, BHAL SAYADAN *v.* AHMAD KHAN. **117 I. C. 372.**

———A Judge passed an order under R. 6, O. 32 providing that money deposited should not be withdrawn, without directions from the Court. The successor-in-office acting under S. 151 set aside that order deeming it unjustified by the decree. This order of the successor-in-office is not appealable. (*Jai Lal, J.*) HARBHAJAM SINGH *v.* SANTOSH SINGH. **A. I. R. 1929 Lah. 884.**

———*Order under S.* 151 *in exercise, by analogy, of jurisdiction under S.* 144 *is appealable—C. P. Code, S.* 144.

Where an order is made under the provisions of S. 151, but in fact in exercise, by analogy, of the jurisdiction under S. 144 an appeal does lie from the order: 2 P. L. J. 361 and 2 P. L. J. 206; A. I. R. 1922 P. C. 269, Ref. (*Greaves and Mukerji, JJ.*) GNANODASUNDARI *v.* CHANDRA KUMAR. **31 C. W. N. 290 = 100 I. C. 735 = A. I. R. 1927 Cal. 285.**

———No appeal lies from an order under S. 151, as it is not one of the orders appealable under O. 43, C. P. Code. (*Page and Graham, JJ.*) KHETRO MOHAN *v.* NALINI BALA DASSI. **104 I. C. 331 = A. I. R. 1927 Cal. 867.**

———*Test.*

An order of remand under S. 151 is appealable only when it amounts to a decree. Where the order of remand merely sets aside the decree of the trial Court and does not itself decide any of the points raised for determination and does not determine the rights of the parties with regard to any of the matters in controversy in the suit, it cannot amount to a decree and must be treated as an order; and no appeal would lie against it

as a decree. The mere fact that the order reverses the decree of the trial Court and deprives the plaintiffs of the valuable right they had acquired thereunder would not make an order of remand a "decree," unless that order itself determines any of the points arising for determination in regard to the matters in controversy in the suit : 44 Cal. 929 (F.B.), Dist.; 3 P. L. J. 99 and 58 I. C. 909, Ref. (*Adami and Kulwant Sahay, JJ.*) PERMANAND KUMAR *v.* BHON LOHUR.
6 Pat. 160 = 7 P. L. T. 535 = 1926 P. H. C. C. 333 = 97 I. C. 105 = A.I.R. 1926 Pat. 457.

———*Appeal not competant against order under the section.*

In a contested suit when the suit came up for hearing before the Munsif, the two pleaders engaged for the plaintiffs were both absent. The Munsif dismissed the suit for default. There was an application for restoration of the suit shortly afterwards under O. 9, R. 9, C. P. C. But a difficulty was found in proceeding with the application under that rule as one of the plaintiffs happened to be present in person in Court when the order for dismissal was made. This difficulty felt by the Munsiff was overcome by his allowing the plaintiffs to alter their application for restoration of the suit to one for review of his previous order and this was not objected to by the defendants. Then the Munsif treating that application as one for review under O. 47, R. 1 set aside his previous order of dismissal in the interest of justice under S. 151 of the Code. The District Judge on appeal from this order set aside the order of the Munsif.

Held that there could not be any appeal to the District Judge against an order passed under S. 151 and therefore the appeal to the District Judge was incompetent. (*B. B. Ghose, J,*) BASANTA KUMAR GUPTA *v.* ABHOY SANKAR SEN. **73 I. C. 306 = 37 C. L. J. 99 = A. I. R. 1923 Cal. 450.**

———An appeal does not lie against order refusing to act under S. 151, (*Coutts and Ross, JJ.*) AJODHYA MAKTON *v.* PHUL KUER. **65 I. C. 341 = 1 Pat. 277 = 1922 P.H.C.C. 61 = A. I. R. 1922 Pat. 479.**

—S. 151—Appeal—Power of Court.

———*Revival of appeal.*

A suit was dismissed under O. 17, R. 3, whereupon an appeal was preferred by the plaintiffs. During the pendency of the appeal an application was made for restoration of the suit and it was allowed. The defendant thereupon applied in revision to High Court. During the pendency of the revision a statement was made to the appellate Court that the decree was no longer subsisting and hence the appeal was dismissed. The High Court deciding the revision application set aside the order restoring the suit. Consequently an application was made to the appellate Court to revive the appeal which had been dismissed on the ground that the decree appealed against had been set aside. The application was allowed and appeal revived. The defendants preferred an appeal contending that the appellate Court had no jurisdiction to revive the appeal.

Held : that there was ample ground for the Court to exercise its inherent jurisdiction in restoring appeal and the appeal could be restored. 35 All. 331 (P. C.), Rel. on. (*Mukerji and King, JJ.*) MOHAMMED SHAFI *v.* CHEDU. **122 I. C. 402 = A. I. R. 1930 All. 100.**

———*Interference on point not raised.*

It is certainly unusual for a Court of appeal to reverse a decision of the Court below on a point which has not been appealed against, but when it is brought to the notice of the Court of appeal that there is a fundamental defect in a suit which has been undetected by the Court below, it is the duty of the Court of appeal to give effect to the result of its observations; otherwise it would not function as a Court of justice or equity. The Court has clearly powers under S. 151, C. P. C., to take action in this respect. (*Stuart, C. J. and Raza, J.*) MOHAMMAD AINUL HAQ *v.* ABDULLA KHAN. **4 O. W. N. 862 = 104 I. C. 824 = A. I. R. 1927 Oudh 455.**

———Where leave to appeal, under S. 106 (*a*) of Act III of 1909 is refused by the Insolvency Courts, the unsuccessful party can apply to the Court of Appeal for special leave to appeal. If a question of principle is involved, the Appeal Court can hear the appeal under its inherent powers. (*Macleod, C. J. and Crump, J,*) PANACHAND NURSEY *v.* STANLEY DOBSON. **72 I.C. 261 = 25 Bom. L. R. 161 = A. I. R. 1923 Bom. 245.**

———*Readmission of appeal dismissed for default.*

It is open to the High Court to make an order re-admitting an appeal dismissed for default in the exercise of its inherent powers for the ends of justice in a proper case. (*Shah and Crump, JJ.*) SONUBAI BABURAO GAIKAWAD *v.* SHIVAJIRAO KRISHNARAO GAIKAWAD **60 I. C. 919 = 45 Bom. 648 = 23 Bom. L. R. 110 = A. I. R. 1921 Bom. 20.**

—S. 151—Appeal—Remand.

———No appeal lies against an order of remand passed under S. 151; A. I. R. 1924 Lah. 487; A. I. R. 1927 Mad. 335; 102 I. C. 28 and A. I. R. 1927 Mad. 1190, Foll. (*Johnstone, J.*) LABHURAM *v.* RAM GOPAL. **118 I. C. 530 = 30 P. L. R. 604 = A. I. R. 1929 Lah. 245.**

———There is no appeal if the order of remand is passed under the inherent powers of the Court given by S. 151. (*Madhavan Nair and Thiruvenkatachariar, JJ.*) THOGARCHEDU KAKAMMA *v.* THOGARCHEDU CHANDRASEKHARA SOMAYAJULU. **119 I. C. 705 = A. I. R. 1929 Mad. 205.**

———No appeal lies against an order of remand in the inherent jurisdiction of the Court. (*Das and Fazl Ali, JJ.*) KAILASH KINKAR *v.* DASRATH SINGH. **119 I. C. 883 = A. I. R. 1929 Pat. 232.**

———Where a remand order is made under S. 151, it is appealable: 37 C. L. J. 491, Rel. on: 31 C. L. J. 357, Dist. (*Panton and Mallik, JJ.*) RADHARANI SANTRA *v.* RAMESHCHANDRA. **117 I. C. 678 = A. I. R. 1928 Cal. 218.**

———*Test.*

Right of appeal is determined by what the Court purported to do, and not by what the Court should have done and so when the Court purported to make a remand under O. 41, R. 23, C. P. Code, though in reality it should have been under S. 151, C. P. Code an appeal from such a remand is competent. (*Dalip Singh, J.*) GOPAL SINGH *v.* MANGAL SINGH. **107 I. C. 284 = A. I. R. 1928 Lah. 341.**

———Where the Court did not decide the suit on any preliminary point but on all the issues raised, an *ex parte* decree is set aside and the suit remanded for trial, such a remand is not under O. 41, R. 23, but it is a remand under S. 151, C. P. Code, and no appeal lies from such order: A. I. R. 1927 Mad. 335 and 30 Mad. 54, Foll. (*Odgers and Madhavan Nair, JJ.*) SUNDARA RAMA IYER *v.* SATHIANATHAN. **1927 M. W. N. 286 = 102 I. C. 28 = A. I. R. 1927 Mad. 1190.**

———Where after the original Court has disposed of a suit by trying all the issues before it, the appellate Court allows an amendment of the plaint and remands the suit for trial on the amended plaint, the order of remand is one passed under the inherent powers of the Court and

an appeal from the order of remand is incompetent. A. I. R. 1925 Mad. 229, Foll. (*Odgers and Curgenven, JJ.*) KARUPPANNA PILLAI *v.* ETHUMALAI PILLAI.
103 I. C. 670 = A. I. R. 1927 Mad. 859.

——An appellate Court has an inherent power of remand under S. 151 apart from O. 41, R. 23 and no appeal lies against an order made in exercise of this power: 1926 M, W. N. 48 Dist.; 37 M. L. J. 536 and 44 Cal. 929 (F. B.), A. I. R 1925 Mad. 229 and 16 M. L. W. 515 Rel. on. (*Odgers and Curgenven, JJ.*) MALLAYA *v.* VEERAYYA. **100 I. C. 135 = 25 M. L. W. 198 = 38 M. L. T. 15 = A. I. R. 1927 Mad. 335 = 52 M. L. J. 90.**

——Where the suit has not been disposed of by the Court of first instance upon a preliminary point, and where remand is ordered on the ground that the case was not properly decided by the lower Court, it is a remand under the inherent jurisdiction of the Court and there is no right of appeal. (*Das and Adami, JJ.*) D. JAGESHAR JHA *v.* MAHTAB SINGH.
7 P. L. T. 811 = 1926 P. H. C. C. 302 = 96 I. C. 440 = A. I. R. 1926 Pat. 516.

——Where there was no question of any preliminary point and the order of remand affected the whole decision of the whole suit,

Held, that the remand must be taken to have been made under inherent powers and no appeal lies. 3 P. L. J. 253, Foll. (*Ross, J.*) BALARAM MANJHI *v.* JAGANNATH MANJHI. **92 I. C. 684 = A. I. R. 1925 Pat. 760.**

—S. 151—Appeal—Right of.

——Where inherent jurisdiction to proceed against the property of the surety has been exercised no right of appeal is given by the Code and there being no inherent right of appeal, the appeal by the surety is incompetent. (*Dalip Singh, J.*) RAMSINGH *v.* IMPERIAL BANK OF INDIA LTD., RAWALPINDI. **A. I. R. 1928 Lah. 802.**

—S. 151—Appeal—Miscellaneous.

——When an application is disposed of under the inherent power of the Court, no appeal lay against the order: 26 All. 447, Dist. (*Jackson, A. J. C.*) MAHADEO *v.* ZINGRU. **26 N. L. R. 187 = A. I. R. 1930 Nag. 199.**

—S. 151—Applicability.

——S. 151 of the C. P. Code does not apply to a commissioner under the Workmen's Compensation Act and so he does not possess any inherent power contemplated by the aforesaid section. (*Shadi Lal, C. J. and Abdul Qadir, J.*) *In the matter of* COMPENSATION FOR THE LIFE OF KARIM DAD, PLANER, LOCO SHOPS, MOGHALPURA. **A. I. R. 1930 Lah. 657.**

——In the execution of a decree on two mortgages the decree-holder purchased the property mortgaged. The writ of delivery of possession was obtained. The bailiff executing the writ delivered possession of the property not covered by the writ of delivery along with that covered by it. Consequently mortgagor filed an objection by an application purporting to be under S. 47 and O. 21, R. 100.

Held, that the application was not provided for in any of the rules relating to the delivery of possession in execution of a decree or after an execution sale. The question of this nature was not a question relating to the execution, discharge or satisfaction of the decree and that it does not arise between the judgment-debtor and the decree-holder as such and did not fall within the scope of S. 47. Although it purported to be under S. 47 and O. 21, R. 100 it was in effect an application under S. 151 to prevent the abuse of the process of the Court and its inherent powers. (*Ross and Chatterji, JJ.*) ABDUL MOKIT *v.* ABDUL RASHID.

A. I. R. 1929 Pat. 391.

——*Test.*

Where there are direct provisions of the law by which justice can be attained and injustice avoided, S. 151 naturally has no application. It applies only when there are direct provisions of the law of procedure which lead to injustice. The application is wholly one for the violation of provisions of the law and S. 151 says this can be done, though only in certain strictly limited circumstances. The argument that if the applications under S. 151 are granted they will nullify the effect of certain decrees passed by the civil Courts is no argument for or against them. (*Hallifax, A.J.C.*) SHRIBALABH *v.* GULAB MALI. **106 I. C. 575 = A. I. R. 1928 Nag. 106.**

——*Absence of other remedies.*

S. 151 of the Code does not apply in every case in which there is no other remedy. A Court has no inherent power to set aside its own orders whenever it chooses to do so. (*Mullick and Kulwant Sahay, JJ.*) ANANT POTDAR *v.* MANGAL POTDAR.
4 Pat. 704 = 7 P. L. T. 291 = 91 I. C. 483 = A. I. R. 1926 Pat. 27.

——If the statute says that a thing should not be done, S. 151 cannot vest the Court with the power to direct that it should be done; but when and where there is doubt and difficulty in applying the other provisions of the Code to the facts of a particular case, S. 151 would apply. (*Jwala Prasad and Kulwant Sahay, JJ.*) ADIT PRASAD *v.* KAMHARAKH AHIR. **91 I. C. 213 = 4 Pat. 180 = 1925 P. H. C. C. 147 = A I. R. 1925 Pat. 435.**

——S. 151 has no application where there is an express provision of law applicable to the case. (*Martineau, J.*) THE FIRM KHANA MAL BENARSI DAS *v.* THE FIRM KHANA MAL NATHU MAL.
69 I. C. 718 = 40 P. L. R. 1922 = A. I. R. 1924 Lah. 70.

——*Conditions.*

Two conditions appear to be necessary for the invocation of section 151. One, which is imposed by the use of the word "necessary" in the section, is that the Court should have reason *prima facie* to believe that the reception of the evidence will enable the person tendering it to win a case which he will otherwise lose. The second which is imposed by the use of the phrase "for the ends of justice," is that the loss of his case should appear as an excessive penalty for the failure to produce the papers in time. 45 Cal. 878, Foll. (*Ashworth, J. C.*) SHANKAR LAL *v.* MAHBUB SHAH. **70 I.C. 278 = 25 O.C. 286 = A. I. R. 1923 Oudh 59.**

——*Restitution.*

The difficulty of invoking the inherent power of the court under S. 151 when there is an express provision to the contrary in a statute, does not arise when S. 144 does not define the full measure of the power of the court to make an order for restitution; consequently the provision of that section may be taken as a guide to determine in what class of cases an order for restitution may be made so that complete justice may be made between the parties and they may be restored to the *status quo ante.* (*Mukerjee and Panton, JJ.*) RAI CHARAN BHUIYA *v.* DEBI PROSAD BHAKAT.
64 I. C. 864 = 26 C. W. N. 408 = 35 C. L. J. 53 = A. I. R. 1922 Cal. 28.

——Section 151 does not apply where a definite period is provided. (*Coutts and Ross, JJ.*) AJODHYA MAHTON *v.* MT. PHUL KUER. **65 I. C. 341 = 1 Pat. 277 = 1922 P. H. C. C. 61 = A. I. R. 1922 Pat. 479.**

——Ordinarily S. 151 of the C. P. Code will not apply to cases where the aggrieved parties have other remedies provided in the Code. 27 M.L.J. 605, Foll. (*Jwala Prasad, J.*) HANUMAN LAL *v.* RAMPEARI KOER. **60 I. C. 368 = 2 P. L. T. 251 = A. I. R. 1921 Pat. 491 (2).**

———*Order certifying adjustment.*

When there is no application for review, a Court cannot set aside an order certifying adjustment of a decree, unless the order is prejudicial to one of the parties. (*Mullick and Sultan Ahmad, JJ.*) RAM GULAM SAHU *v.* SHAM SAHAI DAS. **1 P. L. T. 663 = 1920 P. H. C. C. 358 = 62 I. C. 234 = 5 Pat. L. J. 379.**

—S. 151—Compromise decree.

———*Setting aside.*

A compromise decree can be set aside by an application under S. 151 if it is brought about on account of any fraud practised upon the court. 34 Bom. 408, Appl.; 35 All. 331 (P. C.), Ref. (*Jwala Prasad and Bucknill, JJ.*) SABITRI THAKURANI *v.* F. A. SAVI. **105 I. C. 271 = 6 Pat. 108 = A. I. R. 1927 Pat. 354.**

—S. 151—Consolidation.

———Where three partners of a firm sued a debtor, after dissolution of partnership for the recovery of a debt due to the firm, for their individual share of the debt.

Held, that three suits are not maintainable but the court can allow amalgamation of the three suits into one. Court should allow the plaintiffs to consolidate the suits and try the whole matter as one suit. The court has that power under S. 151, C. P. Code. (*Prideaux, A.J.C.*) KISHAN LAL *v.* CHENDHA. **75 I. C. 917 = A. I. R. 1924 Nag. 196.**

———The Court has inherent jurisdiction to consolidate suits and it is exercisable without the consent of parties. If it were not so it would not have inherent jurisdiction to consolidate at all, for consent of parties cannot confer jurisdiction that did not exist. 17 C. W. N. 526, Foll. (*Coutts and Das, JJ.*) MAHMAD FAZAL *v.* MAHKUMAR MAHTON. **67 I. C. 1000 = 3 Pat. L.T. 584 = 1 Pat. 669 = A.I.R. 1922 Pat. 566.**

—S. 151—Consolidation—Effect of.

———The effect of an order declaring that appeals are analogous is merely that they shall be heard together. It has not the effect of consolidation and an order passed in one does not govern the other unless expressly stated. (*Dawson Miller, C. J. and Foster, J.*) JOFA LAL DAS *v.* SYED MOINUDDIN MIRZA. **93 I. C. 129 = 7 P. L. T. 431 = 4 Pat. 448 = 1925 P.H.C C. 345 = A. I. R. 1925 Pat. 765.**

———Once appeals are consolidated for whatever reason, they form in fact one appeal and the parties in that suit must be treated as the parties in one suit. (*Dawson Miller, C.J. and Mullick, J.*) THE MIDNAPORE ZAMINDARY CO. *v.* MADON MARWARI. **70 I. C. 782 = 1923 P. H. C. C. 17 = A. I. R. 1923 Pat. 215.**

—S. 151—Contempt of Court.

———*Exercise of power to avoid contempt.*

Where the District Judge fixed a certain date for the sale of the property alleged to belong to the judgment-debtor, and the claimant of the property instituted in the Court of the Subordinate Judge a suit for declaring the property to be his own in which he obtained an *ad interim* injunction restraining the decree-holder from selling the property but the District Judge refused to stay the sale.

Held : Although the District Judge was not personally bound by the order of injunction, yet in the exercise of his inherent powers he should have directed that the

sale should not take place, the decree-holder having been restrained by injunction from proceeding with the sale. The District Judge should not have assisted a party to commit a contempt of the Court. Once the injunction is granted the High Court is bound to see that the order of the court is carried out. (*Dawson Miller, C.J. and Mullick, J.*) MAHARAJ BAHADUR SINGH *v.* A. H. FORBES. **70 I. C. 394 = 1922 P. H. C. C. 225 = 3 Pat. L. T. 645 = 1 Pat. 662 = A. I. R. 1922 Pat. 382.**

—S. 151—Costs.

———*Pauper—Order to pay costs in cash—Improper.*

Applicant who was allowed to sue as pauper applied for amendment of plaint. The amendment was allowed but the applicant was directed to pay costs (amounting to Rs. 500) of defendant in cash within a week and on his failure to do so the suit was dismissed.

Held, the order directing the applicant who was a pauper to pay the costs in cash and the order dismissing the suit for failure to pay the costs was not a proper order. (*Shah, Ag. C.J. and Crump, J.*) AMBAI BALWANTRAO MANE *v.* HANMANTRAO BAJIRAO DESHMUKH. **69 I. C. 207 = 24 Bom.L.R. 924 = 47 Bom. 104 = A. I. R. 1922 Bom. 385.**

—S. 151—Costs—Enforcement.

———An order passed by the Court in favour of a commissioner for the payment of costs connected with the execution of a commission which were recoverable from the parties to the suit may be enforced by the Court under the inherent powers conferred upon it by S. 151 of the Code of Civil Procedure in such manner as may be thought proper. (*Kanhaiya Lal, J.*) GOPAL DAS *v.* GOURI SHANKER PRASAD. **74 I. C. 186 = A. I. R. 1924 All. 122.**

—S. 151—Costs—Excusing delay.

———Where a pre-emptor was directed to pay into court pre-emption money and costs in a certain time and he paid the money but failed to pay costs,

Held, that the mistake cannot be excused. (*Broadway, J.*) KHAN MUHAMMAD *v.* AHMAN. **73 I.C. 891 = A.I.R. 1924 Lah. 359.**

—S. 151—Dismissal for default.

———It cannot be laid down as general principle that an ordinary Civil Court has inherent power to set aside its own order and to interfere in any case in which it thinks a failure of justice has occurred when the aggrieved party has another remedy by which it can be set aside, even though the remedy is not as summary or as cheap. So the Court has no inherent power to set aside the order of dismissal for default or an order passed *ex parte* in applications under O. 21, Rr. 97 and 100, on sufficient cause being shown. (Cases referred). (*Wallace, Beasley and Madhavan Nair, JJ.*) ALAGASUNDARAM PILLAI *v.* PICHUVIER. **52 Mad. 899 = 30 M. L. W. 424 = 120 I. C. 567 = A. I. R. 1929 Mad. 757 = 57 M. L. J. 381 (F.B.).**

———*Mistaken order—Can be set aside.*

Where the judgment-debtor was called out by Court and his pleaders declared that they had no instructions and the Court dismissed the application by judgment-debtor under O. 21, R. 90, in default but immediately afterwards the man appeared in Court and applied for restoration,

Held, that there was no default and the order of dismissal in default might be taken as a mistaken one and the court had inherent power to rescind it under S. 151. (*Dalal, J.*) RAM SHANKER TEWARI *v.* RAM NARAIN TEWARI. **26 A. L. J. 382 = 108 I.C. 576 = A. I. R. 1928 All 301.**

———*Mistaken order—Can be set aside.*

Where the dismissal of the suit for default is

C. P. CODE, (1908), S. 151—Dismissal for default.

bad and the dismissal can be set aside in appeal, whether it be under S. 151 of the C. P. Code or whether it be under the inherent jurisdiction of the Court. (*Sanderson, C.J. and Rankin, J.*) KISSIN GOPAL *v.* SUKH LAL KARNANI. **53 Cal. 844 = 31 C. W. N. 22 = 98 I. C. 781 = A. I. R. 1927 Cal. 76.**

———*Application with caution.*

The provisions of S. 151 should be applied with the greatest caution. If a party is absent from the Court when he ought to have been present, and cannot give any satisfactory reason for his absence, then there can be no particular ground for the Court to exercise its inherent powers in his favour, so as to interfere with the rights of third parties, such as an auction-purchaser, which have come into existence owing to his default. (*Macleod, C.J. and Coyajee, J*). BHAGWAN *v.* DATTATRAYA. **50 Bom. 457 = 96 I.C. 411 = 28 Bom. L.R. 686 = A. I. R. 1926 Bom. 377.**

———*Execution application*—Ex parte *restoration.*

After an application for execution of a decree was dismissed in default the decree-holder put in an application under S. 151 for restoration. The Court restored the application for execution without issuing any notice to the judgment-debtor and without considering the merits of the case.

Held, that the order could not be maintained. (*Dalal, J.C. and Neave, A.J.C.*) SITAPAT RAM *v.* MAHABIR PRASAD. **87 I.C. 438 = A. I. R. 1926 Oudh 59.**

—S. 151—Ends of justice.

———*Law of procedure—Courts can go beyond.*

The enactment of S. 151 declares the existence of an inherent jurisdiction in all courts to go beyond the law of procedure in the ends of justice. A. I. R. 1924 All. 446 Rel. on. (*Dalal and Boys, JJ.*) HARNAND LAL *v.* CHATURBHUJ. **24 A.L.J. 375 = 48 All. 356 = 93 I.C. 285 = A. I. R. 1926 All. 212.**

———*Separate suit—Avoidance.*

There is nothing in the language of S. 151 which prevents a party to a suit from applying under that section simply because he has a remedy by a separate suit or proceeding. Courts cannot act under S. 151 if provision is made for a particular contingency by the orders and rules but in cases not covered by them parties should not be put to the trouble, delay and expense of filing separate suits for relief which can be properly given in the suit itself. The language of S. 151 is wide and refers to the inherent powers of the Court to make such orders as may be necessary for the ends of justice. (*Kumaraswami Sastri, J.*) PERUMAL MOOPAN *v.* M. K. VENKATACHARIAR. **68 I. C. 910 = 1922 M. W. N. 268 = 31 M. L. T. 35 = A. I. R. 1922 Mad. 193 = 15 M. L W. 586 = 42 M. L. J. 563.**

———*Abuse of process—Making good the loss.*

Court has got power under S. 151, C. P. Code when its process has been abused by a party, to direct that party to make good the loss which it has caused by such abuse or to restore to the other side the benefit which it has obtained by getting an order by misleading the Court. (*Devadoss, J.*) MEENAKSHI AMMAL *v.* RAMA AYYAR. **110 I. C. 535 = A. I. R. 1928 Mad. 610.**

———*Fraud of Court's officer—Power to remedy.*

When an officer of Court deputed to execute an order issued by it conducts himself dishonestly, with the result that one of the parties to the suit in which the order was issued suffers thereby, the Court, on being informed of this fact, has jurisdiction under S. 151 to remedy the injury by passing necessary orders. (*Madhavan Nair, J.*) A. MALLIKARJUNA *v.* BANGLE BEORAN KUNHI. **91 I. C. 300 = 22 M. L. W. 387 = 1925 M. W. N. 742 = A. I. R. 1925 Mad. 1212.**

———*Fraud on Court.*

Under Section 151 the Court has the inherent power to act *ex debito justitiae* and to do that real substantial justice for the administration of which alone it exists. Fraud on court should be corrected immediately it is known. 33 Cal. 927, Foll. (*Wazir Hasan, A. J.C.*) SHEO DHARSHAN SINGH *v.* MATA DIN SINGH. **80 I. C. 833 = 78 I. C. 96 = 11 O. L. J 227 = A. I. R. 1924 Oudh 408.**

—S. 151—Ends of justice—Miscarriage of justice.

———S. 151 could not be invoked more appropriately than for the purpose of correcting a miscarriage of justice appearing on the face of the proceedings and for making such orders in the nature of consequential orders as may be necessary for the ends of justice and to prevent an abuse of the process of the Court which includes the idle multiplicity of proceedings. (*Walsh, A. C. J. and Ryves, J.*) PANDIT BALGOBIND *v.* SHEO KUMAR. **82 I. C. 184 = 22 A. L. J. 791 = 5 L. R. A. Civ. 545 = 46 All. 864 = A. I. R. 1924 All. 818.**

—S. 151—Ends of justice—When can be exercised.

———The Code of Civil Procedure is not exhaustive and this being so the Court may where the circumstances require it act *ex debito justitiae* and do what is necessary for the administration of justice. 33 Cal. 927, Appr. 17 All. 29 and 34 Cal. 860, Ref. (*Zafar Ali, J.*) HARI SINGH *v.* BULAQI MAL. **119 I. C. 494 = 11 Lah. 93 = 31 P. L. R. 375 = A. I. R. 1930 Lah. 20.**

———There is an inherent jurisdiction in a Court to intervene and supersede the arbitration on grounds other than those mentioned in Sch. 2, Rr. 5, 8 and 15, if the case fell under S. 151 of the Code, *viz.*, where such an order is necessary for the ends of justice or to prevent the abuse of the process of the Court. But it can intervene only if it is satisfied that the ends of justice urgently require its intervention or that without such intervention there would be an abuse of the process of the Court. That being so, if the Court has not applied its mind to the extent of its own jurisdiction and has not recorded any finding that the ends of justice requires its intervention or that the process of the Court is likely to be abused, but has merely superseded the reference on the ground that one of the parties thereto has an apprehension that he would not be fairly treated, the Court, if it has not actually acted without jurisdiction, has certainly acted with material irregularity in the exercise of its jurisdiction, and the High Court will interfere in revision. (*Sulaiman and Niamtullah, JJ.*) BHOLA NATH *v.* RAGHUNATH DAS. **1929 A. L. J. 918 = 51 All. 1010 = A. I. R. 1929 All. 743.**

———It is not necessary for the ends of justice, or to prevent abuse of the process of the Court that orders based on an erroneous view that an incorrect procedure has been taken should be varied. There is no greater injustice or abuse when a claim is wrongly dismissed on the ground that the wrong procedure has been followed than where it is wrongly dismissed on the ground that the claim is invalid. (*Macnair, Offg. J. C. Staples and Subhedar, A. J. Cs.*) SITARAM *v.* KANIRAM. **121 I. C. 57 = 12 N. L. J. 148 = A. I. R. 1929 Nag. 251 (F.B.).**

———*Lengthy enquiry if necessary—Power not to be exercised.*

Where the person, who was said to have been subjected to undue influence, did not repudiate the compromise in his life-time and was dead, and the question of the alleged undue influence would involve an elaborate and lengthy enquiry which could not be satisfactorily made in a summary proceeding: *Held*, the extraordinary discretionary powers, assuming that such powers exist, should not be exercised in refusing to record the compromise; A. I. R. 1927 Pat. 354, Ref. A. I. R. 1925 All. 503, Dist. (*Sulaiman and Kendall, JJ.*) QADRI JAHAN BEGAM *v.* FAZAL AHMAD. **50 All. 748 = 26 A. L. J. 691 = 110 I. C. 573 = A. I. R. 1928 All. 494.**

———*Outrageous valuation of suit—Interference.*

There is no direct authority for the Court to interfere with the valuation set up by a plaintiff who seeks a relief under S. 7, Cl. (4), sub-Cl. (*c*) or sub-Cl, (*d*) of the Court-fees Act, unless the Court can take advantage of S. 151 of the C. P. Code. That section may be brought into use if a plaintiff makes an absurd and outrageous misrepresentation as to the value of his suit in order to have it tried by some particular Court; 32 Cal. 734; A. I. R. 1918 P. C. 135: 40 Cal. 245: 36 All. 500 and 6 O. C. 255, Ref. (*Pullan, J.*) RAJENDRA BAKSH SINGH *v.* BAHU RANI. **107 I. C. 330 = A. I. R. 1928 Oudh 260.**

———So long as there are distinct provisions in the Code, it is not open to the Court to invoke its inherent powers. Where a local inquiry is necessary at an appellate stage for the proper decision of a case the appellate Court can order a fresh local enquiry itself or send the case to the first Court to have a fresh local enquiry made and decide the appeal after considering the result of such fresh local enquiry. (*Cuming and B. B. Ghose, JJ.*) RAJANIKANT DEY *v.* KHATIR MAHOMED. **94 I. C. 393 = A. I. R. 1926 Cal. 897.**

———If the claim is a substantial one and would be barred by limitation, it is a case where the Judge ought to use his inherent power despite the absence of sufficient cause for plaintiff's non-appearance which would require him to restore the suit. See also O. 9, R. 4, (*Ross, J.*) RAMNARAYAN *v.* RAMDHAN SINGH. **72 I. C. 668 = 1924 P. H. C. C. 280 = 4 P. L. T. 647 = A. I. R. 1924 Pat. 274.**

———S. 151 saves the Court's inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court, but there is no rule of law or equity which requires, in the interest of justice, that a plaintiff suing to enforce a contract for the payment of money, where the claim is disputed, should be awarded a portion of the amount claimed before his right has been established by the suit brought for that purpose. (*Dawson Miller, C.J. and Kulwant Sahay, J.*) GOPAL SARAN NARAYAN SINGH *v.* SITA DEVI. **77 I. C. 718 = 1923 P. H. C. C. 290 = 2 Pat. L.R. 159 = 5 Pat. L. T. 560 = A. I. R. 1924 Pat. 69.**

———An order under S.151 is to be made when the ends of justice require it or to frustrate an abuse of the process of the Court. (*Raymond, A.J.C.*) JAI NARAYAN *v.* FIRM OF NARAYAN DAS. **66 I. C. 796 = 16 S. L. R. 79 = A. I. R. 1922 Sind 6.**

—S. 151—Enforcement of order.

———Every Court obviously has the power to enforce its own orders, and to vary a matter to detail in an order made by the consent of parties, when by the accident of circumstances the carrying out of such detail according to the agreement can no longer be achieved. (*Walsh and Ryves, JJ.*) PARSOTTAM DASS *v.* SHIAM LAL. **82 I. C. 513 = A. I. R. 1923 All. 460.**

—S. 151—Execution.

———*Setting aside sale of moveables.*

There is no inherent power under S. 151 to set aside a sale of moveable property in contravention to a definite direction enjoined by statute and this is so even in the case of omission to issue notice to the judgment-debtor and although such wrong procedure may cause injustice to the judgment-debtor. *See also* O. 21, C. 78. (*Dalal, J.*) KUAR LAKSHMIRAJ *v.* SHANKAR. **A. I. R. 1930 All. 513.**

———*Stay af confirmation of sale.*

Court has powers to stay confirmation of sale by virtue of its power under S. 151, for otherwise, if a sale is effected and completed and the case is subsequently decided in the appellant's favour the decision might be of no avail. (*Currie, J,*) BAGGA MAL *v.* BASHESHAR LAL MITHAN LAL. **A. I. R. 1930 Lah. 793.**

———*Defective attachment—Power to set aside sale.*

The land underneath the "haveli" was admittedly attached according to law and the only defect in the attachment was that the haveli therein was not specifically mentioned and its plan was not given. Moreover, it did not appear that there was any misapprehension at the time of the sale as to what was being sold as the land was described as "ghair mumkin abadi;" the Court had found as a fact that the property was not sold below its value and no substantial injury had been proved.

Held, that the defect in the attachment was a mere irregularity and not illegality and that the trial Judge had no jurisdiction to set aside the execution sale *suo motu* under the inherent powers of S. 151. A. I. R. 1923 Pat. 45; A. I. R. 1924 Rang. 124 and 40 P. R. 1910, Foll. (*Bhide, J.*) MAHOMED AKBAR KHAN *v.* AMAR NATH. **122 I. C. 102 = 31 P. L. R. 477 = 12 L. L. J. 71 = A. I. R. 1930 Lah. 789.**

———Where an Act does not provide any clear procedure for execution of an order passed under it, the inherent powers of the Court to execute its own order should be invoked. (*Mukerji, J.*) DAULAT SINGH *v.* SHEO NATH. **114 I. C. 890 = 10 L. R. A. Rev. 179 = A. I. R. 1929 All. 211.**

———*Interference with manner of execution.*

The decree-holder has the right to execute his decree in the manner he desires, and it would be only in exceptional cases that the executing Court would interfere with that right. Court has no reason to refuse to allow the decree-holder to attach and sell the library and office furniture of his judgment-debtor who happens to be a pleader. (*Addison, J.*) BADRI DAS *v.* B. BEVAN PETMAN. **99 I. C. 291 = 28 P. L. R. 86 = A. I. R. 1927 Lah. 153.**

———*Refusal to confirm sale.*

The inherent powers of the Court to refuse to confirm the auction-sale held under its order are only invoked when it is shown that the Court is misled by a misstatement or non-disclosure of relevent facts. (*Findlay, Offg, J. C.*) NIZAMUDDIN *v.* JUMMA. **88 I. C. 693 = A. I. R. 1926 Nag. 17.**

———*Setting aside sale.*

If the judgment-debtor and the auction-purchaser come to an arrangement before an auction sale is confirmed by which the decree-holder is paid off and parties apply to the court to set aside the sale, the court can set aside the sale under S. 151 notwithstanding that the procedure laid down in O. 21. R. 89 has not been followed. *See also* O. 21, R. 89, (*Wazir Hasan, A.J.C.*) KUBER SINGH *v.* BACHURAM. **80 I. C. 444 = A. I. R. 1925 Oudh 128.**

———*Setting aside sale* suo motu—*No proof of injury.*

The Court should not, except in very exceptional circumstances and when it is necessary in the ends of justice or to prevent a gross abuse of the process of the Court, set aside a sale *suo motu* without proof of substantial injury to any party, especially when the Legislature has made it incumbent on a party interested in setting aside a sale to prove that the irregularity or fraud complained of by him has resulted in substantial injury. (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*) RUSTOMJI CURSETJI *v.* PEROZ SHAH D. MINVALA. **86 I. C. 1045 = 18 S. L. R. 130 = A. I. R. 1925 Sind 253.**

———*Sale—Appeal—Powers of Court.*

There is no objection to the Judge, when the sale is before him in appeal, considering its validity from every point of view and exercising his inherent jurisdiction. The ruling that a Court must confine itself to S. 311, of the old Code was before anything like S. 151 was embodied in the statute. *See* O. 21, R. 90. (*Jackson, J.*) AKSHIA PILLAI *v.* GOVINDARAJULU CHETTY. **84 I. C. 975 = 1924 M. W. N. 842 = A. I. R. 1924 Mad. 778 = 47 M. L. J. 549.**

———*Sale under Bombay High Court Admiralty Rules.*

When the sale of a ship has been carried out in strict conformity with R. 36 of the Admiralty Rules, the fact that the procedure was against the practice in such cases and worked great hardship, should not be ground for exercising the powers under S. 151, C. P. Code, to set aside the sale. (*Marten, J.*) FREEMAN *v.* S. S. CALANDA AND CAPT. YANOVASKY. **76 I. C. 433 = 24 Bom. L. R. 1167 = A. I. R. 1923 Bom. 51.**

———*Confirmation of sale—Refusal of—Considerations.*

The Court has an inherent power to refuse to allow the sale to be carried out if it is satisfied that the Court has been misled either in giving leave to bid or in fixing the reserve price. In order to show that the Court has been misled it is necessary to show either actual mis-statements to the Court or non-disclosure to the Court of relevant facts unknown to the Court and which there was a duty to bring before the Court. Where the decree-holder put in an affidavit of which the tenor was that it was very doubtful whether the judgment-debtor had any interest in the property at all which was proposed to be sold, that they had claims to it which were subject to litigation and the outcome of the litigation, like most litigation, was uncertain, and that it was impossible, therefore to give any idea of the market value, and further added that the market value of the lot in question might be fixed at Rs. 3,000 but suppressed a fact well-known to him, namely that the property, in respect of which the judgment-debtors claimed and had since been held by the Court to have, a two-thirds interest, had been put up for sale by the Court before and that the Court had fixed Rs. 45,000 as the reserve price and a bid of Rs. 36,000 had been refused on the ground that it was not great enough.

Held, that there were all the elements necessary for the Court to act on its inherent powers and that the confirmation of sale was rightly refused. O. 21, R. 92, C. P. Code, is no bar to the Court interfering to cancel the sale even though no party has applied therefor. *See also* O. 21, R. 92. (*Schwabe, C. J. and Wallace, J.*) P. V. RAGHAVACHARIAR *v.* MURUGESA MUDALI. **72 I. C. 545 = 17 M. L. W. 750 = 32 M. L. T. 285 = 1923 M. W. N. 323 = 46 Mad. 583 = A. I. R. 1923 Mad. 635 = 44 M. L. J. 680.**

———*Revival of attachment.*

Neither the making nor the removal of an attachment is such an entirely abstract conception that it can be

done by the mere writing and signing of an order without its communication to any body, and the mere writing and signing of the order of dismissal does not actually remove this attachment. If however such a proceeding can remove it, then a similar proceeding can revive it. Provided the Court has power to revive the proceedings it would also have the power under S. 151 to order that the attachment should be regarded as continuing and not as having ceased. (*Hallifax, A. J. C.*) HAR LAL *v.* NARAYAN. **64 I. C. 420 = 4 N. L. J. 118 = 18 N. L. R. 152 = A. I. R. 1922 Nag. 267.**

———*Restoration of execution application.*

Strong grounds would be required to justify an application under S. 151 for the restoration of an execution application as would be required for an application for review. (*Ashworth, J. C. and Simpson, A. J. C.*) NAGESHWAR PRASAD *v.* JAI NARAYAN. **73 I. C. 73 = A. I. R. 1922 Oudh 201.**

———*Confirmation of sale—Refusal of.*

Where appellants, in their application for leave to bid at an execution sale, alleged certain facts which were not true, the appellants were held not entitled to confirmation of sale till they had made good their representations. Where a Court grants permission to bid at an execution sale upon an inaccurate statement that certain conditions are fulfilled, the permission is conditional and the Court has power to refuse to confirm the sale apart altogether from rule 72 and from the provisions contained in R. 92 of O. 21 either under R. 86 or under its inherent powers, until the conditions are in fact fulfilled. *See also* O. 21, Rr. 72, 86, 92 (*Dawson Miller, C. J. and Coutts, J.*) MT. JANAKBATI CHAUDHRAIN *v.* RAMESHWAR SINGH BAHADUR. **69 I. C. 872 = 1 Pat. 235 = 1 Pat. L. R. 179 = A. I. R. 1922 Pat. 511.**

———*Illegal attachment—Release from.*

Apart from O. 21, R. 59 the Code is not exhaustive and the Court has ample power to release property from illegal attachment. *See also* O. 21, R. 59. (*Jwala Prasad and Adami, JJ.*) HARNANDAN MARWARI *v.* PRAN NATH ROY. **61 I. C. 922 = 2 P. L. T. 240 = 1921 P. H. C. C. 205 = A. I. R. 1921 Pat. 409.**

———*Transfer of a decree to a court of a Native State.*

The Code does not authorise Courts in British India to transfer their decrees for execution to a Court of a Native State. But there is nothing to prevent the transmission of certified copies of the necessary documents to such a Court to enable it to execute the decree under any powers conferred by the Legislative authority of its own State. S. 151 is wide enough to cover this procedure and it is a proper course to pursue where a State has intimated its willingness to have decrees of Courts in British India executed in the Courts of the State. (*Twomey, C. J. and Ormond, J.*) SADAYAPPA *v.* ANNAMALAI. **61 I. C. 704 = 13 Bur. L. T. 145.**

—S. 151—Ex-parte Decree.

———*Setting aside at the instance of person not a party to the decree.*

———Although a Court may have no power under S. 151 to set aside an *ex parte* decree against a party to a suit unable to comply with the provisions of O. 9, R. 13, and the law of limitation, still a Court can under S. 151 set aside an *ex parte* decree at the instance of a person not a party to the original suit under peculiar circumstances and make him a defendant and allow him to defend the suit. 43 Mad. 94 and A. I. R. 1922 Pat.

479, Dist. (*Baguley, J.*) U. E. MAUNG *v.* P. A. R. P. CHETTYAR FIRM. **113 I. C. 811 = 6 Rang. 494 = A. I. R. 1928 Rang. 273.**

——*Cancellation of decree for non-service of summons.*

An *ex parte* decree was passed against the defendant but it was subsequently found that summons was not served on him and the Court cancelled the decree under S. 151.

Held, that S. 151 cannot be used for such a purpose. The remedy was for the defendant to apply to set aside the decree when he would become aware of the decree. (*Campbell, J.*) AMAR SINGH *v.* BALA SINGH. **101 I. C. 617 = A. I. R. 1927 Lah. 372.**

——Where an application for setting aside an *ex-parte* decree of a Small Cause Court has been dismissed and the applicant did not avail himself of the right to apply in revision under S. 25 of the Provincial Small Cause Courts Act, he has no remedy under S. 151. Case-law Ref. to. (*Kinkhede, A. J. C.*) SHAKURKHAN *v.* SHEIK BUDHAN. **98 I. C. 658 = A. I. R. 1927 Nag. 95.**

——Except under very special circumstances calling for the application of S. 151, C. P. Code, the applicant is bound to make out a sufficient cause for non-appearance at the proper time. A. I. R. 1926 Sind 249, Rel. on. (*Rupchand Bilaram and Lobo, A. J. Cs.*) CHATANMAL SAMANMAL *v.* RATO KHAN. **103 I. C. 129 = A. I. R. 1927 Sind 223.**

——*No inherent power to set aside.*

A Court has no power apart from the provisions of Order 9, Rule 13 to set aside an *ex parte* decree made by itself, there being no inherent power to do so. 43 Mad. 94, Foll. (*Martineau, J.*) JAGAN NATH *v.* ABDUL HAKIM. **73 I. C. 660 = A.I.R. 1923 Lah. 147.**

——Apart from provisions of O. 9, R. 13, a Court has no jurisdiction to set aside a decree. (*Walsh and Wallach, JJ.*) KALLU *v.* NADIR BAKSH. **64 I. C. 527 = 19 A. L. J. 907 = A. I. R. 1922 All. 441.**

——A Court cannot set aside an *ex parte* decree in exercise of its inherent powers under section 151. C. P. Code. 43 Mad. 94 Foll. (*Coutts and Ross, JJ.*) AJODHYA MAHTON *v.* MT. PHUL KUER. **65 I. C. 341 = 1 Pat. 277 = 1922 P. H. C. C. 61 = A. I. R. 1922 Pat. 479.**

——*Inherent power to set aside.*

Each case has to be judged upon its own merits. It cannot be laid down as a hard and fast rule of law that in no circumstances the power of the Court under S. 151 of the Code can be exercised in respect of an *ex parte* decree except under the provisions of O. 9, R. 13. Because in no previous case the power was exercised with respect to *ex parte* decrees, it cannot be contended that such power should never be exercised in such cases.

Where an *ex parte* decree under O. 34, R. 6 was passed by oversight against a person who was not a mortgagor.

Held, that the Court had inherent jurisdiction to set aside the decree. 43 Mad. 94 (F. B.) and 33 Cal. 927, Ref. (*Jwala Prasad, J.*) HANUMAN LAL *v.* RAM PEARI KOER. **60 I. C. 368 = 2 P. L. T. 251 = A. I. R. 1921 Pat. 491.**

——A Court has inherent power to set aside an *ex parte* order under O. 21, R. 90, 4 P.L.J. 135 and 17 All. 106 (P.C.) Dist. 9 C.W.N. 81 ; 10 C.W.N. 306 and 21 C.W.N. 769, Foll. (*Jwala Prasad, J.*) BHIKHAN GIR GOSSAIN *v.* JALPADAT JHA. **62 I.C. 113 = 2 P.L.T. 270 = A.I.R. 1921 Pat. 293.**

——And therefore as provision has been made in the Code for the setting aside of *ex parte* decrees no power under S. 151 can be exercised in the matter. (*Raymond, A.J.C.*) FIRM OF NOTANDAS *v.* FIRM OF PRIBHDAY. **63 I.C. 131 = 15 S.L.R. 61 = A.I.R. 1921 Sind 38.**

—S. 151—Extension of time.

——Though a party is entitled under R. 9, O. 9, to apply for an order to set the dismissal aside, he must do so within the period of 30 days. Extension of that period cannot be made by a Court under S. 151. (*Prideaux, A.J.C.*) SABA *v.* DAYARAM. **23 N.L.R. 183 = 107 I.C. 193 = A.I.R. 1928 Nag. 91.**

——*Decree for specific performance — Time can be fixed and extended.*

Where in a decree for specific performance of a contract no date for performance has been fixed, such date may be fixed by the Court which made the decree after the decree has been passed and whether the date is fixed in the decree or in subsequent order, the Court which made the decree has a discretion to extend the time. (*Heald and Mya Bu, JJ.*) KO BA CHIT *v.* KO THAN DAING. **5 Rang. 615 = 6 Bur. L. J. 216 = 105 I.C. 467 = A.I.R. 1927 Rang. 311.**

——Where a definite period of limitation has been prescribed by law within which action could be taken, a Court is not entitled to extend such period by invoking S. 151. A.I.R. 1922 Pat. 479, Rel. on. (*Shadi Lal, C.J.*) KUNDAN LAL *v.* KAUSHI RAM. **89 I.C. 427 = A.I.R. 1926 Lah. 135.**

——If Court has jurisdiction to extend time upon an application for review there is no reason why his order should be disturbed because he made the order upon an application for extension and not upon an application for review. (*Kulwant Sahay, J.*) MT. RAM KUMARI *v.* DEONANDAN SINGH. **90 I.C. 79 = 1925 P.H.C.C. 151 = A.I.R. 1925 Pat. 452.**

——Where the appellant failed to pay the costs on payment of which only appeal was to be accepted, the Court has no power to extend the time limited in the order for payment of the money either under S. 148 or 151. (*Das, J.*) SHEIK HAMIDUR RAHMAN *v.* SHAHANAND DAS. **80 I.C. 575 = A.I.R. 1925 Pat. 153.**

—S. 151—Fraud.

——*Consent decree—Fraud—No relief under* S.151.

If a party desires to have a consent decree amended or vacated upon the ground that it was fraudulently procured, his proper course, and indeed his only course, is to proceed by separate suit for the purpose. There is no justification for invoking S.151 at all. (*Rankin, C. J. and C.C. Ghose, J.*) J. C. GALSTAUN *v.* PRAMATHA NATH ROY. **33 C.W.N. 883 = A.I.R. 1929 Cal. 470.**

——*Decree on award — Fraud — No relief under S.* 151.

A decree passed in terms of award cannot be challenged in appeal on the ground of fraud, nor can it be set aside by the Court by virtue of its inherent powers under S. 151. The remedy of the party lies by a separate suit. A.I.R. 1927 Nag. 212, Appl. (*Findlay, J.C.*) SADASHEO KIRAD *v.* MAHADEO GANESH SAHANI. **118 I.C. 61 = A.I.R. 1929 Nag. 111.**

——*Prevention of.*

There is always an inherent power in every Court to see that no fraud is allowed to be perpetrated and to prevent any miscarriage of justice by reason of any fraud perpetrated by parties to proceedings. (*Srinivasa Ayyangar, J.*) SUNDARARAJULU NAIDU *v.* NARAYANASWAMI NAIDU. **39 M L.T. 34 = 103 I.C. 825 = 26 M.L.W. 481 = A.I.R. 1927 Mad. 813.**

———*Compromise—Undue influence—No remedy under S.* 151.

A party filed a petition of compromise supported by an affidavit. On the first day for the appearance of the party himself his Counsel asked the Court to excuse the non-attendance of the party and stated that he had been instructed by the party personally to press the application for compromise. The Court accordingly passed a decree in terms of the compromise. Some time after the party applied for review of judgment on the ground that the petition of compromise and the affidavit were executed by the party because he was in fear of his life at the hands of the defendant. *Held*, that S. 151 could not be applied and O. 41, R. 1, also could not be applied. (*Piggott, J.*) DWARKA DHISH PRASAD SINGH *v.* RAJA KESHO PRASAD SINGH. **82 I.C. 1022 = 46 All. 245 = 22 A.L.J. 118 = 5 L.R.A. Civ. 46 = A.I.R. 1924 All. 398.**

———Ex parte *decree—Fraud—Execution can be stayed.*

The Executing Court has no power to stay the execution under O. 21, R. 29, if at that time no suit is pending before it against the decree-holder on the part of the judgment-debtor ; but the Court has an inherent power under section 151 of the Civil Procedure Code to stay execution on the ground that the *ex parte* decree was obtained by fraud. (*Scott-Smith, J.*) P. W. FITZHOLMES *v.* WARYAM SINGH. **75 I.C. 419 = A.I.R. 1923 Lah. 514.**

———*Consent decree—Limits of interference.*

The Court has inherent powers to correct its own proceedings when it is satisfied that in passing a particular order it was misled by one of the parties. A distinction has been drawn in the cases of Indian Courts between a fraud practised upon a party and a fraud practised upon the Court. It has been laid down that where the question is whether there was consent in fact, there is power in the Court to investigate the matter in a properly constituted application and to set aside the decree if it is satisfied that a party never in fact consented to it, but that the Court was induced to pass the decree on the fraudulent representation made to it that the party had consented to it, but that where there is a consent in fact, *i.e.* to say where the parties have filed a compromise petition and they admit that they have filed but allege that his consent was procured by fraud, the Court cannot investigate the matter either in review or in the exercise of its inherent power, and that the only remedy of the party is to institute a suit to set aside the decree on the ground of fraud. In other words, the *factum* of the consent can be investigated in summary proceedings but the reality of the consent cannot be so investigated. 17 C.W.N. 631 ; 19 C.W.N. 419 ; 34 Bom. 408 ; 27 M.L.J. 172, Foll. (*Das and Kulwant Sahay, JJ.*) SADHO SARAN *v.* ANANT RAI. **77 I.C. 14 = 1923 P.H.C.C. 197 = 2 Pat. 731 = A.I.R. 1923 Pat. 483.**

—S. 151— Guardian and Ward.

———*Decree against minor—No lawful Guardian—Decree set aside for want of guardian—Procedure.*

Where the previous suit had failed for want of a lawful guardian, the proceedings in it including the decision are a nullity from the point when the improper appointment of the guardian was made. It is not a commencement of a fresh suit. It is not an application for rehearing, because in the eye of law there has been none. It is not an application to restore. It is an application to revive it by the appointment of a proper guardian so that from the date of such appointment it becomes a properly constituted suit in which the differences between the parties can be decided. (*Walsh and Ryves, JJ.*) KRIPA KISHEN *v.* BABU LAL. **76 I.C. 765 = 45 All. 606 = A.I.R. 1924 All. 225.**

—S. 151—Inherent Powers.

———*Orders pending P.C. appeals.*

The High Court has an inherent power to make such orders or give such directions as may be called for in the circumstances of a particular case pending an appeal to His Majesty in Council. (*Rankin, C.J. and C.C. Ghose, J.*) KUMAR SARAT KUMAR ROY *v.* OFFICIAL ASSIGNEE OF CALCUTTA. **34 C.W.N. 631.**

———Where a cause of action arises only after the suit has been instituted, still the suit may be decreed in certain circumstances. 37 I. C. 962 ; 7 M.L.W. 403 and 127 P.R. 1919, Ref. (*Zafar Ali and Addison, JJ.*) LABHU RAM *v.* CHARNU FAUJU. **116 I.C. 317 = 30 P.L.R. 306 = 11 L.L.J. 251 = A.I.R. 1929 Lah. 409.**

———*Decision of fact—Re-opening.*

When a court of law has in any proceeding before it, decided upon evidence or in the absence of evidence, a question of fact, it is not competent to it to allow that question to be again re-opened except in the very restricted terms laid down by the provisions for review of judgment. A.I.R. 1921 P.C. 23 ; A.I.R. 1924 Mad. 673 and Mad. C.M.A 467 of 1927, Foll. ; A.I.R. 1923 Mad. 487. Not Foll. and 6 All. 269, Ref. (*Wallace and Madhavan Nair, JJ.*) GOVINDASS KRISHNADOSS *v.* RAJAH OF KARVETNAGAR. **A.I.R. 1929 Mad. 404.**

———*Interlocutory Judgments.*

Although C. P. Code, makes no provision, save in the special case dealt with in O. 14, R. 2, for the preparation and delivery of what has been called an interlocutory judgment or a judgment adjudicating upon some of the issues decided, before delivering the final judgment and decree, the Court would not necessarily be acting illegally or irregularly or in contravention of the Code in so doing. A Court has jurisdiction to pass such an order as a step towards the framing of the final decree. And such an order, if it is an adjudication and not merely an opinion, is binding upon the successor of a Judge passing it. 10 All. 162; A. I. R. 1923 Cal. 521; 20 C. W. N. 43; 32 Bom. 432; 16 All. 306; 15 C. L. J. 259; A. I. R. 1921 All. 276; 2 P. L. J. 663; A. I. R. 1923 All. 384 ; A. I. R. 1924 Cal. 160; and A. I. R. 1921 P. C. 11; Dist. (1897) A. W. N. 150 ; 4 L. B. R. 256; 5 S. L. R. 184; and 14 A. L. J. 1171, Doubted and not Appl.; 6 All. 269 (P.C.); A. I. R. 1924 Cal. 467; A. I. R. 1922 Cal. 307; 33 Bom. 293 ; 45 Cal. 111; 13 P. W. R. 1911; and 8 N. L. R. 92 ; Rel. on. (*Odgers and Curgenven, JJ.*) PARTHASARATHY APPA RAO *v.* VENKATADRI APPA RAO. **113 I. C. 646 = A. I. R. 1929 Mad. 121.**

———*Stay or deferring the issue of process—Considerations.*

An inherent power in a Court to stay or defer the issue or operation of its own processes in cases demanding the exercise of such power in the interest of justice has been always recognised. O. 21, Rr. 21, 26 and 37 do not exhaust all the discretion of the executing Court, nor does R. 11, in the case of a decree for money, limit or restrict any jurisdiction or discretion which an executing Court may have in respect of any decree that is before it for execution. The right of the decree-holder to execute his decree, unless the decree itself imposes a restriction upon the right of immediate enforcement, arises as soon as the decree is complete.

But, consistently with this right, if the Court finds that its processes for its enforcement should be delayed for a while, the Court is not powerless; but the discretion that it has, lies within very narrow limits and should not be used to ignore the just rights of the decree-holder and putting him off indefinitely. (*Mukerji and Graham, JJ.*) J. C. GALSTAUN *v.* F. E. DINSHAW.

31 C. W. N. 653 = 102 I. C. 513 = A. I. R. 1927 Cal. 581.

———*Exercise is discretionary.*

The exercise of the residuary powers of Court under S. 151 is purely a matter of discretion and an appellate Court should not ordinarily interfere with the exercise of that discretion, unless a strong case is made out. (*Mukerji and Graham, JJ.*) SARAT CHANDRA *v.* MITRA MUKERJEE & Co., **100 I. C. 518 = A. I. R. 1927 Cal. 420.**

———A Court has got no inherent jurisdiction to treat his previous order, not cancelled either by review or appeal, as a nullity. (*Greaves and Mukerji, JJ.*) ABDUL KADER *v.* AMBIKA CHARAN.

97 I. C. 697 = A. I. R. 1927 Cal. 57.

———*Revocation of Arbitrator's appointment.*

A Court has inherent power to revoke the appointment of an arbitrator before the making of an award in a proper case, but this power should always be exercised with the greatest caution. (*Broadway, J.*) AMIN CHAND KAUSHI RAM *v.* KAUSHI RAM MITTAR SAIN. **100 I. C. 46 = A. I. R. 1927 Lah. 187.**

———Every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject matter of controversy between the parties. 35 Mad. 607 (P.C.), Foll. (*Curgenven, J.*) G. RAMACHANDRA RAO *v.* SAMA RAYAR.

98 I. C. 280 = A. I. R. 1927 Mad. 143.

———Neither S. 148 nor S. 151 authorizes a Court to meddle with its final decrees. (*Jackson, J.*) KRISHNAMACHARULU *v.* C. VENKATA SUBBIAH.

24 M. L. W. 443 = 1926 M. W. N. 713 = 97 I. C. 795 = A. I. R. 1926 Mad. 1059.

———*Set-off in execution.*

Where a party attaches in execution a decree for mesne profits obtained by the judgment-debtor under S. 144 of the C. P. Code, against a third party, though the case may not strictly fall within O. 21, R. 18, the Court has inherent power to allow such third party to set off as against the attaching decree-holder executing the decree for mesne profits against him (*i. e.*; the third party referred to) a decree which he holds for a larger sum against the original holder of the decree for mesne profits. (*Chatterjee and Panton, JJ.*) ADWAITA CHANDRA *v.* CHITTAGONG CO.

84 I. C. 747 = 28 C. W. N. 988 = A. I. R. 1925 Cal. 102.

———*Order under Para. 3 of II, Sch. C. P. Code can be cancelled.*

Although there is no specific provision in the second Schedule to the C. P. Code authorizing a Court to cancel an order made by it under para. 3 of the Schedule, yet in a proper case and for good cause the Court has inherent power to cancel that order. (Case law discussed), 10 Bom. 381, Not Foll. *See* C.P. Code, Sch. II, para. 3. (*Kulwant Sahay, J.*) LACHMAN MACHHUA *v.* MOGHAL MIAN. **86 I.C. 540 = 6 P.L.T. 488 = A. I. R. 1925 Pat. 720.**

———High Court has power not merely to set aside abortive proceeding in lower Court but to pass such order as the Court ought to have passed itself, and can if the matter be referred back still pass. (*Walsh, Ag.C.J. and Ryves J.*) PANDIT BALGOBIND *v.* SHEO KUMAR.

82 I. C. 184 = 22 A. L. J. 791 = 5 L. R. A. Civ. 545 = 46 All. 864 = A. I. R. 1924 All. 818.

———*Exercise of—Considerations.*

Appeals to the inherent jurisdiction of the Court have to be regarded with the greatest caution. But, if after exercising such caution, the Court is clearly of opinion that the jurisdiction ought to be exercised, it should not be intimidated from so doing, because no case on all fours is forthcoming from the reported decisions in the various High Courts. (*Marten, J.*) JETHABHAI VERSEY *v.* AMARCHAND MADHAVJI & CO.

25 Bom. L. R. 713 = 82 I. C. 852 = A. I. R. 1924 Bom. 90.

———A plaint which was returned for presentation to the proper Court, was on that very day presented to that Court. The pleader who thought that his power to act for the plaintiff had expired asked for time to procure fresh *vakalatnama*. The Munsif accepted the plaint and treated it as presented and the case was decided on the merits in plaintiff's favour. On objection being taken in appeal that the Munsiff had wrongly exercised jurisdiction under S. 151,

Held, the case was a proper one for the application of S. 151, the Court had power under S. 151 of the Civil Procedure Code to allow the plaintiff time for the production of the *vakalatnama*, and it would not nullify the provisions of Rr. 1 and 4 of Order 3 of the Civil Procedure Code. But the power there mentioned must be used very sparingly and only in the last resort, if only because of the great danger of mistake as to what the justice of a given case may be. (*Hallifax, A. J. C.*) DEBI LAL *v.* KRISHNAJI.

67 I. C. 296 = 5 N. L. J. 265 = A. I. R. 1922 Nag. 125.

———*Re-call of predecessor's orders.*

It is well settled that the Court has inherent power to re-call an order which has not been perfected, but no power whatever to re-call one which has been perfected. Therefore a successor has no power to re-call the perfected order of his predecessor. *In re St. Nazaie. Co.* (1879) 12 Ch. D. 88, *Parsi Dai Debi* v. *Jotindra Nath Bose*, 10 C. L. J. 496. (*Coutts and Das, JJ.*) HIRO SINGH *v.* KAZI SYED AHMED HUSSAIN.

69 I. C. 742 = A. I. R. 1922 Pat. 204.

———*Conversion of appeal into revision.*

The High Court has power to convert a Memorandum of Appeal into a revision-petition in a suitable case. (*Sadasiva Aiyar and Coutts Trotter, JJ.*) RUKMANI AMMAL *v.* NARASIMHA IYER.

63 I.C. 730 = 14 M. L. W. 85 = 1921 M. W. N. 487 = A. I. R. 1921 Mad. 612 = 41 M. L. J. 54.

—S. 151—Injunction.

———It is well settled that when the jurisdiction of the Court is invoked under S. 151, it is necessary for the plaintiff to establish a strong *prima facie* case, and show that if the injunction asked for is not granted, irreparable injury or inconvenience would result. 55 I. C. 403, Rel. on. (*Tek Chand, J.*) KUNJ BEHARI LAL *v.* MUBARAK BEGAM. **9 L. L. J. 536 = A. I. R. 1927 Lah. 833.**

———*Temporary injunction against execution.*

A Court is not competent to grant a temporary injunction restraining the execution of a decree passed by a competent Court either under O. 39 or S. 151, and if such injunction has been granted, the remedy of the aggrieved party is not by appeal but revision 43 Mad. 94 (F. B.). Foll. (*Curgenven, J.*) AYYAMPERUMAL NADAR *v.* MUTHUSWAMI PILLAI. **102 I. C. 700 = 38 M. L. T. 358 = 26 M. L. W. 899 = A. I. R. 1927 Mad. 687.**

C. P. CODE (1908), S. 151—Injunction.

——*Scope of power.*

During the pendency of a suit by *B* instituted in the Sub-Court, Devakotah, against *A* for a declaration that he was not entitled to keep the amount for which he had obtained a decree against *C*. *B* obtained an order permitting *A* to execute the decree but directing the money realised in execution to be deposited in Court. Subsequently *C*, after he was impleaded as a party in the Devakotah Sub-Court, put in an application to the High Court for an order of injunction against *A* directing stay of execution.

Held that as it was open to the petitioner to apply to the Sub-Court, Devakotah for the relief sought for and if refused there then to come to the High Court on appeal, it was an improper use and erroneous construction of S. 151 to invoke it in the present case. A. I. R. 1925 Mad. 42 ; 40 Cal. 955, and 3 P. L. J. 435 Cons. (*Ramesam and Madhavan Nair, JJ.*) PETHAPERUMAL CHETTIAR *v.* CHIDAMBARAM CHETTIAR. **102 I. C. 396 = 38 M. L. T. 364 = 1927 M. W. N. 259 = A. I. R. 1927 Mad. 592 = 52 M. L. J. 670.**

——*Temporary mandatory injunction can be granted.*

A Court acting under O. 39, R. 2, can only grant an injunction restraining the defendant from committing injury. It is no answer to such injunction that in effect the defendant is compelled to perform certain acts which ordinarily would be subject of a mandatory injunction. And if for some reason the Court finds it necessary to issue a temporary mandatory injunction it cannot be said that such an injunction is beyond its inherent power, but it should not act under O. 39, R. 2. *See also* O. 39, R. 2. (*Jackson, J.*) GOPPAYYA *v.* ANKAYYA. **99 I. C. 566 = 24 M. L. W. 854 = A. I. R. 1927 Mad. 210.**

——*Govt. officers.*

The Court does not possess an inherent power for granting injunctions against Government officers not subordinate to it. (*Zafar Ali, J.*) RAM SARAN DAS *v.* MAULU. **96 I. C. 540 = 27 P. L. R. 11 = A.I.R. 1926 Lah. 284.**

——*Person outside jurisdiction.*

Although a Court will not issue any injunction against a person not within its jurisdiction yet when that person has submitted to its jurisdiction, the Court will in the ends of justice restrain that party from doing anything which it considers is improper and will amount to an abuse of the process of the Court. 1 P. L. T. 277, Foll. (*Jwala Prasad and Adami, JJ.*) GOSWAMI LALOO LAL SHARMA *v.* RADHEY LAL GOSWAMI. **85 I. C. 852 = 6 P.L.T. 540 = A. I. R. 1926 Pat. 171.**

——*Restraining execution.*

No Court except a chartered High Court in which a suit was instituted has power under the C. P. Code, or any other statutory enactment to restrain the executing Court by an injunction from executing a decree. Only a chartered High Court has inherent powers to issue injunctions of this nature in certain cases, but other Courts do not possess any such powers. 34 Cal. 97 and 34 Cal. 101, Foll. (*Zafar Ali, J.*) KANSHI RAM *v.* FIRM PRABH DIAL ARJAN DASS & CO. **92 I.C. 259 = 7 L.L.J. 457 = 26 P.L.R. 561 = A.I.R. 1925 Lah. 618.**

——*High Court's powers.*

High Court has an inherent power to grant injunction in suitable cases irrespective of the provisions of O. 39. (*Abdul Raoof, J.*) SAMANDAR *v.* FAZAL. **78 I. C. 802 = A. I. R. 1925 Lah. 242.**

——In a suit merely of a declaratory nature it is not proper to grant an injunction staying proceedings in another suit pending in another Court. (*Abdul Raoof, J.*) SAMANDAR *v.* FAZAL. **78 I. C. 802 = A.I.R. 1925 Lah. 242.**

C. P. CODE (1908), S. 151—Jurisdiction.

—S. 151—Invention of Procedure.

——A Court is not justified in applying its power of inherent jurisdiction to introduce a new form of procedure for which no provision is made by the Indian law. (*Newbould and Cuming, JJ.*) GOUR CHANDRA GOSWAMI *v.* THE CHAIRMAN OF THE NABADWIP MUNICIPALITY. **80 I. C. 192 = A. I. R. 1922 Cal. 1.**

—S. 151—Issues.

——*Special issue after evidence.*

Where no direct issue upon a point was taken in the pleadings nor was the issue raised at the trial but the trial Judge after the evidence had been taken and after the arguments were concluded, framed a special issue and decided the case upon it,

Held that this is permissible and even had there been no such express provision in the Code, every Court trying civil causes has inherent jurisdiction to take cognisance of questions which cut at the root of the subject-matter of controversy between the parties. A. I. R. 1918 P. C. 30 Ref. (*Dawson Miller, C. J. and Mullick, J.*) BAIJNATH SINGH *v.* BRIJRAJ KUAR. **68 I. C. 383 = 2 Pat. 52 = 4 P. L. T. 239 = A. I. R. 1922 Pat. 514.**

—S. 151—Jurisdiction.

——Where certain questions have been removed from the jurisdiction of the Court, they cannot be brought within the jurisdiction on the ground that the Court has inherent power to do what justice requires for the parties before it. 45 Bom. 512 ; 24 Bom. 467, Applied. (*Findlay, Offg. J. C.*) NIZAMUDDIN *v.* JUMMA. **88 I. C. 693 = A. I. R. 1926 Nag. 17.**

——*Conferring of.*

When the plaintiff, an old man filed his suit in the Court of the Subordinate Judge, he was told to go to the Court of the Munsif and when he went to the Court of the Munsif he was told by the Munsif that he had no jurisdiction,

Held, that although the orders passed were very old and an application as made for a reference under O. 46, R. 1 could not lie, yet the High Court could take action under S. 151 of the C. P. Code and pass such orders as may be necessary for the ends of justice. High Court ordered the Sub-Judge to take up the case. (*Dalal, J. C.*) N. JAFAR HUSAIN KHAN *v.* MT. CHOUTHI. **85 I. C. 702 = 12 O. L. J. 189 = 2 O. W. N. 81 = 28 O. C. 323 = A. I. R. 1925 Oudh 461.**

——S. 151 cannot confer jurisdiction on Court to do what is prohibited by positive law. Where a judge had passed an order as to Court-fees,

Held, that his successor could not alter that order save in case of arithmetical or clerical error or on review. (*Das and Ross, JJ.*) HARIHAR PRASAD *v.* MAHESWARI PRASAD. **82 I. C. 813 = 3 Pat. 654 = A. I. R. 1925 Pat. 47.**

——A Court has no inherent jurisdiction to do that which is prohibited by the Code. So it cannot set aside its own decree except under S. 152 or on review. (*Das and Ross, JJ.*) RAMESWAR MAHTON *v.* LALA DWARKHA PRASAD. **84 I. C. 320 = 3 Pat. 778 = 6 P. L. T. 309 = A. I. R. 1925 Pat. 36.**

——*High Court-powers.*

Ss. 22 and 23 do not apply where transfers to the Original Side of a High Court from a Court subordinate to another High Court is desired. The High Court has the power in exercise of its inherent jurisdiction to grant the petitioner the relief for which he asks by an order of stay but the right of a plaintiff to institute a suit in a Court in which the law permits him to sue should not be interfered with by the High Court in exercise of its extraordinary jurisdiction unless the suit is brought in bad faith for the purpose of working injustice to which the

defendant would not be subjected if the suit were brought in another competent Court. The mere fact that it would be more convenient to the applicant to have the action tried elsewhere than at Bombay, is no sufficient reason to force the plaintiffs summarily out of the Court in which they are entitled legally to sue and to deprive them of the substantial sum expended by them on Court-fees in a proceeding for which there is no provision in the Code of Civil Procedure and by the application of inherent powers not utilised in practice except for the purpose of preventing or remedying grave abuse. 65 I. C. 782; 20 A. L. J. 118; 44 A. 278; A. I. R. 1922 All. 65, Dist. (*Campbell, J.*) PRAGJI SOORJI & CO., BOMBAY *v.* KALU MAL SHORI MAL & CO.
69 I. C. 772 = A. I. R. 1924 Lah. 306.

———*Dismissal of suit by minor's next friend.*

A court has jurisdiction in a proper case to dismiss a suit filed by the next friend of a minor on the ground that it is not in the interest of the minor that the suit should be allowed to go on. (*Wazir Ali and Neave, A. J. Cs.*) HARIHAR BAKSH SINGH *v.* JAGANNATH SINGH. **83 I. C. 778 = 11 O. L. J. 260 = A. I. R. 1924 Oudh 413.**

—S. 151—Letters of administration.

———*Dismissal for want of—Power to restore.*

Where, though the issues were all found for plaintiff, the suit was dismissed for want of letters of administration, but the Court gave the plaintiff liberty to apply to have the dismissal set aside on obtaining the letters and the plaintiff on subsequently obtaining the same, applied to have the order of dismissal set aside.

Held the order dismissing the suit was really a means of suspending the suit and at the same time discharging it from the list of suits on the file. The merits of the case having been entirely in the plaintiff's favour, he should not be prejudiced by an error in procedure on the part of the trial Court,

Held, also, that the Court to which the application was made was not entitled to question the power of the Court to order allowing restitution against which no appeal was filed. (*Macleod, C. J. and Coyajee, J.*) KHUHAL SINGJI HIMAT SINGJI *v.* UMAN SINGJI DAULAT SINGJI THAKORE. **70 I. C. 910 = 24 Bom. L. R. 738 = A. I. R. 1922 Bom. 210.**

—S. 151—Limits of.

———*Waiver of right of appeal—No right to invoke section.*

A party not taking advantage of the right of appeal granted him by the Code should not be allowed to ask the Court to exercise its powers under S. 151. (*Macleod, C.J. and Coyajee, J.*) VIRAPPA *v.* BASAPPA.
92 I. C. 354 = 27 Bom. L. R. 1511 = A. I. R. 1926 Bom. 139.

———*Appeal in non-appealable cases.*

Under S. 151 of the Code, the Court has no inherent power to allow the appeal against the order of remand where no right of appeal is given by the Code. That section can never be invoked in any case unless a Court has jurisdiction to entertain the case. It cannot be invoked to give this Court jurisdiction if it does not possess it otherwise. (*Ashworth, J. C.*) FARZAND ALI *v.* EKADASHI. **73 I. C. 591 = 26 O. C. 10 = 10 O. L. J. 36 = A. I. R. 1923 Oudh 177.**

———To summon a private citizen to give evidence before another private citizen is not within the inherent jurisdiction of a Court. (*Marten, J.*) JAMES MACKINTOSH & CO. *v.* SCINDIA STEAM NAVIGATION CO., LTD. **75 I. C. 221 = 24 Bom. L. R. 853 = 47 Bom. 250 = A. I. R. 1922 Bom. 444.**

—S. 151—Limits of—Other remedies.

———When there is a specific provision of law to meet the necessities of a case, resort to inherent jurisdiction is not permissible. A. I. R. 1924 All. 668; A.I.R. 1924 Mad. 114 and 1 Lah. 363, Rel. on. (*Bhide, J.*) MUHAMMAD AKBAR KHAN *v.* AMAR NATH.
122 I. C. 102 = 31 P. L. R. 477 = 12 Lah. L. J. 71 = A. I. R. 1930 Lah. 789.

———Resort to inherent powers under S. 151, is not justifiable when other remedies are open to a litigant.

It was open to the auction-purchaser in a declaratory suit to sue for a consequential relief in the shape of mesne profits in addition to the declaration of title sought by him, or he could have also sued for mesne profits separately. He did not, however, do so.

Held, that there seemed to be no justification for resorting to inherent jurisdiction. (*Bhide, J.*) HEM RAJ *v.* BISHESHAR DAS. **120 I. C. 681 = A. I. R. 1930 Lah. 72.**

———*Cannot override express provisions.*

The inherent powers of the Court under S. 151 cannot be exercised to override the explicit provisions of Sch. 2, which limit the jurisdiction of the Court to "correct" and "modify" the award in certain specified cases only; 1 Lah. 363; A. I. R. 1925 Lah. 321; A. I. R. 1925 Pat. 36, Ref. (*Tekchand and Dalip Singh, JJ.*) KAIKABAD *v.* KHAMBUTTA. **A. I. R. 1930 Lah. 26.**

———When the legislature has made special provisions in order to meet a particular contingency it is not open to a party to have recourse to the residuary and more or less nebulous powers inherent in Courts to do justice under S. 151. Case-law fully considered. (*Agha Haidar, J.*) KHUSHI MAHOMED *v.* BARKAT BIBI.
28 P. L. R. 554 = 103 I. C. 425 = A. I. R. 1927 Lah. 622.

———Where the applicants had their remedy otherwise provided and had neglected to make use of it, recourse to inherent powers should not be had. A. I. R. 1924 All. 446, Ref. (*Findlay, J. C.*) BALAJI *v.* GOPAL MALI. **102 I. C. 543 = A. I. R. 1927 Nag. 262.**

———*Principle.*

S. 151 of the C. P Code, makes no law; it merely reminds Judges of what they ought to know already, that if they find the ordinary rules of procedure resulting in injustice in any case, whether by the force of circumstances or through the attempts of a party to set an unfair advantage out of them, those rules can be broken, but the Courts are not bound to break the rules and the power under S. 151 is to be used only when there is no other remedy open. (*Hallifax, A. J. C.*) SADAHEO RAO *v.* UMAJI. **23 N. L. R. 79 = 103 I. C. 220 = A. I. R. 1927 Nag. 212.**

———When the Code makes provision for a certain procedure, the Code must be deemed to be exhaustive in that respect and the provisions of S. 151 cannot be invoked in opposition to those provisions. 43 Mad. 94 and A. I. R. 1924 Mad. 114, Rel. on; A. I. R. 1923 Lah 144, Diss. (*Phillips, J.*) VARADACHARLU *v.* NARASIMHA CHARLU. **92 I. C. 615 = 23 M. L. W. 85 = 1925 M. W. N. 886 = A. I. R. 1926 Mad. 258.**

———Where a Code declares the law on any matter specifically dealt with, the law must be ascertained by an interpretation of the language used by the legislature for, the essence of a Code is to be exhaustive on such matters. 43 M. 94, Foll.; 45 B. 618, Diss. (*Schwabe, C. J. and Waller, J.*) KRISHNASWAMI NAIDU *v.* R. CHENGALROYA NAIDU. **76 I. C. 836 = 18 M. L. W. 870 = 33 M. L. T. 207 = 47 Mad. 171 = A.I.R. 1924 Mad. 114 = 45 M.L.J. 813.**

———A Court cannot invoke its inherent jurisdiction where there is a provision in the Code which would

C. P. CODE (1908), S. 151—Limits of—Other remedies.

meet the necessity of the case. (*Baker, Offg, J. C.*) MT. MULIA *v.* PARTAB. **78 I. C. 72 = A. I. R. 1924 Nag. 325.**

———A suit was dismissed for want of proof. The Court subsequently discovered that there was some documentary evidence on record and therefore of its own motion, it set aside its own decree and fixed the date for final hearing.

Held, that a remedy by way of review being open to the plaintiff, the Court should not have acted under S. 151. (*Daniels, J.*) MAHADEO *v.* KALOO. **73 I. C. 494 = 21 A. L. J. 447 = 4 L. R. A. Civ. 365 = A. I. R. 1923 All. 603.**

—S. 151—Limits—When can be invoked.

———Where there is no provision in the Code expressly providing for a remedy and none which prohibits a remedy being administered and such remedy is called for in order to do that real and substantial justice for the administration of which it exists, the provision of S. 151 may and should be resorted to. (*M. N. Mukerji, J.*) NABU SAHU *v.* KAMDEV NAITY. **107 I. C. 729 = 47 C. L. J. 87 = A. I. R. 1928 Cal. 179.**

———If the Court purports to prevent an abuse it must find what the abuse is; S. 151 is not a general clause validating every act of a Court which cannot otherwise be justified. It is a section allowing a Court to exercise its power in specified circumstances, and it cannot exercise that power until those circumstances are established. (*Sreenivasa Aiyangar and Jackson, JJ.*) TIMMARAJU *v.* NARASIMHA RAJU. **109 I. C. 528 = 1928 M. W. N. 222 = 28 M. L. W. 152 = A. I. R. 1928 Mad. 522 = 54 M. L. J. 665.**

———*Wilful neglect to avail remedy provided.*

A court cannot make use of the special provisions of S. 151 where a party has his remedy provided elsewhere in the Code and has wilfully neglected to avail himself of the remedy so provided. (*Stuart, C. J.*) JAGAT SINGHA *v.* RAJPAL KOER. **114 I. C. 128 = 5 O. W. N. 895 = A. I. R. 1928 Oudh 478.**

———Where the Code contains specific provisions dealing with a particular matter the Court ought not to invoke the aid of S. 151. (*Page and Graham, JJ.*) BANKA BEHARI *v.* BIRENDRA NATH. **103 I. C. 864 = 55 Cal. 219 = 47 C L. J. 69 = A.I.R. 1927 Cal. 850.**

———S. 151 was enacted only to provide remedies in cases where the provisions of the Code are not ample or sufficient to give such remedies and in cases in which a remedy is not provided for by the Code. (*Mukerji and Roy, JJ.*) SATYENDRA NATH *v.* CHARU CHANDRA. **104 I. C. 188 = 45 C. L. J. 557 = A. I. R. 1927 Cal. 657.**

———Where there is no provision in the Code expressly providing for a remedy and none which prohibits a remedy being administered and such remedy is called for in order to do that real and substantial justice for the administration of which it exists, the provision of S. 151 may and should be resorted to. A. I. R. 1925 All. 773 and 21 C. W. N 769, Ref. (*Mukerji and Graham, JJ.*) SARAT KRISHNA *v.* BISESWAR MITRA. **103 I. C. 69 = 54 Cal. 405 = 31 C. W. N. 576 = A. I. R. 1927 Cal. 534.**

———Whenever it is necessary for the ends of justice or to prevent an abuse of the process of the Court, the Court always has jurisdiction to pass an order under S. 151, unless its jurisdiction in that behalf has specifically been taken from it. But whether justice does require a Court to invoke its inherent jurisdiction, must be determined with reference to the particular facts of the case and the rule of law that a Court cannot invoke an inherent jurisdiction where there is a provision in the Code, which, if applied, will meet the justice of the case. 44 Cal. 929, Foll. (*Cuming and Page, JJ.*) ASUTOSH GHOSE *v.* INDU BHUSHAN. **98 I C. 70 = A. I. R. 1927 Cal. 158.**

C. P. CODE, (1908), S. 151—Limits—When can be invoked.

———*Neglect to avail remedy.*

S. 151 cannot be invoked where the party had a remedy in law and failed to take advantage of the same within limitation. A. I. R. 1926 Mad. 258, Foll. (*Prideaux, A. J. C.*) SABUDDIN *v.* PUNDLIK. **101 I. C. 320 = A. I. R. 1927 Nag. 197.**

———If a Court acts under S. 151 of the C. P. Code it ought to state in what manner the ends of justice require the revival of the proceedings. At least as strong grounds should be required to justify an application under S. 151 as would be required on an application for review. (*Dalal, J. C. and Nanavutty, A. J. C.*) SITAPAT RAM *v.* MAHAVIR PRASAD. **87 I. C. 438 = A. I. R. 1926 Oudh 59.**

———*Bar of remedy by neglect.*

S. 151 cannot be invoked to help a party who had a remedy provided by law and failed to take advantage of that remedy within the period of limitation allowed. (*Campbell, J.*) FIRM DUNI CHAND GOKAL CHAND *v.* PRITAM DAS. **7 Lah. L. J. 13 = 26 P.L.R. 841 = 86 I. C. 256 = A.I.R.1925 Lah. 321.**

———S. 151 is not intended to override the express provisions of law. In other words where the law provides a period of limitation for a particular class of applications, the court cannot ignore the provisions of the law of limitation by appealing to S. 151 of the Code. That section is intended for cases for which the strict letter of the law provides no remedy. A. I. R. 1924 All. 446, Foll. (*Daniels, J.*) TOTA RAM *v.* PANNALAL. **79 I. C. 997 = 46 All. 631 = 22 A. L. J. 583 = 5 L.R.A. Civ. 347 = A. I. R. 1924 All. 668.**

———*Should not cause mischief or injustice.*

S. 151 cannot be called in to justify an act where the act instead of being necessary for the ends of justice or to prevent an abuse of the process of the Court not only causes or is likely to cause incalculable mischief but also perpetrates injustice to third parties who are neither parties to the suit nor bound by the decree passed therein. (*Kinkhede, A.J.C.*) PANNALAL *v.* BHAGIRATHIBAI. **78 I. C. 601 = 20 N.L.R. 11 = A. I. R. 1924 Nag. 98.**

———Court cannot re-call order duly made in exercise of inherent jurisdiction save on review or under S. 152. (*Das and Ross, JJ.*) RAMCHARAN SINGH *v.* JANGBAHADUR SINGH. **79 I. C. 900 = 5 P. L. T. 631 = A. I. R. 1924 Pat. 696.**

———*Bar of remedy by neglect.*

The inherent power under S. 151 to set aside the dismissal of a suit does not extend to a case in which the aggrieved party had had a definite remedy open to him but failed to resort to it within the time allowed by law and so has lost it. (*Lentaigne and Carr, JJ.*) S. G. M. SAMSON *v.* SILVARAN. **3 Bur. L. J. 47 = 82 I. C. 418 = A. I. R. 1924 Rang. 274.**

———*Disregard of limitation.*

Where the Code expressly limits the power of a Court there cannot co-exist an inherent power in that Court to disregard the limitation. A. I. R. 1922 Mad. 505, Rel. on. (*Spencer and Venkatasubba Rao, JJ.*) MALAYANDI *v.* BOMMAN POOSARI. **71 I. C. 204 = 17 M.L.W. 159 = A. I. R. 1923 Mad. 331.**

———S. 151 was never meant to enable the Court to contravene a distinct provision of law 1 Lah. 363 Foll. (*Daniels, J.*) BHAGWAN SINGH *v.* SHEONATH SINGH. **64 I. C. 217 = 24 O. C. 215 = A. I. R. 1921 Oudh 46.**

——*Limits of inherent power.*

The inherent power of the Court as vested in it by its own constitution is not limited to Ss. 151 and 152, C. P. Code. (18 C. W. N. 772, Ref.) (*Suhrawardy and Chotzner, JJ.*) KABIR-UD-DIN MONDAL *v.* ENTAJ MONDAL. **79 I.C. 586 = A. I. R. 1925 Cal. 420.**

——*Security for mesne profits.*

Although a plaintiff has often a reasonable fear that if he gets a decree he will fail to realize mesne profits, yet the Code has not made express provision for such an order. (*Dalal and Simpson, A. J. Cs.*) BHAGWAN BAKHSH SINGH *v.* SURENDRA BIKRAM SINGH. **10 O. L. J. 209 = 74 I.C. 335 = A.I.R. 1924 Oudh 11.**

——*Addition of parties in appeal.*

An appellate Court has power to implead only such persons as parties to the appeal as were parties in the Trial Court and were not made parties to the appeal but not those who were complete strangers to the suit. 18 All. 332, Ref. Powers of a Court to implead parties under S. 151, C. P. Code, are circumscribed by O. 41, R. 20 and it is only in exceptional circumstances that the inherent powers under S. 151 could be invoked. 3 Pat. L.J. 409, Dist. (*Moti Sagar, J.*) MT. HALIMAN *v.* NUR MUHAMMAD KHAN. **73 I.C. 136 = A.I.R. 1923 Lah. 490.**

—S. 151—Mistake.

——*Rectification to prevent abuse of process.*

There was a clear accidental slip in including in the judgment, property belonging to some body other than the judgment-debtor, and to correct the slip, the map had to be revised.

Held, that S. 152 applies both to judgments and decrees and the slip in the judgment can be corrected and for that reason the map also can be revised in order to avoid the abuse of the process of the Court under S.151. (*Dalal, J.*) SATTAR *v.* NAZIR KHAN. **114 I.C. 867 = 50 All. 859 = A.I.R. 1929 All. 147.**

——*Wrong figures in judgment.*

But where a wrong sum of money was entered in the judgment itself as payable by one party to the other, through a mistake in calculation by the parties.

Held, the mistake should be corrected under S. 151. (*Mears, C.J. and Dalal, J.*) NAWASI BEGAM *v.* DILAFROZ BEGAM. **102 I.C. 124 = A I.R. 1927 All. 585.**

——*Wrong name.*

S. 151 empowers a Court to allow correction of an accidental mistake in the name of a party. (*Jai Lal, J.*) FIRM RATTAN CHAND BHAWANI DAS *v.* FIRM KEWAL RAM RUP CHAND. **96 I.C. 11 = 8 L. L. J. 398 = 27 P.L.R. 648.**

——*Ignorance of Court.*

Where the court passes an order inadvertently without being aware of certain facts which should have been brought to its notice it has power to correct an error committed by it not owing to the negligence of a party, but owing to its not being aware of certain facts. (*Devadoss and Waller, JJ.*) NARAYANA CHETTIAR *v.* MUTHU CHETTIAR. **50 Mad. 67 = 51 M. L. J. 219 = 1926 M. W. N. 890 = 26 M.L.W. 878 = 97 I.C. 1008 = A.I.R. 1926 Mad. 980.**

——It is an inherent power of every Court to correct its own proceedings where it has been misled, although there may be no express provision in the C. P. Code, for such correction. (*Jackson, J.*) SRINIVASA RAO *v.* VENKATANARASAMMA. **22 M. L. W. 629 = 91 I.C. 727 = A.I.R. 1926 Mad. 119.**

——Even apart from S. 151 the Court has an inherent power to rectify the mistake which had been

inadvertently committed by itself. A preliminary decree for sale was passed in favour of the appellant who within three years of the passing of the preliminary decree applied to the Court to pass a final decree. Notices were issued to the judgment-debtors and the case was adjourned from time to time; on one of the adjourned dates, the applicant happened to be absent. The defendants never appeared. In the absence of the parties, the Judge passed an order dismissing the suit for default.

Held, that the order of the Court was wrong and that the Court was right in setting it aside when the mistake was brought to its notice by the party. ((*Sulaiman and Mukerji, JJ.*) JODHA SING *v.* PADEY GOKARN. **87 I.C. 225 = 47 All. 546 = 23 A.L.J. 405 = A.I.R. 1925 All. 622.**

——*Lapse of time—No relief.*

S. 151 cannot properly be applied, where an application to rectify a mistake in the quantity of property sold in execution was not made till more than three years after the sale, and it was substantially directed against a purchaser for value who was no party to the decree and who acquired the property in good faith on the basis of the sale certificate. (*Ryves and Daniels, JJ.*) IMTIAZ-UN-NISSA *v.* CHUTTAN LAL **47 All. 304 = 22 A. L. J. 1119 = 6 L. R. A Civ. 153 = 84 I. C. 746 = A. I. R. 1925 All. 236.**

——Where the Court had wrongly entered the word "probate" in its judgment instead of "letters of administration" the Court can correct the judgment at a subsequent stage of the same case on the matter having been brought to its notice. (*Mookerjee and Cuming, JJ.*) SIVADAS MOOKERJEE *v.* SURENDRA NATH CHATTERJEE. **82 I. C. 382 = 40 C. L. J. 24 = A. I. R. 1925 Cal. 178.**

——Where a pleader by mistake attached a different decree to the memo. of appeal, the names of parties in two decrees (the correct one and the one attached, being the same but in opposite order.

Held, that he should be allowed to put in the right decree in place of the one already filed. (*Young, J.*) MAUNG PO THIN *v.* MAUNG PO THIN. **85 I. C. 196 = 3 Bur. L. J. 325 = A. I. R. 1925 Rang. 188.**

——*Acquisition of rights by third parties—No relief.*

Obiter: Even an accidental error should not be amended if third parties have acquired rights under the erroneous judgment in the interval. (*Wazir Hasan, A. J.C.*) SHEO DHARSHAN SINGH *v.* MATA DIN SINGH. **80 I. C. 833 = 11 O. L. J. 227 = 78 I. C. 96 = A. I. R. 1924 Oudh 408.**

——Where from the discussion of the case it appeared that the intention of the Judge was to decree the appeal and it was only by a mistake that the words "fails and is dismissed" were used, *held*, that the Court is bound to correct a clerical error such as has taken place in the judgment, and the words "is decreed" should be substituted in place of "fails and is dismissed." The provisions of Ss. 151 and 152 are much wider than the corresponding sections of the old Code. (*Dalal, A.J.C.*) MT. MAHESHA *v.* RAMESHAR. **71 I. C. 563 = A. I. R. 1924 Oudh 144.**

——The powers of a Court to correct an error obvious on the face of the record before the order has been completed are very clear. (*Spencer and Devadoss, JJ.*) GOPALA IYENGAR *v.* MUMMACHI REDDIAR. **74 I. C. 416 = 17 M. L. W. 254 =**

C. P. CODE, (1908), S. 151—Mistake.

A. I. R. 1923 Mad. 392.

———*Execution by mistake.*

Where execution of a decree was ordered under a mistake that plaintiff had fulfilled the terms of the decree, *held* that on discovery of the mistake the Court has got inherent power to set the wrong right. (*Daniels, J.C.*) DORI LAL *v.* MT. JAMAGA. **72 I. C. 879 = A. I. R. 1923 Oudh 16.**

———The Court has got inherent power to correct any mistake it has made. Quite apart from S. 151, any Court might rightly consider itself to possess an inherent power to rectify the mistake which had been inadvertently made. (*Devadoss, J.*) JAMBU AMMAL *v.* NATARAJAM PILLAI. **70 I. C. 867 = 31 M. L. T. 215 = A. I. R. 1922 Mad. 485.**

—S. 151—Parties, addition of.

———*In appeal.*

Whatever the powers of the Court may be under O. 41, R. 20, there is an inherent power in the Court to add parties to appeal in a proper case. A.I.R. 1921 Cal. 722, Rel. on. (*Das and Ross, JJ.*) BEAS SINGH *v.* BALDEO PATHAK. **7 Pat. 510 = 9 P.L. T. 267 = 109 I. C. 609 = A. I. R.1928 Pat. 343.**

———*Transposition also.*

The High Court has ample power in the interest of justice to add parties, or to transpose a party from one category to another 4 C.W.N. 58, Dist.; 10 Bom. 227, Not Foll. (*Suhrawardy and Mullick, JJ.*) SURYAKANTA *v.* TARAK NATH. **44 C. L. J. 243 = 98 I. C. 822 = A. I. R. 1927 Cal. 37.**

———*In appeal.*

Apart from all questions as to the scope of O. 41, R. 20, and O. 41, R. 33, the Court has inherent power to add a respondent to the appeal. (*Mookerjee and Panton, JJ.*) PULIN BIHARI ROY *v.* MAHENDRA CHANDRA GHOSAL. **67 I. C. 10 = 34 C. L. J. 405 = A. I. R. 1921 Cal. 722.**

—S. 151—Receiver.

———*Pending arbitration proceedings.*

The Court is competent to appoint a Receiver in the interval between the submission of an award and the final acceptance or rejection of it and also where an arbitrator is proceeding with a reference. But in the latter case the power of the Court should not be exercised save in exceptional circumstances. (*Kennedy, J. C.*) CHETAN SING BAGASING *v.* GULIBAI. **78 I. C. 84 = 18 S. L. R. 303 = A. I. R. 1925 Sind 102.**

—S. 151—Reconstruction of Records.

———There is inherent power in every Court to reconstruct its own records where it has been destroyed or lost and it follows that there is inherent power in the appellate Court to reconstruct the records of the Court from which an appeal lies to it. (2 Burrows 722; 42 Am. Dec. 640; 7 W. R. 18 Ref.). (*Schwabe, C. J., Oldfield and Ramesam, JJ.*) MARAKKARUTTI *v.* VEERAN KUTTY. **73 I. C. 1050 = 46 Mad. 679 = 18 M. L. W. 21 = 32 M. L. T. 382 = 1923 M. W. N. 471 = A. I. R. 1923 Mad 647 = 44 M. L. J. 673 (F. B.).**

—S. 151—Refund.

———*Excess Court-fee.*

Under S. 151 the subordinate Courts have power to issue certificates directing the refund of Court-fees paid in excess by inadvertence; 14 W. R. (1870), 47; 40 Cal. 365; 46 I. C. 271 and 3 P. L. J. 452, Rel. on. (*Mukerji and Bennet, JJ.*) MENNA LAL *v.* RAM CHANDRA. **122 I. C. 188 = 1930 A. L. J. 805 = A. I. R. 1930 All. 471.**

———*By next friend.*

Where a trial Court cites S. 151 as the authority empowering it to pass the order under O. 32, R. 6, directing the next friend to refund the money to the bank, wherein it was deposited under a decree in favour of the minors and where from the next friend had withdrawn it without the permission of the Court, the order having been passed under S. 151 is not appealable. (*Shadi Lal, C. J. and Broadway, J.*) HARBHAJAN SINGH *v.* SANTOSH SINGH. **31 P. L. R. 171 = A. I. R. 1930 Lah. 496.**

C. P. CODE (1908), S. 151—Reliefs.

———*Court fees for review.*

A decree of the District Judge, by an accidental mistake, made those defendants also against whom no relief was claimed, liable for the decretal amount. On plaintiff's appeal to the High Court, the decretal amount was increased but the question, as to who were bound by the decree was not referred to in the judgment. Thereafter the defendants whose names were wrongly included in the decree applied to the High Court for the amendment of the decree.

Held, that although S. 15, Court Fees Act, was not applicable to this case, as it could not be said that on the rehearing the Court reversed or modified its former decision on the ground of mistake of law or fact, still the court-fee paid on the review application ought to be refunded for the ends of justice and to prevent the abuse of the process of the Court. (*Rutledge, C.J. and Brown, J.*) C. T. A. M. CHETTYAR FIRM *v.* KO YIN GYI. **7 Rang. 88 = 117 I. C. 585 = A. I. R. 1929 Rang. 158.**

———*Auction purchase-money.*

Where in execution of a decree on a prior mortgage a certain property is sold and is again sold in execution of a decree on a subsequent mortgage in a proceeding to which the judgment-debtor, the decree-holder, the previous purchaser and the subsequent purchaser are all parties, the Court has power under S. 151 to direct the decree-holder to refund the amount paid by the auction-purchaser as the price of the property. (*Mukerji, J.*) ATMA RAM *v.* NANAK CHAND. **92 I. C. 571 = A. I. R. 1926 All. 274.**

———*Stamp on returned appeal memo.*

The High Court has inherent power to grant a certificate for renewal or refund of the value of stamps used on a memorandum of appeal which was returned to the appellants, on the ground that it was not properly stamped. 3 P. L. J. 452 Foll. (*Jwala Prasad and Adami, JJ.*) BHUNESHWARI PRASAD *v.* KISHEN DAYAL. **72 I. C. 405 = 4 P. L. T. 504 = A. I. R. 1923 Pat. 600.**

—S. 151—Refusal to amend—Remedy.

———Under S. 152 of the C. P. Code the Court has power, under the peculiar circumstances of any case to refuse the application for amendment of decree if it feels inclined to do so. The Court is not bound to grant the application in every case. On the judgment-debtor satisfying a mortgage decree in full, the case was struck off. Three years afterwards, the defendant applied for amendment of the decree.

Held, that the Court could dismiss the application if it was inclined to do so.

Held further, that the failure by the Court to exercise this jurisdiction on the ground of its non-existence, amounted to material irregularity in the exercise of its jurisdiction, so that revision of its order was permissible. (*Sulaiman and Daniels, JJ.*) PITAM LAL *v.* BALWANT SINGH. **88 I. C. 396 = 23 A. L. J. 518 = 6 L. R. A. Civ. 423 = A. I. R. 1925 All. 556.**

—S. 151—Reliefs.

———An order dismissing for default an objection of judgment-debtor if it is not covered by O. 9, judgment-debtor should have applied under S. 151 or O. 47. (*Sulaiman, Ag. C. J. and Bennet, J.*) SUMER CHAND *v.* BENI PRASAD. **112 I. C. 380 = 26 A. L. J. 1395 = A. I. R. 1929 All. 123.**

——Where an unsuccessful applicant to set aside sale under O. 21, R. 90 brings a suit praying (1) that the sale should be declared void, and (2) that, if the sale be found valid, he alone should be declared to be entitled to the surplus sale proceeds, even if the suit is held to be unentertainable, the Court must give a decision on the second prayer. (*Zafar Ali and Jai Lal, JJ.*) RADHI *v.* BUTA MAL. **119 I. C. 431 = A. I. R. 1929 Lah. 618.**

——*By High Court.*

Where the applicant has been prejudiced by the change of date and the hasty procedure in the Munsif's Court and the District Judge refused to entertain his application on the ground that he could not take up civil matters during the vacation,

Held, that this is a clear case in which the High Court must act under S. 151. (*Pullan, J.*) GAJODHAR LAL *v.* SECRETARY OF STATE. **1 L. C. 187 = 105 I. C. 146 = A. I. R. 1927 Oudh 276.**

——*Advancement of income.*

In cases where the plaintiff is not clearly entitled to some relief in the suit, Courts will refuse to make an order for advancement of income. (*Spencer, O. C. J. and Srinivasa Aiyangar, J.*) YUSUF SAHEB *v.* SUBHAN BIBI. **86 I. C. 909 = 21 M. L. W. 308 = 1925 M. W. N. 109 = A. I. R. 1925 Mad. 443 = 48 M. L. J. 395.**

—S. 151—Remand.

See also C. P. CODE, S. 151—APPEAL.

—S. 151—Remand—Inherent power.

——Even where O. 41, R. 23 does not apply, the suit not having been disposed of on a preliminary issue, the appellate Court has inherent power to make an order of remand under S. 151. 37 M. L. J. 536; A. I. R. 1927 Mad. 335; A. I. R. 1928 Mad. 984; A. I. R. 1928 Mad. 991 and A. I. R. 1928 Mad. 430, Foll. (*Walsh, J.*) THIRUKAVAL CHETTI *v.* KARIA GOUNDAN. **119 I.C. 466 = A. I. R. 1930 Mad. 72.**

——The plaintiff in a redemption suit based his claim on the purchase of the equity of redemption made by him from *X*. At the time of the argument the defendants took the objection that the purchase would not be binding on the heirs of *X* and the trial Court upheld the objection. But the appellate Court allowed the plaint to be amended adding the heirs of *X* as parties to the suit and remanded the suit under its inherent powers, and awarded the plaintiff's costs of the appeal.

Held, that the Court did not exercise its inherent powers of remand without jurisdiction. (*Walsh, J.*) THIRUKAVAL CHETTI *v.* KARIA GOUNDAN. **119 I. C. 466 = A. I. R. 1930 Mad. 72.**

——*Addition of parties and properties.*

When the appellate Court thinks it necessary that other parties should be joined as defendants and certain other properties should be included in the suit, the only course for it to take is to reverse the decision and to remand the suit for a fresh trial from the commencement and that can only be done under the inherent jurisdiction of the Court. 44 Cal. 929, Foll. (*B. B. Ghose and Panton, JJ.*) ANATH BANDHU DUTTA *v.* AISALI NAMADAS. **43 C.L.J. 601 = 97 I.C. 188 = A. I. R. 1926 Cal. 1076.**

——*Second appeal.*

In a second appeal involving several points difficult to disentangle, the appropriate course to follow is to make not an order under O. 41, R. 25, but an order of remand in the exercise of inherent power of the Court 44 Cal. 929; 45 C. 94 (P. C.), Ref. (*Mookerjee and Rankin, JJ.*) KAMINI KUMAR DEB *v.* DURGA CHARAN NAG. **74 I. C. 392 = 37 C. L. J. 122 = A.I.R. 1923 Cal. 521.**

——An appellate Court has inherent powers to order a remand which can however be made only where the justice of the case demands it. (*Walmsley and Ghose, JJ.*) SASHI MUKHI DASI *v.* ABINASH CHANDRA HALDAR. **80 I.C. 172 = A.I.R. 1922 Cal. 279.**

—S. 151—Remand—Interpretation.

——In an appeal from a mortgage decree the first appellate Court decided all the points in dispute except those which related to the amount due to the defendants as mortgagees. The decree of the first court was reversed and that Court was directed to take proper pleadings with regard to the sum due to the mortgagees. In an appeal from the remand order,

Held, that the order was under S. 151. It being neither an order under O. 41, R. 23 nor a decree, no appeal lay. 12 N. L. R. 126 Expl.; 44 Cal. 929 (F. B.); A. I. R. 1927 Pat. 296 and A. I. R. 1925 Mad. 229, Appr. (*Macnair, A. J. C.*) SOBHARAM *v.* RAMPRASHAD. **117 I.C. 280 = 26 N.L.R. 44 = A.I.R. 1929 Nag. 63.**

——A Railway Company was sued for compensation for non-delivery of consignment. The trial Court dismissed the suit on a preliminary point, on the finding that there was no "wilful neglect" on the part of the Railway Company and left undecided the issue as to the question of damages. On appeal the lower appellate Court held that "wilful neglect" was proved and remanded the case.

Held, that the remand was under O. 41, R. 23 and not under S. 151. (*Addison and Bhide, JJ.*) E. I. RY. CO., CALCUTTA *v.* PIYARALAL SOHANLAL. **112 I.C. 736 = 10 Lah. 360 = 30 P.L.R. 541 = A.I.R. 1928 Lah. 774.**

——In the absence of an express indication by the lower appellate Court as to the law under which the remand had been made, it becomes necessary for the High Court to determine under what law it was made. There is no doubt that a remand is permissible under S. 151, but it has often been laid down that a recourse should be had to S. 151 only in very exceptional cases. Therefore, in the absence of an express indication to that effect it cannot be construed that every remand illegally made by the lower appellate court is one under S. 151 in the absence of an express mention of O. 41, R. 23 or R. 25. If it were so construed, the result would be that it would be impossible for the High Court to interfere, in exercise of its appellate powers, with the illegal orders of remand passed by the lower appellate Court. (*Jai Lal, J.*) MT. SAHIBJI *v.* MOHAMMAD SARWAR KHAN. **9 L.L.J. 543 = 106 I.C. 842 = 29 P.L.R. 300 = A.I.R. 1928 Lah. 116.**

——Where the trial Court tries all the issues, but the lower appellate Court frames some more and remands the case for decision thereon, the remand is not under O. 21, R. 23, but one in the exercise of the inherent power of the Court. (*Das and Adami, JJ.*) CHAUDHARY CHANDRIKA PRASAD *v.* MITHU RAI. **103 I.C. 722 = 6 Pat. 380 = A.I.R. 1927 Pat. 296.**

——An order of remand to try the case after amending the plaint is not one under O. 41, R. 23. 44 Cal. 929, Ref. (*Martineau, J.*) MAHOMED SHAH *a.* TALABHUSSAIN SHAH. **73 I.C. 915 = A.I.R. 1924 Lah. 245.**

—S. 151—Remand—Powers of Court.

——Under the Code of 1882, the powers of remand were limited and restricted by the provisions of S. 564. The section has been omitted in the Code of 1908 and it is clear that the powers of remand have been widened by the omission of that restricting section. Under S. 151 an appellate Court may remand the case not directly covered by Rr. 23 and 25, O, 41. The inherent power of the Court extends to such matters; but at the same time a Court cannot exercise its inherent power to the doing of an act which is prohibited by the Code itself. Where therefore an order of remand does nothing which is prohibited by the Code it cannot be properly described as an irregular or invalid order and finding of fact arrived at after the remand is binding in second appeal. 58 I. C. 538. Ref.; 16 Mad. 299 (P. C.), Dist. (*Johnstone and Tekchand, JJ.*) PARMANAND *v.* BASHIR AHMAD. **122 I.C. 473 = 31 P.L.R. 50 = 11 L.L.J. 507 = A.I.R. 1930 Lah. 224.**

——*Findings in order.*

The High Court can, under its inherent powers, to prevent an obvious injustice, refuse to be bound by a finding in a remand order of a Subordinate Court even though neither party can question it, not having appealed from the remand order. (*Boys and Ashworth, JJ.*) KALIKA PRASAD *v.* AJUDHIA PRASAD. **1929 A.L.J. 448 = 121 I. C. 211 = 51 All. 780 = A. I. R. 1929 All. 421.**

——The powers of the appellate Court as regards remand are not restricted to the cases specified in O .41, R. 23. The Court is entitled to make an order of remand under the provisions of S. 151. 44 Cal. 929 and A.I.R. 1922 Bom. 267, Rel. on. (*Mukherji and Roy, JJ.*) JNANENDRA MOHAN *v.* PROFULLANANDA GOSWAMI. **32 C.W.N. 101 = 106 I. C. 542 = A. I. R. 1928 Cal. 812.**

——*Reception of rejected evidence.*

The appellate Court has inherent powers apart from the provisions of O. 21, Rr. 27 and 28 to remand a case for the reception of the evidence rejected by trial Court and for final disposal by the trial Court and therefore the order of remand is not revisable. A.I.R. 1927 Mad. 335 and A. I. R. 1921 Mad. 716, Foll. (*Curgenven and Ananthakrishna Ayyar, JJ.*) VENKAMMA *v.* GOPARAJU PERRAJU. **1928 M. W. N. 164 = 112 I. C. 1 = A.I.R. 1928 Mad. 991.**

——It is not competent for a Court to remand a case under S. 151 when the case is clearly covered by another provision of the law under which a remand could be made. S. 151 only comes into operation in the absence of an express provision of the law governing the case before the Court and is to be used in exceptional cases. (*Jai Lal, J.*) NAND LAL *v.* BAIJ NATH. **95 I. C. 169 = A.I.R. 1926 Lah. 537.**

——The powers of the appellate Court as regards remand are not restricted to the case specified in O. 41, R. 23, but the Court by reason of its inherent jurisdiction vested in it by S. 151 of the C. P. Code, may remand in any case other than the case specified in O. 41, R. 23, if it be necessary for the ends of justice to do so. 44 Cal. 929 (F. B.), Foll. (*Greaves and Mukerji, JJ.*) UMESH NARAIN CHOWDHURY *v.* SECRETARY OF STATE. **87 I. C. 575 = A. I. R. 1925 Cal. 1157.**

——A Court can investigate the correctness of a remand order, though no appeal had been filed against it. (*Das and Ross, JJ.*) RAM RAI *v.* MAHESHWAR PRASAD. **78 I. C. 466 = A.I.R. 1925 Pat. 336.**

——Appellate Court has power to make an order of remand under S. 151 only when O. 41, R. 23 does not apply. (*Martineau, J.*) MOHAMED SHAH *v.* TALAB-HUSSAIN SHAH. **73 I. C. 915 = A. I. R. 1924 Lah. 245.**

——The power of remand by the Appellate Court could not be limited to the case described in O. 41, R. 23. The lower Appellate Court has the power to consider the question whether the suit was heard *ex parte* against the appellant on sufficient grounds. If the Appellate Court is minded under the circumstances of a particular case to reverse the decree of the trial Court and to remand the suit to that Court for a retrial, it has power to do so. It may be that a case may not fall within the scope of R. 23. O. 41, but the words of R. 33, O. 41, as also the provisions of S. 151, are wide enough to save the power of the Appellate Court to make an order suited to the circumstances of the case or in the interest of justice, and if necessary to remand the suit for a retrial. (*Macleod, C. J. and Shah, J.*) JETHALAL GIRDHAR *v.* VARAJLAL BHAISHANKAR. **63 I. C. 478 = 46 Bom. 184 = 23 Bom. L. R. 769 = A. I. R. 1922 Bom. 267.**

——An appellate Court has inherent powers to order a remand which can however be made only where the justice of the case demands it. (*Walmsley and Ghose, JJ.*) SASHI MUKHI DASI *v.* ABINASH CHANDRA HALDAR. **80 I.C. 172 = A.I.R. 1922 Cal 279.**

—S. 151—Remand—Revision over.

——Where both parties declared that they had no evidence to offer on the questions at issue and asked the Court to deal with the case on the admissions made by them, it was highly irregular on the part of the appellate Court to allow appellant to raise new questions and to remand the case for fresh evidence on those points and appellate Court's order of remand could be set aside in revision. (*Madhavan Nair and Thiruvenkatachariar, JJ.*) T. KAKAMMA *v.* CHANDRASEKARA SOMAYAJULU. **119 I.C. 705 = A.I.R. 1929 Mad. 205.**

——The appellate Court has inherent powers apart from the provisions of O. 21, Rr. 27 and 28 to remand a case for the reception of the evidence rejected by trial Court and for final disposal by the trial Court and therefore the order of remand is not revisable. A.I.R. 1927 Mad. 335 and A.I.R. 1921 Mad. 716 Foll. (*Curgenven and Ananthakrishna Aiyar, JJ.*) VENKAMMA *v.* GOPARAJU PERRAJU. **112 I.C. 1 = 1928 M.W.N. 164 = A.I.R. 1928 Mad. 991.**

——Assuming that the appellate Court has improperly used the inherent power under S. 151 in remanding a case, the case is not one of jurisdiction and its order cannot be interfered with in revision. (Case-law Ref. to.) (*Odgers and Curgenven, JJ.*) (BALIA) MALLAYYA *v.* (PEDDI) VEERAYYA. **25 M.L.W. 198 = 38 M.L.T 15 = 100 I.C. 135 = A. I. R. 1927 Mad. 335 = 52 M.L.J. 90.**

—S. 151—Restitution.

——It is open to the Court in the exercise of its inherent power to make an order for restitution for the purpose of doing justice between the parties concerned even in a case which may not come under S. 144. (*Mukherji and Guha, JJ.*) RAMANATH KARMAKAR *v.* SHEIKH ASANULLA. **34 C.W.N. 746.**

——*Execution sale set aside.*

Where a sale in execution of a decree is set aside under O. 21, R. 90 and the judgment debtor applies for restitution and mesne profits decree remains intact and therefore the provisions of S. 144 cannot apply. An order for restitution in such a case comes under S. 151 in the exercise of the inherent jurisdiction of the Court: 2 P.L.R. 361; 41 Mad. 467; 18 C.W.N. 1299, Rel. on: A. I. R. 1924 Pat. 800 and A. I. R. 1922 P. C. 269. Ref. (*Fazl Ali and Dhavle, JJ.*) RAM RATAN PRASAD *v.* BANARSI LAL. **122 I. C. 589 = 11 P.L.T. 156 = A.I.R. 1930 Pat. 280**

——*Conditions.*

Restitution as an equitable relief can only be granted under conditions when complete restoration to the *status quo ante* alone is possible. Further, the party who is called upon to make restitution must be in some manner or other a party claiming under the contract or transaction under which the property in respect of which the restitution is sought has passed to the other party. 9 All. 340; 35 Mad. 692 and 23 M. L. J. 652, Cons. (*Srinivasa Ayyangar and Cornish, JJ.*) VENKATARAMANI *v.* SUBRAMANIA. **108 I.C. 639 = A.I.R. 1928 Mad. 945.**

——*Order to furnish security for restitution.*

The Civil Procedure Code is not exhaustive and does not affect the previously existing powers unless it takes them away, and that, in matters with which it does not deal, the Court will exercise an inherent jurisdiction to do that justice between the parties which is warranted under the circumstances and which the necessities of case require and the High Court has inherent jurisdiction in a proper case to direct the respondents to give security for restitution although the respondents may have obtained possession of the properties without giving any security. 10 M. I. A. 196 and 33 Cal. 927, Foll; 8 W. R. 144 (F. B.), Dist. (*Das and Kalwant Sahay, JJ.*) CHHATRE KUMARI DEBI *v.* MOHAN BIKRAM SHAH. **109 I. C. 323 = 9 P. L. T. 87 = A. I. R. 1928 Pat. 187.**

——*Conditions.*

Apart from the mandatory nature of S. 144, S. 151 gives power to order restitution. 43 Bom. 235, Dist.

There is no legal warrant for the view that if complete restitution all round of the positions occupied by all parties cannot be effected, then no order should be passed under S. 151 ordering restitution "so far as may be," such as would have of necessity to be passed were the case governed by S. 144. (*Coldstream, J.*) GUJAR MAL *v.* NARAIN SINGH. **96 I. C. 804 = A. I. R. 1926 Lah. 685.**

——There is inherent power in Courts under S. 151 to apply the principle of S. 144 even in cases which do do not strictly come within the terms of that section and to order such restitution as may become necessary as the result of their orders. (*Jackson, J.*) SUDALAI MUTHU PILLAI *v.* SUDALAI MUTHU PILLAI. **83 I. C. 138 = A. I. R. 1925 Mad. 365.**

——Jurisdiction as to restitution does not arise merely under Section 144. It is inherent in the general jurisdiction of the court to act rightly and fairly, according to the circumstances, towards all parties concerned. A. I. R. 1922 P. C. 269; A. I. R. 1923 All. 394 (F.B.), Foll. (*Mukerji and Dalal, JJ.*) TARA CHAND *v.* MT. CHAMPA. **84 I.C. 75 = 46 All. 767 = 22 A.L.J. 673 = 5 L. R. A. Civ. 659 = A. I. R. 1924 All. 718.**

——The power of a Court to grant restitution is not confined to cases covered by the provisions of S. 144 but under that section read with S. 151, may be extended to other cases. (*Campbell, J.*) GANGA RAM *v.* NATHA RAM. **75 I. C. 858 = A. I. R. 1924 Lah. 583.**

——*Case not covered by express terms of section—Court has inherent powers to cause restitution.*

A decree-holder purchased property in execution sale. Subsequently, by a private settlement which received the sanction of the Court, it was agreed that the sale should not be confirmed, if by a certain fixed date the judgment-debtors paid Rs. 1,313 to the decree-holder. One of the judgment-debtors paid two instalments of Rs. 317 and 230 respectively within the time allowed and the rest was not paid. Hence the sale was confirmed in full satisfaction of the judgment debt. But the fact that the decree-holder still held in hands the two sums of Rs. 317 and 230 paid to him by the judgment-debtors was overlooked by that Court when the order for confirmation of the sale was made. Therefore the judgment-debtors made the present application for restitution of the two sums mentioned.

Held, that the judgment-debtors were entitled to refund of the amount claimed, that their remedy does not lie by way of a regular Civil Suit, that this case was not covered by the express terms of S. 144 of the Code but that it was competent to the execution Court, in the exercise of its inherent powers under S. 151, to make an order for restitution with a view to secure complete justice between the parties concerned 31 All. 551; 35 Mad. 607; A. I. R. 1915 P. C. 92, Foll. (*Mookerjee and Panton, JJ.*) RAI CHARAN BHUIYA *v.* DEBI PRASAD BHAKAT. **64 I. C. 864 = 26 C. W. N. 408 = 35 C. L. J. 53 = A. I. R. 1922 Cal. 28.**

——*Execution sale set aside.*

After the auction-purchaser was put into possession of the property sold in the execution, the sale was set aside in appeal. The High Court confirmed the order of restitution of the Appellate Court wherefor the judgment-debtor applied for restitution of possession under S.151, C. P. Code. (*Kotval, A. J. C.*) SHRIKISAN *v.* SUNDARBAI. **64 I. C. 732 = 18 N. L. R. 24 = A. I. R. 1922 Nag. 82.**

——Under S. 151 Court can apply the principle of S. 144 to cases to which it would not ordinarily apply and can order restitution as may be necessary. (*Leslie Jones and Broadway, JJ.*) ALLAH DIN *v.* CHIRAGH DIN. **63 I.C. 43 (Lah.).**

S. 151—Restoration.

Dismissal for default.

Ex parte decision.

When can be made.

—S. 151—Restoration—Dismissal for default.

——*Bar of fresh suit.*

But where the petitioner will not be able to bring a fresh suit in consequence of the period of limitation for such a suit having expired, and when the evidence shows the petitioner was precluded from attending the Court on account of justifying circumstances, the Court can interfere under S. 151 and can direct that the suit should be restored. (*Tapp, J.*) NANAK CHAND-RAM LAL *v.* AHMAD DIN. **A. I. R. 1930 Lah. 440.**

——*Bar of fresh application.*

S. 151 enables a Court to make such orders as may be necessary for the ends of justice and to prevent the abuse of the process of the Court. It would not be proper for a Court to restore an application for execution dismissed for default on the ground that limitation would bar a fresh application. When the law lays down certain procedure for parties who are affected by any order, the mere fact that the law of limitation steps in and prevents the party from claiming relief under the procedure is not sufficient justification for the Court to grant a relief under S. 151. 2 Lah. 66, Diss. from. (*Devadoss and Waller, JJ.*) NARAYANA CHETTIAR *v.* MUTHU CHETTIAR. **97 I. C. 1008 = 50 Mad. 67 = 1926 M. W. N. 890 = 26 M. L. W. 878 = A. I. R. 1926 Mad. 980 = 51 M. L. J. 219.**

——*Execution Application.*

The Court has inherent powers under S. 151 to restore to the file the application for execution dismissed for default. A. I. R. 1922 Nag. 267, Foll. (*Subhedar, A. J. C.*) RAMPRASAD *v.* KODU. **120 I. C. 405 = A. I. R. 1930 Nag. 134.**

——S. 151, C. P. Code does authorise an executing Court to restore an application for execution after it has been dismissed for default and this should be done notwithstanding that the applicant has an alternative remedy by making a second application for execution, if he satisfies the Court that it should exercise its inherent jurisdiction *debito iustities*. (*Addison, J.*) CO-OPERATIVE SOCIETY, BHAL SAYADAN *v.* AHMAD KHAN.
117 I. C. 372 (Lah.)

———Under S. 151 the Court has inherent power to restore an application for execution which has been dismissed for default, if it is necessary in the interest of justice and such an order is non-appealable. A. I. R. 1923 Cal. 450; A. I. R. 1921 Lah. 67 and A. I. R. 1926 Lah. 534, Foll. (*Addison, J.*) CO-OPERATIVE SOCIETY BHAL SAYADAN *v.* AHMAD KHAN.
117 I. C. 372 (Lah.)

———*Scope—Application for execution dismissed in default—Decree-holder trying to get the application restored on the ground that the agent's absence was unavoidable—Second application barred at the time—Application was rightly restored under S.* 151.

An application for execution had continued for a long time. Steps had been taken and the matter was approaching completion. However, the decree-holder's agent was unavoidably prevented from appearance on one day; and the application was dismissed. The decree-holder tried to have the application restored on the ground that the agent had been prevented unavoidably by sickness from presence on the day before Court applied the provisions of S. 151 and restored the application as a fresh application was not in time.

Held, that the application of S. 151 was right. A. I. R. 1924 All. 446, Rel. on: A. I. R. 1921 Lah. 67, Ref. (*Stuart, C. J.*) JOGAT SINGHA *v.* RAJPAL KOER.
5 O. W. N. 895 = 114 I. C. 128 =
A. I. R. 1928 Oudh 478.

———An application for execution dismissed for default cannot be restored under the inherent powers under S. 151. (*Odgers and Jackson, JJ.*) RAMARAGHAVAREDDI *v.* RAJA OF VENKATAGIRI.
25 M. L. W. 192 = 99 I. C. 954 =
A. I. R. 1927 Mad. 355 = 52 M. L. J. 123.

———The Court has, in the exercise of its inherent powers expressly recognized by S. 151, right to restore an application for execution which has been dismissed for default and should do so if the Court is satisfied that it should exercise its inherent jurisdiction *ex debito justitae*. (*Addison, J.*) ATTAR SINGH *v.* BURSINGH.
95 I. C. 924 = A. I. R. 1926 Lah. 534.

———Where an application for restoration of an execution case wrongly dismissed for default was headed as an application under O. 47, R. 1 and also under S. 151.

Held, the application was really one under S. 151. (*Suhrawardy, J.*) SARADINDU MUKERJI *v.* GANESH CHANDRA TEWARI.
78 I. C. 816 =
A. I. R. 1925 Cal. 184.

———A Court can under S. 151 restore an application for execution after it has been dismissed for default, and should do so if the applicant satisfies the Court that it should exercise its inherent jurisdiction for the ends of justice and no notice is necessary to the opposite party before setting aside the dismissal. (2 Lah. 66, Foll.) (*Scott-Smith, J.*) ABDUL KARIM *v.* RAM SINGH.
69 I. C. 506 = A. I. R. 1924 Lah. 350.

———The Court has an inherent power to set aside a dismissal of an application for execution for default if the ends of justice render it necessary to do so. The mere circumstance that an alternative remedy may be open to the decree-holder should not prevent the Court from exercising its inherent jurisdiction if the circumstances of the case require its exercise. 35 A. 331 (P. C.), Ref. (*Shadi Lal, C. J. and Wilberforce, J.*) BHOLU *v.* RAM LAL.
60 I. C. 720 = 2 Lah. 66 =
64 P. L. R. 1921 = A. I. R. 1921 Lah. 67.

———*Jurisdiction.*

The Court has inherent power to restore a case dismissed for default if it is satisfied that the case is one in which it should exercise that power. 44 Bom. 82 and 34 All. 426, Foll. (*Heald and Chari, JJ.*) ABDUL KARIM *v.* AI HNOOR.
99 I. C. 151 =
5 Bur. L. J. 139 = A. I. R. 1927 Rang. 58

———*Jurisdiction.*

Where a Court, in the exercise of its inherent power under S. 151, C. P. Code, restores a suit which has been dismissed for default, although it finds on the facts that it cannot be restored under O. 9, R. 9 it does not act without jurisdiction under S. 115 of the Code (*Newbould and Cuming, JJ.*) RAMESHWAR MARWARI *v.* HARMUKH MARWARI.
63 I. C. 440 (Cal.).

———*Mistake of Court.*

A Court has an inherent jurisdiction to restore a case which has been dismissed in default through the mistake of the Court itself. (*Dalip Singh, J.*) KALU RAM *v.* GHAZITARAM.
108 I. C. 603 =
A. I. R. 1928 Lah. 534.

—S. 151—Restoration—Dismissal for default—Remedy.

When once it is conceded that the Court, even without any express provision of law to that effect, is competent to dismiss an application for execution for default, the power to restore that application must also exist, though not expressly conferred. Thus an inherent power to restore must co-exist with the power to dismiss and where either has not been specifically conferred it must be presumed to exist by virtue of the principle enunciated in S. 151, C. P. Code. (*Zafar Ali, J.*) HARI SINGH *v.* BULAQI MAL.
119 I. C. 494 =
11 Lah. 93 = 31 P. L. R. 375 =
A. I. R. 1930 Lah. 20.

———A suit was dismissed for the default. The Court found that there was no sufficient cause for non-appearance of plaintiff. But Court restored the suit to file in exercise of the inherent power of the Court under S. 151.

Held, that the case was a proper one for revision as the question was whether the Court has jurisdiction to make the order. A.I.R. 1920 Bom. 198, Dist. (*Jackson, A. J. C.*) ATMARAM SAO *v.* RAMBHAROS.
121 I. C. 659 = 26 N. L. R. 30 =
A. I. R. 1930 Nag. 48.

———A suit *in forma pauperis* was dismissed for default. The plaintiff applied under O. 9, R. 9 for restoration of the case. He however, did not appear when the application was taken up for hearing and the application was hence dismissed. The plaintiff then applied under S. 151 for restoration of the application. The Judge holding S. 151 inapplicable dismissed the application.

Held, that the Judge was wrong in his view. A.I.R. 1924 All. 446, Dist.: A. I. R. 1927 Cal. 534, Foll.

Held further, that in view of the fact that the Judge declined to deal with the merits of the case upon an erroneous view of S. 151, it cannot be gainsaid that the error was an error apparent on the face of the record. (*Mukerji and Jack, JJ.*) SOURENDRA NATH *v.* JATINDRA NATH
115 I. C. 357 =

C. P. CODE, (1908), S. 151—Restoration—Dismissal for default—Restoration application.

32 C. W. N. 811=A. I. R. 1929 Cal. 17.

—S. 151—Restoration—Dismissal for default——Restoration application.

——Where an application to set aside an *ex parte* decree is dismissed for a default, a fresh application is not the only remedy left open. An application for the restoration of such application can be made. The question for consideration is whether there was good cause for his non-appearance when the application was dismissed. Although O. 9 does not apply to such an application for restoration, the case falls under inherent jurisdiction of the Court as laid down in S. 151. A. I. R. 1925 All. 773, Rel. on. (*Sulaiman and Niamatullah, JJ.*) RAM CHANDER *v.* TEJ SINGH.

120 I. C. 559=A. I. R.1929 All. 906.

—S. 151—Restoration—Dismissal for default.

——Where an application for setting aside dismissal of a suit for default was itself dismissed for default and a subsequent application was made to restore it :

Held : per *Daniels, J.*—That O. 9 read with S. 141, applied to the case, and that if there was no other remedy left to the applicant, S. 151 applied.

Per *Sulaiman, J.*—That though it could not be said that the case came under O. 9 read with S. 141, S. 151 applied and the Court could entertain the application under its inherent jurisdiction. (*Sulaiman and Daniels, JJ.*) GANESH PRASAD *v.* BHAGELU RAM.

89 I. C. 350=23 A. L. J. 817=
6 L. R. A. Civ. 412=47 All. 878=
A. I. R. 1925 All. 773.

—S. 151—Restoration —Dismissal for default—Suits.

——There is an inherent power in the court to restore suits dismissed for default. (*Fazl Ali, J.*) BHUNESHWARI KUER *v.* JAGOO SINGH. 122 I. C. 585.

——*Suit.*

If suit is dismissed for default and if no sufficient cause for non-appearance is shown, the Court has no power to restore the suit to file in exercise of the inherent power under S. 151. 34 All. 426 and 44 Bom. 82, not Foll. ; A. I. R. 1925 All. 610 (F. B.) ; A. I. R. 1922 Pat. 479 ; A. I. R. 1925 Nag. 356 and A. I. R. 1927 Cal. 920, Rel. on. ; A. I. R. 1928 P. C. 137, Expl. and Rel. on ; A. I. R. 1926 Nag. 409, Ref. (*Jackson, A. J. C.*) ATMARAMSAO *v.* RAMBHAROS.

121 I. C. 659=26 N. L. R. 30=
A. I. R. 1930 Nag. 48.

——If a suit dismissed under O. 9, R. 3, cannot be restored under R. 4 for want of sufficient cause for non-appearance, recourse cannot be had to S. 151 to restore the same. (*Ross, J.*) RAM MANDAR *v.* MAHDOO LAL CHOWDHRY. 103 I. C. 620=
9 P. L. T. 136=A. I. R. 1927 Pat. 369.

——The Court has inherent power to restore a suit dismissed for default under S. 151. Nag. Misc. App. 19 of 1908, Rel. on. (*Prideaux, A. J. C.*) WASUDEO *v.* INAYAT HUSSAIN. 95 I. C. 260=
9 N. L. J. 145=A. I. R. 1926 Nag. 409.

——Per *Rupchand, A. J. C.*—Apart from the obligatory duty imposed on the Court to afford relief to a party at fault as provided by O. 9, Rr. 9 and 13 it is open to the Court to afford relief to the party at fault where the cause shown is not sufficient, but just and proper and for that purpose the Court may take into consideration the nature of the claim in suit and the loss likely to result to the absenting party if the *ex parte* order of dismissal of the suit or the *ex parte* decree is not set aside. 26 Mad. 599, Rel. on : 45 Bom. 648, Appr. ; 35 All. 331 (P.C.) Ref. ; 43 Mad. 94, Not Foll.

C. P. CODE, (1908), S. 151—Restoration—Exparte decision.

The merits of demerits of the claim in suit or the extent of the risk involved cannot by themselves be taken into consideration or afford a good ground for vacating an *ex parte* order of dismissal of a suit or an *ex parte* decree under S. 151. (*Kincaid, J.C. and Rupchand Bilaram, A. J. C.*) GHUMAN MAL KHATOOMAL *v.* SECRETARY OF STATE.

95 I. C. 533=20 S.L.R. 266=A.I.R 1926 Sind 249.

—S 151—Restoration—Dismissal for default—When can be made.

——*Rejection of Plaint under O. 7, R 11, C. P. Code.*

Where the District Munsif passed an order rejecting the plaint under O. 7,R. 11, C.P. Code, and on a subsequent application to his successor-in-office the order was set aside and the plaint was ordered to be admitted as a suit, *held*, in revision, that the lower Court has no jurisdiction under S. 151, C. P. Code, to pass the said order, that it could not be viewed as a review of the prior order and that the same should be set aside. (*Phillips, J.*) SREERAMULU *v.* RAMIREDDY.

1929 M. W. N. 140.

—S. 151—Restoration— Dismissal for default—Wrong order.

——Where the Court wrongly dismisses a suit under O. 9, R. 8, there being no default in appearance, according to O. 17, R. 2 (as amended by Allahabad High Court,) the party being represented by a junior pleader, the Court has jurisdiction under S. 151 to restore the case if it thinks that such restoration is necessary for ends of justice. (*Sulaiman and Niamatullah, JJ.*) BHAGWAN PRASAD *v.* MADAN MURARI.

119 I. C. 15=1929 A. L. J. 1183=
A. I. R. 1929 All. 811.

—S. 151—Restoration—Exparte decision.

——*No sufficient cause.*

An application under O. 9, R. 13, was made for restoration of a suit which had been decreed *ex parte*. The Munsiff held that no sufficient cause had been shown for the non-appearance of the applicant but restored the suit on certain terms purporting to act under O. 9, R. 13 and notwithstanding the failure of the applicant to bring himself within the conditions precedent to the making of an order under O. 9, R. 13.

Held, that the Munsiff in making the order in that form under the circumstances was acting without jurisdiction and it would not have been open to him to apply the provisions of S. 151 where there was a specific provision in the Code applicable to the case in hand. (*Page and Patterson, JJ.*) HARIDAS MUKHERJEE *v.* BIJAY KRISHNA DAS.

34 C. W. N. 222=
A. I. R. 1930 Cal. 387.

——A person applied under O. 21, R. 100, in connexion with an execution case and the decree-holder not having appeared, the latter's claim prayed for in the application was allowed. Decree-holder filed an application under O. 9, R. 13, for setting aside the aforesaid ex-parte order and for the rehearing of the claim case, O. 9, not being applicable to application arising out of execution proceedings, the trial Court thinking that in obtaining the ex-parte order the claimants had not put the whole case before the Court, ordered the claim case to be restored under S. 151 to file.

Held, that the trial Court was right in exercising its powers under S. 151 in restoring the claim case. A.I.R. 1927 Cal. 534, Foll. (*M. N. Mukerji, J.*) NABU SAHU *v.* KAMDEV MAITY. 107 I. C. 729=
47 C. L. J. 87=A. I. R. 1928 Cal. 179.

——*Abuse of rules of procedure.*

A landlord filed a suit against an occupancy tenant for rent due from him and the plaint described the tenant as minor and asked for the appointment of his grandmother as his guardian for the suit and notices were duly served, but there was no appearance for the defendant and the Court passed an ex-parte decree without having appointed any guardian for the defendant, whereupon the minor filed a civil suit claiming a declaration that the rent decree passed against him was void because he was still a minor and had not been represented in the suit at all. A decree to that effect was passed and an appeal against it failed. After this, two more suits were instituted by the landlord in which also the tenant did not appear and so ex parte decisions against him were passed. The minor again filed suits against these decrees which also were declared void like the previous one. The landlord, subsequently, on the tenant's attaining majority, filed an application to have his three rent suits restored to the file and treated as still pending, under S. 151, C.P. Code.

Held, that as the rent claimed in all three cases was really due to the landlord, it is at least certain that he had a right to have that question examined when he filed his suits, and as the tenant himself or his guardian intentionally refrained from appearing in all the rent-suits for no purpose but that of allowing decrees to be passed on them which could be set aside on the ground of minority after the claims were time barred, they took an undue advantage by the use of the rules of procedure, however correct that use may be, that is to say, it is an abuse of them, and so the only way of preventing that abuse is by ordering that the three rent-suits shall be restored to the file and treated as pending cases, instituted on the dates on which the plaints were originally presented, and shall be tried out from the beginning. (*Hallifax, A. J. C.*) SHRIBALABH *v.* GULAB MALI.
106 I. C. 575 = A. I. R. 1928 Nag. 106.

—S. 151—Restoration—When can be made.

———*Minor—Not properly represented.*

Subsequent to the discovery that the minor has not been properly represented by a duly appointed guardian it is open to the Court in the exercise of its inherent power under S. 151 to restore the case to its original number on the file and proceed with it after duly appointing a guardian. (*Sulaiman and King, JJ.*) TALIB ALI SHAH *v.* PIAREY LAL.
1930 A. L. J. 938 = A. I. R. 1930 All. 644.

———If no case is made out to satisfy R. 13, O. 9, it is not open to the Court to enlarge the rule by taking recourse to S. 151. The rule deals not with a person who has no excuse for not being present or who, as a reason for not having all his witnesses, asks for an adjournment for the purpose of calling further evidence and is refused. That is not the subject-matter of the rule at all. Where, therefore, an *ex parte* decree is set aside in such a case by the Court on an application under O. 9, R. 13, the Court also invoking the inherent jurisdiction under S. 151 it is an instance of decree being set aside irregularly. The Court purports to exercise powers which it does not possess and the order is liable to be set aside. (*Rankin, C. J. and C. C. Ghose, J.*) K. B. DUTT *v.* SHAMSUDDIN SHAH.
34 C. W. N. 419 = A. I. R. 1930 Cal. 488.

———The Court can only set aside the dismissal of a suit for default when good cause is shown under O. 9, R. 9. It cannot in virtue of its inherent power pass order restoring such suit if no good cause is shown for non-appearance. 43 Mad. 94, Rel. on. (*Heald and Mya, JJ.*) TUN AUNG GYAW *v.* BURMA OIL CO., LTD.
A. I. R. 1930 Rang. 65.

———The Court has jurisdiction to entertain an application made by the judgment-debtor for the restoration of his previous application made for setting aside the sale, and if the Court passes an order of restoration on being satisfied that there was a good ground for the default in appearance made by the judgment-debtor on the day when his previous application came up for hearing the High Court will not interfere in revision on the merits. (*Mukerji and Niamatullah, JJ.*) YUDHISHTER LAL *v.* FATEH SINGH. **119 I. C. 851 = 51 All. 901 = 1929 A. L. J. 1079 = A. I. R. 1929 All. 721.**

———The Court can under S. 151 restore an application made for the restoration of the suit. A. I. R. 1925 All. 773, Rel. on. A. I. R. 1924 All. 503 Ref. (*Mukerji and Young, JJ.*) HURBANS SINGH *v.* SURESH DUTTA. **118 I. C. 669 = 1929 A. L. J. 1082 = A. I. R. 1929 All. 624.**

———A Court invoking the aid of the provisions of S. 151 for the purpose of restoring a suit which had been dismissed is exercising a jurisdiction not vested in it by law. (*C. C. Ghose and Buckland, JJ.*) UMESH CHANDRA *v.* AMAR NATH. **114 I. C. 672 = 48 C. L. J. 596 = A. I. R. 1929 Cal. 158.**

———S. 141, C. P. Code does not make O. 9 applicable to proceedings under O. 9. When an application under O. 9, R. 9, for restoration of the suit is dismissed for default under R. 4 of that order, no application lies under O. 9, R. 9, for setting aside that order of dismissal and for restoration and re-hearing of the former application under O. 9, R. 9, but the second application may be treated as an application to restore the suit itself and not to restore the first application, and if it is within time, there can be no bar to its being dealt with an application under O. 9, R. 9, C.P. Code If it is not within time, S. 151 may be invoked in proper cases to restore the suit. A.I.R. 1924 All. 503, Foll. 44 Cal. 950, Diss. from 17 All. 106 (P.C.). Rel. on. (*Mukerji and Graham, JJ.*) SARAT KRISHNA BOSE *v.* BISWESWAR MITRA. **103 I. C. 69 = 54 Cal. 405 = 31 C. W. N. 576 = A. I. R. 1927 Cal. 534.**

———*Absence of sufficient cause.*

Suits or appeals dismissed for default under O. 9, R. 8, or O. 41, R. 17, can only be restored if sufficient cause is shown and the Courts, in the absence of such sufficient cause being shown are precluded from invoking in aid their inherent powers under S. 151. (*Agha Haider, J.*) KHUSHI MAHOMED *v.* MT. BARKAT BIBI. **103 I. C. 425 = 28 P. L. R. 554 = A. I. R. 1927 Lah. 622.**

———*Court-fee not paid.*

Application of the decree-holder for ascertainment of mesne profits was dismissed on account of non-payment of Court-fee can be restored under S. 151, C. P. Code but not by way of review: 35 All. 331 (P. C.) Foll. (*Dawson Miller, C.J. Mullick, Jwala Prasad, Das and Foster, JJ.*) RAM GOLAM SAHU *v.* CHINTAMAN SINGH. **93 I. C. 939 = 1926 P. H. C. C. 49 = 7 P. L. T. 313 = 5 Pat. 361 = A. I. R. 1926 Pat. 218 (F. B.).**

———*Laches of advocate—Mistake of clerk.*

The laches of an advocate or the careless mistake of his clerk is not sufficient cause for restoration of an appeal dismissed for fault nor is it good ground for the exercise of inherent power by the Court. (*Pratt, J.*) MAUNG THAN *v.* ZAINAT BIBI. **92 I. C. 208 = 3 Rang. 488 = A. I. R. 1926 Rang. 50.**

———*Deceit of Vakil's clerk.*

The deficit court-fee demanded by the Court was paid by the plaintiff to the pleader who handed it to his clerk to put it in Court. The clerk misappropriated the money and filed bogus applications for time to pay the deficit Court-fee with the result that the Court, being tired of such applications, ultimately rejected the plaint. The plaintiff coming to know of the result of the suit and the deceitful conduct of the clerk filed an application in Court for revocation of the order rejecting the plaint and for restoration of the suit to its original file.

Held that the suit must be restored to file. After having paid the money to a duly constituted agent and an officer of the Court under the Legal Practitioners Act and the rules of the High Court, whose duty it was to deposit it in Court, the responsibility of the plaintiff ceased until he was informed of the default made by the pleader or his clerk. (*Jwala Prasad and Kulwant Sahay, JJ.*) ADIT PRASAD *v.* RAMHARAKH AHIR. **91 I.C. 213 = 4 Pat. 180 = 1925 P. H. C. C. 147 = A. I. R. 1925 Pat. 435.**

——*Restoration application dismissed for default.*

There is no rule in the Code that enables the Court to restore an application made under Order 9, Rule 9 which has been dismissed for want of prosecution. Even S. 151 does not apply in such a case. (*Macleod, C. J. and Crump, J.*) D. B. MANKE *v.* B. WALWEKAR, SECRETARY, SEW SPORTS. **80 I.C. 182 = A. I. R. 1923 Bom. 386.**

——*Dismissal under O. 7. R. 11 of the C. P. Code.*

There is no power in the Court to restore the suit under S. 151 of the Code where the suit is rejected under O. 7, R. 11 (*c*). Once an order of the Court is perfected, there is absolutely no power in that Court under its inherent jurisdiction either to alter or add to that order, save as provided by S. 152 or on review. (*Das and Kulwant Sahay, JJ.*) RAMESHWARDHARI SINGH *v.* SADHU SARAN. **72 I. C. 629 = 4 P. L. T. 261 = 2 Pat. 504 = A.I.R. 1923 Pat. 354.**

——*No delay.*

S. 151 not only authorises but also compels the Court to cancel an order of dismissal for default if restoration is applied for immediately after dismissal. (*Hallifax, A. J. C.*) HAR LAL *v.* NARAYAN. **64 I. C. 420 = 18 N. L. R. 152 = 4 N. L. J. 118 = A. I. R. 1922 Nag. 267.**

—S. 151—Retrial.

——*Non-compliance with techincal rules.*

Non-compliance with R. 3. Ch. 7 of the Allahabad High Court Rules, which requires that, when a written judgment is pronounced by one of the Judges it has to be signed by both Judges, is merely an irregularity which does not affect the merits and S. 151, C.P. Code cannot be invoked to ask to re-hear the case merely on account of such technical irregularity. (*Banerji and Kendall, JJ.*) BANARSI DAS *v.* SAGAR MAL. **116 I. C. 23 = 1929 A.L.J. 713 = A. I. R. 1929 All. 403.**

——*Bad trial of suit.*

Where the trial of suit was badly conducted by all concerned from commencement, in that matters not pleaded were put in issue and decision was given by appellate Court on points not contained in grounds of appeal.

Held, that a trial *de novo* should be ordered. (*Harrison and Jailal, JJ.*) BAHAL SINGH *v.* SURAIN SINGH. **103 I. C. 854 = 9 L. L. J. 268 = 28 P. L. R. 679 = A. I. R. 1927 Lah. 480.**

——*Commissioner re opening inquiry.*

The Commissioner has no power to " review " under S. 151 or O. 47, r. 1. But he is not bound to record his finding on each item objected to before proceeding to the next one. Nor is his finding on any of the objections final. He may on proper grounds re-open the inquiry into any of them. Until his report is made he decides nothing final or conclusive. But he must have proper grounds for re-opening enquiry into any item, grounds similar to the provisions of O. 47, r. 1, that rule being the best guide in a matter of this kind. If he re-opens the inquiry on grounds which are not proper the party aggrieved can object only by means of exceptions to his report. He cannot take out summons at an interlocutory stage. (*Mulla, J.*) J. P. FERNANDEZ *v.* P. D. RODRIGUES. **47 Bom. 593 = 25 Bom. L. R. 280 = 82 I. C. 593 = A. I. R. 1924 Bom. 231.**

——*Decision in ignorance of party's death.*

Where one of the respondents had died during the pendency of an appeal but the fact was known to none and the appeal was heard and disposed of ;

Held, that the appellate decree was not a nullity ; the appeal was ordered to be re-heard with due consideration as to the death of the party-respondent. (*Mookerjee and Chotzner, JJ.*) ABDUL AZIZ AND OTHERS *v.* LAKHMI CHANDRA MUJUMDAR. **74 I.C. 545 = 37 C. L. J. 494 = A. I. R. 1923 Cal. 676.**

——*No Proper trial.*

Where in second appeal it was found that the lower Court had entirely misunderstood the defence and there was no proper trial at all and no proper decision on the merits.

Held, that under Section 151 the proceedings after the filing of the pleadings must be considered null and void and a re-trial must be held. (*Lindsay and Stuart, JJ.*) RAMCHHOR DAS *v.* HAR KISHAN DAS. **63 I. C. 501 = 19 A. L. J. 553 = A.I.R. 1921 All. 335.**

——An appellate Court has the power to order a re-trial and this power is to be adopted in exceptional circumstances where the Code does not provide adequate procedure. (*Buckland, J.*) RADHA KANTA *v.* PRAKASH CHANDRA. **64 I.C. 599 (Cal.).**

—S. 151—Review.

——*Interlocutory orders.*

An interlocutory order made in chambers can be reviewed by the Court under S. 151, and ought to be reviewed if the ends of justice require it, even though the application for such a purpose does not expressly fall within the language of O. 47. (*Rangnekar, J.*) YUSUF I. A. LALJI *v.* ABDULLABHOY LALJI. **32 Bom. L. R. 665 = A. I. R. 1930 Bom. 294.**

——*Limits.*

A Court cannot set aside in review its order passed without taking into consideration certain provision of law because to do so would amount to set aside an order passed on a misconception of law, which is not competent. (*Mitter, J.*) SASHI DULAL *v.* NANDA LAL. **48 C. L. J. 594 = 115 I. C. 268 = A. I. R. 1929 Cal. 162.**

——*Statutory prohibition.*

It would be a patent misapplication by the Court of S. 151 of the Code, if the Court in the exercise of its inherent power assumes jurisdiction by way of review where it is expressly forbidden by the legislature to entertain such application. 45 Cal. 519, Foll. (*Mitter, J.*) SUDANANDA MORAL *v.* RAKHAL SANG. **31 C. W. N. 822 = 104 I.C. 136 = A. I.R. 1927 Cal. 920.**

——*Order under O. 11, R. 21, C. P. Code.*

Where plaintiff's suit has been dismissed under O. 11, R. 21, the Court has no power to review its order under S. 151, the order being appealable. (*Cuming and Page, JJ.*) ASUTOSH GHOSH *v.* INDU BHUSAN GHOSE. **98 I. C. 70 = A. I. R. 1927 Cal. 158.**

——*Limits.*

The Court does not have an inherent jurisdiction under S. 151 to review its decree where it was perfectly a good one on the date when it was passed. (*Sulaiman and Boys, JJ.*) NATHULAL *v.* RAGHUBIR SINGH.

48 All. 160 = 6 L. R A. Civ. 569 = 23 A.L. J. 1029 = 89 I. C. 946 = A. I. R. 1926 All. 50.

———*Existence of other remedy.*

Court can admit in the exercise of inherent power an application for review though the proper remedy would have been to apply to have the judgment set aside as having been passed *ex parte*. (*Duckworth, J.*) MAUNG SAN TIN *v.* MA PHET PU. **85 I. C. 284 = 2 Rang. 659 = A. I. R. 1925 Rang. 192.**

———Where the power under O. 47, r. 1 is granted by the Code itself it is not necessary to invoke the inherent powers of the Court under S. 151, C. P. Code. The powers exercisable under these respective provisions are not mutually exclusive. (*Mukerji, J.*) PROBHAS KUMAR GANGULI *v.* NITHAR LAL GANGULI.

84 I. C. 278 = 28 C W. N. 928 = A. I. R. 1924 Cal. 1054.

———*Scope of.*

Apart from O, 47, r, 1 the Court has inherent power under the new S. 151 of the Civil Procedure Code of 1908 to make such orders as may be necessary for the ends of justice and thus to review its wrong orders or decisions passed previously (20 All. 11 Foll.) (*Jwala Prasad and Foster, JJ.*) MANI LAL AND OTHERS *v.* DURGA PRASAD AND OTHERS.

80 I. C. 667 = 5 P. L. T. 425 = 1924 P. H. C.C. 254 = 3 Pat. 930 = A. I. R. 1924 Pat. 673.

—S. 151—Scope of.

See also C. P. CODE, S. 151—LIMITS OF.

———S. 151 saves the inherent powers of Courts to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Court. But the inherent jurisdiction must be exercised subject to the rule that if the Code contains specific provisions which would meet the necessities of the case in question such provisions should be followed. (*Johnstone, J.*) MAHBOOB BEGUM *v.* GHULAM MAHOMED.

119 I. C. 488 = A. I. R. 1929 Lah. 694.

———Section 151 cannot be resorted to where there is another remedy open. (*Bhide, J.*) HARI BAKHSH *v.* BABULAH. **112 I. C. 295 = A. I. R. 1928 Lah. 772.**

———S. 151, C. P. Code, cannot be invoked to help a party who has a remedy provided by law and who has failed to take advantage of that remedy within the period of limitation prescribed. A. I. R. 1922 Pat. 479, Foll. (*Prideaux, A.J.C.*) SABA *v.* DAYARAM.

23 N. L. R. 183 = 107 I. C. 193 = A. I. R. 1928 Nag. 91.

———In proper cases to prevent gross abuse of the powers of the Court S. 151 may be invoked. (*Ramesam and Madhavan Nair, JJ.*) PETHAPERUMAL CHETTIAR *v.* CHIDAMBARAM CHETTIAR.

38 M. L. T. 364 = 1927 M. W. N. 259 = 102 I. C. 396 = A. I. R. 1927 Mad. 592 = 52 M. L. J. 670.

———It is difficult to see how S. 151 can give power to a Court to pass an order in respect of a suit which is not pending before it. A Court which tries a subsequent suit cannot pass an order with reference to a previous suit. (*Devadoss, J.*) VIRAJU *v.* BANGARAJU.

91 I. C. 519 = A. I. R. 1926 Mad. 631.

———*Final decree—Omission of mesne profits—Cannot be granted under S.* 151.

The final decree in a partition suit had omitted to give relief as to mesne profits though it had been allowed in the preliminary decree. No appeal was filed and an application for review was dismissed. Subsequently an application was put in under S. 151 of the C. P. Code asking for further final decree for mesne profits awarded in the preliminary decree.

Held, that in as much as no appeal was filed and the application for review of the final decree had been dismissed, there was no authority and no sufficient ground for invoking the inherent jurisdiction of the Court. (*Phillips, J.*) VEERAPPA GOUNDAN *v.* VEERAPPA GOUNDAN.

88 I. C. 94 = A. I. R. 1925 Mad. 886 = 48 M. L. J. 512.

———S. 151 would not enable the Court to act against any of the express provisions of the Code or the rules but where there is no express provision which prohibits a course or where it does not violate any of the rules there seems to be no reason why S. 151 should not be resorted to in order that the Court may do what in its opinion is fair and equitable. 33 C. 927, Ref. to (case-law discussed). (*Kumaraswami Sastri, J.*) SOORYAPRAKASAM *v.* MUNISWAMI CHETTI.

84 I. C. 134 = 48 Mad. 494 = 20 M. L. W. 175 = A. I. R. 1925 Mad. 42.

———Under S. 151 of the C. P. Code the Courts are given very wide powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. (*Daniels J. C.*) SURAJ BAKSH SING *v.* BANS BAHADUR. **187 I. C. 987 = 12 O. L. J. 246 = 2 O. W. N. 218 = A. I. R. 1925 Oudh 418.**

———*Setting aside sale for violation of an order.*

If the Judge decides to set aside the sale not on the ground of material irregularity occasioning substantial injury, but merely on the ground that an order has been violated, he cannot be said to be acting under O. 21, R. 90. He must be acting under his inherent powers. (*Jackson, J.*) AKSHIA PILLAI *v.* GOVINDARAJULU CHETTI. **84 I C. 975 = 1924 M. W. N. 842 = A. I. R. 1924 Mad. 778 = 47 M. L. J. 549.**

———S. 151 merely mentions, as already existent duty of a Court of Justice which is so obvious and fundamental that it is shortly described as inherent, and reminds the Courts that a too literal and artificial interpretation of the words of the Code is not meant and cannot be allowed to override that duty. (*Hallifax, A. J. C.*) MAROTI SONAR *v.* CHINTAMAN SONAR.

69 I. C. 112 = A. I. R. 1924 Nag. 58.

———*Rejection of plaint.*

The grounds on which a Court is authorised to reject a plaint are not only those given in O. 7, R. 11 of the Code of Civil Procedure. The instances given in the rule cannot be regarded as exhaustive or as limiting the powers of a Court under S. 151 of the same Code. (*Wazir Hasan and Neave, A. J. Cs.*) HARIHAR BAKSH SINGH *v.* JAGANNATH SINGH. **83 I. C. 778 = 11 O. L. J. 260 = A. I. R. 1924 Oudh 413.**

———Under S. 151 a Court can apart from considerations of law and equity, prevent abuse of its processes where the action of the decree-holder is likely to result in undue advantage to one party. (*Dalal, J. C. and Neave, A. J. C.*) YASIN ALI KHAN *v.* ALI BAHADUR.

79 I. C. 685 = 10 O. L.J. 443 = A. I. R. 1924 Oudh 230.

———*Predecessor's order cannot be re-called.*

S. 151 gives no power whatever to a Court to re-call an order passed by his predecessor-in-office. Where there is a remedy by way of appeal, it is, an extraordinary thing for a Judge to set aside an order passed by his predecessor-in-office. He is entitled to correct clerical or arithmetical mistakes in the judgment or errors arising from any accidental slip or omission and he is also entitled to review the judgment if there are grounds for review, but otherwise he is not entitled to touch that judgment in any way. (*Das and Foster, JJ.*)

BISHESHWAR PRATAP NARAIN SAHI *v.* ASARFI SINGH. **74 I. C. 110 = 2 Pat L. R. Civ. 155 = A. I. R. 1924 Pat. 136.**

———*Awarding interest when not decreed.*

The Court cannot under S. 151 award interest or damages in lieu of interest on the decretal amount from the date of decree upto realization where no interest has been awarded by the decree. (*Lentaigne and Carr, JJ.*) MAUNG PE *v.* MA HNIT. **82 I. C. 427 = 3 Bur. L. J. 58 = A. I. R. 1924 Rang. 275.**

———Exercise of powers under S. 151, C. P. Code, is purely discretionary with a Court. (*Moti Sagar, J.*) PUNJAB BANKING CO. *v.* DIWAN DHANPAT RAI. **75 I. C. 487 = A. I. R. 1923 Lah. 506.**

———An order to defendant to prepare an inventory and to keep accounts is not an order under the inherent powers conferred by S. 151 of the Code, but is an order under O. 39, R. 1. (*Campbell, J.*) THE FIRM RAGHBIR SINGH JASWANT OF QUETTA *v.* NARIJAN SINGH. **72 I. C. 569 = A. I. R. 1923 Lah. 48.**

———S. 151 of the C. P. Code, speaks of the inherent and already existing power of a Court to prevent injustice and abuse of its own process. But to do that is much more than a matter within the power of the Court; it is its first duty, and indeed the chief if not the only object of its existence. (*Hallifax, A. J. C.*) MAHARASHTRAYA JNAN KOSH MANDAL, LTD. *v.* BIJJULAL. **71 I. C. 436 = 19 N. L. R. 36 = 6 N. L. J. 100 = A. I. R. 1923 Nag. 182.**

———S. 151 of the C. P. Code, must not be used to defeat the imperative provisions of S. 3 of the Limitation Act. (*Chevis, J.*) KHAIRATI *v.* UMAR DIN. **66 I. C. 270 = A. I. R. 1922 Lah. 266.**

———Inherent powers are not to be used in order to relieve a party from the consequences of his own mistakes or to enable him to evade the law of limitation. (*Oldfield and Venkatasubba Rao, JJ.*) C. GANPATHI MUDALIAR *v.* N. KRISHNAMACHARI. **70 I. C. 743 = 16 M. L. W. 178 = 1922 M. W. N. 514 = 31 M. L. T. 135 = A. I. R. 1922 Mad. 417 = 43 M. L. J. 184.**

———Where an *ex parte* decree was set aside without any jurisdiction and the suit was dismissed.

Held, that although there was force in the contention that the aggrieved party who had failed to appeal as he might have done was not entitled to apply in revision yet, as the order restoring the case was passed without jurisdiction, all the subsequent proceedings were illegal and must fall to the ground on that order being set aside. The provisions of S. 151, C. P. Code, should in proper cases be resorted to for the purpose of doing justice between the parties. (*Daniels, A. J. C.*) MAHABALI PRASAD *v.* BALBHADDAR. **64 I. C. 303 = 24 O. C. 282 = A. I. R. 1921 Oudh 141.**

———Ordinarily S. 151 of the C. P. Code, will not apply to cases where the aggrieved parties have other remedies provided in the Code. 27 M. L. J. 605, Foll. (*Jwala Prasad, J.*) HANUMAL LAL *v.* MT. RAM PEARI KOER. **60 I. C. 368 = 2 P. L. T. 251 = A. I. R. 1921 Pat. 491.**

———S. 151 has been introduced for the simple reason that no Code can exhaustively deal with the procedure for exercising every power, which a Court of Justice is competent to exercise; and the language of the section shows that it should be availed of only where a power which has been exercised, has not been provided for in the Code. 43 Mad. (F. B.), Foll. (*Raymond, A. J. C.*) FIRM OF NOTANDAS *v.* FIRM OF PRIBHDAY. **63 I. C. 131 = 15 S. L. R. 61 = A.I.R. 1921 Sind 38.**

—S. 151—Stay of Execution or Suit.

———A Court has inherent jurisdiction to stay trial of a suit under S. 151, C. P. Code, if it is necessary for the ends of justice to do so. (*Hasan and Bisheshwar Nath, JJ.*) BISHESHWAR BAKSH SINGH *v* DULHIN JADUNATH KUER. **123 I. C. 50 = 7 O. W. N. 386.**

———*Amounting to refusal of jurisdiction.*

Inasmuch, as there are definite provisions of the Code under O. 21, Rr. 97 and 98 according to which the executing Court must proceed to hear application made by the decree-holder under Rr. 97 and 98 complaining of resistance to possession, and decide whether the resistance or obstruction was occasioned without any just cause by the judgment-debtor or any person at his instigation, the action of the Court in entertaining an application made by the obstructor for stay of the proceedings on the ground that he was prosecuting a suit or appeal with respect to property in dispute, amounts to a refusal of jurisdiction and cannot be justified under S. 151. (*Johnstone, J.*) MAHBOOB BEGUM *v.* GHULAM MUHAMMAD. **119 I. C. 488 = A. I. R. 1929 Lah. 694.**

———A suit can not only be stayed under the provisions of S. 10, but even under the inherent powers of the High Court and under the powers of general supervision and superintendence vested in it; a suit in a particular Court can be stayed pending the decision of another suit in different Court. To allow the former suit to proceed on the face of an injunction issued by the latter Court for staying the proceedings of the former pending the decision of the latter, would amount to an abuse of the Court and injunction issued by the latter would be rendered ineffective. (*Addison, J.*) KADUMAL JETHANAND *v.* TILAK RAM. **113 I. C. 783 = 10 L. L. J. 470 = A. I. R. 1929 Lah. 12.**

———The inherent powers of the Court are not to be deemed to be limited or otherwise affected by the express provisions of the Code and so even where a suit cannot be stayed under the terms of S. 10, it can be so stayed by the Court if it is necessary to do so to do justice between the parties: 33 Cal. 927 and in S. 115 Application No. 44 of 1927 Foll. (*Wazir Hasan, Ag. C. J. and Misra, J.*) CHANNAN KUER *v.* SAHDEO SINGH. **114 I. C. 775 = 4 Luck. 573 = 7 O. W. N. 157 = A. I. R. 1929 Oudh 341.**

———*High Court can stay proceedings under Guardians and Wards Act.*

High Court has inherent power to pass an order, to stay proceedings under the Guardians and Wards Act, and can disallow the transfer of the custody of the minor to the guardian appointed by the lower Court pending the decision of the appeal to the High Court. 3 C. L. J. 29, Rel on. (*Bhide, J.*) SHAM SINGH *v.* MT. THARRI. **110 I. C. 912 = A. I. R. 1928 Lah. 912.**

———*Limits of power.*

A decree was obtained *ex parte* by *A* against *B* in Calcutta Court. The decree was transferred to the Court at Surat for execution; and *A* applied for the execution of the decree. Thereupon *B* filed a suit in the Surat Court for a declaration that the decree was inoperative, having been obtained by fraud, and for an injunction restraining *A* from executing the decree. The Surat Court stayed the suit holding that it had jurisdiction to hear the suit, but that for the ends of justice it should be stayed under S. 151 on the application of *A*.

Held, that if *A* wanted to stay the suit in the Surat Court, he ought to have applied under S. 23 (3) for an order that the suit should be transferred to the Calcutta High Court at the earliest opportunity as required by

S. 22, and that there was no substantial basis for holding under S. 151 that it was necessary for the ends of justice that proceedings in the Surat Court should be stayed; and that the stay order was without jurisdiction, A. I. R. 1924 Bom. 90. Dist. (*Fawcett and Madgavkar, JJ.*) VALLABHAI NARANJI *v.* CHHOTALAL.
100 I. C. 154 = 51 Bom. 26 = 28 Bom. L. R. 1442 = A.I.R. 1927 Bom. 79.

———*Civil and criminal case.*

Where the subject-matter of both a criminal case and a civil suit pending in another Court is the same, the criminal case should be stayed. (*Addison, J.*) BISHAMBAR DAS *v.* EMPEROR. **97 I. C. 426 = 27 Cr. L. J. 1114 = A. I. R. 1927 Lah. 17.**

———*Avoidance of multiplicity.*

While a suit was pending, proceedings were started in another Court against one of the defendants under Lunacy Act. Plaintiff prayed for adjournment till the proceedings under the Lunacy Act were over, which prayer was, however, refused.

Held, that High Court had power to order stay of suit to avoid multiplicity of proceedings. A. I. R. 1924 All. 446 and A. I. R. 1924 All. 818, Rel. on. (*Dalal and Boys, JJ.*) HARNAND LAL *v.* CHATURBHUJ.
93 I. C. 285 = 48 All. 356 = 24 A. L. J. 375 = A. I. R. 1926 All. 212.

———When the lower Court has issued notice to certain parties to show cause why they should not be proceeded against under Cr. P. Code S. 476, the superior Court has inherent power under S. 151, to stay the proceedings. (*Zafar Ali, J.*) HARNAM SINGH *v.* MT. ATRI.
7 L. L. J. 73 = 26 Cr. L. J. 1166 = 88 I. C. 526 = A. I. R. 1925 Lah. 323.

———*Limits of power.*

The inherent power of the High Court to make an order staying execution should not be exercised in a case where such an order would merely impede the execution of the final decree without any good and sufficient cause. (*Broadway and Harrison, JJ.*) FITZHOLMES *v.* BANK OF UPPER INDIA. **89 I. C. 588 (Lah.).**

———*Principle governing.*

In cases of applications for execution, whether against the defendant or the suretics the primary consideration must be the interest of the decree-holder and where his interests are likely to be jeopardised by the granting of any application for time, Courts have no option but to execute the decree. But where without any detriment to the interests of the decree-holder the granting of time to the judgment-debtor or the sureties to pay would not only enable the decree amount to be paid but would prevent serious loss or ruin. I think the Court ought to have power to stay execution against the person for such time as it thinks reasonable unless there is something in the Code which prohibits such power. A surety may be perfectly solvent and may be able to pay the amount if a few days' time is given to raise the money and he may, if a merchant, be ruined by a sudden issue of process for arrest and there is no justice in refusing this request. Of course if the law is otherwise he cannot be helped. But there is nothing in the Code which prohibits such a course. (*Kumaraswami Sastri, J.*) PERURI SOORYAPRAKASAM *v.* P. I. MUNISWAMI CHETTI. **84 I. C. 134 = 48 Mad. 494 = 20 M. L. W. 175 = A. I. R. 1925 Mad. 42.**

———*Prior to grant of certificate.*

The wording of O. 45, R. 13 clearly shows that the Court has power to stay execution after grant of a certificate and though no power has been specifically conferred on the Court under O. 45, R. 13 to stay execution

prior to that stage, the Court has power to stay even before the grant of a certificate if not under this rule, under S. 151. 40 Cal. 955 Foll. 19 B. 10 Appr. 6 S. L. R. 86 Not Foll. (*Kincaid, J. C. and Aston, A. J. C.*) NARUMAL *v.* JAGATMAL. **82 I. C. 739 = A. I. R. 1925 Sind 216.**

———*Considerations.*

The Court will stay an action brought within the jurisdiction, in respect of a cause of action arising out of the jurisdiction, if it is satisfied that no injustice will be done thereby to the plaintiff and that the defendant would be subject to such injustice in defending the action as would amount to vexation and oppression to which he would not be subjected if an action were brought in another and accessible Court, where the cause of action arose. A suit may consist of two claims *A* and *B*, and be only oppressive as regards *A*. If, therefore, a defendant satisfies claim *B*, defendant should not be precluded from contending that claim *A* should be stayed. In order to justify a stay it is, as a rule, necessary that something more should exist than a mere balance of convenience in favour of proceedings in some other place. (*Marten, J.*) JETHABHAI VERSEY *v.* AMARCHAND MATHAVJI & CO. **82 I. C. 852 = 25 Bom. L. R. 713 = A. I. R. 1924 Bom. 90.**

———*Principle governing.*

It is beyond controversy that the Court has an inherent power to postpone the hearing of a suit pending the decision of a selected action and to make an order for the stay of cross suits on the ground of convenience. The inherent power is not to be capriciously or arbitrarily exercised; it is to be exercised to facilitate that real and substantial justice for the administration of which alone Courts exist. (*Mookerjee and Chotzner, JJ.*) SYED ABDUL AHMED ABED *v* BADARUDDIN AHMED.
86 I. C. 1023 = 28 C. W. N. 295 = A. I. R. 1924 Cal. 757.

———*Pending insolvency proceedings.*

Where property under attachment is not liable to speedy decay or where it is not of such a nature that the delay in its sale would seriously depreciate its value, the Court should, in the exercise of its inherent jurisdiction order stay of the execution proceeding till such time as the Insolvency Court either passes an order of adjudication or dismisses the application. (*Billaram, A. J. C.*) FIRM OF LYON LORD & CO. *v.* FIRM OF VIRBHANDAS RATTAN CHAND. **76 I. C. 380 = A. I. R. 1924 Sind 69.**

—S. 151—Striking out pleadings.

———*Defence can be struck off for non-compliance of order of Court.*

Where the defendant was ordered by the trial Court to appear before it and the Court made attempts from time to time to persuade the defendant to attend the Court, but he persistently failed to comply with the order and the Court struck out the defence.

Held, that the order of the Court in striking out the defence was not open to any objection as it had full power to pass the order under S. 151. (*Wazir Hasan and Raza, JJ.*) SHEO PARTOB SINGH *v.* GHIROO SINGH. **111 I. C. 473 = 5 O. W. N. 291 = A. I. R. 1928 Oudh 262.**

———Where payment of costs is made a condition precedent of adjournment granted to the defendants, it is open to the Court to strike off the defence and proceed *ex parte*, when the costs are not paid as directed. (*Mukerji, J.*) E. I. RY. CO. *v.* JIT MAL KALLO MAL
86 I. C. 862 = 47 All 538 = 23 A. L. J. 212 = 6 L. R. A. Civ. 212 = A. I. R. 1925 All. 280.

———*Portion of claim.*

C. P. CODE, (1908), S. 151—Striking out pleadings.

Plaintiff sued for possession of certain properties; part of them under proprietary interest and part occupancy interest in different plots of land. The first Court granted a decree, but the appellate Court was of opinion that a suit for the recovery of occupancy land, even from strangers who are not landlords did not lie in the Civil Court. It thereupon passed an order that the plaintiff should strike out from her plaint her claim for possession of the occupancy lands.

Held, that the order of the lower Court amounted to an order in a case because it finally settled the matter whether a suit for the possession of occupancy land did lie in the civil Court or not and that the Judge had no jurisdiction to pass the order which he did because such an order was not necessary for the ends of justice to prevent any abuse of the process of the Court. (*Dalal, J. C.*) MT. MALUKA *v.* PATESHUR SINGH.

85 I. C. 703=A. I. R. 1925 Oudh 604.

—S. 151—Who can invoke.

——*Person repudiating authority to compromise.*

Where a decree is passed on the basis of a compromise verified and admitted by one party on behalf of another when that party had no authority to enter into the compromise on the other party's behalf, it is open to such a party to invoke the inherent power of the Court to get the judgment and the decree amended under Ss. 151, 152 and 153 so that his name might be removed from the decree after the period of limitation prescribed for appeal or review has expired and the judgment and the decree have become final. 32 Cal. 296 (P. C.), and A. I. R. 1924 Oudh 408, Rel. on. (*Stuart, C.J., Wazir Hasan and Raza, JJ.*) MAHOMED RAZA *v.* RAM SAROOP. **118 I. C. 753=6 O.W.N. 604= 4 Luck. 562=A. I. R. 1929 Oudh 385 (F.B.).**

——*Test.*

By virtue of S. 73 of the Transfer of Property Act the moment a mortgaged property is transformed into money by reason of a revenue sale the lien fastens by operation of law upon the surplus sale-proceeds. It is so, on the equitable principle that the mortgagee is entitled, for the purpose of the security, to all such interests as may be acquired in place of the mortgagor's interest. If the mortgagor's interest in the mortgaged property is re-vested in him in consequence of the sale being set aside, and the mortgagor ceases to have any interest in the sale proceeds, the mortgagee is in a position to fall back upon his original security and has no more lien on the sale proceeds which no longer represent the interest of the mortgagor. The fact that by the order of attachment surplus sale proceeds had already become available to the mortgagee makes no difference; for the Court has ample powers in the exercise of its inherent jurisdiction under S. 151, C. P. Code, even to make an order for refund. Also the fact that the auction-purchaser applying for withdrawal of the attachment was not a party to the suit in which the order for attachment of the surplus sale proceeds was made does not disentitle him to apply. 1922 Cal. 28; Foll. The application being one under S. 151, C. P. Code, invoking the inherent powers of the Court to make an order necessary for the ends of justice, the question as to the *locus standi* of the applicant can hardly arise. (*M. N. Mukerji, J.*) RASH BEHARI MAZUMDAR *v.* KASUM KUMARI GUHA. **86 I. C. 882= A. I. R. 1925 Cal. 1145.**

——Where specific procedure is provided in the Code which the party neglected to avail himself of S. 151 cannot be invoked in his aid. (*Stuart, J.*) SHIB PRAKASH *v.* JHINGRURIA. **78 I. C. 416=**

C. P. CODE, (1908), S. 152—Amendment.

46 All. 144=A. I. R. 1924 All. 446.

S. 152.

Amendment.
Appeal.
Consent decree.
Interpretation.
Limitation.
Mistake or error.
Refusal to amend.
Scope
Slip or omission.

—S. 152—Amendment.

——*Decree according to operative portion of judgment.*

Where in a mortgage suit a judgment contains two contradictory directions as regards the decree in a mortgage suit and the decree is technically in accordance with the earlier and operative part of the judgment, no application under S. 152 for the amendment of the decree lies. (*Tek Chand, J.*) DEVI DAS *v.* MT. ROPAN BAI. **A. I. R. 1930 Lah. 589.**

——*Forum.*

Where in appeal to the Privy Council the decree of the lower appellate Court is substantially altered and that of the lower Court restored, since the decree to be executed is the decree of the Privy Council, any clerical error on the face of the record can only be corrected by His Majesty in Council. A. I. R. 1914 P. C. 66, Ref. (*Macnair Offg. J. C. and Jackson, A. J. C.*) ATMARAM BHAWANT *v.* COLLECTOR OF NAGPUR.

120 I. C. 735= A. I. R. 1930 Nag. 138.

——*Satisfaction of decree.*

The moment a decree for money is passed it is open to the judgment-debtor to pay the money into Court. That does not mean that by so doing he disentitles the decree-holder from applying to the Court for amending the decree if the decree should be not in accordance with the judgment. Therefore in the absence of any special circumstances in an ordinary case where there is a discrepancy between the decree and the judgment and the decree-holder accepts payment of the amount due under the decree, he is not by that circumstance alone, debarred from taking proper steps to have the decree brought in accordance with the judgment: A.I.R. 1926 Mad. 516; 12 M.L.J. 96, Dist.; A.I.R. 1925 All. 556. Expl. (*Ananthakrishna Ayyar, J.*) MUNUSWAMI MUDALI *v.* JAGANNADHA REDDI.

1929 M. W. N. 729=A. I. R. 1929 Mad. 830.

——*Lapse of time.*

Under a compromise terminating a suit for partnership accounts, a person, *S*, was held to be entitled to a three annas share in the partnership and it was further agreed that another sharer should transact all the business of the firm, balance the accounts and render them when asked. In the decree that followed it was ordered and declared in terms of compromise that *S* was entitled to three annas share in the property belonging to the firm. *S.* sought to execute the decree praying that he should be put in joint possession of his share and if the decree were considered as not embodying terms of contract it should be amended under S. 152. No appeal against the decree was filed, nor any application for review made within time.

Held, that the decree was only declaratory and was also in accordance with the terms of the compromise. It could not, therefore, be executed as sought for.

Held further, that even supposing that the decree was faulty as not being according to terms of the compromise, it could not now be amended, as time for such amendment as to make it capable of execution had passed by. 21 C.W.N. 835; A.I.R. 1928 Nag. 173; A.I.R.

C. P. CODE, (1908), S. 152—Amendment.

1927 P. C. 204 and A. I. R. 1922 Oudh 150, Dist. (*Findlay, J.C. and Prideaux, A.J.C.*) MT. DHANNABAI JOHARI *v.* KASHARI CHAND JOHARI. **115 I. C. 161 = A. I. R. 1929 Nag. 34.**

——Where the judgment is a clear one and there is no clerical or arithmetical mistake in it and there is no error in it arising from any accidental slip or omission the judgment and decree cannot be amended under S. 152. (*Addison, J.*) GURUDIAL *v.* GANESHDAS. **108 I. C. 737 (Lah.).**

——Courts have power to amend the decree though it is in conformity with the judgment. C. M. P. No. 429 of 1925, Foll. (*Curgenven, J.*) APPASA ROWTHER *v.* MUHAMMAD ROWTHER. **99 I. C. 655 = 25 M. L. W. 102 = 1927 M. W. N. 38 = 38 M. L. T. 24 = A. I. R. 1927 Mad. 435.**

——*Notice to other side.*

It is unfair to amend the decree without giving the party, against whom it is to operate, an opportunity to show cause against it; and if the amendment is wrong, it is open to the judgment-debtor to apply to the original Court for a review of its order. (*Sulaiman, J.*) DEBI BAKHSH *v.* SHAMBU DIAL. **94 I. C. 877 = 48 All. 281 = 24 A. L. J. 266 = A. I. R. 1926 All. 384.**

——*Successor of Judge.*

Where a Judge delivers a judgment and the decree drawn in pursuance thereof is in conformity with the judgment on the face of it, the successor of the Judge has no jurisdiction to amend the decree so as to bring it in conformity with the supposed real intention of the former. (*Cuming and Page, JJ.*) NIRENDRA CHANDRA *v.* DIGENDRA NATH. **96 I.C. 195 = A.I.R. 1926 Cal. 1100.**

——*Satisfaction of decree.*

A Court would not be justified in making a correction which involves the payment of a larger sum of money by one party to another, long after satisfaction has been recorded, and when nothing remains to be done and the decree has become dead. 12 M. L. J. 96 Appl. (*Spencer, J.*) MUNUSWAMI PILLAI *v.* MAHDI HUSAIN. **94 I. C. 453 = 1926 M. W. N. 180 = A.I.R. 1926 Mad. 516 = 50 M. L. J. 655.**

——*Test.*

The test whether a Court can make an alteration under S. 152 is whether the order as it stands represents the intention of the Judge at the time he made it.

When the Court ordered a final decree for sale to be prepared and where by an omission the clause in the preliminary decree regarding interest was not entered in the final decree for sale.

Held, the omission may be rectified at any time by the Court under S. 152. (*Dalal, J. C.*) JAGMOHAN SINGH *v.* SITAPATRAM. **91 I.C. 29 = A.I.R. 1926 Oudh 223.**

——*Pendency of appeal.*

Mistakes, errors or omissions which are referred to in S. 152 can be cured by the lower Court even though the parties have a pending appeal. (*Mears, C.J. and Piggott, J.*) BISHUN NARAIN *v.* MT. BIBI RAMJI. **74 I. C. 842 = A. I. R. 1924 All. 127.**

——Where the decree was a personal decree but the judgment intended it to be in representative capacity (as heirs).

Held, amendment of decree must be allowed. (*Zafar Ali, J.*) CHANDA SINGH *v.* FATEH CHAND. **76 I. C. 198 = A. I. R. 1924 Lah. 621.**

——*Apparent error.*

A Court has no power to amend a decree when it is in conformity with the judgment, not even if there is an error apparent on the face of the judgment, 60 I.C. 368. Not Foll. 3 L.W. 499 Foll. (*Hughes, J.*) LAKSHMANA IYENGAR *v.* NARAYAN IYENGAR. **76 I. C. 786 = 18 M. L. W. 876 = 33 M.L.T. 221 = A. I. R. 1924 Mad. 225.**

C. P. CODE, (1908), S. 152—Consent decree.

——*After appeal.*

A Court can amend a record even after an appeal is brought, because a Court of law has authority over its own record. (*Das and Ross, JJ.*) REWA MAHTO *v.* DELU MAHTO. **78 I. C. 794 = 2 Pat. L. R. Civ. 6 = 5 Pat. L. T. 588 = A. I. R. 1924 Pat. 528.**

——*Limits.*

In a claim proceedings, the District Munsif delivered his judgment orally, dictating it to the short-hand writer: when the short-hand transcription reached the District Munsif he entirely changed the effect of what he had said in open Court.

Held, that the revision contemplated by O. 20, R. 3 and S. 152 cannot be of the effective part of the judgment and must be of the nature referred to in S. 152, *i.e.*, relating to clerical or arithmetical mistakes arising from accidental slip or omission. The Court cannot, by revision, substitute a wholly new decision for the one originally pronounced. (Re-trial directed.) (*Oldfield, J.*) HARI KRISHNAN *v.* ARUR PANDITHAR. **72 I. C. 688 = 18 M. L. W. 105 = 1923 M. W. N. 354 = A. I. R. 1923 Mad. 663.**

——*Intervention of third party's rights.*

The exercise of the power to amend under S. 152 is discretionary and necessarily so when no period of limitation is provided for application for its exercise and therefore no investigation of title can insure those, who acquire rights in property dealt with in a previous decree, against the effect of a subsequent amendment thereof. As a consequence, an application for amendment should be rejected as too late, if the rights of third parties acting in good faith have intervened. *Hation* v. *Harris*, (1892) A. C. 547, Foll. (*Oldfield and Ramesam, JJ.*) P. S. NARAYANA IYER *v.* BIYARI BIVI. **69 I. C. 977 = 16 M. L. W. 623 = 1922 M. W. N. 731 = 32 M. L. T. 98 = A. I. R. 1923 Mad. 57 = 43 M. L. J. 559.**

——*Forum.*

On a decree being passed by the appellate Court, it is that Court that should amend any errors there may be in the decree passed by the original Court. 11 All. 267 (F. B.) Ref. to. (*Tudball, J.*) MAIKU LAL *v.* MULAYAN SINGH. **62 I. C. 910 = 19 A.L.J. 375 = A. I. R. 1921 All. 130.**

——The lower Court cannot amend a decree after it has been superseded by the decree of an appellate Court. 18 Bom. 542, Foll. (*Saunders, J. C.*) MAUNG YAN GIN *v.* KATHARASAN CHETTY. **66 I. C. 799 = 4 U. B. R. 1 = A. I. R. 1921 U. B. 5.**

—S. 152—Appeal.

——No appeal lies against an order amending decree nor can the order directing amendment be challenged in an appeal against the amended decree. A.I.R. 1928 Lah. 352, Foll. (*Shadi Lal, C. J. and Johnstone, J.*) FAUJA SINGH *v.* LAL SINGH. **120 I. C. 174 (Lah.).**

——No appeal lies from an order amending a decree. (*Addison, J.*) BUTA RAM *v.* SUNDAR DAS. **98 I. C. 883 = A. I. R. 1927 Lah. 68.**

——Order under S. 152 is not appealable. (*Zafar Ali, J.*) MOHAMMAD DIN *v.* CHANDU RAM. **97 I. C. 66 = A. I. R. 1926 Lah. 664.**

—S. 152—Consent decree.

——According to the compromise arrived at by the parties to a suit, the plaintiff was to be granted a decree realizable from the assets of a deceased person in the hands of *A.* But the Court in passing the decree made *A* personally liable if the decree could not be realized from the assets.

Held: *Obiter*—further that the error was due to accidental slip and the Court itself could have corrected it under S. 152. (*Bhide, J.*) TIRATH RAM *v.* DEOKI. **116 I. C. 706 = A. I. R. 1929 Lah 254.**

—S. 152—Consent decree—Fraud.

———An application under S. 152 to amend the consent decree on the ground of fraud is entirely outside the section. (*Rankin, C. J. and C. C. Ghose, J.*) J. C. GALSTAUN *v.* PRAMATHA NATH. **33 C. W. N. 883 = A. I. R. 1929 Cal. 470.**

———A plea that the compromise was obtained by fraud, etc., is not open to a decree-holder under a compromise decree in proceedings taken by the judgment-debtor to have the decree amended under S. 152. (*Addison, J.*) GANESH DAS *v.* KAKI BAI. **A. I. R. 1929 Lah. 400.**

—S. 152—Interpretation.

———" Court" in S. 152, C. P. Code, does not mean only the particular presiding Judge, who may have made the mistake. "Court" must always mean Court, whoever may be the presiding officer of the Court. (*Das, J.*) MEWA SAHU *v.* JHONTI SINGH. **63 I.C. 840 = 2 P. L. T. 296 = A. I. R. 1921 Pat. 306.**

—S. 152—Limitation.

———*Mistake in pre-emption decree—Amendment after time fixed.*

The amount payable by the plaintiff was entered in a pre-emption decree, through a clerical error, as a sum higher than that really payable by him. The plaintiff paid the amount really due from him within the time fixed, *bona fide* ignorant of the error in the decree. On objection being raised by the defendant that the decree had not been complied with the plaintiff applied under S. 152 for amendment of the decree. The lower Court (after expiration of the period fixed for the payment of the pre-emption amount by the decree and without giving notice to the defendant) amended the decree.

Held, that the order of the lower Court was correct. (*Daniels, J. C.*) SURAJ BAKSH SING *v.* BANS BAHADUR. **187 I. C. 987 = 12 O. L. J. 246 = 2 O. W. N. 218 = A. I R. 1925 Oudh 418.**

———*No time fixed.*

The word 'may' in S. 152 does not make it discretionary with the Court to order the correction but merely enlarges the power of the Court by providing that such correction can be done at any time; or, in other words, the section simply emphasises that no lapse of time would disentitle the Court to make the correction. The only exception to this general rule is that the Court will refuse to make the amendment where it offends against the principles of equity; for instance it may not be desirable to amend the decree where the interest of a third party who may be a *bona fide* transferee for valuable consideration may be jeopardised.

Per *Graham, J.*—Under O. 20, R. 6 of the Code the decree must be in conformity with the judgment and it is the duty of the Court to see that there is such agreement. No question of limitation arises and under S. 152, C.P. Code, an omission of this nature in the decree can be corrected by the Court at any time. 11 Bom. 284; 9 C.W.N. 605; 19 C.W.N. 1001; 15 C. L. J. 658; 1892 A. C. 547, Ref. (*Suhrawardy and Graham, JJ.*) CHANDRA KUMAR MUKHOPADHYA *v.* SM. SUDHANSU BADANI DEBI. **80 I. C. 55 = 28 C. W. N. 873 = A. I. R. 1924 Cal. 895.**

———Lapse of time has nothing to do with the question. Error may be amended though 20 years old. (*Wazir Hasan, A. J. C.*) SHEO DHARSHAN SINGH

v. MATA DIN SINGH. **80 I. C. 883 = 78 I. C. 96 = 11 O. L. J. 227 = A. I. R. 1924 Oudh 408.**

—S. 152—Mistake or error.

———*When can be done.*

The provisions of S. 152 give power to the Court not only to correct clerical or arithmetical mistakes in judgments, decrees or orders, but also errors arising therein from any accidental slip or omission and such correction may be done at any time by the Court, even without any application by any of the parties. 7 All. 411; 47 P. R. 1913 and A. I. R. 1924 Mad. 225, Dist. (*Dalal, J.*) HUKUM SINGH *v.* SURAJ PAL SINGH. **119 I. C. 287 = 51 All. 672 = 1929 A. L. J. 505 = A. I. R. 1929 All. 337.**

———*Discovery subsequent to decision on appeal.*

When the mistake in decree of the lower Court is found out only subsequent to the decision in appeal, it cannot be said that an application for amending the decree filed in appellate Court should be dismissed on the mere ground that it was not brought to the notice of the Court at the time the appeal was heard. (*Anantakrishna Ayyar, J.*) MUNUSWAMI MUDALI *v.* JAGANNADHA REDDI. **1929 M. W. N. 729 = A. I. R. 1929 Mad. 830.**

———*Pending appeal—Forum.*

Under S. 152 read with S. 107 the appellate Court is entitled, while the appeal is pending before it, to correct any clerical or arithmetical mistake in the decree of the trial Court apparent on the face of the record. (*Banerji and King, JJ.*) ALLIANCE BANK OF SIMLA, LTD. *v.* FAIZIAM HIGH SCHOOL ASSOCIATION, MEERUT. **26 A. L. J. 1323 = 111 I. C. 245 = A. I. R. 1928 All. 458.**

———*Scope of.*

An award was made upon the basis of certain figures contained in certain documents relied on by both the parties and a decree was passed according to the award without any objection from any of the parties. It was subsequently found that there was a mistake in the figures, on which the award was based and the party who was affected by the mistake applied for correction of the error.

Held, that the application was not to correct an error patent and apparent on the face of the record, but to go much deeper into the matter and to re-open the accounts and the figures at which the arbitrators had arrived and the remedy lay either by review or appeal. (*Odgers, J.*) MAKAM LAKSHMI NARAYANAPA *v.* BATCHAYYA. **103 I. C. 829 = 1927 M.W.N. 242 = A. I. R. 1927 Mad. 720 = 53 M. L. J. 38.**

———*Costs.*

Court has inherent power to correct an error in judgment that a certain party being *pro forma* defendant was not liable to pay costs. (*Zafar Ali, J.*) MOHAMMAD DIN *v.* CHANDU RAM. **97 I. C. 66 = A. I. R. 1926 Lah. 664.**

———*When can be done.*

When an error has been committed, it is always within the competency of the Court if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the judge obviously meant to pronounce. Thus where a property is sold at a Court sale and made over to the auction purchaser, the Court which has ordered the sale, cannot set it aside under its inherent powers under S. 152, on the ground that the sale was ordered by a mistake for a sum larger than what was due under the decree. *Hatton* v. *Harris.* (1892) A. C. 54, Foll. (*Macleod, C. J. and Coyajee, J.*) PANDURANG SHRIDHAR PATHALI *v.* NARHAR PANDURANG ATRE. **89 I. C. 569 =**

27 Bom. L. R. 657 = A. I. R. 1925 Bom. 389.

———*Material but palpable.*

A dower decree made all defendants heirs of plaintiff's husband jointly and severally liable for the whole amount of dower.

Held, that the decree could be amended so as to apportion the dower debt on the several heirs in proportion to their shares. (*Walsh and Ryves, JJ.*) MAHOMED ASHIQ *v.* MT. HAJRA BIBI. **82 I.C. 627 = 5 L. R. A. Civ. 467 = A. I. R. 1924 All. 690.**

———*Result of party's mistake.*

Mistakes of the kind which may be described as clerical or due to an oversight between a decree *nisi* and a decree absolute are in the majority of cases the mistakes or slips of the party who sets the Court in motion. A mistake of that sort begun in the plaint and carried right through the proceedings without being discovered can be corrected in the decree. (*Walsh and Ryves, JJ.*) ALLAH DIA *v.* RAHIMUDDIN. **78 I. C. 166 = 22 A. L. J. 215 = 5 L. R. A. Civ. 102 = A. I. R. 1924 All 520.**

———*Deliberate error.*

If the error has been committed deliberately it is settled law that the provisions of S. 152 cannot be invoked for the purpose of correcting such an error but if the error is the result of an accidental slip or omission then it can be corrected. (*Wazir Hasan, A.J.C.*) SHEO DHARSHAN SINGH *v.* MATA DIN SINGH. **80 I. C. 833 = 78 I.C. 96 = 11 O. L. J. 227 = A. I. R. 1924 Oudh 408.**

———*Intervention of third party's rights.*

Obiter.—Even an accidental error should not be amended if third parties have acquired rights under the erroneous judgment in the interval. (*Wazir Hasan, A.J.C.*) SHEO DHARSHAN SINGH *v.* MATA DIN SINGH. **80 I. C. 833 = 78 I. C. 96 = 11 O.L.J 227 = A. I. R. 1924 Oudh 408.**

———Where an application to correct a mistake made in describing certain lands in the plaint was refused,

Held, S. 152 is the widest possible law justifying the amendment of any particular proceedings due to mistake of this kind and the Judge was wrong in refusing the application. (*Piggott and Walsh, JJ.*) SURJAN SINGH *v.* WAZIR SINGH. **72 I. C. 483 = 21 A. L. J. 328 = 4 L.R. A. Civ. 184 = A. I. R. 1923 All. 349.**

———*Disposal of appeal.*

A clerical error was corrected even after dismissal of the appeal in the interests of justice, by directing plaint and decree to be corrected. (*Mullick and Bucknill, JJ.*) KARTAR RAI *v.* TALEY CHOWDHURY. **81 I. C. 295 = 1923 P. H. C. C. 46 = A.I.R. 1923 Pat. 218.**

———*Repetition of error in plaint.*

Where a clerical error was made in the plaint in the description of certain property, the High Court has power to rectify that error in whatever subsequent record it is repeated by slip or inadvertence or mistake, even after decree has been passed. 16 Mad. 424; 1914 M.W.N. 107; 1 L.W. 298 and 7 L.W. 8 Foll. (*Sadasiva Aiyar and Spencer, JJ.*) MAHABOOB BEGUM SAHIBA *v.* LAL BEGUM SAHIBA. **62 I. C. 652 = 14 M. L. W. 445.**

———Errors in judgments and decrees can be corrected at any moment and if those errors follow from clerical mistakes committed in the plaint or other proceedings, it is open to the Court to ascertain by enquiry whether any accidental slip has occurred and to rectify it, if the real points at issue are not affected thereby. 12 A.L.J. 185 and 17 O.C. 256, Rel. on. (*Kanhaiyalal, J. C.*) PAHALWAN SINGH *v.* GUNGA BAKHSH SINGH. **66 I.C. 693 = 8 O.L.J. 416 = A.I.R. 1921 Oudh 190.**

—S. 152—Refusal to amend—Powers.

———Under S. 152 of the C. P. Code, the Court has power, under the peculiar circumstances of any case, to refuse the application for amendment of decree if it feels inclined to do so. The Court is not bound to grant the application in every case. On the judgment-debtor satisfying a mortgage decree in full, the case was struck off. Three years afterwards, the defendant applied for amendment of the decree.

Held, that the Court could dismiss the application if it was inclined to do so.

Per *Daniels, J.*—When a decree for money has been finally satisfied and discharged, the Court is *functus officio* and can no longer entertain an application for amendment under S. 152 of the C. P. Code. (*Sulaiman and Daniels, JJ.*) PITAM LAL *v.* BALWANT SINGH. **88 I. C. 396 = 23 A. L. J. 518 = 6 L. R. A. Civ. 423 = A. I. R. 1925 All 556.**

———Where an application by judgment-debtor under C. P. Code, S. 152 on the ground that a certain sum incurred as expense in summoning witnesses, was wrongly included in the decree, because none of the witnesses appeared on behalf of the decree-holder was refused to be considered on its merits for the reason that the decree as prepared had been signed by the judgment-debtor's pleader.

Held, that in so doing the Court failed to exercise jurisdiction vested in it by law. (*Wazir Hasan, A.J.C.*) SHEO BALAK *v.* AMBIKA SAHAI. **87 I. C. 333 = 12 O. L. J. 141 = A. I. R. 1925 Oudh 373.**

—S. 152—Refusal to amend—Remedy.

———Where the lower Court had declined to exercise a jurisdiction of amending a decree vested in it by law, on the wrong assumption that the decree which was sought to be amended was in conformity with the judgment, it is clearly open to the High Court to interfere on the revision side under S. 44, Punjab Courts Act. (*Tek Chand and Agha Haider, JJ.*) RALLA RAM *v.* GOWARDHAN DAS. **115 I. C. 542 = 30 P. L. R. 363 = A. I. R. 1929 Lah. 664.**

———An accidental slip or omission or a clerical mistake both in judgments and decrees can be corrected under S. 152, and if this correction is not allowed then a revision lies under S. 115 (b) to the High Court. (*Addison, J.*) GANESH DAS *v.* KAKI BAI. **A. I. R. 1929 Lah. 400.**

———*Second application.*

For the amendment of an accidental omission in a decree an appeal is not necessary, nor does an omission to appeal bar an application for amendment. S. 152 allows such an amendment to be made at any time and a second application is maintainable where the first is erroneously refused. (*Carr and Otter, JJ.*) MT. SARA BI *v.* HAMID KASSIM. **4 Rang. 347 = 98 I. C. 799 = A. I. R. 1927 Rang. 57.**

—S. 152—Scope.

———After the lower Court's decree has been confirmed by the appellate Court the jurisdiction of the lower Court to amend its decree ceases, 18 Mad. 214, Rel. on. (*Ananthakrishna Ayyar, J.*) MUNNUSWAMI MUDALI *v.* JAGANNADHA REDDI. **1929 M. W. N. 729 = A. I. R. 1929 Mad. 830.**

———S. 152 deals with amendments of clerical errors in orders or decrees of the Court itself which are drawn up and which do not properly represent what the Court decides. 1 U.P.L.R. (A) 69 Foll. (*Mears, C. J. and Dalal, J.*) MT. NAWASI BEGAM *v.* MT. DILAFROZ BEGAM. **102 I. C. 124 = A. I. R. 1927 All. 585.**

———A decree which is in conformity with judgment cannot be amended. (*Sen, J.*) BAIJU RAI *v.* HISALO RAI. **9 P. L. T. 15 = 103 I. C. 298 =**

A. I. R. 1927 Pat. 405.

——*Discretion.*

Under S. 152 of the C. P. Code there is no right in any party to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of the Court and the discretion has to be exercised in view of the peculiar facts of each case. (*Mukerji and Dalal, JJ.*) KISHORI MOHAN *v.* CHHANGA LAL. **47 All. 44 = 5 L. R. A. Civ. 753 = 82 I. C. 1030 = A. I. R. 1925 All. 187.**

——A Court has no inherent jurisdiction to do that which is prohibited by the Code. So it cannot set aside its own decree except under S. 152 or on review. (*Das and Ross, JJ.*) RAMESWAR MAHTON *v.* LALA DWARKA PRASAD. **84 I. C. 320 = 3 Pat. 778 = 6 P. L. T. 309 = A. I. R. 1925 Pat. 36.**

——*Misdescription of party.*

It is obviously wrong for any Court to direct that a person who was never an appellant before it should be shown in the decree as an appellant. It is outside the jurisdiction of any Court to pass an order thus misdescribing in the decree one of the parties to the same. (*Piggot and Walsh, JJ.*) HARDEO BRASAD *v.* DAMODAR PRASAD. **71 I. C. 424 = 20 A. L. J. 980 = 4 L. R. A. Civ. 53 = A.I.R. 1923 All. 119.**

——If no objection is taken in the grounds or second appeal to a decree passed by the lower appellate Court and the period allowed for review of judgment has expired the point cannot be raised by way of petition under S. 152 when there are no clerical or arithmetical mistakes. (*Spencer and Odgers, JJ.*) MUNIAPPA CHETTY *v.* MANGATHAYAMMAL. **15 M. L. W. 393 = A. I. R. 1922 Mad. 192.**

—S. 152—Scope and applicability.

——*Laches.*

Although there is no limitation for a case under S. 152, no amendment should be allowed by the Court either under S. 152 or S. 151, where laches may, in the particular circumstances of the case, disentitle a party to relief under S. 152. (*Prideaux, A. J. C.*) RAJE UDAJIRAM *v.* RAJESWAR THIMBAK RAO. **109 I. C. 727 = A. I. R. 1928 Nag. 149.**

——Where the omission in the decree was not due to a clerical or arithmetical mistake, S. 152 does not apply. (*Prideaux, A. J. C.*) RAJE UDAJIRAM *v.* RAJESHWAR. **67 I. C. 310 = A.I.R. 1923 Nag. 109.**

——S. 152 refers merely to arithmetical or clerical errors which are patent on the face of the judgment or of the decree. But where the whole system of calculation adopted by the Court was challenged in plaintiff's application and there was no more allegation of an arithmetical or clerical mistake.

Held, that although the Court purported to act under S. 152, it must be considered legally to have acted under O. 47. (*Wilberforce, J.*) RAMJI LAL *v.* GIANI. **66 I. C. 992 = 3 Lah. L. J. 341 = A. I. R. 1921 Lah. 250.**

—S. 152—Slip or omission.

——Where there was no express refusal but only an inadvertent omission to grant the prayer and the omission was not a deliberate one but was merely inadvertent, the judgment and the decree based on it could be amended even though the right of appeal open to the petitioner was not availed of. (*Jai Lal, J.*) RAM SINGH *v.* SANT SINGH. **A. I. R. 1930 Lah. 210.**

——Substitution of a new plaintiff or defendant at one stage of the suit, for instance, upon an appeal as to interlocutory order, is effective for all further stages of suit. There was an appeal against an interlocutory order passed in a suit, and duriug the pendency the plaintiff died. His legal representative was brought on record. After the disposal of the appeal, the legal representative carried on the litigation, resulting in a decree being passed against the plaintiff, but the decree as drawn up was against the plaintiff.

Held, that no joinder of the legal representative was necessary in the suit before the decree was passed, as the Court could have brought it in conformity with the appellate decree which contained the names of the legal representatives of the plaintiffs. A.I.R. 1917 P. C. 156, Foll. (*Rupchand, A. J. C.*) LACHMI BAI *v.* DOWLATRAM DEVIDAS. **120 I. C. 516 = A.I.R. 1930 Sind 96.**

——There was a clear accidental slip in including in the judgment, property belonging to somebody other than the judgment-debtor, and to correct the slip, the map had to be revised.

Held, that S. 152 applies both to judgments and decrees and the slip in the judgment can be corrected and for that reason the map also can be revised in order to avoid the abuse of the process of the Court under S. 151. (*Dalal, J.*) SATTAR *v.* NAZIR KHAN. **114 I. C. 867 = 50 All. 859 = A. I. R. 1929 All. 147.**

——Where in a decree passed in favour of a mortgagee the Court omitted to mention that the amount was recoverable only by sale of the mortgaged property and where subsequently an application was made by the mortgagor to add the words "by sale of the house mortgaged" to the judgment and the decree.

Held, that the words "by sale of the house mortgaged" could be added to the judgment and decree as they where omitted by an accidental slip. (*Tek Chand, J.*) RELU MAL *v.* MARU MAL. **108 I. C. 622 = A. I. R. 1928 Lah. 636.**

——*Terms of compromise.*

In an appeal from the dismissal of a suit by certain reversioners challenging a sale, the parties came to terms and the appellate Court recorded judgment as follows: "Plaintiff's suit and appeal are dismissed without costs of both Courts, defendants having promised to pay plaintiffs one hundred rupees within four months from to-day." Subsequently an application was filed by the plaintiffs in which it was pointed out that the whole terms of the compromise had not been given effect to in the judgment and the appellate Court was asked to exercise its powers under S. 151 to correct the omission. Accordingly in the presence of the parties the Court passed an order in which it added to its judgment the following words. If payment is not made within four months the defendants shall have no claim left to the land and the appeal shall be considered accepted.

Held, further, that the Court had jurisdiction to make the order it did under S. 152. 4 P. L. J. 205, Cons. (*Broadway, Ag. C. J. and Bhide, J.*) RAB NAWAZ *v.* ZAMAN. **119 I. C. 257 = 9 Lah. 176 = 30 P. L. R. 135 = A. I. R. 1928 Lah. 352.**

——*Wrong party—Rectification—Limits.*

Errors which have crept into the pleadings and consequently into the judgment and decree can be rectified by a proper application to the Court; but where the proper party is not before the Court for want of representation the Court has no jurisdiction to make the right person a party by means of an amendment. In another words, the effect of such an amendment is that a decree which has been passed against *Y* is converted into a decree against *X* and a decree passed against *Y* converted into one against *X*. Where the minor defendants were represented in suit by mother, but in the decree the name of the father instead of mother was inserted as guardian through oversight and the same mistake was repeated in the application for execution.

Held, that the name of the mother cannot be substituted for that of father by amending the decree in execution. (*Devadoss, J.*) SAMI CHETTIAR *v.* SESHA IYER CO. **113 I. C. 663=A.I.R. 1928 Mad. 1057.**

———*Directions.*

It is open to a Court under S. 152 to add a necessary direction in its judgment accidentally omitted after the judgment is signed. (*Adami and Macpherson, JJ.*) PROMOTHA NATH MITTER *v.* RAM KISHEN SINGH. **1926 P. H. C. C. 323=97 I. C. 386= 8 P. L. T. 81=A. I. R. 1927 Pat. 25.**

———*Mistake in plaint perpetuated in decree.*

Where in a mortgage drawn up under the direction of the mortgagor there was, due to mere oversight an accidental omission in describing one item of the mortgaged property and the omission was perpetuated in the plaint in a suit brought by the mortgagee on the mortgage deed and was repeated in the decree and subsequently at the instance of the decree-holder the Court amended the decree so as to include the omitted item.

Held, that the case was rather a case of a mere omission rather than a misdescription and one of 'an error arising in the decree from an accidental omission' within S. 152 and the Court had inherent power to make the amendment. (*Duckworth, J*) MAUNG CHIT ALAING *v.* NA. R. M. CHETTY. **74 I. C. 1020=A. I. R. 1924 Rang. 104.**

———*Mistake from pleadings.*

The Court has power to amend clerical errors which had crept into a decree by following similar errors in the plaint, without causing the pleadings in which the errors first appeared to be amended. It is also competent to amend an error arising in the decree from some accidental slip or omission. 51 I.C. 55; Dist.; (1914) M. W. N. 107, 22 Bom. 370, Foll. (*Campbell, J.*) ASA SINGH *v.* JAGJIT SINGH. **73 I. C. 679= A. I. R. 1923 Lah. 147.**

—S. 153—Applicability.

———*Application to set aside—Dismissal for default—Restoration of.*

S. 153 cannot apply to the matter, as the dismissal order was not an error or defect in the proceedings, and it may have been an erroneous order as made on the merits. (*Roe and Jwala Prasad, JJ.*) RAMGHULAM SINGH *v.* SHEODEONARAIN SINGH. **1922 P. H. C. C. 5=A. I. R. 1922 Pat. 121.**

—S. 153—Dead party.

———*Cause title can be amended.*

If an appeal is presented against a person who was dead at the date of presentation the Court may under S. 153 permit the cause title to be amended or may return the appeal memorandum for amendment and re-presentation. Although the appeal may be incompetent owing to the wrong person being named as respondent, the Court which deals with it is acting in a proceeding in a suit and as such has full power under S. 153 to direct an amendment of the appeal memorandum. 1924 Mad. 56, Overruled. (*Spencer, O. C. J., Kumaraswami Sastri and Krishnan, JJ.*) GOPALAKRISHNAYYA *v.* A. LAKSHMANA RAO. **49 Mad. 18= 23 M. L. W. 418=A. I. R. 1925 Mad. 1210= 49 M. L. J. 590 (F. B.).**

———*Fresh appeal necessary.*

Where the respondent, whose name was entered in the appeal as presented, was found to have died before the presentation and the appellant applied to substitute for his name those of his legal representatives.

Held, that an appeal cannot be presented against a person who has ceased to exist and that the appellant should file another appeal and have the delay due to his mistake, committed in good faith, excused. (*Oldfield and Venkatasubba Rao, JJ.*) GOVINDA KAVIRAJ

PUROHITA *v.* GAURANGA SAW. **75 I. C. 739= 18 M. L. W. 54=1923 M. W. N. 408= A. I. R. 1924 Mad. 56=45 M. L. J. 231.**

—S. 153—Error.

———*Repetition of error in plaint.*

Where a clerical error was made in the plaint in the description of certain property, the High Court has power to rectify that error in whatever subsequent record it is repeated by slip or inadvertence or mistake, even after decree has been passed. 16 Mad. 424; 1914 M. W. N. 107; 1 L. W. 298 and 7 L. W. 8, Foll. (*Sadasiva Iyer and Spencer, JJ.*) MAHOOB BEGUM SAHIBA *v.* LAL BEGUM SAHIBA. **62 I. C. 652= 14 M. L. W. 445.**

—S. 153—Ex parte amendment.

———*Notice is necessary.*

Where a sale certificate was amended without notice to the judgment-debtor, *held*, it was the duty of the judge to have given notice of the auction-purchaser's application to the judgment-debtor, especially in a case where amendment is sought to be made of a sale certificate, which, as their Lordships of the Privy Council observe, is a solemn document and could not easily be impugned, and it is acting with material irregularity in not giving to the judgment-debtor notice of the auction-purchaser's application. (*Devadoss, J.*) YAGNASAMI IYER *v.* K. CHIDAMBARANATH MUDALIAR. **1922 M. W. N. 130=16 M. L. W. 760= 65 I. C. 732=A. I. R. 1922 Mad. 63.**

—S. 153—Interpretation.

———The expression "any proceeding" is general enough to include filing of an appeal. (*Niamatullah, J.*) CHATUR PRASAD BARA BACHA *v.* BAIJNATH PRASAD. **123 I. C. 824=A. I. R. 1930 All. 131.**

—S. 153—Limits of.

———All rules of Courts are nothing but provisions intended to secure to the proper administration of justice and it is therefore essential that they should be made to serve and be subordinate to that purpose so that full powers of amendment must be enjoyed and should always be liberally exercised but none-the-less no power has been given to enable one distinct cause of action to be substituted for another, nor to change, by amendment, the subject-matter of the suit. (*Lord Buckmaster.*) MA SHWE MYA *v.* MAUNG MOHNAUNG. **24 Bom. L. R. 682=30 M. L. T. 28= 48 I. A. 214=48 Cal. 832=4 U. B. R. 30= 1921 M. W. N. 396=63 I. C. 914= A. I. R. 1922 P. C. 249.**

—S. 153—No prejudice.

———Where the amendment was asked for, before any prejudice could have arisen and it would in the particular case have raised no new question of limitation, *held*, the objection to amendment was groundless. (*Oldfield and Venkatasubba Rao, JJ.*) C. GANPATI MUDALIAR *v.* N. KRISHNAMACHARI. **70 I. C. 743=16 M. L. W. 178=1922 M.W.N. 514= 31 M. L. T. 135=A. I. R. 1922 Mad. 417= 43 M. L. J. 184.**

———The Courts do not sit as disciplinary bodies to punish parties for inept procedure when their right is clear, and no misunderstanding, surprise or prejudice can occur to the other side. Where the real meaning of the application is perfectly well understood by both parties, and by the Court, the application ought to be amended in suitable form. (*Walsh and Ryves, JJ.*) HANIFUNNISSA *v.* CHUNNI LAL **63 I. C. 185= 19 A. L. J. 549=A. I. R. 1921 All. 321.**

—S. 153—Over-valuation.

———*Return of plaint.*

Over valuing the suit in order to get round a previous

decision is an abuse of the process of the Court and the proper thing for the Court is to return the plaint for presentation to the proper Court. (*Walsh, A. C. J. and Sulaiman, J.*) MOHAN LAL *v.* BHUTESHWAR.
5 L.R. A. Civ. 709 = 83 I.C. 1 = A.I.R. 1925 All. 142.

—S. 153—Signature.

———Under S. 153 the Court is authorised to amend any defect or error in any proceeding in a suit. An application should be allowed to be signed by parties by way of amendment where their signature is necessary but has not originally been made. (*Mukerji and Dalal, JJ.*) SANTI LAL *v.* RAJ NARAIN. **82 I. C. 65 = 5 L. R. A. Civ. 565 = A. I. R. 1924 All. 804.**

—S. 153—Stage.

———*Rectification till decision on appeal.*

Till the appellate Court hears the appeal and decides it, the decree of the trial Court remains in force and it can be rectified or amended by the Court which passed it. It is only when the appeal has been decided and a decree has been passed in appeal confirming, amending or reversing it, that the appellate decree operates to supersede the decree of the trial Court, and it is only then that the jurisdiction of the trial Court to interfere with the decree so superseded ceases. 30 All. 290, Dist. (*Kanhaiyalal, J.*) BACHAN *v.* RAGHUNATH.
48 All. 224 = 24 A. L. J. 149 = 92 I. C. 264 = A. I. R. 1926 All. 304.

—S. 154—Vested rights.

———*Not impliedly repealed.*

The express saving of pending rights of appeal does not imply the repeal of other vested rights. The application of the maxim "*expressio unius est exclusis alterias*" is unsafe in such cases. (*Oldfield and Seshagiri Aiyar, JJ.*) VISWANATHA SASTRI *v.* SITALAKSHMI AMMAL. **61 I. C. 979 = 13 M. L. W. 87 = 1921 M. W. N. 181 = A. I. R. 1921 Mad. 126.**

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